FILED, Clerk of the Appellate Division, December 11, 2023, **A-000120-23**

Superior Court of New Jersey

Appellate Division

Docket No. A-000120-23T4

JAMES W. DABNEY,	:	CIVIL ACTION
Plaintiff-Appellant,	:	ON APPEAL FROM THE FINAL ORDERS OF THE SUPERIOR COURT OF NEW JERSEY, LAW DIVISION, BERGEN COUNTY
vs.	:	
THE OHIO CASUALTY INSURANCE COMPANY,	:	DOCKET NO.: BER-L-1487-22
	:	Sat Below:
Defendant-Respondent.		HON. MICHAEL N. BEUKAS, J.S.C.

BRIEF ON BEHALF OF PLAINTIFF-APPELLANT

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Preliminary Statement

This appeal arises from an insurance company's wrongful attempt to exploit, for its own benefit, disputed summary judgment rulings of a Vermont Trial Court that the insurance company was duty-bound to appeal for its insureds' benefit.

Under Vermont law, which the Trial Court held applied to this dispute, "an insurer under a general duty to defend is required to bring an appeal on its insured's behalf when there are reasonable grounds to believe that the insured's interests might be served by an appeal." *Pharmacists Mut. Ins. Co. v. Myer*, 187 Vt. 323, 334, 993 A.2d 413, 421 (2010). The principle that an insurance company's duty to defend includes a duty to appeal adverse trial court rulings is broadly recognized in jurisdictions throughout the United States.

In direct conflict with *Pharmacists*, the decision below held that defendant-appellee The Ohio Casualty Insurance Company ("Ohio") had no duty to appeal adverse Vermont Trial Court summary judgment rulings irrespective of whether an appeal might have served its insureds' interests. Ohio initially supported an appeal of the subject summary judgment rulings but then, following a monetary award against its insureds, Ohio improperly reversed itself.

When an insurance company breaches its duty to defend and the insured then resolves the case on his own, the insurance company must pay the

settlement so long as it is fair and reasonable. In this case, after Ohio wrongfully abandoned its insureds, they had no practical choice but to settle the Vermont suit and thereby mitigate their damages flowing from Ohio's breach of its duty to defend. Ohio has never asserted that the settlement of the Vermont suit was anything but fair and reasonable in the circumstances.

Although Ohio's breach of its duty to defend is dispositive of this case, Ohio raised certain alternative defenses below, none of which has merit. *First*, Ohio asserted that the monies awarded in the Vermont suit did not even arguably fall within the scope of the undefined term "damages" in the policy. But under both Vermont and New Jersey law, when a policy does not define the term "damages," that term encompasses all forms of financial loss that a court imposes on an insured, including sums compensating a "prevailing" adverse party for attorneys' fees incurred asserting a successful claim. *Second,* Ohio argued that the monies awarded in the Vermont suit constituted an excluded "fine" or "penalty." But under both the Vermont statute and the declaration of condominium invoked by the plaintiffs in the underlying case, no showing of fault was or is required to support a compensatory award of attorneys' fees to a "prevailing" party. *Third,* Ohio cited an inapplicable policy exclusion for damages awarded in a suit "brought by or on behalf of [an] insured." But none of the plaintiffs in the

Vermont suit were "insureds" under the policy at the time that they filed their complaint.

The Trial Court's decision should accordingly be reversed and remanded with instructions to enter judgment that Plaintiff recover $399,352.34 in damages from Ohio, and with leave for Plaintiff to apply for "successful claimant" attorneys' fees under *R.* 4:42-9(a)(6).

Procedural History

Plaintiff James W. Dabney ("Dabney") commenced this insurance coverage action by the filing of his complaint on March 14, 2022. Pa17. Ohio filed its answer to the complaint on May 27, 2022. Pa30. Following the conclusion of discovery, Ohio moved for summary judgment on May 17, 2023. Pa49. Dabney opposed Ohio's motion for summary judgment and filed a cross-motion for summary judgment on July 11, 2023. Pa449. On August 25, 2023, the Trial Court orally granted Ohio's motion for summary judgment and denied Dabney's cross-motion for summary judgment from the bench (the "Challenged Decision"). T73-14 to T85-24; Pa1. On September 14, 2023, Dabney filed a timely Notice of Appeal from the Challenged Decision. Pa5.

Statement of Facts

I. The Relevant Insurance Policy Language

Ohio sold a Comprehensive General Liability ("CGL") Insurance Policy, including a Directors and Officers ("D&O") part, to the Shelburne Cliffs Condominium Owners' Association, Inc. (the "Association"), located in Vermont, with a policy period of January 27, 2019, to January 27, 2020 (the "Policy"). Pa479–80; Pa780–87. The Policy provided a $1 million liability limit for each "Wrongful Act," with an aggregate limit of $2 million. Pa780.

