No. 100462-1

SUPREME COURT
OF THE STATE OF WASHINGTON

GULL INDUSTRIES, INC.,

Petitioner,

v.

GRANITE STATE INSURANCE COMPANY,

Respondent

RESPONDENT'S ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

Petitioner Gull fails to identify any actual conflict between the Court of Appeals decision in this case and any other published decision of the Court of Appeals or of this Court. *See* RAP 13.4(b)(1), (2). Nor does Gull identify a substantial public interest that is actually implicated by the Court of Appeals' rulings with which Gull takes issue. *See* RAP 13.4(b)(4). Gull presents nothing warranting review by this Court in this pollution coverage case, where some 110 sites and numerous factual and legal issues remain to be resolved by the trial court.

II. COUNTERSTATEMENT OF THE ISSUES AND SUMMARY OF GROUNDS FOR DENYING REVIEW

The Court of Appeals granted discretionary review of five issues presented by the parties in this interlocutory appeal. Gull prevailed on three issues and now seeks review of the two rulings affirmed in favor of Granite State.

- Gull contests the Court of Appeals' "attachment point" analysis, which determined Granite State's excess

coverage obligations based on the language in the Granite State excess policies.

- Gull also challenges the Court of Appeals' affirmance of the trial court's summary judgment dismissal of Gull's claims for coverage at sites where, after more than five years of contentious litigation and lengthy discovery, Gull finally *admitted* there was no evidence of *any* third-party property damage at those sites.

Neither of these determinations warrants review by this Court.

Excess insurer Granite State is not a party to Gull's primary insurance contracts. Granite State's rights and obligations are defined by the language of *its* excess insurance contracts with Gull. The Court of Appeals considered Gull's allegation that its concurrent primary coverages (General Liability and Auto) are jointly and severally liable for indivisible third-party property damage (groundwater contamination). The Court then applied

longstanding Washington rules of contract construction[1] to the relevant *excess* insurance contract provisions to reach the correct conclusion: that Gull is contractually obligated to exhaust both of its underlying primary coverages before the Granite State excess coverage is implicated, and set the "attachment point" accordingly.

Notably, Gull does not identify any conflict with any controlling or published precedent. *See* RAP 13.4(b)(1), (2). Gull's real quarrel is with the Court of Appeals' *application* of the law to the facts of this case. But even if the Court of Appeals erred in that application (though it did not), this Court does not grant review merely to correct errors of that nature.

Equally unavailing as a basis for review is Gull's quarrel with the Court of Appeals' affirmation of the trial court's summary judgment dismissal of Gull's coverage claims for sites where, after five years of contentious

[1] *See,* COA Opinion, p. 12-13.

litigation and voluminous discovery, Gull then admitted there was no evidence of any third-party property damage. The Court of Appeals was thus correct in affirming the trial court's dismissal of these sites from the litigation with prejudice, as well as affirming the trial court's discretionary denial of Gull's attempted dismissal of these sites without prejudice. Again, absent a conflict with a published decision of the Court of Appeals or decisions of this Court, this is not worthy of review. No such conflicts are identified by Gull in its Petition. *See* RAP 13.4(b)(1), (2).

Finally, Gull avers a *public interest* need for review by invoking the policy goal of cleaning-up polluted sites. *See* RAP 13.4(b)(4). But Gull's ability to fulfill its obligation to clean-up its polluted sites is in no way prejudiced by the Court of Appeals' rulings, as Gull has received $49 million from its other primary and excess insurers. (COA Opinion, p. 11). By its own accounting, Gull has spent approximately $31,000,000 in clean-up and litigation costs, leaving Gull

with a surplus in excess of $18,000,000 to address Gull's diminishing future costs. *Id.* In fact, Gull's annual clean-up costs—again, by its own accounting—have dropped to a point where *the interest* accruing on its $18,000,000 surplus should be more than sufficient to cover whatever future costs remain. CP 24158-159

Thus, as a practical matter, the Court of Appeals' decision has no impact on Gull's ability to fulfill its environmental clean-up obligations. Nor is the public interest served by facilitating Gull's continued use of this litigation as a profit center for its shareholders, which is *all* that would *actually* be accomplished by granting review and reversing the Court of Appeals on the issues Gull presents in its Petition.

This Court should deny review.

