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IN THE

Supreme Court of the State of Delaware

IN RE VIKING PUMP, INC.
AND WARREN PUMPS, LLC
INSURANCE APPEALS

PUBLIC VERSION FILED:
July 8, 2016

No. 518, 2014
No. 523, 2014
No. 525, 2014
No. 528, 2014

CASES BELOW:

SUPERIOR COURT OF
THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY,
Consolidated C.A. No. N10C-06-141FSS [CCLD]

-and-

COURT OF CHANCERY OF THE
STATE OF DELAWARE,
C.A. No. 1465-VCS

EXCESS INSURERS' SUPPLEMENTAL MEMORANDUM

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Excess Insurers submit this supplemental memorandum in response to the Court's June 14, 2016 request.

INTRODUCTION

All parties agree that the Excess Policies provide coverage — *i.e.*, are "triggered" — only if Warren and Viking prove bodily injury during the applicable policy periods. In this case, the jury was asked to decide only one aspect of trigger: whether initial cellular or molecular damage was "bodily injury" within the meaning of the policies. It found in the affirmative. JA1482–3. But the jury did not decide whether that or any other injury continued over multiple policy periods because Warren and Viking elected not to submit that issue to the jury. Instead, Warren and Viking opted to address the timing and duration of injury post-trial, seeking a ruling from the Superior Court that bodily injury occurred at the time of significant exposure and continued uninterrupted through disease diagnosis. JA1802–07, XA502–11. The Superior Court agreed that bodily injury occurred at the time of significant exposure but twice rejected Warren's request that it find that bodily injury continued through disease diagnosis.[1] JA1868, JA1880–81, JA1889–1891.

As Excess Insurers demonstrated in their Answering Brief, the Superior Court's trigger finding is subject to deferential review for clear error under

[1] Viking did not join in Warren's second request for this finding and has not appealed the trigger ruling.

Superior Court Civil Rule 49(a). EI Ans. Br. 26, 32-34. The Superior Court's trigger finding is supported by the medical testimony at trial, which established that the bodily injury identified by the jury is almost always reversed, and therefore does not start a continuous process that leads to disease. The finding was not an abuse of discretion or clear error. Accordingly, it should be affirmed.

STATEMENT OF FACTS

A. Warren and Viking did not prove continuous injury at trial.

Warren and Viking sought to prove at trial that early molecular and cellular damage constitute bodily injury. That strategic decision had consequences: if accepted, it made it easier for Warren and Viking to prove the existence of early bodily injury. But current medical science made it significantly more difficult to prove that such early reactions were anything other than temporary. By choosing to seek a low bar for what constitutes "bodily injury," Warren and Viking made it more difficult to link that type of bodily injury to disease progression and ultimately diagnosis.

Warren and Viking's expert, Dr. Edward Gabrielson, provided the principal support for their definition of injury. In the context of cancer, he identified DNA damage as injury but acknowledged, when shown his prior testimony, that the body naturally repairs 99% of all cell DNA damage and it is "very temporary." XB441–43. Dr. Gabrielson also identified inflammation as something that caused

DNA damage and mutations and was therefore injury under his standard. Also, when confronted with his past testimony, Dr. Gabrielson admitted that any short period of inflammation was unlikely to affect the development of cancer. XB456–458. In expressing his views on asbestosis, Dr. Gabrielson testified that virtually everyone in the United States has cellular "damage" due to asbestos inhalation, and is therefore "injured" under his standard. XB425. He also agreed that such cellular damage "can be repaired, can be reversible" until there is scarring. *Id.* Damage that is "repaired" plainly does not progress to disease.

Excess Insurers' expert was Dr. David Weill, a Professor of Medicine at Stanford University, who also directs Stanford's Center for Advanced Lung Disease. XB497–98. Dr. Weill testified about the temporary nature of these early cellular and molecular events, both to support his opinion that they were not injury and to show that those events did not share a continuous progression towards disease. Dr. Weill testified about how asbestos fibers are removed from the lung over time. XB511–13. As even Dr. Gabrielson admits, the majority of asbestos fibers that make it to the deep lung are gone six months after exposure, and the filtering process continues until the vast majority of fibers are gone. XB412–413. Inflammation becomes chronic and potentially leads to disease only if this antioxidant response is overwhelmed by the fiber burden. XB518. Dr. Weill used the analogy of a bathtub that was filling but also draining at the same time.

