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AMERICAN GUARANTEE AND LIABILITY INSURANCE COMPANY, Plaintiff, v. VICTORY HIGHLANDS CONDOMINIUM ASSOCIATION, INC. and MARSHALL & MORAN, *et al.,* Defendants.	) Superior Court of New Jersey) Appellate Division) Docket No.: A-003321-22)) On Appeal from the Superior) Court of New Jersey, Law) Division)) Sat below: Hon. Jeffrey B.) Beacham, J.S.C. and Hon.) Annette Scoca, J.S.C.)

MEMORANDUM OF LAW OF DEFENDANT/APPELLANT LARRY CHENAULT ON APPEAL

On the brief:

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PRELIMINARY STATEMENT

This appeal provides the opportunity to correct erroneous legal conclusions in which the Trial Court found, contrary to controlling authority, that (a) "Appleman's rule" does not apply to third-party liability insurance coverage, even though this Court and the Supreme Court have applied the rule in such cases, (b) an exception to a mold exclusion that says the exclusion does not apply to cases in which there is mold "on edible goods intended for human consumption" also required proof that (i) there were mycotoxins in the mold, (ii) the mycotoxins were ingested by the claimant, and (iii) the ingestion caused injury, and (c) the "manifestation" trigger of coverage applies to a case in which there was undisputed proof of continuous injurious exposure to a harmful substance, even though it has been the settled law of New Jersey since at least 1994 that a "continuous trigger" of coverage applies to cases such as this one. The standard of review on all of these issues is *de novo*.

This is, in short, an insurance dispute regarding liability coverage for the acts and omissions of Victory Highlands Condominium Association ("VHCA") that caused defendant Larry Chenault to be unknowingly exposed to toxic mold. From 1991 until spring, 2009, Mr. Chenault lived in a condominium he purchased that was part of a complex owned and managed by VHCA. During that period, water intrusion caused the formation of toxic mold that neither Chenault nor anyone else discovered until it was first detected in March, 2009. VHCA attempted, but failed,

to remediate the contamination; therefore, based on medical advice, Chenault left the condominium and was never able to return to live there. Toxic mold continued to contaminate the condominium into 2015, when it was foreclosed upon.

On April 15, 2010, Chenault filed a negligence action against VHCA and its property manager, Marshall & Moran ("M&M"), for the injuries he suffered as a result of the mold exposure. *Larry Chenault v. Victory Highlands Condominium Association, et al,* Docket No. 3078-10 (Superior Court of Essex County (the "underlying case"). After preliminary discovery, Chenault entered into a settlement agreement with VHCA and M&M in 2012 that included a proviso allowing the lawsuit to be reopened if an insurance archeologist located "applicable" liability insurance coverage issued to VHCA and/or M&M. The Trial Court granted Chenault's February 26, 2014 motion to reopen the lawsuit, and Chenault filed a First Amended Complaint on July 8, 2014.

The amended complaint named VHCA and M&M as defendants and also made coverage claims against four insurers, including Plaintiff American Guaranty and Liability Insurance Company ("Zurich"), that had issued liability policies to VHCA for the years that Larry Chenault had been exposed to mold. On interlocutory appeal, this Court reversed the Trial Court's Order that allowed the claims for coverage and remanded for disposition of the liability claims asserted against VHCA and M&M. Three of the four carriers defended VHCA; but, on January 31, 2014,

Zurich denied all coverage and did not defend Chenault's reopened liability claims.

Following completion of extensive discovery and on the eve of trial, Chenault settled with the three insurers who had defended VHCA for a total of $2,288,725. The defending insurers paid allocated shares of the settlement. Pursuant to the Supreme Court's decision in *Griggs v. Bertram,* VHCA assigned its rights to coverage under Zurich's policies to Chenault. Zurich did not participate in the settlement and filed this declaratory judgment action. VHCA did not participate in this case. Having ceased doing business long before the end of the underlying case, M&M did not participate in the settlement of that case or in this litigation.

This appeal addresses two rulings of the Trial Court. The first, entered October 17, 2019, granted Zurich's motion for summary judgment regarding the applicability of Appleman's rule, which the Court ruled did not apply to Commercial General Liability ("CGL") insurance policies. The second ruling, entered May 24, 2023, followed a four-day bench trial that commenced on October 11, 2022 and (a) upheld the reasonableness of the underlying *Griggs* settlement, but (b) rejected Chenault's claims for coverage under the Zurich policies, ruling that an exception to the mold exclusions in the Zurich polices did not apply and that Chenault's injuries had "first manifested" before those policies commenced. Mold was not discovered in Chenault's condominium or medically suspected as the cause of his injuries until March 2009, well into Zurich's policy coverage.

PROCEDURAY HISTORY

This is the second time the claims of Larry Chenault arising out of his continuous exposure to toxic mold in his condominium have come before this Court. The first was on an interlocutory appeal by several insurers, including Zurich, from Orders of the Trial Court allowing the "reopening" of the underlying case against VHCA and M&M and the filing of Chenault's First Amended Complaint reasserting claims against VHCA and M&M and adding new claims for declaratory relief regarding insurance coverage. Da1217. The underlying case was reopened in accordance with the terms of a May 10, 2012 Settlement Agreement that contained a proviso in paragraph XVIII allowing Chenault to reopen the case if an "insurance archeologist" could locate "applicable" insurance policies covering his clams. Da2081. The agreement provided that Chenault's only monetary remedy in excess of the $110,000 settlement amount paid by VHCA and M&M would be from the proceeds of applicable insurance policies. Da2091.

The insurance archeologist Chenault retained located several liability policies insuring VHCA and possibly M&M during the 1991-2010 period. Chenault's First Amended Complaint, which the court allowed him to file, included counts seeking declaratory relief regarding those insurance policies.[1] Da84.

[1] Shortly after the filing of the First Amended Complaint, Zurich's adjuster issued a letter to VHCA denying all coverage and any duty to defend. Da535.

After additional motion practice, several of the insurers, including Zurich, pursued interlocutory appeals, focusing on the declaratory judgment counts of the First Amended Complaint. Da1126. By order entered November 21, 2016, this Court reversed the Trial Court's ruling allowing the declaratory judgment counts, concluding that, before Chenault could seek a declaratory judgment or other relief from VHCA's insurers, he had to pursue and resolve his liability claims against VHCA and M&M. Da1217. The decision held that allowing Chenault to pursue a declaratory judgment on coverage before he had established the insureds' liability (whether by settlement or judgment) "put the cart before the horse." Da1223.

Following remand, the parties commenced and completed detailed discovery, including the exchange of documents, interrogatories, requests for admissions, and numerous fact and expert witness depositions. Chenault was deposed twice. Da1649, Da1737. Much of the discovery and factual record of the underlying case, together with Chenault's trial exhibits, is included in the Appendix.

The parties to this action postponed expert witness discovery pending a court-ordered mediation, which was attended by the insurers that were defending VHCA and by a Zurich representative. Da2363. The mediation was not successful; therefore, VHCA and Chenault commenced expert witness discovery, including exchanging ten expert reports and taking expert depositions.

After discovery ended and while cross motions for summary judgment and

partial summary judgment were pending and a trial had been scheduled, VHCA, the insurers defending VHCA, and Chenault engaged in lengthy settlement negotiations (Da647) that consummated in execution of a detailed settlement agreement on December 20, 2018. Da1225. This was followed by entry of a Consent Judgment that ended the underlying case. Da529. The Consent Judgment awarded $2,288,725 in damages and specified the shares of the damages amount being allocated to and paid by each of the three "settling insurers" that had defended VHCA. Da529. The "settling insurers" total share ($310,000) left $1,978,725 unpaid, which is the amount of Chenault's damages claim against Zurich. Da531.

Consistent with its denial of coverage and any duty to defend, and on the eve of the settlement, Zurich filed an action for declaratory relief in federal court, which was dismissed without prejudice and effectively refiled as Zurich's Complaint in this case. Da1259, Da1266. Larry Chenault filed a counterclaim seeking to recover from Zurich the unpaid, $1,978,725 portion of the settlement and Consent Judgment. Da66. After production of the voluminous record in the underlying case, but before expert discovery commenced, the parties filed cross motions for summary judgment, which the Trial Court denied. Da165, Da516, Da156.

On October 17, 2019, however, the Trial Court granted Zurich's motion for reconsideration of its summary judgment motion, ruling that the mold exclusion in the Zurich policies barred coverage because "Appleman's rule" – which restores

coverage if there is a covered cause of loss in the sequence of events leading to the damage at issue – did not apply to CGL insurance policies such as those issued by Zurich to VHCA. Da154. The court reserved for trial the applicability of an exception that the mold exclusion "does not apply" in situations involving mold (fungus) on edible goods "intended for human consumption." Da154-55.

Following completion of discovery, this action was called for a bench trial, which commenced before the Honorable Annette Scoca on October 11 and was concluded on October 14, 2022.[2] On May 24, 2023, Judge Scoca ruled, among other things, that the settlement of the underlying case was reasonable in accord with *Griggs v. Bertram,* 88 N.J. 347 (1982). Da30. Zurich has not cross appealed that ruling. She also ruled that the "consumption exception" to the mold exclusion did not apply and also that Larry Chenault's injuries caused by mold contamination had "manifested" before the Zurich coverage commenced. Da3. Chenault filed a timely Notice of Appeal on July 6, 2023. Da144.

STATEMENT OF FACTS

Larry Chenault's condominium was part of a project owned and managed by VHCA. Da2014. When he removed in, he was in excellent health, was a world-

[2] Trial transcripts are referenced as follows: "1T" for October 11, 2022; "2T" for October 12, 2022; "3T" for October 13, 2022; and "4T" for October 14, 2022. Hearing transcripts are referenced as follows: "5T" for May 24, 2019; "6T" for October 17, 2019.

class athlete ranked second nationally in Taekwondo, and was employed consistent with his MBA from Rutgers. 2T211-2 to 2T212-24; 2T214-7 to 2T115-4. Soon, he began to experience health problems, including nosebleeds (epistaxis), respiratory problems, shortness of breath, swelling of his feet and ankles, and could no longer compete in Taekwondo because he "didn't have stamina to continue." 2T214-25 to 2T216-10. He was treated on an outpatient basis by several doctors but – before March of 2009 – none of them ever suggested that his symptoms might have been caused by exposure to mold. 2T216-11 to 20; 2T220-3 to 10. Indeed, he did not discover the mold contamination in his condo until 2009. 2T215-10 to 2T216-25; 2T225-13 to 19.

Chenault discovered water in the basement of the condominium and complained, via counsel, to the project developer; however, no action was taken to stop the water intrusion problem. Da2493. In December, 2008, Chenault discovered water seeping through a crack in the foundation of his bedroom below a nightstand next to his bed that had destroyed the flooring into the basement. 3T6-12 to 3T8-24; Da2516. Photographs of this damage were admitted at trial. Da2509-17.

Chenault showed the damage to Ms. Jennifer Thomas of M&M, VHCA's property manager, who promised to fix the water intrusion problem if Chenault caught up with past-due condominium fees. 1T61-2 to 1T62-19. Chenault paid the dues but "nothing was ever done" to fix the leak. 1T61-13 to 22. In March of 2009,

Chenault showed the damage under the bedroom nightstand to Robert Horwath, a contractor hired to fix a loose banister. 3T15-22 to 3T17-13.

After warning about the presence of hazardous mold, Mr. Howarth sent Chenault on-line information about toxic mold. 1T55-20 to 1T56-13; 3T15-22 to 3T17-20; Da2487. Mr. Horwath is the first person to warn Chenault of possible mold contamination in the condominium and the potential health risks of exposure to toxic mold. 1T55-19 to 1T56-13. Thereafter, Chenault contacted Superior Mold Remediation, who conducted tests confirming substantial mold contamination throughout the condominium, including contamination of the bedroom surfaces by Stachybotrys mold, sometimes referred to as "black mold," which is known to produce the harmful mycotoxin Trichothecene.[3] Da1763.

After discovering in March, 2009 that he had been exposed to toxic mold, Chenault consulted two medical doctors who issued reports and recommended that Chenault should vacate the contaminated premises. Da495; Da623. Chenault complained to VHCA about the mold and demanded appropriate remediation of the contamination. Da2490. Chenault also complained to a representative of the local health department, who filed a complaint in the municipal court for VHCA's failure to comply with the local health code. Da2489.

[3] Trichothecene was detected in Chenault's urine twice, once in 2009 and later, well after he had moved out of the condominium, in late 2014. Da693; Da696.

VHCA's remediation work was never successful. 3T10-24 to 3T11-8. As a result, consistent with medical advice he had received, Chenault never returned to live in his condominium, which was foreclosed upon and repossessed in 2016. 3T11-9; Da2477. In 2010, Chenault sought disability benefits from the Social Security Administration. Following an evidentiary hearing conducted on June 21, 2010, an Administrative Law Judge of the Social Security Administration's Office of Disability Adjudication and Review issued a detailed factual determination finding that Larry Chenault was disabled from engaging in any "substantial gainful activity" as a result of his exposure to toxic mold in his condominium. Da2144.

The report and conclusions of Chenault's principal medical expert, Dr. Althea Hankins, finding that Mr. Chenault had been disabled as a result of exposure to mold in his condominium (Da495) is consistent with the Social Security disability award. After his initial visit in 2009, Dr. Hankins continued to examine Chenault regarding his condition and issued subsequent reports. Da495. Further medical testing, including neurological testing, led to Dr. Hankins's differential diagnosis that Chenault suffered from demyelinating (brain) disease caused by his chronic exposure to toxic mold, which caused him to be disabled from meaningful employment consistent with his background and experience. Da495. Mr. Chenault also was also examined by two psychologists, who issued reports about his mental disability. Da623; Da2243.

In the summer of 2009, in response Chenault's complaints and the municipal court proceedings, VHCA undertook repair and remediation work, but it was unsuccessful, as confirmed by, among others, a report from VHCA's own environmental consultant, MDG Environmental, LLC ("MDG") dated October 20, 2009 in which MDG advised that "there is both fungal (mold) contamination and amplification with the home. Da1789. It can be stated with a reasonable degree of scientific certainty that the fungal contamination and amplification in the home is the result of exterior groundwater issues…." *Id*. MDG erroneously believed that VHCA had corrected the water intrusion problem; however, three subsequent environmental tests confirmed ongoing mold contamination of the condominium. These reports are summarized in the expert report of Ron Tai (Da556), who conducted testing in 2011 that revealed ongoing mold contamination that "places the home off the upper limits scale chart and amongst the highest percentile of homes measure in the AHHS [American Healthy Homes Survey]." Da568. Dr. Tai's follow up testing almost four years later (in June, 2015) showed that the condominium still contained "significant mold growth." Da1968-69.

Chenault's injuries and damage, including loss of his home through foreclosure, resulted in his being effectively "homeless" for almost a year.[4]

[4] As explained to the physicians he saw after moving out of the contaminated condominium, he lived for a period in his office at a non-profit organization, AAA Academy for Children, that he had founded, and at a Taekwondo studio. 3T11-13

The report of the Sobel Tenari Economics Group in the underlying case, (Da2106) detailed Chenault's provable economic losses in excess of $1,000,000. This damages amount, even without considering the loss of his home and other losses, would have supported a significant "pain and suffering" damages award far in excess of the amount of the agreed final settlement of the underlying case. *Id.* As noted above, the Trial Court found, applying the standards of *Griggs v. Bertram, supra,* that the settlement of the underlying case was fair and reasonable. Da30. Zurich has not filed a cross appeal of that ruling.

There are five Zurich policies at issue in this case that were issued to VHCA as named insured covering the period from June 1, 2005- June 1, 2010. Da231-351. These are "umbrella" forms of liability coverage that insured VHCA for its potential liability when underlying, primary coverage does not apply. *Id.* Zurich has admitted that QBE Insurance, which had issued primary liability policies to VHCA, had properly denied coverage (Da1757) and there is no dispute that the Zurich policies "drop down" to provide primary liability coverage to VHCA for bodily injury and property damage attributable to "occurrences" during the coverage periods of the policies. Da336. Like most CGL policies, the Zurich policies define a covered "occurrence" of property damage or bodily injury as "an accident, including

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to 3T12-6. Because he did not have a refrigerator or any other food storage facilities, he continued to store his food in the condominium, placing some on the kitchen counter and some in the refrigerator. 1T68-10 to 22; 3T13-7 to 19.

continuous or repeated exposure to substantially the same general harmful conditions." Da299.

Three of the Zurich policies are at issue in this case. Chenault does not make claims under the first two Zurich policies covering the period from June 1, 2005-June 1, 2007 because those policies contain restrictive mold exclusions that are much broader than the mold exclusions of the final three policies at issue. Da244; Da261. The three policies at issue provide aggregate coverage limits of $15,000,000 each, for a total of $45,000,000, far in excess of the unpaid balance of the Consent Judgment in the underlying case. Da263; Da306; Da352.

ARUGUMENT

Larry Chenault has appealed from two orders of the Trial Court. One, memorialized by a "transcript of decision" issued by Judge Jeffrey B. Beacham on October 17, 2019, granted Zurich's motion for reconsideration of a previous ruling, and entered partial summary judgment for Zurich refusing to apply "Appleman's rule" to coverage under the mold exclusions in Zurich's policies. Da155; 6T27-2 to 8 and 6T30-23 to 6T31-9. The second order, entered by Judge Scoca on May 24, 2023 and accompanied by a memorandum decision, issued following an October 11 through October 14, 2022 bench trial, denied Chenault's claims for coverage under the Zurich policies. Da1. In an alternative ruling, Judge Scoca found that the

settlement of the underlying case was "reasonable" under the standards of *Griggs v. Bertram,* 88 N.J. 347 (1982). That ruling is not a subject of this appeal.

If the October 17, 2019 ruling is reversed, because Appleman's rule does in fact apply to CGL coverage, then the efficient proximate cause of Chenault's injuries is the covered cause of water intrusion and the mold exclusion will not preclude coverage. In that case, this matter should be remanded with directions to enter judgment in favor of Chenault, subject to his claims for interest and attorneys' fees. The same is true if the challenged May 24, 2023 rulings are reversed.

On an appeal of a grant of summary judgment, an appellate court reviews the decision *de novo*, applying the same standard as the trial court. *L.A. v. New Jersey Div. of Youth & Fam. Servs.*, 217 N.J. 311, 323 (2014). Accordingly, Judge Beacham's decision granting summary judgment in favor of Zurich should be reviewed under the familiar standard set forth in *R.* 4:46-2: Summary judgment should be granted where "there is no genuine issue as to any material fact challenged and ... the moving party is entitled to a judgment or order as a matter of law." *Id.; R.* 4:46–2(c).

Moreover, Judge Beacham's decision that Appelmans' rule does not apply to coverage claims under CGL policies presents a question of law for which this Court owes no deference. *Manalapan Realty, L.P. v. Twp. Comm.,* 140 N.J. 366, 378 (1995) ("A trial court's interpretation of the law and the legal consequences that flow from

established facts are not entitled to any special deference"). Likewise, Judge Scoca's interpretation of the exception to the Zurich policy's mold exclusion is subject to *de novo* review. *Simonetti v. Selective Ins. Co.,* 372 N.J.Super. 421, 428 (App. Div. 2004) (interpretation of an insurance policy "is a question of law which we decide independent of the trial court's conclusions").

Finally, Judge Scoca's application of a "manifestation" trigger of coverage to Larry Chenault's claim, rather than the well-settled "continuous trigger" for cases involving continuous injurious exposure to harmful conditions, was an error of law and this Court's review is, therefore, plenary. *Manalapan Realty,* 140 N.J. at 378.

I. The trial court erred as a matter of law by holding that "Appleman's rule" regarding coverage for sequential causes of loss does not apply to GCL policies, such as the policies issued by Zurich. (Da154a; 6T30-23.)

Before discovery commenced in this case, the parties filed cross motions for summary judgment regarding coverage under the three Zurich policies at issue. Initially, Judge Beacham denied the cross motions, finding that issues of fact existed. Da156. Thereafter, by Order entered on October 17, 2019, as memorialized by a transcript of decision, Judge Beacham granted Zurich's motion for reconsideration on the issue of application of "Appleman's rule" to the Zurich policies, preserving for trial the issue of application of the so-called "consumption exception" to the mold exclusions in the policies. Da154; 6T27-2 to 8 and 6T30-23 to 6T31-9.

Appelman's rule has been cited and applied by the courts of New Jersey for

many years and in multiple cases:

> The general rule applicable to a factual context which presents a facial conflict between the risk covered and an exclusion is found in 5 Appleman, Insurance Law and Practice, §3083 at 309-311 (1970):
>
> > Where a peril specifically insured against sets other caused in motion which, in an unbroken sequence and connection between the act and final loss, produce the result for which recovery is sought, the insured peril is regarded as the proximate cause of the entire loss. It is not necessarily the last act in a chain of events which is, therefore, regarded as the proximate cause, but the efficient or predominant cause which sets into motion the chain of events producing the loss. … In other words, *it has been held that recovery may be allowed* where the insured risk was the last step in the chain of causation set in motion by an uninsured period, or *where the insured risk itself set into operation a chain of causation in which the last step may have been an excepted risk*.

Franklin Packaging Co. v. California Union Ins. Co., 171 N.J.Super. 188, 192 (App. Div. 1970) (emphasis added). The practical application of Appleman's rule is that "with regard to sequential causes of loss, [New Jersey] courts have determined that an insured deserves coverage where the included cause of loss is either the first or last step in the chain of causation which leads to the loss." *Simonetti v. Selective Ins. Co.,* 372 N.J.Super. 421, 431 (App. Div. 2004).

It is undisputed that ongoing water intrusion – caused by the negligent failure of VHCA to honor its obligations to Larry Chenault to repair the foundation crack that had caused the groundwater intrusion that, in turn, had caused the formation of toxic mold – resulted in the damages at issue in this case. The Zurich policies do

not bar coverage for water intrusion or for VHCA's negligent breach of its obligations under the New Jersey Condominium Act, N.J.S.A §468B-1-38.

The "first step" in the chain of causation leading to Larry's Chenault's damages for mold-related bodily injury was ground water intrusion through an unrepaired crack in the foundation. The foundation is a "common element" of the project that VHCA had an obligation to maintain and repair. N.J.S.A. §46:8B-14(a). Under Appleman's rule, recovery from Zurich is allowed because an insured risk (water intrusion) set into operation a chain of causation that led to Chenault's injuries, even though the "last step" in the causal chain (mold exposure) might otherwise be an excluded risk.

To avoid application of Appleman's rule, carriers often add language to policy exclusions that specifically eliminate from coverage any and all events in the chain of causation leading up to an excluded event. This language is commonly known as an anti-concurrent causation ("ACC") clause. As explained above, Zurich issued a series of five liability policies covering VHCA. None of these policies contained a water exclusion, although such exclusions in CGL policies are not uncommon. The first two of Zurich's policies contained an ACC clause that barred claims for otherwise covered concurrent or sequential causes of loss in the chain of causation.

Zurich's ACC language appears in the mold exclusions after the clause that excludes "liability, damage, loss, cost or expense arising directly or indirectly, in

whole or in part by 1. [mold]." The ACC language reads as follows:

> It is agreed that this exclusion applies regardless of any other cause, event, material, product and/or building component that contributed concurrently *or in any sequence* to that injury or damage. (Emphasis added.) Da244.

