No. 25-ICA-17

IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

WESTLAKE CHEMICAL CORP., *et al.*,

Petitioners,

vs.

NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA., *et al.*

Respondents.

From the Circuit Court of Marshall County, West Virginia, Trial Court Division
No. 19-C-59, the Honorable Judge Christopher Wilkes

PETITIONERS' REPLY BRIEF

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SUMMARY OF THE ARGUMENT

In its opening brief ("Brief"), Petitioner Westlake[1] explained that the trial court below committed reversible error when it misapplied Pennsylvania collateral-estoppel law, Georgia bad-faith claims-handling law, and Georgia pre-judgment-interest law, thereby improperly limiting Westlake's damages arising out of the Respondents' breaches of their insurance contracts (even as the trial court correctly found that none of the Respondents' coverage-defeating arguments had merit). In their response, the Respondents (henceforth, "the Insurers") fail to meaningfully address any of Westlake's arguments or in any way rebut the controlling law buttressing those arguments. Instead, the Insurers attempt to muddy the waters as to all three legal errors below with inapposite straw-man arguments and mischaracterizations of case law. Specifically:

With respect to the applicability of collateral estoppel, the Insurers do not dispute that the concept of "damage" (*i.e.*, resultant harm to property) and "damages" (*i.e.*, the compensation awarded under a legal theory for harm suffered by a party) are distinct concepts. Nor do the Insurers dispute that Westlake was precluded from introducing evidence relating to its insurance as part of the Pennsylvania Case. This is understandable, since both points are indisputable. The Insurers' only recourse is to mischaracterize the record of the Pennsylvania Case via misleadingly cherry-picked quotations and convenient omissions of key facts. And rather than even attempting to rebut controlling Pennsylvania collateral-estoppel law, the Insurers resort to presenting out-of-context quotes from inapposite cases.

With respect to bad faith, the Insurers concede that it is improper to resolve material disputes of fact in their favor, but claim that there is no "evidence" that the trial court did so. Then, in the next breath, the Insurers present a long list of factual assertions – each of them disputed and contradicted

[1] Capitalized terms not otherwise defined herein shall have the meaning ascribed to them in Westlake's Brief.

in the record – to support their substantive bad-faith argument. In other words, on bad faith, the Insurers are both coming and going, bumping into themselves along the way. None of these logical contortions save the Insurers from the fact that the trial court improperly conflated the absence of evidence of bad faith with the presence of evidence of a rational basis for denying coverage.

Finally, with respect to pre-judgment interest, the Insurers acknowledge that interest begins to run from the date of the breach of contract. They nonetheless assert – *ipse dixit* – that the date that the Pennsylvania jury verdict was entered should start the clock for pre-judgment interest, and not the date that they denied coverage for Westlake's claim.

For all three assignments of error, the result is the same: the Insurers simply fail to engage with Westlake's arguments or the law.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

This appeal is suitable for argument pursuant to Rule 19 because it concerns claims of error in the application of settled law. *See* W. Va. R. App. P. 19(a)(1).

ARGUMENT

I. THE TRIAL COURT ERRED IN GRANTING THE INSURERS' COLLATERAL ESTOPPEL MOTION

A. There is no issue resolved in the Pennsylvania Case that is identical to an issue in this case

With respect to the "identity" element of collateral estoppel, the Insurers raise three equally unavailing arguments, which are addressed in turn below.[2] However, as a threshold matter, the

[2] In footnote 11, the Insurers dispute that they relegated any substantive discussion of the "identical" element to a footnote in their brief, but it is the Insurers' characterization that is "far from accurate." Resp. Br. at 24 n.11. The Insurers unequivocally did not brief the legal merits of this issue below (although they cited to certain factual evidence later used to support this argument in their brief and to which they refer this Court in footnote 11). JA0011402-406. Instead, in the argument section of their brief, the Insurers stated only that "[i]f Plaintiffs dispute the first collateral estoppel element, Defendants will brief the issue further in rebuttal." JA011406 at n.9. Contrary to the Insurers' characterization in footnote 11 of their brief, this was an improper attempt to "hide the ball" on a key legal issue that the trial court was being asked to decide and on which the Insurers carried the burden – indeed, this behavior constituted a waiver as to the