III. COUNTERSTATEMENT OF FACTS

A. Gull's Claims

Gull Industries owned and/or operated 220+ gas stations in the Pacific Northwest. CP 214-219. Gull also

operated a fleet of tanker trucks to deliver fuel to the underground fuel storage tanks at these gas stations. CP 21706, 21732, 21739, 22277. Gull sued its primary and excess General Liability ("GL") and Auto Liability insurers seeking to recover for past and potential future environmental clean-up liability. CP 1-17. Gull has consistently alleged that its general operations and tanker truck operations resulted in concurrent releases of petroleum hydrocarbon that combined to contribute to *indivisible* third-party property damage — groundwater contamination — and further alleged that its primary GL and Auto insurers are jointly and severally liable to pay all costs to remediate this *indivisible* property damage. *See* Gull's Motion for Discretionary Review, p. 4. It is undisputed that Gull has not yet exhausted all available primary coverage underlying each of the three Granite State excess policies issued between 1980 and 1983. CP 23999.

Gull has collected over $49 million from insurers other than Granite State and has by its own accounting incurred approximately $31 million in clean-up costs and litigation expenses, leaving Gull with roughly $18,000,000 in surplus. (COA Opinion, p. 11). Over the past ten-plus years, the annual interest earned on that surplus has alone been sufficient to cover Gull's annual environmental defense and indemnity costs. CP 23621; 24158-159

B. Procedural Posture of the Case

There are no bad faith or breach of contract claims against Granite State in this case. Rather, the focus of the litigation is to determine whether and to what extent (if any) there was groundwater contamination at each of Gull's 220 gas station sites during the Granite State excess policy years (1980-1983), and if so, whether Gull's liability for cleanup costs is linked to that (1980-1983) contamination.

Following adjudication of five "Bellwether" sites, the parties and the trial court agreed to interlocutory appellate review of five issues. CP 24155-24159. The Court of Appeals granted review, found in favor of Gull on three issues, and upheld the trial court rulings in favor of Granite State on the remaining two issues. On the latter two issues, the Court of Appeals (1) affirmed the trial court's determination that the terms of the Granite State excess policies required Gull to exhaust its underlying GL and Auto coverages before excess coverage is implicated, and set an excess "attachment point" of $600,000 based on that exhaustion requirement; and (2) affirmed the trial court's summary judgment dismissal of Gull's coverage claims for sites where, after five years of contentious litigation and onerous discovery, Gull finally admitted there was no evidence of any third-party contamination at those sites (a prerequisite for Gull to recover under the undisputed terms of its policies).

IV. GROUNDS FOR DENYING REVIEW

A. The Granite State Excess Policies Apply Only After all Applicable Primary Coverage is Exhausted.

The Court of Appeals correctly rejected Gull's analysis of Granite State excess obligations. Gull's analysis was erroneously based on the terms and conditions of *primary* insurance contracts — contracts to which Granite State is not a party. (COA Opinion, pp. 29-30). The Court of Appeals held that "the document that governs an excess insurer's duty is the excess policy itself." *Weyerhaeuser Co. v. Commercial Union Ins. Co.,* 142 Wn.2d 654, 661, 15 P.3d 115 (2000). The Court of Appeals was correct in analyzing the "attachment point" issue based on the excess policy language rather than language contained in the primary policies,[2] and thereby correct in rejecting Gull's

[2] As an excess insurer, Granite State is not a party to Gull's primary insurance contracts.

analysis based on the "occurrence" and/or "accident" language in the primary policies.

Notably, in interpreting the excess policies, the Court of Appeals did not, as Gull wrongly asserts, define "occurrence" in a way that merged all underlying coverages or applied the highest limit of liability to all claims. (See Petition, p. 23.) Rather, the court interpreted the Granite State policies as a whole—including the definition of "occurrence"—and held that the indivisible and continuous harm alleged by Gull was treated as "one occurrence" under the excess policies. According to Gull's allegations, the indivisible contamination was concurrently caused in each policy year by its GL and Auto operations, thereby making the primary GL and Auto insurances jointly and severally liable for all third-party property damage. CP 1-17, 118-209, 214-229. The appellate court therefore properly held that both coverages must exhaust before

Granite State's excess obligation is implicated, per the terms of the Granite State policies. (*See* Petition, p. 31.)

In so holding, the Court of Appeals followed established Washington rules of contract construction. Specifically, the excess policy "Insuring Agreement" included the following "Limitation of Liability" language—the language that makes the Granite state policies excess and not primary insurance:

> The Company shall only be liable for the ultimate net loss, the excess of . . .
>
> (a) The limits of the underlying *insurances* as set out in the schedule in respect of each occurrence covered by said underlying *insurances* . . .

