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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.	)	

APPELLANTS' REPLY BRIEF

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INTRODUCTION

BorgWarner Inc. and BorgWarner Morse TEC LLC ("BorgWarner") have subpoenaed information from the Owens Corning/Fibreboard Asbestos Personal Injury Trust (the "Trust") that is relevant to coverage litigation between BorgWarner and its insurers in Illinois state court. At issue 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 insurers have argued in Illinois that such consent is required. But the same insurers previously testified in an alternative dispute resolution ("ADR") proceeding brought under the Agreement Concerning Asbestos-Related Claims (the "Wellington Agreement") involving the Trust's predecessor, Owens-Corning, that consent was not required.[2] Prevailing on this issue will make tens of millions of dollars in additional insurance available to BorgWarner to defend asbestos claims.

Although the Trust did not object to the subpoena, North River Insurance Company ("North River") and First State Insurance Company ("First State," and, together with North River, the "Insurers") did. BorgWarner moved to compel, and

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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 to BorgWarner's Opening Brief).

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

North River and First State moved to quash. The Commissioner granted the motions in part and denied them in part, and the Superior Court affirmed. BorgWarner now appeals.

ARGUMENT

I. THE COMMISSIONER'S AND THE SUPERIOR COURT'S DECISIONS ARE REVIEWABLE *DE NOVO*.

BorgWarner established in its opening brief that the appropriate standard of review is *de novo*. *See* BorgWarner Opening Br. at 9 (citing *Doe v. Cahill*, 884 A.2d 451, 455 (Del. 2005). First State agrees that "whether the Superior Court applied the correct legal standard to a discovery dispute is one of law." First State Br. at 11. This legal standard applies to all questions presented here because each involves an issue of law. The abuse-of-discretion standard applies only when a party appeals from a lower court's factual application of discovery rules, which is not the case here. Thus, despite what North River argues, *see* North River Br. at 13–14, the abuse-of-discretion standard does not apply.

II. THE INSURERS FAILED TO DEMONSTRATE THE "GOOD CAUSE" NECESSARY TO PREVAIL ON A MOTION TO QUASH.

BorgWarner established in its opening brief that Delaware's discovery rules are broad, permitting parties to "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." Super. Ct. Civ. Rule 26(b); *see also* BorgWarner's Opening Br. at 9–11. Indeed, the Insurers do not dispute the breadth of Delaware's discovery rules. Nor do they dispute that the documents and testimony at issue are relevant and not subject to any claim of privilege. But the Insurers contend that the materials are nonetheless immune from discovery. Although a court may restrict discovery of confidential documents "to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense," the party seeking to restrict discovery must first show "good cause." Super. Ct. Civ. R. 26(c). The Insurers have made no such showing here.

The Insurers argue that the "good cause" requirement does not apply to subpoenas under Superior Court of Civil Procedure Rule 45. *See* First State Br. at 12–17; North River Br. at 14–17. This is incorrect. *Tekstrom, Inc. v. Salva*, holds that "[t]he proper scope of a discovery subpoena is controlled by Civil Rule 26(c)." 2007 WL 3231632, at *5 (Del. C.P. Oct. 25, 2007).

First State attempts to distinguish *Tekstrom* on the ground that it construes Court of Common Pleas Rule 45(b), which has different language from Superior Court Rule 45(c)(3), the rule at issue here. First State Br. at 15–16. But the fact that Court of Common Pleas Civil Rule 45(b) requires a showing that a subpoena is "unreasonable and oppressive" whereas Superior Court Rule 45(c)(3) requires a showing of "undue burden" makes no difference. Both rules were modeled on Rule 45 of the Federal Rules of Civil Procedure, and the drafters of the Federal Rules considered the two showings equivalent. *See* C. Wright & A. Miller, 9A Fed. Prac. & Proc. Civ. § 2459 (3d ed.) (noting that a 1991 change in the Federal Rules of Civil Procedure from the "unreasonable and oppressive" language to the "undue burden" language did not change the standard).[3]

Tekstrom is not the only Delaware case to apply the "good cause" requirement to a motion to quash a subpoena under Rule 45. So, too, did *In re Armstrong World Industries., Inc.*, No. 00-4471-KG (Bankr. D. Del. Sept. 4, 2003), where the court held that the opinions in a Wellington ADR proceeding were discoverable.[4] Indeed, *Armstrong* is the only case cited by any party that

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

[4] *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

involves a subpoena for information generated during a Wellington Agreement ADR, and it supports the discovery BorgWarner seeks. As BorgWarner urges here, the *Armstrong* court refused to grant the insurers' motion to quash a subpoena absent a showing of "good cause" under Rule 26(c), which the court defined as "a particularized showing of significant harm either to the party's competitive or financial position."[5] The *Armstrong* insurers attempted to satisfy "good cause" by arguing that "the nature of ADR is such that its processes should be kept confidential."[6] But the court deemed this insufficient to satisfy Rule 26(c), 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."[7] The Insurers have offered no response for why the "good cause" standard applied in *Armstrong* but does not apply here.[8]

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 Indus., Inc.*, No. 00-4471-KG (Bankr. D. Del. Sept. 8, 2003); *see also* BorgWarner's Opening Br. at 11–13.

