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IN THE SUPREME COURT OF THE STATE OF DELAWARE

IN RE VIKING PUMP, INC. AND WARREN PUMPS LLC INSURANCE APPEALS	)	
	)	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-06-141 FSS [CCLD]
	)	-and-
	)	COURT OF CHANCERY OF THE STATE OF
	)	DELAWARE, Civil Action No. 1465-VCS

APPELLANT WARREN PUMPS LLC'S SUPPLEMENTAL REPLY MEMORANDUM ON TRIGGER ISSUES

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ARGUMENT

Insurers' fundamental premise is that Warren failed to meet its burden of proving asbestos injury in fact from first injury to disease manifestation because the trial experts "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 [asbestos disease]." EI Mem. at 14.[1] That premise is fatally flawed for one key reason: Warren has never sought coverage for that 99% share of the population who did not contract asbestos-related diseases.

Rather, Warren seeks *coverage only for the liability it faces to the remaining 1%* – the underlying claimants who actually developed those diseases. The full trigger interrogatories – which Insurers fail to quote – reflect that scope:

> ***With respect to a person who ultimately develops lung cancer or mesothelioma*** as a result of inhalation of asbestos, did the Plaintiffs prove that ***bodily injury first occurs*** (check one):
>
> a. upon cellular and molecular damage caused by asbestos inhalation?
> b. when the first cancer cell is created?
> c. when the cancer impairs lung function?[2]

Both experts at trial agreed that for that small but unlucky group who actually develop a disease, the cellular events that the jury found to be "injuries" are neither

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[1] "EI Mem." refers to Excess Insurers' Supplemental Memorandum (Trans. ID 59186755).

[2] JA1482 ¶ 11(emphasis added). The same question was asked for non-malignant asbestos disease. JA1483 ¶ 12. The jury answered by checking option a, cellular and molecular damage.

"temporary" nor "cured" but are part of the continuous process that ultimately results in disease. WA461-465; WA388-398, 361-376, 343, 376-394, 526-535.

Contrary to the Insurers' suggestion, Warren does not contend that the Superior Court erred because it "did not completely adopt either side's proposed [trigger] language." EI Mem. at 15. The Superior Court erred because it adopted a trigger that had no factual or legal basis and disregarded the unanimous evidence at trial that, for those who became ill, the cellular and molecular damage continued even when external exposure ended.

The Insurers' claim that the Superior Court "assessed the demeanor and credibility of the parties' experts" (EI Mem. at 10) and chose to believe the Insurers' expert rather than Dr. Gabrielson is baseless for at least three reasons. First, the Insurers did not even offer their own expert on the development of asbestos-related cancers, which represent 98% of Warren's costs. Dr. Gabrielson testified *without contradiction* that such cancers begin with cellular and molecular changes at the time of initial inhalation – events the jury found constituted injuries in fact – and that asbestos fibers that reach the lungs "stay in that individual for the rest of that individual's life" and thus cause "additional injuries . . . even if there's no additional inhalation." WA390:14-391:3, 365:4-366:14, 391:15-393:9.[3]

[3] Insurers' counsel never challenged Dr. Gabrielson's testimony on the continuous nature of the disease process. To the contrary, they asked him to *confirm* during cross-examination that

Second, there was no "choice" to be made between the experts with respect to how asbestosis develops. Both experts testified that a person who ultimately *develops* asbestosis has undergone a continuous series of injuries that was neither "temporary" nor "repaired" but continued until diagnosis.[4] They differed only as to when that process began – a dispute resolved in Warren's favor, and not appealed by the Insurers. JA1483 ¶ 12; *see also* Warren Br. at 21-22.

Third and finally, the assertion that the Superior Court weighed the experts' "demeanor" assumes a factual evaluation nowhere reflected in the ruling itself. The Superior Court based its "exposure" trigger solely on a misunderstanding of New York law, without reference to the trial evidence. JA1878, 1733 & n.217.