The Policy defined "insured" to include the following (Pa479–80; Pa785):

> The 'directors and officers' of the insured collectively, and each 'director and officer' individually, are insureds while acting within the scope of their duties on behalf of the insured.

Dabney, a longtime resident of New Jersey and an active member of the New Jersey Bar, was elected to the Board of Directors of the Association on October 31, 2019. Pa471. Dabney was an "insured" under the Policy at all relevant times. Ohio did not challenge Dabney's status as an "insured" in the proceedings below.

The Policy provides its insureds with litigation insurance. Specifically, the Policy requires Ohio to cover litigation-related "loss" and to defend its insureds in litigation, as follows:

> We will pay those sums that the insured become legally obligated to pay because of a '*loss*' due to '*wrongful acts*' committed by the insured's 'directors and officers' solely in the conduct of their management responsibilities. . . . *We will have the right and duty to defend any 'suit' seeking those damages.*" Pa479–80; Pa783 Section I (emphases added).

The Policy defines "wrongful acts" to include "any negligent act(s), error(s), or omission(s) directly related to the operations of the condominium property of the Named Insured." Pa787. "Suit" is defined as "a civil proceeding(s) in which 'loss' because of 'wrongful acts' to which this insurance applies *are alleged*." *Id*. (emphasis added.) "Loss" is defined to mean "damages, settlements, and/or defense costs." *Id*. "Claim" is defined as "a demand received by an insured for money, including the service of a 'suit.'" *Id*. The Policy does not define the term "damages."

Certain exclusions contained in the Policy were cited in the Challenged Decision and are therefore relevant to this appeal. Section 2 of the Policy, entitled "Exclusions," provides in part as follows: "This insurance does not apply to . . . (g) 'Losses' based upon or attributable to the insured gaining any personal profit, remuneration or advantage which is not shared equitably by the condominium association or to which the insured is not legally entitled . . . (o) Fines or penalties imposed by law. . . . [or] (q) Any 'claim' or 'suit' that is brought by or on behalf of any insured or any person or organization which is controlled by,

controls, or is under common control with you." Pa783–84. The Policy includes no choice-of-law or choice-of-venue provision.

II. Nature and Background of the Underlying Action

This insurance coverage dispute has its genesis in a special meeting of the Association's unit owners that took place on December 19, 2019. *See* Pa452–56 (Plaintiff's Statement of Undisputed Material Facts); Pa1041–42 (Defendant's Response to Plaintiff's Counterstatement of Material Facts); Pa470–76 (Certification of James W. Dabney). On that date, the Association's unit owners voted 6-3 to terminate the services of an insurance-company appointed attorney, Susan J. Flynn ("Flynn") of the law firm of Clark, Werner & Flynn ("CWF"). Pa454 ¶ 16; Pa1041 ¶ 16; Pa 472–74 ¶¶ 9–12.

Flynn had appeared for the Association in a Derivative Action (also known as the "774 Case" based upon the first three digits of its docket number) which had been brought on behalf of the Association against Vermont Mutual Insurance Company ("VMIC") (formerly the association's liability insurance company) and certain former officers of the Association. Pa471–42 ¶ 7; Pa483 ¶ 37; Pa878–94 & ¶¶ 21–122. The majority of the Association's unit owners were unhappy with Flynn's representation (Pa747 ¶ 96) and voted to support claims arising in part from alleged professional misconduct on the part of Flynn and CWF. Pa472–74 ¶¶ 7–11.

The verified complaint in the Derivative Action (Pa874–906) asserted nine (9) claims against VMIC for damages, including claims for unfair and deceptive claims practices, breach of contract, inducing breach of fiduciary duty, negligence, and related torts arising from Flynn's, CWF's, and VMIC's having actively encouraged former Association officers Janice Hokenson, Donald Crocker, and Chad Hansen (the "HCH Parties") to disobey a Preliminary Injunction Order issued August 23, 2018, which had commanded: "By not later than September 22, 2018, the patio and alcove areas of Plaintiff Gardner's unit, including the drainage elements for that area, shall be restored to their original design condition as shown by the Original Drawings." Pa453 ¶ 4; Pa1041 ¶ 4; Pa471 ¶ 7; Pa505–06.[1] The Preliminary Injunction Order was premised upon a factual finding by the Vermont Trial Court as follows: "[T]he Court finds that in October 2017, the drainage elements for the alcove and patio areas adjoining