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

[6] *Id.*

[7] *Id.* at A336.

[8] North River contends that *Armstrong* is not precedential. *See* North River Br. at 18–19. Although *Armstrong* stated that its decision "shall not serve as precedent and may not be cited as such for disclosure of any additional documents," that statement, properly interpreted, meant only that the parties to *Armstrong* could not

First State's contention that the Commissioner actually did find "good cause," First State Br. at 17, is similarly without merit. Neither Insurer offered any evidence of "good cause" in the proceedings below. Yet First State now seeks to argue that "a party's desire to protect [confidential] information may . . . constitute good cause" and that "the advancement of Delaware's public policy favoring arbitration constitutes good cause." But the first argument was rejected by *Armstrong*, and neither was considered by the Commissioner or the Superior Court because neither was argued below.

Because the Commissioner and the Superior Court failed to apply the "good cause" standard to the motions to quash BorgWarner's subpoena, these rulings should be reversed.

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cite the *Armstrong* decision to warrant discovery of additional documents in that case. And even if *Armstrong* is not precedential, its logic applies here.

III. DELAWARE'S PUBLIC POLICY FAVORING ARBITRATION IS NOT BROAD ENOUGH TO PRECLUDE THE DISCOVERY BORGWARNER SEEKS.

BorgWarner established in its opening brief that a Delaware public policy favoring arbitration does not bar the discovery it seeks. *See* BorgWarner Opening Br. at 23–25. The Insurers nonetheless argue that because Delaware has a "public policy favoring arbitration," that policy necessarily protects the confidentiality of all materials generated in any arbitration of any kind. First State Br. at 19–26; North River Br. at 22–26. But the Insurers cite no case supporting such a broad rule. In fact, the majority of the Insurers' cases do not even mention confidentiality in discussing Delaware's public policy regarding arbitration. And Delaware courts have permitted disclosure of allegedly confidential arbitration materials particularly where—as here—the arbitration was not conducted under Delaware's arbitration laws. *See, e.g., Chartis Specialty Ins. Co. v. LaSalle Bank, Nat'l Ass'n.*, 2011 WL 3276369 (Del. Ch. July 29, 2011) (refusing to permit filing of arbitration award under seal despite confidentiality order in underlying American Arbitration Association proceeding); *see also J.P. Morgan Chase & Co. v. Am. Century Co., Inc.*, 2013 WL 1668393 (Del Ch. Apr. 18, 2013) (granting discovery of company's reserve amount for arbitration claims).

As discussed in BorgWarner's opening brief, the Owens-Corning ADR occurred more than 25 years ago, and it has no connections to Delaware.[9] As First State admits, confidentiality in ADR proceedings was not even "safeguarded by statute" until 1995, and the Delaware Rapid Arbitration Act was not enacted until 2015. First State Br. at 21, 24.

But even assuming that such a policy of confidentiality in arbitrations existed at the time of the Wellington ADR, this public policy would not be offended by granting the discovery requested here. Any Delaware public policy favoring confidentiality in arbitrations simply does not prohibit discovery of documents exchanged between non-Delaware companies during an out-of-state arbitration. Companies will be no less willing to incorporate in Delaware or arbitrate their claims here if BorgWarner's subpoena is enforced. Enforcement of the subpoena will not create a flood of litigation for Delaware trial courts, because the coverage action between BorgWarner and its insurers is pending in Illinois. For these reasons, Delaware's public policy favoring arbitration cannot overcome BorgWarner's discovery rights.

[9] *See* A60, Hr'g Tr. at 37: 12–22 (Dec. 15, 2015) (noting that the Wellington arbitration took place in New Jersey and had "no connection to Delaware").

IV. REFUSING TO ENFORCE BORGWARNER'S SUBPOENA EFFECTIVELY BINDS BORGWARNER TO A CONTRACT TO WHICH IT DID NOT AGREE.

BorgWarner established in its opening brief that a person cannot be bound to a contract to which he did not agree. *See* BorgWarner Opening Br. at 15–18. And the Insurers do not dispute this principle. *See* First State Br. at 26. They argue, however, that it does not apply here. The Insurers are incorrect.

