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Case Number 413,2016

IN THE SUPREME COURT OF THE STATE OF DELAWARE

BORGWARNER, INC. and BORGWARNER MORSE TEC LLC,	)	
Appellants,	)	C.A. No. 413, 2016
v.	)	Court Below – Superior Court of the State of Delaware,
FIRST STATE INSURANCE COMPANY, NORTH RIVER INSURANCE COMPANY, and OWENS CORNING/FIBREBOARD ASBESTOS PERSONAL INJURY TRUST,	)	C.A. No. N15M-05-009
Appellees.	)	**CORRECTED VERSION**

APPELLANTS' OPENING BRIEF

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NATURE OF THE PROCEEDINGS

This appeal concerns whether two parties can enforce a contract to conceal relevant, non-privileged information from discovery without showing "good cause," i.e., a specific, legitimate harm from complying with the discovery rules. In an arbitration, appellees North River Insurance Company ("North River") and First State Insurance Company ("First State") produced information that they assert is protected by confidentiality agreements. BorgWarner, Inc. and BorgWarner Morse TEC LLC ("BorgWarner"), which were not a party to those agreements, subpoenaed the Owens Corning/Fibreboard Asbestos Personal Injury Trust (the "Trust"), the successor to Owens-Corning Fiberglas Corp. ("Owens-Corning"), which was also a party to the arbitration. The information is relevant to coverage litigation between BorgWarner and its insurers in Illinois state court. The Trust did not object, but North River and First State did on confidentiality grounds. BorgWarner moved to compel, and North River and First State moved to quash. The Commissioner granted the motions in part and denied them in part. Without requiring North River and First State to show good cause under Rule 26(c), the Commissioner held that Delaware's policy favoring arbitration protected the documents from discovery. BorgWarner moved for reconsideration, which the Superior Court denied. This appeal followed.

SUMMARY OF THE ARGUMENT

1. The Superior Court's denial of BorgWarner's motion for reconsideration of the Commissioner's decision should be reversed, and BorgWarner's motion should be granted, for four reasons.

2. First, the Superior Court erred by upholding the Commissioner's grant of a motion to quash in favor of North River and First State without requiring them to show "good cause" under Delaware Superior Court Rule 26(c). The Superior Court erred because Delaware's discovery rules are broad, and the "proper scope of a discovery subpoena is controlled by Civil Rule 26(c)," which expressly requires "good cause" before a court can limit discovery. *Tekstrom, Inc. v. Salva*, 2007 WL 3231632, at *5 (Del. Com. Pl. Oct. 25, 2007) (quoting Rule 26(c)). Indeed, a Delaware bankruptcy court *In re Armstrong World Industries, Inc.* granted a non-party discovery of the exact type of arbitration materials BorgWarner seeks because the objecting insurers failed to show good cause.

3. Second, the Superior Court erred by treating BorgWarner as if it were bound by confidentiality agreements to which it was not a party. Abundant case law construing parallel provisions of the Federal Rules of Civil Procedure makes clear that confidential agreements cannot trump a party's obligation to produce relevant, non-privileged materials. The Court dismissed this case law summarily, concluding that BorgWarner's rights to discovery must yield to Delaware's public

policy favoring arbitrations. But the source of that public policy, the Delaware Rapid Arbitration Act ("DRAA"), was not enacted until 2015, decades after the 1989 arbitration proceeding at issue here. BorgWarner is aware of no pre-1989 statutes or court decisions mandating confidentiality of arbitration proceedings, and it was error to impose a later-enacted policy retroactively in this case. Moreover, any public policy favoring arbitration can only apply to parties that have agreed to arbitration. Here, there is no dispute that BorgWarner did not do so.

4. Third, the Superior Court erred by failing to examine the Commissioner's interpretation of the confidentiality provisions of the agreement at issue here and a separate confidentiality agreement among Owens-Corning, North River, and First State. The Superior Court concluded that the discussion of the agreements' text in the Commissioner's opinion was essentially *dicta* and thus did not examine whether it was correct.

5. Fourth, the Superior Court erred in rejecting BorgWarner's arguments based on subject matter waiver. By using confidential documents in prior public litigation (*North River Insurance Co. v. CIGNA Reinsurance*, 52 F.3d 1194 (3d Cir. 1995)), North River has waived its ability to assert confidentiality protection over other related documents.

STATEMENT OF FACTS

As noted above, this dispute involves a subpoena that BorgWarner served on the Trust for certain documents and testimony from a prior arbitration, which is relevant to BorgWarner's current insurance coverage litigation in Illinois state court (the "Illinois Action"). A key issue in the Illinois Action is whether certain standard-form language drafted by the insurance industry for use in policies requires BorgWarner to obtain written insurer consent before incurring defense costs in defending asbestos claims.[1]

BorgWarner's subpoena seeks prior insurance industry testimony about the meaning of this defense-cost language.[2] That testimony was given in an alternative dispute resolution ("ADR") proceeding brought under the Agreement Concerning Asbestos-Related Claims (the "Wellington Agreement").[3] The Wellington Agreement—to which BorgWarner is not a party—is a settlement agreement between various companies that used asbestos-containing products and their insurers. It provides for arbitration of insurance coverage disputes among its signatories. In the ADR proceeding, the Trust's predecessor, Owens-Corning, sought insurance coverage under policies containing language nearly identical to

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[1] Order at 2, *Continental Cas. Co. v. BorgWarner Inc.*, C.A. No. N15M-05-009 (Mar. 22, 2016) ("Commissioner's Order") (Exhibit A hereto).

[2] *Id.* at 1–2.