Both the primary GL and primary Auto Liability *insurances* are "set out" in the Granite State policies' "schedule" of underlying insurances, and Gull itself alleged that both insurances apply to provide coverage "jointly and severally" for all costs to remediate indivisible groundwater contamination. The Court of Appeals correctly interpreted the unambiguous definition of the

term "occurrence" in the excess policy, which refers to "a continuous and repeated exposure to conditions":

> Granite State's "limit of liability" provision is a statement of limitation. The policies plainly state that Granite State will be liable for "each occurrence covered by said underlying insurances." And then it sets forth the definition of occurrence that controls the excess policy.
>
> Thus, an "occurrence" includes "a continuous or repeated exposure to conditions" which results in property damage to the property of another. However, all such exposure to conditions "existing at or emanating from one premises location shall be deemed one occurrence." Thus, the excess policy itself defines as one occurrence that which is two different risks w[h]ere referenced in the underlying policies. Because the limits of the underlying policies that covered this occurrence have not been both exhausted as to all sites, Granite State's excess obligation is not triggered.

(COA Opinion, p. 31).

The Court of Appeals' analysis was also based on *Gull's own factual allegation* that a combination of general and auto operations concurrently caused indivisible third-party property damage. CP 1-17, 118-209, 214-229. Gull's

legal position that its primary GL and Auto coverages were jointly and severally liable for all cleanup costs for this indivisible harm, and this Court's "joint and several" ruling in *American National Fire Insurance Co. v. B&L Trucking & Construction Co.,* 134 Wn.2d 413, 424, 951 P.2d 250 (1998) ("[A]ll insurers on the risk during the time of ongoing damage have a joint and several obligation to provide full coverage for all damages."), were key to and fully support the Court of Appeals analysis.

Thus, the Court of Appeals included both limits of the applicable underlying insurances (GL and Auto) within each year of coverage—a total of $600,000—in determining the applicable excess coverage "attachment point" in each policy year. Gull quarrels that the Court of Appeals did not recognize the separate obligations owed under the primary GL and Auto insurance coverages. (Petition, p. 20.) To the contrary, the Court of Appeals recognized but rejected Gull's argument, holding that the

excess policy language, which required exhaustion of the implicated underlying primary coverages before the excess coverage must respond, was controlling. (COA Opinion, p. 31.)

Gull's flawed criticism of the Court's application of the excess policies' "occurrence" definition ignores the excess policy language requiring exhaustion of "underlying insurances"—plural—as well as the language in the excess policy "Limit of Liability" clause and "other insurance" clause; all of which unambiguously provide that the Granite State excess coverage is excess to all implicated underlying primary insurance coverages. It was Gull itself that "implicated" both its primary GL and Auto coverages, alleging joint and several liability under both concurrent coverages (GL and AUTO) for indivisible third-party property damage:

> WHEREFORE, Plaintiff prays for the following relief:

> 45. **Declaratory Judgment.** For a judgment declaring that **each defendant is jointly and severally liable**, up to each insurer's applicable policy limits, for all defense and indemnity expenses, incurred and to be incurred, associated with environmental property damage at the Sites.

CP 74. The Court of Appeals decision on the attachment point issue is a straightforward application of *B&L Trucking* based on Gull's own allegations.

Notably, the Court of Appeals ruled in favor of Gull in applying vertical exhaustion (exhaustion of the applicable underlying primary coverage in a *single* policy year) vs. horizontal exhaustion (exhaustion of all applicable underlying primary coverage in *all* implicated policy years). The Court of Appeals has remanded to the trial court to apply these exhaustion principles to determine Granite State's excess coverage obligations, as other factual and legal issues are necessary to the trial court's consideration of this issue.

B. The Court of Appeals "Attachment Point" Analysis is Consistent With the "Vertical Exhaustion" Cases Cited by Gull and Relied Upon by the Court of Appeals.