XB511-13. Only if the bathtub filled faster than it drained would the disease process begin.

Warren has criticized Excess Insurers' decision not to call a cancer expert at trial. This is an odd complaint because Warren and Viking bore the burden of proving the timing and duration of bodily injury, not Excess Insurers. As discussed above, Dr. Weill thoroughly addressed the concept of early inflammation and its lack of relationship to disease. For cancer, Dr. Gabrielson acknowledged that DNA damage and mutations were largely ephemeral and that they were unlikely to impact the development of cancer unless the inflammation became chronic. Particularly with a time-limited trial (each party was allowed 27 hours), Dr. Gabrielson's dispositive admissions on this issue eliminated the need for an additional cancer expert.

Thus, the evidence from both sides was that early molecular and cellular damage — the event Warren and Viking asked the jury to define as bodily injury — is temporary and does not lead to disease in the overwhelming majority of cases. Warren and Viking did not meet their burden of establishing that this minor damage in 1962, for example, started a continuous and unbroken disease process that ultimately led to a claimant's disease diagnosis in 1995. And there was substantial evidence presented at trial to support the Superior Court's determination that it did not.

B. Excess Insurers did not agree or concede that injury was continuous after the initial cellular impact.

Warren claims that the Superior Court and all parties "intended" and "clearly understood" a continuous trigger. Warren Op. Br. 41-43. But the special verdict form, the lack of a stipulation and the Superior Court's post-trial ruling all prove otherwise.

Two months before trial, the Superior Court ordered the parties to narrow the trial issues in dispute. WA123–24. One of the issues was the timing of injury, as shown by Warren's pretrial conference statement that it would submit medical testimony that "injury begins on the date of first exposure all the way up to the date of the claim." JA1094. At roughly the same time, Warren and Viking proposed a verdict form seeking a finding that injury takes place "at or soon after" first exposure to asbestos and "continues thereafter." XB221 ¶ 17. Warren and Viking updated that proposed verdict form a few days before jury deliberations began and well after the medical experts had testified, substituting the words "significant exposure" for "exposure" to track Dr. Gabrielson's testimony on the subject. XB756 ¶ 14; WA346; WA348-349. Warren and Viking did not change the request that the jury find that such injury "continues thereafter." *Id.* Thus, well after the medical evidence concluded, Warren and Viking's updated verdict form continued to reflect the dispute over continuity of injury.

The verdict form ultimately given to the jury, however, did not ask it to find that the injury "continues thereafter" because Warren and Viking chose not to request that finding. XB761–68; JA1482. There was no new evidence, stipulation or agreement at this time; Warren and Viking simply decided not to seek a finding on continuity. Warren and Viking even objected to Excess Insurers' attempt to insert a temporal component into the verdict form, which would have injected some element of timing in the jury verdict. XB774–78; XB781–83.

After deliberating, the jury returned a special verdict finding that "cellular and molecular damage caused by asbestos inhalation" was bodily injury for purposes of triggering insurance coverage. JA1482–83 ¶¶ 11, 12. But the jury was not asked to and did not find that this bodily injury progressed continuously and without interruption until ultimate disease.

Moreover, prior to trial, Warren and Viking submitted 174 Stipulated Facts, and the trial court allowed Warren and Viking to treat those facts as undisputed. JA1892–1929. Warren and Viking never requested, however, and did not obtain a stipulation that injury continued after exposure through diagnosis.

