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FILED

December 18, 2024

Hon. Gary K. Wolinetz, J.S.C.

ATLANTA INTERNATIONAL INSURANCE COMPANY (as successor in interest to Drake Insurance Company), et al.,

Plaintiffs,

v.

JOHNSON & JOHNSON, et al.,

Defendants.

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: MIDDLESEX COUNTY
DOCKET NO.: MID-L-3563-19

CBLP Action

AMENDED ORDER

THIS MATTER, having originally been brought before the Court on the application of Gimigliano Mauriello & Maloney, P.A. and Simpson Thacher & Bartlett LLP, attorneys for defendant Travelers Casualty and Surety Company (f/k/a The Aetna Casualty and Surety Company) ("Travelers"), for an Order granting partial summary judgment in favor of Travelers and against defendants Johnson & Johnson and Johnson & Johnson Consumer, Inc., and its alleged successors by divisional merger (together, "J&J"), and the Court having granted Travelers' motion

and the accompanying Statement of Reasons on December 18, 2024, and the Court having subsequently reviewed the Statement of Reasons and noticed a series of typographical errors, and the Court having issued this Order along with the accompanying Revised Statement of Reasons to correct the aforementioned typographical errors without changing the substance of the Order or the Opinion;

IT IS on this 8th day of January 2025;

ORDERED that Travelers' motion for partial summary judgment is **GRANTED** in its entirety; and it is further

ORDERED and declared that Travelers has no obligation to indemnify J&J for the payment of the judgments entered against J&J by the Circuit Court of the City of St. Louis, State of Missouri in Ingham v. Johnson & Johnson, Case No. 1522-CC10417; and it is further

ORDERED that a copy of this Order shall be deemed served on all counsel of record upon its posting by the Court to the eCourts case jacket for this matter. Pursuant to R. 1:5-1(a), the Movant shall serve a copy of this Order on all parties not served electronically within seven days of this Order.

/s/ Gary K. Wolinetz
GARY K. WOLINETZ, J.S.C.

( ) Unopposed.
(X) Opposed.

REVISED STATEMENT OF REASONS

PRELIMINARY STATEMENT

This is an insurance coverage action filed by various entities including plaintiff Travelers Casualty and Surety Company (f/k/a The Aetna Casualty and Surety Company ("Travelers"). In this motion, Travelers seeks partial summary judgment against defendants Johnson & Johnson and Johnson & Johnson Consumer, Inc. and its alleged successors by a divisional merger (collectively "J&J"). Specifically, Travelers is seeking a declaration that it has no obligation to indemnify J&J for the payment of the judgments entered against J&J for numerous underlying claims of ovarian cancer that a Missouri jury found were caused by exposure to J&J's consumer talc products (the "Products").

The principal issue is whether J&J is entitled to insurance coverage from Travelers for the judgments against J&J in the case captioned Ingham, et al. v. Johnson & Johnson, et al., Case No. 1522-CC10417, (Aug. 20, 2015) ("Ingham"). Following a six-week trial, the jury in Ingham awarded twenty-two plaintiffs (the "Ingham Plaintiffs"), a combined $550 million dollars in compensatory damages and $4.14 billion dollars in punitive damages. The punitive damages were later reduced by more than half on appeal.

J&J appealed to the Missouri Court of Appeals. Ingham v. Johnson & Johnson, 608 S.W.3d. 663, 680 (Mo. Ct. App. 2020). On appeal, J&J raised numerous points including (1) certain expert testimony should have been barred as inadmissible, (2) the Ingham Plaintiffs failed

to offer sufficient evidence to establish causation, and (3) the trial court erred in permitting the Ingham Plaintiffs to seek punitive damages and, later, in denying J&J's motion to vacate or remit the jury's punitive damages award. Id. at 677-678. J&J also raised additional issues on appeal.

In an extensive published written opinion, the Missouri Court of Appeals disagreed with the major issues raised by J&J. As to the award of punitive damages the Court of Appeals found that under Missouri law, the submission of punitive damages to a jury requires that "some element of outrageous conduct is demonstrated that [] shows the defendant acted with a 'willful, wanton or malicious culpable state.'" Id. at 714.

The Court of Appeals recognized that punitive damages may be awarded in negligence actions only if the plaintiffs show that the defendant "knew or had reason to know a high degree of probability existed that the action would result in injury." Id. at 714 n.25.

Following a consideration of the evidence presented at trial, a review that J&J described as "extraordinarily deferential" but one that followed Missouri law, the Court of Appeals concluded that the Ingham Plaintiffs met this standard. The Court of Appeals found "that, motivated by profits, [J&J] disregarded the safety of consumers despite their knowledge the talc in their Products caused ovarian cancer," and "that it was highly probable J&J's conduct was outrageous because of evil motive or reckless indifference based on this evidence." Id. at 718. Further, the Court of Appeals held as follows:

> After considering the substantial evidence presented by Plaintiffs that [J&J] discussed the presence of asbestos in their talc in internal memoranda for several decades; avoided adopting more accurate measures for detecting asbestos and influenced the industry to do the same; attempted to discredit those scientists publishing studies unfavorable to their Products; and did not eliminate talc from the Products and use cornstarch instead because it would be more costly to do so, the jury found [J&J] knew of the asbestos danger in their Products when they were sold to the public. This finding supports

> that [J&J's] exposure of consumers to asbestos over several decades was done with reckless disregard of the health and safety of others. [Id. at 721].[1]

The Missouri Supreme Court denied J&J's application for transfer (the procedure by which Missouri litigants seek review by the Missouri Supreme Court). Thereafter, the United States Supreme Court denied J&J's petition for a writ of certiorari. J&J subsequently paid the Ingham judgment, which was now final. Thus, three appellate courts, including the United States Supreme Court, declined to reverse the jury's verdict, except that the Missouri Court of Appeals reduced the amount of the punitive damages.

J&J disagrees with the Ingham jury, the Missouri Court of Appeals, the Missouri Supreme Court and the United States Supreme Court. J&J contends, among other things: (1) that its actions as described by the Missouri Court of Appeals were not "particularly reprehensible; (2) there was an "occurrence" as that term is defined in the Travelers Policies, and (3) punitive damages are insurable under New Jersey law and public policy.

To remedy the jury's findings, Travelers wants a jury to effectively reconsider the factual findings made in the Ingham case in whole or in part primarily because it has been successful in a series of different talc cases involving different plaintiffs and regards Ingham as an "outlier." How this will happen procedurally absent a lengthy retrial, which J&J says it does not seek, is a mystery. Whatever trial procedure is utilized, J&J asserts that Travelers is obligated to indemnify it for the judgments entered in Ingham.

[1] Because the Court of Appeals found that the trial court lacked personal jurisdiction over J&J regarding claims brought by certain of the Ingham Plaintiffs who resided outside of Missouri, the appellate court proportionally reduced the punitive damages award and entered judgment against Old JJCI (as defined below) for $900 million in punitive damages and against J&J for $715,909,091 in punitive damages. Id. at 724-25.

A key issue is whether partial summary judgment should be entered in favor of Travelers under the principles of collateral estoppel. J&J emphasizes that under New Jersey law governing the interpretation of insurance policies and the standards for summary judgment, the existence of numerous factual disputes preclude the entry of summary judgment and bar the use of collateral estoppel.

I have reviewed the extensive papers submitted by the parties and heard several hours of outstanding oral argument from counsel. I have considered the fairness and reliability of the Ingham verdict and its subsequent appeals, as well as my sense of justice and equality, all referenced in Kortenhaus v. Eli Lilly & Co., 228 N.J. Super. 162 (App. Div. 1988). I have also given J&J the benefit of all inferences to which they are entitled under New Jersey law based on the standards governing summary judgment and law involving the interpretation of insurance policies. Considering these and other factors, I disagree with J&J's position, as I will explain in detail later in this opinion. I find the entry of partial summary judgment in favor of Travelers is appropriate. Specifically, I find as follows:

1. J&J lost the heart of the Ingham case from the trial court verdict, through post-trial motions and appellate review, including the United States Supreme Court.

2. Collateral estoppel applies in this Court to the factual findings made in Ingham.

3. Based on the application of collateral estoppel, this Court will not relitigate the factual findings made in Ingham here in whole or in part which, contrary to J&J's contention, will be extraordinarily complicated and a duplication of judicial resources.

4. Disregarding Ingham because it was an "outlier" verdict, as J&J argues because it has been successful in other ovarian cancer cases ignores the fact that Travelers' motion is based on the Ingham claim itself, not other ovarian cancer cases defended by J&J.

5. J&J is not entitled to indemnification from Travelers for the Ingham judgments under the Travelers Policies.

6. Under principles of collateral estoppel, New Jersey Appellate Division precedent, and public policy, J&J is not entitled to coverage for punitive damages.

Again, I will discuss my legal basis for holding in favor of Travelers in depth at the conclusion of this opinion. At this juncture, I will discuss the proposed material facts and responses to the same submitted by the parties under Rule 4:46-2. In doing so, the Court insists on compliance with that Rule. Thus, I will disregard any statements of material fact or responses that offer or deny certain facts but do not provide a specific citation to the record as required by the Rule. This issue plagued J&J in the submission of its opposition papers.

Finally, under R. 4:105-8, the following excess insurers (who have not settled) have joined in Travelers' motion: Republic Indemnity Company of America, Allstate Insurance Company, as successor in interest to Northbrook Excess and Surplus Insurance Company, formerly Northbrook Insurance Company, Repwest Insurance Company, Employers Insurance Company of Wausau and National Casualty Company, TIG Insurance Company and Everest Reinsurance Company ACE Property & Casualty Company (as successor in interest to Central National Insurance Company, now known as Oakwood Insurance Company, for policies issued through Cravens, Dargan & Company, Pacific Coast, its managing General Agent), Century Indemnity Company (as successor in interest to Insurance Company of North America), Great Northern Insurance Company, Pacific Insurance Company; and Westchester Fire Insurance Company (as successor by novation to Industrial Indemnity Company (collectively, the "Chubb Insurers"), Sentry Insurance Company and DARAG Deutsche Versicherungs- und Ruckversicherungs-AG (as successor-in-interest to A.G. Securitas, now known as Bothnia International Insurance Company Limited (collectively the "Excess Insurers").

Some of the Excess Insurers who have joined in this motion have provided me with Certifications attaching the relevant insurance documents. Some Excess Insurers merely quoted

what they believed were the relevant provisions. One Excess Insurer did not even do that, stating that they did not have the relevant policy. I recognize that many of the Excess Insurers were seeking to avoid bombarding the Court with unnecessary papers and sought to comply with R. 4:105-8, which I appreciate.

However, while I recognize the point of R. 4:105-8, and without disparaging counsel from the Excess Insurers who sought to follow the Court Rules, I regard this motion as too important to rely on a series of "me too" submissions, especially as J&J seem to object to the use of various exclusions set forth in the Certifications from the Excess Insurers. J&J Opposition Brief at footnote 27. Perhaps after reviewing this opinion, the Excess Insurers and J&J will resolve the Excess Insurers' applications without additional motion practice. Perhaps not. If not, in light of the complexity of these motions, I will require each Excess Insurer to file separate motions for summary judgment that will include individual Statements of Material Facts, Briefs (letter briefs will suffice), and Certifications or Affidavits attaching the relevant documents, so I may consider each Excess Insurer's application on its own merits.

