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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

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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

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TABLE OF ABBREVIATIONS*

XB	Appendix to Excess Insurers' Answering Brief
Viking Opening Br.	Appellant Viking Pump, Inc.'s Opening Brief on Appeal
Warren Opening Br.	Appellant Warren Pumps LLC's Opening Brief
WA	Appendix to Appellant Warren Pumps LLC's Opening Brief

* Abbreviations defined in the Excess Insurers' Opening Brief are used here.

NATURE OF PROCEEDINGS

Excess Insurers incorporate the Nature of Proceedings set forth in Excess Insurers' Opening Brief.

<u>**SUMMARY OF ARGUMENT**</u>

Viking and Warren seek rulings that would conflict with controlling New York law and the language of the policies at issue. Additionally, Warren asks this Court to reverse an aspect of the Superior Court's Final Judgment Order based on disputed scientific evidence about asbestos-related injury presented at trial. Finally, Viking and Warren also ask this Court to find that Excess Insurers must pay potentially limitless defense costs contrary to their clear policy language. None of these appellate arguments has merit.

Excess Insurers respond to Viking's opening brief as follows:

I. Denied. This Court need not reach the question of whether "horizontal exhaustion" is compatible with an "all sums" allocation regime. As Excess Insurers demonstrated in their Opening Brief, New York's highest court held in *Con Ed* that policies with substantially similar language to the policies here require pro rata allocation. If this Court agrees and reverses the Court of Chancery's "all sums" allocation ruling, Viking's horizontal exhaustion appeal would become moot. *See* Point I.C.1, below.

If the Court reaches the horizontal exhaustion question, it should affirm. A horizontal exhaustion rule — *i.e.*, requiring that all primary and umbrella policies triggered by a loss be exhausted before Viking and Warren can recover from the Excess Policies — is consistent with the policy language and New York law.

Moreover, contrary to Viking's contention that "all sums" allocation is inherently inconsistent with horizontal exhaustion, California courts have adopted both without any unworkable conflict. At a minimum, this Court should certify the horizontal exhaustion question to the New York Court of Appeals. *See* Point I.C.2–4, below.

* * *

Excess Insurers respond to Warren's opening brief as follows.

I. Denied. All parties agree that the Excess Policies are triggered — meaning, they provide coverage for bodily injury claims if the other terms and conditions of the policies are satisfied — only when Viking and Warren establish "bodily injury" during the policy period. This is not a simple question in asbestos-related cases, where diagnosis of disease may not occur until decades after an individual plaintiff's relevant exposure to asbestos took place. Courts around the country have adopted a variety of approaches to the timing of asbestos-related injury. Some states have adopted an expansive "continuous trigger" theory of bodily injury — *i.e.*, they presume as a matter of law that injury occurs continuously in every policy period from exposure through manifestation of asbestos-related disease. Other states use a more limited "exposure trigger" that allows recovery only from a policy that was in effect during exposure to asbestos.

New York law — the law that governs the Excess Policies here — presumes neither. Rather, courts applying New York law follow an injury-in-fact standard under which the timing of bodily injury that triggers coverage is decided based on the evidence at trial, not as a matter of law. Despite this New York standard, Warren argues that the Superior Court erred as a matter of law by failing to adopt factual findings from unrelated, decades-old cases regarding the timing of bodily injury. The Court should reject Warren's argument. As the cases Warren cites demonstrate, the timing of injury is a question of fact to be decided in each case based on the evidence presented — as occurred below — and not by citing to case law. *See* Point II.C.2, below.

II. Denied. While Viking and Warren included a request for a "continuous trigger" finding in verdict forms they proposed immediately before and during trial, they decided on their own not to include such a request in their final verdict form proposal. The special verdict form put before the jury reflected that choice. Under these circumstances, Superior Court Civil Rule 49(a) provides that Warren waived its right to a jury trial on the omitted issue, which may then be decided by the trial judge. Warren then raised the issue of continuity of injury after the jury's verdict, in connection with drafting the Final Judgment Order. The trial judge declined to find that Warren had established continuity of injury at trial. Warren then moved to clarify, and the Superior Court again declined to find that Warren

had proven continuity of injury. On appeal, Warren challenges these Superior Court determinations.

This Court should affirm. The Superior Court's refusal to find that Warren had proven continuous injury is subject to a deferential standard of review on appeal. That determination — which is supported by expert testimony about asbestos-related injury — was not an abuse of discretion or clear error. *See* Point II.C.3, below. And Warren's footnote argument that the Superior Court denied Warren's constitutional right of access to the courts was not properly raised on appeal and, in any event, is meritless. *See* Point II.C.4, below.

III. Denied. The Superior Court ruled that certain Excess Policies paid defense costs "within" the applicable policy limits. In other words, as to these Excess Policies, payment of defense costs erodes the policy limits — unlike the underlying Liberty Policies, as to which Liberty's payment of Viking and Warren defense costs was made in addition to Liberty's policy limits. Warren has appealed the Superior Court's ruling concerning three groups of Excess Policies. As to the first group of policies, the Superior Court correctly applied basic New York insurance law that specific language in a "follow form" excess policy trumps language in the underlying policy. And as set forth in the Excess Insurers' Opening Brief, the Superior Court erred in ruling that the second and third groups of policies had any defense obligations at all. *See* Point III, below.

STATEMENT OF FACTS

Excess Insurers incorporate the Statement of Facts set forth in their Opening Brief, and recite the following additional background facts in response to Viking's and Warren's opening briefs.

A. The parties contested continuity of "bodily injury."

All parties agree that the Excess Policies provide coverage only if Viking and Warren establish "bodily injury" during the policy period. This is known as the "trigger" of coverage. The parties disputed when asbestos-related bodily injury occurs for purposes of triggering the Excess Policies. For asbestos-related disease, resolving this question necessarily involves complex medical science that has evolved significantly over the last thirty years.

Before trial, the Excess Insurers moved for summary judgment on the issue of trigger, arguing that minor alterations of tissue cells and subclinical tissue damage were not bodily injury. XB40–65, XB92–100. The Superior Court declined to make that ruling as matter of law (JA1116), meaning that Viking and Warren were free to attempt to prove at trial that such bodily reactions were "bodily injury" under the policies.

Warren now asserts on appeal that there was no need to ask the jury whether the body's initial reaction to asbestos was the start of continuous injury, ultimately culminating in a diagnosis of asbestos-related disease, because it asserts that the

issue was undisputed. But Viking and Warren did not seek a stipulation on this supposedly undisputed issue, even when, immediately before trial, they drafted a thirty-seven page document reflecting 174 "Established Facts for Submission To Jury." JA1892–1929. The parties did not stipulate to this critical fact for the simple reason that it was very much in dispute.

B. At trial, the parties presented medical evidence about the timing of bodily injury.

At trial, both experts acknowledged the temporary nature of early tissue and DNA damage. XB443–47; XB456–58; XB514; XB518. Viking and Warren chose to focus at trial on proving that early tissue cell alterations and subclinical tissue damage are bodily injury. While it was easier for Viking and Warren to prove the existence and timing of these early reactions, current medical science made it more difficult to prove that the reactions were anything other than benign and temporary. Even for individuals who eventually develop clinical disease, these early reactions to asbestos most often do not develop into disease. By seeking to establish that these early reactions were "bodily injury," Viking and Warren made it almost impossible to prove that bodily injury was *continuous* after those reactions.

In fact, almost everyone inhales naturally occurring asbestos, as Viking and Warren's expert acknowledged. XB424. But the body's defense and clearance mechanisms must be overwhelmed by a sufficient dose of asbestos to cause disease. XB436; XB511–13; XB515; XB537. Particularly with low-dose

defendants like Viking or Warren, the body's defense mechanisms often make these early reactions to asbestos subside and resolve. XB455–56; XB518; XB547.

1. Both sides' experts agreed that the body's initial defense mechanisms prevent the vast majority of asbestos fibers from making it to the lungs.