In its briefs to this Court and at oral argument, Warren cited to the parties' summary judgment briefing, apparently in an attempt to shore up its own evidentiary record and to suggest some mutual understanding of continuous injury. Those citations are not a part of the trial record and cannot support an argument

that the Superior Court's finding was clearly erroneous. Moreover, Warren suggests an admission of continuous injury where none exists. Excess Insurers' summary judgment positions were entirely consistent with the positions they took at trial. *See* WA060–61 (early mild inflammation in response to asbestos fibers is "managed and reversed by antioxidants"); WA080 (oxidants can cause irritation and inflammation, but antioxidants counter those oxidants unless and until there is a threshold fiber burden); WA087 (monkeys exposed to occupational asbestos exposure levels, biopsied after 11 years, showed no lesions attributable to inhalation exposure); WA103 (inflammatory responses to asbestos are reversible and inflammation does not necessarily lead to permanent changes); WA114–16 (Excess Insurers' expert disagreeing with plaintiff's expert that each exposure to asbestos that causes cellular and molecular damage contributes to cancer).

As to Warren's argument that the Superior Court ruled that "the jury's findings would resolve the ultimate issue of what constitutes a triggering asbestos injury," Warren Op. Br. 41, the Superior Court made no such ruling and in fact issued rulings post-trial that supplemented the jury's findings. After presiding over pretrial proceedings, the trial and the charge conference, the Superior Court found that there was no "assumed" or "deemed" continuous trigger. Warren's claim to the contrary is wholly unsupported by the testimony at trial — from both sides' experts — about the body's repair mechanisms.

C. The Superior Court found Warren and Viking did not prove injury at any time other than periods of significant exposure.

In early post-trial briefing, Excess Insurers argued that the trial court should reject the jury's trigger finding that initial cellular and molecular damage was bodily injury, based on the ruling in *Continental Casualty Co. v. Employers Insurance Company of Wausau*, 871 N.Y.S.2d 48 (N.Y. App. Div. 2008) ("*Keasbey*"), that early alteration of tissue cells and subclinical tissue did not progress to disease unless and until the body's defenses were overwhelmed. Excess Insurers also argued that the jury had not decided whether injury occurred during any particular policy period because Warren and Viking had objected to including a temporal element in the jury instructions. JA1482; XB774–78; XB781–83. Warren and Viking responded by asking the trial court to find that "the jury's verdict reflected their conclusion that individuals who ultimately develop an asbestos-related disease suffered bodily injury at the time of their first occupational exposure to asbestos." JA1618. The Superior Court found that Warren and Viking had proven that bodily injury occurred at the time of *significant exposure*, adopting the testimony of Warren and Viking's expert at trial. JA1734–35. Warren and Viking have not appealed this "significant exposure" aspect of the ruling.

Pursuant to the Superior Court's direction, the parties then began drafting a proposed final judgment order based on the Superior Court's opinion. Warren and

Viking's initial draft asked the Court to find that bodily injury began at claimant's first significant exposure to asbestos and triggered all excess policies in effect thereafter. XB802; XB817. Ultimately, the Superior Court entered a Final Judgment Order that rejected Warren's and Viking's request:

> As to a person who ultimately develops lung cancer, mesothelioma or non-malignant asbestos-related disease, bodily injury first occurs, for policy purposes, upon cellular and molecular damage caused by asbestos inhalation, and such cellular and molecular damage occurs *during each and every period of asbestos claimant's significant exposure to asbestos*.

JA1868 (emphasis added). The trial court explained why it developed its own language rather than adopting either side's proposed language, stating that the trigger language had to address the definition of injury, the timing of injury and the difference between the duties to defend and indemnify. JA1877–78.

Judge Silverman made his views on timing of injury even more clear in response to Warren's Rule 59 motion. On June 16, 2014, Warren sought clarification or modification of the Final Judgment Order, arguing that the Order should be amended to provide that bodily injury "continues until development of the relevant disease." WA676. The Superior Court denied the motion, noting that "the trial focused almost exclusively on when bodily injury first occurr[ed], rather than on the illness's course" and declining to accept Warren's invitation to equate the concepts of injury-in-fact and continuous injury. JA1880–81, JA1890 ¶ 3.