Insurers' arguments with respect to this particular element fail to directly address Westlake's primary contention, which is that the trial court's collateral estoppel order is in error because it conflated two distinct concepts – the concept of the quantum of physical ***damage to property resulting from the Tank Car Rupture*** with the ***measure of money damages*** resulting from the Maintenance Vendors' tortious and contract-breaching conduct that the Pennsylvania jury awarded Axiall in the Pennsylvania case. In short, both the trial court's holding and the Insurers' arguments are in error because they fail to recognize the distinction discussed at length in Westlake's Brief at pages 23 to 28 between damage (*i.e.,* the harm that is done) and damages (*i.e.,* money ordered to be paid as compensation for loss or injury pursuant to a particular legal theory). This distinction is key: while the physical damage to the Natrium Plant at issue in this case and the Pennsylvania case is identical (because it was caused by the same event, the Tank Car Rupture), the legal damages flowing from this damage in the two cases are not and cannot be identical, since the two cases involve different defendants who have different types of liability calculated in completely different ways. The Pennsylvania jury was never charged with determining the damage to the Plant, only in determining the damages to Axiall resulting from the Maintenance Vendors' negligence (factoring in Axiall's own negligence). Therefore, there can be no identity of issues that is a threshold requirement for collateral estoppel. That distinction by itself is enough to end the collateral estoppel analysis. But for the sake of completeness Westlake will now rebut each of the Insurers' specific straw-man arguments with respect to collateral estoppel.

"identity" factor. *See Grayson O Co. v. Agadir Int'l LLC*, 856 F.3d 307, 316 (4th Cir. 2017) ("A party waives an argument by failing to present it in its opening brief or by failing to develop its argument – even if its brief takes a passing shot at the issue.") (internal citation and punctuation omitted); *Hannah v. Mullins Family Funeral Home, LLC*, No. 2:20-cv-00617, 2022 WL 194413, at *6 (S.D.W. Va. Jan. 20, 2022) ("Inasmuch as this argument is not asserted in the defendants' opening memorandum, it has been waived.").

1. Westlake's alleged admissions regarding the damage to its equipment caused by the Tank Car Rupture and evidence relating thereto introduced in both litigations is irrelevant to deciding whether the issues presented in both litigations are identical

The Insurers first argue that the Pennsylvania Case and the present action involve an "identical" issue because Westlake allegedly admitted throughout this litigation that "the amount sought for alleged damage to the Natrium Plant and equipment in the Pennsylvania [Case] and in this action is the same." Resp. Br. at 21. As stated in Westlake's Brief, Westlake does not contest that certain evidence related to the scope of the property damage caused by the Tank Car Rupture was produced in both the Pennsylvania Case and in the instant case and concedes the obvious and trivial fact that the "damage" caused by the Tank Car Rupture involved in the Pennsylvania Case and this action are the same. Brief at 26, n.13. Of course they are the same damage, because there was only one Tank Car Rupture. But this is exactly the point both the trial court and the Insurers missed: while the "damage" may be the same, the "damages" legally owed by the Maintenance Vendors and the Insurers under separate and distinct theories of liability are not and cannot possibly be. Thus, these "admissions" regarding the scope of the damage are irrelevant for determining whether the two cases involve "identical" issues for purposes of applying collateral estoppel.

Moreover, as a matter of Pennsylvania law, the "fact that the same or similar evidence may be adduced at the trial of entirely different and distinct issues in two different cases is not sufficient to make adjudication of an issue in one case conclusive of a different issue in a second case." 10 Pa. Standard Practice 2d § 65:110; *Van Wyk Constr. Co. v. City of Phila.*, 64 Pa. D. & C.2d 443, 446-47 (Pa. Ct. Com. Pls. 1974) ("An adjudication of an issue in one case is not conclusive of an entirely different and distinct issue arising in a second case, even though much of the same evidence may be adduced on the trial of both issues."). Thus, the fact that Westlake pointed to the same support for the quantum of damage caused by the Tank Car Rupture, including the figure set

forth in its proof of loss provided to the Insurers, in both the Pennsylvania Case and the present action does not satisfy the "identity" element of the collateral estoppel doctrine.

2. The Insurers falsely contend that the jury in the Pennsylvania Case determined the amount of physical damage to the Natrium Plant

The Insurers next contend that the jury in the Pennsylvania Case determined the quantum of physical damage at the Natrium Plant caused by the Tank Car Rupture in a vacuum divorced from any relevant legal theory on which liability was assessed. *See* Resp. Br. at 24-26. This is just plain false. In order to make this argument, the Insurers rely on cherry-picked, misleading quotations from both the Pennsylvania jury verdict form and the Pennsylvania judge's instructions to the jury. *See id.* When reviewed in full and in context (as presented in Westlake's Brief) it is clear that the Pennsylvania jury was only instructed to determine the amount of damages arising from the tort and maintenance-contract theories of liability at issue in the Pennsylvania Case.

With respect to the jury verdict form, the Insurers narrowly focus on the "line item" with a "blank" that the jury filled in with the number $5,900,000.00. Resp. Br. at 25. In making this argument, the Insurers ignore the actual jury question – Question 14 – to which this "line item with a blank" provides the answer. And they ignore all of the other questions in the verdict slip, including the three questions that are specifically referenced in Question 14. *See id.* It is thus important to provide the proper context for Question 14 by quoting it in full, as well as the other jury questions that precede it and which are baked into the response to Question 14.