THE MATERIAL FACTS

A. The Travelers Policies

Travelers issued primary general liability policies and product liability policies to J&J in effect from January 1, 1958, to January 1, 1981 (the "Primary Policies"). J&J also purchased excess indemnity (umbrella) policies from Travelers that were in effect from January 1, 1967 to January 1, 1973 (the "Umbrella Policies"). Travelers issued excess indemnity policies to J&J in effect from January 1, 1970 to January 1, 1986 (the "Excess Policies," together with the Primary Policies and the Umbrella Policies constitute the "Travelers Policies").

Subject to their terms, conditions and exclusions, the Travelers Policies provide indemnity for damages incurred because of bodily injury caused by an "accident" or "occurrence." The Primary Policies with policy periods before January 1, 1967, define "occurrence" as "an event, or continuous and repeated exposure to conditions, which unexpectedly causes injury during the policy period."

Similarly, the remaining Primary Policies define "occurrence" as "an accident, including injurious exposure to conditions, which results, during the policy period, in bodily injury or property damage neither expected nor intended from the standpoint of the insured." Likewise, according to Travelers, which J&J disputes because it asserts that the quotation is incomplete, the Umbrella Policies typically define "occurrence" to include "a continuous or repeated exposure to conditions which results in personal injury or property damage which is neither expected nor intended from the standpoint of the Insured."

Certain Excess Policies use the same, or a substantially similar definition of "occurrence," which J&J disputes. The Excess Policies provide coverage for "excess net loss," which is limited to "damages on account of any one accident or occurrence, and which would be covered by the terms of the Controlling Underlying Insurance." [2]

Certain Umbrella Policies and Primary Policies are explicitly listed as Controlling Insurance. In addition, policies issued by London, North River, Home, and Granite State are identified as controlling insurance in other Excess Policies. These policies use a substantially similar definition of "occurrence" as the Travelers' Policies. (("[O]ccurrence" . . . shall mean an accident or a happening or event or a continuous or repeated exposure to conditions which

[2] The policy in effect for the period from September 24, 1957 to January 1, 1958 is written on an "accident" basis.

unexpectedly and unintentionally results in personal injury . . . .") (emphasis added); ("Occurrence" . . . shall mean an accident or happening or event or a continuous or repeated exposure to conditions which **unexpectedly and unintentionally** results in personal injury . . . .") (emphasis added); ("Occurrence" . . . shall mean an accident or happening or event or a continuous or repeated exposure to conditions which **unexpectedly and unintentionally** results in personal injury . . . .") (emphasis added).

B. The Ingham Litigation

On August 20, 2015, Gail and Robert Ingham, husband and wife, along with fifty-five other plaintiffs filed a lawsuit in the Circuit Court of the City of St. Louis alleging J&J had engaged in "negligent, willful, and wrongful conduct in connection with the design, development, manufacture, testing, packaging, promoting, marketing, distribution, labeling, and/or sale" of J&J's consumer talc products and sought "recovery for damages as a result of developing ovarian cancer, which was directly and proximately caused by such wrongful conduct by [J&J], the unreasonably dangerous and defective nature of talcum powder, and the attendant effects of developing ovarian cancer." As I previously noted, I have referred to these individuals as the "Ingham Plaintiffs."

The Ingham Plaintiffs asserted causes of action for strict liability, negligence, breach of express and implied warranties, civil conspiracy, concert of action, and punitive damages. As the Ingham Court of Appeals described, twenty-two plaintiffs proceeded to trial on May 31, 2018. Ingham, 608 S.W.3d at 680.

After a six-week trial, the Ingham Court of Appeals explained that the Ingham trial court instructed the jury that if they found in favor of the Ingham Plaintiffs and believed that (1) J&J "failed to adequately warn of the risk of harm, if any, from [J&J's] talc products," (2) J&J "knew

or had information from [J&J] in the exercise of ordinary care, should have known that such conduct created a high degree of probability of injury," and (3) J&J "thereby showed complete indifference to or conscious disregard for the safety of others," then the jury may find J&J liable for punitive damages. Id. at 714.

The Ingham jury returned a verdict awarding the Ingham Plaintiffs a combined $550 million in compensatory damages and $4.14 billion in punitive damages. Id. at 680. On appeal, J&J argued that the Ingham Plaintiffs had failed to support their claims for punitive damages and that the trial court should have granted J&J's motion to vacate or remit the punitive damages award. Id. at 677-678.

The Missouri Court of Appeals held that under Missouri law the submission of punitive damages to a jury requires that "some element of outrageous conduct is demonstrated that [] shows the defendant acted with a 'willful, wanton or malicious culpable state.'" Id. at 714.

The Court of Appeals recognized that punitive damages may be awarded in negligence actions only if the plaintiffs show that the defendant "knew or had reason to know a high degree of probability existed that the action would result in injury." Id. at 714 n.25.

The Court of Appeals concluded that the Ingham Plaintiffs met this standard. Specifically, according to the Court of Appeals, the jury found "that, motivated by profits, [J&J] disregarded the safety of consumers despite their knowledge the talc in their Products caused ovarian cancer," and "that it was highly probable [J&J's] conduct was outrageous because of evil motive or reckless indifference based on this evidence." Id. at 718. Further, as I previously noted, the Court of Appeals held as follows:

> After considering the substantial evidence presented by Plaintiffs that [J&J] discussed the presence of asbestos in their talc in internal memoranda for several decades; avoided adopting more accurate measures for detecting asbestos and influenced the industry to do the same; attempted to discredit

> those scientists publishing studies unfavorable to their Products; and did not eliminate talc from the Products and use cornstarch instead because it would be more costly to do so, the jury found [J&J] knew of the asbestos danger in their Products when they were sold to the public. This finding supports that [J&J's] exposure of consumers to asbestos over several decades was done with reckless disregard of the health and safety of others. [Id. at 721].

The Missouri Supreme Court declined J&J's application for transfer to the Missouri Supreme Court. On June 1, 2021, the United States Supreme Court denied J&J's petition for a writ of certiorari. J&J subsequently paid the Ingham judgment, which was now final.

C. Prior Coverage Litigation Between J&J and Travelers Involving Coverage for Punitive Damages

The present litigation is not the first time J&J has sought coverage under a policy issued to J&J for a verdict involving punitive damages. Specifically, in the early 1980s, an adverse verdict was entered against J&J in a products liability case, Racer v. Utterman, 629 S.W. 2d 387 (Mo. Ct. App. 1981), appeal dismissed and cert. denied, 469 U.S. 965 (1984) ("Racer"). The Racer case was discussed by the New Jersey Appellate Division in Johnson & Johnson v. Aetna Cas. & Sur. Co., 285 N.J. Super. 575, 577 (App. Div. 1995).

The Racer jury was instructed that "if you believe that the conduct of [J&J] as submitted . . . showed complete indifference to or conscious disregard for the safety of others, you may assess punitive damages . . . ." Id. at 579. The jury awarded $517,500 in punitive damages as a component of the verdict. Id.

The Missouri Court of Appeals reversed and remanded because the jury instruction did not require a finding that J&J placed a dangerous product in the stream of commerce. Id. Following remand, J&J settled the punitive damages claim for $355,237. Id.

Thereafter, J&J filed a declaratory judgment action in New Jersey Superior Court seeking indemnification for the punitive damages award under the Travelers Excess Policy in effect in

1976. Id.[3] The trial court granted Travelers' motion for summary judgment and denied J&J's cross-motion, finding that "it is against public policy to insure against punitive damages awards." Id.

J&J appealed. The Appellate Division affirmed, holding that New Jersey law "proscribe[s] coverage for punitive damage liability because such a result offends public policy and frustrates the purposes of punitive damages awards." Id. at 583. The Appellate Division rejected J&J's argument that coverage for punitive damages would not run afoul of public policy because the punitive damages were awarded for "'unintentional conduct' that is a 'species' of negligence or gross negligence." Id. at 587. The Appellate Division found that Missouri's standard for awarding punitive damages in a products liability case did not "articulate a 'species' of negligence." Id. at 588

D. This Insurance Coverage Litigation

In May 2019, certain insurers filed this coverage action against J&J and dozens of J&J's historical insurers, including J&J's captive insurer, Middlesex Assurance Company ("Middlesex"). The insurers seek a declaratory judgment that they are not obligated to indemnify or defend J&J in connection with underlying claims asserted against J&J arising from alleged exposure to talc products, including the Ingham litigation. Travelers asserts that because the Court may be called

[3] According to Travelers, in addition to seeking indemnification for the punitive damages award in Racer, J&J sought indemnification for a punitive damages award entered against a subsidiary in a separate products liability case in Kansas state court. Aetna, 285 N.J. Super. at 578). Travelers contends that the Kansas punitive damages award was similarly deemed uninsurable. Id. J&J disputes these statements noting that "Travelers has failed to establish that that the Travelers Excess Policy produced in connection with this motion is the same policy as the one at issue in Racer." Further, J&J asserts that "Travelers' description of the Kansas state court matter to the extent it mischaracterizes the holding in that case." [sic].

upon to determine the rights and obligations of J&J's other insurers to resolve their claims, Travelers was included as a defendant.

Travelers cross-claimed against J&J and Middlesex and seeks various declarations that it is not obligated to reimburse J&J for defense or indemnity in connection with the underlying talc claims, and that any such obligations are limited or should be apportioned consistent with New Jersey law. J&J and Middlesex cross-claimed against Travelers, seeking a declaratory judgment that Travelers is required to defend and indemnify J&J for damages incurred in connection with the underlying claims, including Ingham. J&J also brought a claim for breach of contract against Travelers and filed similar declaratory relief and breach claims against J&J's other insurers.

E. Formation of LTL and the LTL Bankruptcy Proceedings[4]

In 2015, as described by Travelers, J&J Consumer Companies, a subsidiary of J&J, merged with an affiliate, which then merged into McNeil-PPC, Inc. The resulting entity was renamed Johnson & Johnson Consumer Inc. (including all former names and historical forms, "Old JJCI") and was named as a defendant in the complaint.

[4] J&J contends the facts prepared by Travelers regarding J&J's legal maneuvers in the Bankruptcy Courts in Texas and North Carolina are irrelevant to this coverage dispute. I have included them to illustrate the efforts of J&J and its related entities to avoid, among other things, civil litigation and potential damages regarding its talc related claims. During the pendency of this motion, as described by counsel for J&J by letter dated October 24, 2024, Johnson & Johnson Consumer, Inc. ("JCCI"), a subsidiary of J&J and a plaintiff in this insurance coverage action, "underwent a series of corporate transactions by which it ceased to exist as a single entity and, ultimately, three new J&J entities were created. One of those resulting entities, Red River Talc LLC filed for bankruptcy in the Bankruptcy Court for the Southern District of Texas" on September 26, 2024. The filing of the bankruptcy delayed this case for several months until counsel for J&J and Travelers advised me by separate letters dated November 13, 2024 that this this case could proceed and I may decide the pending motion.