Warren mischaracterizes the Superior Court's decision by restating it in extreme and inaccurate terms. Warren describes the ruling as a factual finding that "the claimants' injuries commenced upon significant inhalation, ceased upon the end of external exposure to asbestos and then suddenly re-emerged in the form of fully developed illnesses decades later." Warren Reply Br. 4. That is not what the Superior Court found. Instead, having presided over the trial, having heard all of the medical evidence on trigger and assessed the demeanor and credibility of the parties' experts, the Superior Court found that Warren and Viking had met their burden in establishing that injury "first occurs" at initial cellular or molecular damage but had not met their burden of proving that there was continuous injury from the time of significant exposure through disease diagnosis. *See* JA1868, JA1877-78, JA1880–81, JA1890 ¶ 3.

ARGUMENT

As set forth in Excess Insurers' answering brief, under Rule 49(a), the Superior Court's trigger finding is subject to a deferential standard of review for clear error or abuse of discretion. EI Ans. Br. 26, 32-34. Warren cannot remotely meet this high bar.

I. New York law applies an injury-in-fact trigger and timing is decided as a matter of medical evidence.

As Warren itself acknowledges, New York courts have rejected an "assumed" continuous trigger theory in favor of an injury-in-fact standard that

requires proof that "injury takes place in every year from exposure to manifestation." Warren Op. Br. 37-38; *see also id.* at 5. Warren also does not contest that, as plaintiff, it has the burden to establish that injury during every policy period in which coverage is sought. *Consol. Edison Co. of N.Y. v. Allstate Ins. Co.*, 774 N.E.2d 687, 690 (N.Y. 2002); *see also Atl. Cas. Ins. Co. v. Value Waterproofing, Inc.*, 918 F. Supp. 2d 243, 253 (S.D.N.Y. 2013) ("The insured party bears the burden of establishing that the claimed loss falls within the scope of the policy."), *aff'd*, 548 F. App'x 716 (2d Cir. 2013).

Having agreed that the two trigger approaches are distinct, however, and that Warren and Viking bore the burden of proof as a matter of fact, Warren then proceeds to conflate injury-in-fact and continuous trigger. Warren first argues that the trial court's trigger ruling was incorrect "as a matter of law," Warren Op. Br. 32–38, citing cases rather than trial evidence.[2] It claims that "both triggers will generally lead to the same result: the triggering of all policies in effect from the first significant exposure to the hazardous substance until the manifestation of disease." Warren Reply Br. 13. But courts applying New York law have long

[2] To the extent that Warren and Viking assert that this was not a "finding" under 49(a), Rule 49(a) provides that the court "shall be deemed to have made a finding in accord with the judgment." If "no express findings on such omitted questions are made by the trial court, it is *presumed* to have made all factual findings on such omitted issues necessary to sustain its judgment." *Vero Grp. v. ISS-Int'l Serv. Sys.*, 971 F.2d 1178, 1182 (5th Cir. 1992) (emphasis added).

required actual proof of bodily injury during each policy period. *See Am. Home Prods. Corp v. Liberty Mut. Ins. Co.*, 748 F.2d 760, 765 (2d Cir. 1984) (policy language identical to that addressed here unambiguously required proof of actual injury within the policy period). New York cases have applied that concept in the asbestos context, in each case deciding the timing of injury based on the evidence presented at trial. In *Stonewall Insurance Co. v. Asbestos Claims Management Corp.*, 73 F.3d 1178 (2d Cir. 1995) (applying New York law), *modified on other grounds*, 85 F.3d 49 (2d Cir. 1996), the trial court held two trials on the question of injury-in-fact: a jury trial and a later bench trial for parties with no right to a jury trial. The Second Circuit found no error in the fact that the judge and jury initially reached different conclusions on the timing of injury for asbestos-related cancer claims, illustrating the point that the timing of bodily injury is judged based on evidence presented at trial instead of legal standards:

> [W]e understand [*American Home Products*] to have used an injury-in-fact approach that *ordinarily leaves to the fact-finder* the task of determining whether an insured, contending for a continuous trigger of coverage, has proven by a preponderance of the evidence that injuries were in fact occurring continuously during the disease process. Despite the jury's finding of continuous injuries, the Judge in the bench trial *was free to assess the record before him differently*.

