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	PUBLIC VERSION FILED: DECEMBER 24, 2014

ANSWERING BRIEF OF APPELLEE TRAVELERS CASUALTY AND SURETY CO.

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NATURE OF THE PROCEEDINGS

In this insurance-coverage dispute, plaintiffs Viking Pump, Inc. ("Viking") and Warren Pumps, LLC ("Warren") claim that they are entitled to coverage under a series of excess insurance policies issued to Houdaille Industries, Inc. ("Houdaille"). The defendants consist of some 20 different excess carriers that issued policies to Houdaille from the mid-1960s to the mid-1980s. Appellee Travelers Casualty and Surety Company, formerly known as The Aetna Casualty and Surety Company ("Travelers"), is one of those excess carriers.

At the trial-court level, the Chancery Court initially addressed two issues on the parties' cross-motions for summary judgment: (1) whether Viking and Warren had been validly transferred rights to coverage under Houdaille's excess policies, and (2) how to allocate liabilities for asbestos injuries that may trigger coverage across multiple policy periods.[1] As to the first issue, the Court refused to enforce the excess policies' express provisions requiring insurer consent to assignment of coverage and held that Viking and Warren validly received Houdaille's insurance rights. As to the second issue, the Court held that, under New York law, the excess

[1] *See Viking Pump, Inc. v. Century Indem.* Co., 2 A.3d 76 (Del. Ch. 2009) (copy of slip opinion at JA903-93).

policies were subject to joint-and-several allocation, which allows the insured to pick a triggered policy and collect in full up to policy limits.

Following the summary-judgment proceedings, the case was transferred to the Superior Court to hear and determine several follow-on issues, one of which was whether the excess policies were subject to vertical or horizontal exhaustion. In a post-trial opinion dated October 31, 2013, the Court held that Viking and Warren were obligated to horizontally exhaust all triggered "primary and umbrella insurance layers before tapping" any of Houdaille's excess coverage.[2] In a subsequent opinion dated February 28, 2014, the Superior Court clarified that this horizontal-exhaustion requirement was limited to the primary and umbrella coverage layers. The Court held that the excess policies, including the policies that the Court had found followed form to the terms and conditions of the underlying umbrella policies, were nonetheless governed by a different exhaustion rule than the umbrella policies. Viking and Warren, the Court explained, were under no obligation to horizontally exhaust "all policies in each excess layer" before accessing a higher-level excess policy.[3]

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[2] *Viking Pump, Inc. v. Century Indem. Co.*, 2013 Del. Super. LEXIS 615, at *69 (Del. Super. Oct. 31, 2013) (copy of slip opinion at JA1684-1763).

[3] *Viking Pump, Inc. v. Century Indem. Co.*, 2014 WL 1305003, at *12 (Del. Super. Feb. 28, 2014) (slip opinion at JA1764-1801).

A second follow-on issue decided in the Superior Court was when does "bodily injury" occur for purposes of determining which excess policies are triggered. At trial, the jury found that injury "first occurs . . . upon cellular and molecular damage caused by asbestos inhalation." JA1482-83. In its October 2013 post-trial opinion, the Superior Court concluded that injury occurs upon "significant exposure" to asbestos and held that "the verdict stands as to injury-in-fact."[4] The jury and the Court were not asked—and did not consider—whether a bodily injury triggering coverage *continues* after significant exposure to asbestos ceases.

In the course of submitting its proposed final judgment, Warren for the first time asked the Superior Court to enter a continuous-trigger ruling, which would have extended coverage to all policies in effect *after* the claimant's significant exposure to asbestos ended. The Superior Court, however, rejected this proposal. Its final judgment was that bodily injury first occurs upon "cellular and molecular damage caused by asbestos inhalation," and continues "during each and every period of [an] asbestos claimant's significant exposure to asbestos." JA1868. Warren then filed a motion to modify the judgment under Superior Court Civil Rule 59, in which it once again raised the continuous-trigger issue. The Superior

[4] 2013 Del. Super. LEXIS 615, at *54-58.

Court denied the motion and explained that it was unwilling to equate "injury-in-fact" with "continuous trigger . . . at this late hour." JA1881, JA1890.