On October 12, 2021, Old JJCI implemented a divisive merger under Texas law whereby Old JJCI ceased to exist and two new entities were created: LTL Management LLC ("LTL") and "Johnson & Johnson Consumer Inc." ("New JJCI").[5]

As a result of this corporate restructuring, LTL purportedly holds certain of Old JJCI's assets, including its rights to make claims under insurance policies in which Old JJCI is an insured, additional insured, successor, beneficiary or otherwise, but solely to the extent such policies purportedly provide coverage for talc-related liabilities. LTL is also responsible for the alleged talc-related liabilities of J&J and Old JJCI.

New JJCI purportedly holds all other assets of Old JJCI, including insurance policies in which Old JJCI has rights as an insured, additional insured, successor, beneficiary or otherwise, other than as respects claims for talc-related liabilities. New JJCI is solely responsible for all other (non-talc-related) liabilities of Old JJCI. In other words, due to the divisive merger, Old JJCI's rights and obligations under the insurance policies were allocated to New JJCI other than the right to make claims for talc-related liabilities. LTL was allocated the right to make such claims for Old JJCI's talc-related liabilities but was not allocated the policies that remain in New JJCI.

Following this restructuring, on October 18, 2021, J&J filed a Notice of Bankruptcy Filing and Stay of Proceedings informing the parties and this Court that "LTL Management LLC, a North Carolina limited liability company . . . is now responsible for the talc related claims asserted against Old JJCI and was allocated the insurance rights of Old JJCI that are the subject of [this]

[5] New JJCI merged into its parent company. In December 2022, New JJCI changed its name to Johnson & Johnson Holdco (NA) Inc. ("Holdco"). See In re LTL Management LLC, 652 B.R. 433, 438 (Bankr. D.N.J. 2023). In January 2023, Holdco transferred its consumer health business to its parent company, Janssen Pharmaceuticals, Inc., in connection with the transfer of Johnson & Johnson's consumer products business to a new, publicly traded entity—Kenvue, Inc. Holdco is LTL's direct parent company.

Proceeding" and that "upon the filing of LTL's chapter 11 case, the automatic stay imposed by section 362 of the Bankruptcy Code . . . became immediately effective" to stay this action.

On November 15, 2021, the Bankruptcy Court for the Western District of North Carolina issued a preliminary injunction barring talc claimants (but no other parties) from prosecuting claims against J&J, its affiliates, and certain other protected parties, including Travelers and the other insurer parties to this action. That same day, the court ordered the bankruptcy case to be transferred to the District of New Jersey in the interests of justice and judicial economy.

Various groups of talc claimants filed motions to dismiss the bankruptcy. While these motions were pending, Travelers and certain other insurers, including the plaintiffs here, filed motions seeking relief from the automatic stay to allow this action to proceed. The bankruptcy court denied the motions to dismiss. In re LTL Mgmt. LLC, 637 B.R. 396 (Bankr. D.N.J. 2022)).

After several adjournments of various motions, the Court modified the automatic stay to allow third-party discovery to proceed, but otherwise kept the automatic stay in place. While the bankruptcy case continued, the talc claimants appealed the court's denial of their motion to dismiss to the Third Circuit. On January 30, 2023, the Third Circuit reversed the bankruptcy court, holding that the case should be dismissed because, among other things, it was not filed in good faith. In re LTL Mgmt. LLC, 58 F.4th 738, 745 (3d Cir. 2023). Following a petition for rehearing en banc, which was denied, the bankruptcy case was dismissed, and the automatic stay was lifted on April 4, 2023.

A few hours after the dismissal of the bankruptcy, LTL filed a second petition for voluntary bankruptcy under Chapter 11 of the Bankruptcy Code, thus reinstating the automatic stay. In re LTL Mgmt., LLC, 652 B.R. 433, 439 (Bankr. D.N.J. 2023). On April 25, 2023, the bankruptcy court again issued a preliminary injunction barring the prosecution of talc-related claims against

J&J, its affiliates, and certain other protected parties including Travelers and the other insurer parties to this action.

Thereafter, various groups of talc claimants, including the Official Committee of Talc Claimants and certain States, filed motions to dismiss the bankruptcy. On August 11, 2023, the bankruptcy court granted the motions to dismiss the bankruptcy upon finding that LTL's second petition was not filed in good faith. The dismissal of the second bankruptcy resulted in the termination of the automatic stay and vacatur of the preliminary injunction. On December 29, 2023, LTL redomiciled in Texas and changed its name to LLT Management LLC.

F. J&J Success in Ovarian Cancer Claims Following Ingham[6]

According to J&J, it has prevailed in most of the ovarian cancer claims brought to trial against it, including securing unanimous defense verdicts in the five most recent ovarian cancer claims tried to verdict, which are Forrest (2019), Cadagin (2021), Kleiner (2021), Giese (2021), and Monroe (2021). The Ingham verdict was rendered in 2018, before each of the five most recent defense verdicts. Ingham, 608 S.W.3d at 680. Moreover, J&J asserts that appellate courts in five cases have reversed jury verdicts against J&J or otherwise found in its favor.

J&J argues that the Superior Court of New Jersey, Appellate Division, has directed that testimony by certain plaintiffs' experts introduced in the Ingham trial are inadmissible under New Jersey law. Lanzo v. Cyprus Amax Minerals Co., 467 N.J. Super 476 (App. Div. 2021) (admission of testimony of three of plaintiffs' experts, Jaqueline Moline, M.D., William E. Longo, Ph.D., and James Webber, Ph.D., constituted reversible error; trial court failed to perform its gatekeeping

[6] The remaining facts are set forth in J&J's Counterstatement of Additional Material Facts. Travelers did not respond to any of these alleged facts.

function by permitting these experts to testify on matters which were capable of producing unjust results.)

Drs. Moline and Longo testified in the Ingham matter, and the Missouri Court of Appeals' decision relied in part on their testimony. Ingham, 608 S.W.3d at 700-13. Giese was a multi-plaintiff ovarian cancer case tried to verdict in the same court, before the same judge, as Ingham.

According to J&J, the jury answered identical questions concerning J&J's conduct, and rendered a complete defense verdict in favor of J&J. The Giese jury answered in the negative the question of whether "Johnson's Baby Powder was carcinogenic" and whether "Johnson & Johnson failed to use ordinary care to adequately warn of the risk of harm."

G. J&J Claims that Decades of Studies Show that J&J's Talc Products are Safe

J&J contends that in 1976, Dr. Arthur Langer published a peer-reviewed study reversing an earlier report and concluding that Johnson's Baby Powder was not contaminated with asbestos. That same year, J&J asserts that in 1976, the president of Mount Sinai Medical Center issued a statement that "[t]he most commonly used baby talc [Johnson's Baby Powder] has been consistently free of asbestos."

According to J&J, in 1980, Dr. Walter McCrone[7] explained, concerning an earlier report by Dr. Seymour Lewin of asbestos in talc samples, that "it finally became apparent that the original [Lewin] … report was grossly wrong."

J&J asserts from the early 1970s, it sent its products to various experts to test, including the Colorado School of Mines, the nation's top mining engineering school; McCrone Laboratories, the top microscopy lab in the country; and professors at Princeton and Cardiff (a leading asbestos

[7] According to J&J, one of the plaintiffs' experts in Ingham, Dr. Longo, described Dr. McCrone as "one of the top optical microscopists in the world," "[w]ell-respected," and "[a] great scientist."

research university in Wales). In that time frame, using various testing methods, J&J notes that these experts uniformly concluded that J&J's Powders were not contaminated with asbestos.

Also in the early 1970s, J&J claimed that the FDA had led an intensive multi-year research project to examine whether cosmetic talc contained asbestos. In 1976, J&J asserts that the FDA announced that it had not detected asbestos in any of its Powders. A 1986 FDA analysis focused specifically on whether there is "a health hazard attributable to asbestos in cosmetic talc," and found none. According to J&J, in 2009, the FDA conducted another round of testing on J&J's Powders, and "found no asbestos fibers or structures in any of [its] samples of cosmetic-grade raw material talc or cosmetic products containing talc." J&J asserts that the FDA testing included samples drawn from the mine and the finished product.

J&J states that before the 1970s, there was no uniform standard for testing for asbestos. J&J contends that in the 1970s, the FDA apparently worked with the talc industry to develop what became the industry-standard method for testing for asbestos in cosmetic talc: the two step "J4-1 standard."

The J4-1 standard starts with X-ray diffraction (XRD), which can confirm that asbestos is not present within the instrument's limits of detectability but cannot definitively confirm that it is present. If XRD reveals the possibility of asbestos, the next step is polarized light microscopy ("PLM"). J&J states that the Ingham Plaintiffs' expert, Dr. Longo, admitted that in the 1970s, the XRD and PLM sequence was "the best analysis" to run.

In 1986, a decade after adopting the J4-1 standard, the FDA declared, "[t]his specification contributed to the continued improvement of cosmetic talc quality." That same year, 1986, in response to a petition seeking a warning label on cosmetic talc, the FDA concluded that "there is no basis at this time for the agency to conclude that there is a health hazard attributable to asbestos

in cosmetic talc. Without evidence of such a hazard, the agency concludes that there is no need to require a warning label on cosmetic talc."

J&J claims that since the early 1970s, J&J and its suppliers have routinely tested their talc for asbestos using methods that exceeded the J4-1 industry standard. In addition to industry-standard XRD and PLM testing, J&J states that it has been using more sensitive and sophisticated TEM (transmission electron microscopy) as part of their routine testing dating back to the 1970s.

For decades, J&J allegedly took samples of powder every hour of every shift for every working day and collected them into composite samples for testing. The testing regimen included weekly testing of washed powder, monthly testing of ore from mines, and quarterly testing of finished powder.

J&J states that McCrone Laboratories participated in the testing, using the most sensitive techniques validated in peer-reviewed literature. Testing of the Powders over the years consistently found no asbestos contamination. The testing referenced in the preceding paragraph included testing by independent scientists, such as researchers in a joint program between Harvard and the National Institute for Occupational Safety and Health (NIOSH), who studied the Vermont mine that yielded much of the talc for the Powders. The Illinois EPA also tested the Powders and found no asbestos.

In 2014, the FDA allegedly found a warning label unwarranted by the available data. The FDA's 2014 conclusions included that "[T]here exists no direct proof of talc and ovarian carcinogenesis." Also, in 2014, the FDA concluded that "[T]he data submitted [did not] present[] conclusive evidence of a causal association between talc use in the perineal area and ovarian cancer." The FDA apparently determined in 2014 that a "cogent biological mechanism by which

talc might lead to ovarian cancer is lacking." The FDA further found in 2014 that the evidence was "insufficient" to justify warnings.

According to J&J, multiple epidemiological studies have found no meaningful increase in ovarian cancer among cosmetic talc users. J&J states that the view among numerous major regulatory and scientific bodies—including the FDA and the National Cancer Institute ("NCI") — is that the scientific evidence does not establish a causal relationship between cosmetic talc use and ovarian cancer.

In 2018, J&J asserts that the National Cancer Institute declared that "[t]he weight of evidence does not support an association between perineal talc exposure and an increased risk of ovarian cancer." In 2023, the National Cancer Institute stated that "…the data are inadequate to support an association between perineal talc exposure and an increased risk of ovarian cancer."