Question 14 reads:

> If you answered "Yes" to any part of Questions 2, 9, or 13, state the amount of ***damages*** sustained by Axiall Corporation ***as a result of any of the defendants' conduct*** without any reduction for the percentage of negligence (if any) you attributed to Axiall in your answer to question 5.

Question 2 reads:

> Was the ***negligence of those defendants*** you have found to be negligent a factual ***cause*** of any harm to Axiall?

Question 9 reads:

> Did Axiall Corporation sustain ***damages resulting from*** Rescar Companies' breach of contract or warranty?

Question 13 reads:

> Did Axiall Corporation sustain ***damages resulting from*** AllTranstek LLC's breach of contract or warranty?

JA007530-7534 (underline emphasis original) (bold and italicized emphasis added).

Reading the entire verdict slip in context leads to the incontrovertible conclusion that Question 14 asks the Pennsylvania jury to determine the award of ***damages*** legally chargeable against the Maintenance Vendors for their specific liability. The verdict slip uses the word "damage" only when distinguishing different types of losses: "a. ***Damage*** to Natrium plant and equipment … b. Payments to third parties for property ***damage*** … c. Lost profit." *Id.* These three categories comprise what the verdict slip refers to as Axiall's "Total Damages," and they are expressly tied to the Maintenance Vendors' specific legal liability and nothing else. *See id.* Hence, the Insurers' narrow interpretation of the verdict slip requires this Court to entirely ignore Question 2, Question 9, Question 13, and to mostly ignore Question 14, with the exception of one of the three answers to Question 14. When one actually reads the entire verdict slip, however, it becomes impossible to characterize the "Damage to Natrium plant and equipment" line item as a determination of the monetary value of the property damage caused by the Tank Car Rupture *per se*, as opposed to a determination of the damages the Maintenance Vendors' owed Westlake that flowed from their specific, several liability – a liability much narrower than the Insurers' liability under their respective first-party property insurance policies.

The Insurers similarly mischaracterize the Pennsylvania court's jury instructions, quoting only a single sentence contained therein. Resp. Br. at 25. The Insurers cite only to the Pennsylvania judge's instruction that: "Axiall is entitled to be compensated for the harm done to

its property." And in doing so, they pass over the context in which that phrase is expressed, and which completely undermines their contention:

> ***If you find AllTranstek or Rescar was negligent or breached its contract or warranty with Axiall, or that Superheat was negligent***, Axiall is entitled to be compensated for the harm done to its property and recover other incurred losses. JA012077.

The proper context of the phrase indicates that the Pennsylvania judge was tasking the jury not with determining the "monetary value of the damage caused to the Natrium Plant and equipment," but rather with a determination of the amount of money damages that Axiall was "entitled to be compensated" as a consequence of the Maintenance Vendors' liability for negligence or breach of contract. What the Insurers cannot point to – because it does not exist – is any instruction where the Pennsylvania judge tasked the jury with finding, as a determination of fact (as opposed to a determination of legal liability), the monetary value of physical damage the Tank Car Rupture caused at the Natrium Plant *per se*.

3. <u>As a matter of law, the Insurers are incorrect in asserting that the "identity" element of collateral estoppel can be satisfied where the two actions involve different theories of liability asserted against different defendants</u>

Finally, the Insurers assert that the fact that the present litigation and Pennsylvania Case involve entirely different legal theories is irrelevant to the application of collateral estoppel. *See* Resp. Br. at 26. Specifically, they argue that Pennsylvania courts "recognize that the application of collateral estoppel is not defeated or otherwise diminished by alleged differences in causes of action or theories of liability between two cases," (*id.*) and support this point with a citation to *Balent v. City of Wilkes-Barre*, 669 A.2d 309, 313 (Pa. 1995)[3] – a case they cited for the first time

[3] The Insurers also cite *Eisbacher v. Maytag Corp.*, No. 1163 MDA 2015, 2017 WL 947606, at *5 (Pa. Super. Ct. Mar. 9, 2017) and *Roman v. Jury Selection Comm'n of Lebanon Cty.*, 780 A.2d 805, 809 n.3 (Pa. Commw. Ct. 2001) in support of the proposition that "[i]ntermediate appellate courts in Pennsylvania have reached the same conclusion [as in *Balent*]." Resp. Br. at 26. However, their reliance on both decisions is misplaced. In *Eisbacher*, the court – without citing to *Balent* – articulated the basic elements of collateral estoppel, but quickly rejected the doctrine's application since the issue was not raised before the trial court

in their reply brief in support of their collateral estoppel summary judgment motion below and which, as explained in Westlake's Brief, was the only case on which the trial court relied for this proposition. The Insurers thus claim that Westlake's position on the identity element of collateral estoppel attempts to "circumvent" well-established precedent. *See* Resp. Br. at 26.