In light of this broad, ACC language, Chenault has not sought any recovery from the first two Zurich policies, both of which contain the limiting ACC language. The three policies that are at issue in this case, however, do not contain ACC clauses. The mold exclusions in those policies bar claims for "liability, damage, loss, cost or expense" caused "directly or indirectly" by mold, but omit the ACC language contained in the first two policies. Da277. Elimination of the ACC clause from the three policies at issue broadened coverage when there are insured events in the chain of causation leading to mold damage.

The Trial Court's October 17, 2019 ruling ignores the change eliminating the ACC language from the three policies at issue. Instead, in the Transcript of Court Decision, relying on unpublished decisions and cases from other jurisdictions, Judge Beacham ruled as follows:

> The Court finds that there is no support in the defendant's papers or in New Jersey's law for expanding Appleman's sequential causation rule to a CTL [*sic*, should be "CGL"] policy, particularly one that lacks any language that compels its application. 6T30-23 to 6T31-2.

While *Simonetti, supra,* and *Franklin Packaging, supra,* addressed property insurance policies, nothing in the language of those cases, in the language of

Appelman's rule (which this Court applied in *Simonetti* and *Franklin Packaging*), or in any other New Jersey case, limits application of the rule to first-party property policies or bars application of the sequential cause rule in a CGL coverage case. On the contrary, controlling authority has recognized that Appleman's rule is "generally applicable" and has, in fact, been applied to third-party liability coverage claims by this Court and by the Supreme Court. *See Flomerfelt v. Cardiello,* 202 N.J. 432 (2010) (homeowners liability policy discussing Appleman's rule); *Wear v. Selective Service, Inc.,* 455 N.J.Super. 440 (App. Div. 2018) (commercial general liability policy excluded mold claims because it contained an ACC clause that prohibited application of Appleman's rule).

The *Wear* case is instructive. It involved a "*Griggs* settlement" of a mold related bodily-injury liability claim. The mold exclusion at issue contained exclusionary language for concurrent or sequential causes virtually identical to the ACC clauses in the first two Zurich policies. In discussing the impact of such language, the *Wear* court noted that New Jersey cases had ruled that "where 'two or more identifiable causes—one a covered event and one excluded—may contribute to a single property loss,' there is coverage absent an anti-concurrent or anti-sequential clause in the policy." *Id.* at 454 (citing the statement of Appleman's rule in *Simonetti v. Selective Ins. Co.,* 372 N.J.Super. 421, 431 (App. Div. 2004)). Because the Selective policy contained such a clause, the *Wear* court ruled that "[a]

fair reading of the exclusion is that despite other potential [insured] causes, *mold must be excluded as a causative factor* in order for there to be a covered loss." *Id.* at 455-56 (emphasis added).

In New Jersey, Appleman's rule applies in third-party liability insurance cases when either concurrent or sequential causes of loss result in otherwise excluded injuries. In *Flomerfelt v. Cardiello,* 202 N.J. 432 (2010), a homeowner's third-party liability insurance case, the coverage question turned on whether the plaintiff's injuries were caused by one or another of two concurrent causes: drug use, which was excluded, or alcohol ingestion, which was not excluded. The Court noted that "New Jersey courts have generally considered questions about how to evaluate multiple or concurrent causes of damages only in the context of first-party claims against insurers for coverage." *Id.* at 447. Nevertheless, the Court also observed that "*first-party coverage decisions do, however, yield two generally applicable rules*. In situations in which multiple events, one of which is covered, occur sequentially in a chain of causation to produce a loss, we have adopted the approach known as 'Appleman's rule,' pursuant to which the loss is covered if a covered cause starts or ends the sequence of events leading to the loss." *Id.* (Emphasis added.)

In other words, according to the Supreme Court, Appleman's rule is a principle of general applicability. This case involves the kind of sequential causes of loss referenced in *Wear* and in the *Flomerfelt* Court's description of Appleman's

rule. Moreover, the *Flomerfelt* Court cited with approval this Court's application of Appleman's rule to the third-party liability coverage question in *Search EDP, Inc. v. Am. Home Assurance Co.,* 267 N.J.Super. 537 (App. Div. 1993), *certif. denied,* 135 N.J. 466 (1994). *Id.* at 450-51. Specifically, in *Search EDP* this Court had "used the approach embodied in Appleman's rule and endorsed in *Franklin Packaging*, concluding that the proper focus was not on the claimed harm to the insured's client, but on the claimed cause that set in motion the chain of events resulting in that harm." *Id. Flomerfelt* and *Search EDP* are controlling authority that the Trial Court was bound to follow.

In her concurring opinion in *Flomerfelt,* Justice LaVecchia stated that the "holding in *Salem Group v. Oliver,* 128 N.J. 1 (1992) had set the stage for subsequent case law, which has required that to eliminate a duty to defend, an insurance policy must unambiguously state that an exclusion will operate notwithstanding any concurrent or sequential causation issues even when the policy's exclusion is otherwise clear and specific." *Id.* at 459. The duty to defend applies only in the context of third-party liability insurance. *Salem Group* also was, in fact, a third-party liability insurance case. Moreover, in this case Larry Chenault claimed – as had the insured in *Salem Group* – that Zurich improperly denied its duty to defend.

Justice LaVecchia even specified the kind of clause that should be included in a CGL policy to bar application of Appleman's rule: "Because the instant policy did

not unambiguously declare that coverage would be excluded for injuries arising out of the use of illegal drugs 'regardless of any other cause of event contributing concurrently or in any sequence to the loss,' or words to that effect, the holding in *Salem Group* is controlling." *Id.* at 461-62. The first two policies issued by Zurich to VHCA contain classically worded ACC language; but that language was removed from the three policies at issue in this case, thereby allowing application of Appleman's rule. Removal of the ACC language from the mold exclusions in the three Zurich policies expanded the coverage by failing to restrict application of Appleman's rule. As in *Simon Group* and *Flomerfelt*, the absence of an ACC clause in the Zurich policies at issue triggered its duty to defend and it was reversible error to hold otherwise.

Moreover, by failing to consider the impact of the change in the language of the three Zurich policies at issue that eliminated the ACC clause and added an exception to the mold exclusion, Judge Beacham ignored Supreme Court precedent concerning the proper interpretation of insurance policies. When the drafters of the CGL policy revise later versions of the policy form by adding an exception to an otherwise applicable exclusion (as Zurich did here), it demonstrates an intent to broaden coverage and to eliminate the exclusion in cases where the exception applies. *Cypress Point Condominium Ass'n, Inc. v. Adria Towers, L.L.C.,* 226 N.J. 403 (2016).

In *Cypress Point*, the Supreme Court was faced with an earlier landmark ruling regarding construction contractor liability, *Weedo v, Stone-E-Brick, Inc.,* 81 N.J. 233 (1979). *Weedo* applied the "your work" exclusion to bar liability coverage to general contractors for construction defects. *Weedo* has been cited throughout the United States and in New Jersey as barring insurance coverage on the ground that construction defects are an uninsurable "business risk." The *Cypress Point* Court decided that it was not bound by *Weedo* because the exclusionary language in the CGL form had changed.

The revised CGL form in *Cypress Point* contained "a subcontractor exception to the [policy's] 'your work' exclusion that was not included in the [previous] form." *Id.* at 414. The revised language of the "your work" exclusion provided that the exclusion "*does not apply* if the damaged work or the work out of which the damage arises was performed on your behalf by a subcontractor." *Id.* at 417-18 (emphasis added). Accordingly, noting that this exception was not included in the CGL policy form addressed in *Weedo,* the *Cypress Point* Court held that the exception "unquestionably applies in this case," ruling that "*if the insurer decides that this is a risk it does not want to insure, it can clearly amend the policy to exclude coverage, as can be done simply by either eliminating the subcontractor exception or adding a breach of contract exclusion*." [citations omitted] *Id.* at 430-31 (emphasis added). In reaching this conclusion, the Court cited the following rule of policy construction:

"'[I]f the clause in question is one of exclusion or exception designed to limit the protection afford by the general coverage provision of the policy, a strict interpretation is in order.'" *Id.* at 429.

In this case, Zurich's policy language changed. The language of the mold exclusions in the first two CGL policies Zurich issued to VHCA contains the restrictive ACC clause quoted above. If, as Judge Beacham held, Appleman's rule does not apply to CGL policies, there would be no reason for the previous CGL forms to include the restrictive ACC language: The entire purpose of the ACC clause is to eliminate the application of Appleman's rule. The *Wear* court expressly referenced Appleman's rule when it held that the ACC language contained in the CGL form at issue barred coverage for mold liability that might otherwise have been available.

In *Cypress Point,* the change in the policy language expanded coverage by adding an exception to the "your work" exclusion that otherwise would have barred coverage. In this case, removal of the restrictive ACC clause language that would have barred coverage regardless of the existence of a covered cause of loss in the chain of causation also expanded coverage. The ACC language removed from the Zurich policies at issue is the very type of restrictive language that the *Cypress Point* court noted could have been added to the policy (as the insurer did in *Wear*) via an ACC clause to limit the policy coverage.

Elimination of the ACC language allows coverage if a covered event (in this case, water intrusion caused by the insured's negligence) is the "first step" in the chain of causation leading to an otherwise excluded cause of loss. In accordance with the guidance from *Cypress Point,* Zurich could have restricted coverage for a risk "it did not want to insure," either by restoring the removed ACC clause language or by adding a separate, express exclusion barring coverage for claims attributable to or arising out of water intrusion. Zurich did neither.

The Trial Court ignored the change in policy language that eliminated the restrictive ACC clause, did not cite *Cypress Point,* and ignored well-established principles of policy interpretation in cases involving a policy exclusion. "It is well-established that the coverage sections of an insurance policy are to be liberally construed in favor of the insured, exclusions are to be read narrowly, and ambiguities are to be construed against the insurer." *DEB Assocs. v. Greater New York Mut. Ins. Co*., 407 N.J. Super. 287, 293 (App. Div. 2009) (citations omitted). *See also Wakefern Food Corp. v. Liberty Mut. Fire Ins. Co.,* 406 N.J. Super. 524, 539 (App. Div.), *certif. denied*, 200 N.J. 209 (2009) ("[I]t is well settled that those purchasing insurance 'should not be subjected to technical encumbrances or to hidden pitfalls,' and that insurance policies 'should be construed liberally in their favor to the end that coverage is afforded to the full extent that any fair interpretation will allow.'").

A special set of rules applies to policy exclusions, which are enforceable only

if clearly applicable. *Nestle Foods Corp. v. Aetna Cas. and Surety Co.*, 842 F. Supp. 125, 131 (D.N.J. 1993). "When the issue involves an exclusion clause, it is strictly construed against the insurer." *L.C.S., Inc. v. Lexington Ins. Co.*, 371 N.J. Super. 482, 491 (App. Div. 2004) (citing *Aetna Ins. Co. v. Weiss*, 174 N.J.Super. 292, 296 (App. Div.), *certif. denied*, 85 N.J. 127 (1980)). The burden is on the insurer to show that coverage limitations apply. *Adron, Inc. v. Home Ins. Co.*, 292 N.J.Super. 463, 473 (App. Div.1996).

Consistent with the forgoing rules, a policy exclusion may not be rewritten by a court to expand the exclusionary limitation on coverage or to add words of limitation that are not contained in the exclusion, as drafted by the insurance carrier. *Kampf v. Franklin Life Ins. Co*., 33 N.J. 36, 43 (1960); *see also Simonetti v. Selective Ins. Co,* 372 N.J. Super. 421, 428, (App. Div. 2004) ("When the terms of the contract are clear and unambiguous, the court must enforce the contract as it is written; the court cannot make a better contract for parties than the one that they themselves agreed to").

The Trial Court's ruling that Appleman's rule cannot be applied to a CGL policy unless the policy itself requires its application plainly violates these rules of policy interpretation. The ruling effectively imports an ambiguity into the policy that does not otherwise exist, and it ignores the reasonable expectations of the insured that elimination of the ACC clause broadened the policy coverage by

restoring application of Appleman's rule when there are sequential causes of loss, one of which (water intrusion) is covered by the Zurich policies. As the Supreme Court held in *Doto v. Russo*, 140 N.J.544, 556 (1995):

> [O]ur courts have endorsed the principle of giving effect to the 'reasonable expectations' of the insured for the purpose of rendering a 'fair interpretation' of the boundaries of insurance coverage." [citation omitted]. "The insured's 'reasonable expectations in the transaction may not justly be frustrated and courts have properly molded their governing interpretative principles with that uppermost in mind.'" [citation omitted].

The Trial Court's clearly erroneous refusal to apply Appelman's rule to the water intrusion and the mold exclusions in the Zurich policies should be reversed.

II. The Trial Court misinterpreted the exception to the mold exclusion by misapplying well-established rules of policy interpretation. (Da31.)

Judge Beacham's partial summary judgment ruling refusing to apply Appleman's rule left for trial the issue of whether or not an exception to the mold exclusion applied to allow coverage for mold on food intended for consumption by Larry Chenault. The exception at issue is not contained in the first two Zurich policies issued to VHCA and was added to the mold exclusion in the Zurich policy that incepted on June 4, 2007. The exception reads as follows:

> This exclusion does not apply to any fungi or bacteria that are, are on, or are contained in, an edible good or edible product intended for human or animal consumption. Da277.

This exception addresses situations in which any mold is "on" or "contained in" an "edible good" (food) that is "intended" for human consumption. While courts,

including the Trial Court, have referred to this clause as a "consumption exception," the plain language does not even require actual proof of consumption of mold contaminated food. The evidence adduced in the underlying case, however, shows that Chenault did in fact consume "mold on or in" the food he consumed during the eighteen years he was chronically exposed to mold in his condominium. All the express policy language requires is that the contaminated food be "*intended*" for human consumption.[5] This exception, if triggered, plainly modifies the exclusion at issue, which bars coverage for "liability, damage, loss, cost or expense" caused by "ingestion of… fungi or bacteria."

It is well established that "ingestion" – that is, "eating" – of toxic mold, including mold containing trichothecene mycotoxins, is a principal (but not the only) means of exposure to mold-related illness. The exception provides that the very broad exclusion for loss, harm, or damage arising from the "ingestion of, contact with, exposure to, the existence of, or presence of any fungi or bacteria" simply "does not apply" if the exception for mold "on or contained in" an edible good is triggered. The Trial Court refused to apply the exception – even though there is no

[5] Courts in other jurisdictions considering similar exceptions in cases involving harm from contaminated water have not required proof that the claimants actually consumed the water by drinking it. *See, e.g., Acuity v. Reed & Associates,* 124 F.Supp.3d 787 (W.D. Tenn. 2015) (mold-contaminated water in home that insured did not actually drink nevertheless was "intended for consumption" for purpose of "consumption" exception); *Nationwide Mut. Ins. Co. v. Dillard House*, 651 F. Supp. 2d 357 (N.D. Ga. 2009) (same, as applied to hot-tub water).

doubt whatsoever that the high concentrations of airborne mold landed on every surface and item, including the food, in Mr. Chenault's condo unit – because the Court believed that applying the exception's plain language would "swallow the Mold Exclusion itself." Da37.

The short response to that concern is: It was Zurich that wrote the exception into the exclusion. Zurich is therefore to blame, and not Mr. Chenault, if application of the plain language of the exception eliminates the exclusion because "it does not apply" when the exception applies. In any event, it is the Trial Cout's view of the exception as "swallowing" the mold exclusion, rather than Chenault's view, that is erroneous. The exclusion bars coverage for the "ingestion" of mold, an undefined term. Yet, the exception expressly applies to provide coverage for all loss or damage arising from any mold that is "on food." The plain wording of the exception states that the mold exclusion simply "does not apply" if the exception applies. In other words, if the loss or damage arises from mold "on food," the mold exclusion drops out of the policy.

There are, in fact, numerous ways that mold can cause harm, loss, or damage that have nothing whatsoever to do with mold "on edible goods intended for human consumption." It can be inhaled, it can be absorbed through contact, and its growth on wood, sheetrock, and other cellulose-containing materials can cause property damage. None of these kinds of excluded mold losses will be "swallowed" by the

application of the exception for mold "on edible goods." The record of the underlying case contains substantial evidence about the routes of human exposure to hazardous mold (inhalation, dermal contact, and ingestion), with some sources suggesting that ingestion is a significant, if not primary route of exposure.[6] The elimination of the ACC clause and the addition of the exception eliminated the application of the mold exclusion when the loss arises from mold on edible goods. The Trial Court's opinion did not consider the restoration of mold coverage that these changes effected, nor did it apply a strict construction of the policy language in favor of coverage, as New Jersey law requires.

The Trial Court opined that its view of the exception was further supported by the requirement in the policy for proof of "bodily injury" and that Chenault "did not allege such in his pleadings." Da38. In fact, as Zurich, itself, accurately acknowledged in its Complaint in this action, Chenault's First Amended Complaint against VHCA alleged, at ¶ 20, that he had "suffered and continues to suffer serious, adverse health consequences caused by his ongoing, continuous injurious exposure

[6] *See, e.g.,* "Trichothecene Mycotoxins," a treatise by the Toxinology [*sic*] Division of the U.S. Army Medical Research Institute of Infectious Diseases, introduced as Trial Exhibit 67 (Da2522) (the "Army Treatise"). One purpose of the Army Treatise was to explore the use by the Army of trichothecene poisoning as a bioweapon. "After direct dermal application or oral ingestion, trichothecene mycotoxins can cause rapid irritation to the skin or intestinal mucosa." Da2529. See also, Da1362, a World Health Organization Bulletin introduced at trial that discusses dermal and inhalation exposure to mold mycotoxins.

to toxic mold from 1991 through June, 2010." Da58. Zurich further acknowledged that "[i]n Chenault's October 12, 2010 answers to Uniform Form A Interrogatories [in the underlying action] he states that he suffers from 'bodily injury' as a result of exposure to mold." Da58. Chenault produced overwhelming medical evidence in the underlying case establishing that he had suffered serious injury, including mental injury unknowingly caused by his chronic exposure to mold in his condominium. Otherwise, VHCA and its other insurers would not have settled that case.

Relying extensively on the testimony of Zurich's expert, Dr. Robert Laumbach, the Trial Court ruled that Chenault had to prove not only that he actually consumed mold-contaminated food (which, in fact, he did), but that the food he consumed contained harmful mycotoxins, specifically Trichothecene, and that those particular mycotoxins caused the injuries he complained about in the underlying case. Da38. The Trial Court's focus on Trichothecene probably is a result of lab reports showing that Chenault's urine tested positive for Trichothecene, twice. Trichothecene, however, is not the only harmful byproduct of mold, and the Stachybotrys mold that produces it was certainly not the only species of mold discovered in the condominium. For instance, the bodily injury at issue in *Wear, supra* was caused by Aspergillus, another species of mold that was found in the Chenault condominium.

In ruling in favor of Zurich, the Trial Court effectively added restrictive

language to the exception that the policy, itself, does not actually contain, concluding that the exception does not apply absent proof: (1) that Chenault actually ingested mold-contaminated food; (2) that the food he ingested contained harmful species of mold that included the mycotoxin Trichothecene; and (3) that he consumed the contaminated food in sufficient quantities to cause his bodily injuries. This is precisely the kind of restrictive "add on" language that Zurich could have written into the policy, but that is missing entirely from the exception at issue.

The leading case addressing exceptions to policy exclusions is *Cypress Point Condominium Ass'n, Inc. v. Adria Towers, L.L.C.,* 226 N.J. 403 (2016), which is discussed in Point I, above. In *Cypress Point,* the Supreme Court discussed the impact of a change in policy forms that added an exception, the "subcontractor exception," to an exclusion for liability claims attributable to a contractor's faulty workmanship. If the exception applies, the "your work" exclusion "does not apply." By adding an exception to the your-work exclusion, insurers broadened the coverage for construction-related damage by eliminating the exclusion altogether in circumstances where the exception applied. Thus, if an exception applies, it does in fact "swallow" the exclusion containing it, as was the result in *Cypress Point* when the Supreme Court applied the "subcontractor exception" to avoid the otherwise outcome determinative "your work" exclusion the insurance carrier had invoked.

Here, as in *Cypress Point,* the policy wording of Zurich's coverage exclusions

for mold changed. The form of broadly worded mold exclusion contained in the first two Zurich policies included limiting language (the ACC clause) and did not contain any exceptions. Those policies barred all coverage for mold-related claims, regardless of whether there was a covered cause in the chain of causation. The revised form of mold exclusion in the three successor Zurich policies, however, eliminated the ACC language and contained a new, express exception limiting the exclusion if there is "fungi or bacteria on or in food" that is "intended for human consumption." This new exception, like the change adding the "subcontractor exception" to the "your-work" exclusion in *Cypress Point*, is outcome determinative. Quite simply, if the exception applies, the mold exclusion "does not apply."

There is no language in the exception stating that it applies "only if the fungi-containing good or product includes a mycotoxin that is actually consumed and causes a distinct, identifiable injury." (Zurich could certainly have drafted such language into the policy, but the Court should not do so.) During trial, Zurich's "mold" expert answered a question on direct examination, stating that it was "implausible" that "Stachybotrys Chartarum germinated in Chenault's food and produced a sufficient amount [*sic*] of mycotoxins to cause injury at any point in the 18 years he was living there." 2T63-14-21. The language of the exception, however, does not contain any language about mycotoxins, or requiring "germination" of mycotoxins, or requiring that the policyholder prove the extent of injury caused

directly by consumption of mycotoxins in food. Construing the exception to require such proof violated every one of the rules of insurance policy interpretation discussed above.

As the *Cypress Point* Court pointed out, Zurich could have restricted the scope of the exception to injury proved to have been caused by mycotoxins in food or by eliminating any exception to the mold exclusion entirely, as it had in its 2005-07 policies. For example, the pollution exclusion in the 2007-2010 Zurich policies contains expressly worded and limited exceptions providing that the policy's pollution exclusion "does not apply" to liability caused by certain specified events, such as "hostile fire," "vandalism or malicious mischief," "explosion," "application of pesticides," or "fumes, vapors or gasses" not containing asbestos or lead. No similar express limitations are included in the mold exclusion's exception for mold "on or in" food intended for human consumption.

If the exception applies, because there was proof of mold "on" Larry Chenault's food, the mold exclusion "does not apply;" therefore, it makes no difference which of the routes of his exposure to toxic mold caused his injuries (although probably all of them did): (1) Dermal exposure to mold spores in the dust and on the surfaces of the contaminated condominium; (2) inhalation of mold spores disbursed in the air of the condominium; and (3) ingestion of mold "on" the food that Mr. Chenault consumed during the eighteen years that he lived in the

condominium (and for more than a year afterwards while he consumed food stored there). If there is mold "on" edible goods "intended" for consumption, that is all that is required to trigger the exception; and if the exception applies, the mold exclusion does, in fact, get "swallowed" by the losses arising from that particular cause. The Trial Court failed to consider and did not cite *Cypress Point* and committed reversible error by effectively adding restrictive language to the exception that it does not contain.