The American Cancer Society ("ACS") said in 2018 that "[i]t is not clear if consumer products containing talcum powder increase cancer risk." At most, "there is some suggestion of a possible increase in ovarian cancer risk." The ACS added that the only suggestion of a possible increase in ovarian cancer risk came from "types of studies [that] can be biased because they often rely on a person's memory of talc use many years earlier."

H. J&J Suffers an Outlier Defeat in Ingham

In Ingham, according to J&J, the trial court permitted the consolidation of 22 plaintiffs for a single trial. 608 S.W.3d at 677. The Ingham Plaintiffs submitted claims implicating the laws of 12 different states. Id. at 680. Over 30 witnesses testified during a six-week trial. Ingham. Id. The trial court issued extensive jury instructions that took more than five hours to read. Id.

The jury awarded every plaintiff family exactly $25 million in compensatory damages despite, according to J&J, prognoses and health outcomes ranging from individuals who had

passed away from ovarian cancer to those who were in remission, including, according to J&J, one woman who had been in remission for so many decades that she could be considered cured.

With the facts advanced by each party complete, I will now discuss the respective legal arguments from Travelers and J&J.

TRAVELERS' LEGAL ARGUMENTS IN ITS MOVING BRIEF

Travelers asserts that summary judgment should be granted in its favor on several grounds. First, Travelers argues that New Jersey law provides that when an insured's conduct is "particularly reprehensible," or the injury at issue is an "inherently probable consequence of the insured's conduct," summary judgment denying coverage is warranted. That is because the insured expected or intended the injury to occur and, as a result, the event causing the injury does not constitute an "occurrence." Travelers contends that it has satisfied both the "expected" or "intended" standards based on the factors set forth by the Missouri Court of Appeals in Ingham, which are consistent with the standards governing New Jersey insurance law.

Travelers claims that J&J's conduct was "particularly reprehensible" based on the Missouri Court of Appeals' holding that "there was significant reprehensibility in [J&J's] conduct." Ingham, 608 S.W.3d at 721. As to whether the Ingham Plaintiffs' injuries were an "inherently probable consequence" of J&J's conduct, the Court of Appeals held that J&J "knew or had reason to know a high degree of probability existed that the action would result in injury." Id. at 714 n.25. According to Travelers, these findings are final and establish that J&J expected or intended Ingham Plaintiffs' injuries, thereby precluding coverage.

Travelers further contends that the punitive damages awarded to the Ingham Plaintiffs are independently uninsurable as a matter of law, previously established in prior coverage litigation

between J&J and Travelers. According to Travelers, the punitive damages awarded to the Ingham Plaintiffs are outside the scope of coverage.

The foregoing summarizes Travelers' legal position. I will now discuss the legal arguments advanced by Travelers in greater detail.

Regarding the coverage dispute, Travelers asserts that its policies are only intended to provide coverage for damages caused by an "occurrence." Travelers notes that it is a fundamental precept of liability insurance that coverage will not provided where "the alleged wrongdoer intended or expected to cause an injury." Voorhees v. Preferred Mut. Ins. Co., 128 N.J. 165, 183 (1992). Travelers contends that while an insured's subjective intent is sometimes relevant, "[w]hen the actions are particularly reprehensible, the intent to injure can be presumed from the action without an inquiry into the actor's subjective intent to injure." Id. at 184. Further, when the record "undisputably demonstrates" that the injury caused by the insured "was an inherently probable consequence of the insured's conduct," summary judgment is appropriate. Harleysville Ins. Co. v. Garrita, 170 N.J. 223, 234-35 (2001).

Travelers asserts that J&J's intent to injure has been conclusively established by the findings of the Missouri courts that J&J's actions were "particularly reprehensible." In determining whether conduct is "particularly reprehensible," Travelers argues that courts should look to the duration of the insured's conduct, the quality of the insured's knowledge regarding propensity for harm, and the existence of subjective knowledge regarding the likelihood of harm. See Morton Int'l, Inc. v. General Acc. Ins. Co. of Am., 134 N.J. 1, 86 (1993).

In affirming the Ingham jury's punitive damages award, Travelers notes that the Missouri Court of Appeals determined that the jury relied on "substantial evidence" that "[J&J's] exposure of consumers to asbestos over several decades was done with reckless disregard of the health and

safety of others." Ingham, 608 S.W.3d at 721. Travelers argues that the evidence at the Ingham trial was summarized by the Court of Appeals which included, among other things: (i) J&J's internal memoranda discussing the presence of asbestos in their talc for several decades; (ii) J&J'a decision not to adopt more accurate measures for detecting asbestos; (iii) J&J's efforts to discredit scientists publishing unfavorable studies; and (iv) J&J's decision not to eliminate talc from its products because it was costly to do so." Id. Travelers cites the Court of Appeals conclusion, which it claims was unequivocal: "We find there was significant reprehensibility in [J&J's] conduct."

Regarding the "inherently probable consequence" standard that the injuries suffered by the Ingham Plaintiffs were expected or intended by J&J under New Jersey law, Travelers argues that it is substantively similar to the Missouri standard for punitive damages that was applied in Ingham. Specifically, while Travelers asserts that New Jersey courts may consider whether the injury "was an inherently probable consequence of the insured's conduct" when determining whether a claimant's injuries were expected or intended, Missouri courts upholding punitive damages must find that the defendant "knew or had information from which [J&J], in the exercise of ordinary care, should have known that such conduct created a high degree of probability of injury."

According to Travelers, the same conduct the Missouri Court of Appeals found justified the award of punitive damages in Ingham establishes that the harm was expected or intended as a matter of law. Thus, Travelers states that whether I employ the "particularly reprehensible" or the "inherently probable consequence" standard, summary judgment is warranted confirming that Travelers has no obligation to indemnify J&J for the damages awarded in Ingham.

Citing and discussing various federal and sister state cases, Travelers contends that courts have frequently concluded that factual findings supporting an award of punitive damages are sufficient to establish that injuries were expected or intended as a matter of law. See Alcolac, Inc. v. St. Paul Fire & Marine Ins. Co., 716 F. Supp 1541, 1542, 1544-45 (D. Md. 1989) ("under Missouri law, the award of punitive damages means that [the insured] knew that its conduct was attended by a high degree of probability that the action would result in an injury. Thus, the injuries to the [ ] plaintiffs were not unexpected." Am. Family Mut. Ins. Co. v. M.B., 563 N.W.2d 326, 328 (Minn. Ct. App. 1997) (Under Minnesota law, a party acts with deliberate disregard for the safety of others when it "has knowledge of facts or intentionally disregards facts that create a high probability of injury to the safety of others and deliberately proceeds" to either "act in conscious or intentional disregard of the high degree of probability to the safety of others" or "act with indifference to the high probability to the safety of others." "This language closely resembles that used in the definition of 'expected': 'knew or should have known that there was a substantial probability that certain consequences would result from his actions.'"); Ga. Farm Bureau Mut. Ins. Co., 586 S.E. 2d 715, 718 (Ga. Ct. App. 2003) (insurer "was under no obligation to defend [its insured]" because the plaintiff in the underlying action, "by seeking punitive damages . . . has explicitly alleged that the act was intentional or at least evinced an expectation of harm.")

In conclusion, Travelers argued that because the jury's verdict in Ingham and award of substantial compensatory and punitive damages were based on injuries determined to have been expected or intended by J&J, the company is not entitled to indemnification for Ingham as a matter of law.

Next, relying on Aetna, 285 N.J. Super. at 577, Travelers contends that punitive damages are not covered by insurance under the doctrine of collateral estoppel. In Aetna, J&J sought

indemnification for punitive damages awarded in product liability actions in Kansas and Missouri. The Appellate Division held that coverage is not available for punitive damages because "affording coverage . . . would run counter to the underlying theory of punitive damages: to punish the wrongdoer and deter aggravated misconduct in the future." Travelers contends that collateral estoppel forecloses relitigation of this issue in light of the following issue framed by the Appellate Division: "[t]he question before us is whether excess liability policies issued by defendants to plaintiff [ ] Johnson & Johnson . . . afford coverage for punitive damage awards suffered by plaintiffs in two failure-to-warn, product liability actions." Id. Travelers asserts that this is the same issue before me.

Further, aside from collateral estoppel, Travelers contends that coverage is not available for punitive damages in New Jersey as a matter of public policy. Consistent with Aetna, Travelers argues that if J&J "were permitted to shift the burden to an insurance company, punitive damages would serve no useful purpose." Aetna, 285 N.J. Super. at 584. Travelers notes that it did nothing wrong. The wrong was committed by J&J, and in order to provide a deterrent effect, punitive damages must be assessed by the party that committed the wrong. Travelers emphasizes that the Ingham Court of Appeals made clear that J&J committed the wrong by permitting the use of asbestos in its products sold to consumers, for which punitive damages would have a deterrent effect. Travelers reiterates that it should not be punished for the bad acts of J&J as determined by the courts in Missouri.

Travelers argues that having failed to convince three different appellate courts, including the United States Supreme Court to reverse the Ingham jury's verdict, J&J wants this Court to effectively relitigate Ingham. In doing so, Travelers contends that J&J wants to relieve itself of its obligation to pay for the injuries that J&J expected or intended. Travelers asserts that, based on

the Ingham verdict, J&J engaged in decades-long marketing and sale of carcinogenic products that were prolonged, deadly and "reprehensible."

Travelers notes that I am bound to apply Aetna, a case that held that punitive damages are uninsurable as a matter of public policy. Travelers labels footnote 3 in Chubb as dicta that did not undermine the holding in Aetna, a decision involving the same parties concerning the same policies and regarding punitive damages awarded under the laws of the same state. Travelers notes that, in addition to being uninsurable as a matter of public policy, collateral estoppel precludes J&J from seeking indemnification for punitive damages under the Travelers' policies.

J&J's OPPOSITION BRIEF

By way of summary, as discussed in its Preliminary Statement, J&J's major premise is that the issue posed by Travelers in this motion -- did J&J expect and intend to injure its customers -- is a factual question that rarely lends itself to resolution by a court on summary judgment. J&J emphasizes that this factual issue is disputed.

J&J states that, according to the position espoused by Travelers, the result in Ingham deprives the Court of the ability and obligation to resolve that question. J&J argues that Travelers is wrong as a matter of law. Citing Voorhees, 128 N.J. at 185, J&J contends that New Jersey law requires an inquiry into J&J's subjective intent to cause injury – a standard that Travelers cannot meet. J&J states that it intends to vigorously dispute with facts and admissible evidence any suggestion that it intended to harm its customers, including the Ingham Plaintiffs.

According to J&J, Travelers' goal, relying on the Ingham verdict and the Missouri Court of Appeals' affirmance of that verdict is to seek a ruling that J&J is collaterally estopped from defending its conduct here. J&J states that collateral estoppel is inapplicable because the Ingham

court resolved different issues and considered different evidence that must be weighed by the factfinder here. Further, according to J&J, I must consider the fairness of simply applying Ingham considering the favorable outcomes that J&J has secured in every other ovarian case tried to a verdict, both before and after Ingham was decided.

