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IN THE SUPREME COURT OF THE STATE OF DELAWARE

IN RE TIAA-CREF INSURANCE APPEALS	)	
	)	No. 478, 2017
	)	No. 479, 2017
	)	No. 480, 2017
	)	No. 481, 2017
	)	
	)	Court Below – Superior Court
	)	of the State of Delaware
	)	
	)	C.A. No. N14C-05-178 JRJ [CCLD]

PUBLIC VERSION

DEFENDANT BELOW, APPELLANT ARCH INSURANCE COMPANY'S OPENING BRIEF REGARDING CONSENT TO SETTLE AND REDUCTION OF INSURANCE LIMITS

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NATURE OF PROCEEDINGS

Plaintiffs below, Appellees (collectively, **"TIAA"**) commenced this action seeking insurance coverage in connection with multiple class actions filed against TIAA. With respect to Defendant below, Appellant Arch Insurance Company (**"Arch"**), TIAA seeks coverage under one of the excess policies issued by Arch as part of a tiered professional-liability insurance program (the **"Arch Policy"**). However, it is undisputed that TIAA failed to even seek, let alone obtain, Arch's prior consent before settling two of the class actions. In doing so, TIAA failed to comply with a condition precedent in the Arch Policy requiring Arch's consent in advance of settlements, which precludes TIAA's claims against Arch.

Arch, in its summary judgment motion, established TIAA's breach of the consent provision and also explained the legal insufficiency of TIAA's argument that consent was waived or otherwise excused. This should have ended the case for Arch. Instead, the Superior Court found an issue of fact in connection with one of Arch's alternative arguments pertaining to waiver. Indeed, the issue of fact could not be material for purposes of requiring a trial because, as a matter of law, TIAA still failed to establish a legitimate basis to excuse its non-compliance with the consent requirement. TIAA never even established that Arch had a duty to raise the consent defense prior to this action; nor did TIAA ever request any payment from Arch before this action. Moreover, the record demonstrates that

Arch clearly and repeatedly reserved all of its rights when corresponding with TIAA. Arch even asked to be kept apprised of the settlement status while expressing its intent to participate in any negotiations. Instead, TIAA admits it waited until the ink was dry on the settlement agreements before communicating any further with Arch.

Although the case against Arch should never have proceeded to trial, the Superior Court compounded its mistake with numerous additional errors leading up to and during trial, including: (1) rejecting jury instructions explaining the limitations of waiver; (2) permitting TIAA to sidestep requirements for waiver and repudiation with its so-called "futility" theory and justify its excusal from consent retroactively with information that was unknown at the time of settlement; (3) permitting TIAA to introduce evidence that was undeniably irrelevant and unfairly prejudicial; and (4) permitting TIAA to effectively use other insurers' depositions as expert testimony to opine as to the meaning of Arch's consent provision even though the Superior Court previously found the language unambiguous. After all these errors, the jury returned a verdict for TIAA on the consent issue. The Superior Court then wrongly denied Arch's motions for judgment as a matter of law or a new trial.

In addition, the Superior Court erred when it determined the new maximum limit that Arch could potentially owe. Although the Arch Policy originally was

[redacted]

limited to [redacted] TIAA conceded that Arch's limit was reduced by TIAA's settlement with another insurer, St. Paul Mercury Insurance Company (**"St. Paul"**). The Arch's Policy's "shavings" provision reduced Arch's limit by the percentage of savings that St. Paul received in the settlement. But the Superior Court refused to account for the fact that the settlement with St. Paul also resolved additional claims in excess of and separate from St. Paul's limit, which meant the settlement represented a larger savings on St. Paul's limit than that applied by the Court. Instead of a [redacted] discount, the Superior Court should have decreased Arch's limit by [redacted], which would lower it to [redacted].

In view of the foregoing, this Court should reverse the decision denying Arch's motion for summary judgment and/or otherwise grant Arch judgment as a matter of law dismissing TIAA's claims. In the alternative, Arch should be granted a new trial. This Court should also correct the Superior Court's opinion as to the appropriate reduction of Arch's limit.

Arch now appeals the following: (1) denial of Arch's Motion for Summary Judgment;[1] (2) denial of Arch's motions *in limine*;[2] (3) denial of Arch's Motion for Judgment as a Matter of Law;[3] (4) rulings regarding jury instructions, the inclusion

[1] Ex. A.

[2] Ex. B.

[3] Ex. C.

[redacted]

of the "futility" question, and the burden of proof for futility;[4] (5) allowing deposition testimony from other insurers on Arch's consent issue;[5] (6) the jury verdict against Arch following trial;[6] (7) denial of Arch's renewed motion for judgment as a matter of law and alternative motion for new trial;[7] (8) the portion of the opinion and order on TIAA's motion for final order and judgment that determined the size of Arch's limit reduction;[8] and (9) the Order and Certified Final Judgment Pursuant to Rule 54(b).[9]

[4] Ex. D.

[5] Ex. E.

[6] Ex. F.

[7] Ex. G.

[8] Ex. H.

[9] Ex. I.

[redacted]

SUMMARY OF ARGUMENT

1. The Arch Policy required TIAA to obtain Arch's consent before settling the class actions. It was undisputed (a) that consent is a condition precedent to coverage, (b) that it was TIAA's burden to prove its compliance with the consent provision, and (c) that TIAA failed to seek or obtain Arch's consent for the two settlements. Accordingly, TIAA had to establish it was excused from consent for both settlements to avoid dismissal of its claims against Arch. The Superior Court erred in finding genuine issues of material fact as to whether Arch waived, or TIAA was excused from, consent. Thus, Arch should have been granted summary judgment or other judgment as a matter of law.

2. TIAA failed to satisfy its burden with respect to its argument that the consent provision did not require consent for *Rink* because the *Rink* settlement, alone, did not reach Arch's layer. The Superior Court correctly found the consent provision was unambiguous but incorrectly found issues of fact as to whether it applied to *Rink*. However, TIAA never presented the jury with a special interrogatory that addressed this issue and therefore did not satisfy its burden to show compliance or excusal on this basis.

3. As a matter of law, an insurer's silence cannot constitute waiver absent a duty to speak. Here, Arch had no duty to speak, and therefore any silence or delay by Arch in raising consent cannot support waiver. Arch was not required

[redacted]

to raise consent prior to this action, and TIAA did not even demand anything from Arch before this action. Therefore, TIAA's argument that Arch waived its defense by not raising it earlier should have been rejected as a matter of law.

4. As a matter of law, Arch's closure of its *Rink* files cannot establish waiver. It is undisputed that Arch's closure letter related to a different insurance policy not at issue here. Even assuming, *arguendo*, that the closure letter had any relevance, Arch expressly reserved all of its rights therein and such reservation language precludes waiver as a matter of law. Indeed, TIAA's own witness testified this language meant Arch was not giving up any rights. Arch's closure of its other *Rink* file also cannot support waiver because it was unknown to TIAA when it settled. In any event, a mere file closure cannot indicate that consent was unnecessary.

5. As a matter of law, Arch's coverage letter for *Bauer* could not waive any of Arch's rights nor excuse TIAA from the consent requirement. Consent is neither waived nor futile when an insurer invites discussion of the coverage issues it raised and asks to participate in settlement discussions. Even assuming, *arguendo*, that the letter definitively refused coverage, there is no waiver where a disclaimer letter expressly reserves all rights.

6. The Superior Court committed reversible error when it refused to add jury instructions explaining these limitations of waiver in the face of evidence of

[redacted]

Arch's silence, Arch's reservation language, and information unknown to TIAA when it settled without consent.

7. The Superior Court made another reversible error by permitting TIAA's "futility" theory. New York does not recognize futility separately from traditional theories of waiver and anticipatory repudiation. The separate "futility" question confused the jurors, causing them to consider the consent issue based on hindsight instead of Arch's then-known behavior when TIAA settled. It further allowed TIAA to circumvent the strict requirements of waiver and repudiation, including the higher burden of proof required for waiver.

8. The Superior Court committed another reversible error in allowing irrelevant and unfairly prejudicial evidence regarding Arch's closure of its claim files. The closure letter concerned an entirely different insurance policy, and Arch's other file closure was unknown to TIAA. Therefore, the jury should not have been permitted to even consider these file closures for purposes of waiver or "futility."

9. It was also a reversible error to allow TIAA to present irrelevant and unfairly prejudicial deposition testimony from other insurers. The deposition testimony concerned other insurers' opinions as to when consent is required despite having policies with different consent provisions. Arch also had no opportunity at trial to cross-examine these witnesses, who were effectively used to

[redacted]

provide expert opinions on waiver law and the meaning of a consent provision that the Superior Court previously determined was unambiguous.

10. The Superior Court erred in determining the size of Arch's limit reduction. Because the St. Paul settlement resolved additional claims separate from claims against St. Paul's policy limit, the Court should have recognized a larger savings on St. Paul's limit and further reduced Arch's limit to [redacted].

[redacted]

STATEMENT OF FACTS

A. THE INSURANCE PROGRAM

This action concerns professional-liability insurance purchased by TIAA from multiple insurance companies.[10] As this action progressed, TIAA's claims became limited to insurance for lawsuits filed in the 2007-08 policy year.[11] For that year, Arch issued Policy No. [redacted] (the **"Arch Policy"** or **"2007-08 Arch Policy"** or the **"Lower Arch Policy"**).[12]

The Arch Policy is an excess follow-form policy with a [redacted] attachment point, which means there must be more than [redacted] in covered loss before there is even potential coverage.[13] The Arch Policy applies in conformance with the terms and conditions of the "Followed Policy," except as

[10] First Am. Compl. ¶¶ 1-18, JA1875-JA1882. In accordance with Delaware Supreme Court Rule 14(j), the parties to the consolidated appeals filed a Joint Appendix of documents bates-stamped with the prefix "JA." Additionally, Arch filed its own Appendix with additional documents bates-stamped with the prefix "AA." In this brief, Arch cites documents contained in these appendices by the bates-stamped pages.

[11] Pls.' Br. in Opp'n to the Mots. for Summ. J. of Defs. St. Paul and Arch, JA3274-JA3276, at pp. 32-34; JA5230 at p. 28 ("TIAA-CREF, Illinois National, and ACE argue that *Bauer-Ramazani* and *Cummings* relate back to 2007-08.").

[12] Ex. A to Pre-Trial Stipulation and Order, AA000210 at ¶ 42; JA1891, JA0505-JA0524.

[13] Arch Policy, JA0508, JA2904-JA2915.

[redacted]

otherwise provided therein.[14] The Arch Policy contains a consent provision in Section V, which provides:

> DUTIES IN THE EVENT OF A CLAIM
>
> A. With respect to any Claim(s) that, alone or combined, might result in payment pursuant to the insurance coverage afforded under this Policy, the Insured shall not admit liability and shall not agree to settle any Claim without the Excess Insurer's consent.
>
> * * *
>
> C. With respect to any Claim(s) that, alone or combined, might result in payment pursuant to the insurance coverage afforded under this Policy, no costs, charges or expenses for investigation or defense of any Claim shall be incurred, or settlements made, without the Excess Insurer's consent, such consent not to be unreasonable withheld.[15]

As stated above, the Arch Policy "appl[ies] in conformance with the terms and conditions of the Followed Policy,"[16] designated as Policy No. [redacted] issued by Illinois National Insurance Company (**"Illinois National"**).[17] The Arch Policy therefore incorporates the additional consent provision from Section 5.D.3 of the "Followed Policy," which provides that "[t]he Insured shall not … settle any

[14] *Id.* at JA0511.

[15] JA0513 at § V.

[16] JA0511 at § I.C.

[17] JA0507.