[3] The Wellington Agreement is available at A86–A134.

that at issue here.[4] In that ADR, several of BorgWarner's insurers (or their corporate affiliates), including North River and First State, took positions on the meaning of the defense-cost language that contravene the positions they now are taking in the Illinois Action.[5] Based in part on this testimony, the arbitrator ruled in the ADR that North River had to pay defense costs.[6]

North River's and First State's positions on the defense-cost language were disclosed publicly when North River sued its reinsurer for coverage of the amounts North River had been ordered to pay in the ADR. *See North River Ins. Co. v. CIGNA Reinsurance*, 52 F.3d 1194 (3d Cir. 1995). One issue in *North River* was whether the ADR arbitrator had properly concluded that this language required North River to pay defense costs.[7]

To support its argument that defense costs were covered, North River relied on testimony by several insurance executives from the ADR proceeding.[8] Specifically, a former chief executive of First State testified that "it would be very rare for an insured to make a formal request of an insurer for consent."[9] A retired British insurance executive similarly testified that "he had never experienced a

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[4] *Id.* at 3.

[5] *Id.*

[6] *Id.*

[7] Commissioner's Order at 3.

[8] *Id.* at 3–4.

[9] *Id.* at 3 (quoting *North River*, 52 F.3d at 1208).

case where the insured would go to the excess carrier for consent to costs being incurred."[10] And an insurance executive from Crum & Forster (North River's parent company) testified that "a policy requirement that written consent be obtained before costs are incurred does not necessarily constitute a condition to the payment of costs."[11]

In contrast to this testimony, BorgWarner's insurers argued in the Illinois Action that the defense-cost language required BorgWarner to obtain written consent from its insurers before incurring defense costs. The Illinois court agreed with the insurers, but "invited the policyholders to present additional evidence on the issue, should they wish to develop it."[12]

BorgWarner's subpoena to the Trust sought to develop that evidence by uncovering the more comprehensive ADR record. North River and First State moved to quash, arguing that the discovery is not relevant and is confidential under the Wellington Agreement's terms and under a separate confidentiality agreement among the ADR parties.[13] BorgWarner then moved to compel compliance with its subpoena.

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[10] *Id.* at 4 (quoting *North River*, 52 F.3d at 1208).

[11] *Id.* (quoting *North River*, 52 F.3d at 1208).

[12] *Id.* at 3.

[13] *Id.* at 1. *See also* A135–A138, ADR Confidentiality Agreement, dated June 26, 1989.

On March 22, 2016, the Commissioner granted BorgWarner's motion in part and denied it in part. Notably, the Commissioner did not question the relevance of BorgWarner's subpoena, holding that it was "made in good faith and is reasonably calculated to lead to the discovery of relevant admissible evidence."[14] Nor did the Commissioner hold that the materials sought by BorgWarner were privileged. Rather, he held that they were protected on confidentiality grounds by virtue of (1) the Wellington Agreement and the separate confidentiality agreement among Owens-Corning and the insurers; and (2) Delaware's public policy favoring confidentiality in arbitrations. The Commissioner also held that the confidentiality of some materials had been waived by North River's use of them in prior litigation. Accordingly, he ordered the Trust to produce only those documents "publicly disclosed, released or used" in *North River* or in any "other previous litigation" and required such production to be subject to the protective order in the Illinois Action.[15]

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[14] Commissioner's Order at 5.

[15] Commissioner's Order at 11. The Protective Order provides, "[A]ny party or non-party . . . may designate as 'CONFIDENTIAL' any documents, information or material that any Responding Entity believes contains proprietary, confidential or sensitive information, the disclosure of which would tend to cause unreasonable annoyance, expense, embarrassment, disadvantage or oppression to the Responding Entity's legitimate business or privacy interests." A347, Protective Order ¶ 1, *Continental Cas. Co. v. BorgWarner Inc.*, No. 04 CH 1708 (Ill. Cir. Ct. Nov. 17, 2005). Material designated as "CONFIDENTIAL" may not be disclosed

BorgWarner sought reconsideration of the Commissioner's Order, which the Superior Court denied on July 14, 2016. Like the Commissioner, the Court did not question the relevance of BorgWarner's requests nor suggest that the documents and testimony sought were privileged. However, the Court rejected BorgWarner's argument that North River and First State had to show "good cause" under Rule 26(c) to bar discovery. The Court reasoned that the "good cause" standard applies only to protective orders.[16] Further, the Court rejected BorgWarner's argument that the Wellington Agreement permitted disclosure, noting that BorgWarner did not cite any controlling law.[17] And while acknowledging that "the Wellington ADR predated the [Delaware Rapid Arbitration Act ("DRAA")] by at least 25 years," the Court held that the DRAA reflected Delaware public policy favoring confidentiality of arbitrations.[18] Finally, the Court rejected BorgWarner's arguments based on subject matter waiver largely because North River is not a party to BorgWarner's Illinois insurance litigation.[19]

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except to parties, their attorneys, their experts, and limited others. A349, Protective Order ¶ 7.

[16] Op. on Mot. of BorgWarner for Reconsideration of Commissioner's Order Granting, in Part, and Denying, in Part, Their Motion to Compel at 6–7, *Continental Cas. Co. v. BorgWarner Inc.*, C.A. No. N15M-05-009 (July 14, 2016) ("Reconsideration Order") (Exhibit B hereto).

[17] *Id.* at 12.

[18] *Id.* at 12–13.

[19] *Id.* at 13–16.

ARGUMENT

I. THE SUPERIOR COURT ERRED BY PRECLUDING DISCOVERY OF RELEVANT, NON-PROPRIETARY INFORMATION WITHOUT A SHOWING OF GOOD CAUSE.

A. Question Presented

Did the Superior Court err by denying BorgWarner's motion without requiring a showing of good cause for precluding the discovery? A974–A977.