J&J notes that the Appellate Division has rejected the application of collateral estoppel in product liability cases with inconsistent verdicts. Kortenhaus, 228 N.J. Super. at 168. In Kortenhaus, the Appellate Division held: "[t]he application of offensive collateral estoppel in the fact of inconsistent verdicts is antithetical to the very basis of the rule – confidence in the first outcome. 'Not only does issue preclusion in [cases where there are inconsistent verdicts] appears arbitrary to a defendant who has had favorable judgments on the same issue, it also undermines the premise that different juries reach equally valid verdicts."

J&J also disputes Travelers' request for summary judgment on the insurability of the punitive damage award in Ingham. According to J&J, the New Jersey Supreme Court has criticized Appellate Division decisions that held that punitive damages were uninsurable as a matter of New Jersey public policy because (a) neither the Supreme Court nor the New Jersey Legislature has declared punitive damages uninsurable, and (b) our Legislature has passed legislation authorizing recovery of punitive damages from the New Jersey Property-Liability Insurance Guaranty Fund if those damages are otherwise covered by an insolvent's insurer's policy. J&J further notes that the Supreme Court expressly criticized Aetna, a case heavily relied on by Travelers.

Moving on from the summary it provided in its Preliminary Statement, J&J disputes the notion that J&J subjectively intended to harm the Ingham Plaintiffs. J&J asserts that to determine whether an insured intended to cause an underlying injury, "the insured's subjective intent to injure" is controlling. Voorhees, 128 N.J. at 185. According to J&J, this analysis "generally

focuses on whether the tortfeasor subjectively intended to cause harm to the injured party." F.S. v. L.D., 362 N.J. Super. 161, 167 (App. Div. 2003). J&J argues that the subjective intent must be evaluated as of the time of the policy period; evidence bearing on the intent the insured may have formed after the policy period is irrelevant. Carter-Wallace, Inc. v. Admiral Ins, Co., 154 N.J. 312, 335 (1998).

J&J next asserts that if there is some evidence of a subjective intent to cause *some type* of injury, I must make a second inquiry into subjective intent and consider whether the policyholder subjectively intended to cause the *actual* injury suffered. SL Indus., Inc. v. Am. Motorists Ins. Co., 128 N.J. 188, 210-212 (1992). Thus, J&J contends that this analysis requires two layers of inquiry, subject to the exception recognized below.

To that end, J&J recognizes in some cases where the actual injury is the inherently probable consequence of the injurious act, the two subjective intent inquiries collapse into each other, and a finding of subjective intent to cause *some* injury suffices, without further inquiry into subjective intent to cause the *actual* injury. Harleysville, 170 N.J. at 234.

Based on the fact-sensitive nature of the subjective intent analysis, J&J asserts that New Jersey courts routinely deny summary judgment motions involving exclusionary expected/intended language. See, e.g., CPC Int'l, Inc. v. Hartford Acc. & Indem. Co., 316 N.J. Super. 351, 376 (App. Div. 1998) ("[w]e have repeatedly held that issues hinging upon a party's mental state are not appropriate for resolution by way of summary judgment. The question is fact-sensitive and allocation of the burden of persuasion is critical to its resolution."). According to J&J, Travelers seeks to shoehorn this case into a narrow "particular responsibility" exception that entirely circumvents the inquiry into subjective intent.

J&J asserts that Travelers' focus on the exception is not surprising because substantial evidence existed, which the Missouri Court of Appeals was required to disregard, demonstrating that J&J lacked any subjective intent to harm its customers, including the Ingham Plaintiffs. J&J claims these are the basic facts related to its use and testing of the cosmetic talc:

1. The FDA, examining the evidence, specifically found that no warning labels should be required on cosmetic talc products;

2. Epidemiological studies found no causal association between the use of talc and future injuries;

3. Over the past few decades, numerous regulatory agencies and independent laboratories tested J&J's powders and found no asbestos;

4. J&J's testing consistently showed negative results for asbestos throughout routine testing;

5. The FDA approved the talc industry's testing protocol for asbestos, and J&J consistently exceeded that standard; and

6. An independent laboratory with expertise in asbestos performed much of the routine testing.

J&J asserts that it is entitled to present all of this evidence to a New Jersey jury, which will determine whether J&J subjectively expected or intended to harm its customers in each of the pre-1986 insurance policy periods at issue. According to J&J, these facts are disputed.

J&J further argues that no exception permits this Court to avoid inquiring into J&J's subjective intent. J&J asserts that the "particularly reprehensible" exception is reserved for the most egregious cases involving physical violence, sexual assault, child molestation or domestic violence where the insured's conduct implicated an intent to injure. J&J contends that the "particular reprehensibility" exception has even been expressly rejected in the context of long tail environmental liabilities, even where the acts were egregious, and which J&J asserts are limited to the most extreme environmental pollution context where there was evidence of ongoing evasion and stonewalling of regulatory efforts. See Morton, 134 N.J. at 86. J&J notes that no New Jersey

court has applied this narrow "particular reprehensibility" exception to a dispute over insurance coverage for underlying products liability claims and, in light of the scientific and regulatory consensus here, the exception is inapplicable here.

J&J asserts that Travelers has not submitted such evidence to this Court and contrary to Morton, J&J acted according to scientific and regulatory consensus about its product. According to J&J, a departure from the subjective intent standard is warranted when "the issue is an inherently probable consequence of the insured's conduct." Travelers' Moving Brief at 12. J&J argues that Travelers' position is a misstatement of the law, citing SL Idus., Garrita, and Morton. Specifically, only after a general subjective intent to cause injury is established may a court inquire whether the actual resulting injury was an "inherently probable consequence" of the insured's conduct.

J&J emphasizes that, based on the requirements of New Jersey law, Travelers has not shown that J&J intended to cause any injury at all, much less the ovarian cancer suffered by the Ingham Plaintiffs. J&J reiterates that the issues regarding its alleged subjective intent are disputed issues of material fact that a jury must resolve.

J&J further notes that Travelers has submitted no countervailing testimony or contemporaneous documents regarding J&J's conduct. J&J states that the only relevant items that Travelers submitted were the Ingham complaint, an excerpt of jury instructions, the decision of the Missouri Court of Appeals affirming the Ingham jury verdict, orders denying review by the Missouri and United States Supreme Court, and statements that the Ingham judgment was paid.

According to J&J, the only relevant fact that can be gleaned from Ingham is that the jury reached a verdict in the Ingham case in favor of the Ingham Plaintiffs. J&J contends that the record does not explain how the jury reached its verdict and whether, based on the Ingham jury instructions, J&J "knew that [its] conduct created a high degree of probability of injury." J&J

states that this jury finding, while sufficient to support punitive damages in Missouri, does not constitute "particularly reprehensible" conduct to obtain insurance coverage in New Jersey, citing CPC Int'l Inc., 316 N.J. Super. at 370.

J&J suggests that I do not focus on the Ingham jury verdict because, among other reasons, it offers no indication as to J&J's state of mind or how and why the jury reached its conclusions. J&J argues that the only relevant evidence of what the jury did was the jury verdict itself - - not the Court of Appeals explanation of what it believed the jury did. J&J asserts that the only thing the Court of Appeals did was affirm the jury verdict using an extraordinarily deferential standard of review and I should ignore its selective narration of the evidence that supported the verdict without considering the evidence that favored J&J.

J&J emphasizes that the Court of Appeals acknowledged that J&J presented evidence, all of which the Court of Appeals disregarded under Missouri law, that: (1) "many public health agencies have found that there is insufficient evidence to conclude cosmetic talk causes ovarian cancer: (2) "the FDA has found no warning labels should be required on cosmetic talc products," (3) "several epidemiological studies found no association between cosmetic talc and cancer," (4) "many any [sic] regulatory agencies and laboratories have found no asbestos in the Products," and (5) [J&J's] routine testing measures detected no asbestos in the Products." Ingham, 608 S.W.3d at 718.

J&J asserts that Travelers should not be permitted to deprive it of litigating whether it intended to cause ovarian cancer within the meaning of its insurance policies. Instead of relying on various out-of-state cases, J&J contends that New Jersey's collateral estoppel law is well developed and clarifies that the doctrine is inapplicable here.

According to J&J, the equitable doctrine of collateral estoppel prohibits a party from re-litigating an issue previously decided in another case. Kortenhaus, 228 N.J. Super. at 165. Under Kortenhaus, as interpreted by J&J, the application of offensive collateral estoppel "is a discretionary matter for the court" and "it should not be applied unless the court is fully satisfied with its fairness." Id. at 166. Quoting Kortenhaus, J&J states that "[f]undamental to the theory of collateral estoppel is the notion that the earlier decision is reliable, an underlying confidence the result was substantially correct." Id. (citing Restatement (2d. of Judgments § 29, cmt. F (1982)). "The premise is that properly retried, the outcome should be the same." Id.

Again relying on Kortenhaus, J&J notes that collateral estoppel should only be applied if the prior court decided "precisely the same issue." Id. Citing Kortenhaus, J&J argues that in making this determination, I should consider the following factors: (1) the determination relied on as preclusive was itself inconsistent with another determination of the same issue, (2) treating the issue as conclusively determined may complicate the determination of issues in the subsequent action or prejudice the interests of another party, and (3) other compelling circumstances make it appropriate that the party is permitted to relitigate the issue. Id. at 165.

J&J asserts that I should not allow the outcome in Ingham to foreclose J&J's rights in this case. J&J contends that Ingham resolved a different issue, on a different body of evidence, with a different standard of review, than those at issue in this insurance coverage case. J&J notes that Ingham is an outlier, which was outnumbered by cases resolving similar issues in J&J's favor.

J&J also disputes Travelers' contention that the Ingham jury found that J&J's conduct was "particularly reprehensible." According to J&J, the Ingham's court "reprehensibility" inquiry was markedly different from New Jersey's "particular reprehensibility" standard. J&J notes that New Jersey law requires a determination that the conduct at issue was "so egregious that an alleged

benign subjective intent is not to be believed" as a matter of law. Atl. Emps. Ins. Co. v. Chartwell Manor Sch., 280 N.J. Super. 457, 465 (App. Div. 1995). Further, J&J notes that the Ingham Court of Appeals not only "view[ed] the evidence in the light most favorable to the verdict" and "[gave] the plaintiff[s] all reasonable inferences," but it also "disregard[ed] all contrary evidence and inferences." Ingham, 608 S.W.3d at 720-21.

J&J argues that on this motion for summary judgment, I must do the exact opposite of what the Missouri Court of Appeals was obligated to do under Missouri law. Rather, consistent with New Jersey law governing motions for summary judgment, I must give J&J "the benefit of the most favorable evidence and most favorable inferences drawn from that evidence." Rivera v. Cherry Hill Towers, LLC, 474 N.J. Super. 234, 238 (App. Div. 2022). Indeed, according to J&J, I must "view the summary judgment record through the prism of [J&J's] best case." Gormley v. Wood-El, 218 N.J. 72, 86 (2014). According to J&J, its "best case," which the Court of Appeals ignored as required by Missouri law, was that J&J acted in accordance with a scientific and regulatory consensus about the safety of its product and followed and even exceeded industry standards.

Setting aside the standard of review, J&J argued that Ingham involved a different body of evidence that I must consider here based on the insurance policy periods at issue here - - 1957 to 1986. J&J stated that the trial court and the Court of Appeals in Ingham considered evidence from 1969 – 2010, much of which J&J contends would not have been admissible in this Court.