[redacted]

Claim … without the written consent of the Insurer, but such consent shall not be unreasonably withheld."[18]

The Arch Policy also contains a "shavings" provision in Endorsement No. 4, which states:

> [I]f with respect to any covered Claim the Underlying Limit is reduced or exhausted by payments by the Insureds as provided in Section 1(B) above, …. the unexhausted Limit of Liability under this Policy applicable to such Claim shall be reduced by at least the largest percentage savings of the Underlying Insurance's Limit(s) of Liability as provided in the Limit Reduction Agreements applicable to such Claim.
>
> …[A] Limit Reduction Agreement is an agreement between the Insureds and one or more insurer(s) of the Underlying Insurance pursuant to which such insurer(s) agrees to pay a portion of its unexhausted Limit of Liability in exchange for a release from the Insureds, provided the sole basis for such agreement and release is the compromise of good faith coverage issues under the Underlying Insurance ….[19]

B. THE UNDERLYING CLASS ACTIONS AND CLAIMS HANDLING

This opening brief concerns coverage for two class-action lawsuits against TIAA. The first class action (**"*Rink*"** or the **"*Rink* Action"**) was commenced in Kentucky state court during the 2007-08 policy year.[20] TIAA reported *Rink* under its 2007-08 policies, including the Lower Arch Policy at issue (No. [redacted]

[18] Illinois National Policy, JA0363 at § 5.D.3.

[19] JA0518.

[20] JA1279-JA1296.

[redacted]

[redacted]), which covers loss above [redacted].[21] TIAA also reported *Rink* under a second higher-excess policy issued by Arch for the 2007-08 year (No. [redacted]), which insures loss above [redacted] (the **"Higher Arch Policy"**).[22] TIAA is not seeking coverage under the Higher Arch Policy.[23]

Arch opened two claim files for *Rink*—one for the Lower Arch Policy (Claim No. [redacted]) and the other for the Higher Arch Policy (Claim No. [redacted]). Arch sent TIAA separate acknowledgement letters for each file.[24] Soon after *Rink* was reported (but before the second class action was filed), Arch determined that *Rink*, alone, was unlikely to reach the Higher Arch Policy's [redacted] attachment point, and Arch therefore closed its file for Claim No. [redacted] under the Higher Arch Policy.[25]

On January 29, 2008, Arch issued a letter (the **"Closure Letter"**) informing TIAA it was closing its claim file for *Rink* under the Higher Arch Policy (Claim No. [redacted]) because it did not believe there would be sufficient covered loss from

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[21] *Id*. at JA1281-JA1283, Ex. A to Pre-Trial Stipulation and Order, AA000210 at ¶ 43.

[22] Ex. A to Pre-Trial Stipulation and Order, AA000214 at ¶ 70.

[23] *Id*.

[24] Letter from Steven L. White to Sanford Victor (Dec.11, 2007), JA2916-JA2918; Dep. of Jeremy Salzman, JA4618-JA4619 at 109:16 – 109:25, 110:2 – 110:7, 111:7 – 111:10.

[25] Letter from Ryan Hale to Sanford Victor, dated Jan. 29, 2008, JA1326-JA1329; Dep. of Jeremy Salzman, JA4612 at 84:6-23.

[redacted]

Rink to trigger the Higher Arch Policy.[26] The Closure Letter stated this closure was "without prejudice to any of the rights under the Arch policies, all of which remain reserved in the unlikely event this matter may impact [Arch's] coverage."[27] The Closure Letter did not deny coverage, nor suggest *Rink* was not otherwise covered. Instead, it stated that the file was subject to possible reopening if circumstances warranted.[28] The Closure Letter referenced only the Higher Arch Policy. It contained no reference to the Lower Arch Policy at issue or the separate claim file associated with that policy.

Arch also internally closed its claim file for *Rink* under the Lower Arch Policy (Claim No. [redacted]), but this second file closure was unknown to TIAA until fact discovery in this action.[29]

The second class action (**"*Bauer*"** or the **"*Bauer* Action"**) was filed in federal court in Vermont during the 2009-10 policy year.[30] TIAA reported *Bauer* under its 2009-10 policies, including certain policies Arch issued for the 2009-10 year.[31] TIAA is not seeking coverage under the 2009-10 policies.[32]

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[26] JA1326-JA1329.

[27] *Id*.

[28] *Id*.

[29] Dep. of Jeremy Salzman, JA4619 at 110:15-24.

[30] First Am. Compl., JA1898 at ¶ 65.

[31] JA1507-JA1548.

[redacted]

In June 2012, years after *Bauer* was filed, TIAA settled the original *Rink* Action.[33] It is undisputed and stipulated that TIAA did not seek or obtain Arch's consent prior to the *Rink* settlement.[34] [redacted][35]

On June 7, 2013, Arch sent TIAA a letter setting forth Arch's coverage position with respect to *Bauer* under Arch's policies in the 2009-10 policy year (the **"*Bauer* Letter"**). Specifically with respect to those 2009-10 policies, the *Bauer* Letter adopted Illinois National's denial of coverage for the *Bauer* Action.[36] However, Arch's disclaimer was expressly conditional, stating that its coverage position was "premised upon … presently known facts" and was "subject to change" based upon any additional facts that develop.[37] The *Bauer* Letter also invited TIAA to provide "any additional information [it] believe[d] should be factored into [Arch's] coverage analysis" so that Arch could "review it for its

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[32] JA5230.

[33] Ex. A to Pre-Trial Stipulation and Order, AA000214-AA000215 at ¶ 76.

[34] *Id*., AA000214 at ¶ 75.

[35] *Id*., AA000216-AA000217 at ¶¶ 88-94.

[36] JA4716-JA4719.

[37] *Id*.

[redacted]

impact on coverage."[38] In addition, the *Bauer* Letter asked TIAA "to keep [Arch] advised of the status of [*Bauer*], so that Arch may at its discretion exercise its right to associate in the defense and/or settlement of any matter that may be covered by the Arch Policies, even if the Underlying Policies have not been exhausted."[39] Then the *Bauer* Letter "expressly reserve[d] all rights … whether or not such rights were specifically referenced [t]herein," including "the right to raise additional defenses or exclusions to coverage as circumstances warrant."[40] The *Bauer* Letter made no reference to the 2007-08 Arch Policy or coverage for the *Rink* Action.

TIAA negotiated a settlement of the *Bauer* Action and executed the settlement agreement on January 31, 2014.[41] Prior to settling *Bauer*, TIAA sought consent from Illinois National and ACE American Insurance Company (**"ACE"**), even though both insurers previously denied coverage for *Bauer*.[42] However, TIAA did not seek or obtain Arch's consent before settling the *Bauer* Action—an undisputed and stipulated fact.[43] TIAA also did not respond to Arch's *Bauer* Letter

[38] *Id*.

[39] *Id*.

[40] *Id.*

[41] JA0667-JA0733.

[42] Email from Sanford Victor to Susan Rosmarin and Christina Smith, Dec. 17 and 18, 2013, JA1703-JA1706; Email from Illinois National to TIAA, Apr. 23, 2013, JA1568-JA1578; Email from Christina Smith to Ira Cohen, June 11, 2013, AA000667-AA000670.

[43] Ex. A to Pre-Trial Stipulation and Order, AA000216 at ¶ 86.

[redacted]

or further communicate with Arch prior to settling. [redacted][44]

C. PROCEDURAL HISTORY IN THE SUPERIOR COURT

1. Motion for Summary Judgment

TIAA commenced this action in the Superior Court on May 20, 2014 against Arch and several other insurers.[45] Following discovery, Arch moved for summary judgment on May 20, 2016.[46] It was undisputed that TIAA did not seek Arch's consent before settling *Rink* or *Bauer*,[47] and Arch argued that this failure to comply with the consent provision precluded TIAA's claims against Arch as a matter of law.[48]

TIAA attempted to excuse the consent requirement with arguments that Arch waived its consent defense by, among other things, closing its internal claim file for *Rink* and denying coverage for *Bauer*.[49] Arch argued that these excuses

[44] *Id*., AA000217 at ¶¶ 95-98.

[45] JA0243, JA0323-325.

[46] JA2875-JA2903.

[47] Ex. A to Pre-Trial Stipulation and Order, AA000214, AA000216 at ¶¶ 75, 86.

[48] JA2890-JA2901; JA4977-JA5001.

[49] TIAA's Br. in Opp'n to the Mots. for Summ. J. of Defs. St. Paul and Arch, JA3265-JA3267.

[redacted]

were legally insufficient.[50] TIAA also pointed to Arch's delay in raising consent, but Arch argued that its inaction or silence, as a matter of law, did not clearly manifest intent to waive the defense.[51] Alternatively, Arch argued TIAA's own conduct in seeking coverage for *Bauer* under a subsequent policy year and never requesting payment from Arch vitiated TIAA's excuses for not seeking consent.[52]

On October 20, 2016, the Superior Court denied Arch's motion for summary judgment.[53] Out of a 45-page opinion, the Court devoted two pages to the consent issue and did not address most of the consent arguments.[54] It only discussed Arch's alternative argument regarding TIAA's own conduct and identified a single issue of fact: "when and if" Arch received notice that TIAA and Illinois National sought to relate *Bauer* back to *Rink* under the earlier policy year.[55]

2. Pre-Trial Proceedings

Before trial, Arch filed motions *in limine* pertaining to the consent issue.[56] The first motion sought to exclude the Closure Letter because it clearly concerned

[50] Arch's Reply Br. in Supp. of its Mot. for Summ. J., JA4977-JA5001.

[51] *Id*. at JA4996-JA4999.

[52] *Id.*

[53] JA5201.

[54] JA5236-JA5238.

[55] JA5237.

[56] AA000001-AA000020.

a different insurance policy not at issue.[57] The second motion sought to exclude evidence of Arch's internal closure of the other claim file because it was unknown to TIAA until learned through discovery in this action.[58] On November 18, 2016, the Superior Court summarily denied both motions without explanation as to why the evidence was relevant or non-prejudicial.[59]

Arch and other defendants also jointly filed a motion *in limine* to preclude any evidence that the policy terms were ambiguous.[60] TIAA argued that Arch's consent provision was ambiguous.[61] However, the Superior Court rejected TIAA's argument and held Arch's consent provision is not ambiguous.[62] The Court also identified certain issues of fact regarding the consent provision's applicability.[63]

Arch also objected to TIAA's plan to present the jury with videotaped depositions of other insurers testifying about when consent is not needed to settle.[64] The Superior Court again ruled against Arch two days before trial, allowing TIAA to use other insurers' deposition testimony to interpret Arch's consent right under a

[57] AA000001-AA000013.

[58] AA000014-AA000020.

[59] JA5293, at 4:13-4:19.

[60] AA000021-AA000026.

[61] AA000129-AA000135.

[62] JA5295-5296, at 6:17-7:16.

[63] *Id*., JA5296-JA5298, at 7:4-9:21.

[64] Ex. B to Pretrial Stipulation and Order, AA000218-AA000227.

[redacted]

provision previously found to be unambiguous, which deprived Arch of any ability to cross-examine the testimony at trial because it was being submitted via deposition.[65]

3. Trial

The case proceeded to a jury trial on December 5, 2016. The parties submitted competing sets of jury instructions and special verdict forms.[66] TIAA sought to inform the jury that consent was excused if the request for consent reasonably appeared futile or pointless based upon Arch's conduct.[67] Arch opposed this "futility" theory and related instruction, arguing that the theory is not independent of traditional theories to excuse compliance such as waiver.[68] Arch also objected to the burden of proof for the "futility" question because futility is another waiver argument, which is subject to a "clear and convincing" standard.[69] The night before closing arguments, the Superior Court overruled Arch's objections in favor of including the futility question and related instructions and applying a "preponderance of evidence" standard.[70] The Court also rejected

[65] Ex. E.