This argument is a straw-man. There is no dispute that collateral estoppel can apply to cases involving different causes of action, nor can there be such a dispute, because this is what distinguishes collateral estoppel from the related but distinct doctrine of *res judicata*. *Res judicata* is claim preclusion. Collateral estoppel, on the other hand, is issue preclusion. The only difference between the two is that collateral estoppel can apply where there are different causes of action – claims – but identical issues. This is the point that *Balent* makes in the context of a case that is entirely concerned with *res judicata*. *Balent* is inapposite here because it is a *res judicata* case that – after defining the difference between collateral estoppel and *res judicata* – proceeds with a *res judicata* analysis without shedding any light on what constitutes an "identical" issue for collateral estoppel purposes. *Balent*, 669 A.2d at 313.

At the heart of the Insurers' insistence that *Balent* is relevant to this case is their conflation of a "cause of action" and a "theory of recovery" with a "theory of liability." Westlake has pointed out that the Pennsylvania Case against the Maintenance Vendors involves different defendants, different contracts, and different governing law – not because collateral estoppel cannot exist where the prior action involved a different cause of action, but because the issue of the Insurers' first-party property insurance liability governed by Georgia law is distinct from, and thus not

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and "because no prior lawsuit exists." *Eisbacher*, 2017 WL 947606, at *5. Likewise in *Roman*, the court articulated the basic elements of collateral estoppel, but because the court based its decision on the application of the doctrine of *res judicata*, the court concluded that it was "unnecessary for [the court] to analyze Appellant's other allegations of error." *Roman*, 780 A.2d at 808-09.

identical to, the Maintenance Vendors' separate, several Pennsylvania tort and contract liability (which is more limited than the Insurers' "all risks" coverage liability).[4]

This point is aptly demonstrated by the uninsured motorist case, *Hade v. Bell Helmets, Inc.*, 21 Phila. Co. Rptr. 80, 82 (Pa. Ct. Com. Pls. 1990), on which the Insurers themselves rely in their briefing. Resp. Br. at 26. In an uninsured motorist case, an automobile insurer sells uninsured motorist coverage whereby, if a policyholder sustains damage caused by an uninsured motorist, the insurer steps into the shoes of that uninsured motorist and compensates the policyholder for the damage the uninsured motorist caused. In this context, the plaintiff in *Hade* pursued a claim in arbitration against his own insurer to cover the damage caused by the uninsured motorist during which it was determined that the plaintiff's damages for the vehicle accident were $300,000. *Hade*, 21 Phila. Co. Rptr. at 80-81. In a subsequent action against the other uninsured driver, the court concluded that the plaintiff was collaterally estopped from attempting to relitigate his damages. *Id.* at 83.[5] As a matter of black letter Pennsylvania law, a prior action where the uninsured

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[4] Because, as discussed above, Westlake does not dispute the fundamental point that *res judicata* requires identical causes of action, but collateral estoppel does not, the Insurers' citations to *Ke v. Drexel Univ.*, No. 95 EDA 2018, 2018 WL 6167474, at *7 (Pa. Super. Ct. Nov. 26, 2018); *Wells Fargo Bank, N.A. v. Doughty*, No. 1169 EDA 2018, 2018 WL 4907630, at *3 n.4 (Pa. Super. Ct. Oct. 10, 2018); *Bonnie Heights Homes, Inc. v. Carsetter*, 69 Pa. D. & C.2d 504, 505-06 (Pa. Ct. Com. Pls. 1975) in support of this basic proposition are irrelevant. *See* Resp. Br. at 27-28.

[5] In support of their argument that there is identity of issues between the present action and the Pennsylvania Case, the Insurers misleadingly cite to a portion of the *Hade* decision that has no relevance to the collateral estoppel question. Resp. Br. at 26 (quoting *Hade*, 21 Phila. Co. at 82). Specifically, the Insurers quote the court in *Hade* as saying "[e]ven though Plaintiffs claim a different theory of recovery in this case…the factual issues are basically the same" as support for their proposition that "[l]ower courts in Pennsylvania have recognized that a finding of damages in one case bars re-litigation of the same damages in a later action despite alleged differences in the theory of recovery in the later case." *Id.* (quoting *Hade*, 21 Phila. Co. at 82). The discussion on Page 82 of the *Hade* decision quoted by the Insurers ***does not address the doctrine of collateral estoppel***, but rather the "single recovery" rule, which is not at issue in this appeal or the case below. *Hade*, 21 Phila. Co. at 82. In assessing the applicability of the single recovery rule as it related to two alleged joint tortfeasors, the court held that the plaintiff could not recover more in damages from his motorcycle helmet manufacturer than he could recover from the uninsured motorist involved in the accident. *Id.* The court held that "[e]ven though Plaintiffs claim a different theory of recovery in this case (product liability rather than negligence), the factual issues are basically the same" because "[i]t is a fundamental rule of damages that a person injured by the tortious act of another is entitled to compensation,