Next, J&J reiterates that even if Ingham involved the same facts and issues in this case, which J&J contends it does not, Ingham should not be given collateral estoppel effect here because it is an outlier inconsistent with the outcome in every other ovarian cancer case J&J has taken to trial. Quoting Kortenhaus, J&J emphasizes that "[t]he application of offensive collateral estoppel

in the face of inconsistent verdicts is antithetical to the very basis of the rule – confidence in the first outcome. 'Not only does issue preclusion [in cases where there are inconsistent verdicts] appear arbitrary to a defendant who has had a favorable judgments on the same issue, it also undermines the premise that different juries reach equally valid verdict.'" Kortenhaus, 228 N.J. Super. at 168.

J&J notes that in all other ovarian cases tried to a verdict, both before and after Ingham, J&J either won a complete defense verdict or secured reversal on appeal. According to J&J, these inconsistent verdict cast doubt on the reliability of the results in Ingham. See Johnson & Johnson Powder Cases, 37 Cal. App. 5th 292, 332-35 (Cal. Ct. App. 2019) (court recognized that it was "undisputed that there has not been direct, conclusive evidence, establishing genital talc use causes ovarian cancer.")

J&J argues that affording preclusive effect to Ingham would introduce significant complications to this insurance coverage case. According to J&J, providing preclusive effect to Ingham here would suggest that the "expected/intended" issue may be decided separately regarding each of the thousands of remaining underlying ovarian cancer claims, even though J&J's intent and the overarching conduct at issue, does not vary from one underlying plaintiff to another. J&J asserts that such a result would involve similar, serial motions for summary judgment each time an ovarian cancer case was resolved. J&J contends that this approach would be unworkable and illogical because the conduct to be evaluated – J&J's conduct – does not vary from claimant to claimant. In short, J&J asserts that the Court's use of collateral estoppel based on Travelers' use of Ingham to decide this insurance coverage case on the expected/intended issue – "does not bar the comforting sense of reliability that justifies its use to bar [J&J] from litigating . . . issues which it strongly contests." Kortenhaus, 228 N.J. Super. at 170.

J&J further contends that Travelers' arguments that (1) punitive damages are not insurable in New Jersey as a matter of public policy, and (2) J&J is collaterally estopped from arguing to the contrary, both fail.

As to the first issue, J&J stated that, notwithstanding the Aetna decision, the New Jersey Supreme Court held that "there has never been a declaration by this Court or the Legislature that punitive damages are uninsurable." Chubb Custom Ins. Co. v. Prudential Ins. Co., 195 N.J. 231, 245 n.3 (2008). J&J asserted that the Supreme Court criticized the Appellate Division's conclusion in Aetna based on "questionable premises." Id.

Quoting Chubb, J&J noted that the New Jersey Legislature "has at least implicitly recognized that insurance of punitive damages does not violate the public policy of this State." Id. (citing N.J.S.A. 17:30-5). Specifically, J&J argues that the State's insurance guaranty funds must pay for punitive damage awards against policyholders insured by insolvent insurers, provided that the policies contain no punitive damage exclusions." Citing the New Jersey Property-Liability Insurance Guaranty Association Act ("NJPLIGA"), N.J.S.A. 17:30A-5 ('"Covered claim' means an unpaid claim . . . which arises out of and is withing the coverage . . . [and] shall not include . . . (3) punitive damages unless covered by the policy."); New Jersey Surplus Lines Insurance Guaranty Fund Act ("NJSLIGFA"), N.J.S.A. 17:22-6.72 ('"Covered claim' means an unpaid claim . . . which arises out of and is within the coverage . . . [and] shall not include . . . (3) punitive damages unless covered by the policy.")

According to J&J, contrary to the Appellate Division's decision in Aetna, but consistent with the Supreme Court's declaration in Chubb, the New Jersey Legislature made a public policy decision not to deprive policyholders of their bargained right to coverage for punitive damages. In doing so, J&J argues that the New Jersey Legislature has acted consistently with the following

thirteen states that do not, as a matter of public policy, prohibit insurance coverage for punitive damage awards: Delaware, Georgia, Maryland, Idaho, Montana, New Mexico, North Carolina, North Dakota, Oregon, Vermont, Virginia and Wisconsin.

In light of the actions of the New Jersey Legislature, J&J contends that Aetna does not and cannot establish that the public policy of this State precludes insurance coverage for punitive damages. Indeed, according to J&J, the Legislature's determination to permit insurance coverage for punitive damages via insurance guaranty funds reflects a decision consistent with New Jersey common law not to rewrite insurance policies that insurers and policyholders have executed.

Here, J&J states that Travelers could have, but did not, include a punitive damage exclusion in the policies it sold to J&J. Further, citing several out-of-state cases, J&J contends that there is no basis to suggest that permitting insurance for punitive damages would deter future misconduct and punishment of the wrongdoer. J&J argues that imposing collateral estoppel is not warranted to its contractual rights to punitive damages coverage under the Travelers Policies merely because Travelers litigated this issue thirty years ago.

J&J reiterates that it is unfair to apply collateral estoppel here because (1) Aetna did not determine that any term, condition, or exclusion of the Travelers' Policies before it barred coverage for punitive damages, (2) Aetna improperly decided this issue, which was really a question of law, as a matter of public policy, (3) Aetna conflicts with the Legislature's passage of NJPLIGA and NJSLIGFA, which, according to J&J, acknowledge the possibility of insurance coverage for the punitive damages award, and (4) the Supreme Court labeled as "questionable" the Aetna's court's decision that punitive damages are uninsurable as a matter of New Jersey law. As a result, J&J contends that Travelers cannot establish the legal or equitable grounds to collaterally estop J&J from seeking coverage for punitive damages awarded against it in Ingham.

TRAVELERS' REPLY BRIEF

Many of the issues Travelers addressed in its reply brief were detailed at length in its moving brief. As a result, I will only emphasize new positions raised by Travelers.

First, Travelers asserts that there are no "genuine issues of fact" at issue because the very issues required to determine coverage for the Ingham judgments were litigated and decided by the Ingham court. Thus, J&J is collaterally estopped from relitigating those issues in this Court.

Travelers describes J&J's distinction between the phrases "significant reprehensibility" and "particularly reprehensible" as a "pedantic quibble." Travelers Reply Brief at 4. Travelers notes that in Ingham, J&J was found to have knowingly exposed the Ingham Plaintiffs for monetary gain to carcinogenic asbestos to decades resulting in at least five deaths. Travelers asserts that this is a far cry from the injuries recounted by J&J which were not "particularly reprehensible." All in all, Travelers contends that there is no difference between the factual findings in Ingham and the issue to be decided here - - that, based on its conduct, J&J expected or intended the injuries suffered by the Ingham Plaintiffs.

Next, Travelers notes that there is no dispute that it has not met the remaining elements of collateral estoppel. These elements include the following: (1) the issue was actually litigated in the prior proceeding, (2) the court in the prior proceeding issued a final judgment on the merits, (3) the determination of the issues was essential to the prior judgment, and (4) the party against whom the doctrine is asserted was a party to . . . the earlier proceeding." Winters v. N. Hudson Regional Fire & Rescue, 2112 N.J. 67, 85 (2012). Travelers emphasizes that I should not "substitute[e] generalized concerns about the imposition of collateral estoppel when the clearly established elements have been met." Gannon v. Am. Home Products, Inc., 211 N.J. 454, 480 (2012).

Travelers further discounts the alleged status of Ingham as an outlier as it notes that Travelers only seeks to apply the Ingham verdict to determine coverage for the Ingham claim. Travelers notes J&J's successful defense of its other talc cases is irrelevant because it does not change the fact that J&J lost Ingham and it has exhausted all of its appeals. According to Travelers, J&J must live with the consequences of Ingham as they concern the coverage determinations of that case. Travelers contends that if J&J continues its success in other ovarian cancer cases, there would be no need to have subsequent motions for summary judgment on coverage issues to determine the insurers' duty to indemnify because if J&J is successful, there would be no money judgment that may place J&J and its insurers at odds.

Next, Travelers contends that New Jersey law does not require proof that J&J subjectively intended to injure the Ingham Plaintiffs to preclude coverage. Relying on Voorhees, 128 N.J. 165, Travelers contends that New Jersey courts may use an objective test to determine the insured's intent. Travelers states that New Jersey law "hold[s] that the accidental nature of an occurrence is determined by analyzing whether the alleged wrongdoer intended or expected to cause an injury." Id. at 183. Voorhees clarifies that "[w]hen the actions are particularly reprehensible, the intent to injure can be presumed by without an inquiry into the actor's subjective intent to injure." Id. at 184. This "objective approach focuses on the likelihood that an injury will result from an actor's behavior rather than on the wrongdoer's subjective state of mind." Id. Thus, according to Travelers, the objective test applies when the insured's actions demonstrate an intent to cause an injury. Haleysville, 170 N.J. at 235.

Applying the objective test, Travelers notes that J&J's actions - - as determined in Ingham - - not only caused the Ingham Plaintiffs to suffer injuries, but the Missouri courts found, and the United States Supreme Court did not disturb, that J&J's actions warranted judgments exceeding

$2 billion. Under these facts, Travelers contends that J&J's actions must be inherently injurious and reprehensible. According to Travelers, this is not a "foolish" act or an "unlikely happenstance" or even a purposeful inappropriate act over a limited duration. Instead, J&J's actions culminated in the expected and expected consequences and injuries that the Ingham Plaintiffs suffered based on their exposure to asbestos over many years. Because such damages were expected or intended by J&J, Travelers restates that they are not covered by the Travelers Policies and Travelers is entitled to partial summary judgment.

Finally, Travelers reiterates that collateral estoppel and public policy bar coverage for punitive damages. Travelers asserts that Aetna, 285 N.J. Super. 575, is a binding precedent that I am required to follow, which has never been reversed by judicial or legislative enactment, notwithstanding the comments in a footnote from the Supreme Court Chubb, 195 N.J. at 245 n.3 ("there has never been a declaration by this Court or the Legislature that punitive damages are uninsurable.").

Further, Travelers contends that the insurance guaranty funds do not demonstrate that the Legislature established a policy in favor of insurance for punitive damages but rather constituted a "backstop" of an insurer's commitment to provide such coverage. Travelers asserts that these statutes have no impact on the issue of whether J&J is entitled to indemnification for punitive damages here.

At this point, I have explained the relevant facts offered by the parties and offered a fairly in-depth recitation of their respective arguments. I will now set forth the applicable standards in New Jersey governing the standards for summary judgment, the interpretation of insurance policies, and a brief review of the elements of collateral estoppel. I will then conclude with my opinion.

SUMMARY JUDGMENT STANDARD

On a summary judgment motion, the court must consider "whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party in the consideration of the applicable evidentiary standard, are sufficient to permit a rational fact finder to resolve the alleged dispute in favor of the non-moving party." Brill v. Guardian Life Insurance, 142 N.J. 520, 541 (1995); R. 4:46-2. Summary judgment must be granted if "the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law." R. 4:46-2(c).