The filter system in the nasal cavity, mouth, and throat is the first line of defense against inhaled asbestos fibers (or any particles). Both sides' experts testified that particles get trapped by fine hairs in the nasal cavity and are removed by coughing, sneezing, or swallowing. XB337–38; XB503. For any particles that make it through the nasal filter, the second line of defense is the muscociliary escalator, which is comprised of mucus and fine hairs (or "cilia") that coat the lung airways from the trachea to the alveolar sacs. XB338; XB503–04. Both sides' experts agreed that cilia catch particles and then sweep them back up the trachea to the mouth where a person can cough, sneeze, or swallow them. XB338; XB503–04. Warren's expert agreed that "between the filtering of the nose and the muscociliary escalator, 95, 99 percent of the fibers are cleared, they will never make it down to the deep lung." XB411.

2. Even if fibers reach the lungs, the majority are removed by other natural defense mechanisms.

Those few particles that reach the lung encounter additional defenses. The lymphatic system, a "channel system" "that runs through the lung and pleural space" that covers the lung, drains fluids and materials suspended in those fluids

(including asbestos fibers) out of the lungs. XB504–05. Both sides' experts testified that particles are also cleaned out of the lungs by cells called macrophages, which engulf and remove them through the lymphatic system or release enzymes to dissolve or digest them. XB355; XB505–06. As a result, the "vast majority" of asbestos fibers that reach the lungs are cleared out or neutralized. XB412. Warren's expert testified that most fibers breathed in are gone in minutes, and within six months, 75% of the fibers that have made it to the deep lung are gone. XB412–13. This continues until the "vast majority" of the fibers that reach the deep lungs are gone. XB413.

3. To the extent fibers remain in the lungs, antioxidants neutralize those fibers unless and until the antioxidants are overwhelmed by a sufficient dose of asbestos.

In recent years, medical science has come to better understand this reaction and its impact on the timing of asbestos-related diseases. XB511. When activated, macrophages release oxidants, and antioxidants are recruited to neutralize the oxidants. XB506; XB511. This process can cause a cellular reaction called "acute inflammation." XB509–10. Acute inflammation can result in minor tissue and cellular damage that is common and frequently experienced by virtually every adult in the United States. XB424–25. Viking and Warren's expert testified that "all of us experience some levels of reactive oxygen species that cause damage at a cellular level." XB427.

In an episode of acute inflammation, the oxidants and antioxidants are in balance. XB513–14. Excess Insurers' expert Dr. Weill used a bathtub analogy to describe this process. As the bathtub fills up with oxidants, the antioxidants act as a drain, giving the asbestos fibers time to filter out of the lung through the lymphatic system. XB511–13. As both experts acknowledged, this reaction means that the half-life of the most common type of asbestos fibers — known as "chrysotile" fibers, which constitute 95% of the asbestos used in the United States — is a matter of weeks or months, and the fibers continue to exit the body. XB333–34; XB412–13; XB507. All of the Viking products contained chrysotile, and a number of the Warren products did. XB266; WA272–73.

Mild inflammation is a normal event with "no lasting effects." XB518. As Viking and Warren's expert acknowledged, (i) any short or "acute" episode of inflammation is unlikely to have an impact on disease (XB456–58); and (ii) until inflammation leads to scarring, "injury" can be repaired and is reversible (XB425). Asbestos disease happens only if the antioxidants are overwhelmed by a "persistent imbalance" of oxidants. XB515. At that point, inflammation becomes chronic and may have harmful effects on the lung. XB518.

With respect to cancer, Viking and Warren's expert acknowledged that initial cellular and molecular damage does not invariably have lasting effects. He testified that (i) 99% of damaged DNA is promptly repaired (XB442–43); and

(ii) even for DNA damage that becomes a mutation, almost all mutations are meaningless and without permanent consequence (XB445–46). Thus, while initial DNA damage causes sub-clinical cellular change, it is unlikely to have an impact on the development of cancer. XB456–58.

Because of the body's defenses, asbestos fibers in the body do not invariably lead to diagnosable disease, even among individuals exposed to heavy asbestos doses. Dr. Weill explained that only 15–20% of asbestos insulators working next to asbestos for ten to twenty years develop asbestosis. XB533. Thus, even significant exposure does not begin a continuous process that leads to disease in most cases.

C. The jury did not find continuous injury.

Both sides submitted several sets of proposed jury forms before and during trial. *See* XB141; XB178; XB191; XB215; XB751; XB761. Viking and Warren proposed forms that sought a finding that injury takes place "at or soon after" exposure to asbestos or — in a later version — significant exposure. WA136 ¶ 17; WA579 ¶ 14. Those proposed verdict forms requested a finding that bodily injury "continues thereafter." WA136 ¶ 17; WA579 ¶ 14. The proposed verdict form that Viking and Warren submitted just before closings asked, "Did Plaintiffs prove by a preponderance of the evidence that, for individuals who ultimately develop an asbestos-related disease as a result of alleged significant exposure to asbestos in

connection with a Warren or Viking product, that bodily injury takes place at or soon after that exposure *and continues thereafter*?" WA579 ¶ 14 (emphasis added).

But the final verdict form that Viking and Warren submitted did not include a proposed finding that the injury "continues thereafter." XB761–68, JA1482. Viking and Warren even protested the Excess Insurers' attempt to insert a temporal component into the verdict form, which would have put the issue squarely before the jury. 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. JA1482–83 ¶¶ 11, 12. But the jury was not asked to and did not make a finding that injury continues in all subsequent periods through diagnosis of asbestos-related disease.

D. Relevant post-trial rulings

After post-trial briefing, the court below ruled as follows (as relevant here):

Horizontal exhaustion. The Excess Insurers argued for "horizontal exhaustion" while Viking and Warren argued for "vertical exhaustion." *Compare* JA1569–70 & JA1651–58 *with* JA1534–40 & JA1612–14. The Superior Court summarized the dispute as follows:

> [Viking and Warren] argue for "vertical exhaustion," where once an underlying umbrella policy's limits are depleted, [Viking and Warren] may tender to the next excess policy, even if other, viable umbrella policies

> remain. Simply put, vertical exhaustion depletes a single year's tower from the bottom primary policy through all excess policies above. [Excess Insurers] argue for "horizontal exhaustion," where [Viking and Warren] must exhaust all limits within each underlying layer before *any* excess policy is triggered. Restated, [Excess Insurers] argue that [Viking and Warren] must deplete all primary policies, then all umbrella policies, then all first layer excess policies, and so on.

Viking III at 58 (emphasis in original). The Superior Court ruled for Excess Insurers and adopted horizontal exhaustion. *Id.* at 59. The Superior Court rejected Viking and Warren's reliance on Delaware cases favoring vertical exhaustion, stating that "New York law . . . governs the excess policies" and that "[t]hat is important here, as New York requires each underlying layer to be depleted before an insured can access *any* excess layer." *Id.* at 60 (emphasis in original).

Viking admitted at trial that several primary policies remain unexhausted and that is "Liberty's position as well." XB229. Viking admitted that the primary policies from 1968 to 1972 and 1986 were unexhausted, followed by the umbrella policies in those years, and Liberty was still paying Viking's expenses. XB229–30. Accordingly, until all triggered primary and umbrella policies are exhausted, Viking is not entitled to excess coverage.

Trigger. In post-trial briefing, the Excess Insurers argued that the Court should reverse the trigger finding that bodily injury occurred upon initial cellular

and molecular damage and that there was no temporal element in the jury's findings. JA1482, XB774–78; XB781–83. Viking and Warren responded by asking the 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 Viking and Warren had proven that bodily injury occurred at the time of "significant exposure," adopting the testimony of Viking and Warren's expert at trial. *Viking III* at 51.