[66] AA000235-AA000312.

[67] AA000310.

[68] *Id*. at n.2; JA6102-JA6104, at 33:7-35:1.

[69] JA6118, at 49:6-49:21.

[70] JA6115, 46:3-46:13; JA6118, at 49:6-49:21.

Arch's proposed jury instructions, explaining the limitations of waiver in connection with silence and reservation-of-rights language.[71] Instead, the Superior Court prepared its own instructions that did not address these limitations.

At the close of TIAA's case in chief on December 8, 2016, Arch moved for judgment as a matter of law,[72] but the Superior Court took it under advisement and later said Arch was not entitled to such judgment.[73] Following TIAA's closing remarks where it tied waiver to Arch's silence and connected futility with hindsight evidence previously unknown to TIAA,[74] the jury returned a verdict on December 12, 2016.[75] Regarding consent, the jury found Arch waived consent for both settlements,[76] and further that, at the time of the settlements, it reasonably appeared futile for TIAA to request consent.[77]

4. Post-Trial Motions

On February 17, 2017, Arch renewed its motion for judgment as a matter of law and alternatively moved for a new trial,[78] which was denied on June 29,

[71] JA6083-JA6084, AA000279.

[72] DA0143-DA0157.

[73] JA6115, at 46:3-9.

[74] JA6366-JA6371.

[75] JA6515-JA6520.

[76] The third underlying class action was not at issue at trial.

[77] JA6518.

[78] AA000325-AA000349.

2017.[79] On February 11, 2017, TIAA moved for entry of a final order and judgment pursuant to Rule 54(b).[80] Arch opposed that motion in part, disputing among other things the extent to which TIAA's settlement with St. Paul reduced Arch's policy limit.[81] While Arch argued that its limit should be reduced to [redacted], the Court on October 23, 2017 agreed with TIAA and held Arch's limit to only be reduced to [redacted].[82] However, the Superior Court also held Arch did not anticipatorily breach the Arch Policy because it found no unambiguous evidence of repudiation.[83] That same day, a final order and judgment was issued but did not award any damages from Arch.[84]

[79] JA6642.

[80] AA000421-AA000442.

[81] AA000448-AA000472.

[82] JA6678.

[83] JA6672-JA6673.

[84] JA6680-JA6682.

[redacted]

ARGUMENT

I. ARCH WAS ENTITLED TO JUDGMENT AS A MATTER OF LAW UNLESS TIAA PROVED IT WAS EXCUSED FROM THE CONSENT REQUIREMENT FOR BOTH THE *RINK* AND *BAUER* SETTLEMENTS.

A. Questions Presented

Could TIAA prevail without satisfying its burden to prove it was excused from the consent requirement for both the *Rink* and *Bauer* settlements?

This issue was raised in Arch's motion for summary judgment, motion for judgment as a matter of law, at trial, and renewed motion for judgment as a matter of law.[85]

B. Scope of Review

Questions of law decided by the Superior Court are reviewed *de novo*. *Broadmeadow Inv., LLC v. Del. Health Res. Bd. & Healthsouth Middletown Rehab Hosp.*, 56 A.3d 1057, 1059 (Del. 2012). This includes the Superior Court's rulings on the motions for summary judgment and for judgment as a matter of law. *Rizzitiello v. McDonald's Corp.*, 868 A.2d 825, 829 (Del. 2005); *Saudi Basic Indus. Corp. v. Mobil Yanbu Petrochemical Co.*, 866 A.2d 1, 24 (Del. 2005).

[85] JA2879-JA2881, JA4555-JA4560, JA5618-JA5626, DA0143-DA0157, AA000325-AA000349.

C. Merits of Argument

TIAA does not dispute (and has stipulated) that it did not seek, let alone obtain, Arch's consent before settling *Rink* or *Bauer*.[86] Yet, the Arch Policy requires that "the Insured … shall not agree to settle any Claim without [Arch]'s consent" and further provides that "no … settlements [shall be] made[] without [Arch]'s consent."[87] TIAA also never disputed that this consent provision is a condition precedent to coverage.[88] Nor has TIAA ever disputed that breach of the consent provision (absent waiver) would relieve Arch of any obligation to provide coverage.[89] Consequently, TIAA failed to satisfy a condition precedent to coverage for both the *Rink* and *Bauer* settlements, and Arch thus has no potential coverage obligation. *SI Venture Holdings, LLC v. Catlin Specialty Ins.*, 118 F. Supp. 3d 548, 550-51 (S.D.N.Y. 2015) ("[C]onsent-to-settle provisions … are 'routinely enforced' as 'a condition precedent to coverage.'"); *Bartolomeo v. Fid.*

[86] AA000214, AA000216 at ¶¶ 75, 86.

[87] Arch Policy, § V, JA0513.

[88] JA3261-JA3267; *see also PB Americas, Inc. v. Cont'l Cas. Co.*, 690 F. Supp. 2d 242, 249-50 (S.D.N.Y. 2010); *TLC Beatrice Int'l Holdings v. CIGNA Ins. Co.*, 2000 WL 282967, at *4 (S.D.N.Y. Mar. 16, 2000*), aff'd*, 234 F.3d 1262 (2d Cir. 2000).

[89] JA3261-JA3267, JA4982-JA4983; *see also PB Americas, Inc.*, 690 F. Supp. 2d at 250; *E. Baby Stores, Inc. v. Cent. Mut. Ins. Co.*, 2008 WL 2276527, at *2 (S.D.N.Y. June 2, 2008) (insured's failure to satisfy condition precedent, as matter of law, "vitiates the contract"); *Great Canal Realty Corp. v. Seneca Ins. Co., Inc.*, 5 N.Y.3d 742, 743, 833 N.E.2d 1196 (2005).

Nat'l Title Ins. Co. of N.Y., 134 A.D.3d 1063, 1064 (N.Y. App. Div. 2015) (barring coverage because insured failed to satisfy consent-to-settle obligation).

It is well-settled that TIAA, as the insured, had the burden to demonstrate satisfaction of all conditions precedent to coverage or any excusal from the condition.[90] And courts routinely grant summary judgment to insurers dismissing claims for coverage where the insured breached a condition precedent to coverage, particularly where the insured did not even request consent. *Cont'l Cas. Co. v. Ace Am. Ins. Co.*, 2009 WL 857594, at *3-*5 (S.D.N.Y. Mar. 31, 2009) (granting insurer summary judgment because "[f]ailure to obtain such consent absolves [insurer] of any liability"); *Ill. Nat'l Ins. Co. v. Tutor Perini Corp.*, 2012 WL 5860478, at *8 (S.D.N.Y. Nov. 15, 2012) (granting summary judgment for insurers); *Sunham Home Fashions, LLC v. Diamond State Ins. Co.*, 813 F. Supp. 2d 411, 417 (S.D.N.Y. 2011) (same); *Bear Wagner Specialists, LLC v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.*, 2009 WL 2045601, at *8 (N.Y. Sup. July, 7, 2009) (same).

[90] *Sirignano v. Chicago Ins. Co.*, 192 F. Supp. 2d 199, 203 (S.D.N.Y. 2002); *Thomson v. Power Auth. of State of N.Y.*, 217 A.D.2d 495, 496 (N.Y. App. Div. 1995); *Rael Automatic Sprinker Co., Inc. v. Schaefer Agency*, 32 A.D.3d 835, 835 (N.Y. App. Div. 2006); *TLC Beatrice Intern. Holdings, Inc.*, 2000 WL 282967 at *4 (insurer entitled to summary judgment where insured couldn't prove it complied with or was excused from condition precedent requiring consent to settle).

[redacted]

As a result, unless TIAA demonstrated that it was somehow excused from complying with the consent provision (which it did not), Arch should have been awarded judgment as a matter of law because Arch would have no obligation to provide coverage in connection with those settlements. *Lewis v. Cigna Ins. Co.*, 2000 WL 1654530, at *1 (2d Cir. Nov. 3, 2000) (affirming summary judgment because insured breached consent requirement); *Indem. Ins. Co. of N. Am. v. St. Paul Mercury Ins. Co.*, 900 N.Y.S.2d 24, 27 (App. Div. 2010) (granting summary judgment because insurer neither participated in nor agreed to settlement); *AIU Ins. Co. v. Valley Forge Ins. Co.*, 758 N.Y.S.2d 16, 17-18 (App. Div. 2003) (affirming summary judgment for insurer that did not participate in or agree to settlement).

TIAA also never disputed Arch's contention that TIAA had to demonstrate excusal from seeking consent for both the *Rink* and *Bauer* settlements.[91] If TIAA breached its consent requirement for just one of those two settlements, there would not be enough covered loss to reach the Arch Policy's [redacted] attachment point.[92]

In the Superior Court, TIAA raised several arguments as to why it should be excused from the consent requirement. First, TIAA argued that the consent provision did not apply to the *Rink* settlement because the size of the *Rink*

[91] JA2983-JA2894.

[92] JA2899-JA2901.

[redacted]

settlement, alone, did not reach Arch's [redacted] attachment point.[93] Arch disputed TIAA's interpretation by pointing to the consent provision's language, which expressly applied to "any Claim(s) that, *alone or combined, might* result in payment pursuant to the insurance coverage afforded under this Policy."[94] Shortly before trial, the Superior Court found Arch's consent provision to be unambiguous but said issues of fact existed as to whether the condition was satisfied.[95] While Arch disagreed that any issues of fact existed, TIAA never even attempted to present the jury with a special interrogatory regarding this issue.[96] As a result, the jury verdict only decided issues of waiver and so-called "futility," and TIAA failed to satisfy its burden to establish excusal from consent on this basis. *TLC Beatrice*, 2000 WL 282967 at *4 (requiring insured to prove it complied with or was excused from consent condition).

Each of TIAA's other arguments for excusal is addressed below.

[93] JA3261-JA3264.

[94] JA4986-JA4991 (emphasis added).

[95] JA5295-JA5298 at 6:17 – 9:19.

[96] AA000310.

[redacted]

II. SINCE TIAA FAILED TO DEMONSTRATE ARCH HAD A DUTY TO SPEAK, ARCH COULD NOT WAIVE CONSENT BY WAITING UNTIL THIS ACTION BEFORE RAISING THE CONSENT DEFENSE.

A. Questions Presented

By waiting until this action to raise its consent defense, could Arch have waived the defense even though it had no prior duty to speak?

The issue was raised in Arch's motion for summary judgment, motion for judgment as a matter of law, at trial, renewed motion for judgment as a matter of law, and alternative motion for new trial.[97]

B. Scope of Review

Questions of law decided by the Superior Court are reviewed *de novo*. *Broadmeadow Inv., LLC*, 56 A.3d at 1059. This includes the Superior Court's rulings on the motions for summary judgment and for judgment as a matter of law. *Rizzitiello*, 868 A.2d at 829; *Saudi Basic Indus. Corp.*, 866 A.2d at 24. The Supreme Court will review a jury's factual findings for "any competent evidence upon which the verdict could reasonably be based" and it will set aside jury verdicts only if "a reasonable jury could not have reached the result." *Town of Cheswold v. Vann*, 9 A.3d 467, 473-74 (Del. 2010).

[97] JA4996-JA4999, Trial Tr., Dec. 5, 2016, JA5625, DA0155-DA0156, AA000336-AA000338.

[redacted]

C. Merits of Argument

TIAA sought to be excused from complying with the consent provision on another basis. It argued that Arch waived its consent defense because Arch waited for this action to be filed before asserting this defense.[98] However, TIAA failed to establish that Arch had any duty to raise the consent defense before this action, and therefore, as a matter of law, any silence by Arch in the interim could not serve as a basis for waiver.