"An issue of material fact is 'genuine only if, considering the burden of persuasion at trial, the evidence submitted by the parties on the motion, together with all legitimate inferences therefrom favoring the non-moving party, would require submission of the issue to the trier of fact.'" Grande v. Saint Clare's Health Sys., 230 N.J. 1, 24 (2017) (citations omitted).

While "[i]t is critical that a trial court ruling on a summary judgment motion not shut a deserving litigant from his or her trial, . . . it is just as important that the court not allow harassment of an equally deserving suitor for immediate relief by a long and worthless trial." Brill, 142 N.J. at 540-41 (internal citations, quotations, and alterations omitted).

STANDARD FOR TO THE INTERPRETATION OF AN INSURANCE POLICY

An insurance policy, like any contract, "will be enforced as written when its terms are clear in order that the expectations of the parties will be fulfilled." Flomerfelt v. Cardiello, 202 N.J. 432, 441 (2010) (citations omitted). Consistent with these principles of contract interpretation, the terms of an insurance policy are to be interpreted "according to [their] plain and ordinary meaning." Voorhees, 128 N.J. at 175 (1992).

Ambiguous terms in an insurance policy are to be construed "in favor of the insured and against the insurer." Doto v. Russo, 140 N.J. 544, 556 (1995) (citations omitted). "Recognizing the position of laymen with respect to insurance policies prepared and marketed by the insurer, [New Jersey] 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." Di Orio v. New Jersey Mfrs. Ins. Co., 79 N.J. 257, 269 (1979). "This is so even if a 'close reading' might yield a different outcome, or if a 'painstaking' analysis would have alerted the insured that there would be no coverage." Flomerfelt, 202 N.J. at 441 (internal citations omitted). "Notwithstanding that principle of construction, courts should not write for the insured a better policy of insurance than the one purchased." Walker Rogge, Inc. v. Chelsea Title & Guaranty Co., 116 N.J. 517, 529 (1989) (citation omitted).

"In general, insurance policy exclusions must be narrowly construed; the burden is on the insurer to bring the case within the exclusion." Am. Motorists Ins. Co. v. L-C-A Sales Co., 155 N.J. 29, 41 (1998). Still, though, "[e]xclusionary clauses are presumptively valid and are enforced if they are 'specific, plain, clear, prominent, and not contrary to public policy.'" Flomerfelt, 202 N.J. at 441 (quoting Princeton Ins. Co. v. Chunmuang, 151 N.J. 80, 95 (1997) (internal citations omitted)). But "if there is more than one possible interpretation of the language, courts apply the meaning that supports coverage rather than the one that limits it." Id. at 442 (citation omitted). Ultimately, when faced with ambiguity in an insurance policy's exclusionary provisions, courts must evaluate the language using a "fair interpretation" of the language without "disregard[ing] the clear import and intent of the policy's exclusion." Id. at 442 (quotations and citations omitted).

STANDARD AS TO COLLATERAL ESTOPPEL

Application of the doctrine of collateral estoppel requires (1) the issue to be precluded is identical to the issue decided in the prior proceeding; (2) the issue was actually litigated in the prior proceeding; (3) the court in the prior proceeding issued a final judgment on the merits; (4) the determination of the issue was essential to the prior judgment; and (5) the party against whom the doctrine is asserted was a party to or in privity with a party to the earlier proceeding. Winters v. North Hudson Reg. Fire, 212 N.J. 67, 85 (2012).

THE COURT'S OPINION

One thing is certain. J&J had its day in Court in the Ingham case. And J&J lost.

J&J was represented and continues to be represented by among the nation's top attorneys. Through a six-week trial, an appeal to the Missouri Court of Appeals, which generated a lengthy published written opinion, an application for review to the Missouri Supreme Court, a petition for a writ of certiorari before the United States Supreme Court, and various complex proceedings involving the creation of new entities that were adjudicated through the Bankruptcy Courts of New Jersey, North Carolina and Texas and the Third Circuit Court of Appeals, J&J advanced its plan to avoid liability. J&J was successful in reducing the award of punitive damages awarded to the Ingham Plaintiffs for claims brought by out-of-state plaintiffs.

Aside from its loss in Ingham, J&J has been very successful in numerous cases where plaintiffs alleged that their ovarian cancer was caused by J&J's talc products. But this case is different because, here, we are dealing with an insurance coverage dispute where the underlying facts were not only decided by a Missouri jury, but survived J&J's appellate challenges to the Missouri Court of Appeals, the Missouri Supreme Court and the United States Supreme Court.

This case raises many questions. Should J&J be foreclosed from effectively relitigating in some fashion the Ingham case under the collateral estoppel principles outlined in Kortenhaus? Was the Ingham verdict and the subsequent appeals fair and reliable? Does the Ingham verdict and the subsequent appeals evidence a sense of justice or equality? Was J&J's conduct "particularly reprehensible" because it knew or had reason to know that its actions as determined by the Ingham jury would cause the Ingham Plaintiffs to develop ovarian cancer and other serious medical issues? Or because J&J was victorious in other comparable cases and argued that there were genuine issues of disputed material facts in this coverage dispute should I cast the Ingham verdict and subsequent appeals aside and effectively declare the Ingham case a "do-over."

J&J clearly disagrees with the results of the Ingham case, and the numerous reasons referenced here, including the standard of proof employed by the Missouri Court of Appeals. But I believe the best place to start is the opinion rendered by the Court of Appeals which carefully analyzed the Ingham trial verdict and the trial record. These are the highlights of what the Missouri Court of Appeals held:

1. The Ingham Plaintiffs presented evidence of specific causation for each plaintiff in that case through their expert, Dr. Flelsher. Ingham, 608 S.W.3d at 684.
2. In his differential diagnosis, Dr. Felsher considered and compared the unique risk factors of each Ingham Plaintiff in detail. Id.
3. Dr. Felsher told the jury about each Ingham Plaintiff's personal history, opined about which aspects of her history made her more or less at risk for developing ovarian cancer, and concluded talc exposure directly caused or directly contributed to cause her ovarian cancer. Id.

4. The trial court properly ruled (according to the Court of Appeals) that joinder of the Ingham Plaintiffs was appropriate and gave adequate instructions to treat each Ingham Plaintiff's claim separately. Id. at 685.
5. The trial court properly determined (according to the Court of Appeals) that Dr. Felsher's testimony was admissible. Id. at 710.
6. The trial court properly ruled (according to the Court of Appeals) that Dr. Longo's expert testimony on behalf of the Ingham Plaintiffs regarding the exposure of asbestos in Johnson's Baby Bottle samples and related videotaped tests that were admitted into evidence by the trial court was not unreliable. Id. at 702-705.
7. Dr. Madigan, an expert witness on behalf of the Ingham Plaintiffs, testified that if an Ingham Plaintiff was exposed to 50 containers of Johnson's Baby Powder the probability of them not being exposed to asbestos was very small, comparable to winning the Powerball lottery with one ticket. Id. at 705-706.
8. The trial court properly ruled (according to the Court of Appeals) that Dr. Madigan's testimony was not unreliable. Id. at 706.
9. Another expert, Dr. Egilman, testified on behalf of the Ingham Plaintiffs regarding their exposure to asbestos. Id. at 707.
10. Dr. Egilman testified that he interviewed every living Ingham Plaintiff or a relative of the deceased parties. Id.
11. Based on, among other things, a 1972 National Institute of Health for Occupational Safety and Health Study which tested Johnson's Baby Powder to estimate asbestos exposure during diapering and J&J studies of the same type, Dr. Egilman concluded

the Ingham Plaintiffs' exposure to Johnson's Baby Powder was more than double their baseline risk of developing ovarian cancer. Id. at 708.

12. The trial court properly ruled (according to the Court of Appeals) that Dr. Egilman's testimony was based on reasonable scientific methodology. Id. at 709.

13. Dr. Moline, another expert who testified on behalf of the Ingham Plaintiffs, stated that asbestos causes or significantly contributes to cause ovarian cancer. Id. at 713.

14. Dr. Moline testified that her opinion is consistent with the findings of the International Agency for Research on Cancer ("IARC"), the American Cancer Society, the U.S. Department of Health and Human Services, the Environmental Protection Agency, and the National Cancer Institute. Id. at 713.

15. Another expert for the Ingham Plaintiffs, Dr. Rosner, testified that several scientific studies have established a "link" between asbestos and ovarian cancer. Id.

16. Dr. Blount, an additional expert for the Ingham Plaintiffs, testified that she tested one bottle of Johnson's Baby Powder that she purchased off-the-shelf from a store and found it contained asbestos. Id.

17. J&J admitted in its appellate brief that "the FDA has opined 'a possible association' between cosmetic talc and ovarian cancer 'is difficult to dismiss' and the IARC has opined 'perineal use of talc-based body powder is possible carcinogenic." Id. at 713-714.

18. The evidence presented to the trial court, when viewed in the light most favorable to the verdict and disregarding J&J's unfavorable evidence, reveals that the Ingham Plaintiffs met their burden of persuasion under Missouri law. Id. at 712-713.

19. As to punitive damages, the Court of Appeals held that the Ingham Plaintiffs "proved with convincing clarity that Defendants engaged in outrageous conduct because of an evil motive or reckless indifference." Id. at 715.

20. Various memoranda from 1969 through the 1970s demonstrated that J&J knew that its Products contained asbestos and its knowledge continued well into the 2000s, including cosmetic talc products. Id. 715-716.

21. J&J discussed replacing talc with cornstarch but was reluctant to do so because it would be costly. Id. at 716.

22. J&J worked to ensure the industry adopted testing protocols not sensitive enough to detect asbestos in every talc sample. Id. at 716-717.

23. J&J deliberately chose not to use a concentrating technique to test for the presence of asbestos in its Products because it feared doing so would cause too much asbestos to be detected. Id. at 717.

In a section of its opinion worth quoting at length the Court of Appeals commented on J&J's efforts to shield the public from information about asbestos in its Products or criticizing information that did:

> Plaintiffs adduced additional evidence that [J&J] published articles downplaying the safety hazards associated with talc through deception without revealing their funding. . . . Plaintiffs also adduced evidence that [J&J] attempted to discredit scientists who published or sought to publish unfavorable studies regarding their Products. For example, after [J&J] learned the Dutch Consumer Organization reported asbestos in the Products in 1973, [J&J] asked the Dutch Consumer Organization "not to make any publications about asbestos in baby powder [ ] before [J&J] agreed with their findings. And after the Mount Sinai School of Medicine published findings [J&J] deemed "hostile" regarding asbestos in Johnson's Baby Powder in 1975, [J&J] demanded that those findings be "immediate[ly] removed from materials being disseminated at an occupational health conference. The following year, [J&J] pressured Mount Sinai to retract the

> results of its study and issue a press release to that effect. [J&J] noted Mount Sinai did so "reluctantly."
>
> A reasonable inference from all this evidence is that, motivated by profits, [J&J] disregarded the safety of consumers despite their knowledge the talc in their Products caused ovarian cancer. The jury, exercising its "right to determine credibility, weigh the evidence and draw justifiable inferences of fact," could have reasonably concluded it was highly probable [J&J's] conduct "was outrageous because of evil motive or reckless indifference" based on this evidence. *See Peters*, 200 S.W.3d at 25. [Id. at 717-718].