B. Standard of Review

The Superior Court's application of relevant discovery rules is a question of law, which is reviewable by this Court *de novo*. *Doe v. Cahill*, 884 A.2d 451, 455 (Del. 2005) (reviewing trial court's application of "good cause" standard under Rule 26(c) *de novo*); *Wolhar v. General Motors Corp.*, 712 A.2d 457, 458 (Del. 1997) (reviewing special discovery master's application of privilege *de novo*).

C. Merits of Argument

Delaware favors broad discovery. *Brett v. Berkowitz*, 706 A.2d 509, 513 (Del. 1998) (noting the "liberal parameters of allowable discovery under Superior Court Rule 26(b)"). Superior Court Rule 26(b)(1) states, "[p]arties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action . . . . [When] the information sought appears reasonably calculated to lead to the discovery of admissible evidence." Rule 26(c)

establishes a limited exception. A court may restrict discovery "to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense." Super. Ct. Civ. R. 26(c). But a court may do so only upon a showing of "good cause." The "good cause" requirement applies with equal force to a discovery subpoena. *See Tekstrom, Inc. v. Salva*, 2007 WL 3231632, at *5 (Del. Com. Pl. Oct. 25, 2007);[20] *see also Wiggins v. Burge*, 173 F.R.D. 226, 228–29 (N.D. Ill. 1997) (parties must show good cause to shield documents from discovery even when not seeking a protective order).

Here, the Superior Court erred by upholding the Commissioner's denial of BorgWarner's subpoena without requiring North River and First State to demonstrate good cause, i.e., that "disclosure of the information would work a clearly defined and serious injury." *Int'l Bus. Mach. Corp. v. Comdisco, Inc.*, 1992 WL 91129, at *1 (Del. Super. Apr. 13, 1992).[21] First State offered no evidence of harm at any point in these proceedings. And North River likewise did not claim any specific harm. Instead, while admitting the testimony BorgWarner seeks

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[20] The Superior Court sought to distinguish *Tekstrom*, which clearly makes the "good cause" standard applicable to subpoenas, on the ground that it involves the Delaware Court of Common Pleas rules. Contrary to the Superior Court's conclusion, *Tekstrom*, while interpreting the Delaware Court of Common Pleas' discovery rules, is relevant here because those rules are identical in all relevant respects to the Superior Court's applicable discovery rules. *Compare* Super. Ct. R. 26(b), 26(c) *with* Com. Pl. R. 26(b), 26(c).

[21] *See also* Reconsideration Order at 6–7.

"absolutely may" run counter to North River's current position, North River's counsel argued, "I don't want this type of testimony floating around out there because whatever the testimony was, whatever the testimony was, was viewed through the lens of Wellington, was viewed through the presumptions of a settlement agreement that I agreed, I agreed compromised and adjusted my legal position."[22]

Indeed, a Delaware bankruptcy court in *In re Armstrong World Industries, Inc.* ("Armstrong") permitted discovery of confidential arbitration documents from a Wellington ADR proceeding when the objecting insurers did not satisfy Rule 26(c)'s good cause requirement. Armstrong was a bankrupt company that manufactured, sold, and installed asbestos-containing materials. In Armstrong's bankruptcy, two groups of creditors, the Asbestos Claimants' Committee (the "ACC") and the Legal Representative for Future Asbestos Claimants (the "FCR"), moved to compel Armstrong to disclose Wellington ADR decisions and

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[22] *See* A46, Hr'g Tr. 23:6–23, *Continental Cas. Co. v. BorgWarner Inc.*, C.A. No. N15M-05-009 (Del. Super. Dec. 14, 2015). North River's argument demonstrates that this is not a case where disclosure would result in specific, identifiable competitive harm to the party complying with the subpoena. *See Coca-Cola Bottling Co. of Shreveport, Inc. v. The Coca-Cola Co.*, 107 F.R.D. 288, 294 (D. Del. 1985) (holding that formulae of cola products were trade secrets).[22] Nor is it a case where compliance with a subpoena will result in disclosure of medical or other intimate personal information. *See Crowhorn v. Nationwide Mut. Ins. Co.*, 2002 WL 1767529, at *12 (Del. Super. July 10, 2002) (permitting discovery of documents containing medical and other personal information only when such information could be redacted).

related briefing regarding the amount of insurance available to fund a post-bankruptcy asbestos trust.[23] Like North River here, two of Armstrong's insurers argued that the Wellington Agreement's terms and a separate confidentiality agreement among the parties barred disclosure.[24]

The Delaware bankruptcy court rejected these arguments. Notably, the court held that the insurers must satisfy Rule 26(c) to prevent disclosure "by demonstrating a particular need for protection . . . Essentially there must be a particularized showing of significant harm either to the party's competitive or financial position."[25] The insurers argued that "the nature of ADR is such that its processes should be kept confidential."[26] The court deemed this insufficient to

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[23] *See* A139, Mot. of the ACC & the FCR to Compel Debtors to Release Rulings by ADR Panel Concerning Debtors' Ins. Assets at 1, *In re Armstrong World Indus., Inc.*, No. 00-4471-KG (Bankr. D. Del. Aug. 13, 2003).

[24] *See* A202–A324, Objection of Liberty Mut. to Mot. of the ACC & the FCR to Compel Debtors to Release Confidential ADR Materials with Exhibits, *In re Armstrong World Indus., Inc.*, No. 00-4471-KG (Bankr. D. Del. Aug. 22, 2003); A325–A329, London Market Insurers' Objections to Mot. of the ACC & the FCR to Compel Debtors to Release Rulings by ADR Panel Concerning Debtors' Ins. Assets, *In re Armstrong World Indus., Inc.*, No. 00-4471-KG (Bankr. D. Del. Aug. 26, 2003).