The parties then began drafting an order based on the Superior Court's opinion. Viking and Warren's initial draft tied the timing of injury to the date of first significant exposure. XB802; XB817. The drafting process was protracted and Viking and Warren attempted to mold the final judgment in ways that were contrary to law and fact.[1] In their proposed Final Judgment Orders, Viking and Warren asked the Superior Court for a finding that injury continued from the date of first significant exposure through disease diagnosis. XB802; XB817. Thus Viking and Warren waited until after the jury's verdict to seek a finding that all policies in place *after* periods of significant exposure were triggered. XB802; XB817.

[1] For example, Viking and Warren attempted to define significant exposure as "the date the claimant *allegedly inhaled* asbestos fibers," misstating both the actual injury test and the evidence presented at trial. XB802; XB817.

The Superior Court entered a Final Judgment Order After Trial reflecting its determination on trigger:

> 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. In an accompanying letter, the Superior Court expressed concern about the parties' continued requests for additional post-trial rulings, stating that "[t]o the extent that any party is relying on disputed facts not previously presented, those issues are waived or the opposing party is entitled to a favorable inference." JA1877. Thus, having presided over the trial, and heard the evidence on trigger, the Superior Court rejected Viking and Warren's request for a finding that continuous injury from exposure to diagnosis was "undisputed." *Id.*

Warren then made another attempt to obtain a continuous trigger finding. On June 16, 2014, Warren filed a Rule 59 motion for clarification or modification of the Final Judgment Order in which Warren requested that the Final Judgment Order be amended to provide that bodily injury "continues until development of the relevant disease." WA676. The Superior Court denied the motion, explaining that it was "unwilling to equate" injury-in-fact and continuous trigger "at this late hour." JA1881, JA1890 ¶ 3.

Defense costs. The parties disagree about whether, and how, the Excess Policies cover Viking's and Warren's defense costs. Viking and Warren argue that *all* Excess Policies have an obligation to cover defense costs, and that each policy does so in addition to its stated limit of liability — in contravention of contrary express language in the Excess Policies. JA1622–32.[2] The Excess Insurers argue that many of the policies had no defense cost obligations (which is the subject of the Excess Insurers' appeal) while others pay defense but only within policy limits. JA1576–86.

The Superior Court ruled that the policies fell into two groups; those that carried full defense obligations in addition to policy limits, and those that carried defense obligations within each policy's applicable limits. *Viking III* at 80.

[2] Viking and Warren stipulated that ISLIC policy number XSI 5217 does not have a defense obligation. The Final Judgment Order states that "ISLIC has no obligation to pay the costs of defending asbestos claims against Warren and/or Viking." JA1868.

ARGUMENT

I. THE SUPERIOR COURT'S HORIZONTAL EXHAUSTION RULING SHOULD NOT BE DISTURBED ON APPEAL.

A. Question Presented

Did the Superior Court err in applying a horizontal exhaustion rule — requiring exhaustion of primary and umbrella policies before Viking and Warren can recover from the Excess Policies — that is supported by the policy language, New York case law, and the "all sums" approach followed in California? This question was raised below (JA1569–70; JA1651–58) and considered by the Superior Court (*Viking III* at 58–61).

B. Scope of Review

This Court reviews the trial court's interpretation of contract terms *de novo*. *BLGH Holdings LLC v. enXco LFG Holding, LLC*, 41 A.3d 410, 414 (Del. 2012).

C. Merits of Argument

1. The Court of Chancery's erroneous "all sums" ruling created the horizontal exhaustion question.

This Court need not even reach the horizontal exhaustion question. As demonstrated in Excess Insurers' Opening Brief, New York's highest court held in *Consolidated Edison Co. of N.Y., Inc. v. Allstate Insurance Co.*, 774 N.E.2d 687 (N.Y. 2002), that policies with substantially similar language to the policies here require pro rata allocation. The Court of Chancery's failure to follow *Con Ed* and

decision to instead apply "all sums" allocation should be reversed or, at minimum, certified for review by the New York Court of Appeals. If this Court were to reverse the "all sums" ruling, there would be no need for this Court to address the horizontal exhaustion question raised in Viking's Opening Brief. Whether policies should be exhausted horizontally by layer is a question that typically does not arise in a pro rata allocation regime, as the Superior Court observed. *See Viking IV* at 16 (noting that pro rata allocation mooted exhaustion issue in *Illinois Cent. R.R. Co. v. Accident & Cas. Co. of Winterthur*, 739 N.E.2d 1049 (Ill. App. Ct. 2000)).

Under a horizontal exhaustion approach, all primary policies in effect during the triggered policy periods must be exhausted before any excess policies pay. In *North River Insurance Co. v. ACE American Reinsurance Co.,* 361 F.3d 134, 138 (2d Cir. 2004), the court explained that, under horizontal exhaustion, "losses are allocated to the lowest layer of coverage first and, like a bathtub, fill from the bottom layer up." *Id.* at 138 n.6. Treatises similarly describe horizontal exhaustion as "exhaustion by layers." *See* BARRY R. OSTRAGER & THOMAS R. NEWMAN, HANDBOOK ON INSURANCE COVERAGE DISPUTES § 13.14 (16th ed. 2013).

For example, if a particular individual's claims triggered policies in effect during the years 1980–1985, a horizontal exhaustion approach would require Viking to exhaust all of the primary policies for 1980–1985, and then all of the

umbrella policies for 1980–1985, before reaching the Excess Policies. By contrast, under a vertical exhaustion approach, Viking could pick a single policy year — say, 1982 — exhaust the primary 1982 policy, then the umbrella 1982 policy, and then reach the Excess Policies for 1982, even if the primary and umbrella policies for 1980, 1981, 1983, 1984, and 1985 had not paid a cent.

Typically, under pro rata allocation, policies in different policy periods exhaust evenly by definition — making the horizontal exhaustion inquiry superfluous in most cases. As one commentator explains, "[p]ro rata allocation has the practical effect of spreading liability across policy years. Thus, there are fewer opportunities for disputes as to whether a policyholder must completely exhaust all underlying coverage before triggering defense and indemnity obligations of excess insurers." PIERCE, WESTON, LEVY & MCMAHON, INSURANCE PRACTICES AND COVERAGE IN LIABILITY DEFENSE § 12.03(b) (August 2014).

By turning away from New York law as articulated in *Con Ed*, the Court of Chancery created a question that New York courts typically do not confront: whether and how horizontal exhaustion applies under an "all sums" allocation. If this Court were to reverse the Court of Chancery's erroneous "all sums" allocation ruling, it would dispose of Viking's horizontal exhaustion appeal. Similarly, if this Court were to certify the allocation ruling to the New York Court of Appeals, the Court of Appeals' answer to the certified question may likewise dispose of

Viking's horizontal exhaustion appeal. There would be no reason for this Court to reach the question of horizontal exhaustion in the "all sums" context.

2. The Superior Court correctly held that Viking and Warren must exhaust all underlying policies in a given layer before accessing higher level Excess Policies.

Even if this Court were to reach the horizontal exhaustion issue, the Superior Court's ruling on horizontal exhaustion was correct (as far as it went).[3] Viking cites no New York precedent that *requires* vertical rather than horizontal exhaustion. Indeed, Viking acknowledges that "[n]o New York court has even addressed horizontal exhaustion in the successive policy context." Viking Opening Br. 28. Instead, Viking urges this Court to apply *Delaware* law to the policy language. Viking Opening Br. 28 (citing *Stonewall Ins. Co. v. E.I. du Pont de Nemours & Co.*, 996 A.2d 1254, 1259 (Del. 2010)). Viking is wrong on all counts.

a. The Excess Policy language calls for horizontal exhaustion. Each Excess Policy expressly lists a Liberty umbrella policy among the defined underlying insurance. *See*, *e.g.*, JA4166, JA4298. As a matter of New York law, "an umbrella policy is not required to contribute to the payment of a settlement until *all other applicable policies have been exhausted*." *Home Ins. Co. v. Liberty Mut. Ins. Co.*,

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[3] The Excess Insurers argued below that the horizontal exhaustion rule actually applies across *all* layers rather than the primary and umbrella only. That is still the Excess Insurers' position. So the Excess Insurers disagree with the Superior Court's horizontal exhaustion ruling to the extent that it does not apply more broadly. But the Excess Insurers do not appeal any aspect of the horizontal exhaustion ruling.