All parties now appeal from the final judgment. Travelers' appeal challenges both the Chancery Court's assignment ruling and its joint-and-several allocation holding. Travelers Opening Br. at 19-46; *see also* Certain Excess Insurers Opening Br. at 15-37 & 49 n.16 (same). Viking's appeal disputes the Superior Court's follow-on decision denying Viking access to excess insurance until it first "exhausts . . . all primary and umbrella insurance." Viking Br. at 1. And, as relevant here, Warren appeals from the Superior Court's trigger ruling. Warren Br. at 32-43.

SUMMARY OF ARGUMENT

I. Viking's contention that it may access the excess policies after vertically exhausting underlying primary and umbrella coverage, *see* Viking Br. at 19-46, is denied. Regardless of how Viking goes about exhausting underlying insurance, its claims fail at the threshold because Viking does not have *any* rights to Houdaille's excess insurance. Further, even if Viking did have rights to excess coverage, its exhaustion argument is also expressly linked to, and depends upon, the Chancery Court's erroneous joint-and-several allocation holding. Because both the Chancery Court's assignment holding and its allocation ruling were error, the Court should simply reverse the judgment below without ever reaching the exhaustion issue raised in Viking's appeal.

II. Warren's separate claim that the excess policies compel a continuous-trigger finding—from "when a claimant was exposed to external asbestos" through manifestation of disease, *see* Warren Br. at 32-43—is also denied. Like Viking, Warren has no rights to coverage under Houdaille's excess insurance, and this Court should reverse the judgment on that ground alone. Even if the Court were to reach the trigger issue, Warren has failed to make any showing warranting reversal of the Superior Court's rejection of the continuous-trigger rule. Contrary to how Warren has cast the issue, under New York law, bodily injury does not occur

simply by a claimant's exposure to external asbestos; New York law requires a factual finding that the claimant experienced a "significant exposure to asbestos" resulting in an injury-in-fact during the policy period. Accordingly, the Superior Court's ruling rejecting Warren's request for a continuous trigger was amply supported by the evidence and consistent with New York law.

STATEMENT OF FACTS

Travelers adheres to the factual statement in its opening brief.

ARGUMENT

I. THE COURT SHOULD REVERSE THE JUDGMENT WITHOUT EVER REACHING VIKING'S EXHAUSTION CLAIM.

A. QUESTION PRESENTED.

Whether the terms of the excess policies subject the underlying Liberty primary and umbrella policies to vertical exhaustion.

B. STANDARD OF REVIEW.

This Court reviews *de novo* a lower court's interpretation of contractual language. *See BLGH Holdings LLC v. enXco LFG Holding, LLC*, 41 A.3d 410, 414 (Del. 2012).

C. MERITS OF ARGUMENT.

Viking's appeal purports to raise the "narrow issue" of whether it must horizontally exhaust all of its available "primary and umbrella insurance" before it seeks coverage under the excess policies. Viking Br. at 3. This Court, however, can and should reverse the judgment below without ever reaching that "narrow" issue. As explained in Travelers' opening brief, Viking has no insurance rights under the excess policies because the alleged transfers of Houdaille's coverage to Viking were invalid and without legal effect. Travelers Opening Br. at 19-37. That alone disposes of this case and renders all other issues moot.

Moreover, even if Viking did have rights to Houdaille's coverage, Viking's arguments on exhaustion are also dependent upon the Chancery Court's erroneous "joint and several" allocation holding. *See id.* at 38-46. According to Viking, "[a]llocation methodology" is "inherently intertwined" with exhaustion. Viking Br. at 5. And Viking further contends that "the mechanics of [the Chancery Court's joint-and-several] allocation" holding dictate exhaustion of "excess coverage on a vertical basis." *Id.* at 26-27, citing *Stonewall Ins. Co. v. E.I. du Pont de Nemours & Co.*, 996 A.2d 1224, 1259-60 (Del. 2010); *see also id.* 29-31 (surveying authority "applying vertical exhaustion where the all sums allocation method is adopted"). This argument fails because the Chancery Court's allocation holding is clearly wrong as a matter of controlling New York law.

As explained in Travelers' opening brief, New York precedent expressly rejects "joint and several allocation" as "not consistent" with standard policy language "providing indemnification for 'all sums' of liability" attributable to injury "'*during the policy period.*'" *Consol. Edison Co. of N.Y. v. Allstate Ins. Co.*, 774 N.E.2d 687, 693 (N.Y. 2002); *see* Travelers Opening Br. at 38-40. The excess policies in this case contain "during the policy period" language that is materially identical to the language in these New York cases. As a result, the policies compel

pro rata allocation, and the basic premise underlying Viking's exhaustion argument is simply incorrect. *See also* Certain Excess Insurers' Answering Br. at I.C.1.