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[1] At the time of the December 19, 2019, unit owner vote, there were two parallel pending lawsuits. In *Gardner, et al. v. Hokenson, et al.*, Superior Court of the State of Vermont, Chittenden Unit, Docket No. 1007-10-17 Cncv (the "1007 Case"), the plaintiffs alleged that the HCH Parties had caused damage to certain Association drainage systems and that HCH and VMIC had wrongfully induced the Association to defy a court order for repair of the damage by September 22, 2018. Pa 471–72 ¶¶ 6–7; Pa483 ¶ 38; Pa907–41. In *Gardner et al v. Vermont Mutual Insurance Co*., Superior Court of the State of Vermont, Chittenden Unit, Docket No. 774-08-19 Cncv (the "774 Case"), the same plaintiffs asserted the same claims as were asserted in the 1007 Case, but derivatively on behalf of the Association. Pa 471–71 ¶¶ 6–7; Pa483 ¶ 37; Pa874–906. One of the plaintiffs in both cases, Virginia Gardner, was Dabney's spouse.

Plaintiff Gardner's unit were altered in a manner that has exposed the building to increased risk of flood damage." Pa452 ¶ 3; Pa 1041 ¶ 3; Pa471–72 ¶¶ 6–7. In addition to voting to fire Flynn and CWF, the Association unit owners also voted 6-3 to support pressing the Derivative Action (and thereby hopefully recovering, for the Association, the cost of repairing damaged Association drainage systems), to retain the Barr Law Group as independent counsel for the Association in lieu of Flynn and CWF, and to request the withdrawal of certain Court filings by Flynn and CWF that the Association had never authorized and that the majority of voting unit owners believed were detrimental to then-pending claims against VMIC in the Derivative Action. Pa454–55 ¶¶ 16–26; Pa473–74 ¶¶ 11–12; Pa748–49 ¶¶ 100–09; Pa1041 ¶ 16. (Two of the HCH Parties, Hokenson and Crocker, voted "NAY" on these resolutions. Pa749 ¶ 105.)

Dabney did not personally participate in any Association activity on December 19, 2019, as he was in San Diego, California that day taking a deposition in another matter. Pa455 ¶ 20; Pa1041 ¶ 20; Pa475 ¶ 13. Two of the "AYE" votes on the resolutions were cast by attorney Walter A. McCarthy, the then-corporate representative of 345 Morgan Drive LLC and 353 Morgan Drive LLC, two limited liability companies in which Dabney was the sole member. Pa454 ¶ 14; Pa455 ¶ 21; Pa1041 ¶¶ 14, 21; Pa470 ¶¶ 3–4; Pa475 ¶ 13. Attorney

McCarthy is a principal with the Vermont law firm of Sheehey, Furlong & Behm, P.C. and is experienced in condominium real estate matters. PA455 ¶ 22; Pa1041 ¶ 22; Pa475 ¶ 13.

On December 19, 2019, in accordance with the Association unit owner vote held earlier that day, the then-new President of the Association, Howard Malovany, instructed Barr Law Group to enter appearances for the Association in the Derivative Action and in the 1007 Case. Pa456 ¶ 24; Pa1042 ¶ 24; Pa475 ¶ 14; Pa661; Pa665. To protect the Association's interests, the Barr Law Group filed two notices of withdrawal of legal filings that Flynn and her firm, CWF, had made in the Association's name but without the Association's authorization. Pa456 ¶ 24; Pa1042 ¶ 24; Pa475 ¶ 14; Pa659; Pa663. The Barr Law Group notified attorney Flynn that her representation of the Association was terminated and requested that she and CWF turn over their Association-related files. Pa456 ¶ 25; Pa1042 ¶ 25; Pa475 ¶ 14; Pa656.

Meanwhile, on December 16, 2019, the HCH Parties launched a hostile corporate takeover bid in the form of a separate action against Dabney and others captioned *Janice Hokenson, Donald Crocker, and Chad Hansen v. Howard Malovany, et al.,* Case No. 1117-12-19 Cncv (Vermont Super. Ct.) (the "HCH Action") Pa456 ¶ 27; Pa1042 ¶ 27; Pa473 ¶ 10; Pa314–32. The complaint in the HCH Action alleged that it was wrongful for Dabney, or for any other

Director, to cast *unit owner votes* on whether the Association should fire attorney Flynn, hire Barr Law Group, or support then-pending claims in the Derivative Action. Pa321 ¶ 30; Pa324 ¶ 39.