Chenault's toxicology expert, Lawrence Guzzardi, M.D., is one of only 300 medical doctors in the United States recognized as a toxicologist. 3T36-1 to 12. As noted above, multiple reports of environmental testing produced in the underlying case confirmed that substantial quantities of various species of toxic mold were detected throughout the condominium, including in the air and on the walls, carpets, and furniture in the condominium. There is, in fact, no evidence to the contrary.

Requiring Chenault to prove the extent to which he was injured by the mold on the food he consumed is inconsistent with the language of the exception and would, in any event, require an impossible level of proof. The courts of New Jersey have, in fact, relaxed the standards for proof of causation in toxic tort cases. This is based on the recognition that the causes and effects of exposure to toxins are subtle and difficult to prove with scientific certainty.

Thus, in the toxic-tort field, the modern trend has been to relax or broaden the

standard of determining medical causation. *Landrigan v. Celotex Corp.,* 127 N.J. 404, 413 (1992); *Rubanick v. Witco Chem. Corp.,* 125 N.J. 421, 434 (1991). This is because, in the toxic-tort context, "proof that a defendant's conduct caused decedent's injuries is more subtle and sophisticated than proof in cases concerned with more traditional torts." *Landrigan,* 127 N.J. at 413. A less traditional standard is essential because, unlike the typical personal injury action, the toxic-tort case often involves: (1) exposure of long duration, chronic and repeated; (2) exposure to multiple toxins; and (3) harm normally resulting from biochemical disruption or acute toxic substance as opposed to physical trauma. *James v. Chevron U.S.A., Inc.,* 301 N.J.Super. 512, 531 (App. Div.1997), *aff'd sub nom., James v. Bessemer Processing Co.,* 155 N.J. 279 (1998).

Accordingly, "plaintiffs in toxic-tort litigation, despite strong and indeed compelling indicators that they have been tortiously harmed by toxic exposure, may never recover if required to await general acceptance by the scientific community of a reasonable, but as yet not certain, theory of causation." *Rubanick v. Witco Chem. Corp.,* 125 N.J. at 434. "We agree with the reasoning and conclusion of the Appellate Division, and hold that a plaintiff in an occupational-exposure, toxic-tort case may demonstrate medical causation by establishing: (1) factual proof of the plaintiff's frequent, regular and proximate exposure to a defendant's products; and (2) medical and/or scientific proof of a nexus between the exposure and the

plaintiff's condition." *James v. Bessemer Processing Co.*, 155 N.J. 279, 304 (1998). Chenault's proofs in the underlying case and in this case met both of these factors.

In response to a question about whether or not mold-related injuries could be allocated to a particular route of exposure, Dr. Guzzardi testified that "whether the Trichothecenes were absorbed through the skin, whether they were absorbed through inhalation, or whether they were adsorbed through ingestion, the results are the same. There's no way to determine how the exposure occurred." 3T73-3 to12. Dr. Laumbach did not contradict this testimony. No scientific resource or report in the record suggests that the source of mold-related injury can be identified as having been caused by any particular route of exposure, whether dermal contact, inhalation, or ingestion.

In his report, Dr. Guzzardi correctly confirmed that the evidence he reviewed showed that "mold, mold spores, and mold fragments" were deposited on surfaces in the kitchen and on office desks, beds and tables, in the refrigerator, and on the foods on those surfaces.[7] 3T74-9 to 25. Larry Chenault testified that he usually ate in his condominium, where he often carried the food he consumed to his bedroom,

[7] In response to a question from the court, Dr. Guzzardi testified that "[t]he more you're exposed the more toxic affects [sic] you expect. A little bit of exposure, a little bit of effect, 18 years of exposure a lot of effect. I believe that Mr. Chenault was subject to mold in his apartment for a long period of time, chronic exposure." 3T76-2 to 12.

which he placed on the desk or other furniture in the room, including surfaces found contaminated by mold. 3T14-13 to 3T15-21. The foundation wall in the corner of the bedroom was the principal source of water intrusion into the condominium. The highest concentrations of airborne and surface mold contamination were found in his bedroom.

Judge Scoca accepted Dr. Guzzardi as an expert medical toxicologist but ruled that his testimony was not credible because it was not backed up by scientific studies, did not address mold dosage and the frequency of consumption of mold contaminated by mycotoxins (Da26-27), and erroneously relied on urine testing not recognized by the CDC and the FDA. Da28. This latter statement is contrary to the Trial Court's Finding of Fact No. 26, acknowledging that Dr. S.M. Phillips, VHCA's medical and mold expert in the underlying case, testified that urinalysis was the "best test" for detecting mycotoxins. Da10. Dr. Guzzardi also described the circumstances under which food can become contaminated by mold, as explained in the numerous scientific reports and articles he reviewed and that are summarized in his report. 3T77-14 to 3T78-23; 3T80-15 to 3T81-7. Da1347-1451. These materials were admitted into evidence and refute the Trial Court's statement that Dr. Guzzardi "did not identify scientific methodology in his report or on direct examination." Da26-27.

The finding that Dr. Guzzardi's analysis lacked scientific support and that he

"could not identify a single study addressing whether indoor-growing mold contaminates food and causes injury" is not merely unsupported by any evidence in the record, it is contradicted by the numerous studies concerning foodborne hazards of mold that were (a) cited in his expert report, (b) relied upon in reaching his conclusions, and (c) admitted into evidence as Trial Exhibit D-20, Da1347. For instance, one of the scholarly articles upon which Dr. Guzzardi relied says that "mold contaminations were also shown to originate from the air" and that "the indoor air at a consumer's home is also a potent source of spoilage molds." Da1358.

An EPA report upon which Dr. Guzzardi relied and that was admitted as part of Trial Exhibit D-20 discusses "exposure pathways" for mold contamination: "People will be exposed to hazardous substances in soil, sediment or dust if they accidentally ingest it (e.g., the contaminants land on their food)." Da1360-61. The EPA report continues by advising that "[e]ating food that has been contaminated is another common exposure route. In some cases, food found on people's plates may be contaminated as a result of direct exposure to the hazardous substance." Da1361. A bulletin of the World Health Organization that Dr. Guzzardi cites in his report and that was admitted into evidence says that "[e]xposure to mycotoxins is mostly by ingestion, but also occurs by the dermal and inhalation routes…. Most of the outbreaks of mycotoxicosis described are a consequence of the ingestion of food that is contaminated with mycotoxins." Da1362. The same WHO Bulletin observed:

"Trichothecenes were found in air samples collected … in the ventilation systems of private homes…. There are some reports showing trichothecene involvement in the development of 'sick building syndrome.'" *Id.* Trichothecenes are mycotoxins produced by the Stachybotrys mold discovered in Mr. Chenault's bedroom and detected in his urine.

Judge Scoca's determination also ignores the USDA's Brochure admitted as part of Trial Exhibit D-20 (the materials on which Dr. Guzzardi relied) that is entitled "Molds on Food: Are they Dangerous?" Da1347. The USDA's answer is "yes." *Id*. The brochure advises that molds can grow at refrigerator temperatures, that when serving food, it should be kept covered "to prevent exposure to mold spores in the air," and that perishable food should not be left out of the refrigerator for more than 2 hours. Da1349. Dr. Laumbach, Zurich's expert, was shown the USDA document at trial and did not disagree with it. 2T127-4 to 2T128-19**.** He also testified that even a "single spore" of mold can grow into a "colony" and that, without regard to mycotoxins, mold can be harmful to human health. 2T81-15 to 18; 2T82-1 to 6.

Dr. Laumbach otherwise sought to retry the underlying case by introducing a theory of causation rejected by VHCA's medical expert, Dr. Phillips. Dr. Laumbach suggested that the only likely means of exposure to mycotoxin-containing mold was via inhalation of mold spores in the air of the condominium rather than ingestion of mold-contaminated food. This otherwise unsupported testimony contradicts the

documents that were admitted as Trial Exhibit D-20 and the testimony of Dr. Phillips in the underlying case, who opined that injury from inhalation of mold spores was not likely, as opposed to injury caused by ingestion of mold spores. In particular, Dr. Phillips "did not disagree" with an expert report he reviewed during his deposition stating that "foodborne exposure to mycotoxins and fungal contamination has been well researched" and noting that while "[a]irborne exposure is likely the most significant route of exposure in water-damaged environments… transdermal and potentially foodborne exposure through contact with indoor mycotoxins can also occur…." Da1602. *See also* the Army Treatise ("Limited data are available on the respiratory effects of inhaled trichothecene mycotoxins.") Da2537.

Chenault cited two "consumption exception" cases from other jurisdictions that restored coverage for mold losses resulting from the consumption of mold on food that the Trial Court found "instructive." *Acuity v. Reed & Associates of TN, LLC*, 124 F.Supp. 3d 787 (D. Tenn. 2015) and *Nationwide Mutual Fire Ins. Co. v. Dillard House*, 651 F.Supp.2d 367 (N.D. Ga. 2009). Among the key reasons, however, that the Trial Court found that the exception to the mold exclusion in this case did not apply, and that Zurich did not breach its duty to defend, was a finding that Chenault never alleged the consumption of mold contaminated food as a source of his injuries: "The policy exception to the exclusion [in *Acuity* and in *Dillard House*] was nearly identical to the one at issue, but it is distinguishable because

Chenault did not allege that his injuries were caused by consumption of mold in any pleadings, including those of the underlying action." Da37. This finding is clearly erroneous, as the following is the allegation in Chenault's Amended Answer:

> *The three policies that AGLIC issued to VHCA* from June, I,2007 - June 1, 2010 *contain an exception to the modified mold exclusions* in those policies when injury is the result of "any fungi or bacteria that are, are on, or are contained in, an edible good or edible product intended for human... consumption"; *therefore, the mold exclusions in those policies do not bar Larry Chenault's claims for bodily and mental injury resulting from his consumption of edible food that was contaminated by mold spores released by the extensive toxic mold contamination in his condominium*. Da78-79 (emphasis added).

The law of New Jersey is clear that Zurich cannot re-try in this case the claims it wrongfully failed to defend in the underlying case by adding new evidence that (a) was not presented by VHCA and its experts, and (b) contradicts the expert testimony that VHCA did present. *LCS, Inc. v. Lexington Ins. Co.,*371 N.J.Super. 482 (App. Div. 2004). In *LCS,* the carrier failed to defend against the plaintiff's bodily injury claims, invoking an "assault and battery" exclusion in the policy. The carrier argued that the plaintiff's effort to re-characterize the case as a claim for "negligent hiring" was a bogus attempt to avoid the applicable exclusion. The court ruled otherwise, noting that in *Ohio Cas. Ins. Co. v. Flanagan,* 44 N.J. 504, 412 (1965), the Supreme Court held that "[i]t is the nature of the claim for damages, not the details of the accident… which trigger the obligation to defend." The *LCS* court ruled that when a carrier disclaims coverage and refuses to defend its insured, it is not entitled to

"relitigate" the determinative issues tried in the settled case. *Id.* at 497.

Zurich had every opportunity to involve itself in defending the underlying case, which was the proper time and place to question the source and nature of Chenault's exposure to mold. The Trial Court erred by effectively allowing Zurich to "relitigate" the underlying case. Further, the Trial Court added restrictive language to the exception to the mold exclusion that inappropriately limits the scope of the exception. A court may not rewrite a policy to favor a carrier's position not otherwise supported by the existing policy language. The Trial Court failed to consider the import of the revised language of the mold exclusion in the three policies at issue that expanded, rather than restricted coverage, thereby triggering Zurich's duty to defend. These erroneous rulings should be reversed.

III. The Trial Court erroneously applied a "first manifestation" trigger to coverage for Chenault's continuous injuries and damage. (Da42-43.)

From the outset of the underlying case, Chenault alleged that his injuries and damage resulted from his continuous (but unknown) exposure to mold in his condominium. Da76 (First Amended Complaint ¶14(e)). *See, e.g., Owens-Illinois, Inc, v. United Ins. Co.*, 138 N.J. 437 (1994) (continuous exposure to asbestos); *Carter-Wallace v. Admiral Ins. Co.,* 154 N.J. 312 (1998) (exposure to progressive environmental damage).[8] In this case, however, instead of applying the settled law

[8] In *Carter-Wallace,* the Supreme Court ruled that all of the insurance policies in effect during the continuous injury period should participate in sharing the

of New Jersey on the trigger of coverage, the Trial Court relied on an unpublished decision and a ruling from Pennsylvania that applied a "first manifestation" trigger, *Pa. Nat'l Mut. Cas. Co. v. St. John,* 106 A.3d 1 (Pa. 2014).

St. John refused to extend the "multiple trigger," continuing injury analysis of *J.H. France Refractories Co. v. Allstate Ins. Co.,* 625 A.2d 502 (Pa. 1993) to a claim for continuing, progressive property damage. The *St. John* ruling is inconsistent with controlling New Jersey law, including *Carter-Wallace* and the decision in *Air Master & Cooling, Inc. v. Selective Ins. Co. of America,* 452 N.J. Super. 35 (App. Div. 2017). In *Air Master*, this Court applied a continuous trigger analysis in a case involving progressive property damage. The "first manifestation" ruling in *St. John* is inconsistent with *Air Master* and with the rulings in *Owens-Illinois* and *Carter-Wallace.* The unpublished ruling in *Crivelli v. Selective Ins. Co. of Am.,* 2005 N.J.Super. Unpub. 703 (App. Div. Sept. 27, 2005) is likewise not pertinent. Indeed, that court had no quarrel with the continuous injurious exposure theory because there was "no evidence" of ongoing injury that would trigger the doctrine.

Because Chenault suffered adverse health "symptoms," such as headaches, nose bleeds, and respiratory problems for which he was treated before the Zurich

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damages loss, subject to their limits and time on the risk. This "sharing" of proportionate loss is precisely the type of allocation that the three settling insurers undertook in settling the Chenault claims in the underlying case. The remaining unpaid portion of the Consent Judgement is precisely the amount that should be allocated to Zurich.

coverage commenced, the Trial Court concluded that Zurich's coverage could not be triggered. There is, however, no evidence anywhere in the record tying any of these otherwise common ailments to Chenault's mold exposure, which remained unknown until several species of toxic mold were discovered by environmental testing that was conducted for the first time in March, 2009.

Moreover, the word "mold" does not appear in any of the medical records of any treating physician before the first report of Dr. Althea Hankins regarding her initial consultation with Larry Chenault in March, 2009. There is no evidence that anyone – whether a lawyer Chenault had retained to complain to the project developer about water intrusion, a representative of VHCA or its property manager, M&M, or anyone else – suggested that Chenault might have been suffering symptoms attributable to environmental exposure to mold or bacteria or any other toxic substance. Before March 2009, there was absolutely no basis for bringing such a claim against a third party, such as VHCA, because there was no evidence until that time of any connection between the acts or omissions of any third party and the symptoms Chenault was experiencing. The decisions in *Polarome Int'l, Inc. v. Greenwich Ins. Co.,* 404 N.J. Super. 241 (App. Div. 2008) (a toxic tort case) and *Air Master, supra,* are contrary to the Trial Court's ruling and require a different result.

In *Polarome,* the claimants had been exposed to a toxic workplace chemical, which was determined to have caused bodily injury. While the claimants' last

injurious exposure had ended when their employment ended, the court noted that the "last pull" of the coverage trigger had not occurred until the "the initial manifestation of [their] toxin-related disease." *Id.* at 272. As explained in the subsequent *Air Master* decision, the plaintiffs' "initial lung symptoms in *Polarome* were not dispositive of the trigger end date," which was determined instead by a subsequent clinical diagnosis of one plaintiff and the results of a biopsy of the other plaintiff. 452 N.J. Super. at 55 (citing *Polarome*, 404 N.J.Super. at 256-57).

In contrast to the claimants in *Polarome*, there was no "clinical diagnosis" or other medical procedure, such as a biopsy, suggesting that Larry Chenault had been harmed by toxic mold. His symptoms plainly did not, in his mind or in the mind of any treating physician (before Dr. Hankins), suggest that he had been harmed by exposure to a toxic substance. The *Air Master* court reversed the trial court's decision and rejected a claim based on a "manifestation argument" tied to the plaintiff's first complaints of water intrusion damage, ruling instead that the "public policy" reasons underlying the continuous trigger doctrine in toxic-exposure bodily-injury cases applied equally to claims of continuing property damage: "The progressively-worsening nature of a variety of construction defects, such as water infiltration *or mold*, logically support the application of the continuous-trigger doctrine." *Id.* at 48 (emphasis added).

It is undisputed that the presence of toxic mold in the Chenault condominium

remained hidden and unknown to him (or anyone else) until March, 2009, well within the Zurich policy period. The source of the water intrusion (the unrepaired crack in the foundation outside Chenault's bedroom) that had caused the formation of the hidden mold also remained unknown until at least the summer of 2009. The actual cause of the health problems Chenault suffered also remained unknown — both to Chenault and to the doctors who treated him.

It is likewise undisputed, as shown by overwhelming evidence, including scientific studies and peer-reviewed articles introduced in the underlying case, that Chenault suffered progressive injury resulting from his chronic, but unknown, exposure to the mold in his condominium. Thus, as summarized in her report, Dr. Hankins's medical history showed that, after moving into his condominium in 1991, Mr. Chenault "developed progressively severe and multiple symptoms that progressed into the loss of job, home, and health. One of the worst ongoing problems that developed was his decreasing memory function that resulted in his being unable to work, or function in [a] manner compatible with his previous level of intellectual or physical function." Da498. Because Chenault's medical records showed elevated monocyte counts, which "are associated with chronic infections especially fungal" (Da499), Dr. Hankins concluded, that "Mr. Chenault has severe documented post-exposure medical issues that have resulted in severe and persistent disability. There will not be a return to baseline function." Da500. Dr. Hankins's

opinions regarding Chenault's progressive, but otherwise unknown, illness attributable to chronic mold exposure are consistent with numerous studies used during the deposition of VHCA's medical expert, Dr. Phillips, in the underlying case. *See also* fn. 6, *supra* (Dr. Guzzardi's testimony in this case).

One of the articles reviewed by Dr. Guzzardi confirms that "Chronic conditions have a much greater impact, numerically, on human health in general, and induce diverse and powerful toxic effects…. some are carcinogenic… and neurotoxic." Trial Exhibit D-20, Da1347. The "neurotoxic" consequences (demyelinating disease) of Chenault's chronic exposure to mold remained unknown and were not detected until the psychological and neurological testing conducted after the spring of 2009, when the additional testing led to Dr. Hankins's opinions and her "differential diagnosis" of Chenault's brain-related injury and its relationship to his chronic exposure to mold.

The following is a list prepared by the court reporter at pp. 4-6 of Dr. Phillips's deposition in the underlying case (Da1564) of "chronic exposure" materials that were included among the exhibits about which he was asked, but that he had not previously seen or reviewed (showing deposition transcript page numbers):

> Ex-30. The Putative Role of Viruses, Bacteria, and Chronic Fungal Biotoxin Exposure in the Genesis of Intractable Fatigue Accompanied by Cognitive and Physical Disability, 22 pages, June 17, 2015 [pg. 175]
>
> Ex-31. Development of New-Onset Chronic Inflammatory Demyelinating Polyneuropathy Following Exposure to a Water-

Damaged Home with High Airborne Mold Levels: A Report of Two Cases and a Review of the Literature, four pages, 2017 [pg. 178]

Ex-32. Detection of Mycotoxins in Patients with Chronic Fatigue Syndrome, 13 pages, 4-11-13 [pg. 182]

Ex-33. Chronic Illness Associated with Mold and Mycotoxins: Is Naso-Sinus Fungal Biofilm the Culprit? Two pages, 12-24-13 [pg. 184]

The jury in the underlying case would have seen these exhibits; would have heard the testimony of Dr. Phillips, VHCA's expert, acknowledging that he had not reviewed them; and would have heard the testimony of Dr. Hankins. The jury would *not* have heard the testimony of Dr. Laumbach, Zurich's expert in this case. Zurich should not be allowed to "retry" or relitigate the underlying case by introducing new evidence that Zurich failed to introduce because it improperly failed to defend VHCA. *LCS, Inc., supra.*

The Trial Court's ruling that Chenault's claims were precluded by the manifestation of compensable injury from mold before the commencement of the first Zurich policy at issue is erroneous as a matter of law and should be reversed.

CONCLUSION

The trial court committed reversible error by (a) erroneously failing to apply Appleman's rule to Chenault's claims; (b) erroneously failing to consider the impact of changes in the wording of the mold exclusions in the Zurich policies; (c) effectively rewording the language of the exception to the mold exclusion regarding "mold on or in" food "intended for human consumption" to favor Zurich's position;

and (d) by erroneously failing to recognize Chenault's claims for continuous injurious, but unknown, exposure to mold, ruling instead that the symptoms for which Chenault sought treatment constituted "manifestation" of mold-related injury before the Zurich policies' coverage commenced. The Trial Court's erroneous rulings should be reversed and the case remanded for entry of judgment in favor of Larry Chenault.

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Superior Court of New Jersey

Appellate Division

Docket No. A-003321-22

AMERICAN GUARANTEE AND LIABILITY INSURANCE COMPANY, *Plaintiff-Respondent,* vs. VICTORY HIGHLANDS CONDOMINIUM ASSOCIATION, INC., MARSHALL & MORAN, *Defendants,* and LARRY CHENAULT, *Defendant-Appellant.*	CIVIL ACTION ON APPEAL FROM THE FINAL JUDGMENT OF THE SUPERIOR COURT OF NEW JERSEY, LAW DIVISION, ESSEX COUNTY DOCKET NO. ESX-L-008231-18 Sat Below: HON. JEFFREY B. BEACHAM, J.S.C. HON. ANNETTE SCOCA, J.S.C.

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American Guarantee and Liability Insurance Company ("Zurich") submits this respondent brief in response to Larry Chenault's appeals from the trial court's summary judgment order dated October 17, 2019 and verdict dated May 24, 2023.

PRELIMINARY STATEMENT

Larry Chenault ("Chenault") seeks to enforce a multi-million-dollar consent judgment predicated on injuries he suffered exclusively by exposure to mold against an insurer with mold exclusions. Because the plain language of the Zurich Policies forecloses this absurd result—as the trial court has held—Chenault advocates for a sweeping, unsupported change to New Jersey insurance law. He asks this Court to expand a rule limited to first-party property policies—the efficient proximate cause rule—to a third-party commercial general liability policy. There are substantial analytical differences between first-party property and third-party liability policies required by their policy language. The trial court recognized that these crucial differences rendered the efficient proximate cause rule inapplicable, applied the Mold Exclusion as written, and held that it bars coverage. This Court should affirm.

Alongside his misguided attempt to change New Jersey law, Chenault asks this Court to adopt a deeply strained interpretation of the Consumption Exception. This common exception restores coverage for injuries caused by

fungi or bacteria that are, are on, or are contained in, edible goods or products intended for human consumption. The trial court correctly applied this language to require proof that Chenault was injured by eating mold-contaminated food. Following a multi-day bench trial hinging on expert testimony, the trial court held that Chenault failed to prove he was injured by consuming mold-contaminated food. His expert lacked "credibility" and that expert's opinion was scientifically unsound. In contrast, Zurich's expert was "extremely credible," and his opinion scientifically reliable. Those factual findings and conclusions are entitled significant deference and should be affirmed.