Insurers' contention that Warren strategically "chose not to request" a finding on continuity is equally flawed. EI Mem. at 6. As Insurers admit, all of Warren's pre-November 13 forms asked the jury to find that the claimants' injuries began at first exposure and "continue[d] thereafter." *Id*. at 5.[5] Insurers simply

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asbestos-related cancers "start with one cell that acquires a first cancer relevant mutation and that begins a cell line that eventually results in a malignant cell." *See* WA447:6-13.

[4] *See* WA343:5-23, 351:17-358:11, 361:6-367:2, 396:1-398:1, 486:2-487:18, 495:17-23, 511:5-513:4, 527:11-531:19, 534:18-535:7, 541:15-543:16.

[5] *See, e.g.*, WA579. Thus, Warren "demand[ed] [the] submission" of that issue to the jury by virtue of its proposed jury interrogatories, and therefore, did not waive its right to a jury determination – the prerequisite to a "deemed" finding by the Court under Rule 49(a). *See McDaniel v. Anheuser-Busch, Inc.*, 987 F.2d 298, 306 (5th Cir. 1993); *Stewart & Stevenson Servs., Inc. v. Pickard*, 749 F.2d 635, 642-43 (11th Cir. 1984).

neglect to mention that the Court rejected that approach in favor of Insurers' approach. WA586-87. Now, after convincing the Superior Court to reject Warren's proposal and seizing on the Court's mistaken "exposure" trigger, Insurers seek to convert the jury's finding that injury *first* occurred at exposure into a finding that it *only* occurred during exposure.[6] In fact, the jury instructions, based on the Insurers' suggested format, told the jury just the opposite – that by resolving when the *first* injury took place, they would resolve the trigger issue as a whole:

> *For an underlying claim to be covered, Plaintiffs must show by a preponderance of the evidence that the claimant suffered "bodily injury" during the policy period of an Excess Policy*.
>
> *Specifically, you must decide* whether, with respect to non-malignancy asbestos-related bodily injury *first* occurs:
>
> 1. upon cellular or molecular damage caused by asbestos inhalation; OR
> 2. when the inhalation of asbestos is sufficient to overwhelm the bodies' defense mechanisms and cause fibrosis; OR
> 3. when the claimant's lung function is impaired.[7]

Nor, contrary to the Insurers' depiction of the charging conference which led to those trigger instructions, did Warren "object[] to Excess Insurers' attempt to insert a temporal component into the verdict form." EI Mem. at 6. Rather, the

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[6] *See TIG Ins. Co. v. Premier Parks, Inc.*, 2004 WL 728858, at *8 (Del. Super. Mar. 10, 2004) (refusing to engage in post-trial fact finding on issues that party whose jury interrogatories were adopted claimed were left open because it was a "dilemma . . . of [the party's] own making").

[7] JA1462 (emphasis added). The jury was further instructed that with respect to lung cancer and mesothelioma, it would have to decide whether injury first occurred upon cellular or molecular damage, the creation of the first cancer cell, or impairment of lung function. *Id.*

Superior Court held that additional language was *unnecessary* because the form already contained the only necessary temporal component by telling the jury to determine when injury "first" occurred. WA622:22-623:10.

Finally, Insurers' argument that the continuity must have been "disputed," because it was not on the list of "undisputed" facts "imposed" on Insurers, is without merit. Insurers fail to mention that the list was "imposed" because the Superior Court found that "consistent with [Insurers'] past sanctionable practices, [they] were attempting to put Plaintiffs to their proofs concerning facts that were not truly disputed." JA1157, 1153-55. In light of that recalcitrance, Plaintiffs fought only for stipulations that could eliminate the need for certain documents or witness testimony at trial. Plaintiffs knew that Dr. Gabrielson would have to testify with respect to the disease process in order to disprove Insurers' arguments on when the "first" injury took place, and so did not include any medical experts' opinions or testimony on their proposed list of undisputed facts. *See* JA1892-1929.

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