motorist's liability is determined has collateral-estoppel effect on a subsequent action, even though the two actions involve entirely different causes of action (tort in one case, breach of contract in the other). *Id.* In both cases, despite there being two distinct causes of action, there is an identical issue presented in both instances: the uninsured motorist's liability to the plaintiff. *See id.* In one instance, that liability is the uninsured motorist's own; in the other, it is the insurer's, who via the uninsured motorist insurance contract has contractually stepped into the uninsured motorist's liability. In either case, it is the same exact liability – it is an identical liability. Contrast that with the current case, where the Maintenance Vendors and the Insurers have completely different liability to Westlake. In fact, if the Insurers in this case were to step into anyone's shoes, they would have stepped into Westlake's shoes via their right of subrogation. *See* JA012652-12653.

To summarize: here, the Insurers do not, and cannot, stand in the Maintenance Vendors' shoes. The Insurers have a distinct, several liability for Westlake's property damage under their respective all-risk insurance policies, whether or not that damage was caused by the Maintenance Vendors. This distinct, several liability means that an award of damages against the Maintenance Vendors has no collateral estoppel effect on Westlake's action against the Insurers, and *vice versa*, because the damages flowing from the two types of liability cannot be identical, so there cannot be an "identity of issues" – the threshold factor for the collateral estoppel analysis.

This fundamental point of Pennsylvania collateral-estoppel law is expressly recognized in

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but a Court will not allow that injured person more than one satisfaction in damages under different theories of liability." *Id.* In short, the Insurers rely on *Hade* entirely for its discussion of a different legal doctrine to misleadingly suggest to this Court that Pennsylvania courts have held that collateral estoppel can apply under circumstances like those at issue here – not so. *See also* page 7-8, *infra*. The inapplicability of the single recovery theory to this case is aptly illustrated by the fact that were Westlake to recover damages from the Maintenance Vendors for their negligence and breach of a Pennsylvania maintenance contract ***and*** recovery from the Insurers for breaches of their Georgia insurance policies, this would not constitute a double recovery; rather, the Insurers would have subrogation rights against the Maintenance Vendors and could recover some or all of what they owe Westlake from the Maintenance Vendors.

Grossman v. Rosen, 623 A.2d 1 (Pa. Super. Ct. 1993) where the Pennsylvania Superior Court specifically refused to apply the doctrine of collateral estoppel in circumstances where an award of damages in a prior action was based on different liability than the liability at stake in a subsequent action. *See Grossman*, 623 A.2d at 2-3. Importantly, in *Grossman*, the causes of action in the first case were the same as those in the second case, but this made no difference with respect to the collateral estoppel analysis. This illustrates that the Insurers' focus on "cause of action" is a red herring. Collateral estoppel can apply where the causes of action between two cases are the same, and it can apply where they are different. But it cannot apply to a determination of damages in a subsequent case where the damages finding in the first case was based on different theories of liability and different measures of compensable damages, because those differences make the two damages determinations non-identical under the collateral estoppel analysis.

The Insurers' Brief attempts to evade the fatal import of *Grossman* by misrepresenting *Grossman*'s holding. The Insurers claim:

> While the court [in *Grossman*] noted that because of the relationship between the accountant and the attorney, issues pertaining to liability would be different in the actions, the comment was made in connection the finding that *res judicata* did not apply.

Resp. Br. at 27. This assertion is false. The *Grossman* court rejected the defendant's collateral estoppel claim specifically on the basis that:

> Here, the parties are not identical to the ones in the prior federal litigation. The defendant in the prior action was A. Grossman, the principal; the defendant in the instant action is Paul R. Rosen, the attorney. ***Because of the relationship between A. Grossman and Paul R. Rosen, the issues pertaining to liability will also be different. Therefore, the trial court erred when it held that the present action was barred by principles of collateral estoppel or res judicata.***

Grossman, 623 A.2d at 2-3 (emphasis added).