[25] *See* A335–A336, Hr'g Tr. 68:12–69:10, Aug. 29, 2003, attached to Certification of Counsel Re: Proposed Order on Mot. to Compel Debtors to Disclose ADR Decisions & Brs., *In re Armstrong World Indus., Inc.*, No. 00-4471-KG (Bankr. D. Del. Sept. 4, 2003); *see also* A345–A346, Order Granting Mot. to Compel Debtors to Disclose ADR Decisions & Brs., *In re Armstrong World Industries, Inc.*, No. 00-4471-KG (Bankr. D. Del. Sept. 8, 2003).

[26] A335, Hr'g Tr. 68:20–21, Aug. 29, 2003.

satisfy Rule 26(b), holding that "there's been no showing that the insurers' secrecy interests are anything but a desire rather than an essential ingredient of their ADR proceedings."[27]

The factual similarities between the instant case and *Armstrong* are striking. Both involve third-party subpoenas seeking allegedly confidential information under a Wellington arbitration. And the insurers here did not make a stronger showing for protection of Wellington-related material than in *Armstrong*. Yet the Superior Court declined to follow the *Armstrong* court's reasoning without any sound basis. The court attempted to distinguish *Armstrong* because it cited Bankruptcy Rule 2004 in conducting the Rule 26(c) analysis and because it permitted an in-camera review by the challenging parties, but ultimately reasoned that even if the facts were "completely analogous" to those here, it would not following *Armstrong* because "decisions from the District of Delaware Bankruptcy Court are not binding on this Court."[28] But regardless of whether *Armstrong* is binding, it demonstrates, on closely analogous facts, that confidentiality agreements, by themselves, do not supply the "good cause" required by Rule 26(c).[29]

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[27] *Id.* at A336.

[28] Reconsideration Order at 11.

[29] Further, the Superior Court rejected BorgWarner's reliance on *Armstrong* because the *Armstrong* order explicitly states that the decision shall not serve as

II. THE SUPERIOR COURT ERRED BY PLACING A PRIVATE CONFIDENTIALITY AGREEMENT ABOVE THE COURT'S SUBPOENA POWER AND BORGWARNER'S DISCOVERY RIGHTS THROUGH AN UNWARRANTED APPLICATION OF THE DELAWARE RAPID ARBITRATION ACT.

A. Question Presented

Did the Superior Court err by denying BorgWarner discovery of relevant, non-privileged information based on (1) confidentiality agreements to which BorgWarner was not a party, and (2) the Delaware Rapid Arbitration Act? A448–A449; A718–A723; A958–A961; A977–A988.

B. Standard of Review

The Superior Court's application of relevant discovery rules is a question of law, which is reviewable by this Court *de novo*. *Doe*, 884 A.2d at 455; *Wolhar*, 712 A.2d at 458.

The Superior Court's application of a statute also is a question of law that is reviewable *de novo*. *Hazout v. Tsang Mun Ting*, 134 A.3d 274, 284 (Del. 2016);

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precedent and be cited for disclosure of additional documents. Reconsideration Order at 11 n.19 (citing A 337, Hr'g Tr. 68:12–69:10, Aug. 29, 2003, attached to Certification of Counsel Re: Proposed Order on Mot. to Compel Debtors to Disclose ADR Decisions & Brs., *In re Armstrong World Indus., Inc.*, No. 00-04471-KG (Bankr. D. Del. Sept. 4, 2003). However, the context makes clear that the decision court not serve as precedent for additional discovery within the Armstrong bankruptcy. The order does not prohibit citing it as precedent in other cases. And even if the order did so, BorgWarner's argument is not that *Armstrong* is binding precedent but that *Armstrong* is persuasive because of its similar facts.

DMS Properties-First, Inc. v. P.W. Scott Assocs., Inc., 748 A.2d 389, 391 (Del. 2000) (dispute under Delaware Uniform Arbitration Act reviewed *de novo*).

C. Merits of Argument

The Superior Court erred by disregarding the principle that one cannot be bound to follow a contract to which one has not agreed. In essence, the Superior Court held that BorgWarner was bound by the purported confidentiality provisions of the Wellington Agreement and the confidentiality agreement among the parties to the Wellington ADR. In other words, the Superior Court treated BorgWarner as if BorgWarner had signed the Wellington Agreement and the confidentiality agreement among Owens-Corning and its insurers. In doing so, the Superior Court essentially permitted parties to a contract to undermine the court's discovery rules by putting documents beyond their reach. This was error.

Further, the Superior Court erred by relying on the DRAA, enacted in 2015, to bar discovery of materials generated during a Wellington Agreement arbitration that occurred more than 25 years earlier.

1. Private Confidentiality Agreements Cannot Bind Non-Parties or Trump the Delaware Courts' Subpoena Powers.

It is black-letter law that a person cannot be bound to a contract to which he did not agree and to which he is not a party. *NAMA Holdings, LLC v. Related World Market Ctr., LLC*, 922 A.2d 417, 430–31 (Del. Ch. 2007) (refusing to compel arbitration against non-signatory to arbitration agreement); *see also*

Western Air Lines, Inc. v. Allegheny Airlines, Inc., 313 A.2d 145, 154 (Del. Ch. 1973) (same); *United States v. Panhandle Eastern Corp.*, 672 F. Supp. 149, 153 (D. Del. 1987) (same); *E.I. DuPont de Nemours & Co. v. Rhone Poulenc Fiber & Resin Intermediates, S.A.S.*, 269 F.3d 187, 194–95 (3d Cir. 2001) (same).[30]