In addition to affirming the trial court's application of the Mold Exclusion, the Court should affirm the trial court's determination on trigger of coverage. Chenault's mold-caused injuries began in 1991 and allegedly caused debilitating injuries for the next eighteen years. So debilitating were these ongoing injuries that they, as argued by Chenault and his expert, supported a $2.3 million consent judgment. The trial court appropriately determined, however, that Chenault cannot have his cake and eat it too. Since Chenault introduced evidence that his widespread mold-caused respiratory, neurological, and cognitive injuries manifested for sixteen consecutive years before the first Zurich Policy incepted in 2007, the trial court correctly determined that the Zurich Policies were not triggered.

This Court should put an end to Chenault's decade-long crusade to hold Zurich—an insurer with mold exclusions—liable for his mold-caused injuries. Chenault could have, and should have, pursued the $7 million of coverage provided by three defending primary insurers to Victory Highlands Condominium Association ("VHCA"), none of which had mold exclusions in their policies. Doing so would have required him to litigate against VHCA beyond motion practice. Chenault opted instead to settle with these primary insurers for a fraction of their limits— $310,000—and to give those insurers a full release regardless of the outcome of this suit against Zurich. Chenault bears the responsibility for this gamble.

In summary, the trial court's comprehensive rulings rejecting Chenault's case apply the plain terms of the Zurich Policies and settled New Jersey law. They also include factual findings and conclusions entitled to significant deference. Chenault has provided no basis to overturn any aspect of those rulings. The Court should affirm and declare that the Zurich Policies do not afford coverage for the consent judgment.

PROCEDURAL HISTORY

In November 2018, Zurich filed this coverage action (the "DJ Action") seeking a declaration that it had no duty to defend and indemnify VHCA in the lawsuit captioned *Larry Chenault v. Victory Highlands Condominium*

Association Inc., Marshall and Moran, LLC, et al., Docket No. ESX-L-3078-10, Superior Court of New Jersey, Essex County ("Underlying Action").

Months later, Zurich moved for summary judgment because the Mold Exclusion in its umbrella policies barred coverage to VHCA for the Underlying Action. Da165a. Chenault opposed and cross-moved for summary judgment, arguing that the Mold Exclusion did not apply because Appleman's rule rendered the Mold Exclusions inapplicable. Pa606-Pa613. Under that rule, claimed Chenault, the "efficient proximate cause" of the mold was VHCA's negligent failure to repair water intrusion, which was a "covered risk". *Id*. In a brief opinion, the trial court (Beachem, J.S.C.) denied both motions. Da156a.

Chenault filed a Motion for Reconsideration of the decision and Zurich filed a limited Cross-Motion for Reconsideration, requesting that the trial court declare that the Mold Exclusions barred coverage unless the Consumption Exception applied. Da937a; Da943a. In October 2019, the trial court denied Chenault's Motion for Reconsideration and granted Zurich's Cross-Motion. Da154a. In a 33-page opinion, the trial court rejected Chenault's reliance on Appleman's rule and held that the Mold Exclusion barred coverage to VHCA for the Underlying Action unless the Consumption Exception restored coverage. Applying settled law, it determined that Appleman's rule only applies to first-party policies, which grant coverage based on whether a loss was caused by a

covered peril. 6T27-2-22. The court further held that Appleman's rule does not apply to third-party policies, under which the right to coverage is based on fault, proximate cause, and duty. 6T27-9-22. If coverage could be afforded for an otherwise excluded loss simply because one cause of that loss was covered, the court reasoned, then most provisions of a third-party policy would be rendered meaningless. 6T27-23 to 6T28-3. Applying these principles, the court held that the Mold Exclusion barred coverage because Chenault's injuries "indisputably were caused by mold exposure" and not water intrusion. *Id*.

After discovery ended, Zurich filed a motion for summary judgment, arguing that: (1) Chenault's bodily injury and property damage were not covered because they manifested before the Zurich Policy periods; (2) the Consumption Exception did not restore coverage barred by the Mold Exclusion; and (3) the Settlement was unenforceable. Pa22-Pa23. Chenault filed an opposition and cross-motion for summary judgment on February 9, 2021. Pa24. The trial court (Passamono, J.S.C.) denied both the motion and cross-motion, holding that issues of material fact existed. Pa25-Pa52.

To resolve these factual issues, the parties proceeded to a bench trial before the Hon. Annette Scoca, J.S.C. from October 11-14, 2022. During that proceeding, the parties introduced fact testimony from Chenault and expert testimony from two medical experts, Dr. Lawrence Guzzardi and Dr. Robert

Laumbach, and two legal experts, Mr. David Field and Mr. Louis Niedelman. They also introduced considerable documentary evidence. Following trial, both parties submitted proposed findings of fact and conclusions of law and post-trial briefs. On May 24, 2023, the trial court issued a 53-page verdict and opinion, declaring that Zurich had no obligation to provide coverage to VHCA in the Underlying Action. Da3a.

First, the trial court ruled that the Consumption Exception did not revive coverage. Da31a-Da39a. Examining the competing expert testimony, the court found that Chenault's expert, Dr. Guzzardi, was unreliable, and that Zurich's expert, Dr. Laumbach, was "credible, articulate, and extremely knowledgeable about the issue at hand." Da38a. Based on these factual findings, the court concluded that Chenault failed to meet his burden of showing that he was injured through the consumption of mold-contaminated food. Da38a-Da39a.

Second, the trial court held that there was no occurrence of bodily injury and property damage during the Zurich Policies because Chenault's injuries and damages initially manifested in the 1990s, whether applying the first manifestation or the continuous trigger rule. Da39a-Da43a. Under either rule, the "last pull" of the coverage trigger is the manifestation of the personal injury, when the symptoms become known. Da42a. The court held that Chenault's injuries were obvious to him beginning in the 1990s, well before the inception

of the Zurich Policies. Da43a. Chenault's property damage did not impact the court's analysis, because it was barred by the Mold Exclusion and could not be restored through the Consumption Exception, but in any event manifested in the 1990s. *Id.*

Finally, although the trial court concluded that there was no coverage, it separately addressed the reasonableness of the Settlement and stated that it was not presented with enough evidence to conclude that the Settlement was unreasonable or reached in bad faith. Da46a-Da55a.

COUNTER STATEMENT OF FACTS

A. The Underlying Action

i. The Underlying Pleadings

Chenault began the first of his two lawsuits against VHCA in April 2010, when he filed the Underlying Action. He alleged that he purchased a condo maintained by VHCA, a condo board, and by Marshall & Moran ("Marshall"), VHCA's property manager. Da1118a-Da1119a. Chenault alleged that water infiltration led to the formation of toxic mold in his condo unit, causing him to suffer property damage and bodily injury. Da1119a. He repeatedly alleged that he "inhaled toxic mold and sustained severe and permanent personal injuries." Da1121a-Da1124a.

After two years of litigation, Chenault settled for $110,000, to be paid by VHCA and Marshall (the "2012 Settlement"). The 2012 Settlement provided VHCA and Marshall with a total release. But that Settlement permitted Chenault to re-file his complaint and seek damages in excess of $110,000 from VHCA and Marshall's insurers, provided they were identified. Da2081a-Da2094a.

In 2014, with court permission, Chenault re-filed his complaint, dubbing it the First Amendment Complaint ("FAC"), and naming as defendants VHCA, Marshall, Zurich, and several insurers that provided primary coverage to VHCA in the 1990s and 2000s. Da84a. Newark, Clarendon, and Imperium (the "Primary Insurers") agreed to defend VHCA. Da1225a. The Primary Insurers issued policies to VHCA starting on June 1, 1991 and, in total, insured VHCA for eight years between 1991 and 2004, with collective limits of liability of $7,050,000. None of these insurers had mold exclusions. Pa518; Pa63-Pa516.

In the FAC, Chenault repeated his prior allegations of exposure to toxic mold in his condo. In describing VHCA's wrongful conduct, Chenault alleged that VHCA's negligent acts and omissions in failing to maintain the building led to "constant and ongoing incidents of water intrusion into the premises beginning in 1991 and continuing during the entire period of time that plaintiff resided at 9 Victory Court." Da87a-88a. Chenault alleged that the water intrusion led to the formation of toxic mold to which he was exposed

commencing in 1991 and continuing until March 2009. Da89a. He further alleged that he suffered "serious, adverse health consequences caused by his ongoing, continuous exposure to toxic mold from 1991 through June 2010[.]" Da89a. Nowhere within the FAC did Chenault allege that he was injured by ingesting mold-contaminated food. Even when detailing why Zurich was obligated to provide coverage, Chenault did not invoke the Consumption Exception or otherwise allege a foodborne injury. Da100a-Da101a.

ii. Chenault's Evidence On Injurious Exposure

To support his allegations of serious injuries and property damage manifesting as early as 1991 and continuing during his residency at the condo, Chenault offered his own testimony and support from retained experts. For example, at his January 2012 deposition, Chenault testified that:

a. The leaks in his condominium unit were constant and apparent, starting in 1991.

b. Around that time, he observed leaks in the corner ceiling of his basement and in the ceiling of his bedroom. Water would flow right out of the joist in the basement.

c. He promptly complained about the water damage to the developers and even hired an attorney to send a letter.

d. Sometime thereafter, the developer tried to repair the leaks by caulking the sidewalk. However, the leaks continued and by the mid-1990s, the leaks were so bad they forced Chenault to move out.

e. Around that time, the developer attempted a second repair, this time by digging around the corner of his unit and filling it with concrete.

f. By 1996 or 1997, the condo association took control, but nothing changed.

g. The leaks continued, and so did Chenault's complaints, which were "constant." He told the condo association that the water was "pouring" in.

h. Starting in 2002, Chenault complained to Marshall. By around 2003, he became so frustrated with the constant, unaddressed water intrusion that he ceased paying condo dues.

i. By the mid-2000s, Chenault's walls were changing color and by December 2008, he saw mold, though he asserts that he did not know it was mold at the time.

j. Chenault first began to experience symptoms in 1991, which continued through his residency at the condo.

k. In the early 1990s, his symptoms became so severe that they caused the collapse of his marriage.

Da408a-Da454a.

Chenault's medical experts echoed his testimony. Following his discovery of mold in March 2009, Chenault consulted with Dr. Adrienne Sprouse. Dr. Sprouse described Chenault as being "well until 1991" after which he "experienced progressively severe symptoms that have led to his current disability." Da635a. Dr. Ronald Lazar, another of Chenault's litigation consultants, recounted a similar medical history. Dr. Lazar reported that after Chenault found water damage in his ceiling and basement in 1991, Chenault "began experiencing the gradual onset of stomach pains, sneezing, coughing-up

blood, deteriorating eyesight, headaches and increasing difficulty with calculations." Da2243a. Dr. Lazar further reported that "[b]y the mid-1990s, he was increasingly aware of his cognitive deficits…" He was also "continually tired" and "having trouble remembering important Taekwondo forms (moves)." *Id.* Dr. Althea Hankins, Chenault's expert in the Underlying Action, explained at her deposition that Chenault's "[medical] problem was initially identified in 1991" and determined that the "problems with him…started in 1991." Da1539a; Da1549a. Dr. Hankins causally related Chenault's long-term symptoms, like sneezing, coughing, running nose, headaches, difficulty breathing, chest congestion, nose bleeds and coughing up blood, to his historic mold exposure. Da1539a-Da1541a; Da1550a.

iii. The Consent Judgment and Settlement

In spring 2018, VHCA moved for summary judgment seeking to dismiss the FAC based on, among other things, the statute of limitations. Pa5. Faced with the potential for complete dismissal of his case, Chenault proceeded to mediation and, thereafter, settled. Although Zurich participated in the mediation, it was omitted from the eventual settlement struck between Chenault and the Primary Insurers.

Under the settlement agreement, the Primary Insurers gave Chenault a $2,888,725 Consent Judgment against VHCA and an assignment of rights to

pursue coverage under five policies issued by Zurich and five policies issued by LMI Insurance between 1994 and 2000. Da1225a-Da1254a. In exchange, Chenault accepted a $310,000 payment from the Primary Insurers, agreed not to execute against VHCA and the Primary Insurers, provided VHCA with a warrant satisfying the Consent Judgment, released VHCA (for a second time) and the Primary Insurers, and agreed to defend and indemnify them if they were brought into a lawsuit arising from the Underlying Action. *Id.*; Da1257a.

B. The Zurich Policies

Zurich issued five annual commercial umbrella liability insurance policies to VHCA, incepting on June 1, 2005 and expiring on June 1, 2010. Da231a-Da395a. The parties agree that only the last three Zurich Policies are relevant to this dispute (the "Zurich Policies").

The Zurich Policies offer two forms of coverage: Coverage A and Coverage B. Coverage A, titled "Excess Follow Form Liability Insurance," provides what is known as follow form coverage. Coverage B, titled "Umbrella Liability Insurance," applies when Coverage A does not and is subject to its own terms, conditions, and exclusions. Da289a.

Coverage A of the Zurich Policies follows form to primary policies issued by QBE. QBE disclaimed coverage to VHCA based on mold exclusions in its policies and the parties agree that those exclusions bar coverage. Da535a.

Accordingly, the parties agree that Coverage A of the Zurich Policies is inapplicable.

Coverage B affords coverage for "damages the **insured** becomes legally obligated to pay by reason of liability imposed by law…because of **bodily injury, property damage**…covered by this insurance but only if the injury…takes place during the policy period of this policy…" Da289a. For claims falling within this insuring grant, there are several exclusions that bar coverage.

As relevant here, the Zurich Policies include a Fungus or Bacteria Exclusion (the "Mold Exclusion"), which provides as follows:

> Under **Coverage A** and **Coverage B** this policy does not apply to any liability, damage, loss, cost or expense:
>
> A. Caused directly or indirectly by the actual, alleged or threatened inhalation of, ingestion of, contact with, exposure to, existence of, or presence of any:
>
> 1. Fungi, or bacteria; or
>
> 2. Substance, vapor or gas produced by or arising out of any fungi or bacteria.
>
> ***
>
> Definitions
>
> As used in this endorsement:
>
> **1. Bacteria** means any type or form of bacteria and any materials or substances that are produced or released by bacteria.

> **2. Fungi** means any type or form of fungus, including mold or mildew and any mycotoxins, spores, scents or by-products produced or released by fungi.
> **3. Spores** mean reproductive bodies produced by or arising out of **fungi.**
>
> This exclusion does not apply to any **fungi** and **bacteria** that are, are on, or are contained in, an edible good or edible product intended for human or animal consumption.

Da277a.

C. The Coverage Trial

As described in the procedural history above, this matter proceeded to trial to determine three issues: (1) whether the Consumption Exception restored coverage to VHCA for the Consent Judgment; (2) whether Chenault's injuries manifested before the inception of the first Zurich Policy on June 1, 2007; and (3) whether Chenault's settlement was reasonable, entered into in good faith, and non-collusive. Da1a-Da2a. The evidence introduced at trial came through considerable documents from the Underlying Action but also through trial testimony from Chenault and expert witnesses. We discuss the relevant testimony below.

i. Larry Chenault's Trial Testimony

Chenault's trial testimony was consistent with his deposition testimony from the Underlying Action. At trial, as in the Underlying Action, he emphasized the extent to which he complained to VHCA in the 1990s of leaks and damage

to his property and on the severe impact of his injuries beginning in the 1990s and continuing over time. 1T47-2-12; 1T47-19 to 1T48-9; 1T47-25 to 1T49-3.

For instance, the water infiltration was so severe that he hired a lawyer to write to VHCA, he stopped paying his condo dues, and a lessee moved out prematurely. 1T51-16 to 1T52-14. Chenault testified that his symptoms were contemporaneous with the water infiltration and that he sought treatment in the early 1990s. 1T52-20-24; 1T53-10-13. He was not the only one to experience symptoms because of mold. Chenault's wife lived in the condo with him in the early 1990s, during which time she also allegedly experienced mold-related symptoms. These symptoms caused her to become argumentative, delusional, sickly, and irrational. Chenault believes this caused the downfall of his marriage. 1T53-14 to 1T54-19. Chenault's brother Daryl also lived in the condo with Chenault for about four or five years in the 1990s. During that time, Daryl also experienced symptoms which Chenault believes were caused by mold, including shortness of breath, weight gain, and open sores. 1T54-23 to 1T55-13.

ii. Dr. Robert Laumbach's Trial Testimony

Zurich retained Dr. Robert Laumbach as its medical expert to address whether Chenault suffered injury by ingesting food contaminated by indoor-growing mold in his condo. Dr. Laumbach's impressive credentials are discussed

in detail in the trial court's findings of fact. Da23a-Da25a. To frame his opinions, Dr. Laumbach provided thorough testimony on mold in the environment.

Mold are multi-cellular types of fungi that are ubiquitous indoors and outdoors. 2T20-18 to 2T21-19. In New Jersey, there are several common types of mold, including Penicillium, Aspergillus, Cladosporium, and Alternaria. 2T22-8-12. Mold grows by reproducing through mold spores. Mold spores are produced when a mold has the conditions necessary to grow, which include moisture and a suitable food source. 2T23-13-24. Mold spores are microscopic, typically measuring between 1 and 10 microns. Stacked together, it would take between 2,500 and 25,000 microns to equal one inch in length. 2T22-15-23.

People inhale and ingest mold daily. Exposure through ingestion results from mold growing in our food supply, such as where corn, wheat, or other grains are growing or stored. 2T25-17 to 2T26-16. Due to ubiquity of mold and mycotoxins in the food supply, the Food and Drug Administration has set limits on the permissible levels of certain mycotoxins in certain foods. 2T26-2-6. Most molds are not harmful. Instead, only a few molds are capable of causing harm, and then only under "very specific conditions[.]" 2T24-14-18. Some molds are capable of producing mycotoxins, which are chemical substances that molds produce to compete with other organisms. Many molds do not produce mycotoxins. 2T24-19 to 2T25-6. For example, Stachybotrys is a genus of mold

and one of its species, Stachybotrys Chartarum, is capable of producing the mycotoxin trichothecene. Other species of Stachybotrys, however, do not produce mycotoxins. 2T29-5 to 2T31-6. Like mold, people are regularly exposed to mycotoxins by inhalation and, separately, by ingestion of foods contaminated by mycotoxins in the food supply. 2T27-11-13; 2T25-17-24. Humans do not typically suffer injury from their daily inhalation or ingestion of mold and mycotoxins because the dosage is insufficient to cause injury. 2T27-14 to 2T28-4.

Dr. Laumbach used a well-accepted scientific methodology to evaluate whether Chenault was injured by ingesting food contaminated by indoor-growing mold: an exposure pathway analysis. 2T38-4-11. This involves a "process of looking at how someone could become exposed to a hazardous agent, with the goal being, establishing that the person, first of all, was exposed and second of all, the extent of which they're exposed, which is really the dose." 2T38-14-19. It focuses on specific causation. 2T124-15-24. Dr. Laumbach's exposure pathway analysis included five steps. For Chenault's alleged injuries to be caused by his ingestion of food contaminated by indoor-growing mold, the evidence must be sufficient to satisfy each and every step. 2T39-14-19.

Step One: The first step in the exposure pathway analysis was evaluating whether there was evidence of excessive mold growth in the condo while

Chenault resided there. Yet no environmental tests were performed during the eighteen years he resided there. This itself is a problem since environmental tests are simply a snapshot in time and the greater the time between the residency and the tests, the "less representative of what an actual exposure may have been." 2T40-15 to 2T41-10. As such, Dr. Laumbach was required to use environmental samples collected after Chenault vacated the property, the first of which was performed by Chenault's contractor, Superior Mold Remediation ("Superior"), on March 21, 2009. Da1763a.

Superior's tests did not detect excessive growth of the sole mold capable of producing the mycotoxin to which Chenault claims he was exposed – trichothecene – which can be produced by the mold species Stachybotrys Chartarum. Indeed, Superior did not even test for Stachybotrys Chartarum. It tested for the genus Stachybotrys, which has many species that do not produce trichothecene. 2T29-5 to 2T31-6. In any event, Superior detected either no Stachybotrys or the bare minimum that could be detected. The report states that these spores *likely originated outside*. Da1763a. 2T43-22 to 2T46-22.

There were also serious flaws with Superior and its methodology. First, no mold was detected outside, which is abnormal because mold is ubiquitous. Second, a mold remediation company is typically conflicted out of collecting samples. Third, Superior's extrapolation of raw spore counts to spores per cubic

meter is mathematically incorrect such that the report vastly overstates the quantum of spores per meter. 2T41-19 to 2T42-19.[1]

In addition to Superior's testing in March 2009, additional air samples were collected in October 2009 and February 2011. This time, no Stachybotrys was detected. 2T49-9-15; 2T51-12-20. Da765a; Da1874a-Da1882a.

Based on the tests finding either no Stachybotrys or the bare minimum, Dr. Laumbach concluded that there was insufficient evidence to meet the first step in his exposure pathway analysis, i.e., there was no evidence of excessive mold growth while Chenault was living in the condo. 2T51-21 to 2T52-2.

Step Two: In the second step, Dr. Laumbach analyzed whether the Stachybotrys allegedly growing in Chenault's condo produced trichothecene.

No tests were performed to see if the species Stachybotrys Chararum was present and was actually producing trichothecene, which is important because the presence of this mold does not mean it is producing trichothecene. 2T53-24 to 2T54-2; Pa572. ("Importantly, the mere presence of [a mold capable of producing a mycotoxin] should not be taken as evidence that the mold was producing any mycotoxin"). Pa572. Indeed, only about one-third of

[1] Dr. Lawrence Guzzardi was unaware of how raw spores are extrapolated to cubic meters and was unaware of the significant mathematical error in Superior's report. 3T125-15-21.

Stachybotrys Chartarum isolates are even capable of producing trichothecene. 2T54-16-18.

Based on these facts, Dr. Laumbach concluded that there was insufficient evidence to meet the second step in his exposure pathway analysis, *i.e.*, there was no evidence that Stachybotrys Chartarum was producing trichothecene. 2T54-19-23.

Step Three: In step 3, Dr. Laumbach evaluated whether it was likely that Stachybotrys Chartarum and trichothecene were in the air in an appreciable quantity because the fewer spores, the less likely they are to settle on food. 2T54-24 to 2T56-14.

Since mold spores are microscopic and airborne tests detected either no Stachybotrys or the bare minimum, Dr. Laumbach concluded that there was insufficient evidence to meet the third step in his exposure pathway analysis, i.e., there was no evidence mycotoxins and Stachybotrys Chartarum got into the air in appreciable quantities. *Id*.; Pa57-Pa58.

Step Four: In step 4, Dr. Laumbach evaluated whether Stachybotrys Chartarum was likely to contaminate Chenault's food. 2T56-23 to 2T57-4.

Since there was no evidence that any of Chenault's foods were contaminated by mold because they were never tested, Dr. Laumbach focused

on whether household foods could act as a food source for Stachybotrys Chartarum. 2T57-5 to 2T58-21.

Stachybotrys Chartarum requires a food with high cellulose, a high moisture content, and ambient temperatures to grow and proliferate. *Id*. Household foods do not provide these conditions. Very few have a sufficient water activity. Very few have a high enough cellulose content. And most foods are stored in a refrigerator, which is too cold to support growth of this mold. 2T58-22 to 2T61-24. Without the conditions necessary to grow, Stachybotrys Chartarum is incapable of producing the quantity of trichothecene necessary to cause injury. 2T28-5-17.