It is clear from the Superior Court's opinion that its rejection of collateral estoppel is based entirely on the fact that the prior action and the case before it involved different defendants with

"different issues pertaining to liability." Indeed, this is the only basis that the *Grossman* court relies on in rejecting the application of collateral estoppel. If the Insurers were right that this fact was only cited "in connection with" *res judicata*, there would be no basis at all for the Superior Court's collateral estoppel holding. Contrary to the Insurers' false representation, the Superior Court in *Grossman* held that collateral estoppel does not apply to a damages award where there are "different issues pertaining to liability," and then ***also*** found that *res judicata* did not apply.[6]

B. Westlake did not have a full and fair opportunity to litigate the quantum of physical damage at the Natrium Plant in the Pennsylvania Case

As a threshold matter, it is not correct that Westlake failed to properly raise the "full and fair opportunity to litigate" issue in response to the Insurers' summary judgment motion. *See* Resp. Br. at 28, n.14. Westlake expressly argued in its Opposition to the Insurers' collateral estoppel summary judgment motion that the fourth factor did not apply and thus precluded collateral estoppel. *See* JA007431-7432. Westlake also brought the Pennsylvania judge's collateral-source-rule Order to the trial court's attention in that same Opposition. *See* JA007427. Westlake further expounded on its fourth-factor arguments in its Rule 59(e) Motion, but there is no prohibition against further explanation, as opposed to raising "new legal arguments, factual contentions, or claims that could have been previously argued." *See Mey v. Pep Boys-Manny, Moe & Jack*, 228 W.Va. 48, 56, 717 S.E.2d 235, 243 (W. Va. 2011).

Putting aside the procedural issue and assuming that the Pennsylvania jury had been charged with determining the quantum of physical damage caused by the Tank Car Rupture, the

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[6] The court concluded that *res judicata* could not apply because the actions did not have identical parties, as required to establish *res judicata* under Pennsylvania law. *Grossman v. Rosen*, 623 A.2d at 3, n.2 (citing *City of Pittsburgh v. Zoning Bd. of Adjustment*, 559 A.2d 896, 901 (Pa. 1989)). But the *res judicata* holding was clearly secondary to the collateral estoppel holding, which was expressly and solely based on the fact that the two cases involved different liabilities. Having made its collateral estoppel holding, the Superior Court as to *res judicata* explained that "it, ***too***, is inapplicable here." *Id.* (emphasis added).

Insurers raise four equally meritless arguments that, notwithstanding the restrictions placed on the introduction of certain evidence, Westlake nonetheless had a full and fair opportunity to litigate the question of the scope of physical damage to the Natrium Plant.

First, the Insurers contend that because Westlake was precluded from introducing evidence relating to its insurance coverage as a result of its own motion *in limine* in the Pennsylvania Case it had a full and fair opportunity to litigate the question of damage to the Plant. Rep. Br. at 29. The Insurers' argument is squarely at odds with Pennsylvania law, which protects parties from facing the prejudice of a collateral-source finding even as it refuses to apply collateral estoppel in cases involving different liability. *See Beechwoods Flying Serv., Inc. v. Al Hamilton Cont. Corp.*, 476 A.2d 350, 352 (Pa. 1984) ("[T]he 'collateral source' rule was intended to avoid precluding a claimant from obtaining redress for his or her injury merely because coverage for the injury was provided by some collateral source, e.g., insurance."). Wrongdoers cannot benefit from a collateral source of recovery available to a plaintiff precisely because damages are a function of liability and the wrongdoer's liability – and the measure of the damages it owes as a result of its liability – cannot be diminished just because some other party also has liability for the same ***damage*** (which should not be conflated with ***damages***). If the Insurers' view of collateral-estoppel law were correct, Westlake would have been forced to either introduce evidence of its first-party property insurance program in a third-party liability case – thereby risking a jury finding that the Maintenance Vendors were not liable because non-party insurers were liable – or else face the prospect of collateral estoppel. Pennsylvania law simply does not support such a result.[7]

[7] None of the cases cited by the Insurers compel a different conclusion. Resp. Br. at 29. Neither of the decisions that substantively address the "full and fair opportunity to litigate" prong involve a situation where the collateral source rule applied. *See In re Freeman*, 446 B.R. 625, 630 (Bankr. S.D. Ga. 2010); *Cofrancesco Chiropractic & Healing Arts v. Maciewjewski*, No. CV136042888S, 2014 WL 5099200, at *4 (Conn. Super. Ct. Sept. 4, 2014). In both cases, through negligence, deliberate indifference, or some other oversight, the party against whom collateral estoppel was asserted simply did not challenge in any way the

Second, the Insurers argue that Westlake could have introduced evidence relating to the Insurers' consultant's findings without discussing the scope of Westlake's insurance coverage. *See* Resp. Br. at 31. This contention is absurd. The estimates made by the Insurers' loss adjustment team, which included their technical experts were specifically related to the Insurers' investigation of Westlake's claim under the Policies. It would have been impossible to present evidence of the results of the Insurers' loss investigation and replacement-cost estimation without explaining who conducted that investigation and in what context it was conducted – which would have violated the Pennsylvania court's *in limine* order precluding introduction of evidence related to Westlake's insurance.