The complaint in the HCH Action specifically alleged that Dabney had supposedly breached a "duty of care." Pa327, ¶¶54-56. The Association tendered the defense of the HCH Action to Ohio, which provided a defense under a reservation of rights for more than fifteen (15) months (Pa480 ¶ 25), including multiple attempts to secure appellate review of interlocutory orders (*see* Pa457 ¶ 29; Pa461–62 ¶¶ 53–54; Pa1041 ¶ 29; Pa1044 ¶¶ 53–54; Pa476–77 ¶ 16; Pa483 ¶ 41) and opposition to the HCH Parties' claim for an award of attorneys' fees. Pa480 ¶ 25. By defending the HCH Action, Ohio effectively acknowledged that the complaint in the HCH Action alleged breach of "the duty of care" (Pa327 ¶ 54) falling within the Policy's definition of "Wrongful Act." Pa787. As the Trial Court in this coverage case has confirmed, "the allegations of breach as to the fiduciary care may be supported by a theory of negligence." T83-6 to T83-8.

On January 6, 2020, during proceedings held in the Vermont Trial Court (before a different trial judge from the one which issued the Preliminary Injunction Order), Dabney testified that, by having attorney McCarthy cast unit owner votes to support firing Flynn and CWF and pressing the Derivative Action (*see*

Pa454–56 ¶¶ 14–26; Pa1041–42 ¶¶ 14–25), Dabney had acted in what he viewed as the best interests of the Association in seeking redress from VMIC for court order disobedience and for other wrongful conduct of VMIC's agent, Flynn:

> The defendants in this case have Interests that are complete[ly] aligned with the interests of Shelburne Cliffs Condominium Association. The condominium association has…voted to support recovery from Vermont Mutual for the costs of repairing the damage, which was done and which was not repaired and which was not repaired as a result of fierce resistance by Vermont Mutual appointed counsel under circumstances, which we believe were grounds for giving rise to liability for compensatory and punitive damages on the part of Vermont Mutual…The Association wants its damaged property repaired at Vermont Mutual's expense, so do Ms. Gardner and Mr. Malovany. The Association wants to seek a judgment and that will require Vermont Mutual to pay money to the Association without the disability of an agent of Vermont Mutual acting to sabotage the interests of the Association, so do Mr. Malovany and Ms. Gardner.

Pa476–77 ¶ 16; Pa683–84.

In its response to Plaintiff's Statement of Undisputed Material Facts in Support of His Cross-Motion for Summary Judgment, Ohio specifically admitted the following for purposes of this appeal:

- No money or any other thing of value was transferred, released, or exchanged as a result of the unit owner resolutions adopted December 19, 2019.

- The unit owner resolutions adopted December 19, 2019, did not and did not purport to alter or affect any legal rights or claims that the Association then held vis à vis any person.

- The actions of the Barr Law Group on December 19, 2019, did not and did not purport to alter or affect any legal rights or claims that the Association then held vis à vis any person.

- Dabney did not personally participate in any Association activity on December 19, 2019, as he was taking a deposition that day in an unrelated case.

Pa454–56 ¶¶ 16–26; Pa1041–42 ¶¶ 16–26.

III. The Vermont Trial Court's Rulings.

On March 8, 2020, the Vermont Court appointed a "Litigation Receiver" (Pa696–99) and empowered the Litigation Receiver to speak and act in the name of the Association in the Derivative Action (Pa696 ¶¶ 1–2), even though the Association was solvent and had a fully functioning Board of Directors. Pa477 ¶ 17.

On August 3, 2020, the Vermont Trial Court issued a summary judgment ruling that Dabney was liable to the HCH Parties for breach of fiduciary duty. Pa477–49 ¶¶ 17–22; Pa360–38. Without discussing or referencing Dabney's sworn testimony, quoted above, that the "AYE" unit owner votes cast in favor of firing Flynn and CWF, hiring Barr Law Group, and supporting the Derivative Action did not alter or impair any Association interests (as Ohio has admitted for purposes of this appeal) but, to the contrary, advanced the Association's interests as they were defined by the Unit Owner vote taken December 19, 2019, the Court wrote as follows:

> The Defendants . . . fail to acknowledge that they were personally in an adversary role against the Association in [the 1007 Case in which the August 23 Order had been granted]. Directing new counsel to withdraw legal filings for the obvious purpose of personally benefiting the Defendants financially, and harming the Association financially, was a clear violation of Defendants' duties to the Association. The same is true of the attempt to obtain the privileged records of the Association's prior counsel [Flynn and CWF], which were generated at least in part in her capacity as a lawyer opposing defendants.

Pa364.

The Vermont Trial Court's summary judgment decision did not identify any money or property that the Association lost, or that any Director gained, as a result of anything that happened on December 19, 2019. Flynn and VMIC and the HCH Parties, on the other hand, stood to gain from defeating the Derivative Action. Pa471–72 ¶¶ 6–7; Pa475–76 ¶ 14.

Concurrently with its summary judgment decision, the Vermont Trial Court issued an order for "voluntary" dismissal of the Derivative Action with prejudice, based solely on a request made by the court-appointed Litigation Receiver. Pa461 ¶ 48; Pa1043 ¶ 48; Pa479 ¶ 22; Pa777–78.