Here, BorgWarner is not a party to the Wellington Agreement. Therefore, the Wellington Agreement's confidentiality requirements cannot bind BorgWarner. The Insurers offer no justification for why this basic principle is trumped by Delaware's public policy favoring arbitration, a policy that BorgWarner has shown does not prevent the discovery sought here.[10]

The Insurers similarly offer no meaningful rebuttal to BorgWarner's argument that parties cannot restrict the power of courts to order discovery by agreeing between themselves that certain materials are confidential. The Insurers urge the Court to ignore *Gotham Holdings, LP v. Health Grades, Inc.*, 580 F.3d 664 (7th Cir. 2009), as factually distinguishable and non-binding, *see* North River

[10] *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 ev3 v. Lesh*, 114 A.3d 527, 529 n.3 (Del. 2015) ("Delaware courts seek to ensure freedom of contract and promote clarity in the law in order to facilitate commerce.").

Br. at 26–28, but it is more similar to BorgWarner's case than any other case the parties have identified (except perhaps *Armstrong*). Further, the reason that the parties have focused so heavily on *Gotham* here is that the Commissioner recognized its similarity to BorgWarner's case and ordered supplemental briefing on its application.[11] Far from being irrelevant, *Gotham* is on all fours with the present case.

Like BorgWarner's case, *Gotham* involved a subpoena that was served on a third party for materials produced in a confidential arbitration between the third party and another entity. The Seventh Circuit ordered the materials produced, despite confidentiality objections, because "[c]ontracts bind only the parties" and, therefore, the party serving the subpoena was not bound by the confidentiality agreement between the parties to the arbitration. 580 F.3d at 665.[12]

First State points out that the confidentiality agreement in *Gotham* was different than those at issue here because it provided that documents from an

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[11] A41–42 (Hr'g Tr. at 18:13–19:22, where the Commissioner asks, "[W]hy shouldn't I follow this case? . . . I do appreciate your public-policy argument . . . [b]ut here we have BorgWarner, who is not a party, seeking, arguably, you know, relevant information from North River.").

[12] First State has no basis to argue that the Seventh Circuit applied an abuse-of-discretion standard in enforcing the subpoena because, as First State notes, the "court did not trouble to state the standard of review." The fact that First State even mentions this point to differentiate *Gotham* from BorgWarner's case suggests that First State agrees with BorgWarner that the higher *de novo* standard of review applies in this case.

arbitration could be disclosed in response to a subpoena. First State Br. at 29. But the Seventh Circuit found this point immaterial, ruling 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.

First State's next argument is that the *Gotham* court enforced the subpoena because the party resisting it had put various arbitration documents at issue by submitting them to the trial court. First State Br. at 29. But the same is true here of North River, which put at issue the documents and testimony in question by disclosing them to the Third Circuit in *North River Insurance Co. v. CIGNA Reinsurance*, 52 F.3d 1194 (3d Cir. 1995).

Finally, the fact that the Seventh Circuit recognized no national policy favoring arbitration does not change the outcome for BorgWarner. *See* First State Br. at 29–30; North River Br. at 26–27. Even assuming that Delaware public policy favors arbitration, that policy does not justify denying the discovery requested here, as shown above.

V. THE POSITIONS THE INSURERS TAKE HERE ARE INCONSISTENT WITH THOSE THEY HAVE TAKEN ELSEWHERE.

A. The *North River* Case

As BorgWarner established in its opening brief, in *North River Insurance Co. v. CIGNA Reinsurance*, 52 F.3d 1194 (3d Cir. 1995), North River disclosed many of the same documents that it now claims are confidential. BorgWarner Opening Br. at 31–33. North River's disclosure and affirmative use of these documents constitutes a waiver of confidentiality for all documents and testimony on the same subject matter.

First State agrees that a basic principle of fairness means that "[a] party should not be allowed to make affirmative use of some favorable information on a particular subject matter while at the same time withholding other information on the same subject matter." First State Br. at 43. However, a First State witness's testimony in the Wellington ADR (which is quoted in the Third Circuit's opinion), takes the exact opposite position on the consent-to-defense issue that First State is asserting in the Illinois litigation.

Like First State, North River contends that "the purpose of the rule of partial disclosure is one of fairness to discourage the use of the privilege as a litigation weapon in the interest of fairness." North River Br. at 41. But North River disclosed in *North River v. CIGNA* testimony of certain witnesses (including a

representative of its parent company) regarding the payment of defense costs under certain insurance policies, which is directly contrary to the position insurers are taking in Illinois. As the Commissioner recognized, the Insurers cannot use "confidential information as a sword in one context and then shield that same information from disclosure in another."[13] For this reason, the Insurers have waived confidentiality protection over the discovery BorgWarner seeks.