In ruling in favor of Gull on the issue of "vertical" exhaustion, the Court of Appeals relied on *Montrose Chemical Corp. v. Superior Court of Los Angeles County,* 9 Cal. 5th 215, 460 P.3d 1201, 260 Cal. Rptr. 3d 822 (2020); *Santa Fe Braun, Inc. v. Insurance Co. of North America*, 52 Cal. App. 5th 19, 265 Cal. Rptr. 3d 692 (2020), review denied, No. S264060 (Cal. Sep. 30, 2020); and *Devington Condominium Association v. Steadfast Insurance Co.,* No. C06-1213 MJP, 2007 WL 869954 (W.D. Wash. Mar. 20, 2007). These same cases also support the Court of Appeals' attachment point analysis requiring exhaustion of all applicable underlying primary coverages available in the same policy year and listed in the excess policy "schedule of underlying insurance." In *Montrose,* the California Supreme Court expressly held that access to the excess coverage required exhaustion of the applicable

underlying primary policies purchased for the same policy year:

> [T]he policies are most naturally read to mean that Montrose may access its excess insurance whenever it has ***exhausted the other directly underlying excess insurance policies [plural] that were purchased for the same policy period.*** (citing *Montrose*, 460 P.3d at 1212-13.)

(COA Opinion, 17) (emphasis added).

> [I]n a case involving continuous injury, where all primary insurance has been exhausted, the policy language at issue here permits the insured to access any excess policy for indemnification during a triggered policy period ***once the directly underlying excess insurance has been exhausted.*** *(citing* Montrose, 460 P.3d at 1215).

(COA Opinion, 18-19) (emphasis added). In discussing *Santa Fe*, the Court of Appeals further explained that the California Court of Appeals held that "the insured becomes entitled to the coverage it purchased from the excess carriers ***once the primary policies [plural] specified in the excess policy have been exhausted***." *Id.* (citing, *Santa Fe*, 52 Cal. App. 5th at 29

(emphasis added). And, in discussing Judge Pechman's decision in *Devington*, the Court of Appeals explained:

> Judge Pechman then recognized that "other insurance" refers to other insurers [plural] that insure (1) the same risk (2) for the same entity (3) ***during the same period.*** *Devington*, 2007 WL 869954 at *3-4 (concluding "that 'other insurance' clauses do not apply where the at-issue policies provided consecutive rather than concurrent insurance coverage").

(COA Opinion, p. 28) (emphasis added).

These cases — all cited and relied upon by Gull and the Court of Appeals in support of Gull's "vertical exhaustion" argument — also support the Court of Appeals' "attachment point" analysis requiring exhaustion of the scheduled underlying primary policies specified in the excess policy and purchased for the same policy period. The Court of Appeals' decision on the "attachment point" issue is wholly consistent with the legal precedent cited and relied upon by Gull itself. Gull cannot credibly ask this Court to apply these cases to support Gull on the issue of vertical (versus horizontal) exhaustion and at the same

time ask this Court to ignore these same cases on the related attachment point issue Gull now challenges.

C. The Court of Appeals' "Attachment Point" Analysis does not Create a "Gap" in Primary Coverage

Gull argues that the Court of Appeals' "attachment point" ruling creates a gap in primary coverage. It does not. Gull's argument asks this Court to overlook the undisputed fact that Gull has both primary GL and primary Auto coverage, that Gull voluntarily settled with those primary insurers, and that Gull now sits on a significant $18 million surplus paid to Gull by its primary GL and Auto insurers to cover Gull's environmental liabilities.

As a practical matter, Gull's diminishing liability exposure provides no indication that Gull will ever deplete its $18 million windfall. As the Court of Appeals observed, and contrary to Gull's dire predictions about its potential future environmental liability, "based on the factual record herein, the evidence was that where property damage had

not yet taken place, at this late date it was unlikely to do so." (See COA Opinion, p. 52). This is further supported by Gull's actual, declining environmental liability over the past decade, which had been paid for entirely with the interest Gull has earned on the $18 million.[3] Gull now self-insures the primary layer of coverage, and has ample funds to do so.

D. The Court of Appeals Properly Affirmed the Trial Court's Summary Judgment Dismissal of Sites Where Gull Admitted There Was No Evidence of Third-Party Property Damage

This Court should reject Gull's Petition to review the Court of Appeals' ruling affirming the summary judgment dismissal of sites where Gull, after five years of litigation, finally *admitted* there was *no* evidence of *any* third-party property damage (the "admitted sites"). This affirmance was both appropriate and required by the factual record

[3] Since 2007, Gull has spent less than $200,000 per year on cleanup costs (CP 23621), well within nominal interest on Gull's $18 million surplus.

indicating that "where property damage had not yet taken place, at this late date it was unlikely to do so," as well as the parties' lengthy and costly history in litigating coverage for those "admitted" sites. (COA Opinion, p. 52) (citing *Vallandigham v. Clover Park Sch. Dist. No. 400*, 154 Wn.2d 16, 26, 109 P.3d 805 (2005) (holding that summary judgment is proper when the nonmoving party fails to "present evidence that demonstrates that material facts are in dispute)).