II. THE COURT SHOULD REJECT WARREN'S REQUEST FOR A CONTINUOUS-TRIGGER FINDING ON APPEAL.

A. QUESTION PRESENTED.

Whether the evidence at trial was sufficient to support the Superior Court's rejection of Warren's proposed continuous-trigger finding.

B. STANDARD OF REVIEW.

This Court reviews a trial court's factual findings for clear error, *see Pellicone v. New Castle Cty.*, 88 A.3d 670, 673 (Del. 2014), and reviews a decision to make factual findings under Superior Court Civil Rule 49(a) solely for abuse of discretion, *see Hubbard v. Dunkleberger*, 1995 WL 131789, at *6 (Del. March 16, 1995). "The disposition of a Superior Court Civil Rule 59(d) motion to alter or amend the judgment" is also subject to "the sound discretion of the trial court." *Brown v. Weiler*, 1998 Del. LEXIS 339, at *3-4 (Del. Aug. 18, 1998).

C. MERITS OF ARGUMENT.

In its appeal, Warren asks this Court to overrule the Superior Court and to impose a continuous trigger running from a claimant's first significant exposure to asbestos through the manifestation of an actual asbestos-related disease.[5] Warren

[5] In its Conclusion, Warren requests that the Court issue an order directing the Final Judgment Order be amended to provide that "all Excess Policies in effect during or after a claimant's first significant exposure to external asbestos are triggered...." Throughout the body of its Brief, however, Warren contends that the

Br. at 32-43. Once again, the Court should reverse the judgment without ever reaching this issue: Warren, like Viking, has no rights to coverage under Houdaille's excess policies. *See* Travelers Br. at 19-37.

In the alternative, the Court should affirm the trial court's ruling rejecting Warren's request to adopt a continuous trigger. As the other excess carriers have explained at length, New York courts specifically reject the continuous-trigger rule that Warren now asks this Court to impose in favor of an injury-in-fact standard. Certain Excess Insurers Answering Br. at II.C.1-2; *see, e.g.*, *Am. Home Products Corp. v. Liberty Mutual Ins. Co.*, 748 F.2d 760 (2d Cir. 1984); *Continental Casualty Co. v. Employers Ins. Co. of Wausau*, 871 N.Y.S. 2d 48 (N.Y. App. Div. 2008) ("*Keasbey*"). Under this injury-in-fact rule, the timing of bodily injury should be determined by the factfinder based on evidence, not imposed by an appellate court as a matter of law. *See* Certain Excess Insurers Answering Br. at II.C.1-2. The *Keasbey* court held that, as a matter of law, early alteration of tissue cells and subclinical tissue did not meet the policy's "bodily injury" definition and that, with respect to trigger, an insured must prove actual bodily injury (injury-in-fact) during each policy period in order to trigger coverage under that policy.

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policies are triggered merely when a claimant "was exposed to external asbestos." That is inconsistent with controlling New York law which requires the insured to demonstrate injury-in-fact during the policy period.

Warren's continuous-trigger argument would eliminate the need for the insured to prove actual "bodily injury" during the policy period and would instead presume that bodily injury occurs immediately after the claimant's first significant exposure to asbestos and continues thereafter through manifestation. This is inconsistent with both New York law and the evidence introduced at trial.

In this case, the jury was asked only to determine when asbestos bodily injury "first occurs." JA1482-83. It was not asked—and did not determine—whether this injury continues indefinitely up through the manifestation of an asbestos-related disease. The Superior Court properly rejected Warren's post-trial arguments that either the jury's findings or New York law required the application of a continuous-trigger rule. JA1868; *see* Del. Superior Court Civ. R. 49(a). New York law unequivocally requires injury-in-fact during the policy period as a result of a claimant's significant exposure to asbestos. The Superior Court's rejection of Warren's post-trial request for a continuous-trigger ruling was fully supported by both the evidence at trial and New York law, and does not even approach a clear error warranting reversal on appeal. *See* Certain Excess Insurers Answering Br. at II.C.3.

CONCLUSION

Because the Chancery Court erred at the threshold, this Court should reverse the judgment and need not even reach the issues raised in Viking's and Warren's appeals. In the alternative, the Court should affirm the Superior Court's ruling rejecting Warren's request to adopt a continuous-trigger rule.

Respectfully submitted,

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