Under New York law, waiver is an intentional relinquishment of a known right and should not be lightly presumed. *Gilbert Frank Corp. v. Fed. Ins. Co.*, 520 N.E.2d 512, 514 (N.Y. 1988). Instead, an insured must offer evidence demonstrating the insurer's "clear manifestation of intent" to relinquish the right. *Id.*; *Globecon Grp., LLC v. Hartford Fire Ins. Co.*, 434 F.3d 165, 176 (2d Cir. 2006). The waiving party must have "lulled [the other party] into sleeping on its rights under the insurance contract." *Globecon Grp., LLC*, 434 F.3d at 176. Accordingly, the waiver must be "clear, unmistakable, and without ambiguity" and cannot be created by oversight or negligence. *Prof'l Staff Congress-City Univ. of N.Y. v. N.Y. State Pub. Empl. Relations Bd.*, 857 N.E.2d 1108, 1111 (N.Y. 2006); *Amerex Grp., Inc. v. Lexington Ins. Co.*, 678 F.3d 193, 201 (2d Cir. 2012).

[98] JA32710-JA3273, Trial Tr., Dec. 5, 2016, JA5569-JA5570, AA000183.

[redacted]

TIAA argued that the waiver standard was satisfied by Arch's silence after learning of the *Rink* and *Bauer* settlements. To the contrary, an insurer's silence is insufficient to support an inference of waiver and "is simply not enough to raise a triable issue" as to waiver of a defense. *Ill. Nat'l Ins. Co. v. Tutor Perini Corp.*, 2013 U.S. Dist. LEXIS 20514, at *13 (S.D.N.Y. Feb. 5, 2013); *accord Luitpold Pharms., Inc. v. Ed. Geistlich Söhne A.G. Für Chemische Industrie*, 784 F.3d 78, 95 (2d Cir. 2015).[99] In fact, Arch was well within its rights to wait until TIAA commenced this action before raising its consent defense, and even three years of inaction does not demonstrate an insurer's clear manifestation of intent to relinquish a defense. *Compis Servs. v. Hartford Steam Boiler Inspection & Ins. Co.*, 708 N.Y.S.2d 770, 772 (App. Div. 2000); *Allen v. Dutchess Cnty. Mut. Ins. Co.*, 95 A.D. 86, 87-88 (N.Y. App. Div. 1904) (silence is not waiver, and insurer could wait until after action began and then plead defense); *Travelers Indem. Co. v. Northrop Grumman Corp.*, 2013 U.S. Dist. LEXIS 161552, at *33, 35 (S.D.N.Y. Oct. 31, 2013) (delay in noticing defense not waived where insurer pled the defense in Answer).

As explained in *City of Utica v. Genesee Management*, 934 F. Supp. 510, 523 (N.D.N.Y. 1996), there are only two circumstances where an insurer's delay in

[99] *U.S. Liab. Ins. Co. v. Winchester Fine Arts Servs.*, 337 F. Supp. 2d 435, 453 (S.D.N.Y. 2004).

[redacted]

raising a defense could constitute waiver. First, when a complaint alleges bodily injury or death, the insurer will lose its right to disclaim unless it asserts non-compliance "as soon as reasonably possible" as required by New York Insurance Law § 3420(d). Second, an insurer may be equitably estopped from asserting the non-compliance defense if the insured has been prejudiced by the insurer's failure to timely raise the defense. *Id.*; *Travelers Indem. Co. v. Northrop Grumman Corp.*, 2013 U.S. Dist. LEXIS 161552, at *33, 35 (S.D.N.Y. Oct. 31, 2013) ("[I]naction alone constitutes a waiver only when the insured has been prejudiced by the delay.").

Neither is applicable here. TIAA never contended it was somehow prejudiced by Arch's delay, nor could TIAA have had any basis to demonstrate such prejudice. With respect to Section 3420(d), the statute only applies to insurance cases involving death or bodily injury and does not apply to professional-liability insurance for cases like *Rink* and *Bauer*. *Fairmont Funding, Ltd. v. Utica Mut. Ins. Co.*, 694 N.Y.S.2d 389, 390-91 (App. Div. 1999) (Section 3420(d) does not apply to "errors and omissions" policy). New York's highest court recently explained that, outside the context of Section 3420(d), an insurer will not be barred from disclaiming coverage simply as a result of the passage of time. *KeySpan Gas E. Corp. v. Munich Reins. Am., Inc.*, 15 N.E.3d 1194, 1197-98 (N.Y. 2014). Section 3420(d) creates a duty to speak in bodily-injury cases. But

[redacted]

in cases where Section 3420(d) is not implicated, waiver is limited to common-law principles and must depend on the insurer's clear manifestation of intent to release a right. *Id.*; *Fairmont Funding, Ltd.*, 694 N.Y.S.2d at 391 (under common law, even unreasonable delay will not estop insurer from disclaiming unless delay prejudiced insured); *Lumbermens Mut. Cas. Co. v. Flow Int'l Corp.*, 844 F. Supp. 2d 286, 309 (N.D.N.Y. 2012) (outside Section 3420(d), failure to promptly disclaim does not preclude insurer from relying upon coverage defenses); *K. Bell & Assocs. v. Lloyd's Underwriters*, 1997 U.S. Dist. LEXIS 2417, at *21-22 (S.D.N.Y. Mar. 4, 1997), *aff'd*, 1997 U.S. App. LEXIS 31872 (2d Cir. Nov. 10, 1997).

Therefore, under New York law, Arch did not have any duty to assert its consent defense even if it did not intend to pay TIAA on this basis. *Proc v. Home Ins. Co.*, 217 N.E.2d 136, 139-40 (N.Y. 1966) (insurers were not obligated to inform insureds that they never intended to pay); *Compis Servs. v. Hartford Steam Boiler Inspection & Ins. Co.*, 708 N.Y.S.2d 770, 772 (App. Div. 2000) (affirming insurer's summary judgment because insurer has no duty to advise insured of coverage defense); *Travelers Indem. Co. of Am. v. S. Gastronom Corp.*, 2010 U.S. Dist. LEXIS 32333 (E.D.N.Y. Mar. 3, 2010), *aff'd*, 2011 U.S. App. LEXIS 11711, at *42-43 (2d Cir. June 8, 2011) (insurer has no statutory obligation to provide reservation-of-rights letter, and lack thereof is not basis to presume coverage);

[redacted]

Steadfast Ins. Co. v. Stroock & Stroock & Lavan LLP, 277 F. Supp. 2d 245, 255 & n.2 (S.D.N.Y. 2003) (even if insurer had not explicitly reserved rights, it cannot be said to have waived defenses).

In the Superior Court, TIAA never established that Arch had a duty to promptly raise consent. Consequently, the Court should have concluded as a matter of law that Arch did not waive its consent defense by waiting until TIAA brought this action before asserting the defense, and the issue never should have been submitted to the jury. *Satyam Imports, Inc. v. Underwriters at Lloyd's Via Marsh, S.A.*, 2003 U.S. Dist. LEXIS 18350, at *7-8 (S.D.N.Y. Oct. 9, 2003) (granting insurer's motion to dismiss while explaining that insurer's procrastination does not constitute waiver); *Travelers Indem. Co. of Am.*, 2010 U.S. Dist. LEXIS 32333 at *43, *aff'd*, 2011 U.S. App. LEXIS 11711 (no genuine issue of material fact because it was "broad-sweeping proposition" to base waiver on no reservation letter); *Compis Servs.*, 708 N.Y.S.2d at 772 (affirming summary judgment because insurer has no duty to advise insured of defense); *K. Bell & Assocs.*, 1997 U.S. Dist. LEXIS 2417 (granting insurer summary judgment).

III. AS A MATTER OF LAW, ARCH DID NOT WAIVE CONSENT OR MAKE ITS CONSENT FUTILE BY CLOSING ITS CLAIM FILES.

A. Questions Presented

By closing its claim files, did Arch waive consent or otherwise make TIAA reasonably believe it was futile to seek its consent?

The issue was raised in the parties' motions for summary judgment, Arch's motion for judgment as a matter of law, at trial, and in Arch's renewed motion for judgment as a matter of law.[100]

B. Scope of Review

The Court reviews *de novo* questions of law. *Broadmeadow Inv., LLC*, 56 A.3d at 1059. This includes the Superior Court's rulings on the motions for summary judgment and for judgment as a matter of law. *Rizzitiello*, 868 A.2d at 829; *Saudi Basic Indus. Corp.*, 866 A.2d at 24. The Supreme Court will review a jury's factual findings for "any competent evidence upon which the verdict could reasonably be based" and it will set aside jury verdicts only if "a reasonable jury could not have reached the result." *Town of Cheswold v. Vann*, 9 A.3d 467, 473-74 (Del. 2010).

[100] JA4993-JA4995, JA6359-JA6361, DA0151-DA0153, AA000332-AA000334.

C. Merits of Argument

TIAA also pointed to Arch's Closure Letter informing TIAA that Arch was closing one of its two claim files for the *Rink* Action and argued that this letter somehow meant TIAA was no longer required to obtain Arch's consent to settle *Rink* either because this waived Arch's consent rights or demonstrated that it was futile to request Arch's consent.[101]

First, the Closure Letter pertains to the Higher Arch Policy, and TIAA is not pursuing coverage under the Higher Arch Policy, which has never even been at issue in this action.[102] The Closure Letter clearly references the Higher Arch Policy and makes absolutely no mention of the Lower Arch Policy at issue here or the claim number associated with the Lower Arch Policy.[103] Consequently, the Closure Letter could not possibly impact Arch's rights under an insurance policy to which it did not relate.

Even if the Closure Letter did pertain to the Lower Arch Policy (which it did not), the Closure Letter still would not affect Arch's rights under the Lower Arch Policy. With the Closure Letter, Arch simply informed TIAA that it did not expect

[101] JA3266.

[102] AA000214, at ¶ 70.

[103] JA1326-JA1329.

[redacted]

there to be enough loss from *Rink* to reach Arch's excess layer.[104] The Closure Letter gave no indication that Arch would deny coverage in the event of a large enough loss to reach Arch's layer, and it clearly stated the file was "subject to re-opening should circumstances warrant."[105]

In arguing that the Closure Letter waived Arch's rights, TIAA relied on a single New York case, *General Star National Insurance Co. v. Universal Fabricators, Inc.*, 427 Fed. App'x 32 (2d Cir. 2011), which is readily distinguishable. Unlike the situation with Arch's Closure Letter, when the insurer in *General Star* informed the insured it had closed its file, the insurer expressly directed the insured to "handle [the matter] as [it] s[aw] fit." *Id.* at 34. Therefore, in *General Star*, the insurer expressly waived its right to be consulted. This is worlds apart from Arch's Closure Letter. No reasonable person could read the Closure Letter and actually believe that Arch gave TIAA *carte blanche* to ignore the consent requirement or any other rights. In fact, under New York law, a closure letter without such express waiver language, as a matter of law, does not waive the insurer's rights. *Preston v. Northern Ins. Co.*, 231 N.Y.S.2d 93, 95 (Sup. Ct. 1962) (granting insurer's motion on pleadings because insurer's letter informing insured it was closing file could not in any way lull insured into

[104] *Id.*

[105] *Id.*

[redacted]

inactivity or in any way mislead insured so as to prevent him from complying with condition).