IV. The Appeal Taken With Ohio's Then-Active Support and Authorization

On December 4, 2020, with Ohio's then-active support, Dabney and his co-defendants filed a Notice of Appeal bringing up for appellate review and

reversal the Vermont Trial Court's summary judgment decision and prior rulings putting the Association into receivership despite its solvency. Pa461 ¶ 53; Pa1044 ¶ 53; Pa479 ¶ 23; Pa969. On January 4, 2021, Ohio authorized and paid for the filing of an appellate Docketing Statement (Pa971–1016) which identified the following issues for appellate review and determination:

> 1. Whether the trial court's Preliminary Injunction Order and Order Appointing Litigation Receiver were based on an erroneous interpretation of 11B V.S.A. § 8.31(a) and Vermont law governing common owner voting rights.
>
> 2. Whether the trial court's Preliminary Injunction Order and Order Appointing Litigation Receiver were unconstitutional as effecting a private taking of property, as suppressing speech, and as compelling speech.
>
> 3. Whether the trial court abused its equity power by granting the Litigation Receiver unprecedented powers, including the power to dismiss legal claims and pending actions.
>
> 4. Whether the trial court erred in granting summary judgment in favor of Appellees.
>
> 5. Whether the trial court erred in dismissing Appellants' Counterclaims.

Pa462 ¶ 54; Pa1044 ¶ 54; Pa977–77.

In other words, after reviewing the Vermont Trial Court's summary judgment decision, Ohio authorized an appellate challenge to all of the substantive rulings that it contained. Ohio also supported Dabney's defense of a motion for an award of attorneys' fees filed by the HCH Parties on November 24, 2020,

based on the Vermont Trial Court's summary judgment ruling and the "voluntary" dismissal of the Derivative Action. Pa480 ¶ 25.

V. Ohio's Abrupt Abandonment of Dabney and Its Other Insureds.

On February 10, 2021, Vermont Trial Court issued an order (Pa370–37) holding Dabney liable to pay monies in amounts equal to attorneys' fees that the HCH Parties had paid to their own attorneys in filing and pressing the HCH Action. The Vermont Trial Court grounded its award in Vt. Stat. Ann. tit. 27A, § 4-117(a) and Section 12.1(d) of the SCCA Declaration of Condominium (Pa480 ¶ 26; Pa370–37), both of which authorize recovery of attorneys' fees incurred by "prevailing" parties without any showing of bad faith or fault.

On March 5, 2021, more than three (3) months after authorizing an appeal of the Vermont Trial Court's summary judgment decision, Ohio abruptly reversed field and withdrew its defense of the HCH Action. Pa462 ¶ 60; Pa1044 ¶ 60. In a letter dated March 5, 2021 (the "Denial Letter"), Ohio asserted that certain "orders and decisions" of the Vermont Trial Court operated to terminate Ohio's obligation to continue supporting a then-pending appeal challenging the correctness of those very orders and decisions. Pa480 ¶ 27; Pa357–58. By issuing its Denial Letter, Ohio repudiated its legal duty "to bring an appeal on its insured's behalf when there are reasonable grounds to believe that the insured's

interests might be served by an appeal." *Pharmacists*, 187 Vt. at 334, 993 A.2d at 421.

Ohio further asserted that the negligence basis of liability alleged in the HCH Action complaint had somehow vanished (*contra* Pa484 ¶ 49) and that the undefined term "damages" in the Policy did not even arguably include an award of money to compensate "prevailing" parties for attorneys' fees incurred by them. Pa480 ¶ 27; Pa357–58. The Denial Letter stated in part:

> *Based on the information now known to us, including* plaintiff's *voluntary dismissal* of *the damages claims* and *the Court's orders and decisions set forth above*, we have determined that there is *no obligation to defend Defendants* in the Lawsuit or the associated appeal, and that there is no coverage for the Lawsuit and, in turn, the Award. As set forth below, there is *no longer a "suit"* seeking *"those damages"* set forth in the insuring agreement…
>
> The claims in the Lawsuit were based upon allegations that Defendants breached their fiduciary duty and that they were personally in an adversary role against the Shelburne Cliffs Condo Association ("Association"). *On August 3, 2020, the Court ruled, concluding that these allegations were true*. . . . Thus the Lawsuit, *as confirmed by the Court's findings*, *falls within exclusion g*, which precludes "'losses' based upon or attributable to the insured gaining any personal profit, remuneration or advantage which is not shared equitably by the condominium association or to which the insured is not legally entitled….
>
> Even more preliminarily, if all of claims in the Lawsuit did not fall within exclusion g, the Lawsuit *ceased falling* within the insuring agreement of the Policy's Condominium Association Directors and Officer Liability Coverage Form when the Court granted Plaintiffs' *voluntary dismissal of all their damages counts* on November 5,