When asked to identify food that could support Stachybotrys Chartarum growth, Dr. Laumbach explained that bran flakes could potentially support its growth, provided they remained wet for days. 2T60-20 to 2T61-3. So, if Chenault ate multi-day-old wet cereal, that would be a possible household food that could have supported the growth of Stachybotrys Chartarum and potentially caused injury. There is no evidence Chenault ate multi-day-old wet cereal.

Based on these facts, Dr. Laumbach concluded that there was insufficient evidence to meet the fourth step in his exposure pathway analysis, *i.e.*, that Stachybotrys Chartarum grew in Chenault's food and produced appreciable levels of trichothecene. 2T63-14-21.

Step Five: In step 5, Dr. Laumbach evaluated whether Chenault was injured by eating food contaminated with indoor-growing mold by assessing critical principles of toxicology. To suffer injury by exposure to mold, as with any other potential toxin, there must be a sufficient dose and sufficient frequency of exposure. 2T75-11-23.

Mycotoxin levels that predict disease have not been established. 2T76-15-25; Pa521. But there have been efforts to evaluate at what levels exposure could be toxic. These studies indicated that a person would have to be exposed to a dose of Stachybotrys containing trichothecene on the magnitude of ten billion spores. In contrast, the highest airborne spore count of Stachybotrys ever detected in Chenault's condo was 1 raw spore or 8 spores per cubic meter. 2T78-6-14; 2T44-20 to 2T45-2.

Dr. Laumbach further testified that there is a complete lack of scientific studies, case reports, or other evidence documenting that indoor-growing mold is known to contaminate household foods and lead to injury. 2T79-14-24. In fact, Dr. Laumbach testified that it is not generally accepted in the scientific community that injury can be caused by indoor-growing mold mycotoxins that settle on food. That opinion is consistent with the Position Statement from the American Academy of Asthma, Allergy and Immunology. 2T142-13 to 2T143-6; Pa572.

Based on these facts, Dr. Laumbach concluded that there was insufficient evidence to meet the fifth step in his exposure pathway analysis, *i.e.*, that Chenault was injured by eating food contaminated by Stachybotrys Chartarum and trichothecene. 2T79-25 to 2T80-5.

iii. Dr. Lawrence Guzzardi's Trial Testimony

Chenault retained Dr. Lawrence Guzzardi as an expert sometime after the October 2019 summary judgment award to Zurich concluding that the Mold Exclusion in the Zurich Policies barred coverage for the claims in the FAC. 3T84-14-17. Dr. Guzzardi did not examine Chenault. His opinion is based on his limited review of certain of Chenault's records and certain deposition transcripts, and an interview of Chenault. 3T38-11-18.

It is Dr. Guzzardi's opinion that Chenault ate food contaminated by indoor-growing mold and its mycotoxins and suffered injury. He did not identify his scientific methodology in his report or on direct examination. Rather, on cross-examination, Dr. Guzzardi described his scientific method as "common sense." 3T128-22 to 3T129-7. In essence, Dr. Guzzardi's opinion is that because there was mold in the air in the condo and because Chenault ate food while residing in his condo, he must have eaten food contaminated by that mold and suffered injury. 3T118-15-20.

On cross-examination, Dr. Guzzardi was pressed on basic principles of toxicology. He agreed that to suffer injury through exposure to mold, Chenault would have to have been exposed to an "appreciable quantity" of mold or mycotoxins. "[O]ne mold spore would not cause toxicity." 3T115-16-22. But Dr. Guzzardi did not know at what dose Chenault consumed mycotoxins at any point in time. 3T118-21-24. Nor did he did not know with what frequency he consumed food contaminated with mycotoxins. 3T118-25 to 3T119-4.

Dr. Guzzardi also conceded that for injury to arise from ingestion of mold-contaminated food, the mold must have been a strain capable of producing trichothecene, and must have grown, proliferated, and produced sufficient mycotoxins to cause injury. 3T116-2 to 3T118-14. Yet on cross-examination, Dr. Guzzardi testified, like Dr. Laumbach, that most household foods do not provide the necessary conditions for Stachybotrys Chartarum to grow, let alone proliferate. Dr. Guzzardi "definitely agreed" that "[l]ots of foods do not have a high enough moisture content to support the growth of Stachybotrys Chartarum." 3T106-7-10. He also testified, like Dr. Laumbach, that Stachybotrys Chartarum is known to grow on high cellulose materials, like gypsum. On that type of product, this mold can grow after approximately 48 hours of prolonged moisture. 3T105-24 to 3T106-2. To the extent Stachybotrys Chartarum could grow on a household food, it would "likely" take 10 to 20 days.

3T116-23 to 3T117-3. But Chenault, like most people, did not eat multi-week-old food. Instead, he testified that he regularly consumed his food in one sitting or within a few days. 1T68-18 to 1T69-6.

Dr. Guzzardi's opinion that mold growing in Chenault's condo contaminated his food and caused him injury is admittedly not supported by a single study anywhere that documented this ever having taken place in human history. 3T108-24 to 3T110-5.

iv. David Field's Trial Testimony

Chenault's expert, David W. Field, Esq, testified that the settlement amount was reasonable. On cross, Mr. Field was shown several New Jersey mold verdicts and settlements, the largest of which was $150,000 for a single plaintiff. 3T183-13-15; Da19a. The mold cases which Mr. Field personally litigated also resulted in lower verdicts or settled for *de minimis* amounts, for example, a $32,500 jury award on a $14.5 million demand. 3T187-8-14.

Mr. Field also testified that VHCA's statute of limitations defense was not viable due to the continuing tort doctrine, the "discovery rule", and the assertion that the Underlying Action was timely filed. 3T198-9-16. On cross-examination, he retracted his testimony as to the continuing tort doctrine and admitted that he overlooked the equitable considerations behind the application of the discovery rule. 3T202-10 to 3T204-24; Da20a.

Mr. Field further testified that Chenault could survive a pre-trial motion on exposure, based on a report by Chenault's expert, Dr. Ronald Tai, which concluded that Chenault was exposed to toxic mold in his condo unit. To conduct his sampling, Dr. Tai relied upon the ERMI Method, which has been validated for research purposes only. On cross-examination, Mr. Field admitted he was unfamiliar with the ERMI Method but admitted that the likelihood of a successful verdict would be impacted if Chenault used a scientifically invalid mold sampling method. 3T210-9 to 3T212-3; Da20a.

Mr. Field also acknowledged the disagreement in the scientific community on whether the mycotoxins Chenault claimed caused his injury could produce that result, that the doctor Chenault planned to rely on to prove that connection, Dr. Althea Hankins, had credibility issues because of her long-standing business dealings with Chenault, and that VHCA had retained well-credentialed experts to contest causation. Given these issues, he would not even guess whether Chenault would prevail on causation. 3T217-20 to 3T219-24; Da20a.

v. Louis Niedelman's Trial Testimony

Zurich retained Louis Niedelman, a New Jersey trial attorney and a partner at the law firm of Cooper Levenson, who specializes in personal injury and property damage defense, as its reasonableness expert. 2T149-23 to 2T150-12.

Mr. Niedelman testified that the settlement was not reasonable because it was far greater than the full value of the case. 2T158-14-16.

Unlike Mr. Field, Mr. Niedelman considered the present value the damages Chenault would likely recover and discounted it for the risk of not prevailing, as required by the law. He determined that the likely value of Chenault's pain and suffering and economic damages without discounting it for liability, credibility, causation or other issues was $1.6 million. 2T160-1-3. But because of the strength of VHCA's statute of limitations defense, because of the type of credibility issues the trial court identified in Chenault's testimony (Da23a), and the issues of causation, in Mr. Niedelman's professional judgment, the settlement value was approximately $550,000. 2T185-4-25.

He explained that there was a strong statute of limitations defense because a two and a six-year statute of limitations applied to the personal injury and property damage claims, respectively, because where, as here, the physical symptom's causal relationship to the toxic substance is a matter of common understanding by the layperson, the discovery rule does not apply and reasonable medical support linking the injury and cause is not required. 2T170-1 to 2T175-10. Since mold is readily understood to cause health problems and damage, two Appellate Division decisions have held that the discovery rule is inapplicable to alleged toxic mold cases. Thus, the statute of limitations on

Chenault's claim in the Underlying Action began to accrue in the 1990s, when his symptoms started, and he was aware of water intrusion in his condo unit. 2T173-14 to 2T175-6.

Mr. Niedelman testified to the many weaknesses on causation. Chenault's primary expert on causation was Dr. Hankins, a family physician who cited no authorities to support her conclusion and did not address specific causation. 2T180-13-21. She was also Chenault's business partner in various endeavors. Meanwhile, VHCA's medical experts were well-credentialed and their testimony had scientific support. 2T176-17 to 2T177-13; Da20a. These credibility and causation issues likewise reduced the reasonable settlement value.

ARGUMENT

I. STANDARD OF REVIEW

The trial court's order on summary judgment interpreting the Mold Exclusion is "not entitled to any special deference." *Manalapan Realty, L.P. v. Twp. Comm. Of Manalapan*, 140 N.J. 366, 378 (1995). However, the trial court's findings of fact and conclusions of law after trial are controlled by a far different standard. The scope of appellate review of a trial court's fact-finding function is limited. *Walid v. Yolanda for Irene Couture*, 425 N.J. Super. 171, 179 (App. Div. 2012). "Findings by the trial judge are considered binding on appeal when supported by adequate, substantial, credible evidence." *Rova Farms Resort v.*

Investors Ins. Co., 65 N.J. 474, 484 (1974). This Court must "grant substantial deference to a trial court's findings of fact and conclusions of law, which will only be disturbed if they are manifestly unsupported by or inconsistent with the competent, relevant and reasonably credible evidence." *Crespo v. Crespo*, 395 N.J. Super. 190, 193-94 (App. Div. 2007) (citing *Rova Farms*, 65 N.J. at 484).

II. THE TRIAL COURT CORRECTLY HELD THAT ZURICH'S MOLD EXCLUSIONS BAR COVERAGE FOR CHENAULT'S MOLD INJURIES

The Mold Exclusions in the Zurich Policies are unambiguous and bar coverage for Chenault's mold-caused injuries. *See Hurst v. Am. Zurich Ins. Co.*, 2014 N.J. Super. Unpub. LEXIS 2866 (App. Div. Oct. 21, 2014) (declaring that similar mold exclusion precludes coverage for mold injuries); *Restoration Risk Retention Group, Inc. v. Selective Way Ins. Co.*, 2011 N.J. Super. Unpub. LEXIS 2587 (App. Div. Oct. 12, 2011) (same). Chenault does not disagree. Rather, he seeks to circumvent the exclusion entirely by advocating for a groundbreaking expansion of the efficient proximate cause rule, also known as Appleman's rule.

Chenault erroneously claims that because VHCA's negligence in permitting water to enter his condo is covered under the insuring grant of the Zurich Policies, and that negligence set in motion the chain of causation that led to his mold-caused injuries, it is immaterial that his injuries were excluded under

the Mold Exclusions. The trial court (Beacham, J) rejected this misguided argument. 6T17-23. This Court should affirm.

A. Applying Principles of First-Party Property Insurance Contract Interpretation to Third-Party Liability Insurance Contracts Mixes Apples and Oranges

New Jersey has adopted the efficient proximate cause rule to analyze coverage under first-party property insurance policies. *Flomerfelt v. Cardiello*, 202 N.J. 432, 447 (2010) ("New Jersey courts have generally considered questions about how to evaluate multiple or concurrent causes of damages only in the context of first-party claims against insurers for coverage."); Ostrager & Newman, *Handbook on Insurance Coverage Disputes*, (14th ed. 2008), § 21.02(c), pg. 1455. In "first-party coverage decisions," New Jersey has "adopted the approach known as 'Appleman's rule,' pursuant to which the loss is covered if a covered cause starts or ends the sequence of events leading to the loss." *Flomerfelt*, at 447.

"Commercial property insurance can generally be divided into two categories: 'all risk' or 'named perils.'" Ostrager, (14th ed. 2008), § 21.02, pg. 1447. "Coverage, in turn, is commonly provided by reference to causation, e.g., 'loss caused by . . .' certain enumerated perils." *Garvey*, 48 Cal. 3d at 406. "The term 'perils' in traditional property insurance parlance refers to fortuitous, active, physical forces such as lightning, wind, and explosion, which bring about the

loss. *Thus, the 'cause' of loss in the context of a property insurance contract is totally different from that in a liability policy.* This distinction is critical to the resolution of losses involving multiple causes." *Ibid.* (italics in original).

In contrast to first-party policies, coverage under a third-party commercial general liability ("CGL") policy does not turn on whether the loss was caused by a covered peril. Rather, as the Zurich Policies demonstrate, coverage depends on whether "the insured becomes legally obligated to pay by reason of liability imposed by law…because of bodily injury, property damage…covered by this insurance…". Da289a. Thus, "the right to coverage in the third-party liability insurance context draws on traditional tort concepts of fault, proximate cause and duty." *Garvey v. State Farm Fire & Cas. Co.*, 770 P.2d 704, 710 (Cal. 1998).

Because of these material differences, "there are substantial analytical differences between first party property policies and third party liability policies." *Prudential-LMI Commercial Ins. Co. v. Superior Court*, 51 Cal. 3d 674, 679 (1990). Thus, "[a]ttempting to apply principles of first party property insurance contract interpretation to third party liability insurance" is equivalent to "mixing apples and oranges." *See* Ostrager & Newman, *Handbook on Insurance Coverage Disputes*, (14th ed. 2008), pg. 1443 citing *Standard Fire Ins. Co. v. Spectrum Community Assoc.*, 141 Cal. App. 4th 1117, 1136 (Cal. App. 2006). Conversely, "traditional interpretations of liability coverage apply only

to claims made under third-party policies, and not to first-party losses of the insured." *Port Auth. v. Affiliated FM Ins. Co.*, 245 F. Supp.2d 563, 577 (D.N.J. 2001) *aff'd* 311 F.2d 266 (3d Cir. 2002). Thus, the New Jersey Supreme Court has made clear that "[b]ecause the nature of first-party coverage and the applicable policy provisions are different…those decisions [applying Appleman's Rule] are of limited relevance" to analyzing third-party policies. *Flomerfelt*, 202 N.J. at 447.

Because the grants of coverage materially differ, courts nationwide have rejected policyholder attempts to expand Appleman's rule from first-party property to third-party CGL policies. *See Garvey,* 770 P.2d 704; *Aragona v. St. Paul Fire & Marine Ins. Co.*, 378 A.2d 1346 (Md. 1977); *City of Carlsbad v. Ins. Co. of State of Pennsylvania*, 180 Cal. App. 4th 176 (Cal. App. Ct. 2009); *Larsen*, 1995 U.S. App. LEXIS 36215; *United States Liability Ins. Co. v. Bourbeau*, 49 F.3d 786 (1st Cir. 1985) (applying Massachusetts law); *Utica Mut. Ins. Co. v. Hall Equip., Inc.*, 73 F. Supp.2d 83 (D. Mass. 1999); *Bao v. Liberty Mut. Ins. Co.*, 535 F. Supp.2d 532 (D. Md. 2008); *Schmitt v. NIC Ins. Co.*, 2007 U.S. Dist. LEXIS 81411 (N.D. Cal. Nov. 1, 2007).

In *Bourbeau*, the First Circuit rejected an insured's request to expand Appleman's rule to a third-party CGL liability policy. There, the insured was retained to remove paint from two buildings in the Town of Hadley. While the

work was in progress, the Massachusetts Department of Environmental Protection notified the insured that paint chips from one of the buildings were contaminating surrounding soil. 49 F.3d at 787. An adjacent landowner sued the Town of Hadley alleging that it had caused lead to be deposited on his land. The Town of Hadley filed a third-party complaint against the insured alleging that his negligence proximately caused the landowner's injury. *Ibid*.

The insured's CGL insurer, U.S. Liability, filed a declaratory judgment action seeking a declaration that an absolute pollution exclusion barred coverage for property damage caused by lead contamination. *Ibid*. The insured argued that because the "cause of the damage was a covered risk – his alleged negligence in the normal course of performing the painting contract," the train of events test, also known as Appleman's rule, mandated coverage. For support, the insured cited to a Supreme Judicial Court of Massachusetts decision applying the efficient proximate cause rule to a first-party property policy. *Id.* at 789.

The First Circuit decided it "need not linger long on this argument." *Ibid*. In rejecting the precise argument Chenault makes here – that loss caused by negligence was a covered risk, the court held, "[i]t would be ironic indeed to hold that an insured is not covered for damage to property caused by his discharge of pollutants unless it happens that the proximate cause was his own negligent conduct." *Id.* at 790. Moreover, the insured's "reasoning would

eviscerate the plain language and explicit purpose of the Absolute Pollution Exclusion clause." *Ibid; see also Schmitt*, 2007 U.S. Dist. LEXIS 81411, at *27 ("if there is a claim against the insured regarding mold, it is excluded. It is irrelevant whether the mold was caused by Schmitt's negligence, Schmitt's intentional acts, acts of unaffiliated third parties, or acts of god.").

The Mold Exclusion, like the pollution exclusion in *Bourbeau*, bars coverage for liability caused by a certain agent. It would be equally ironic here to hold that VHCA is not covered for liability or damage caused by its negligent creation of mold unless it happens that the proximate cause of that liability was its own negligent conduct. Similarly, Chenault's reasoning would eviscerate the plain language and explicit purpose of the Mold Exclusion.

Appleman's rule exists because the language in first-party property policies requires it. Unlike first-party property policies, third-party CGL policies like the Zurich Policies lack any language supporting the expansion of Appleman's rule. As the trial court held, "[t[he plain language of the Mold Exclusion forecloses application of the Appleman's rule." 6T28-4-5. That exclusion precludes coverage for "any liability, damage, loss, cost or expense: A. *Caused directly or indirectly* by the actual, alleged or threatened inhalation of, ingestion of, contact with, *exposure to*, existence of, or presence of any: 1. *Fungi*, or bacteria…." (emphasis added). Da277a. This language is clear,

unambiguous, and plainly bars coverage for "liability, damage, [or] loss" caused, "directly or indirectly," by mold. *See Hurst*, 2014 N.J. Super. Unpub. LEXIS 2866 (holding that substantially similar mold exclusion is unambiguous and bars coverage for negligence claim against insured arising from exposure to mold).

B. New Jersey Law Does Not Support Expansion of Appleman's Rule to The Zurich Policies

There is no support in New Jersey law for expanding Appleman's rule to the Zurich Policies. Illustrating this point, Chenault relies on cases applying the distinctly different concurrent causation rule to inaccurately assert that "controlling authority has recognized that Appleman's rule is 'generally applicable' and has, in fact, been applied to third-party liability coverage claims by this Court and by the Supreme Court." Db19. *Flomerfelt* and *Wear v. Selective Service Inc.*, 455 N.J. Super. 440 (App. Div. 2018),[2] do not support this misstatement.

Flomerfelt and *Wear* are concurrent, not sequential, causation cases. To be sure, *Flomerfelt* discussed Appleman's rule. 202 N.J. at 447. But in doing so, the Court explained that the rule has been applied "only in the context to first-party claims," and that "because [of] the nature of first-party coverage" and different policy provisions, "those decisions are of limited relevance." *Id.* at 447.

[2] Chenault mis-cites this case. The correct citation is *Wear v. Selective Ins. Co.*, 455 N.J. Super. 440 (App. Div. 2018).

From there, the Court adopted a *concurrent causation* test (not Appleman's sequential cause test) to evaluate an insurer's duty to defend under a homeowner's policy where a complaint alleged two independent theories of liability, one covered and the other not. *Id*.

This Court did not even mention, let alone apply, Appleman's rule in *Wear*. Db. 19. *Wear* was a concurrent causation case where, unlike here, the complaint alleged that the claimants were injured by exposure to multiple environmental toxins, not just mold. 455 N.J. Super. at 445. Notwithstanding multiple causative agents, the insurer argued that its mold exclusion barred coverage for the entirety of the suit because the exclusion contained anti-concurrent and anti-sequential language such that it was immaterial if the claimants were injured by toxins other than mold. The trial court found a duty to defend because the complaint alleged an "environmental hazard" "besides mold." *Id*. at 447. This Court modified that ruling, holding that it was premature for the trial court to rule on the insurer's duty to defend "since it was unclear, based on the anti-concurrent and anti-sequential language in the exclusion, whether *any* claims would be covered." 455 N.J. Super. at 457.

Flomerfelt and *Wear* stand for the unremarkable proposition that the concurrent causation test applies to liability policies. But this is not a concurrent causation case. Chenault has not alleged nor argued that multiple causative

agents are responsible for his injuries. Rather, he has pled and argued that mold is the sole cause of his injuries.

The only decision from this Court to explicitly address the application of Appleman's rule to a CGL policy has rejected it. *See Sherwood v. Kelido, Inc.*, 2009 N.J. Super. Unpub. LEXIS 1505 (App. Div. 2009) *certif. denied* 200 N.J. 367. In *Sherwood*, Daniel Sherwood was injured while performing electrical work at a Dunkin Donuts when one of the walls caved in. He sued the general contractor, among others, and the general contractor tendered to its commercial general liability insurer, Essex Insurance Company. *Id.* at *1-3.

Essex disclaimed coverage pursuant to a subsidence exclusion that lacked anti-concurrent and anti-sequential clauses, so like Chenault, the injured plaintiff argued that Appleman's rule applied. *Id.* at *8-9. Just like Chenault, the plaintiff argued that because the general contractor's negligence was covered under the Essex policy, the exclusion did not apply. For support, the plaintiff, like Chenault, turned to *Search EDP, Inc. v. American Home Ins. Co.*, 276 N.J. Super. 537 (App. Div. 1993). *Id.* at *8-9.

This Court rejected the plaintiff's reliance on *Search EDP*, finding it readily distinguishable given the fundamentally different nature of commercial general liability and professional liability policies and their attendant policy language. *Id.* at *11-12. The court went on to reject the exact argument Chenault

has made here: "Even assuming that DBM's negligence was the proximate cause of Daniel Sherwood's injuries, the particular negligent conduct at issue was clearly not covered by the policy." *Id.*

Chenault's injuries indisputably were caused by his exposure to mold, not by any other agent, and he sought to hold VHCA liable because its negligence allegedly caused him to be exposed to toxic mold. Although Chenault has contended that coverage exists because VHCA's liability was predicated on its negligence, *Sherwood* reiterates the well-accepted rule that the basis for the insured's tort liability is irrelevant when an exclusion bars coverage "for the particular negligent conduct at issue." *Sherwood*, at *11-12; *see also Mount Vernon Fire Ins. Co. v. Adamson*, 2010 U.S. Dist. LEXIS 106758 (E.D. Va. Sept. 15, 2010) (mold exclusion barred coverage for count alleging that negligent failure to remedy water intrusion resulted in mold) *rec. adopted* 2010 U.S. Dist. LEXIS 106741 (E.D. Va. Oct. 6, 2010); *State Farm Lloyds v. Chandler*, 2005 U.S. Dist. LEXIS 44285 (E.D. Tex. Oct. 6, 2005) (same).