Nor can parties restrict the power of courts to order discovery by agreeing between themselves that certain materials they have exchanged are confidential. *See Gotham Holdings, LP v. Health Grades, Inc.*, 580 F.3d 664 (7th Cir. 2009) (discussed below); *Sonnino v. Univ. of Kan. Hosp. Auth.*, 2004 WL 769325, at *3 (D. Kan. Apr. 8, 2004) ("Parties cannot create a privilege against civil discovery by mere written agreement."); *In re Application of O'Keeffe*, 2016 WL 2771697, at *4 (D. Nev. Apr. 4, 2016) ("[L]itigants cannot shield otherwise discoverable information from disclosure to others by agreeing to maintain its confidentiality, and cannot modify the Federal Rules of Civil Procedure by agreement.") (citation omitted); *Green v. Cosby*, 314 F.R.D. 164, 170 (E.D. Pa. 2016) ("[T]here is no Federal Rule of Civil Procedure, or legal precedent, that requires Plaintiffs to provide a compelling justification for the disclosure in discovery of materials deemed confidential pursuant to a private settlement agreement.").

[30] Cases interpreting the Federal Rules of Civil Procedure are persuasive authority when interpreting the Superior Court's Rules of Civil Procedure because they closely track each other. *Appriva Shareholder Litigation Co. LLC v. Lesh*, 937 A.2d 1275, 1286 (Del. 2007).

In *Gotham Holdings*, Gotham asked Health Grades, Inc. ("Health Grades") to produce documents from a prior arbitration between Health Grades and Hewitt Associates, LLC ("Hewitt"). 580 F.3d at 665. When Health Grades refused, citing a confidentiality agreement from the prior arbitration, Gotham subpoenaed the documents from Hewitt. *Id.*

The Seventh Circuit ordered the subpoena enforced. Significantly, the court reasoned that "[c]ontracts bind only the parties" and therefore rejected the argument that Gotham was bound by the confidentiality agreement between Health Grades and Hewitt. *Id.* The court further explained that, although "[t]rade secrets, privileges, and statutes or rules requiring confidentiality must be respected . . . litigants' preference for secrecy does not create a legal bar to disclosure." *Id.* (citations omitted). To the contrary, the Seventh Circuit stated, "[n]o one can 'agree' with someone else that a stranger's resort to discovery under the Federal Rules of Civil Procedure will be cut off." *Id.*

In his Order, the Commissioner explained that *Gotham* in essence said:

> You may well have an agreement to keep this arbitration confidential, but when faced with a third-party subpoena, a non-party to this Agreement, [t]he Court, in essence, subject to the usual limitations, vi[t]iated the Agreement. And so I think, and I'm looking at this case, and my question ultimately to the parties at the end of the day, is, why shouldn't I follow this case?[31]

[31] A42, Hr'g Tr. 19:4–12, Dec. 14, 2015.

However, while noting that "this Court does not disagree with the general proposition of *Gotham*; namely that parties cannot agree to put information beyond the reach of the court's subpoena power,"[32] the Commissioner ultimately declined to follow *Gotham* because of Delaware's public policy favoring arbitration (which is discussed below).[33]

The Superior Court, too, rejected *Gotham* as non-binding on Delaware courts and because the confidentiality agreement in *Gotham* differed from that in the present case in that it permitted the disclosure of arbitration documents in response to a subpoena. However, the court in *Gotham* found this fact immaterial, concluding that "even if the agreement had purported to block disclosure, such a provision would be ineffectual" because "[c]ontracts bind only the parties. No one can agree with someone else that a stranger's resort to discovery under the Federal Rules of Civil Procedure will be cut off." *Gotham*, 580 F.3d at 665. By rejecting the reasoning of *Gotham*, the Superior Court has allowed First State and North River to do exactly what parties should not be able to do, i.e., restrict the discovery rights of parties not bound to confidentiality and the Delaware courts' powers to enforce subpoenas. Therefore, the Superior Court erred by rejecting the reasoning of *Gotham*.

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[32] Commissioner's Order at 8.

[33] *Id.*

2. Confidentiality Agreements Do Not Trump Rule 26(b).

Courts in Delaware and elsewhere routinely have granted discovery of materials subject to private confidentiality agreements when such discovery satisfied the relevancy test of Rule 26(b). For example, the court in *Gruwell v. Allstate Insurance Co.*, 2010 WL 3528900, at *1–2 (Del. Super. Sept. 9, 2010) (citation omitted), granted discovery of a confidential settlement agreement between a policyholder and its insurer because "[p]arties to litigation do not have an absolute right to deny access to the terms of their settlement to the non-settling parties" when "the terms of the settlement agreement may lead to the discovery of admissible evidence." Similarly, the court in *Council of Unit Owners of Sea Colony East v. Carl M. Freeman Associates*, 1990 WL 128185, at *3 (Del. Super. 1990), ordered "discovery of that portion of the [settlement] agreement that appears to have been reasonably calculated to lead to admissible evidence."[34]

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[34] *See also In re C.R. Bard, Inc. Pelvic Repair Sys. Prods. Liab. Litig.*, 287 F.R.D. 377, 384 (S.D.W. Va. 2012) (granting discovery of materials subject to confidentiality provisions of distribution agreement because "private confidentiality agreements do not preclude the production of documents for the purpose of discovery") (citations omitted); *Peter Kiewit Sons, Inc. v. Wall Street Equity Grp.*, 2011 WL 5075720, at *6–7 (D. Neb. Oct. 25, 2011) (finding relevant business information discoverable despite confidentiality agreements in the business documents); *DIRECTV, Inc. v. Puccinelli*, 224 F.R.D. 677, 684–85 (D. Kan. 2004) ("[L]itigants may not shield otherwise discoverable information from disclosure to others merely by agreeing to maintain its confidentiality.") (citation omitted); *Grumman Aerospace Corp. v. Titanium Metals Corp. of Am.*, 91 F.R.D. 84, 87–88 (E.D.N.Y. 1981) (granting discovery of economic analysis report because parties cannot "contract privately for the confidentiality of documents, and

These cases demonstrate that, at least without a showing of good cause, confidentiality provisions cannot trump the discovery rules. Yet the Superior Court refused to apply, or even consider, the foregoing case law, erroneously deeming it "irrelevant."