The Insurers attempt to diminish the consequences of this foreclosed opportunity by asserting that Westlake was only deprived of the opportunity to introduce "more evidence" into the record in the Pennsylvania Case as to the quantum of its damages. Resp. Br. at 30. This argument fundamentally misses the point, which is that because Westlake could not introduce the evidence relating to the Insurers' and their technical consultants' investigation and conclusions in the Pennsylvania Case, it would be deprived of a "full and fair opportunity to litigate" the scope of its damages against the Insurers for their Georgia breach-of-contract liability if the doctrine of collateral estoppel applies.

Third, the Insurers contend that Westlake must have been provided a full and fair opportunity to litigate the extent of its damage because the trial of the Pennsylvania Case lasted

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assertions made in the prior litigation. *See In re Freeman*, 446 B.R. at 630 ("Because MERS, as nominee, filed a proof of claim, styled in its own name as the creditor, and because Debtor failed to object to that claim under 11 U.S.C. 502(b) or to otherwise challenge MER's right to payment, Debtor is estopped from challenging MERS's right to that payment in this proceeding."); *Cofrancesco*, 2014 WL 5099200, at *4 ("[T]he plaintiff had a full and fair opportunity to litigate the issues raised in the previous motion to dismiss, but chose not to do so."). *City of Pittsburgh v. Zoning Bd. of Adjustment*, 559 A.2d 896, 901 (Pa. 1989) does not substantively address the "full and fair opportunity to litigate" element at all.

more than a month and included dozens of witnesses. Resp. Br. at 31. The Insurers do not cite to any legal authority to support their assertion that having a lengthy trial on wholly unrelated theories of liability against different defendants, and with clear restrictions on the evidence permitted to be introduced proves *ipso facto* that Westlake was provided a "full and fair opportunity to litigate the amount of damage to the Natrium Plant."[8] And Westlake is not otherwise aware of any such legal authority.

Fourth, the Insurers again point to the fact that Westlake sought the same amount in damages in the Pennsylvania Case as was reflected in the proof of loss submitted to the Insurers in the instant matter to assert that Westlake had a full and fair opportunity to litigate the question here. Resp. Br. at 32. As discussed above, the fact that the evidence introduced in the actions relating to the quantum of property damage to the Plant may be the same has no bearing on the applicability of the doctrine of collateral estoppel. Moreover, it is unclear from the Insurers' argument how the fact that Westlake was able to introduce evidence of its estimate of the total quantum of damage somehow obviates the fact that Westlake did not have the opportunity to present all of the evidence it developed in this case from the Insurers' internal documents and testimony as discussed on pages 28-30 of Westlake's Brief.

II. THE TRIAL COURT ERRED IN GRANTING THE INSURERS' MOTION FOR SUMMARY JUDGMENT CONCERNING BAD FAITH CLAIMS UNDER GEORGIA LAW

As explained in Westlake's Brief, while the trial court and the Insurers correctly cited the Georgia bad faith standard both misapply that standard. Everyone is agreed that only where there is "no evidence of unfounded reason for the nonpayment" or where the issue of liability under the

[8] *In re Bohrer* does not stand for the proposition that a lengthy trial necessarily equals a full and fair opportunity to litigate. 19 B.R. 958, 960 (Bankr. E.D. Pa. 1982). There, the court simply acknowledged – without any detailed factual discussion – that notes from the parties' single-day hearing "show the case to have been vigorously litigated." *Id.*

policy is "close" can the court decide as a matter of law that bad faith penalties are not allowed. *Montgomery v. Travelers Home & Marine Ins. Co.*, 859 S.E.2d 130, 135 (Ga. Ct. App. 2021) (citing *Lee v. Mercury Ins. Co. of Ga.*, 808 S.E.2d 116, 133 (Ga. 2017)). In contravention of that standard, however, the trial court erroneously concluded that because there was some disputed evidence as to the reasonableness of the Insurers' investigation into Westlake's claim that there was thus "no evidence of unfounded reason for the nonpayment." This is a misapplication of the Georgia standard. Moreover, as even the Insurers appear to concede in their Brief (*see* Resp. Br. at 36-37), reaching this conclusion requires distorting the principles governing Rule 56 Motions, which require that any disputed material fact be resolved by the finder of fact.