B. The *Porter Hayden* and *Federal-Mogul* Cases

Similarly, in *Federal Mogul Products v. AIG Casualty Co.* and *National Union Fire Insurance Co. of Pittsburgh, Pa. v. Porter Hayden Co.*,[14] the insurers took a position on confidentiality opposite from the one they take here. In those cases, various insurers moved successfully to compel production of confidential information regarding claims made against asbestos trusts. *See* BorgWarner Opening Br. at 20–23. The Insurers complain that those cases are non-binding and factually distinguishable. First State Br. at 28–29.[15] But the point of these cases is

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[13] Commissioner's Order at 10 (attached as Exhibit A to BorgWarner's Opening Brief).

[14] *See Federal-Mogul Prods., Inc. v. AIG Cas. Co.*, No. MRS-L-002535-06 (N.J. Super. Ct. July 20, 2011) (Opinion included in Appendix at A374-443); *Nat'l Union Fire Ins. Co. of Pittsburgh, Pa. v. Porter Hayden Co.*, 2012 WL 628493, at *1 (D. Md. Feb. 24, 2012).

[15] First State maintains that these cases are further distinguishable because, unlike BorgWarner here, "the claimants are parties in the action." First State Br. at 29. BorgWarner respectfully disagrees. The claimants were not parties to those coverage actions.

not that they are factually identical; the point is that they demonstrate that the insurers have taken contrary positions on confidentiality.

As discussed in BorgWarner's opening brief, both cases involved attempts by various insurers to obtain confidential information about claimants who asserted asbestos-related bodily injury claims against non-party bankruptcy trusts and claims-processing facilities. The insurers served subpoenas on the trusts to obtain certain claimant information. When the claimants and the trusts objected, the *Porter Hayden* insurers argued that "[while] the confidentiality provisions . . . may be binding on and between the Claimants and the trusts . . . there is no recognized legal principle holding that parties can create immunity from discovery for themselves by entering into a private agreement." 2012 WL 628493, at *2.

Similarly, First State argued in *Federal-Mogul* that claimant data was discoverable notwithstanding confidentiality concerns because "parties cannot contract around the court's discovery rules,"[16] and "courts have frequently required production of relevant documents, even in the face of a private confidentiality agreement."[17] First State further argued, contrary to what it asserts here, that the

[16] A389, Report at 16.

[17] 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.[18] These cases demonstrate that the Insurers are willing to dispense with confidentiality when it helps their litigation position but will insist on it as a matter of public policy when it will harm them.

[18] A399, Report at 26; A370–A371, First State Memo at 13–14. There similarly is a protective order in place in BorgWarner's Illinois litigation that will protect the discovery requested here. *See* A347–A353.

VI. THE PLAIN TERMS OF THE WELLINGTON AGREEMENT DO NOT BAR THE DISCOVERY BORGWARNER SEEKS.

BorgWarner established in its opening brief that the Wellington Agreement's plain terms do not preclude discovery here. *See* BorgWarner Opening Br. at 26–29. However, the Insurers contend that the Commissioner did not interpret the Wellington Agreement and a confidentiality agreement among Owens Corning and the Insurers to preclude discovery as a matter of contract law. First State Br. at 36–43; North River Br. at 25, 36–37. Again, the Insurers are wrong. The Commissioner examined BorgWarner's arguments regarding the Wellington Agreement's provisions and held: "BorgWarner's interpretation of the [Wellington] Agreement's confidentiality language is tortured, to say the least. When read as a whole, the Agreement and 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."[19]

But even if the parties to the Wellington Agreement agreed to confidentiality among themselves, that same expectation does not apply to courts. Paragraph 5 of the Wellington Agreement's General Provisions states:

> All persons 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

[19] Commissioner's Order at 6.

> Agreement, including its development and implementation.[20]

Given the provision above, the Wellington parties had no expectation of confidentiality vis-à-vis the courts and third parties. Therefore, it was error for the Commissioner and the Superior Court to conclude that the Wellington Agreement's plain language protected the materials at issue here.

[20] First State incorrectly says that the Wellington Agreement "offer[ed] the parties 'full privilege and protection.'" First State Br. at 7. That is not so. The Wellington Agreement merely "request[ed] . . . full privilege and protection." *See* Wellington Agreement at A89 ¶ 5.

CONCLUSION

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

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