3. The Insurers Have Argued Successfully to Obtain Confidential Documents in Similar Circumstances.

In its papers, BorgWarner cited case law demonstrating that insurers, including the parties involved here, have successfully made the same arguments that BorgWarner is making here to obtain confidential documents from asbestos trusts, which process the tort claims against bankrupt asbestos companies. This case law, too, was disregarded by the Superior Court.

For example, in *National Union Fire Insurance Co. of Pittsburgh, Pa. v. Porter Hayden Co.*, various insurers sought confidential information from non-party bankruptcy trusts and claims-processing facilities regarding claimants who had also submitted claims for payment of asbestos-related bodily injury disease to the Porter Hayden Bodily Injury Trust. 2012 WL 628493, at *1 (D. Md. Feb. 24, 2012). The insurers sought information such as claimant exposure dates and work histories in an effort to show that claimants were making inconsistent submissions to different trusts. *Id.* at *1–2. The claimants objected, arguing (among other

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foreclose others from obtaining, in the course of litigation, materials that are relevant to their efforts to vindicate a legal position").

things) that the materials at issue were protected by confidentiality provisions. The insurers, like BorgWarner here, argued that the confidentiality agreements were contracts that bound only the parties to these agreements (i.e., the claimants and the trusts), and not the insurers. *Id.* The court agreed with the insurers and ordered the trusts to produce the claimant information. *Id.*

Similarly, in *Federal-Mogul Products v. AIG Casualty Co.*, First State sought production of asbestos claimant information from a claims-processing facility, despite the confidential nature of the material.[35] There, First State argued exactly the opposite of what it contends here: that the claimant data was discoverable notwithstanding confidentiality concerns because "parties cannot contract around the court's discovery rules,"[36] and "courts have frequently required production of relevant documents, even in the face of a private confidentiality agreement."[37] First State further argued, contrary to what it asserts here, that the

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[35] *See* A374–A443, Report & Recommendation of the Special Discovery Master with Regard to Hartford's Mot. to Compel Verus to Appear for Dep. & Produc. Docs. Pursuant to Subpoena, Cross-Mot. by Verus to Quash the Subpoena, & Cross-Mot. by Certain Trusts to Intervene & Quash Subpoena, or Alternatively, for a Protective Order with Exhibits, *Federal-Mogul Prods., Inc. v. AIG Cas. Co.*, No. MRS-L-002535-06 (N.J. Super. Ct. July 20, 2011) ("Report").

[36] A389, Report at 16.

[37] A354–A373, Defs. Hartford Acc. & Indem. Co., First State Ins. Co., & New England Ins. Co.'s Mem. of Law in Supp. of Mot. to Compel Produc. of Docs. from Verus Claims Servs., LLC at 10, *Federal-Mogul Prods., Inc. v. AIG Cas. Co.*, No. MRS-L-002535-06 (N.J. Super. Ct. July 29, 2010) ("First State Memo") (citation omitted).

existing protective order in Federal-Mogul's coverage litigation was sufficient to protect confidentiality of the claimant data.[38] Further, First State argued that the asbestos claimants had waived confidentiality of medical and other information by submitting claims to bankruptcy trusts to advance a claim of damages,[39] which mirrors BorgWarner's argument that North River waived confidentiality over documents on the defense provisions by using them in *North River Insurance Co. v. CIGNA Reinsurance*. Despite the claimants' objections, a New Jersey court ordered discovery of certain claimant information.[40]

These cases demonstrate that the insurers have successfully argued that confidentiality agreements in private contracts cannot block disclosure of otherwise discoverable information. Indeed, this matter presents a much stronger argument for disclosure than *Porter Hayden* and *Federal-Mogul*. Those cases involved confidential medical information, which courts have held warrants protection from discovery. *See Crowhorn*, 2002 WL 1767529, at *12. The present case, by contrast, involves policy interpretation, and the insurers have not shown specifically how they would be harmed by the disclosure of such information.

The Superior Court attempted to distinguish these cases, stating that "disclosure of confidential claimant information in the context of asbestos

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[38] A399, Report at 26; A370–A371, First State Memo at 13–14.

[39] A369–A370, First State Memo at 12–13.

[40] A407, Report at 34.

bankruptcy trusts is vastly distinguishable from the issue of confidentiality associated with Delaware arbitrations."[41] However, the court did not explain how the contexts are different when both involve efforts to obtain confidential information despite the existence of a valid confidentiality agreement. The situations are analogous, the Superior Court erred in allowing the confidentiality agreements to trump the requirements of the Delaware discovery rules.

4. The DRAA Does Not Apply Here.

In denying relief to BorgWarner, both the Commissioner and the Superior Court relied on the pro-arbitration policy of the DRAA. But as the Superior Court recognized, "the Wellington ADR predated the DRAA by at least 25 years."[42] Nonetheless, the Superior Court held that "this very absence of any default, statutory rules governing the administration of a formal arbitration in Delaware at that time" permitted the Commissioner "to now-contemplate the rules then-established by the parties" to the Wellington Agreement.[43] This was error.

The DRAA, 10 *Del. C.* § 5801 *et seq.*, does not apply here because it was not enacted until 2015. *See, e.g., A.W. Fin. Servs., S.A. v. Empire Res., Inc.*, 981 A.2d 1114, 1120 (Del. 2009) ("In Delaware, there is a 'presumption against retroactivity.' Laws apply retroactively only where the General Assembly has

[41] Reconsideration Order at 12.