Even if Arch's Closure Letter could otherwise imply waiver, such implication was clearly nullified by the Closure Letter's own words, which clarify that the file closure was not intended to prejudice Arch's rights and that all rights "remain reserved in the unlikely event this matter may impact our coverage."[106] With such reservation language, this case is more analogous to *ACHS Mgmt. v. Chartis Prop. Cas. Co.*, 2014 N.Y. Misc. LEXIS 619, at *2 (N.Y. Sup. Feb. 10, 2014), which also involved an excess insurer that sent a letter informing its insured that "it did not believe that the excess coverage would be reached and that it was closing the file."

Like Arch's Closure Letter, the excess insurer's letter in *ACHS* reserved its right to assert any coverage defenses. *Id.* As a result, the Court concluded that the excess insurer was not estopped from subsequently raising a coverage defense "because it reserved the right to do so in the [closure] [l]etter. *Id.* at *4. As explained in *ACHS*, the insured could not demonstrate reliance in the face of such reservation language. *See id.* And if an insured could not rely on such closure letter for estoppel purposes, then clearly Arch's Closure Letter could not demonstrate a clear manifestation of intent to relinquish Arch's rights for waiver

[106] *Id.*

[redacted]

purposes. *State of N.Y. v. Ted B.*, 2015 N.Y. App. Div. LEXIS 6221, *11-12 (N.Y. App. Div. July 29, 2015) (waiver must be "clear, unmistakable and without ambiguity"). Consequently, the Court in *ACHS* found for the excess insurer as a matter of law and granted summary judgment. *ACHS Mgmt.*, 2014 N.Y. Misc. LEXIS 619 at *7.

Moreover, courts in New York (including its highest court) routinely reject waiver arguments as a matter of law in the face of such reservation/non-waiver language. *Proc v. Home Ins. Co.*, 217 N.E.2d 136, 139-40 (N.Y. 1966) (affirming insurer's motion to dismiss, finding "no basis" for waiver where writing contained non-waiver language); *Gilbert Frank Corp. v. Fed. Ins. Co.*, 520 N.E.2d 512, 514 (N.Y. 1988) (granting insurer summary judgment, emphasizing that insurer's offer was made "without prejudice" and therefore did not support waiver); *Globecon Grp., LLC v. Hartford Fire Ins. Co.*, 434 F.3d 165, 176 (2d Cir. 2006) (affirming insurer's summary judgment because evidence "falls well short of a manifestation of any alleged intent by [insurer] to waive its rights" where insurer reserved rights); *XL Specialty Ins. Co. v. Lakian*, 2017 U.S. Dist. LEXIS 39528, at *19 (S.D.N.Y. Mar. 20, 2017) (when insurer "reserves *all rights* under the Policy and at law," there is no implied waiver for unidentified defenses); *Raniolo v. Travelers Indem. Co.*, 718 N.Y.S.2d 884, 884 (App. Div. 2001) (finding no issue of fact as to

waiver where insurer reserved rights).[107]

Even putting the well-settled law aside, TIAA's own witness, Ira Cohen, admitted during cross-examination at trial that the Closure Letter's reservation-of-rights language meant that Arch wasn't giving up any of its rights.[108]

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[107] *See also Compis Servs. v. Hartford Steam Boiler Inspection & Ins. Co.*, 708 N.Y.S.2d 770, 771-72 (App. Div. 2000) (no waiver inferred where insurer investigated and negotiated "under a full reservation of rights"); *Culinary Inst. of Am. v. Aetna Cas. & Sur. Co.*, 542 N.Y.S.2d 705, 706 (App. Div. 1989) (affirming summary judgment for insurer because general reservation of rights precluded triable issue of act regarding waiver); *Satyam Imports, Inc. v. Underwriters at Lloyd's Via Marsh, S.A.*, 2003 U.S. Dist. LEXIS 18350, at *11 (S.D.N.Y. Oct. 9, 2003) (granting insurer's motion to dismiss because reservation of rights is "regarded by both state and federal courts in New York as weighing heavily against a claim of waiver or estoppel"); *Arkin-Medo Corp. v. St. Paul Fire & Marine Ins. Co.*, 585 F. Supp. 11, 13 (E.D.N.Y. 1982) (granting insurer summary judgment because non-waiver language "constituted notice that [insurer] was not waiving any right" and "vitiate any reasonable basis [the insureds] might otherwise have for claiming they were 'lulled into inactivity'"); *Helios Trading Corp. v. Great Am. Ins. Co.*, 1993 U.S. Dist. LEXIS 2859, at *11 (S.D.N.Y. Mar. 8, 1993) (granting insurer summary judgment against waiver because of reservation of rights); *Water Transp. Co. v. Boston Towing & Transp. Co.*, 1994 U.S. Dist. LEXIS 4222, at *16-17 (S.D.N.Y. Mar. 31, 1994) (granting insurer summary judgment because letter's reservation language illustrated intention not to waive); *Gelfman v. Capitol Indem. Corp.*, 39 F. Supp. 3d 255, 269 (E.D.N.Y. 2014) (precluding waiver where insurer repeatedly reserved rights).

[108] Trial Tr., JA5807-JA5808, at 179:22 – 180:9 (Test. of Ira Cohen) (Dec. 6, 2016); 181:16 – 182:5 ("Q. Then it says … please note that such action is taken without prejudice to any of the rights under the ARCH policies, all of which remain reserved in the unlikely event this matter may impact our coverage…. And again, from your nearly four decades in the insurance industry, you understood that ARCH was reserving its rights? A. Correct. Q. That it wasn't giving any of them up? A. That's correct.").

Given that Arch's Closure Letter does not even concern the Lower Arch Policy at issue in this action, TIAA resorted to highlighting (for the first time during oral arguments on the summary judgment motions) the fact that Arch had also internally closed its second claim file for *Rink* with respect to the Lower Arch Policy.[109] However, this second closure was never communicated to TIAA, and TIAA did not become aware of it until it first learned of this separate and internal closure while deposing an Arch witness in this action.[110] Significantly, over a century of New York jurisprudence requires that common-law waiver, when implied by conduct, must be predicated on justifiable reliance. *Allen v. Dutchess Cnty. Mut. Ins. Co.*, 95 A.D. 86, 87-89 (N.Y. App. Div. 1904) (in absence of *express* waiver, some elements of estoppel must exist – the assured must have been misled by some action by insurer); *Bank of N.Y. v. Murphy*, 645 N.Y.S.2d 800, 802 (N.Y. App. Div. 1996) (holding that "justifiable reliance" is "necessary element" of both waiver and estoppel); *Fox-Knapp, Inc. v. Employers Mut. Cas. Co.*, 725 F. Supp. 706, 711 (S.D.N.Y. 1989) (insured must show insurer intended to lull the insured into inactivity); *Skylark Enters., Inc. v. Am. Cent. Ins. Co.*, 201 N.Y.S.2d 174, 175 (Sup. Ct. 1960) ("The law is settled that this does not constitute a waiver and that there must be such conduct on the part of an insurer which deceives the

[109] JA5173.

[110] *Id.* ("I referenced you to deposition testimony that clarifies that Arch closed its…*Rink* file.").

[redacted]

assured so that he sleeps on his rights, in the nature of an estoppel, before he is excused from complying with a limitation such as this.").[111]

Of course, TIAA could not rely on the internal file closure at all because it was not known to TIAA, and therefore waiver could not ensue. Courts have determined this with respect to internal activity (such as an insurer's internal notes) and other uncommunicated acts. *Gelfman v. Capitol Indem. Corp.*, 39 F. Supp. 3d 255, 271 (E.D.N.Y. 2014) (insurer's internal notes are "not evidence of any communication to the [insureds] on which [the insureds] could purport to have relied"); *First Nat'l Bank v. Gridley*, 112 A.D. 398, 406-07 (N.Y. App. Div. 1906) ("I am wholly unable to comprehend upon what principle an absolute waiver can be implied from an equivocal act not communicated to the plaintiff."). Nor could TIAA have believed it was futile to seek consent based on information it did not know.

Even if waiver could be established by unknown activity (and it cannot), a mere closure of a claim file falls far short of the necessary standard. A waiver

[111] *Armstrong v. Agricultural Ins. Co.*, 29 N.E. 991, 993 (N.Y. 1892) ("[I]n every case where a waiver has been implied from the [insurer]'s acts, there has existed something of the element of an estoppel," such as when "[t]he [insured] has been misled to his harm."); *Palma v. Nat'l Fire Ins. Co.*, 270 N.Y.S. 503, 508 (App. Div. 1934) (requiring "an intention to abandon, or not to insist upon, the particular defense afterwards relied upon, or that it was purposely concealed under *circumstances calculated to, and which actually did, mislead* the other party to his injury").

[redacted]

must be "clear, unmistakable and without ambiguity" and "cannot be created by oversight or negligence." *E.g., Travelers Indem. Co. v. Northrop Grumman Corp.*, 2013 U.S. Dist. LEXIS 161552, at *33 (S.D.N.Y. Oct. 31, 2013). An insurer's decision to internally close a file cannot be viewed as a waiver of its rights without first taking a number of inferential leaps. However, "waiver should not be lightly presumed," and the act of closing a file simply cannot establish the required "clear manifestation of intent to relinquish a contractual protection." *Luitpold Pharms., Inc. v. Ed. Geistlich Söhne A.G. Für Chemische Industrie*, 784 F.3d 78, 95 (2d Cir. 2015).

[redacted]

IV. ARCH'S COVERAGE LETTER REGARDING *BAUER* DID NOT EXCUSE THE CONSENT REQUIREMENT.

A. Questions Presented

Did Arch's *Bauer* Letter waive Arch's right to consent to the *Bauer* settlement or otherwise make it futile for TIAA to seek Arch's consent under the 2007-08 Arch Policy?

Did Arch's *Bauer* Letter waive Arch's consent defense to the *Rink* settlement?

These issues were raised in the parties' motions for summary judgment, Arch's motion for judgment as a matter of law, at trial, and in Arch's renewed motion for judgment as a matter of law.[112]

B. Scope of Review

Questions of law are reviewed *de novo*. *Broadmeadow Inv., LLC*, 56 A.3d at 1059. This includes the Superior Court's rulings on the motions for summary judgment and for judgment as a matter of law. *Rizzitiello*, 868 A.2d at 829; *Saudi Basic Indus. Corp.*, 866 A.2d at 24. The Supreme Court will review a jury's factual findings for "any competent evidence upon which the verdict could reasonably be based" and it will set aside jury verdicts only if "a reasonable jury

[112] JA4991-JA4996, JA6368-JA6370, DA0153-DA0154, AA000334-AA000336.

could not have reached the result." *Town of Cheswold v. Vann*, 9 A.3d 467, 473-74 (Del. 2010).

C. Merits of Argument

TIAA also points to Arch's *Bauer* Letter and argues that it waived Arch's consent defense for the previous *Rink* settlement and also waived Arch's right to consent to the future *Bauer* settlement (or otherwise made it futile for TIAA to seek Arch's consent before settling *Bauer*).[113] The *Bauer* Letter set forth Arch's coverage position with respect to *Bauer* under Arch's 2009-10 policies by adopting Illinois National's denial of coverage for *Bauer*.[114] Before turning to the substance of Arch's coverage position, there are a number of threshold issues that should have precluded consideration of the *Bauer* Letter.

First, Arch's *Bauer* Letter expressly applied only to Arch's policies from the 2009-10 policy year. TIAA is no longer seeking coverage under any 2009-10 policy.[115] At this time, TIAA is only pursuing the 2007-08 Arch Policy, and the *Bauer* Letter makes zero mention of the 2007-08 Arch Policy. Therefore, it is unreasonable to view the *Bauer* Letter as having any impact on Arch's rights under the 2007-08 Arch Policy for the *Rink* or *Bauer* settlement. Waiver under the 2007-

[113] JA3266.