> 2020. The Lawsuit was *no longer* for '*loss*,' meaning 'damages, settlements, and/ or defense costs.'…
>
> Plaintiffs' award of the *attorneys' fees and costs they incurred* in bringing the Lawsuit against Defendants *does not qualify as "damages*, settlements, and/or defense costs." Further, while Plaintiffs' were also awarded their attorneys' fees and costs in defending against counterclaims, the counterclaims (and all Plaintiffs' fees and costs they incurred in bringing the Lawsuit against Defendants does not qualify as "damages, settlements, and/ or defense costs." . . .
>
> Similarly, the award of the litigation receiver's fees and costs is precluded by exclusion q. The request that the litigation receiver's fees and costs be assessed against the non-prevailing party was made by the Association through its receiver. The Court adopted the receiver's request in awarding these fees and costs. Coverage for this award is barred by exclusion q because the award is based on a "claim . . . brought by or on behalf of an[] insured."
>
> Lastly, the award of fees and costs under 27A V.S.A. Section 4-117(a) are precluded under exclusion o, as a penalty imposed by law.

Pa480 ¶ 27; Pa357–58 (emphasis added).

VI. Dabney's Reasonable Settlement of the HCH Action.

Ohio's 180-degree reversal of position with respect to the pending appeal left Dabney and his co-defendants in an untenable and precarious position. Pa481 ¶ 28. Continuing the appeal without Ohio's support would have exposed Dabney to (i) risk of additional liability for attorneys' fees incurred by the HCH Parties, (ii) risk of liability for statutory judgment interest at 12% under Vt. Stat. Ann. tit. 9, § 41a, and (iii) substantial out-of-pocket defense costs, with no

assurance of success on appeal and no assurance of recovery from Ohio irrespective of success on appeal. *Id.*

On March 10, 2021, Dabney and his co-defendants made the painful decision to settle the HCH Action by moving for voluntary dismissal of the appeal and paying all sums that they became legally obligated to pay in the HCH Action. Pa481 ¶ 28; Pa484 ¶ 45; Pa1018–22. Dabney and his assignor (another unit owner, Howard Malovany) paid, out-of-pocket, a grand total of $382,152.12 to settle judgment debts incurred in the HCH Action. Pa481–82 ¶¶ 29–31. Ohio has never contested the fairness and reasonableness of this settlement amount. Dabney and his assignor additionally incurred and paid $17,198.22 in HCH Action defense costs after March 5, 2021 (Pa 482 ¶ 32), for a total loss of $399,352.34.

VII. The Challenged Decision in This Case

In the Challenged Decision, the Trial Court quoted and relied on Vermont Trial Court rulings in the Vermont suit (T79-4–T80-21) as if there had been no breach of the duty to defend by Ohio and as if the subject Vermont Trial Court rulings had been upheld on appeal. The Trial Court did not address whether, at the time Ohio withdrew its defense of the HCH Action on March 5, 2021, there *then existed* reasonable grounds to believe that Ohio's insureds' interests might have been served by an appeal of the Vermont Trial Court rulings that Ohio cited

as purported grounds for withdrawing its defense. That issue was raised to the Trial Court (*see* T72-4 to T72-7) but was simply not addressed by the Trial Court.

Instead, the Trial Court stated: "Insofar as plaintiff disputes the findings of the Vermont Superior Court, and repeatedly referred to the findings as, quote, erroneous, end quote, in the responding statement of material facts, this Court reiterates it lacks the requisite jurisdiction to review or undertake an appeal of the findings of the Vermont court." T84-16 to T84-22.

Argument

I. Trial Court Failed to Address Whether Ohio Breached Its Duty to Appeal Adverse Rulings of the Vermont Trial Court. (Pa3).

As an initial matter, appellate review of a grant of summary judgment is *de novo*. *Giannakopoulos v. Mid State Mall*, 438 N.J. Super. 595, 599, 106 A.3d 507, 509 (App. Div. 2014). Summary judgment should be entered only "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show there is no genuine issue as to any material fact challenged and that the moving party is entitled to judgment or order as a matter of law." *R.* 4:46-2(c). The appellate record includes the Certification of Plaintiff James W. Dabney, an active member of the Bar of this State. Pa470–85.

To determine whether there are genuine issues of material fact, this Court must consider "whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party." *Davis v. Brickman Landscaping, Ltd.*, 219 N.J. 395, 406, 98 A.3d 1173, 1178 (2014) (quoting *Brill v. Guardian Life Ins. Co. of Am.*, 142 N.J. 520, 540, 666 A.2d 146, 147 (1995)). Summary judgment should be denied when a determination of material disputed facts depends primarily on credibility evaluations. *Petersen v. Twp. of Raritan*, 418 N.J. Super. 125, 132, 12 A.3d 250, 254 (App. Div. 2011).