In a final attempt to wrongly import first-party property rules into this third-party case, Chenault asks this Court to create coverage by implication. Chenault emphasizes that Zurich modified the Mold Exclusion in the latter three policies by eliminating the anti-concurrent ("ACC") clause that existed in the first two policies. According to Chenault "[e]limination of the ACC clause from

the three policies at issue broadened coverage when there are insured events in the chain of causation leading to mold damage." Db18. Zurich did not eliminate the ACC clause since it continued to bar coverage for liability "caused directly or indirectly" by fungi or mold. *See Estate of Doerfler v. Federal Ins. Co.*, 2020 N.J. Super. Unpub. LEXIS 920, at *10 (App. Div. May 14, 2020) ("caused by" provision, defined to mean loss that is contributed to, made worse by, or in any way results from that peril, fulfilled the purpose of an anti-sequential cause); *Garmany of Red Bank, Inc. v. Harleysville Ins. Co.*, 2021 U.S. Dist. LEXIS 50985, at *13 (D.N.J. Mar. 18, 2021) (interpreting phrase in an exclusion barring coverage for loss caused 'directly or indirectly' by COVID-19 to be an "anti-concurrent clause"). But even if Zurich did eliminate the ACC clause, there remains no language within the Zurich insuring grant or Mold Exclusion that supports the radical expansion of Appleman's rule to a policy that does not confer coverage based on a specified cause of loss. *See Garvey*, 48 Cal. 3d at 406 (discussing the distinction between liability and property insurance).

In sum, Chenault has offered no authority or intelligible rationale to expand Appleman's rule to a third-party CGL policy, particularly where there is no policy language supporting its application. New Jersey law demonstrates that the type of policy at issue and particular policy language controls which interpretive tool applies, if any. *See, e.g., Auto Lenders Acceptance Corp. v.*

Gentilli Ford, Inc., 181 N.J. 245 (2004) (holding that Appleman's rule was appropriate for evaluating coverage under a first-party employee dishonesty policy that requires a "direct loss"). There is ample support in New Jersey, nationwide, and in the Zurich Policies for rejecting expansion of Appleman's rule to this case. Accordingly, this Court should affirm the trial court's ruling that the Mold Exclusions in the Zurich Policies bar coverage.

III. THE TRIAL COURT CORRECTLY DETERMINED, BASED ON THE FACTUAL RECORD CREATED AT TRIAL, THAT CHENAULT FAILED TO PROVE THAT THE CONSUMPTION EXCEPTION RESTORES COVERAGE

After the trial court granted summary judgment to Zurich declaring that the Mold Exclusions bar coverage for the Consent Judgment, Chenault began his journey to reimagine his case to fit it within the narrow Consumption Exception. Chenault fundamentally altered his interpretation of the Consumption Exception to lessen his burden of proof, he retained a retired emergency room physician and professional expert, Dr. Lawrence Guzzardi, to support him, and he offered testimony that was not credible.

The trial court (Scoca, J) was unpersuaded. After a multi-day bench trial, the court rejected Chenault's belated and misguided attempt to squeeze his Consent Judgment into the Consumption Exception. Carefully dissecting its many flaws, the trial court rejected Chenault's absurd interpretation of the Consumption Exception as conferring coverage without evidence of a

consumption-caused injury. Da31a-Da39a. Then, based on its assessment of the evidence and credibility of the witnesses, the trial court issued findings of fact and conclusions of law that "did not find [Dr. Guzzardi's] opinion to be credible," "found Dr. Laumbach to be extremely credible," and held that Chenault failed to prove an injury through consumption of mold-contaminated food. Da38a-Da39a. As a result, the trial court determined that the Consumption Exception did not restore coverage for the Consent Judgment. This Court should affirm that decision.

A. The Consumption Exception Restores Coverage Only For Bodily Injuries Caused By Consuming Food Contaminated By Indoor-Growing Mold

Chenault's primary contention is the Consumption Exception restores coverage for his Consent Judgment against VHCA regardless of whether he was injured by consuming mold-contaminated food. This position is unsupported by case law, the policy language, and basic rules of policy interpretation.

1. Nationwide Case Law Supports Zurich's Position

Courts nationwide have uniformly interpreted the Consumption Exception to restore coverage for bodily injuries caused by consumption of fungi or bacteria that are, are on, or are in goods or products. *See Harris v. Durham Enters.*, 586 F. Supp.3d 856, 865 (S.D. Ill. Feb. 22, 2022) ("The Bodily Consumption Exception excepts from the Bacteria Exclusion bodily injury or

losses caused by "bacteria that are, are on, or are contained in, a good or product intended for bodily consumption."); *Frey v. Anderson Corp.*, 2015 Ohio Misc. LEXIS 21992 (Ohio Ct. Cm. Pleas 2015) (declining to apply Consumption Exception to restore coverage for a bodily injury claim based on ingesting airborne mold spores); *Acuity v. Reed & Assocs. of TN, LLC,* 124 F. Supp. 3d 787, 795 (W.D. Tenn. 2015) (allegations that the claimant "suffered bodily injury as a result of mold in the water supply" triggered the insurer's duty to defend); *Heinecke v. Aurora Healthcare, Inc.*, 841 N.W.2d 52 (WI App. Ct. 2013) (Consumption Exception did not restore coverage where claimant did not allege that he consumed mold-contaminated water); *NGM Ins. Co. v. Low Country Finish Carpentry, Inc.,* 2012 U.S. Dist. LEXIS 200367, at *12 (D.S.C. Oct. 31, 2012) (Consumption Exception inapplicable where insured's allegations of injury were limited to exposure to "high levels of mold or mildew…throughout the home…"); *Nationwide Mut. Fire. Ins. Co. v. Dillard House*, 651 F. Supp.2d 1367,1379 (N.D. Ga. 2009) ("The Consumption Exception allows for coverage under both policies for allegations of harm caused by "bacteria that are, are on, or are contained in, a good or product intended for (bodily) consumption.")

In those cases where the court has applied the Consumption Exception to require an insurer to provide a defense, it was because the complaint alleged an injury caused by a fungi or bacteria on or in a good or product. For instance, in

Acuity, the court held that the insurer had a duty to defend where the complaint alleged "bodily injuries suffered as a result of mold infestation." 124 F. Supp.3d 787, 792. In *Dillard*, the court held that the insurer had a duty to defend where the complaint alleged the claimant died because of exposure to legionnaire's disease he contracted by bathing in a hot tub. Contrary to Chenault's misdescription of these cases, Db28, fn. 5, both courts required that the claimants prove bodily injury to obtain indemnification. *Acuity*, 124 F. Supp.3d at 795; *Dillard*, 651 F. Supp.2d at 1379.

The Southern District of Illinois' recent decision in *Harris* re-affirms this requirement. There, the claimant, Tommy Harris, alleged that he was injured by an infection he contracted at a dialysis center for which Durham, the insured, provided commercial cleaning services. 586 F. Supp.3d 856. He sued Durham. Durham's insurer, Liberty, denied coverage based on the same type Fungi or Bacteria Exclusion as found in the Zurich Policies. *Id.* at 860. Thereafter, Harris and Durham came to an agreement (much like Chenault did here with VHCA) that Harris would enter judgment for $2 million. *Id.* at 859.

In the coverage action that followed, Harris asserted that Liberty breached its duty to defend Durham because Liberty knew or should have known that the claims were within the Consumption Exception even though the complaint did not allege that he was injured by consuming a fungi or bacteria. The court

rejected that argument and held that it would have required "an unacceptable degree of imagination." *Id.* at 866. Surveying nationwide decisions, the court held that the "Bodily Consumption Exception excepts from the Bacteria Exclusion ***bodily injury or losses*** caused by 'bacteria that are, are on, or are contained in, a good or product intended for bodily consumption.'" *Ibid*. (emphasis added). Since the pleadings did not allege that bacteria was in or on a good intended for bodily consumption "***and then actually consumed by Harris*****,**" there was "simply nothing in the Amended Complaint that could reasonably have placed Harris' claim within the Bodily Consumption Exception without exercising 'an unacceptable degree of imagination.'" *Id.* at 866 (citation omitted) (emphasis added).

Harris and the myriad decisions interpreting the Consumption Exception require a claimant to allege an injury caused by consumption of fungi or bacteria that are, are in, or are on an edible good or product intended for human consumption to obtain a defense and to prove such an injury to obtain indemnity. Chenault did neither.

2. The Plain Terms Of The Consumption Exception Require A Consumption-Caused Injury

Straightforward application of the terms of the Consumption Exception demonstrates why every court to analyze that exception holds that it restores

coverage only for injuries caused by fungi or bacteria that are, are in, or are on an edible good or product intended for human consumption.

The Mold Exclusion bars coverage for "liability, damage, loss, cost or expense…Caused directly or indirectly by the actual, alleged or threatened inhalation of, ingestion of, contact with, exposure to, existence of, or presence of any…Fungi or bacteria…" Da277a. The exception then states:

> This exclusion does not apply to any **fungi** and **bacteria** that are, are on, or are contained in, an edible good or edible product intended for human or animal consumption.

Id. Reading the language of the exclusion and exception together, as this Court must, there is but one reasonable interpretation. *Prather v. American Motorist Ins. Co.*, 2 N.J. 496, 502 (1949) (an insurance policy must be "read and considered as a whole"). For liability, damage, loss, cost or expense falling within the exclusion, the Consumption Exception will restore coverage if such liability, damage, loss, cost or expense was caused by "**fungi** and **bacteria** that are, are on, or are contained in, an edible good or edible product intended for human or animal consumption."

Thus, if Chenault had been injured by inhalation of, contact with, *and* ingestion of mold, any liability, damage, loss, cost or expenses incurred by VHCA would fall within the exclusion. *But*, the Consumption Exception would

except from the exclusion liability, damage, loss, cost or expenses caused by "bacteria that are, are on, or are contained in, a good or product intended for bodily consumption," *i.e.*, foodborne illness.

Carving out foodborne injuries from the Mold Exclusion reads the exception as it is meant to be read: it narrows the exclusion by adding back a limited form of coverage. *See Cypress Point*, 226 N.J. 403, 430 ("the 'your work' exclusion contains an important exception that 'narrows the exclusion…'"). But, contrary to Chenault's assertion, it does not add back coverage that never existed under the insuring grant. *See* David Dekker et al., *The Expansion of Insurance Coverage for Defective Construction*, 28 Constr. Law, Fall 2008, at 19-20 ("Exceptions to exclusions narrow the scope of the exclusion and, as a consequence, add back coverage. But it is the initial broad grant of coverage, not the exception to the exclusion, that ultimately creates (or does not create) the coverage sought.") This reading is also demanded by the plain language of the exception. *See Zararias v. Allstate Ins. Co.*, 168 N.J. 590, 595 (2001) ("If the policy terms are clear, courts should interpret the policy as written and avoid writing a better insurance policy than the one purchased.").

3. Chenault's Interpretation Breaks Fundamental Rules of Policy Interpretation

Chenault's far-fetched interpretation also breaks fundamental rules of policy interpretation. Through its painstaking analysis and application of settled New Jersey law, the trial court identified each and every fatal flaw in Chenault's misguided interpretation.

First, the trial court correctly held that Chenault's tortured reading causes the exception to swallow the exclusion, which is improper. Da37a-Da38a. *See GTE Corp. v. Allendale Mut. Ins. Co.,* 372 F.3d. 598, 614 (3d Cir. 2004) (applying New Jersey law) ("the exception to [the]…exclusion cannot be construed so broadly that the rule (the exclusion) is swallowed by the exception.") (citation omitted); *Wojciechowski v. State Farm Fire & Cas. Co.*, 2012 U.S. Dist. LEXIS 65093, at *11 (D.N.J. May 8, 2012) ("an exception to an exclusion, like the Resulting Loss Exception, cannot be read so broadly that the exception swallows the exclusion").

Second, the trial court correctly held that Chenault's tortured reading causes the exception to create coverage that does not exist under the insuring grant, which is also improper. *See Unitrin Direct Ins. Co. v. Esposito*, 751 Fed. Appx. 213, 215 (3d Cir. 2018) ("exceptions to policy exclusions cannot create or expand insurance coverage.") The insuring agreement provides that Zurich will pay "damages the insured becomes legally obligated to pay by reason of liability imposed by law…because of bodily injury, property damage…covered

by this insurance but only if the injury, damage or offense…takes place during the policy period and is caused by an occurrence….” Da289a. If a claim falls within this coverage grant, Zurich will pay damages unless the claim is otherwise excluded. Chenault’s “mold on food” interpretation renders the insuring grant meaningless. VHCA could not have been ordered to pay damages to Chenault simply because mold contaminated Chenault’s food. Nor could VHCA have been obligated to pay damages to Chenault if he ate moldy food but was not injured. In either case, Chenault would have no claim for relief against VHCA because there are no damages. For the Consumption Exception to be read consistently with the policy as a whole, it must be read to restore coverage *for bodily injuries caused* by mold on Chenault’s food.

Third, the trial court correctly recognized that Chenault’s tortured interpretation is contrary to his pleaded allegations. Da66a In his answer and counterclaims against Zurich, Chenault alleged an interpretation of the Consumption Exception that is fully consistent with Zurich’s view. There, he asserted that the Zurich Policies “contain an exception to the modified mold exclusions ***when the injury is the result*** of any fungi or bacteria that are, are on, or are contained in, an edible good or edible product intended for human…consumption.” Da78a. (emphasis added). Chenault further alleged that “the mold exclusions in those policies do not bar Larry Chenault’s claims for

bodily and mental injury resulting from his consumption of edible food that was contaminated by mold spores released by the extensive toxic mold contamination in his condominium." *Id*. Chenault pled this interpretation before fact discovery in this case conclusively demonstrated that he suffered no injury by eating mold-contaminated food. He modified that sensible interpretation to the outlandish theory he proffered at trial and here. The trial court rejected it. So should this Court.

In sum, the plain and unambiguous terms of the Consumption Exception require it to be interpreted to restore coverage only for liability, damage, loss, cost or expense caused by fungi and bacteria that are, are on, or are contained in, an edible good or edible product intended for human or animal consumption, *i.e.*, foodborne injuries.

B. Chenault Failed To Prove That Was He Injured By Ingesting Food Contaminated By Indoor-Growing Mold

If an insurer proves that the exclusionary language applies, it is the insured's burden to prove that the exception to the exclusion applies. *See Redding-Hunter, Inc. v. Aetna Cas. & Sur. Co.*, 206 A.D.2d 805, 807 (N.Y. App. Div. 3d Dep't 1994); *Air Prods. & Chems. v. Hartford Accident & Indem. Co.*, 25 F.3d 177, 180 (3d Cir. 1994) (applying Pennsylvania law); *E.I. du Pont de Nemours & Co. v. Allstate Ins. Co.*, 693 A.2d 1059, 1061 (Del. 1997); *NVR v.*

Nat'l Idem. Co., 2010 N.J. Super. Unpub. LEXIS 2336, at *32 (Super. Ct. Law Div. Aug. 20, 2010). To overturn the trial court's findings of fact and conclusions of law, Chenault, as VHCA's assignee, must prove that the trial court's findings were "so manifestly unsupported by or inconsistent with the competent, relevant and reasonably credible evidence as to offend the interests of justice." *Rova Farms Resort v. Investors Ins. Co.*, 65 N.J. 474, 484 (1974). Chenault failed to meet that burden.

Whether Chenault was injured by consuming mold-contaminated food was decided by a battle of the experts. Chenault offered Dr. Lawrence Guzzardi; Zurich offered Dr. Robert Laumbach. The trial court determined that Dr. Guzzardi's testimony was factually unsupported, scientifically unsound, and not credible, so it rejected that testimony. Da26a-Da28a. So credible, scientifically sound, and fact-based was Dr. Laumbach's testimony, that the trial court readily accepted his opinions. Da25a.

Chenault recognizes the deep flaws in Dr. Guzzardi's testimony, so he buries any discussion of that expert until deep into the brief. Db35. And even then, the testimony is discussed without any depth. Meanwhile, Chenault offers nothing more than superficial snipes about Dr. Laumbach's testimony. As will be demonstrated below, the trial court's findings of fact and conclusions of law

are consistent with the credible evidence and Chenault's criticisms are unfounded.

1. The Trial Court's Findings on Dr. Guzzardi's Testimony (Da25a)

The trial court decided the battle of the experts by evaluating whether the parties' expert's methodologies were reliable and their data sound. *See Lanzo v. Cyprus Amax Minerals Co.*, 467 N.J. Super. 476 (App. Div. 2021). As part of this function, the court assessed the credibility of the witnesses.

The trial court made the following crucial findings of fact with respect to Dr. Guzzardi: (1) Dr. Guzzardi could not identify a single study addressing whether indoor-growing mold contaminates food and causes injury (Da26a); (2) Dr. Guzzardi did not identify a scientific methodology supporting his conclusion that Chenault was injured by food contaminated by indoor-growing mold, referring to it only as "common sense" (Da26-27); (3) while Dr. Guzzardi testified that Chenault's urine tests detecting Trichothecene were "definitive proof" of his conclusions, the tests were taken months or years after Chenault vacated the condo and Dr. Guzzardi never explained how Trichothecene, which is rapidly excreted from the body, could still be in Chenault's body long after the exposure (Da27); and (4) Dr. Guzzardi agreed that to suffer injury through exposure to mold, Chenault would have to be exposed to an appreciable quantity

of mold or mycotoxins, yet Dr. Guzzardi did not know at what dose or frequency Chenault consumed mycotoxins (Da27).

The trial court concluded:

> Based upon Dr. Guzzardi's lack of scientific explanation, lack of knowledge of dosing and the frequency of food contaminated with mycotoxins, the use of (urine analysis) not recognized by the CDC and the FDA, the Court did not find Dr. Guzzardi's opinions credible, especially when compared to the testimony of Dr. Laumbach.

Da28.

Chenault cherry picks and then disagrees with certain of the trial court's findings. Chenault criticizes the trial court's finding that the CDC and FDA have not validated urine analysis for accuracy or clinical use. He does not rely on Dr. Guzzardi's testimony or any authoritative documents as support. Rather, Chenault argues that VHCA's expert in the Underlying Action testified that urine analysis "was the 'best test' for detecting mycotoxins." Db38. That is at best a half-truth.

Dr. Phillips, VHCA's expert in the Underlying Action, testified that "most studies would indicate that urine is probably the best test for looking for mycotoxins.'" Da1609a. But read in context with the preceding question, Dr. Philips testified "that urine is not an appropriate fluid for evaluate[ing] mycotoxins, but if someone is trying to find them, urine is where they should look." Da1609a. Thus, Dr. Phillips' testimony is consistent with the FDA and

CDC and Dr. Laumbach in confirming that Dr. Guzzardi relied on an unvalidated urine analysis.

Chenault also criticizes the trial court's findings that Dr. Guzzardi's opinion was not credible because it "was not backed up by scientific studies[.]" Db38. Chenault claims that Dr. Guzzardi's opinion was based on "numerous studies concerning foodborne hazards," such as a USDA brochure, a WHO Bulletin, and an Army treatise. Db39-40. Brochures, bulletins, and Army treatises are not authoritative studies. *See In re Accutane Litigation*, 234 N.J. 340 (2018) (explaining the value and nature of studies and hierarchy of evidence when evaluating causation). That aside, Dr. Guzzardi admitted that none of these documents address the relevant issue here—whether it is generally accepted in the scientific community that indoor growing mold contaminates food and causes injury. 3T108-24 to 3T110-5. In fact, Dr. Guzzardi acknowledged that he is not aware of a single epidemiological study, scientific study, or even a case report that documents an incidence of indoor-growing mold contaminating food and causing injury. 3T109-3 to 3T110-5. Thus, the trial court's factual finding is well-supported.

While Chenault selectively attacks certain of the trial court's findings, he never addresses the trial court's resounding rejection of Dr. Guzzardi's "common sense" methodology as scientifically unreliable. "Common sense" is

plainly insufficient under *N.J.R.E.* 702 and 703 to prove causation; *see, e.g., Jay v. Royal Caribbean Cruises Ltd.*, 2022 U.S. Dist. LEXIS 108558, at *14-15 (S.D. Fla. June 17, 2022) (holding that the plaintiff's expert's testimony was insufficiently reliable to satisfy the requirements of *Daubert* because the expert did "not explain any scientific methodology or testing used in forming the opinion, nor provide any basis to believe anything other than common sense was used to reach his opinion."); *Jacquillard v. Home Depot USA, Inc.*, 2012 U.S. Dist. LEXIS 19889 (S.D. Ga. Feb. 16, 2012) ("The Court cannot allow Hunt to attach his 'expert' conclusion to an opinion that is merely based on common sense and not a scientific method"); *McCreless v. Global Upholstery Co.*, 500 F. Supp.2d 1350, 1358 (N.D. Ala. 2007); ("'intuition,' 'common sense,' and 'general experience' in a particular field are not acceptable methods for reaching sound scientific conclusions").

Nor did Chenault address the trial court's conclusion that Dr. Guzzardi "did not know at what dose Chenault consumed mycotoxins at any point in time. Nor did he know with what frequency [Chenault] consumed food contaminated with mycotoxins." Da27a. Yet these requirements are necessary to prove causation in a toxic tort case. *James v. Bessemer Processing Co.*, 155 N.J. 279, 299-301 (1998).

The trial court reviewed Dr. Guzzardi's report, listened to and observed his testimony, and over the course of 53-pages of findings of fact and conclusions of law, thoroughly and cogently rejected Dr. Guzzardi's testimony. Those findings are entitled to substantial deference. *Rova Farms*, 65 N.J. at 484.

2. The Trial Court's Findings on Dr. Laumbach's Testimony

In contrast to Dr. Guzzardi, the trial court found Dr. Laumbach's testimony "extremely credible" and determined that "his testimony was based on scientific analysis as well as vast experience and his training." Da25a. That scientific analysis is known as an exposure pathway analysis, which the trial court explained in detail in its findings of fact and conclusions of law. Da14a-Da17a. Chenault omits any substantive discussion of Dr. Laumbach's testimony.

Even Chenault's superficial attacks are hollow and misleading. Chenault claims that Dr. Laumbach did not disagree with the findings in a USDA brochure discussing best practices for protecting food from mold growth. Db40. Dr. Laumbach agreed that certain actions, like refrigerating food within two hours, would protect food from mold. 2T128-6-18. Neither this brochure nor Dr. Laumbach's testimony about it are relevant. Next, Chenault inaccurately claims that Dr. Laumbach's theory of causation was rejected by VHCA's expert from Underlying Action, Dr. Phillips. Db20. Dr. Phillips was not asked to provide an opinion on whether Chenault was injured by eating mold-contaminated by food.

But in responding to one-off questions from Chenault's counsel, he testified that "ingestion or inhalation would be the two ways humans would be exposed." Da1591a. He further testified that it "seems like quite a stretch in this case" that Chenault's injuries were caused by ingestion of contaminated food. Da1590a.

Chenault further claims that "Dr. Phillips 'did not disagree' with an expert report he reviewed stating that 'foodborne exposure to mycotoxins and fungal contamination has been well researched' and noting that 'while [a]irborne exposure is likely the most significant route of exposure in water-damaged environments…transdermal and potentially foodborne exposure through contact with indoor mycotoxins can also occur.'" Db41. The "expert report" is no report at all. It is an article about water-damaged buildings. It includes no discussion whatsoever about foodborne exposure to indoor mycotoxins. Da729-Da749a. Dr. Phillips had never seen the article and was not prepared to comment on it. Da1602a.