678 F. Supp. 1066, 1069 (S.D.N.Y. 1988) (emphasis added). The court in *Home* agreed with the umbrella insurer that an umbrella policy is "by its nature" excess to primary insurance "and therefore is a final tier of coverage." *Id*. Because the Excess Policies expressly state that they are excess to umbrella policies governed by New York law, the Excess Policies are not triggered until the umbrella policies are exhausted, and the umbrella policies cannot be exhausted until all underlying policies are exhausted. *State Farm Fire & Cas. Co. v. LiMauro*, 482 N.E.2d 13, 18 (N.Y. 1985); *Seneca Ins. Co. v. Ill. Nat'l Ins. Co.*, 2009 WL 2001565, at *5 (S.D.N.Y. July 9, 2009) (holding that, under New York law, excess other insurance clauses do not render a primary policy excess to a true excess or umbrella policy).

b. Moreover, as the Superior Court correctly held, New York authority supports horizontal exhaustion. *Viking III* at 60. While New York courts have not expressly addressed horizontal exhaustion — which is not a surprise in that pro rata jurisdiction — New York precedents provide that all primary coverage must be exhausted before the policyholder may access higher-level policies. *See Home Ins. Co.*, 678 F. Supp. at 1069; *Liberty Mut. Ins. Co. v. Ins. Co. of State of Pa.*, 841 N.Y.S.2d 288, 290–91 (N.Y. App. Div. 2007) (two primary policies had to exhaust before an excess policy had to contribute because primary coverage "took precedence" over excess coverage); *Cont'l Cas. Co. v. Emp'rs. Ins. Co. of Wausau*, 923 N.Y.S.2d 538, 541 (N.Y. App. Div. 2011). As one commentator has

explained, “New York courts continue to insist, as a general rule, that all primary policies covering a risk be exhausted before implicating excess policies.” Dan D. Kohane, *Kohane on Liberty Mutual Insurance Company v. Insurance Company of Pennsylvania*, 2008 Emerging Issues 1309 (Dec. 4, 2007).

c. Viking suggests that the Superior Court’s observation that “there is policy language supporting Plaintiffs’ argument for vertical exhaustion” and that “but for New York’s law, the court could reject horizontal exhaustion” repudiates clear policy language. Viking Opening Br. 17. But these comments do not mean that the policies’ plain language *mandates* vertical exhaustion or prohibits horizontal exhaustion — rather, they mean that the policy language may be reconcilable with vertical exhaustion. Of course, as discussed above, the language here also fully supports horizontal exhaustion, and under New York law, the language mandates that conclusion. It was certainly not error for the Superior Court to follow New York cases on a question of New York law. As this Court has held, “[t]he Delaware courts are not the proper forum for . . . judicial innovation in New York law.” *Caspian Alpha Long Credit Fund, L.P. v. GS Mezzanine Partners 2006, L.P.*, 93 A.3d 1203, 1207 (Del. 2014) (affirming application of New York law).

3. Horizontal exhaustion can be applied in an “all sums” regime.

Viking also argues that “an all sums allocation contemplates vertical exhaustion” and “[t]he Superior Court’s . . . adoption of the horizontal exhaustion

rule is inconsistent with the Court of Chancery's all sums ruling." Viking Opening Br. 25, 29. But the two are not inherently inconsistent.

a. Horizontal exhaustion is compatible with "all sums" allocation because the two doctrines address different problems in asbestos cases. "All sums" governs the relationship among multiple triggered policies *in the same coverage layer* by guiding liability allocation among those policies. *See Viking II*, 2 A.3d at 107.

By contrast, horizontal exhaustion controls the relationship among policies in *different coverage layers*. In other words, horizontal exhaustion determines *when* liability for a claim triggering multiple policies shifts from primary coverage to excess. *See State v. Cont'l Ins. Co.*, 88 Cal. Rptr. 3d 288, 306 (Cal. Ct. App. 2009) ("the horizontal exhaustion rule only governs the relationship between the primary and excess insurers"), *aff'd*, 281 P.3d 1000 (Cal. 2012); 3-16 PAUL E.B. GLAD, ET AL., NEW APPLEMAN ON INSURANCE LAW § 16.09[3][a][v] (3d ed. 2014) ("The horizontal exhaustion doctrine serves to allocate insurer liability where multiple insurance policies are triggered by the same loss. In the exhaustion context, the triggered policies are primary and excess.").

Thus, when an asbestos-related claim triggers more than one primary policy, the "all sums" rule allows the insured to pick from among the triggered policies and "claim its full loss on [that] policy in the first instance." *Viking II*, 2 A.3d at 128 n.184. Since the rule is concerned only with how liability is allocated among

policies in the same coverage layer, it does not dictate when insurance from another layer applies. Therefore, because horizontal exhaustion and "all sums" allocation resolve different issues, they are not at odds.

b. Case law from other jurisdictions shows that horizontal exhaustion is compatible with "all sums" allocation. California — an "all sums" jurisdiction — uses horizontal exhaustion. *See*, *e.g.*, *Cmty. Redevelopment Agency v. Aetna Cas. & Sur. Co.*, 57 Cal. Rptr. 2d 755, 761 (Cal. Ct. App. 1996) (stating California's "general rule that all primary insurance must be exhausted before a secondary insurer will have exposure favors and results in what is called 'horizontal exhaustion.'"); *Kaiser Cement & Gypsum Corp. v. Ins. Co. of the State of Penn.*, 126 Cal. Rptr. 3d 602 (Cal. Ct. App. 2011) (applying horizontal exhaustion to all primary policies underlying an excess policy, including primary policies from other years); *State v. Cont'l Ins. Co.*, 88 Cal. Rptr. 3d at 299, 306 (Cal. Ct. App. 2009) ("As a general rule, California requires horizontal exhaustion.").

c. Viking asserts that horizontal exhaustion would limit its options by requiring it to exhaust an entire layer before accessing the next layer. Viking Opening Br. 26. But that is not a legally valid reason to adopt vertical exhaustion. Under New York law, a policyholder must exhaust all primary and umbrella policies before accessing the excess policies. As the California jurisprudence shows, the two rules can and do coexist in a workable scheme.

4. The Court should certify the question to the New York Court of Appeals.

The Superior Court committed no error under New York law in ruling that the primary policies must exhaust horizontally before any Excess Policies may be accessed. This Court should therefore affirm on this question. Alternatively, this Court should certify the horizontal exhaustion question to the New York Court of Appeals. Section 500.27 of the New York Court of Appeals Rules of Practice allows certification when a determinative question of New York law has no controlling precedent. *Quadrant Structured Prods. Co. v. Vertin*, —A.3d—, 2013 WL 5962813, at *5 (Del. Nov. 7, 2013).

Certification would be particularly appropriate under these circumstances. A holding that the standard policy language here mandates not only "all sums" allocation but also vertical exhaustion would further encourage policyholders to file coverage suits governed by New York law in Delaware in a bid to shop for a more favorable version of New York law. As the Excess Insurers demonstrated in their Opening Brief, New York has a significant interest in the consistent interpretation and application of New York insurance law. And because a ruling that pro rata allocation applies would moot the horizontal exhaustion question here, the issue of horizontal exhaustion under "all sums" allocation could be readily packaged with allocation as a combined certified question.

II. THE COURT SHOULD REJECT WARREN'S ARGUMENTS FOR A FACTUAL FINDING OF CONTINUOUS TRIGGER.

A. Question Presented

Did the Superior Court commit reversible error in rejecting Warren's request for a factual finding of continuous injury? The question regarding continuity of injury was not included in the verdict form submitted to the jury. JA1482–83. Warren raised the question in a post-verdict letter about the form of the Final Judgment Order and raised it again in a motion for clarification and supplementation of the judgment (JA1802–06, XA502–11), and the issue was considered by the Superior Court (JA1868, JA1880–81, JA1889–1891).