[42] *Id.*

[43] *Id.*

made its intent plain and unambiguous.") (internal citations omitted); *see also Chrysler Corp. v. State*, 457 A.2d 345, 351 (Del. 1983) ("It is a time-honored principle . . . that 'to give an act a retrospective operation would be contrary to well settled principles of law applicable to the construction of statutes . . . .'") (quoting *Keller v. Wilson & Co.*, 190 A. 115, 125 (Del. 1936)).

Putting aside the enactment date, the Wellington arbitration also did not satisfy the specific statutory requirements of the DRAA, and the statute therefore does not apply. To invoke arbitration under the DRAA, the parties must sign a written agreement to arbitrate that is governed by Delaware law, and it must explicitly refer to the DRAA by name. 10 *Del. C.* § 5803(a). Further, one of the parties to the arbitration must either be incorporated in Delaware or have its principal offices in Delaware. *Id.* These requirements were not met in Owens-Corning's Wellington ADR. As North River admitted, the Wellington ADR had no Delaware connection.[44]

And even assuming Delaware public policy favors arbitration, that public policy applies only when a party has agreed to arbitrate. Thus, where a party has contracted to arbitrate disputes, the arbitration clause will be construed broadly.

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[44] *See* A60, Hr'g Tr. 37:12–18, Dec. 14, 2015 ("[T]he Facility at the time was located in the Princeton area of New Jersey, the Arbitrator was a retired federal judge from the Western District of Kentucky, the actual trial, itself, was conducted in Princeton, New Jersey.").

But when a party has not agreed to arbitrate a dispute, public policy will not force him to do so. *See Parfi Holding AB v. Mirror Image Internet, Inc.*, 817 A.2d 149, 156 (Del. 2002) (Delaware's "policy that favors alternate dispute resolution mechanisms, such as arbitration, does not trump basic principles of contract interpretation."). *See also E.I. DuPont de Nemours*, 269 F.3d at 194–95. Here, where BorgWarner did not sign the Wellington Agreement or the confidentiality agreement between Owens-Corning and its insurers, Delaware's policy favoring arbitration does not apply, and BorgWarner's discovery rights must prevail.[45]

[45] Further, many of the cases that announce Delaware's public policy favoring arbitration do not even mention confidentiality, and thus Delaware public policy can be respected without making every aspect of an arbitration confidential. *See, e.g., Graham v. State Farm Mut. Auto. Ins. Co.*, 565 A.2d 908, 911 (Del. 1989) (noting that "the public policy of this state favors the resolution of disputes through arbitration" without mentioning confidentiality); *SBC Interactive, Inc. v. Corporate Media Partners*, 714 A.2d 758, 761 (Del. 1998) (same); *DMS Properties-First, Inc. v. P.W. Scott Assocs., Inc.*, 748 A.2d 389, 391 (Del. 2000) (same).

III. THE SUPERIOR COURT ERRED BY FAILING TO EXAMINE THE COMMISSIONER'S HOLDING THAT THE WELLINGTON AGREEMENT AND A SEPARATE CONFIDENTIALITY AGREEMENT'S TERMS PROHIBIT DISCOVERY.

A. Question Presented

Did the Superior Court err by denying BorgWarner's discovery without examining the Commissioner's holding that the Wellington Agreement's plain terms, and a separate confidentiality agreement, preclude it? A448–A449; A988–A991.

B. Standard of Review

The Superior Court's interpretation of the Wellington Agreement, a contract, is reviewed *de novo*. *Salamone v. Gorman*, 106 A.3d 354, 367 (Del. 2014).

C. Merits of Argument

The Superior Court erred by declining to review the Commissioner's reading of the text of the Wellington Agreement and a separate confidentiality agreement among Owens-Corning, North River, and First State to preclude the discovery BorgWarner seeks. The Superior Court sought to rationalize this decision by observing that the Commissioner did not rule against discovery on textual grounds, but rather on grounds of public policy.[46] But the Commissioner held that "BorgWarner's interpretation of the [Wellington] Agreement's confidentiality language is tortured, to say the least. When read as a whole, the Agreement and

[46] Reconsideration Order at 8 (citing Commissioner's Order at 6).

associated 1989 Confidentiality Agreement both make it abundantly clear that the parties intended every part of the arbitration—from evidence to result—to be confidential."[47]

In reviewing the Order, the Superior Court did not analyze this aspect of the Commissioner's holding, which was error. BorgWarner need not have cited any case law or statute to demonstrate that the Commissioner's ruling on this point was contrary to law.[48] The court simply needed to analyze the confidentiality provisions of the Wellington Agreement and apply them to the facts here, which it failed to do. Indeed, those provisions make clear that not all aspects of Wellington proceedings are confidential.[49] The chart below summarizes the Wellington provisions on which North River and First State relied before the Commissioner in support of blanket confidentiality protections and BorgWarner's responses:

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[47] Commissioner's Order at 6.

[48] *See* Reconsideration Order at 8.

[49] The Wellington Agreement is available at A86–A134.