The Court of Appeals was also correct in affirming the trial court's discretionary ruling that "dismissal [without prejudice] of these sites, at this stage of litigation would unduly prejudice defendants" and that the "investment of time, money and resources into defending against these claims—some five years after this lawsuit was filed—would be completely wasted if dismissed [without prejudice] now." (COA Opinion, fn. 39) (citing *Haselwood v. Bremerton Ice Arena, Inc.*, 137 Wn. App. 872, 889, 155

P.3d 952 (2007) (holding that a trial court's refusal to grant leave to amend a complaint will not be overturned on appeal unless the decision was a manifest abuse of discretion). The Court of Appeals properly held that the court did not abuse its discretion, given these facts, in rejecting Gull's attempted dismissal with prejudice.

This Court should disregard Gull's improper reference to alleged evidence of a lawsuit involving Site 204. (*See* Petition, pp. 24-25.) The referenced litigation—filed *before* the second oral argument in this case and *before* Gull filed its motion for reconsideration—was never brought to the Court of Appeals' attention via a request to supplement the record or other appropriate mechanism. The purported evidence is not part of the record on appeal and its inclusion in Gull's petition is improper and should be completely disregarded. *See Doe v. Puget Sound Blood Ctr.*, 117 Wn.2d 772, 786, 819 P.2d 370 (1991) (an appellate court will not consider matters of fact that have no support

in the record); *Dibble v. Washington Food Co.*, 57 Wash. 176, 106 P. 760 (1910) (holding that "[m]atters outside of the record will not be considered, although discussed in the briefs.").

Gull has outright failed to show error, much less something worthy of review by this Court.

E. Self-Insurance is not Against Public Policy

Insureds self-insure all the time. Here, Gull voluntarily accepted $49 million from a number of its other insurers to cover Gull's environmental cleanup obligations—obligations that would otherwise *still* be covered by those primary insurers. In so doing, Gull voluntarily assumed the obligations of its primary insurers to "self-insure" the primary layer of coverage. There is no public policy prohibition again this arrangement, which Gull voluntarily entered into. Gull contracted with Granite State to provide coverage *in excess* of the implicated

primary policy *limits*—regardless of where the payment comes from.

Moreover, even where "gaps" do occur in primary coverage due to the insolvency of an underlying insurer—as happened with primary insurer Home Insurance Company during the 1980-1981 policy period—under Washington Law excess insurers do not "drop down" to take the place of an insolvent primary insurer. *Polygon Nw. Co. v. Am. Nat'l Fire Ins. Co.,* 143 Wn. App. 753, 770-74, 189 P.3d 777 (2008)(insurer had obligation to pay insured's damages in excess of insolvent primary insurer's policy limits, but was not liable for gap created by the insolvency). Thus, Gull's "public policy" argument of perceived "gaps" occasioned by Gull's voluntary settlement agreements with underlying insurers is not supported by the facts of this case, or by Washington law.

F. Supreme Court Review is Premature

Of the 220-plus sites implicated by Gull in this declaratory judgment action, more than half remain for further adjudication. Of the five Bellwether sites, Gull was able to establish "trigger of coverage" (*i.e.*, third-party property damage during the 1980-1983 Granite State excess policy years) at only one site—Meeker Street—and Gull's total liability at that site was $325,818—well under the $600,000 attachment point.

As the Court of Appeals recognized, there remains much to be done by the trial court, especially with respect to still undetermined and unadjudicated facts. The Court of Appeals expressly acknowledged the transitory import of its rulings in light of this basic reality of remand:

> The trial court's reengagement with its rulings will not be constrained by CR 59 or any other state or local procedural rule. Our purpose in accepting discretionary review of this case is to assist the trial court. It should pay no heed to claims that any unreviewed rulings remain as the "law of the case" or any other such claim. ***All of the trial court's rulings remain***

> ***interlocutory, and thus subject to change. The trial court has free rein to alter any ruling it has heretofore made as a result of the issuance of this opinion.***

(COA Opinion, p. 27) (emphasis added).

This Court should not interject itself into a case where so much remains to be done at the trial court level. This Court should allow the matter to return to the trial court to allow the parties to litigate the issues that still need to be addressed before the final contours of the case can be known for further appellate consideration.

V. CONCLUSION

This Court should deny review.

This document contains 3,947 words, excluding the parts of the document exempted from the word count by RAP 18.17.

Respectfully submitted this 8th day of February, 2022.

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