"[W]hen a civil action is brought in New Jersey, we use New Jersey choice-of-law rules to decide whether this state's or another state's legal framework should be applied. *Cont'l Ins. Co. v. Honeywell Int'l, Inc*., 234 N.J. 23, 46, 188 A.3d 297, 311 (2017). "The first step in a conflicts analysis is to decide whether there is any actual conflict between the laws of the states with interests in the litigation." *Id.* "If there is no actual conflict, then the choice-of-law question is inconsequential, and the forum state applies its own law to resolve the disputed issue." *Id.*

In this case, the Trial Court held that Ohio's obligations to Dabney under the Policy were governed by Vermont law. T76-4. Dabney agrees that the duty

to appeal prescribed in *Pharmacists Mutual Insurance Co. v. Myer*, 187 Vt. 323, 334, 993 A.2d 413, 421 (2010), forms part of the duty to defend in the Policy, as *Pharmacist's* holding and reasoning are fully consistent with New Jersey law and are widely if not universally followed. *See generally Couch on Insurance* § 200:49 (3d ed. 2005) ("the duty to defend continues through the appellate process until it can be concluded as a matter of law that there is no basis on which the insurer may be obligated to indemnify the insured."); *Appleman on Insurance* § 136.11 (2d ed. 2003) ("courts have generally held that, when an insurer writes a policy with a broad duty to defend clause, its duty to defend includes the duty to appeal a judgment against the insured"). Relevant excerpts from the cited insurance law treatises were filed below and appear in the appendix. Pa484 ¶¶ 46–48; Pa1024–34. Ohio has never even argued that the duty to defend in the Policy did not include a duty to appeal adverse trial court rulings in accordance with the principle stated in *Pharmacists* and the above-quoted treatises.

Under *Pharmacists*, an insurance company's duty to defend includes a duty to appeal adverse trial court rulings "when there are *reasonable grounds to believe* that the insured's interests *might be served* by an appeal." 187 Vt. at 334, 993 A.2d at 421 (emphasis added). This is a lenient standard that does not require demonstration that an appeal would have been successful or even that success on appeal was likely. *Id.*

In *Pharmacists*, the Supreme Court of Vermont, citing extensive authority, held:

> [T]he general rule is that an insurer under a general duty to defend is required to bring an appeal on its insured's behalf 'when there are reasonable grounds to believe that the insured's interests might be served by an appeal.' [1 A. Windt, Insurance Claims Disputes], § 4:17, at 4-160; accord *Delmonte v. State Farm Fire Cas. Co.*, 975 P.2d 1159, 1168 (Haw. 1999) (observing that 'the general rule is that the insurer . . . owes a duty to appeal in all instances where it appears the substantial interests of the insured may be served' and "reasonable grounds for an appeal exist" (quotation omitted)); *Truck Ins. Exch. of Farmers Ins. Group v. Century Indent. Co.*, 887 P.2d 455, 459 (Wash. Ct. App. 1995) (noting the general rule that 'an insurer owing a duty to defend its insured is liable for the costs of prosecuting an appeal from a judgment against its insured provided there are reasonable grounds for the appeal'); see generally 22 E. Holmes, Holmes' Appleman on Insurance § 136.11, at 86 (2d ed. 2003) (insurer is obligated to bring an appeal 'when there appear to be reasonable grounds that a substantial interest of the insured may be served or protected by an appeal'). As discussed, the underlying judgment here exposed [the policyholder] to both covered and uncovered damages; a reversal would plainly have served his interests; and the appeal raised at least reasonable — if ultimately unsuccessful — grounds for challenging the judgment.

Pharmacists, 187 Vt. at 334, 993 A.2d at 421.

Ohio in this case made no argument, and the Challenged Decision makes no finding, that when Ohio abruptly withdrew its defense of the HCH Action on March 5, 2021, there did not then exist at least "*reasonable grounds* to believe that the insured's interests *might be served* by an appeal." *Id.* at 334, 993 A.2d

at 421 (emphasis added). Ohio would be hard-pressed to make any such argument, given that Ohio initially authorized and paid for the filing and prosecution of an appeal from the adverse Vermont Trial Court rulings that Ohio now, in a total reversal of position, argues justified Ohio's abandonment of Dabney and his co-defendants on March 5, 2021. Ohio in this case wrongfully attempted *to exploit* appealable Vermont Trial Court rulings for its own benefit, when its legal duty was *to appeal* those rulings for its insureds' benefit. *Cf. Cathay Mortuary (Wah Sang) Inc. v. United Pac. Ins. Co.*, 582 F. Supp. 650, 660 (N.D. Cal. 1984) (describing insurer misconduct very similar to that of Ohio in this case and holding an insurer liable to pay a settlement made by its insureds following the insurer's wrongful refusal to defend post-trial).