Insurer Objection	BorgWarner's Response
Wellington I. GENERAL CONDITIONS ¶ 4: "All actions taken and statements made by persons or their representatives relating to their participation in the Agreement, including its development and implementation, shall be without prejudice or value as precedents . . . ."	This provision relates only to the development and implementation of the Wellington Agreement and not to disputes that arise after development. Further, it relates only to precedential value of actions and has nothing to do with confidentiality.
Wellington I. GENERAL CONDITIONS ¶ 5: "All person subscribing to or otherwise associating themselves with the Agreement request all Courts . . . to accord all persons . . . full privilege and protection with respect to the disclosure of their actions, statements, documents, papers and other materials relating to the Agreement, including its development and implementation."	This provision also relates only to the development and implementation of the Wellington Agreement and not to disputes that arise after development.
V. COOPERATION WITH FACILITY "To the extent practicable, the Facility shall maintain the confidentiality of confidential or proprietary information submitted by Subscribing Producers and Subscribing Insurers."	This provision relates to the Asbestos Claim Facility, which defended all asbestos-related claims against Subscribing Producers, and not to the ADR procedures, which are discussed in a separate section of the Wellington Agreement. Moreover, the quoted language does not promise universal confidentiality protection, but only "[t]o the extent practicable."

Insurer Objection	BorgWarner's Response
Appendix C ¶ 10.A3: "Nothing from the ADR process is admissible in subsequent litigation."	This provision applies only to non-binding ADR decisions, where there is no written opinion by a judge. *See* ¶ 10.A. It does not apply to binding ADR decisions, like the one in *North River*, about which discovery is sought. *See* ¶ 10.B. Further, this provision does not mention confidentiality.
Appendix C ¶ 100.6: "There will be no precedential effect of any decisions rendered in the ADR Procedure."	This provision is unrelated to confidentiality.
Appendix C ¶ 100.7: "All decisions in the ADR Procedure shall be filed with the Facility but will be maintained by the Facility on a confidential basis and shall be available only to subscribers."	This provision refers only to "decisions," not to the testimony and other evidence that BorgWarner is seeking. Further, the decision at issue has been made public via the *North River* proceeding.

In short, there is no statement in the Wellington Agreement that all materials produced in connection with the agreement are confidential for all purposes. The Agreement contains separate, more limited confidentiality provisions for specific purposes and does not protect the information that BorgWarner seeks.

In addition, a confidentiality agreement among Owens-Corning, North River, and First State does not protect the documents that BorgWarner seeks.[50] That document "is intended to ensure confidential treatment for certain documents

[50] *See* A135–138, ADR Confidentiality Agreement, dated June 26, 1989.

exchanged between and among their counsel in the [ADR]."[51] The confidentiality agreement permits the parties to designate documents exchanged during the ADR as "confidential," and the other parties are prohibited from disclosing those documents. However, the agreement applies only to designated documents exchanged during the Wellington ADR and does not protect other materials BorgWarner seeks, such as the Wellington ADR testimony. In addition, BorgWarner is not a party to the confidentiality agreement and thus is not bound by it. *See* Section II, infra.[52]

For these reasons, the Superior Court erred by not considering BorgWarner's textual arguments against confidentiality. Had the Superior Court done so, the Commissioner's holding should have been reversed.

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[51] *Id.*

[52] *Id.*

IV. THE SUPERIOR COURT ERRED BY REJECTING BORGWARNER'S ARGUMENT BASED ON SUBJECT MATTER WAIVER.

A. Question Presented

Did the Superior Court err by denying enforcement of BorgWarner's subpoena, despite the fact that North River had waived protection over many of the documents sought through disclosure in *North River Insurance Co. v. CIGNA Reinsurance*? A449; A723; A962; A991–A993.

B. Standard of Review

The Superior Court's application of relevant discovery rules is a question of law, which is reviewable by this Court *de novo*. *Doe*, 884 A.2d at 455; *Wolhar*, 712 A.2d at 458.

C. Merits of Argument

The Superior Court erred by ruling that North River did not waive the confidentiality of its Wellington ADR documents by disclosing a subset of them in *North River Insurance Co. v. CIGNA Reinsurance*, 52 F.3d 1194 (3d Cir. 1995). Once a party voluntarily discloses a privileged document, that party is deemed to have waived privilege as to all documents involving the same subject matter, whether or not actually disclosed. *Tackett v. State Farm Fire & Cas. Ins. Co.*, 653 A.2d 254, 259–60 (Del. 1995) (partial disclosure of insured's claim file waived privilege over entire file); *see also Zirn v. VLI Corp.*, 621 A.2d 773,

781–82 (Del. 1993) (partial disclosure of attorney advice waived privilege as to all such advice). The same principle should apply to documents a party claims are confidential. BorgWarner submits that the same principles apply equally in the context of information shielded by a confidential designation or agreement.

The Superior Court correctly noted that the purpose behind the rule of subject matter waiver/partial disclosure is "fairness and discouraging use of the attorney-client privilege as a litigation weapon."[53] That is why the Commissioner held that "North River cannot use evidence that was created during the Wellington ADR in litigation where it was the plaintiff and then argue that it is still confidential and not subject to disclosure in unrelated litigation."[54]

But the Superior Court's recognition of the fairness principle begs the question: Why is it fair for North River to waive privilege and confidentiality over some Wellington ADR documents introduced in *North River Insurance Co. v. CIGNA Reinsurance* but seek to maintain confidentiality over others? North River's actions are a classic example of subject matter waiver, which covers a "situation[] in which a party intentionally puts protected information into the litigation in a selective, misleading and unfair manner." *See* Advisory Committee Notes on Fed. R. Evid. 502(a) (governing limitations on privilege waiver).

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[53] Reconsideration Order at 14 (citation omitted).

[54] Commissioner's Order at 9–10.

The Superior Court's focus on North River as a non-party to BorgWarner's Illinois litigation is irrelevant. North River, whether or not a party to BorgWarner's underlying litigation, is taking an inconsistent position and trying to maintain protection over documents it has previously disclosed.[55] The Superior Court therefore erred by failing to apply subject matter waiver here.

[55] Reconsideration Order at 13–14.

CONCLUSION

For all the foregoing reasons, the Court should reverse the rulings below and remand with instructions to enforce BorgWarner's subpoena.

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