Neither Chenault, nor his expert at trial, even attempted to undermine Dr. Laumbach's scientifically sound, data-based conclusions. Instead, they offered data-absent, scientifically unsound "evidence." The trial court considered the evidence presented and the credibility of the witnesses, and thoroughly documented its findings of fact and conclusions of law. Chenault has fallen woefully short of establishing that those findings are manifestly unsupported by

or inconsistent with the competent, relevant and reasonably credible evidence. Accordingly, the Court should affirm the trial court's determination that Chenault failed to prove that the Consumption Exception restored coverage.

IV. THE TRIAL COURT CORRECTLY HELD THAT THERE WAS NO OCCURRENCE OF BODILY INJURY OR PROPERTY DAMAGE DURING THE ZURICH POLICY PERIODS

In its comprehensive opinion, the trial court also determined that Chenault failed to satisfy the basic terms of the insuring grant because there was no occurrence of "bodily injury" or "property damage" during the Zurich Policy periods. Da43a. Chenault contends on appeal that the trial court erred because it wrongly applied the "first manifestation" trigger and did so by relying on extra-jurisdictional law and unpublished cases. Db43-44. Once more, Chenault misleads. The trial court concluded that Chenault's injuries and damages manifested before the Zurich Policies under *either* the first manifestation or continuous trigger rule. Da39a-Da43a In so concluding, the trial court applied binding New Jersey law. *Id*. That decision should be affirmed.

A. The Continuous Trigger And The First Manifestation Rules Share The Same Endpoint: Initial Manifestation

New Jersey applies the first manifestation rule to determine which commercial general liability policy must respond to an "occurrence" causing bodily injury and property damage claims. *Hartford Acci. & Indem. Co. v. Aetna*

Life & Cas. Ins. Co., 98 N.J. 18, 28 (1984). Under this theory, only the policy in effect when the injury first manifests is triggered. This is required because the "occurrence" within the meaning of an "indemnity policy is not the time the wrongful act was committed but when the complaining party was actually damaged." *Muller Fuel Oil Co. v. Insurance Co. of North America*, 95 N.J. Super. 564, 578 (App. Div. 1967); *Memorial Properties, LLC v. Zurich American Ins. Co.*, 210 N.J. 512 (2012).

For certain latent, progressive injuries like asbestosis, however, New Jersey Courts have used a continuous injury trigger. *See Owens-Illinois, Inc. v. United Insurance Co.*, 138 N.J. 437 (1994). Under the "continuous trigger" rule, "injury occurs during each phase of environmental contamination – exposure, exposure in residence (defined as further progression of injury even after exposure has ceased), and manifestation of disease." *Id.* at 451. Under this approach, an occurrence triggering coverage occurs in each year from the time that the injured party is exposed to an injurious condition up to and including the date of the manifestation of the resultant disease. *Owens-Illinois*, at 454, 478.

The key reason for applying the continuous trigger rule for injury arising from exposure to asbestos is that people exposed to asbestos "do not necessarily display the harmful effects until long after the initial exposure." *Id*. at 437, 455.

As such, these "progressive indivisible injuries should be treated as an occurrence within each of the years of a CGL policy." *Benjamin Moore & Co. v. Aetna Cas. & Sur. Co.*, 179 N.J. 87, 101 (2004).

But "[i]t is only the undetectable injuries at and after exposure and prior to initial manifestation that are progressive and indivisible" that trigger successive commercial general liability policies. *Polarome Int'l, Inc. v. Greenwich Ins. Co.*, 404 N.J. Super. 241, 268 (App. Div. 2008). The initial manifestation of a toxic tort injury is the "last pull of the trigger" because that is when "the issue of scientific uncertainties" over when the injury first occurs are laid to rest and "subsequent CGL policies are not triggered." *Id*. at 268-69. Thus:

> The sequelae of that initially manifested injury and all subsequent, related injuries are no longer indivisible simply because there has been an initial manifestation. It is only the undetectable injuries at and after exposure and prior to initial manifestation that are progressive and indivisible such that the occurrence of an injury cannot be known.

Id. at 268.

As a result, the first manifestation and continuous trigger rules share an important commonality: under neither rule can any policies incepting after initial manifestation of injury be triggered. *See Air Master & Cooling, Inc. v. Selective Ins. Co. of America*, 452 N.J. Super. 35, 45 (App. Div. 2017) ("the

continuous trigger theory shares the same coverage endpoint as the manifestation theory, i.e., the date when the harm has sufficiently become apparent to trigger a covered occurrence"); *Polarome*, 404 N.J. Super. at 250 (no duty to defend under continuous trigger rule where injuries manifested prior to policy periods).

In addressing which of the two theories applied to the facts of this case, the trial court acknowledged that the only decision from this Court addressing the applicability of the continuous trigger to mold exposure ruled that it did not apply because there was no evidence of latent, progressive injury. *See Crivelli v. Selective Ins. Co. of Am*., 2005 N.J. Super. Unpub. 703 (App. Div. Sept. 27, 2005). The trial court also acknowledged the Pennsylvania Supreme Court's decision in *Pa. Nat'l Mut. Cas. Co. v. St. John*, 630 Pa. 1 (Pa. 2014), where the Court declined to extend the continuous trigger to ongoing damage after there has been initial manifestation, thoroughly explaining the moral hazards to doing so.

But ultimately, the trial court recognized that because the two trigger rules share the same endpoint, the result is the same under each method. Da42a. As will be explained below, its factual finding that "Chenault's debilitating injuries were obvious to him beginning in the late 1990s, which was well before the

inception of the Zurich policies," Da43a, is not manifestly unsupported by or inconsistent with the competent, relevant and reasonably credible evidence.

B. The Trial Court's Factual Finding That Chenault's Injuries and Damage Manifested Before The Zurich Policies Incepted Is Entitled To Substantial Deference

Based on the testimonial and documentary evidence presented at trial, the trial court determined that Chenault's injuries and damage manifested years before the Zurich Policies incepted. That decision is entitled to substantial deference. *Rova Farms*, 65 N.J. at 484.

Chenault omits his burden to overturn the trial court's factual determination but he does not seriously quarrel with its conclusion. How could he? He introduced substantial evidence at trial of his debilitating symptoms, beginning in 1991 and continuing for eighteen years, to argue that his multi-million-dollar Consent Judgment was reasonable. Now that the trial court accepted that the Settlement was reasonable, Chenault contradictorily asserts that his symptoms had not sufficiently manifested until more than sixteen years after they began. The evidence he introduced at trial shows otherwise.

For example, Chenault testified that the mold that formed in 1991 immediately caused him symptoms that continued through the 2000s, that he immediately began treating with doctors for those symptoms, and that those symptoms caused the downfall of his marriage. 1T52-20 to 1T53-24. Dr.

Sprouse, one of Chenault's treating physicians, described Chenault as being "well until 1991" after which he "experienced progressively severe symptoms that have led to his current disability" resulting from mold exposure. Da635a. Dr. Lazar, another of Chenault's treating physicians, recounted similar medical problems for Chenault beginning in 1991 and continuing afterward. Da2243a. Among other things, he stated that Chenault "began experiencing the gradual onset of stomach pains, sneezing, coughing-up blood, deteriorating eyesight, headaches and increasing difficulty with calculations." *Id.* Dr. Lazar reported that "[b]y the mid-1990s, he was increasing aware of his cognitive deficits…" *Id.* Dr. Hankins, Chenault's treating physician and retained expert, recorded that "[the medical] problem was initially identified in 1991" and determined that the "problems with him…started in 1991." Da1539a-Da1549a. Dr Hankins causally related Chenault's long-term symptoms, like sneezing, coughing, running nose, headaches, difficult breathing, chest congestion, nose bleeds and coughing up blood, to his historic mold exposure. Da1539a-Da1541a; Da1550a.

Chenault's claimed ongoing, debilitating respiratory, neurological and cognitive symptoms are far different than the "initial lung symptoms" exhibited by one of the claimants in *Polarome*, who had a persistent cough. In that case, neither the trial court nor this Court were required to determine whether those initial lung symptoms or any of the symptoms that continued thereafter were

sufficient to constitute manifestation because the relevant policies did not incept for years after the symptoms began. The trial court in *Polarome* relied on certain tests and procedures from October 1993 and February/March 2002 to illustrate that the polices were not triggered even under the most liberal manifestation estimates. The trial court's task was the same here. What was the latest Chenault's injuries and damage manifested under the most liberal manifestation estimate?

By emphasizing the tests and procedures relied on by the *Polarome* court to find that most liberal manifestation estimate, Chenault wrongly argues that some sort of diagnostic confirmation of injury was required for there to be initial manifestation. Even if that was true (which it is not), that is present here.

In addition to his claimed wide-spread neurological, cognitive and respiratory symptoms, Chenault points to diagnostic evidence of his mold injury. While Chenault conveniently omits the date of this diagnostic test, he asserts that it showed a monocyte count was associated with "chronic infections especially fungal." Db47. That test was on May 14, 2005, and according to Dr. Hankins, "is independent laboratory confirmation of the effect of mold as the cause of his symptoms." Da499. Thus, while a clinical test is not required to prove initial manifestation of injury, there can be no dispute that the last pull of the trigger is the monocyte test confirming a fungal infection. Since that test

occurred in 2005, two years before the Zurich Policies incepted, Chenault cannot show an occurrence of bodily injury during the Zurich Policy periods.[3]

C. Applying Settled New Jersey Law, The Trial Court Properly Rejected An Attribution Requirement

Just like the claimants in *Polarome* and *Air Master*, Chenault argues that because he did not know that his injuries were caused by mold, and no doctor told him such, this somehow changes the manifestation date. Db45. Applying *Polarome* and *Air Master*, the trial court correctly rejected this contention.

In *Polarome*, the policyholder argued that one of the underlying plaintiffs, Klettner, did not know his injuries were caused by exposure to a harmful substance until long after his symptoms manifested. Specifically, the "claimant did not learn that his condition may have been caused by diacetyl exposure until viewing a March 2004 news program…" 404 N.J. Super at 254. But because the date the claimant learned his symptoms were attributed to his exposure is irrelevant to the trigger analysis, the court determined that the last pull of the trigger occurred more than a decade earlier. *Id.* at 257

In *Air Master*, the policyholder, just like Chenault, sought to graft onto the "initial manifestation" rule a requirement that the damage be attributed to the fault of a specific insured before the "last pull" could take place. *Air Master*

[3] Chenault does not argue in his brief that his property damage did not manifest before the Zurich Policies and so we do not address that here.

continued that "such an attribution requirement is consistent with the public policies underlying the continuous-trigger doctrine." 452 N.J. Super. 35, 49. The trial court, and this Court affirming, "sensibly rejected this attribution argument, for several reasons." *Ibid*.

Among the many reasons for rejecting this argument, the Court noted that the policyholder "does not cite to any published opinions—nor could we find one—in which courts have engrafted such an attribution element upon the continuous trigger analysis." *Ibid*. It also reasoned that it would "be unwise to delay the coverage trigger date to a date by which there is sufficient information to link an insured's faulty conduct to the progressive injury." 452 N.J. Super. 35, 50. "Such an attribution analysis could be highly fact-dependent, and difficult to resolve when the insured makes a request for defense and indemnification after being named in a complaint." *Id.* at 49-50. "By contrast, using a date of initial manifestation…promotes efficiency and certainty." *Id*. at 50. Further, "[i]t would be unfair and inappropriate to use statute-of-limitations equitable tolling concepts to impose coverage and defense obligations upon insurers that issued 'occurrence-based' policies years after an injury had clearly been manifested." *Ibid.*

The Pennsylvania Supreme Court reached the same conclusion in *St. John*, 630 Pa. 1. There, the claimant argued that "neither bodily injury nor property

damage manifests until the injured party is able, in the exercise of reasonable diligence, to ascertain that the injury or damage is fairly traceable to some outside causative force or agency." *Id*. at 20. Just like the *Air Master* court, the Pennsylvania Supreme Court held that the claimant was improperly attempting to import equitable tolling concepts from the statute of limitations, but the date an injured party knows he has been harmed by another's conduct "has no special relevance in determining the date an insurance policy is triggered[.]" *Id.* at 24. Nor was there any "language in the Penn National Policies" to support the contention that coverage is triggered when both the injury and its cause are reasonably ascertainable. *Id.* at 25. The Court also identified several policy reasons for reaching this determination. *Id.* at 27.

Just like the policyholder in *Air Master*, Chenault has offered this Court no legal authority for requiring the cause of the injury to be discoverable before an injury initially manifests. And just like the claimant in *St. John*, Chenault has not cited to any policy language that supports importing equitable tolling concepts from the statute of limitations to decide when an insurance policy is triggered. Accordingly, the Court should hold that the date Chenault learned his injuries were caused by exposure to mold is irrelevant to when his injuries first manifested for the purposes of determining which policies are triggered.

Chenault's suggestion that exposure into the Zurich policy periods extends the initial manifestation rule is likewise unsupported. In fact, *Polarome*, *Air Master,* and *St. John* reject that contention primarily because it is fundamentally incompatible with the very basis for the continuous injury trigger. As explained in *Polarome*, the initial manifestation of a toxic tort injury is the "last pull of the trigger" because that is when "the issue of scientific uncertainties" over when the injury first occurs are laid to rest and "subsequent CGL policies are not triggered." 404 N.J. Super. at 268-269.

Although exposure to the injurious chemicals ended in *Polarome* before the relevant policies incepted, the Court's holding demonstrated that injuries occurring after initial manifestation do not trigger additional policies, regardless of whether there is continued exposure. Indeed, that was the very scenario in *St. John*, where the dairy herd continued to be exposed to tainted water for two years after initial manifestation and continued to suffer injury. Yet the Court held that no policies after initial manifestation should be triggered. The outcome should be the same here.

In summary, Chenault introduced evidence at trial that he suffered 16 years of widespread respiratory, neurological and cognitive injuries before the Zurich Policies incepted. Under New Jersey's trigger framework and the evidence introduced at trial, the trial court correctly determined that the last pull

of the continuous trigger occurred long before the Zurich Policies incepted, and thus, Zurich owes no coverage for the Settlement and Consent Judgment.

IV. THE TRIAL COURT ERRED BY SUMMARILY CONCLUDING THAT THE SETTLEMENT WAS REASONABLE

The trial court identified numerous flaws in Chenault's case and in his expert's opinions, yet it summarily accepted that expert's opinion that the Settlement was fair, reasonable and not negotiated in bad faith. The competent, relevant and reasonably credible evidence does not support that finding. Although Zurich did not cross-appeal from the verdict, this Court may affirm on the trial court's finding of no-coverage on any ground supported by the record. *See Do-Wop Corp. v. City of Rahway*, 168 N.J. 191 (2001) (a respondent can argue any point on appeal to sustain the judgment of the lower court).

A. The Settlement and Consent Judgment Were Not A Compromise

"[A] settlement may be enforced against an insurer…only if it is reasonable in amount and entered into in good faith." *Griggs v. Bertram*, 88 N.J. 347, 368 (1982); *Battista v. W. World Ins. Co., Inc*., 227 N.J. Super. 135, 146 (Law Div. 1988). Reasonableness is not just a matter of the extent of the plaintiff's damages claim, but also the extent of the defendant's exposure to liability. *Fireman's Fund Ins. Co. v. Imbesi*, 826 A.2d 735, 756 (App. Div. 2003) certif. denied, 178 N.J. 33 (2003). Reasonableness is determined by the size of possible recovery and degree of probability of the claimant's success against the

insured. *See Pemaquid Underwriting Brokerage, Inc. v. Certain Underwriters at Lloyd's*, 2011 N.J. Super. Unpub. LEXIS 2474, at *24-25 (App. Div. Sept. 29, 2011). In settled cases, "the reasonableness of the compromise is a proper subject of inquiry which cannot be answered without some examination into the merits of the claim." *Excelsior Ins. Co. v. Pennsbury Pain Ctr*., 975 F. Supp. 342, 356 (D.N.J. 1996) (citation omitted). The proposed settlement should be compared to "the present value of the damages the plaintiff would likely recover, if successful, discounted by the risk of not prevailing." *D.M. v. Terhune*, 67 F.Supp.2d 401, 409 (D.N.J. 1999) The present value of a claimant's damages can be determined from "an understanding of the applicable law, and knowledge of jury verdicts in the forum in which the action is to be tried." *Pasha v. Rosemount Memorial Park, Inc.*, 344 N.J. Super. 350, 359 (App. Div. 2001).

In this case, an examination of the merits demonstrates that Chenault's Settlement with the Primary Insurers was fifteen times higher than the largest single plaintiff mold verdict in New Jersey history. Chenault's expert, Mr. Field, testified that the $2.3 million Settlement was reasonable based on the potential for a seven to eight figure pain and suffering award. He did not base this conclusion on his personal experience. The mold cases Mr. Field settled in his own practice were for *de minimis* amounts and the sole case that went to verdict yielded a $32,500 jury award against a $14.5 million demand. 3T187-8-14. He

did not base this conclusion on New Jersey jury verdicts and settlements, claiming he could not locate any. But on cross-examination, Mr. Field was shown several New Jersey mold verdicts and settlements, the largest of which was $150,000 for a single plaintiff. 3T183-13-15. As a result, the only support for Mr. Field's assertion that there was the potential for seven to eight figure pain and suffering award was his "self-validating, unsubstantiated personal beliefs." *In re Accutane*, 234 N.J. 340, 390-91. These personal beliefs are insufficient for Chenault to meet his burden of production. *See Pasha,* 344 N.J. Super at 358 (holding that expert's opinion that settlement was reasonable in light of "extremely wide range of sustainable verdicts and even greater range of reasonable settlements" was insufficient to sustain burden of production).

Mr. Field's opinions on the likelihood Chenault would have prevailed on liability and causation were similarly devoid of support. Mr. Field testified that VHCA's statute of limitations defense was unlikely to succeed because the continuing tort rule would have extended the accrual date. But when shown case law on cross-examination demonstrating that the continuing tort doctrine does not apply to personal injury actions, *see Nicolosi v. Smith & Nephew, Inc*., 2017 N.J. Super. Unpub. LEXIS 389, at *8 (App. Div. 16, 2017) ("No authority extends the [continuing tort doctrine] to medical torts or personal injury claims"), Mr. Field retracted his statement. 3T202-10 to 3T204-24; Da20a. Mr.

Field further testified that the "discovery rule" would have tolled the statute of limitations. 3T198-9-21. But as the trial court recognized, Mr. Field failed to consider whether it would be equitable to apply that rule given the loss of witnesses and ability to test for mold in the 18 years Chenault resided at the premises. Da20a. Therefore, his view that Chenault was likely to defeat VHCA's statute of limitations argument was again based on his self-validating, unsubstantiated personal beliefs.

Mr. Field's opinion on the critical issues of exposure and causation were riddled with holes. He testified that Chenault could survive a pre-trial motion on exposure based on his reliance on Chenault's underlying expert, Dr. Ronald Tai. 3T172-1-9. Tai concluded that Chenault was exposed to toxic mold in his condo unit. To conduct his sampling, Dr. Tai relied upon the ERMI Method, which has been validated for research purposes only. 2T140-16-18. As the trial court recognized, "Mr. Field was unfamiliar with the ERMI Method used by Dr. Tai but admitted that the likelihood of a successful verdict would be impacted if Chenault used a scientifically invalid mold sampling method." Da20a. Mr. Field's testimony was similarly incomplete on the issue of causation. He acknowledged there is disagreement in the scientific community on whether the mycotoxins Chenault claimed caused his injury were capable of producing that result, (3T209-2-16) that the doctor Chenault planned to rely on to prove that

connection, Dr. Althea Hankins, had credibility issues because of her long-standing business dealings with Chenault, (3T218-25 to 3T219-5), and that VHCA had retained well-credentialed experts to contest causation. 3T218-1-13. Given these issues, he would not even venture a guess on whether Chenault would prevail on causation. 3T210-9-17. The trial court again recognized as much in its verdict, finding that "[i]n addition to credibility issues with Hankins as Chenault's business partner, Mr. Field knew her opinion on causation could be problematic because there is scientific disagreement on whether exposure to mycotoxins could in fact cause the deficits Chenault allegedly experienced." Da20a.

In summary, Chenault relied exclusively on Mr. Field to meet his burden of production. But because that testimony was based on Mr. Field's self-validating, unsubstantiated personal beliefs, it was insufficient for Chenault to meet his burden of production. *See Pasha,* 344 N.J. Super at 358.

B. The Settlement Includes Covered And Non-Covered Damages

Settlements are unreasonable and entered in bad faith where the policyholder "squeezes" in covered and uncovered damages. *Fireman's Fund* at 756 ("the Settlement Agreement clearly represents an inappropriate attempt to squeeze a settlement for both compensatory and punitive damages into a sum for compensatory damages alone, solely for the purpose of obtaining insurance

coverage."); *Bob Meyer Cmtys. v. Ohio Cas. Ins. Co*., 2020 N.J. Super. Unpub. LEXIS 1873 (App. Div. Sept. 14, 2020) (insurer was not liable to satisfy settlement that included uncovered damages). Chenault's Settlement squeezes in multiple forms of uncovered damages.

First, the Settlement includes uncovered property damage caused by mold. In addition to settling his claim for inhalation injuries, Chenault settled and released his claim for "property damage." Da1232a. Mr. Field identified Chenault's "significant out-of-pocket losses for property damage" as a factor justifying the reasonableness of the Settlement. Da1297a. For the reasons explained above, under no circumstance does the Consumption Exception restore coverage for an injury that is not caused by "fungi that are, are on, or are contained in, an edible good or product intended for bodily consumption." Da277a. Property damage, by its nature, cannot be and here was not alleged to be, caused by fungi on an edible good or edible product intended for human consumption. The trial court held that, even if the Consumption Exception did restore coverage, Chenault's property damage was still not covered. Da43a. ("[a]s to Chenault's arguments about the property damage they are excluded by the Mold Exclusion and cannot be restored through the Consumption Exception."). Though the trial court recognized that uncovered damages were

included in the Settlement, it overlooked the fact that this rendered the Settlement unenforceable.

Second, damages because of bodily injury arising from inhalation of and dermal contact with mold are not covered. Even if Chenault proved that the Consumption Exception applied (which he did not), injuries caused by inhalation of or dermal contact with mold remain excluded. Those injuries were undisputedly part of the Settlement. Da1232a.