[114] Letter from J. Salzman to S. Victor re: Arch coverage position letter re Bauer-Ramazani Action, JA4716-JA4719.

[115] JA3274.

08 Arch Policy would require a cavernous leap not contemplated by New York common law. *Luitpold Pharms., Inc. v. Ed. Geistlich Söhne A.G. Für Chemische Industrie*, 784 F.3d 78, 95 (2d Cir. 2015) (waiver "should not be lightly presumed" and requires "clear manifestation of intent"). Similarly, the *Bauer* Letter also makes no mention of coverage for the *Rink* Action, and for the same reason, it could not waive Arch's consent defense for the *Rink* settlement. *Id.*

TIAA also argued that, pursuant to the *Bauer* Letter, Arch denied or repudiated coverage for the *Bauer* Action, thereby relieving TIAA from its obligation to seek consent to settle *Bauer*.[116] TIAA's argument, however, directly contradicts the language of the *Bauer* Letter. While the *Bauer* Letter adopted Illinois National's disclaimer of *Bauer*, Arch qualified its position making it clear that it was not actually refusing potential liability for *Bauer*. To the contrary, Arch expressly made its position subject to change based on new information and specifically invited TIAA to provide any additional information it believed "should be factored into" Arch's analysis so that Arch could review it for its impact on coverage.[117] Moreover, the *Bauer* Letter expressly asked to keep Arch advised of the status of *Bauer* so Arch could participate in settlement discussions. Given this indication that Arch might contribute to a settlement of *Bauer*, the language clearly

[116] JA3266.

[117] JA4716-JA4719.

[redacted]

eliminates any inference that the *Bauer* Letter was a blanket refusal of coverage. TIAA could not reasonably believe it was futile to request Arch's consent when Arch sought to participate in the settlement. *Md. Cas. Co. v. W.R. Grace & Co.*, 1996 U.S. Dist. LEXIS 7795, at *4-5 (S.D.N.Y. June 7, 1996) (repudiation requires insurer's "definite and final communication").

Similar circumstances were addressed in *City of Utica v. Genesee Management*, 934 F. Supp. 510 (N.D.N.Y. 1996). There, the Court concluded that an insurer's letter did not directly disclaim coverage as it invited the insured to "explain why [it] believe[s] that this contract should respond to this situation." *Id.* at 521. Consequently, the letter did not waive un-asserted defenses because it was not an actual disclaimer, and the Court granted summary judgment for the insurer. *Id.*; *see also Travelers Indem. Co. of Am. v. S. Gastronom Corp.*, 2010 U.S. Dist. LEXIS 32333, at *47-48 (E.D.N.Y. Mar. 3, 2010) (it is "simply incredulous" for insured to ignore conditions contained in coverage letter), *aff'd*, 2011 U.S. App. LEXIS 11711 (2d Cir. June 8, 2011).[118]

While TIAA could not reasonably believe it was futile to seek consent, TIAA also did not actually believe it. TIAA's reliance on the *Bauer* Letter is

[118] *See also U.S. Underwriters Ins. Co. v. Falcon Constr. Corp.*, 2006 U.S. Dist. LEXIS 79329, at *13 n.5 (S.D.N.Y. Oct. 30, 2006) (disclaimer requires sufficiently definite language); *Cent. Mut. Ins. Co. v. Willig*, 29 F. Supp. 3d 112, 117 (N.D.N.Y. June 27, 2014) (same); *Tudor Ins. Co. v. McKenna Assocs.*, 2005 U.S. Dist. LEXIS 9046, at *15 (S.D.N.Y. May 12, 2005) (same).

completely undermined by the fact that TIAA still sought consent from Illinois National and ACE for the *Bauer* settlement, even after both insurers had previously denied coverage for *Bauer*.[119] TIAA thus did not view such communications as a waiver of consent or as a repudiation. In light of the foregoing, it is not surprising that the Superior Court ultimately found that Arch did not repudiate.[120]

TIAA also argued that Arch waived the consent defense because the *Bauer* Letter did not specifically identify the consent defense as a basis for disclaiming coverage.[121] TIAA's argument was based on a line of New York cases finding that, when an insurer disclaims coverage on one ground, it waives all other un-asserted defenses as long as it has sufficient knowledge of the un-asserted defense. *E.g.*, *State of N.Y. v. AMRO Realty Corp.*, 936 F.2d 1420, 1431 (2d Cir. 1991). However, there are several reasons why this precedent does not apply here.

First, this precedent stems from an insurer's duty under New York Insurance Law § 3420(d), and this statute only applies to insurance claims for death or bodily injury. *E.g.*, *Fairmont Funding, Ltd. v. Utica Mut. Ins. Co.*, 694 N.Y.S.2d 389, 390-91 (App. Div. 1999) (Section 3420(d) does not apply to "errors and omissions" policy). When Section 3420(d) applies, an insurer can waive a defense

[119] E-mail from Sanford Victor to Susan Rosmarin and Christina Smith regarding *Bauer* (Dec. 17, 2013), JA4720-JA4723.

[120] JA6674-JA6675.

[121] JA3272-JA3273.

if its disclaimer is not issued promptly and with specificity. *Ability Transmission, Inc. v. John's Transmission, Inc.*, 150 A.D.3d 1056, at 1057 (N.Y. App. Div. 2017). This is fundamentally the same as the theory waiving defenses not asserted in a disclaimer. After all, when a defense is missing from the original disclaimer, it is not being promptly raised, and the original disclaimer is not specific enough as to the missing defense.

The entanglement of TIAA's theory and Section 3420(d) is demonstrated in *Roman Catholic Diocese of Brooklyn v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA.*, 991 N.E.2d 666, 669-71 (N.Y. 2013). There, the insured argued that the insurer waived two defenses by failing to timely include them in its disclaimer letter. Nevertheless, New York's highest court still analyzed waiver based on the "as soon as is reasonably possible" standard taken from Section 3420(d). *Id.*

In fact, a New York appellate court recently attempted to establish that defenses not asserted in a disclaimer can *still* be waived pursuant to common-law principles *even if* Section 3420(d) does not apply. *Estee Lauder Inc. v. OneBeacon Ins. Grp.*, 130 A.D.3d 497, 497-80 (N.Y. App. Div. 2015). However, New York's highest court reversed the decision and reaffirmed that the standard for common-law waiver is "clear manifestation of intent." *Estee Lauder Inc. v. OneBeacon Ins. Grp., LLC*, 63 N.E.3d 66, 66-67 (N.Y. 2016). In other words, without a duty under Section 3420(d), a disclaimer letter does not automatically waive un-asserted

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defenses, and instead the insured must establish a clear manifestation of intent to waive. Given that this action involves professional-liability insurance and does not concern bodily injury, Arch had no duty to speak under Section 3420(d). Therefore, TIAA's automatic-waiver theory should not even be considered in the first instance.

TIAA's waiver theory for un-asserted defenses is also precluded by the *Bauer* Letter's reservation-of-rights language, which expressly reserved all rights "whether or not such rights were specifically referenced [t]herein," including "the right to raise additional defenses or exclusions to coverage as circumstances warrant."[122] Under New York law, it is well-settled that an insurer's disclaimer does not waive un-asserted defenses if that disclaimer also contains a reservation of rights, as long as the reservation language is sufficiently broad to include the un-asserted defense. *Guberman v. William Penn Life Ins. Co.*, 538 N.Y.S.2d 571, 574 (App. Div. 1989) (where insurer states that one defense should not be construed to waive others, "it is difficult to imagine" how insured could reasonably believe in waiver); *Royal Ins. Co. of Am. v. DHL Worldwide Express*, 1999 U.S. Dist. LEXIS 13061, at *9-11 (S.D.N.Y. Aug. 25, 1999), *aff'd*, 2000 U.S. App. LEXIS 3469 (2d Cir. Feb. 28, 2000) (disclaimer does not waive un-asserted defenses when containing reservation broad enough to encompass subsequently asserted defense);

[122] JA4716-JA4719.

[redacted]

Heiser v. Union Cent. Life Ins. Co., 1995 U.S. Dist. LEXIS 8271, at *17 (N.D.N.Y. June 12, 1995) (where disclaimer contains reservation, "it cannot be said that [insurer], by word or act, intended to abandon [the un-specified defense] as a ground for denial"); *Lugo v. AIG Life Ins. Co.*, 852 F. Supp. 187, 192 (S.D.N.Y. 1994) (disclaimer did not waive unspecified defense because general reservation made it "obvious" insurer did not abandon defense); *Employers Ins. of Wausau v. Duplan Corp.*, 1999 U.S. Dist. LEXIS 15368, at *126-28 (S.D.N.Y. Sept. 28, 1999) (insurer's answer was first affirmative disclaimer but contained reservation language, which "manifest[ed] its intention to preserve – not abandon – any defense not included therein").

Moreover, a disclaimer letter's general reservation clause will preclude waiver as a matter of law, given that New York courts have used this basis to dismiss waiver claims against insurers at the motion-to-dismiss phase and upon summary judgment. *Home Décor Furniture & Lighting, Inc. v. United Nat'l Group*, 2006 U.S. Dist. LEXIS 100759, at *20, 25-26 (E.D.N.Y. Dec. 12, 2006) (granting insurer summary judgment holding that, *as a matter of law*, disclaimer with general reservation clause did not waive other defenses); *Gen. Ins. Co. of Am., Inc. v. Marvel Enters.*, 784 N.Y.S.2d 920, 920 (Sup. Ct. 2004) (no waiver as a matter of law because "courts have held that an insurer does not waive other defenses if it expressly reserves its right to assert them in the future"); *Constitution*

[redacted]

Reins. Corp. v. Stonewall Ins. Co., 980 F. Supp. 124, 132 (S.D.N.Y. 1997) (granting summary judgment because disclaimer letters contained unequivocal reservations of rights and therefore could not waive other defense); *Tudor Ins. Co. v. First Advantage Litig. Consulting, LLC*, 2012 U.S. Dist. LEXIS 120178, at *38 & n.12 (S.D.N.Y. Aug. 21, 2012), *aff'd*, 525 Fed App'x 60 (2d Cir. 2013) (granting summary judgment while holding that, where insurer ultimately disclaims coverage on different ground than initially identified, reservation as to other grounds precludes waiver); *Nat'l Rests. Mgmt. v. Exec. Risk Indem., Inc.*, 758 N.Y.S.2d 624, 625 (App. Div. 2003) (affirming insurer's motion to dismiss because disclaimer with reservation did not waive un-asserted defense).

The *Bauer* Letter's reservation language is exceedingly broad and clearly encompasses Arch's consent defense. Consequently, as a matter of law, Arch did not waive consent with its *Bauer* Letter and appropriately raised consent in its Answer. *Neth. Ins. Co. v. United Specialty Ins. Co.*, 2017 U.S. Dist. LEXIS 140403, at *34-36 (S.D.N.Y. Aug. 30, 2017) (even though insurer did not raise defense in original disclaimer and first asserted it as defense in insurance litigation, insurer did not waive defense because original disclaimer reserved all rights "whether cited in this letter or not").

Moreover, while the *Bauer* Letter's reservation clause, as a matter of law, prevented any waiver of unspecified defenses, TIAA also understood that to be the

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case. TIAA's own witness, Ira Cohen, admitted during cross-examination that such reservation language meant that Arch wasn't giving up any rights.[123]

Accordingly, this Court should reverse the Superior Court's decisions below and grant Arch summary judgment on its consent defense for the *Rink* and *Bauer* settlements or at least grant Arch judgment as a matter of law.

[123] Trial Tr. 178:9 – 180:9, 181:16 – 182:5 (Test. of Ira Cohen) (Dec. 6, 2016), JA5807-JA5808.