B. Scope of Review

The Supreme Court "will not overturn a trial court's factual findings unless they are clearly erroneous and the record does not support them." *Pellicone v. New Castle Cnty.*, 88 A.3d 670, 673 (Del. 2014). A Superior Court Judge's decision to make factual findings under Superior Court Civil Rule 49(a) is "a matter that is entirely discretionary with the trial judge." *Hubbard v. Dunkleberger*, 1995 WL 131789, at *6 (Del. Mar. 16, 1995) (table).

The Supreme Court reviews motions under Superior Court Civil Rules 59(d) and (e) for abuse of discretion. *Carriere v. Peninsula Ins. Co.*, 2002 WL 31649167, at *2 (Del. Nov. 20, 2002) (table); *Joyner v. Kmart Corp.*, 2005 WL 2179238, at *2 n.2 (Del. Sept. 7, 2005) (table).

C. Merits of Argument

Warren asks this Court to reverse the consequences of Warren's own decision not to seek a finding of continuous injury from the jury. Where a question was not included in the special verdict form submitted to the jury, Superior Court Civil Rule 49(a) provides that a Superior Court Judge may make a factual finding on the question. Warren here asks this Court to make its own finding of fact on continuity of injury. The Court should reject that request for multiple reasons.[4]

1. New York law uses injury-in-fact to determine trigger.

The language of the Excess Policies provides that a particular policy is triggered — that is, the policy provides coverage for bodily injury claims — only if Viking and Warren show "bodily injury" during the policy period. In many cases, determining when bodily injury occurred is straightforward. For example, in the event of an explosion at a plant, there is no debate over the year in which injury occurred. Asbestos-related disease is more complex. Does an individual who is exposed to asbestos only in the years 1955–1956 and is diagnosed with asbestosis in 2011 suffer a "bodily injury" occurring during the policy year 1982?

Some states have adopted an expansive "continuous trigger" theory of bodily injury in asbestos coverage cases — *i.e.*, they presume as a matter of law

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[4] While the Excess Insurers disagree with aspects of the Superior Court's trigger ruling, they do not appeal that ruling.

that injury occurs continuously in every policy period from exposure through manifestation of asbestos-related disease. *See*, *e.g.*, *J.H. France Refractories Co. v. Allstate Ins. Co.*, 626 A.2d 502 (Pa. 1993) (adopting continuous trigger under Pennsylvania law for asbestos-related injury); *Owens-Illinois, Inc. v. United Ins. Co.*, 650 A.2d 974, 983 (N.J. 1994) (adopting continuous trigger under New Jersey law). Other states apply a more limited "exposure trigger" rule that "allows recovery only from a policy that was in effect during some exposure to asbestos." *Shook & Fletcher Asbestos Settlement Trust v. Safety Nat'l Cas. Corp.*, 909 A.2d 125, 126 (Del. 2006) (applying Alabama law); *see also Cole v. Celotex Corp.*, 599 So.2d 1058, 1075 (La. 1992) (describing how "courts nationwide have split over the proper theory to be applied for determining the trigger of coverage" and adopting an exposure theory as a matter of Louisiana law).

New York law — the law that governs the Excess Policies here — presumes neither. Rather, courts applying New York law follow an injury-in-fact standard under which the timing of bodily injury is decided as a matter of fact based on the evidence at trial, not as a matter of law. *See*, *e.g.*, *Am. Home Prods. Corp. v. Liberty Mut. Ins. Co.*, 748 F.2d 760 (2d Cir. 1984) (applying New York law); *Stonewall Ins. Co. v. Asbestos Claims Mgmt. Corp.*, 73 F.3d 1178 (2d Cir. 1995) (applying New York law), *modified on other grounds*, 85 F.3d 49 (2d Cir. 1996).

2. The timing of injury-in-fact is based on the evidence presented at trial, not on factual findings in other cases.

Warren's lead argument is that the trial court's trigger ruling was incorrect "as a matter of law." Warren Opening Br. 32–38. But under New York law, the timing of bodily injury triggering coverage must be decided as a matter of fact at trial instead of by looking to case law.[5]

a. Warren itself acknowledges that New York courts have "rejected" an assumed "continuous trigger" theory in favor of an injury-in-fact standard that requires proof of actual bodily injury in each policy period. Warren Opening 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 the policy period. *Con Ed*, 774 N.E.2d at 690; *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).

b. Contrary to Warren's argument, under New York law, the timing of injury-in-fact cannot be established by citing to case law — as demonstrated by the cases that Warren cites. Courts applying New York law have long rejected the

[5] The Superior Court denied the Excess Insurers' summary judgment motion arguing that Viking and Warren could not satisfy their burden to demonstrate bodily injury during the policy period as a matter of law.

"assumed" continuous trigger theory and adopted an injury-in-fact standard that requires proof of bodily injury during the policy period. In *American Home Products Corp v. Liberty Mutual Insurance Co.*, 748 F.2d 760 (cited at Warren Opening Br. 32), the court found that policy language identical to that addressed here was unambiguous and required proof of actual injury within the policy period. *Id.* at 765. Later New York cases applied that concept in the asbestos context, each time deciding the timing of injury based on the evidence presented at trial.

For example, in *Stonewall Insurance Co. v. Asbestos Claims Management Corp.* (cited at Warren Opening Br. 33–35), 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 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).

Other cases Warren cites were similarly decided based on trial evidence, and *not* as a matter of law. *See Hoechst v. Celanese Corp. v. Certain Underwriters at Lloyd's London*, 673 A.2d 164 (Del. 1996) (cited at Warren Opening Br. 32) (ruling on cross motions for summary judgment remanded for findings on a genuine issue of material fact as to when injury-in-fact took place); *E.R. Squibb & Sons, Inc. v. Lloyd's & Cos.*, 241 F.3d 154, 168 (2d. Cir. 2001) (cited at Warren Opening Br. 33) (judgment on jury verdict); *see also Abex Corp. v. Maryland Cas. Co.*, 790 F.2d 119 (D.C. Cir. 1986) (applying New York law and remanding to trial court for factual finding on injury-in-fact).

c. Even if the Court were inclined to agree with Warren that the existence of bodily injury during the policy period could be decided as a matter of law — which, under New York law, it cannot — the cases Warren cites were based on decades-old medical science. *See, e.g.*, *Am. Home Products Corp.*, 748 F.2d 760 (cited at Warren Opening Br. 32); *Stonewall*, 73 F.3d 1178 (cited at Warren Opening Br. 33–35). As the evidence at trial established, more recent science on antioxidants has changed the way medical experts view the timing of the body's reactions to asbestos. *See* pp. 7–11, above.

As discussed above, New York law requires that the timing of injury be decided as a matter of fact in each case. But if the Court were to adopt Warren's view that prior New York cases control, that would apply with even more force to

the definition of bodily injury, which the most recent New York appellate precedent on trigger found could be decided as a matter of law. *Cont'l Cas. Co. v. Emp'rs Ins. Co. of Wausau*, 871 N.Y.S. 2d 48 (N.Y. App. Div. 2008) ("*Keasbey*"). *Keasbey* took a decidedly different approach from the old cases Warren cites, based on expert testimony reflecting up-to-date medical science. *Keasbey* held that early alteration of tissue cells and subclinical tissue did not necessarily progress into asbestos-related disease, and therefore were not "bodily injury" as a matter of law. Warren's incorrect argument that the Court should rely on New York cases for the timing of bodily injury cannot be reconciled with its argument on the definition of bodily injury.