Third, injury and damage outside the Zurich policy periods are not covered. Chenault's allocation of 86% of the Settlement to Zurich represents a significant disparity between the amount paid by the Primary Insurers, which is strong evidence that the Settlement was unreasonable and collusive. *See Imbesi*, 826 A.2d 735 (finding allocation of approximately 25% to settling insurers and approximately 75% of the settlement to the non-settling insurer to be indicative of bad faith and collusion); *Pasha*, 344 N.J. Super. 350, 357-8 (finding allocation of 94% of settlement to the non-settling insurer to be evidence of bad faith). Chenault's justification for allocating 86% of this Settlement to Zurich fails. His argument that the parties' proportional shares were consistent with *Carter-Wallace, Inc. v. Admiral Ins. Co*., 154 N.J. 312 (1998) is misguided. Unlike the present case, *Carter Wallace* applied a continuous trigger rule. Accordingly, its allocation methodology is not applicable. Even if *Carter Wallace* did apply, an

86% allocation to Zurich would still be unjustified because: (1) Chenault wrongfully fails to allocate responsibility to insurance policies issued by LMI Insurance between 1994 and 2000; and (2) Chenault wrongly allocates damages to insurance provided by Zurich post-dating March 23, 2009.[4]

As the foregoing demonstrates, Chenault failed to introduce competent, relevant and reasonably credible evidence to meet his burden of production. Accordingly, the Court should affirm the trial court's judgment in Zurich's favor on the ground that Chenault failed to prove the Settlement was reasonable and entered into in good faith.

CONCLUSION

For the foregoing reasons, Zurich respectfully requests that this Court: (1) affirm the October 17, 2019 Order denying Chenault's Motion for Summary Judgment and granting Zurich's Cross-Motion for Summary Judgment; and (2) affirm the May 24, 2023 order and verdict declaring that Zurich had no obligation to pay the Consent Judgment.

Respectfully submitted,

By: *s/ Gabriel E. Darwick*
Gabriel E. Darwick, Esq.
James Layman, Esq.

[4] March 23, 2009 is the date Chenault was diagnosed with a mold-related injury. Even if coverage was triggered up to this point (which it was not), it would be the cutoff point for coverage and no post-March 2009 Zurich polices would be triggered.

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AMERICAN GUARANTEE AND LIABILITY INSURANCE COMPANY, Plaintiff, v. VICTORY HIGHLANDS CONDOMINIUM ASSOCIATION, INC. and MARSHALL & MORAN, *et al.,* Defendants.	) Superior Court of New Jersey) Appellate Division) Docket No.: A-003321-22)) On Appeal from the Superior) Court of New Jersey, Law) Division)) Sat below: Hon. Jeffrey B.) Beacham, J.S.C. and Hon.) Annette Scoca, J.S.C.)

REPLY BRIEF OF DEFENDANT/APPELLANT LARRY CHENAULT ON APPEAL

On the brief:

Edmund Kneisel, Esq., *pro hac vice*
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PRELIMINARY STATEMENT

Appellee Zurich essentially makes four arguments in its Brief opposing Larry Chenault's appeal. First, Zurich argues that the Trial Court correctly ruled as a matter of law that "Appleman's Rule" only applies to first-party property policies and not to comprehensive general liability ("CGL") policies, such as those Zurich issued to Victory Highlands Condominium Association ("VHCA"). Zurich's argument ignores rulings by this Court and by the Supreme Court applying the Rule in liability coverage cases, including cases addressing CGL policies. It is settled New Jersey law that Appleman's Rule requires coverage if either the first or the last event in the chain of causation leading to injury is a covered cause.

An insurer can avoid Appleman's Rule only by including an "anti-concurrent causation" ("ACC") clause in its policy, which Zurich did in the first two CGL policies it issued to VHCA, which settled the underlying case and assigned its coverage rights to Chenault. The mold exclusions in Zurich's first two policies contained "classic" ACC clauses barring coverage "regardless of any other cause, event, material, product and/or building component that contributed concurrently *or in any sequence to that injury or damage."* (Emphasis added.) The sole purpose of such a clause is to avoid Appleman's Rule. If, as Zurich contends, Appleman's Rule does not apply to CGL coverage, the question becomes: Why did Zurich include ACC clauses in its CGL policies? It removed those clauses from the mold exclusions

in the three CGL policies at issue, thus permitting application of Appleman's Rule.

Zurich's second argument, that Appleman's Rule applies only to "concurrent" causes of loss in the liability coverage context, finds no support whatsoever in the case law. In 2010, the Supreme Court applied Appleman's Rule in a homeowner's liability coverage case, observing that it had been "adopted" by New Jersey courts to cover both concurrent and sequential causes of loss.

Zurich's third argument addresses an exception to the mold exclusion that it added to the three policies at issue, providing that the exclusion "does not apply" to claims arising from mold that is "on or in an edible good or edible product [food] intended for human consumption." The Trial Court erroneously failed to apply the exception, despite undisputed evidence showing that for more than eighteen years Chenault had been chronically exposed to mold "on or in" the food he consumed. The Trial Court's error is one of policy interpretation, a decision on an issue of law that warrants *de novo* review. Rather than applying the exception as written, the Trial Court erroneously added language to the exception requiring proof that the food Chenault ate contained harmful mycotoxins (trichothecene) and that those mycotoxins had caused identifiable and distinct bodily injury. The Trial Court's ruling adds pro-carrier, restrictive language to the exception that it does not contain, in violation of New Jersey's rules of policy interpretation.

Fourth, Zurich argues that this Court should affirm the Trial Court's use of a

"manifestation" trigger of coverage that New Jersey courts have rejected since 1994, when the Supreme Court first adopted "continuous trigger" principles in cases involving continuous injurious exposure to toxic substances. There are no contemporaneous medical records suggesting that Larry Chenault's routine health complaints, such as nose bleeds, headaches, shortness of breath, memory lapses, irritability, and fatigue, were related in any way to his exposure to mold. Neither Chenault nor any medical professional suggested, or even suspected, any impact to Chenault's health by mold until after the mold contamination of his condominium was first discovered in March 2009, well within the Zurich policy coverage.

It should be axiomatic that Chenault cannot be expected to know or suspect that his health had been impaired by mold before he had any idea that he had ever been exposed to mold. No New Jersey case holds that a claimant's injury caused by exposure to a toxin had manifested before anyone knew or even suspected that the claimant had ever been exposed to the toxin.

ARGUMENT[1]

I. Appleman's Rule governs the outcome of this appeal.

Zurich argues that the Trial Court properly rejected application of Appleman's Rule on summary judgment because the rule only applies to first-party property

[1] Chenault incorporates here by reference the Procedural History and Statement of Facts set forth in its principal brief on this appeal.

policies, not to CGL policies. No New Jersey case supports this argument. Indeed, the most obvious evidence that Zurich is wrong is set forth in the first two liability policies it issued to VHCA, which included "classic" ACC clauses that were written to avoid or circumvent application of Appleman's Rule to Zurich's CGL coverage.

Zurich cites *Flomerfelt v. Cardiello,* 202 N.J. 432 (2010), which addresses coverage under a homeowner's liability policy, for the proposition that the Rule should be limited to first-party property cases. Pb30. The decision actually compels the opposite conclusion. The Court did observe that analysis of first-party coverage is *generally* "of limited relevance;" in context, however, that comment focused on the coverage provisions of first-party property policies that "are different from the 'arising out of' language that is central to this appeal" and that are commonly used in liability policies. *Id.* at 447. The Court then instructed that "first-party coverage decisions do, however, yield two *generally applicable rules*. In situations *in which multiple events*, one of which is covered, *occur sequentially in a chain of causation* to produce a loss, *we have adopted the approach known as 'Appleman's rule*,' pursuant to which the loss is covered if a covered cause starts or ends the sequence of events leading to the loss." *Id.* (Emphasis added.) *See also* Justice LaVecchia's concurrence, quoting the "classic" form of ACC clause that a liability carrier must use to avoid Appleman's Rule: "[T]he instant policy did not unambiguously declare that coverage would be excluded for injuries arising out of the use of illegal drugs

"'*regardless of any other cause or event contributing concurrently or in any sequence to the loss.*'" *Id.* at 461-62 (Emphasis in original; citation omitted).

Flomerfelt and other New Jersey cases compel the conclusion that under Appleman's Rule an excluded cause (mold) does not bar coverage when the first event in the sequential chain of causation (water intrusion) is a covered cause of loss. Here, there is no dispute that the continuous water intrusion into Chenault's condominium resulting from the insured's negligence and its violation of New Jersey's Condominium Act was a covered cause of loss.

Zurich cites this Court's unpublished opinion in *Sherwood v. Kelido, Inc.*, 2009 WL 1010988 (App. Div. Apr. 15, 2009) as the "only" New Jersey case to consider Appleman's Rule in connection with CGL coverage. Pb35. This is not correct. *See, e.g., Wear v. Selective Servic, Inc.,* l455 N.J.Super 440 (App. Div. 2018)(discussing application of Appleman's Rule in a CGL case). *Sherwood* did not refuse to apply Appleman's Rule because the case involved CGL coverage, but because the plaintiff's injury claim in the underlying case was not based on a covered cause of loss. The plaintiff had sued for bodily injury caused by the negligence of the insured contractor, but that cause of loss was expressly excluded by policy language barring coverage for the insured's negligent work.

The *Sherwood* Court ruled that "the particular negligent conduct [of the insured contractor] at issue was clearly not covered by the policy." *Id.* at *4.

Accordingly, there was no insured event in the chain of causation that could trigger Appleman's Rule. This Court distinguished *Search EDP, Inc. v. Am. Home Ins. Co.,* 267 N.J.Super 537 (App. Div. 1993), *certif. denied,* 135 N.J. 466 (1994), which applied Appleman's Rule in a liability coverage case because a covered event in the chain of causation, professional negligence, caused the injury at issue in that case. This Court said, "We fully subscribe" to Appleman's Rule, which "is regarded as expressing the majority rule in those jurisdictions addressing the issue." *Id.* at 543.

The Trial Court's decision that Appleman's Rule does not apply to CGL cases is unsupported by *Sherwood* and is, indeed, expressly refuted by other controlling cases. Instead, Zurich relies on foreign case law, especially from California, to argue that courts have rejected "expansion" of Appleman's Rule to liability policies. Pb32. Zurich selectively ignores cases decided elsewhere that have used Appleman's Rule to find coverage for mold related claims when a covered cause of loss is in the chain of causation. *See, e.g., Kelly v. Farmers Ins. Co., Inc.,* 281 F.Supp.2d 1290 (W.D. Okla. 2003) (applying the Rule to find coverage in a mold case because "'the insured risk is regarded as the proximate cause of the entire loss, even if the last step in the chain of causation was an excepted risk.'") *Id.* at 1296 (citation omitted).

Zurich cites *Garvey v. State Farm Fire & Cas. Co.,* 770 P.2d 704 (Cal. 1989) to support its argument restricting application of Appleman's Rule to first-party property insurance claims, but *Garvey* provides no such support. The trial court in

Garvey had directed a verdict in favor of coverage under the property insurance policy at issue, relying on *State Farm Mut. Auto Ins. Co. v. Partridge,* 514 P.2d 123 (Cal. 1973), in which the California Supreme Court ruled that liability insurance coverage is established under California's "concurrent cause" rule that applies when there are multiple causes of injury. "That multiple causes may have effectuated the loss does not negate any single cause; that multiple acts concurred in the infliction of injury does not nullify any single contributory act." *Id.* at 818-19.[2]

The *Garvey* court distinguished the more liberal approach to coverage in CGL coverage cases from the more limited "efficient proximate cause" approach that should be used in first-party property policies:

> [T]he right to coverage in the third-party liability insurance context draws on traditional tort concepts of fault, proximate cause and duty. This liability analysis differs substantially from the coverage analysis in the property insurance context, which draws on the relationship between perils that are either covered or excluded in the contract. *In liability insurance, by insuring for personal liability, and agreeing to cover the insured for his own negligence, the insurer agrees to cover the insured for a broader spectrum of risks.*

[2] This ruling is consistent with California's standard jury charge involving "multiple causes," which provides that when a defendant's "negligence [is] a substantial factor in causing [plaintiff's] harm, then…. [defendant] cannot avoid responsibility just because some other person, condition or event was also a substantial factor in causing [plaintiff's] harm. CACI No. 431. New Jersey also uses "substantial factor" wording in its standard proximate cause charge: When a defendant's negligence is a "substantial factor that singly, or in combination with other causes, brought about the… injury/loss/harm claimed…. [t]he mere circumstance that there may also be another cause of the... injury/loss/harm does not mean that there cannot be a finding of proximate cause." N.J. Charge No. 6.12. This charge is fully consistent with application of Appleman's Rule in finding coverage for the insured's negligence.

Id. at 710 (emphasis added). Interestingly, in California, ACC clauses intended to avoid application of the efficient proximate cause doctrine are unenforceable as contrary to California public policy. *Howell v. State Farm Fire & Cas. Co.,* 267 Cal. Rptr. 708, 218 Cal. App. 3d 1446 (Cal. App. 1990). Zurich's argument and the Trial Court's summary judgment ruling that Appelman's Rule does not apply to CGL coverage is simply wrong under controlling New Jersey law**.**

Zurich's alternative argument that Appleman's rule only applies to CGL coverage involving "concurrent" causes of loss also is wrong. The entire purpose of the Rule is to eliminate operation of a policy exclusion when the claim involves a covered cause of loss in the chain of causation and the policy does not contain an ACC clause. The *Flomerfelt* Court recognized that the Rule applies in cases involving sequential as well as concurrent causes of loss: "[W]e have adopted the approach known as 'Appleman's rule,' pursuant to which the loss is covered if a covered cause starts or ends *the sequence of events* leading to the loss." *Flomerfelt,* 202 N.J. at 447 (emphasis added).

The ACC clauses in the first two Zurich policies bar coverage "regardless of" whether the causes of loss occurred concurrently or sequentially. Zurich then eliminated the ACC clauses from the three policies at issue in this case. This change in policy language, like the change in the policy language addressed in *Cypress Point Condominium Ass'n, Inc. v. Adria Towers, L.L.C.,* 226 N.J. 403 (2016), discussed

below, plainly broadened the coverage available to the insured. The elimination of the ACC clause warrants application of Appleman's Rule when at least one of the events in the chain of causation is covered. The undisputed evidence establishes that the "first cause" in the chain of causation leading to Chenault's injuries – water intrusion – is covered by the Zurich policies; therefore, the Trial Court's refusal to apply Appleman's Rule to find coverage constitutes reversible error.

II. The so-called "Consumption Exception" was triggered by the mold on food that Chenault consumed.

The revised mold exclusions in the three Zurich policies at issue not only eliminated the restrictive ACC clause, but further broadened coverage with new language stating that the mold exclusion "*does not apply* to fungi or bacteria that are, are on, or are contained in, an edible good or edible product intended for human or animal consumption." (emphasis added). In *Cypress Point, supra,* the policy form at issue added a "subcontractor exception" to the "your work" exclusion that had been applied by numerous New Jersey courts to bar coverage for construction defects. The Supreme Court ruled that the addition of the exception to the exclusion expanded the coverage that otherwise would have been barred by the exclusion.

A policyholder would reasonably expect that the "plain language" of the new exception Zurich added to the mold exclusion clearly broadened policy coverage if there is mold "on" food that is merely "intended" for consumption. The undisputed evidence in the underlying case was that there was extensive mold contamination in

the air, on the floor, on the furniture, and elsewhere throughout the Chenault condominium. The food Chenault ate for eighteen years while living in the condominium and for a year later (during 2009) while, by necessity, he continued to store his food in the contaminated condominium, also was contaminated by airborne mold. Airborne contamination of food by mold was introduced into evidence through various reports and warnings by, among others, the USDA, the World Health Organization, and the EPA. Instead of applying the exception as written, the Trial Court required Chenault to prove (a) that he not only ate mold-contaminated food, but that the food he ate had been contaminated by an identifiable species of Stachybotrys mold; (b) that the mold species in question produced a harmful mycotoxin, trichothecene; and (c) that he had been directly (and distinctly) injured by his consumption of food that contained trichothecene mycotoxins.[3] Da37-39.

The plain language of the exclusion does not mention any particular species of mold; it does not mention trichothecenes or any other hazardous mycotoxin; and it does not require that the mold-contaminated food must be eaten and cause an identifiable and distinct injury. As written, the exception applies (and, therefore, the mold exclusion "does not apply") when there is mold "on" food that is "intended for

[3] As Chenault's expert witness testified without contradiction, requiring such proof would be an impossibility because there is no scientific way to determine the extent of bodily injury caused by any one of the three recognized pathways of harmful mold exposure: ingestion, inhalation, and dermal contact. 33T73-3-12.

human consumption." Nothing more is required. As the *Cypress Point* Court ruled, courts should not rewrite policy language to add missing terms favorable to the insurer that drafted the policy. *Cypress Point,* 226 N.J. at 415 ("[w]hen the terms of an insurance contract are clear, it is the function of a court to enforce it as written and not to make a better contract for either of the parties") (citations omitted).

Zurich relies in its Opposition Brief, as it did at trial, extensively on the testimony of its medical expert, Dr. Laumbach. Pb15-22. Zurich could (and should) have presented this testimony in the underlying case. Instead, it denied coverage, refused to defend its insured, and did not participate in the litigation or the final settlement of the case. Zurich, via Dr. Lambach's testimony, effectively relitigated the question whether Larry Chenault suffered injury from mold, the issue at the heart of the underlying case. New Jersey law precludes an insurer that has denied its duty to defend to relitigate issues it could have raised had it complied with its defense obligations.[4] Zurich seeks to reword the exception to require proof that its plain language does not require and that cannot be added by implication. *Cypress Point, supra.* The Trial Court's decision to reword the exception is reversible, legal error.

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[4] *LCS, Inc. v. Lexington Ins. Co.,*371 N.J.Super. 482, 497 (App. Div. 2004). *See also IMO Indus., Inc. v. Transamerica Corp.,* 437 N.J.Super 577, 625 (App. Div. 2014 (citing *Owens-Illinois v. United Ins. Co.,* 138 N.J. 437, 477 (1994) for the proposition that "where the insurers… refused to involve themselves in the defense of the claims as presented, they should be bound by the facts set forth in the insureds' records…. and *there can be no relitigation of those settled claims*.") (*Owens-Illinois,* 138 N.J. at 477; emphasis added).

III. Chenault's continuous injurious exposure to toxic mold triggered the three Zurich policies at issue.

The First Amended Complaint in the underlying case identified water intrusion caused by VHCA's negligence as the source of the toxic mold that had contaminated Chenault's condominium. Da87-89. Chenault also alleged, and introduced substantial supporting evidence, that he had been injured and that the value of his condominium had been damaged by continuous, but unknown, exposure to toxic mold throughout the coverage period of the Zurich policies. Da89-91.

Medical testing evidence produced in the underlying case shows that Chenault's body contained excessive levels of trichothecene, first discovered in 2010 and again in 2014. Da90-91. Zurich's expert, Dr. Laumbach, questioned the validity of this evidence, focusing on trichothecene and whether or not the species of mold that produces it existed in sufficient quantities in the food Chenault consumed to cause the formation of trichothecene mycotoxin.[5] Pb18-22. Issues regarding trichothecenes were also fully litigated in the underlying action, including whether Chenault suffered continuous injuries caused by exposure to toxic mold. Chenault produced scientific evidence showing that, especially in situations involving chronic mold exposure, patients continued to exhibit mold-related illness long after their

[5] Zurich's argument at trial that Chenault was not injured by mold at all and its argument on this appeal that Chenault's mold-related injuries manifested before inception of Zurich's coverage are plainly – and irreconcilably – inconsistent.

active exposure to toxic mold ended. Da1609-10. Similarly, medical evidence was presented in the underlying action regarding the risks of placing food on surfaces that had been contaminated by mold and VHCA's medical expert "did not disagree" with this evidence. Da1602. Zurich improperly seeks to relitigate this evidence.[6]

Neither VHCA nor the three carriers that defended VHCA seriously contested the evidence that Chenault had been continuously exposed to toxic mold. No carrier argued that coverage was barred because Chenault's mold-related bodily injuries had "manifested" before the policy's coverage commenced.[7] The last of the policies one of the settling insurers issued expired on June 1, 2005, shortly before the Zurich coverage commenced. Of course, neither Chenault nor anyone else knew or even suspected that the condominium had been contaminated by mold before March 2009, well within Zurich's coverage. *See also* Pb10 (admitting that mold was first discovered in Chenault's condominium in March 2009).

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[6] Zurich also effectively seeks to relitigate the viability of an AAAAI "Position Statement" upon which Dr. Laumbach relied. Pb22. This Statement, which was marked as exhibit 16 during the underlying Phillips deposition, says that it is "not to be considered to reflect current AAAAI standards or policy" after February 2006. Da1597. A scholarly article that questioned and criticized the AAAAI Position Statement was marked as exhibit 17 at the Phillips deposition. Da1597-98.

[7] In 2010 the Social Security Administration issued findings and a detailed report, concluding that Chenault was permanently disabled on account of his exposure to toxic mold. Da638. Dr. Hankins, Chenault's medical expert, concluded in her report of October 23, 2017 that Chenault's "post-exposure" mold-related disability was continuing and persistent. Da497 and Da1554.

Even assuming that Zurich can now invoke a "manifestation" defense that it could have, but did not, assert in the underlying case, it cannot now contradict the evidence of Chenault's continuous, but unknown, exposure to toxic mold that was ligated in the underlying case. Zurich has not cited any continuous injury cases holding that the types of common illnesses that Chenault experienced, none of which were indicative of any toxic exposure to mold or any other harmful environmental condition, could "trigger" liability coverage.[8]

IV. Zurich should be ordered to pay its proportional share of the settlement.

As discussed above, the three insurers that defended against the underlying action paid their allocated shares of the settlement amount. Zurich argues in its Opposition that the settlement was "unreasonable." Pb68-75. The Trial Court resolved that issue in Chenault's favor and Zurich did not file a cross-appeal of that decision. Zurich is therefore precluded from questioning that part of the judgment here. "A party may not attack the judgment under review without having appealed." *Burbridge v. Paschal*, 239 N.J. Super. 139, 151 (App. Div. 1990). *See also Franklin Discount Co. v. Ford,* 27 N.J. 473, 491 (1958) ("[A] party, in order to attack the actions below which were adverse to him, must pursue a cross-appeal").

[8] Unlike Larry Chenault, the plaintiffs in *Polarome Int'l, Inc. v. Greenwich Ins. Co*., 404 N.J.Super. 537 (App. Div. 2008) – upon which Zurich heavily relies – knew about their injurious exposure to the toxic chemicals at issue, exposure that had ended long before the policy coverage commenced in that case. *Id.* at 252-53.

The unpaid portion of the underlying settlement that Chenault claims in this case is precisely the amount that would be allocated to Zurich's $45 million in coverage using the *pro rata* policy limits over time-on-the-risk formula adopted in *Owens-Illinois v. United Ins. Co.,* 138 N.J. 437 (1994), *Carter-Wallace, Inc. v. Admiral Ins. Co.,* 154 N.J. 312 (1998), and other continuous-trigger cases. The evidence of the lengthy and vigorously contested litigation, followed by a detailed settlement negotiated by VHCA and the three carriers that defended VHCA, fully supports the Trial Court's decision that the settlement was negotiated in good faith and was reasonable, in accord with *Griggs v. Bertram,* 88 N.J. 347 (1982). Zurich did not cross-appeal from that decision and should not be allowed to contest it now.

CONCLUSION

For the reasons stated above and in Chenault's principal brief filed on September 25, 2023, the judgment appealed from should be reversed and the case remanded for entry of judgment in favor of Chenault, together with interest and attorneys' fees in accordance with *R.* 4:42-9(a)(6).

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