More specifically, in support of their contention that the trial court correctly applied the bad faith standard, they cite to five factual "findings" by the trial court that supposedly support its conclusion. Resp. Br. at 36. They also claim on the very next page that "[t]here is no evidence that the Business Court resolved any material disputes of fact in Insurers' favor." *Id.* at 37. The problem with this argument, however, is that all but one[9] of the "findings" on which the Insurers and trial court relied are disputed. *Compare* Resp. Br. at 36 *with* Brief at 34-37. Thus, the only way that the trial court could have concluded from these disputed facts that the Insurers had a reasonable basis for denying Westlake's claim was to draw all inferences from these disputed facts in the Insurers' favor (*i.e.*, the movant's favor) contrary to the Rule 56 standard and Georgia law.[10]

The trial court's conclusion and the Insurers' arguments regarding the Insurers' so-called "reliance" on technical consultants suffers from the same flaw. The trial court concluded and the

[9] It is undisputed that the underlying Tank Car Rupture involved a large-scale incident and that there was a lengthy claims adjustment and investigation process.

[10] The Insurers are also incorrect in asserting that the Business Court "addressed" all of the disputed facts cited at pages 33-34 of Westlake's Brief. *See* Resp. Br. at 37. As explained in Westlake's Brief, none of these facts are addressed beyond a cursory acknowledgment. *See* JA000046-49.

Insurers contend that simply because the Insurers' "retained ED&T, Failure Analysis & Prevention Inc., Telecordia, and Werlinger & Associates to provide technical assistance" that summary judgment in the insurers' favor was proper. *Compare* JA000049-50 *with* Resp. Br. at 38-39. However, as a matter of black letter Georgia law, reliance on the advice of these technical consultants can only provide a basis for dismissing a bad faith claim as a matter of law where there is no evidence that the advice from these consultants "is in the nature of mere pretext for an insurer's unwarranted prior decision to [deny the claim]." *Wallace v. State Farm Fire Cas. Co.*, 539 S.E.2d 509, 511 n.6 (Ga. Ct. App. 2000); *Montgomery*, 859 S.E.2d at 135; *SAGU LLC v. Grange Ins. Co.*, No. 1:19-cv-203 (WLS), 2022 WL 1624814, at *6 (M.D. Ga. Mar. 30, 2022).

As explained at length in Westlake's Brief at pages 34-37, material disputed facts indicate that the Insurers' purported reliance on the advice of their "enhanced" technical team was nothing more than a pretext for their decision to deny Westlake's claim once they learned of the potential magnitude of the loss amount. Moreover, some of the Insurers' own representatives admitted during depositions in this case that the Insurers' decision to deny coverage was *not* based on the findings of their technical consultants, but rather on their policy-exclusion defenses that have been ruled by the trial court to be unambiguously inapplicable. *See, e.g.,* JA002998-2999, JA008564-8565, JA008581-8582. The Insurers do not address these arguments in their Brief thus conceding the same. *See* Resp. Br. at 38-39.

In short, not only did the trial court misapply the relevant legal standard by concluding that some disputed evidence of a reasonable basis was equivalent to there being no evidence of an unfounded basis to deny the claim, but as the Insurers' own briefing makes clear the only way that the trial court could have reached that result was by improperly construing disputed material facts in the Insurers' favor and against Westlake.

III. THE TRIAL COURT ERRED IN CONCLUDING THAT PRE-JUDGMENT INTEREST BEGAN TO ACCRUE FROM THE DATE OF THE JURY VERDICT IN THE PENNSYLVANIA LITIGATION (AUGUST 10, 2022) AS OPPOSED TO THIRTY DAYS AFTER THE DATE WESTLAKE SUBMITTED ITS PARTIAL PROOF OF LOSS (JUNE 21, 2018)

Both Westlake and the Insurers agree that when pre-judgment interest is awarded (which is a matter wholly vested within the trial court's discretion), it accrues from the date of the breach. *Compare* Brief at 38 *with* Resp. Br. at 40. The Insurers contend that pre-judgment interest should nonetheless run from the date the jury verdict was entered in the Pennsylvania Case. Resp. Br. at 40. They do not provide any explanation for why this is the correct date nor could they, because the entry of the jury verdict in the Pennsylvania Case has nothing to do with the timing of the Insurers' obligation under their insurance policies to pay a covered claim. As explained in Westlake's Brief, it submitted a proof of loss for a valid claim for coverage. The Insurers' breach thus occurred when they initially failed and refused to pay that valid claim (*i.e.*, June 21, 2018). It is from that date that pre-judgment interest should run under Georgia law.

CONCLUSION

For the reasons set forth above and in Petitioners' Brief, Westlake respectfully requests that this Court reverse the trial court's Collateral Estoppel Order and Bad Faith Order, as well as the trial court's ruling regarding the date on which pre-judgment interest begins to run. This Court should remand this case to the trial court for trial on the issues of the amount of breach-of-contract damages owed by the Insurers and the determination of whether the Insurers breached their duty of good faith and fair dealing in their handling and ultimate denial of Westlake's coverage claim.

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CERTIFICATE OF SERVICE

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