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

Warren also argues that the Final Judgment Order trigger ruling was erroneous because, while the jury verdict contained no continuous trigger finding, it was nonetheless "intended" and "understood" to do so. Warren Opening Br. 39–43. As Warren concedes, *id.* at 39, it must overcome a deferential standard of review to prevail in challenging the trial court's factual findings. Warren does not meet that high burden.

a. Superior Court Civil Rule 49(a) governs the use of special verdicts as in this case. Rule 49(a) provides that issues omitted from the verdict form are submitted to the trial judge:

> If in so doing the Court omits any issue of fact raised by the pleadings or the evidence, each party waives the right to a trial by jury of the issue unless before the jury retires the party demands its submission to the jury. *As to an issue omitted without such demand, the Court may make such finding; or, if it fails to do so, it shall be deemed to have made a finding in accord with the judgment* on the special verdict.

Sup. Ct. Civ. R. 49(a) (emphasis added).

Indeed, even where the trial court does not make an express factual finding, Rule 49(a) provides that the court "shall be deemed to have made a finding in accord with the judgment." As federal cases interpreting the substantially similar Federal Rule of Civil Procedure 49(a) have held, 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); 9B CHARLES ALAN WRIGHT, ET AL., FEDERAL PRACTICE AND PROCEDURE § 2507 at 138–39 (3d ed. 2008) ("If the right to jury trial has been waived on an issue by a failure to demand its submission, the trial judge should make his or her own finding of fact on that issue. If the court does not do so, it will be presumed on appeal that the lower court made whatever finding was necessary in order to support the verdict and judgment that was entered."). "Even though this practice may seem to be harsh, it has the salutary purpose of giving the judge an

opportunity to correct any inadvertent failure to submit the issue to the jury." WRIGHT, FEDERAL PRACTICE AND PROCEDURE § 2507 at 136–37.[6]

A Superior Court Judge's decision to make factual findings under Rule 49(a) is "a matter that is entirely discretionary with the trial judge." *Hubbard*, 1995 WL 131789, at *6. And federal courts have held that "trial court findings (deemed or express)" made under Federal Rule of Civil Procedure 49(a) may only be set aside on appeal if they are "clearly erroneous." *McConney v. City of Houston*, 863 F.2d 1180, 1186 (5th Cir. 1989); *see also Katz v. Cohn*, 900 F.2d 262 (9th Cir. 1990) (similar); *Bruno v. W. Elec. Co.*, 829 F.2d 957, 962 (10th Cir. 1987) (similar). Because the question of continuous injury was not submitted to the jury and there was no timely objection, the trial judge became the fact finder, whose findings are subject to a deferential standard of review.

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[6] Because Superior Court Civil Rule 49(a) "closely tracks" the language of Federal Rule of Civil Procedure 49(a), "interpretations of the Federal Rule[] provide persuasive guidance." *Crumplar v. Superior Court ex rel. New Castle Cnty.*, 56 A.3d 1000, 1007 (Del. 2012). In addition, although this is a procedural question governed by the Superior Court Civil Rules, Excess Insurers note that New York state courts follow a substantially similar rule. N.Y. C.P.L.R. R. 4111(b).

b. The Superior Court's trigger finding was supported by evidence presented at trial. The Superior Court found that bodily injury occurred on significant exposure to asbestos, accepting Warren's expert's opinion that "injury occur[s] after 'significant exposure.'" *Viking III* at 51; *see also* WA348, WA349, WA351–53, WA361–62, WA370–73, WA388–89.

The Court's refusal to adopt Warren's proposed finding that bodily injury occurred in every policy period after that significant exposure was supported by substantial evidence presented at trial. To take just a few examples:

- The early inflammation that Warren's expert characterized as injury is most often temporary and unlikely to lead to the development of cancer. XB456–58; XB509–10; XB513–14.
- By his own admission, 99% of the mutations that Warren's expert characterized as injury were promptly repaired, meaningless, and had no permanent consequence. XB442–43; XB445.
- By Warren's expert's calculation, 75% of even those asbestos fibers that make it to the deep lung are gone six months after exposure. XB412–13.
- The antioxidant process holds harmful reactions to asbestos in check while the macrophages work to eliminate asbestos fibers. XB355; XB505–06; XB511–13.
- Even in the case of a "heavily exposed population" like insulation workers, just 15%-20% develop asbestosis — meaning that significant exposure does not inevitably progress to disease. XB533.
- Asked whether asbestos "that reaches the deep lung and avoids elimination or clearance [can] cause injury of any kind thereafter," Warren's expert equivocated: "Yes. . . . People who are exposed when they are young *can* have fibers that stay in their body for the rest

> of their life and those fibers *can* continue to do all of this . . . . They *can* continue to cause injury." WA366–67 (emphasis added).[7]

Based on the evidence presented at trial, the Superior Court's determination that Viking and Warren had not established continuous injury was not an abuse of discretion or clear error.

c. Warren seizes on an out-of-context comment from the Superior Court's July 11, 2014 letter in connection with Warren's Rule 59(d) and (e) motion that "I was going to observe that the trial focused almost exclusively on when bodily injury first occurs, rather than the illness's course." Warren Opening Br. 39–40 (citing JA1880). While Warren elevates the correctness of this comment to a "question presented," the statement is not a ruling and does not present an appealable issue. The question for this Court in reviewing Rule 59(d) and (e) motions is whether the Superior Court committed an abuse of discretion. Warren has not met this high standard.

d. Although Warren claims that the Excess Insurers "conceded the continuing nature of the injury process" (Warren Opening Br. 40), that is not so. Warren provides no record cite for this supposed concession. Warren also claims

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[7] Warren's expert later testified that asbestos fibers, "*particularly fibers such as amosite* . . . stay in that individual for the rest of that individual's life" and continue to cause injury. WA390–91 (emphasis added). But all of Viking's products and a number of Warren's products contained chrysotile, a different variety of asbestos that breaks down in the body within a matter of months. XB266; XB333–34; XB412–13; XB507; WA272–73.

that Excess Insurers presented "no contrary testimony" to Warren's expert Dr. Gabrielson and that "both experts identified the same bodily processes." *Id.* But on the same page, Warren acknowledges that the parties' experts "differ[ed] . . . as to what part of those processes qualified as 'injuries.'" *Id.* And both experts agreed that the molecular and cellular damage caused by early reaction to asbestos was most often temporary and did not progress. XB443–47; XB456–58; XB514; XB518.

Warren also claims that the Superior Court and all parties "intended," "clearly understood," and "assumed" a continuous trigger. Warren Opening Br. 41–43. Far from assuming continuous trigger, there was contrary evidence presented at trial. *See* pp. 7–11, above. And Warren did not obtain a stipulation of continuous injury. Instead, Warren proposed a jury verdict question on the continuity of injury right up through the point at the end of trial — after the medical experts had testified — only to then drop the request for that finding. JA1482–83. Supposed assumptions and understandings do not provide a basis for reversing factual findings supported by the evidence.

e. Finally, Warren asserts that the fact that "the jury found that the factual allegations in the Asbestos Claims raised *the possibility* that the underlying claimants sustained bodily injuries during the Excess Policy periods" creates an "inconsistency between the jury's finding on this issue" and the Superior Court's

factual finding on trigger. Warren Opening Br. 43 (emphasis added). But "the possibility" of harm occurring after exposure does not mandate a factual finding of continuous trigger, *i.e.*, that harm necessarily occurs in all periods from exposure to manifestation of asbestos-related disease.