73 F.3d at 1200 (emphasis added).

New York law thus requires the policyholder to establish the timing of injury as a *matter of fact*. *See Hoechst Celanese Corp. v. Certain Underwriters at Lloyd's London*, 673 A.2d 164, 167-70 (Del. 1996) (ruling on cross motions for summary judgment under New York law, finding that the question of injury-in-fact could not be resolved as a matter of law); *E.R. Squibb & Sons, Inc. v. Lloyd's & Cos.*, 241 F.3d 154, 168 (2d. Cir. 2001) (judgment on jury verdict); *Cont'l Cas. Co.*, 871 N.Y.S.2d 48, 61-64 (ruling based on medical evidence presented at trial); *see also Abex Corp. v. Maryland Cas. Co.*, 790 F.2d 119, 121-22 (D.C. Cir. 1986) (applying New York law and remanding to trial court for factual finding on injury-in-fact). Delaware courts have been vigilant in respecting the distinctions in trigger concepts and they rigorously apply the law of another state even when it does not agree with Delaware's "continuous trigger" approach. *See, e.g.*, *Monsanto Co. v. Aetna Cas. & Sur. Co.*, 1994 WL 161953, at *7-12 (Del. 1994) (identifying the five theories for trigger, applying Missouri's injury-in-fact trigger and denying summary judgment because no party had shown undisputed facts as to when injury-in-fact occurred), *rev'd on other grounds sub nom. Monsanto Co. v. C.E. Heath Comp. & Liab. Ins. Co.*, 652 A.2d 30 (Del. 1994); *Shook & Fletcher Asbestos Settlement Trust v. Safety Nat'l Cas. Corp.*, 909 A.2d 125, 128-32 (Del. 2006) (careful analysis of exposure versus continuous trigger, adopting exposure trigger as reflective of Alabama law).

II. This Court should not disturb the trial court's factual findings.

Warren challenges the Final Judgment Order trigger ruling as clearly erroneous, Warren Op. Br. 39, but it has not met its high burden of establishing clear error.

Warren and Viking succeeded in convincing the jury that an early, temporary reaction met the standard for bodily injury. They did not convince either the jury or the trial court that such a reaction continued without interruption from the time the significant exposure occurred through disease diagnosis. The Superior Court's decision to reject a continuous injury finding was supported by substantial trial evidence. Warren and Viking's medical expert agreed that the initial events that Warren and Viking identified as injury were temporary in 99% of cases and that those early reactions were unlikely to have impact on the development of cancer. (*See* pp. 2–3.) He agreed that the body has defense mechanisms that removed fibers from the lung, eliminating the majority of fibers after six months and the vast majority thereafter. *Id*. With reference to asbestosis, the two experts *agreed* that early inflammation can be repaired and is reversible unless and until it leads to scarring. *Id.* They disagreed in some respects about the timing and details of these processes, but not about the temporary nature of this early injury. Substantial evidence presented at trial supported the Superior Court's determination that Warren and Viking had not established continuous injury. And

it certainly was not an abuse of discretion or clear error to refuse to find continuous injury.

Warren argues that the Superior Court Judge could not have made a factual finding that Warren and Viking did not prove continuous injury because his ruling was "directly contrary to the trigger positions of both parties." Warren Reply Br. 19. That is incorrect. The Superior Court's decision did not completely adopt either side's proposed language, as it was free to do. *Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 572-73 (1985) (trial court's factual findings should not "simply adopt petitioner's proposed findings," but rather "represent the judge's own considered conclusions"). It found instead that Warren and Viking had not persuasively linked the injury they alleged upon inhalation to a continuous disease process thereafter culminating in diagnosis. The Superior Court's ruling that Warren and Viking failed to meet their burden is well-supported and not clearly erroneous.

CONCLUSION

For the foregoing reasons, and those set forth in Excess Insurers' Answering Brief at pp. 26-36, the Court should affirm the Superior Court's factual findings on trigger.

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