[redacted]

V. IT WAS REVERSIBLE ERROR TO REFUSE JURY INSTRUCTIONS REGARDING THE PROPER STANDARD AND LIMITATIONS OF WAIVER.

A. Questions Presented

Was it reversible error to refuse jury instructions explaining the limitations of waiver in the face of evidence of Arch's silence, Arch's reservation language, and information unknown to TIAA when it settled without Arch's consent?

The issue was raised in the parties' pre-trial stipulation, in Arch's proposed jury instructions, at trial, and in Arch's motion for a new trial.[124]

B. Scope of Review

A denial of a requested jury instruction is reviewed *de novo*. *R.T. Vanderbilt Co. v. Galliher*, 98 A.3d 122, 125 (Del. 2013). A trial court must submit all the issues affirmatively to the jury and must not ignore a requested jury instruction applicable to the facts and law of the case. *Id.*

C. Merits of Argument

Although the consent defense should have resulted in judgment in Arch's favor as a matter of law, Arch's consent issue proceeded to trial and was submitted to a jury. Arch's proposed a number of jury instructions to ensure each juror was aware of the law on waiver before deliberating. However, the Superior Court

[124] AA000193, AA000279, AA000338-AA000347, JA6464-JA6565 at 24:16-25:4.

[redacted]

refused to include a number of instructions that would have caused a reasonable juror to discount the vast majority of TIAA's evidence.[125]

For example, the Superior Court refused to include Arch's requested instruction explaining there can be no waiver until "an insurer has an obligation to either accept or deny coverage" and "[m]ere silence on the part of the insurer cannot waiver a defense."[126] Consequently, and in contravention of the law, the jury was given approval to consider Arch's silence, including evidence that Arch did not object to the settlements (even though those settlement agreements were signed before TIAA ever reported them to Arch) and waited until this action before raising consent.[127] In fact, the Court later expressly determined that Arch's silence and failure to object to the settlements justified the jury's verdict against Arch, which confirms the error was prejudicial.[128]

Moreover, the Superior Court rejected additional instructions proposed by Arch regarding the limitations of waiver, including that TIAA was required to demonstrate a "clear manifestation of intent" to waive and that "an insurer's denial of coverage or other conduct does not waive un-asserted defenses if the insurer

[125] JA6341-JA6344 at 202:14-205:3.

[126] AA000278-AA000280, JA JA6341-JA6344.

[127] *Id*.

[128] JA6647-JA6649.

[redacted]

also reserves its rights to assert other defenses."[129] Accordingly, without being informed of waiver's limitations, the jury had unconditional authority to give weight to the *Bauer* Letter and to information then-unknown to TIAA without being instructed that this evidence cannot support waiver. Again, the Court confirmed that Arch was prejudiced when it subsequently concluded that such evidence justified the verdict.[130]

Given that the jury was incorrectly instructed on the law and the likelihood that this impacted the verdict, this Court should alternatively set aside the verdict and grant Arch a new trial.

[129] AA000279-AA000280.

[130] JA6647-JA6649.

[redacted]

VI. IT WAS REVERSIBLE ERROR TO ALLOW TIAA'S FUTILITY ARGUMENT AND TO APPLY A PREPONDERANCE STANDARD.

A. Questions Presented

Was it reversible error to permit TIAA's "futility" argument and/or to instruct the jury to apply a "preponderance of the evidence" standard to this issue?

The issue was raised in the parties' pre-trial stipulation of issues to be decided at trial, at trial and in Arch's motion for a new trial.[131]

B. Scope of Review

Claims that the Superior Court determined the applicable law incorrectly or instructed the jury erroneously are reviewed *de novo* for legal error. *Saudi Basic Indus. Corp.*, 866 A.2d at 24.

C. Merits of Argument

The Superior Court committed reversible error by permitting a special verdict form interrogatory and corresponding jury instruction regarding TIAA's so-called "futility" argument, which purportedly excused TIAA from seeking Arch's consent if the request would be futile or pointless.[132]

New York law does not recognize futility as an independent theory for excusing consent. Instead, futility is simply part of the theory of implied waiver or sometimes anticipatory repudiation. *Isadore Rosen & Sons, Inc. v. Sec. Mut. Ins.*

[131] AA000188, AA000345-AA000347, JA6366.

[132] Trial Tr. (Jury Instructions) (Dec. 9, 2016), JA6341-JA6342 at 202:19 - 203:14.

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Co. of N.Y., 291 N.E.2d 380 (1972) (finding issue of fact as to whether insurer *waived* consent); *Gen. Star Nat. Ins. Co. v. Univ. Fabricators, Inc.*, 427 Fed. App'x 32, 34 (2d Cir. 2011) (insurer *relinquished* consent right). In denying Arch a new trial on this basis, the Superior Court relied upon two cases as examples of the "futility" theory: *J. Petrocelli Const., Inc. v. Realm Elec. Contractors, Inc.*, 790 N.Y.S.2d 197 (App. Div. 2005), and *Allbrand Discount Liquors, Inc. v. Times Square Stores Corp.*, 399 N.Y.S.2d 700 (App. Div. 1977).[133] However, both cases make it clear that futility is intertwined with the theory of repudiation or anticipatory breach of contract. *J. Petrocelli*, 790 N.Y.S.2d at 199; *Allbrand*, 399 N.Y.S.2d at 701; *see also L&L Painting Co., Inc. v. Odyssey Contr. Corp.*, 2014 N.Y. Misc. LEXIS 4300, at *15-16 (N.Y. Sup. Sept. 25, 2014).

Given that the concept stems from theories of waiver or repudiation, "futility" must be predicated on conduct relied upon by the insured. *E.g.*, *Bank of N.Y. v. Murphy*, 645 N.Y.S.2d 800, 802 (App. Div. 1996) (waiver requires justifiable reliance); *Stanford Square L.L.C. v. Nomura Asset Capital Corp.*, 228 F. Supp. 2d 293, 299-300 (S.D.N.Y. 2002) (requiring "overt communication" to establish repudiation and rejecting evidence "learned from third parties"). It must be conduct *at the time* of the settlements on which the insured could have relied *at the time* to believe it would be futile to seek consent. By permitting TIAA to use

[133] JA6649.

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futility as a concept separate from traditional theories of repudiation or implied waiver, the Superior Court effectively confused the jury into believing they could consider other evidence outside of Arch's then-known conduct to determine, in hindsight, whether Arch actually would have paid the settlements. To the contrary, the determination must be based on what would have been clear from TIAA's reasonable perspective at the time of the settlements based on Arch's then-known behavior. *Id.*

TIAA seized on this confusion and perpetuated it throughout the trial.[134] It fueled the confusion by introducing all sorts of evidence to show that Arch would not have paid the settlements based on what we know now.[135] This culminated with TIAA's closing arguments where it expressly tied its futility question to such hindsight evidence.[136] Based on evidence beyond Arch's communications with TIAA, TIAA argued that Arch would have followed Illinois National's position even if asked for consent. TIAA then stated: "And this goes to futility. Would it have mattered? Would it have made a difference if we asked them? Nothing would be different. We would be here [in court] doing the same thing."[137] TIAA was permitted to inappropriately lower the standard by equating "futility" with

[134] Trial Tr. (Dec. 9, 2016) 227:6 – 227:17, JA6366.

[135] AA000218-AA000227.

[136] Trial Tr. (Dec. 9, 2016) 227:6 – 227:17, JA6366.

[137] Trial Tr. (Dec. 9, 2016) 225:12 – 227:15, JA6364-JA6366.

"pointlessness" or "uselessness." *U.S. Bank N.A. v. DLJ Mtge. Capital, Inc.*, 2015 N.Y. Misc. LEXIS 872, at *28 (N.Y. Sup. Ct. Mar. 24, 2015) ("futility" standard is not "uselessness" but instead requires impossibility of performance or repudiation). As a result, Arch was prejudiced by the inclusion of futility as a separate jury question with a corresponding instruction.

Since futility should not have been separate from the waiver question, it also was reversible error to apply a lower burden of proof. The futility question permitted TIAA to evade the stricter "clear and convincing evidence" standard that the Superior Court applied to waiver. Instead, the less burdensome "preponderance" standard was applied to futility.[138]

Had TIAA not been allowed to frame a waiver or anticipatory repudiation argument with vague and confusing terms like "futility" and "pointless," TIAA would have been required to establish that Arch's then-known conduct amounted to waiver or anticipatory repudiation of the Arch Policy. As discussed throughout this opening brief, TIAA did not come close to meeting the standard to prove waiver. Moreover, for similar reasons, Arch could not have been found to repudiate the Arch Policy. *Princes Point LLC v. Muss Dev. L.L.C.*, 87 N.E.3d 121, 30 N.Y.3d 127, 133 (N.Y. 2017) (anticipatory repudiation requires "positive" and "unequivocal" expression of intent not to perform). Indeed, the Superior Court

[138] JA6518.

actually (and correctly) did hold as a matter of law that Arch did not repudiate the Arch Policy because there was no unambiguous evidence of repudiation.[139] Accordingly, since true theories of "futility" applying the accurate standard could not succeed as a matter of law (and in fact were not even asserted by TIAA), it follows that TIAA's futility theory should have been rejected. Instead, it tainted the jury's verdict and prejudiced Arch.

[139] JA6674-JA6675.

VII. THE SUPERIOR COURT'S EVIDENTIARY RULINGS INCLUDED REVERSIBLE ERRORS.

A. Questions Presented

Was it reversible error to permit evidence regarding (1) Arch's Closure Letter concerning the Higher Arch Policy, (2) Arch's then-unknown closure of its *Rink* file associated with the Lower Arch Policy, and/or (3) other insurers' deposition testimony regarding whether consent was required?

These issues were raised in Arch's motions *in limine*, at trial, and in Arch's renewed motion for judgment as a matter of law and for a new trial.[140]

B. Scope of Review

The Court applies an abuse-of-discretion standard of review as to the trial court's evidentiary rulings and ruling on a motion for new trial. *Barriocanal v. Gibbs*, 697 A.2d 1169, 1171 (Del. 1997).

C. Merits of Argument

The Superior Court abused its discretion by permitting various evidence and testimony over the objections of Arch. Assuming, *arguendo*, that Arch is not entitled to judgment as a matter of law, this Court should at least reverse these evidentiary rulings and grant a new trial.

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[140] AA000001-AA000020, AA000339-AA000344, AA000347-AA000348, JA5773.

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With motions *in limine*, Arch challenged the admissibility of (1) the Closure Letter and (2) the internal file closure on two grounds: relevance and unfair prejudice.[141] Evidence is only admissible if it is relevant, which requires a "tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." D.R.E. 401-402. Accordingly, evidence must be both material and probative. *Farmer v. State*, 698 A.2d 946, 948 (Del. 1997).

As discussed above, the Closure Letter cannot be relevant because the letter only concerns the *Rink* file associated with the Higher Arch Policy, and TIAA is not seeking coverage under that policy.[142] Since the Higher Arch Policy is not at issue, a letter concerning Arch's belief that *Rink* would not ultimately reach the Higher Arch Policy is immaterial. The Closure Letter clearly references the Higher Arch Policy and makes absolutely no mention of the Lower Arch Policy that is actually at issue or the claim number associated with the Lower Arch Policy. Consequently, the Closure Letter could not possibly impact Arch's rights under an entirely different insurance policy. As such, it is not probative of Arch's rights under the Lower Arch Policy.

[141] AA000001-AA000020.

[142] AA000214 at ¶ 70.