4. The Superior Court did not deny Warren's constitutional right of access to the courts.

Although not raised in the argument section of its brief, Warren claims that the Superior Court "denied the parties their constitutional right of access to the Superior Court" when — following a plenary trial, post-trial briefing, and a Rule 59 motion for clarification or modification of the final judgment — the Superior Court entered a further Final Judgment order stating that "The Prothonotary **SHALL** accept no further filings. This case is closed." Warren Opening Br. 30–31 (citing JA1891).

a. Warren waived this argument. "It is well established that 'to assure consideration of an issue by the court, the appellant must both raise it in [the Summary of the Argument] and pursue it in the Argument portion of the brief.'" *Roca v. E.I. du Pont de Nemours & Co.*, 842 A.2d 1238, 1242 (Del. 2004) (alteration in original) (quoting 16A CHARLES ALAN WRIGHT, ET AL., FEDERAL PRACTICE AND PROCEDURE § 3974.1, at 504–08 (1999 and Supp. 2003)); *see also Tumlinson v. Advanced Micro Devices, Inc.*, —A.3d—, 2013 WL 4399144, at *2 (Del. Aug. 16, 2013) (An appellant "must pursue [each issue] in the argument

section or the issue will be deemed waived.”). Warren did neither, mentioning the issue only in its statement of facts. Such a “[c]asual mention of an issue in a brief is cursory treatment insufficient to preserve the issue for appeal.” *Roca*, 842 at 1242. Warren thus “has abandoned th[e] issue on appeal.” *Id.*

b. In any event, Warren’s constitutional argument is meritless. “[T]here is a need for certainty and finality in litigation.” *Sheppard v. GPM Invs., LLC*, 2008 WL 193317, at *3 (Del. Super. Ct. Jan. 23, 2008); *see also Campbell v. Campbell*, 522 A.2d 1253, 1255 (Del. 1987) (noting “[t]he need for finality” with respect to final judgments). Both this Court and Delaware’s trial courts have directed clerks to not accept further filings at the end of a case. *See In re Cook*, 1990 WL 1098710, at *1 (Del. Super. Ct. Jan. 9, 1990) (noting both Supreme and Superior Courts “have previously entered orders directing the clerks of the respective courts to reject further filings” from party); *Gorton v. Brown*, 2007 WL 1610423, at *1 (Del. June 5, 2007) (table) (ordering clerk to “reject for filing any further submission” except timely filed opening brief); *Tatem v. State*, 1988 WL 19215 (Del. Feb. 11, 1988) (table) (directing clerk not to accept additional filings from party). The Superior Court committed no constitutional violation. Warren had its day in court.

III. THE COURT SHOULD REJECT WARREN'S ARGUMENTS REGARDING DEFENSE COSTS.

A. Question Presented

Do certain Excess Policies pay defense costs and expenses within, or in addition to, policy limits? This question was raised below (JA1580–86) and considered by the Superior Court (*Viking III* at 61–80).

B. Scope of Review

This Court reviews the trial court's interpretation of contract terms *de novo*. *BLGH Holdings*, 41 A.3d at 414.

C. Merits of Argument

The Superior Court ruled the "Liberty policies include an unlimited duty to defend," meaning that Liberty is obligated to pay defense costs and those payments do not erode Liberty's policy limits. *Viking III* at 67. But based on express language different from the Liberty policies, the Superior Court ruled that certain Excess Policies "limit defense obligations to *within* the policy limits." *Id.* at 67, 70–74, 80 (emphasis added). Warren appealed this ruling as to sixteen Excess Policies, dividing the policies into three groups. Viking joined this portion of Warren's appeal.

Under New York law, where an excess policy has defense provisions different from the underlying policy, the excess policy's language governs. *Home Ins. Co. v. Am. Home Prods. Corp.*, 902 F.2d 1111, 1114 (2d Cir. 1990) (applying

New York law). Warren argues that "there is no language in the [sixteen] Excess Policies . . . that negates their obligation to follow form to the umbrella's express promise to pay such costs in addition to the policy limits." Warren Opening Br. 45. Warren is incorrect. The Superior Court correctly applied the language of the first group of policies. And as Excess Insurers demonstrate in their Opening Brief at pp. 42–49, the Superior Court erred in ruling that the policies that Warren places in the second and third group had any defense obligations at all. The Superior Court therefore certainly did not err in ruling that, to the extent that they had any defense obligation, that obligation was confined to the policy limits.

1. The first group of policies pays defense costs within limits, to the extent it pays them at all.[8]

a. Each policy in the first group contains essentially the same carve-out from the "follow form" provision: "This Policy is subject to the same terms, definitions, exclusions and conditions (*except as regards . . . the amount and limits of liability* and *except as otherwise provided herein*) as are contained in or as may be added to the Underlying Umbrella Policies." *E.g.*, JA3876 (emphasis added).

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[8] The Superior Court actually addressed ten policies in this group (JA1753 n.258), but two were policies issued by First State, which settled since. This section therefore addresses the following eight policies: (1) Central National Insurance Company of Omaha Policy No. CNZ14-19-51 (JA3740–48); (2) Central National Policy No. CNZ14-19-89 (JA3875–81); (3) Century Indemnity Company Policy No. CIZ425741 (JA4294–300); (4) Old Republic Insurance Company Policy No. OZX11405 (JA3882–95); (5) Puritan Insurance Company Policy no. ML651258 (JA3605–20); (6) Lexington Insurance Company Policy No. GC403427 (JA2568–88); (7) Lexington Policy No. CE5503312 (JA3109–35); and (8) Granite State Insurance Company Policy No. 6279-0163 (JA3575–88).

With respect to defense expenses, these Excess Policies contain different language from the underlying umbrella policies. The umbrella policies provide coverage for "damages" separate from a second provision committing to "pay defense *expenses* incurred with its written consent *in addition to its applicable limit of liability*." *E.g.*, JA3851–52 (emphasis added). But each of the group one Excess Policies expressly include "expenses" as part of the general coverage obligation:

Underlying Umbrella	**Group One Excess Policies**
"The company will pay on behalf of the insured all sums which the insured shall become legally obligated to pay . . . as damages, direct or consequential, because of: (a) personal injury . . . with respect to which this policy applies and caused by an occurrence." *E.g.*, JA3851.	"The Company hereby agrees, subject to the limitations, terms and conditions hereinafter mentioned, to indemnify the insured for all sums which the insured shall be obligated to pay by reason of the liability, (a) imposed upon the insured by law, . . . for damages, direct or consequential **and expenses** on account of: (i) personal injuries . . . caused by or arising out of each occurrence . . . arising out of the hazards covered by and as defined in the Underlying Umbrella Policies." *E.g.*, JA3876 (emphasis added).

The group one Excess Policies' coverage provision thus treats "damages . . . and expenses" the same, in both cases making the Excess Insurers' agreement to pay "subject to the limitations . . . hereinafter mentioned." The immediately following section sets forth the per-occurrence and aggregate policy limits. *E.g.*, JA3876.

b. The addition of the word "expenses" to the coverage obligation that is "subject to the limitations" of the first group of Excess Policies is significant because "[i]t is understood . . . within the [insurance] industry that 'damages' includes loss compensation but not defense expenses." *Aetna Cas. & Sur. Co. v. Home Ins. Co.*, 882 F. Supp. 1328, 1337 (S.D.N.Y. 1995) (applying New York law); *see also Stonewall*, 73 F.3d at 1218 (applying New York law) (holding that, where the term "ultimate net loss" was amended to delete the term "expenses," it "unambiguously includes only damages and not defense costs"); *Maryland Cas. Co. v. W.R. Grace & Co.*, 1996 WL 306372, at *8–9 (S.D.N.Y. June 7, 1996) (applying New York law) (holding that policy that excluded "legal expenses" contained no duty to pay defense costs); *City of Sterling Heights v. United Nat'l Ins. Co.*, 2006 WL 5097403, at *1 (E.D. Mich. Jan. 27, 2006) (applying Michigan law) (holding that the policy limit of an excess policy with a similar coverage provision referring to both "damages" and "expenses" was "eroded by defense expenses"). Here, because the group one Excess Policies provide that both "damages" and "expenses" are subject to the policy limits, defense costs are paid within limits.

c. Moreover, each Excess Insurer's aggregate limit is unequivocally set forth in the "Limit of Liability – Underlying Limits" section of the policy. *E.g.*, JA3876. That section provides that the Excess Insurer is "liable to pay *only* the

excess . . . up to . . . the aggregate . . ." (*e.g.*, JA3885–86 (emphasis added)), with the aggregate limit stated as a specific dollar amount. The specific dollar aggregate limit — which is the Excess Insurer's "only" obligation — makes clear that no further responsibility exists once total payments have reached that limit.