The Court of Appeals specifically rejected the same argument that J&J makes in this coverage dispute - - other cases ruled in its favor in comparable asbestos cases. Id. at 718-719. The Court of Appeals reiterated that "evidence adduced in this trial showed clear and convincing evidence [J&J] engaged in conduct that was outrageous because of evil motive or reckless indifference." Id. at 719.

The Court of Appeals emphasized that J&J bore "significant reprehensibility" regarding its conduct:

> The harm suffered by Plaintiffs was physical, not just economic. Plaintiffs each developed and suffered from ovarian cancer. Plaintiffs underwent chemotherapy, hysterectomies and countless other surgeries. These medical procedures caused them to experience symptoms such as hair loss, sleeplessness, mouth sores, loss of appetite, seizures, nausea, neuropathy, and other infections. Several Plaintiffs died, and surviving Plaintiffs experience recurrences of cancer and fear of relapse. All Plaintiffs suffered mentally and emotionally. Their ovarian cancer diagnosis caused them constant fear and worry.
>
> After considering the substantial evidence presented by Plaintiffs that [J&J] discussed the presence of asbestos in their talc in internal memoranda for several decades; avoided adopting more accurate measures for detecting asbestos and influenced the industry to do the same; attempted to discredit those scientists publishing studies unfavorable to their Products; and did not eliminate talc from the Products and use cornstarch instead because it would be more costly to do so, the jury found [J&J] knew of the asbestos danger in their Products when they were sold to the public. This finding supports that [J&J's] exposure of consumers to asbestos over several decades was done with reckless disregard of the health and safety of others. [Id. at 721].

J&J sought review of this comprehensive decision with the Missouri Supreme Court and the United States Supreme Court. Both the Missouri Supreme Court and the United States Supreme Court refused to hear the case. J&J paid the judgment to the Ingham Plaintiffs. Now, J&J wants me to deny Travelers' motion for partial summary judgment so it can, in one way or the other, relitigate some or all of the Ingham case. I will go through each reason advanced by J&J.

First, J&J argues that numerous issues of disputed fact prelude the issuance of summary judgment in favor of Travelers. Alternatively, Travelers asserts that the very issues required to determine coverage for Ingham judgments were actually litigated and resolved by the Ingham courts. According to Travelers, J&J is collaterally estopped from relitigating those issues in this Court.

I agree with Travelers that the primary issues are the same. The Court of Appeals' affirmance of the Ingham trial court's decision finding that, as detailed above, J&J engaged in decades-length marketing and sale of carcinogenic products to the public that was "particularly reprehensible" and was done, among other reasons, because using substitute materials such as cornstarch would have been too costly. One can certainly find based on the Ingham verdict and the decision of the Court of Appeals referenced above that J&J's conduct reflects an objective intent to injure.

But this is far from the end of the inquiry because I must consider the concept of collateral estoppel and its applicability here, particularly in light of Kortenhaus. Undoubtedly, as J&J points out, there are evidential disparities. But the fact that Ingham may be an "outlier" does not control my analysis as Travelers is only using the Inghram verdict to determine coverage for the Ingham claim itself. And there is no doubt that J&J lost Ingham, from the trial verdict to its affirmance by the Court of Appeals and the subsequent refusal of the Missouri Supreme Court and the United

States Supreme Court to hear the case. Even if some of the Ingham evidence were excluded in a subsequent trial, and that still may be an issue, the evidence was overwhelming that J&J "expected or intended" that the Ingham Plaintiffs would suffer injuries, especially as the Ingham Plaintiffs were required to demonstrate their entitlement to punitive damages by clear and convincing evidence.

I disagree with J&J's position that New Jersey law requires proof that it can only be found to have "expected or intended" the Ingham Plaintiffs' injuries if it subjectively intended to injure the victims. The New Jersey Supreme Court held in Voorhees that "when the actions are particularly reprehensible, the intent to injure can be presumed without an inquiry into the actor's subjective intent to injure." Voorhees, 128 N.J. at 184. The Supreme Court held that this "objective approach focuses on the likelihood that an injury will result from the actor's behavior rather than on the wrongdoer's subjective state of mind." Id.

The Ingham jury found and the Court of Appeals affirmed that J&J's conduct in that case over the span of decades evidenced "reprehensible" conduct that was done "with reckless disregard of the health and safety of others." Ingham, 608 S.W.3d at 721. The Court of Appeals noted following its review of the six-week trial record that based on J&J's conduct, the Ingham Plaintiffs suffered significant injuries such as ovarian cancer, chemotherapy, hysterectomies and numerous other surgeries that justified judgments in excess of $2 billion. Id. Frankly, reading the Court of Appeals' decision, the word that best describes J&J's conduct is "reprehensible" and J&J "expected or intended" that result. Contrary to J&J's position, I find no difference in the phrase "significant reprehensibility" in contrast to being "particularly reprehensible."

Nor do I find concerns about "serial motions for summary judgment each time an ovarian case is resolved" which may result in potentially "inconsistent results." J&J Opposition Brief at

40-41. If J&J is successful in other trials, as J&J appears confident it will, there will be no coverage disputes as collateral estoppel would be inapplicable. If not, to the extent J&J loses a case or cases, or whether other summary judgment motions need to be filed in this case, this Court is confident that it can resolve whatever insurance coverage disputes arise.

Kortenhaus, heavily relied upon by J&J does not suggest a different result. There, in a case involving the offensive use of collateral estoppel, not an insurance coverage dispute involving the same underlying case, the Appellate Division held that collateral estoppel emphasizes "a discretionary weighing of economy and fairness." Kortenhaus, 228 N.J. Super. at 165. The point of collateral estoppel is to bar the re-litigation of issues that were actually litigated and decided in a prior action. Fama v. Yi, 359 N.J. Super. 353, 359 (App. Div. 2003).

The application of collateral estoppel is a discretionary matter for the court. Kortenhaus, 228 N.J. at 166. "Fundamental to the theory of collateral estoppel is the notion that the earlier decision is reliable, and underlying confidence that the result was substantially correct." Id. at 166. "The application of collateral estoppel in the face of inconsistent verdicts is antithetical the very basis of the rule - - confidence in the first outcome." Id. at 168. Collateral estoppel should only be applied "when the criteria of full and fair determination of precisely the same issues have been met." Id. at 166.

As I previously noted, J&J argues that collateral estoppel is inapplicable because there were "inconsistent verdicts" regarding other ovarian cases that were tried to a verdict or were reversed on appeal in favor of J&J. According to J&J, these cases cast doubt on the reliability of the results in Ingham. J&J also contends that Ingham considered a different body of evidence – the years 1969-2010 -- in contrast to the time period here – the years 1957 to 1986. Thus, according to J&J,

Ingham did not consider the precise question that is relevant in determining whether to apply collateral estoppel.

I have carefully examined all documents that the parties submitted in this matter. I recognize the purpose and intent of Korterhaus.

I find a fundamental difference between a typical case where a party seeks to use offensive collateral estoppel outlined in Korterhaus and what we have here - - (1) an insurance coverage dispute action involving an underlying lawsuit that the insurer lost following a six-week trial, (2) an appeal of the trial verdict, (3) an appellate court who authored a lengthy published opinion explaining in great length the alleged "evil motive" of the insured who, according to the Court of Appeals, placed corporate profits over the health of its consumers that suffered significant injuries such as ovarian cancer, chemotherapy, hysterectomies and numerous other surgeries that justified judgments in excess of $2 billion, including substantial punitive damages, (4) the refusal of the Missouri Supreme Court and the United States Supreme Court to hear this case.

According to J&J, Ingham may be an "outlier." But, under these circumstances, using my discretion, focusing on the fairness to the parties and considering the Ingham jury trial verdict, its affirmance by the Court of Appeals along with its detailed recitation of the trial record, and the reluctance of both the Missouri Supreme Court and the United States Supreme Court to become involved in Ingham, I find that collateral estoppel is applicable here. Even if the evidence, covers a different period of time and certain evidence is excluded, I do not find J&J's liability for compensatory and punitive damages forecloses application of collateral estoppel as the Ingham verdict and the decision of the Court of Appeals makes clear that J&J expected or intended the Ingham Plaintiffs' injuries. Thus, there is no "occurrence" under the Travelers Policies. On that

basis alone, J&J is not entitled to indemnification or insurance coverage arising out of the Ingham verdicts and partial summary judgment in favor of Travelers is granted.

Further, I agree with and am bound by the Appellate Division's decision in Johnson & Johnson v. Aetna Ins Co., 285 N.J. Super. 575, 579-580 (App. Div. 1980), that punitive damages are not insurable. In that case, as here, J&J sought indemnification for punitive damages that were awarded in product liability actions in Missouri (and also Kansas). The trial court denied J&J's application for indemnification for punitive damages, holding that "it is against public policy to insure against punitive damages awards." Id.

The Appellate Division affirmed, noting that "New Jersey sides with those jurisdictions which proscribe coverage for punitive damage liability because such a result offends public policy and frustrates the purpose of punitive damages." Id. at 583. The Appellate Division explained as follows:

> Where a punitive damage award arises in [a product liability] case, the purpose of the award is to punish the wrongdoer, to deter defendant and others from similar conduct in the future, and to encourage plaintiffs to pursue a manufacturer who engages in deliberate act or omission with knowledge of a high degree of probability of harm and reckless indifference to consequences. Punitive damages serve the public interest by encouraging corporations to keep defective products . . . out of the marketplace. Permitting a shift of responsibility from the manufacturer to its insurance company in a product liability case would thwart those purposes. [Id. at 584-585 (citations and quotations omitted) (emphasis added)]

The Appellate Division concluded that it would not "abandon our State's well-settled policy which precludes insurance coverage for punitive damage liability. Id. at 589.

I disagree with J&J that New Jersey's long-standing public policy against insuring against punitive damages has been altered by a footnote in a Supreme Court opinion and statutes governing New Jersey's insurance guaranty funds.

In Chubb, the Supreme Court noted that "there has never been a declaration by this Court or the Legislature that punitive damages are uninsurable." Chubb, 195 N.J. 245 n.3. That statement, which Travelers argues is dicta, does not permit me to ignore the Appellate Division's decision in Aetna. Nothing in Chubb states, equivocally or otherwise, that Aetna has been reversed or overruled. Accordingly, I am required to follow Aetna's clear statement of New Jersey law and policy, especially where I am dealing with a tortfeasor who is seeking coverage for their own wrongdoing that has been the subject of a trial verdict, appellate review and a petition for a writ of certiorari to the United States Supreme Court, all unsuccessful.

Finally, I agree with Travelers that the Legislature's establishment of the insurance guaranty funds does not create a new public policy in favor of insurance for punitive damages. Obviously, if New Jersey had made such a dramatic change, it would do so in a bold pronouncement by the Legislature or the Supreme Court, not hidden in a footnote or in relatively obscure statutes. Absent a clear pronouncement from the Supreme Court, Appellate Division, or Legislature, that their intent was to overrule or reverse Aetna, I have no choice but to follow that decision. Which I will.

CONCLUSION

For the reasons stated, Travelers' motion for partial summary judgment is granted. The Excess Insurers may, if they choose, file their own separate applications as detailed herein.

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