[redacted]

Moreover, presenting the Closure Letter to the jury was unfairly prejudicial and likely led to jury confusion, substantially outweighing any probative value. D.R.E. 403. TIAA used the Closure Letter to show Arch waived the consent provision in the Lower Arch Policy (or that it was futile) even though the Closure Letter only concerned the Higher Arch Policy.[143] During direct examination of TIAA's witness, Ira Cohen testified that the Closure Letter meant that "Arch is saying we're [redacted] excess of [redacted], we don't think the *Rink* matter will go that high, thanks for the material, but we're closing our file."[144] Again, the Closure Letter only addressed the Higher Arch Policy, which cannot be triggered until there is at least [redacted] in covered loss, and therefore, Mr. Cohen's testimony confused the jury by connecting the Closure Letter to the wrong policy.[145] Further, TIAA tied the Closure Letter for the Higher Arch Policy to Arch's acknowledgment letter for the Lower Arch Policy,[146] even though the Closure

[143] JA3272.

[144] Trial Tr. 38:1 – 10 (Test. of Ira Cohen) (Dec. 6, 2016), JA5772.

[145] *Id*. at 39:3 – 11 ("Q. Now, I think in the tower we identified that Arch had participated in two layers. Is that correct? A. Yes. Q. And did you make a distinction at the time you received this as to what this letter applied to? A. No, I did not. I just felt that they were closing their file on Rink in total.").

[146] Letter from S. White (Arch) to S. Victor re: acknowledgment of *Rink* (Dec. 11, 2007), JA2916-JA2918; Trial Tr. 45:18 – 48:4 (Test of Ira Cohen) (Dec. 6, 2016) ("Q. And you see, is that the December 11th, 2007 letter that the closing letter was referring to? A. That is correct….Q. Did you, at the time you received the letter PX337, which was the letter closing files, did you appreciate that this letter was

[redacted]

Letter actually referred to a separate acknowledgement letter for the Higher Arch Policy sent on the same date.[147] While Arch attempted to clear up this confusion during trial, this was extremely confusing to the jury and unfairly prejudicial to Arch.

Similarly, the Superior Court abused its discretion by permitting TIAA to introduce evidence of Arch's internal closure of its second *Rink* file associated with the Lower Arch Policy. Arch's internal closure has no relevance to TIAA's waiver arguments, because TIAA did not learn of this second closure until fact discovery in this action.[148] Yet, waiver, when implied by conduct, must be predicated on justifiable reliance. *E.g.*, *Allen v. Dutchess Cnty. Mut. Ins. Co.*, 95 A.D. 86, 87-89 (N.Y. App. Div. 1904) (implied waiver requires elements of estoppel and must mislead insured); *Bank of N.Y. v. Murphy*, 645 N.Y.S.2d 800, 802 (App. Div. 1996) ("justifiable reliance" is "necessary element" of waiver); *Fox-Knapp, Inc. v. Employers Mut. Cas. Co.*, 725 F. Supp. 706, 711 (S.D.N.Y.

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referring to a different policy number than the prior number? A. I did not appreciate that."), JA5773-JA5774.

[147] Letter from S. White (Arch) to S. Victor re: acknowledgment of *Rink* under BFI Policy, AA000354.

[148] JA5173 ("I referenced you to deposition testimony that clarifies that Arch closed its…*Rink* file."); Dep. of Jeremy Salzman, at 110:15-24, JA4619.

[redacted]

1989) (insurer must intend to lull insured into inactivity).[149]

Of course, TIAA could not rely on the file closure at all because it was unknown to TIAA, and therefore waiver cannot result. Courts have determined this with respect to internal activity (such as an insurer's internal notes) and other uncommunicated acts. *E.g.*, *Gelfman v. Capitol Indem. Corp.*, 39 F. Supp. 3d 255, 271 (E.D.N.Y. 2014) (insurer's internal notes are "not evidence of any communication to the [insureds] on which [the insureds] could purport to have relied"); *First Nat'l Bank v. Gridley*, 112 A.D. 398, 406-07 (N.Y. App. Div. 1906) ("I am wholly unable to comprehend upon what principle an absolute waiver can be implied from an equivocal act not communicated to the plaintiff.").

Nor could TIAA have believed it was futile to seek consent based on information it did not know. It is contrary to the law and defies logic to imply waiver with conduct unknown to the party asserting waiver. Therefore, the internal file closure was immaterial and had no probative value. D.R.E. 401-402. Whatever minute probative value Arch's internal file closure might theoretically have in supporting waiver was substantially outweighed by unfair prejudice.

[149] *See also Skylark Enters., Inc. v. Am. Cent. Ins. Co.*, 201 N.Y.S.2d 174, 175 (Sup. Ct. 1960) (waiver requires insurer to deceive insured to sleep on his rights, in the nature of estoppel); *Armstrong v. Agricultural Ins. Co.*, 29 N.E. 991, 993 (N.Y. 1892) (implied waiver requires element of estoppel such as when insured is misled to his harm); *Palma v. Nat'l Fire Ins. Co.*, 270 N.Y.S. 503, 508 (App. Div. 1934) (defense must be purposely concealed under *circumstances calculated to, and which actually did, mislead* the other party to injury).

[redacted]

D.R.E. 403. In particular, the jury likely confused Arch's actual conduct with Arch's then-known conduct.

The Superior Court further abused its discretion in allowing TIAA to introduce deposition testimony at trial from witnesses for other insurers regarding whether consent was required for settlement. For example, ACE did not raise any consent issues and was not even involved in (or present at) the trial. Yet, despite Arch's objections, TIAA played video clips from the deposition of the ACE claims handler testifying that she "did not believe" consent was needed to settle *Rink*.[150] TIAA also played clips in which she testified that once coverage is denied, TIAA did not need to seek consent.[151]

Arch's own consent provision is significantly different from the one in ACE's policy,[152] and jurors likely were confused by this distinction and led to believe the same standard applies to all insurance policies regardless of differences in terms. Arch also had no ability at trial to cross-examine the witnesses with respect to those differences or as to the intent of Arch's *Bauer* Letter. TIAA double-downed on this opportunity by introducing similar evidence from other

[150] Dep. of Christina Smith, AA000357-AA000367 at 126:02 – 15 ("Q. Because the amount of the settlement was below Ace's attachment point, TIAA-CREF did not need to seek consent from Ace with respect to that settlement; is that correct? A. I don't believe it did in that case.").

[151] *Id*. at 223:02 – 223:05.

[152] JA0496-JA0502.

[redacted]

insurers and then telling the jury during closing arguments that this meant TIAA did not need Arch's consent.[153]

In fact, the jury was not supposed to interpret the meaning of Arch's consent provision. Prior to trial, the Superior Court determined that Arch's consent language was unambiguous.[154] Despite no ambiguity, the Court permitted TIAA to effectively use these witnesses as expert testimony as to the meaning of an unambiguous consent provision. Such testimony, along with TIAA's closing statements, carried with it a high risk of misleading jurors that it was excused from obtaining Arch's consent, regardless of whether any of Arch's then-known conduct was sufficient to clearly manifest intent to waive or repudiate. Consequently, the evidence twisted the standard TIAA had to meet.

Accordingly, the Superior Court abused its discretion and committed reversible error in allowing TIAA to introduce evidence of the Closure Letter, Arch's internal file closure, and deposition testimony from other insurers, each of which had no probative value and served only to unfairly prejudice Arch.

[153] Trial Tr. (Dec. 9, 2016) 225:19 – 227:5, 230:21 – 231:11, JA6364-JA6366, JA6369-JA6370.

[154] JA5295.

VIII. THE SUPERIOR COURT ERRED IN DETERMINING THE SIZE OF THE REDUCTION TO ARCH'S POLICY LIMIT.

A. Questions Presented

When Arch's policy limit was reduced as a result of TIAA's settlement with St. Paul, should the Superior Court have factored in the settlement of prejudgment interest claims to further reduce Arch's limit?

The issue was raised in Arch's partial opposition to TIAA's 54(b) motion for entry of a final order and judgment.[155]

B. Scope of Review

The Court reviews *de novo* questions of law. *Broadmeadow Inv., LLC*, 56 A.3d at 1059.

C. Merits of Argument

Although the Arch Policy's coverage was originally limited to [redacted], TIAA conceded (and the Superior Court agreed) that Arch's coverage limit must be reduced pursuant to the Arch Policy's "shavings" provision as a result of TIAA's settlement with St. Paul.[156]

To provide some background, coverage under the Arch Policy cannot be triggered until the underlying insurance is paid by the insurers of the underlying

[155] AA000468-AA000471.

[156] AA000660-AA000661.

[redacted]

policies.[157] However, Endorsement No. 4 permits the payment of some of the underlying insurance to come directly from TIAA under very limited circumstances. For example, payment may be made by "the Insureds … pursuant to a Limit Reduction Agreement … with the insurer(s) of the Underlying Insurance."[158] We understand TIAA's settlement agreement with St. Paul constitutes a "Limit Reduction Agreement,"[159] and it is undisputed that this entitles Arch to a "shaving" off of its limit proportional to the discount received by St. Paul. What the parties dispute is the size of the discount, and this is where the Superior Court erred.

Specifically, the shavings provision provides that Arch's limit "shall be reduced by at least the largest percentage savings of the Underlying Insurance's Limit(s) of Liability as provided in the Limit Reduction Agreements."[160] Because St. Paul had a [redacted] limit and settled for [redacted], the Superior Court took this to mean that St. Paul saved [redacted] of its limit.[161] However, the Court refused to factor in that additional claims beyond St. Paul's limit were also released. St. Paul did not solely settle St. Paul's insurance limit; the agreement

[157] Arch Policy, Endorsement No. 4, JA0518.

[158] *Id.*, JA0518.

[159] *Id.*

[160] *Id.*

[161] JA6678.

[redacted]

also settled [redacted] in claimed prejudgment interest.[162] When taking this into account, St. Paul actually settled a [redacted] claim for [redacted], which is a [redacted] discount.

The Superior Court said the settled interest claim "does not change the fact that St. Paul Mercury paid [redacted] of its limits of liability."[163] It is true that St. Paul paid an amount equal to [redacted] of its limit, but not all of this payment came from St. Paul's limit. TIAA will readily admit that prejudgment interest is not subject to policy limits and cannot be used to erode the coverage limits. After all, TIAA sought from Illinois National (and was awarded) [redacted] above Illinois National's limit[164] (and TIAA is still pursuing ACE and Arch for amounts above their respective limits due to interest). Therefore, the portion of St. Paul's payment attributable to claimed interest did not come from St. Paul's limit, and St. Paul actually and necessarily received a greater savings on its limit. Arch is in turn entitled to a greater discount off its own limit. As a result, the Superior Court

[162] Joint Mot. to Dismiss All Claims Between Pls. and Defs. St. Paul Mercury Insurance Company and St. Paul Fire & Marine Insurance Company, Pursuant to Rule 41(A)(2), AA000635-AA000641; First Am. Compl., Prayer for Relief, AA000538 at ¶ 14. The [redacted] in interest for St. Paul was calculated based on the same method used by TIAA to calculate the other defendants' interest. However, the figure represents the amount St. Paul would have allegedly owed at the time St. Paul and TIAA reached a settlement in principle.

[163] JA6678.

[164] JA6681, at ¶ 2.

[redacted]

wrongly applied a [redacted] savings to Arch when it should have been a [redacted] discount. This Court should therefore find that Arch's limit is further reduced to [redacted]

[redacted]

CONCLUSION

For the reasons above, Arch respectfully requests that this Court reverse the Superior Court's decision on Arch's motion for summary judgment or otherwise award Arch judgment as a matter of law. In the alternative, Arch respectfully requests that the Court order a new trial on Arch's consent defense given the reversible errors committed by the Superior Court.

In addition, Arch respectfully requests a finding that the Arch Policy's limit is further reduced to [redacted].

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