These provisions make inapplicable many of the cases Warren cites. *Owens-Corning Fiberglas Corp. v. American Centennial Insurance Co.*, 660 N.E.2d 770 (Ohio Ct. Comm. Pl. 1995) (cited at Warren Opening Br. 48), held that the umbrella carrier had the obligation to pay defense costs in addition to "ultimate net loss" based on specific policy language that required the umbrella insurer to pay, "in addition to the amount of ultimate net loss payable[,] . . . all [defense] expenses . . . ." *Id.* at 801. No such language appears in the eight group one policies. The same is true for *Aetna*, 882 F. Supp. 1328 (cited at Warren Opening Br. 48), and *In re Silicone Breast Implant Insurance Coverage Litigation*, 652 N.W.2d 46 (Minn. Ct. App. 2002) (cited at Warren Opening Br. 44). *Aetna* supports the Excess Insurers' argument because there the court ruled the policy's overall limit of liability capped the insurer's maximum liability, including defense costs. And in *In re Silicone*, unlike here, the court held that the excess policy followed form to a primary policy that provided for paying defense costs in excess of "ultimate net loss." 652 N.W.2d at 65–66.

d. Warren's arguments to the contrary cannot overcome the language of the first group of Excess Policies.

i. Warren argues "the 'amount and limits' exception to the follow-form obligation has no application to the underlying Liberty promise to pay defense costs in addition to the policy limits" and that "the Liberty umbrella policy provisions make clear that defense costs are payable 'in addition' to limits." Warren Opening Br. 47. Warren's argument ignores the principle under New York law that inconsistent terms of an excess policy "prevail[] over the terms of the policy whose form it follows." *200 Fifth Ave. Owner, LLC v. N.H. Ins. Co.*, 2012 WL 2344973, at *16 (N.Y. Sup. Ct. June 5, 2012); *see also Home Ins.*, 902 F.2d at 1114 (excess policy language trumps underlying policy language where there is a difference between the two). Because the group one Excess Policies make both damages and expenses "subject to" policy limits, they cannot also provide for payment of defense costs outside of policy limits.

The cases Warren cites do not advance its argument. *Gulfport-Brittany LLC v. RSUI Indem. Co.*, 339 F. App'x 413, 416 (5th Cir. 2009) (cited at Warren Opening Br. 46), which applied Mississippi law, actually held that that "amount and limits" language in an excess property insurance policy *protected* the excess insurer from the primary policy's expanded coverage endorsement, so that the excess insurer's own "scheduled limit . . . therefore applies." *Id.* at 416. And

Fireman's Fund Ins. Co. v. Great Am. Ins. Co. of N.Y., 2013 WL 1195277 (S.D.N.Y. Mar. 25, 2013) (cited at Warren Opening Br. 46), relied on an entirely different provision — one stating "that 'sublimits' are 'n/a'" — in finding that the excess policy "removes any sublimits [in the primary policy] for any particular coverage." 2013 WL 1195277 at *8. The *Fireman's Fund* court referred to the excess policy's "amount and limits" language only in *dictum*.

ii. Warren also claims that the "argument that the 'amount and limits' language bars incorporation of any underlying provision dealing with any aspect of the policy limits" is contradicted by the Excess Insurers' purported "conce[ssion] that their follow-form policies incorporate the 'non-cumulation of liability' provisions that . . . appear in the Liberty umbrella policy 'Limits of Liability' Section." Warren Opening Br. 47. In fact, each of the eight policies in the first group contains its own "non-cumulation of liability provision" (JA3746, JA3876, JA4297, JA3582, JA3886, JA3615, JA2583, JA3125), and thus does not follow form to the Liberty non-cumulation language. Moreover, Warren ignores the fact that the non-cumulation provision is an additional *limit* on the Excess Insurer's potential payment obligation, not an expansion of the otherwise stated policy limit.

iii. Warren argues that the use of the undefined term "ultimate net loss" in the Limits of Liability section (*see, e.g.*, JA3876) supposedly provides an independent obligation to pay defense costs outside policy limits. Warren Opening

Br. 47–48. But as explained above, the group one Excess Policies expressly make payment of damages and expenses subject to the same aggregate limit. However one interprets "ultimate net loss," the aggregate limit continues to apply to expenses under the express policy language. Moreover, "excess policies generally include defense costs within the limit of covered ultimate net loss." BARRY R. OSTRAGER & THOMAS R. NEWMAN, HANDBOOK ON INSURANCE COVERAGE DISPUTES § 13.14 at 1242 (16th ed. 2013); *see also Missouri Pub. Entity Risk Mgmt. Fund v. Investors Ins. Co. of Am.*, 2007 WL 1147318, *3 (W.D. Mo. Apr. 17, 2007) (holding that undefined term "ultimate net loss" "must include both judgments and settlements . . . as well as [] defense costs"). As these authorities suggest, the term "ultimate net loss" has a generally accepted meaning in the excess insurance context as including defense costs, and it is clearly the meaning intended in the first group of Excess Policies, as reflected in the language discussed above.

That "ultimate net loss" in the underlying Liberty policies may exclude defense costs does not change this conclusion. As discussed above, in the event of an inconsistency with underlying policies, excess policy language controls.

2. The second group of policies pays defense costs within limits, to the extent it pays them at all.[9]

Warren fails to mention that, unlike each of the policies in the first group, these four policies contain "assistance and cooperation" clauses, which state:

> The [insurers] shall not be called upon to assume charge of the settlement or defense of any claim made, suit brought or proceeding instituted against the Assured but the Underwriters shall have the right and shall be given the opportunity to associate with the Assured or the Assured's underlying insurers, or both, in the defense and control of any claim, suit or proceeding relative to an occurrence where the claim or suit involves or appears reasonably likely to involve the Underwriters, in which event the Assureds and the Underwriters shall cooperate in all things in the defense of such claim, suit or proceeding.

See, *e.g.*, JA2434.

Warren's arguments concerning the second group of policies fail for two reasons. First, for the reasons stated in the Excess Insurers' Opening Brief at pp. 42–49, this policy language means the policies "clearly disclaim coverage of defense costs." *In re Sept. 11th Liab. Ins. Coverage Cases*, 458 F. Supp. 2d 104, 123 (S.D.N.Y. 2006) (interpreting similar "assistance and cooperation" language under New York law).

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[9] This second group consists of London Policy Nos. K24961 (JA2405–77); UGL0160 (JA2847–904); UGL0162 (JA2922–79); and CX5026 (JA2371–404).

Warren's argument also fails because the second group of policies contains the same "follow form" provision, including the "except as regards the premium, the amount and limits of liability and except as otherwise provided herein." *See*, *e.g.*, JA2395. For the reasons stated in Point III.C.1 above, the language here caps the Excess Insurer's liability.

3. The third group of policies pays defense costs within limits, to the extent it pays them at all.[10]

The third group of policies generally "follow form" to the underlying umbrella insurance. But each of those policies explicitly provides that it does not cover defense costs at all, as set forth in the Excess Insurers' Opening Brief at pp. 42–49. Warren's argument that these policies pay defense costs "in addition to" rather than "within" policy limits is, therefore, beside the point.

[10] This third group consists of (i) California Union Insurance Company Policy No. ZCX003889 (JA3621–28); (ii) INA Policy No. XCP145194 (JA4164–71); (iii) INA Policy No. XCP156562 (JA4420–26); and (iv) Lexington Policy No. 5510143 (JA3371–79). To the extent Lexington Policy No. 5510143 follows form to London Policy No. UKL0349, it provides no defense cost coverage for the reasons stated in Excess Insurers' Opening Brief at Point III.C.2.

CONCLUSION

For the foregoing reasons, this Court should (a) decline to consider Viking's arguments regarding horizontal exhaustion or at minimum certify the horizontal exhaustion question to the New York Court of Appeals, (b) affirm the Superior Court's factual findings on trigger, and (c) affirm the Superior Court's rulings on defense costs except as otherwise set forth in Excess Insurers' Opening Brief.

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