Contrary to the Trial Court's suggestion (T78-2 to T78-23), to apply the liability rule stated in *Pharmacists* is not to deny "full faith and credit" (T78-4) to a sister state judgment. It is, rather, merely to ask whether, following issuance of a sister state judgment, there then existed "*reasonable grounds to believe* that the insured's interests *might be served* by an appeal." *Pharmacists*, 187 Vt. at 334, 993 A.2d at 421 (emphasis added). This question can be answered "yes" without purporting to reverse or vacate a sister state's judgment or findings.

Dabney did not ask the Trial Court, and is not asking this Court, to reverse or vacate any rulings of the Vermont Trial Court.[2] Rather, whether Ohio breached its duty to defend the Vermont suit turns on whether, as of March 5, 2021, there *then* existed "*reasonable grounds* to believe that the insured's interests *might be served* by an appeal." *Pharmacists*, 187 Vt. at 334, 993 A.2d at 421 (emphasis added). That question cannot be evaded, as Ohio tries to do, by simply ignoring it and pointing to the *results* of Ohio's breach of its duty to defend, namely, Dabney's settlement of the HCH Action leaving adverse Vermont Trial Court rulings unchallenged. The relevant time for analyzing Ohio liability to Dabney is the time of breach, March 5, 2021, not the present time.

Pharmacists is instructive on this point. In *Pharmacists*, a jury had found the policyholder liable for defamation and for intentional infliction of emotional distress, and that verdict was upheld on appeal. *See Cooper v. Myer*, 183 Vt. 561, 944 A.2d 915 (Vt. 2008). The Supreme Court of Vermont rejected the policyholder's appeal in its entirety. 183 Vt. at 563, 944 A.2d at 919.

[2] The Trial Court criticized Dabney's use of the term "erroneous" to characterize certain Vermont Trial Court rulings. T84-18. Dabney's use of "erroneous" was presented in the context of arguing that there were "*reasonable grounds to believe* that the insured's interests *might be served* by an appeal." *Pharmacists*, 187 Vt. at 334, 993 A.2d at 421 (emphasis added). Dabney at no time suggested asked the Trial Court to reverse or vacate any rulings of the Vermont Trial Court.

Nevertheless, in a related insurance coverage case, the Supreme Court of Vermont held that the insurance company was obligated to fund the policy-holder's appeal because, post-verdict and judgment, there had been reasonable grounds to believe that insured's interests might have been served by taking the appeal, even though the appeal was eventually unsuccessful. *See Pharmacists*, 187 Vt. at 334, 993 A.2d at 421.

Similarly here, when Ohio abruptly withdrew its defense of the Vermont suit on March 5, 2021, there *then* were at least "*reasonable grounds to believe* that the insured's interests *might be served* by an appeal." *Pharmacists*, 187 Vt. at 334, 993 A.2d at 421 (emphasis added). Those grounds included the Vermont Trial Court's drawing of factual inferences *against* Dabney on summary judg-ment and refusing to credit Dabney's in-court testimony of record before the Vermont Trial Court, including the following: "The Association wants its dam-aged property repaired at Vermont Mutual's expense, so do Ms. Gardner and Mr. Malovany. The Association wants to seek a judgment and that will require Vermont Mutual to pay money to the Association without the disability of an agent of Vermont Mutual acting to sabotage the interests of the Association, [and] so do Mr. Malovany and Ms. Gardner." Pa683–84. The Vermont Trial Court also overlooked the legal principle that: "when control of a corporation passes to new management, the authority to assert and waive the corporation's

attorney-client privilege passes as well." *CFTC v. Weintraub*, 471 U.S. 343, 349 (1985).

Like New Jersey law, Vermont law requires a denial of summary judgment if, viewing the record most favorably to the non-moving party, any material issue of fact exists. *Weisburgh v. Mahady*, 147 Vt. 70, 72, 511 A.2d 504, 505 (1986) ("A party moving for summary judgment has the burden of proof, and the opposing party must be given the benefit of all reasonable doubts and inferences in determining whether a genuine issue exist").

As is the case with New Jersey law, the standard of review on appeal from a grant of summary judgment in Vermont is de novo. *See State Farm Mut. Auto. Ins. Co. v. Colby*, 194 Vt. 532, 535, 82 A.3d 1174, 1177 (2013) ("We review a motion for summary judgment de novo under the same standard of review as the trial court")

The Trial Court here overlooked Ohio's critical admissions, made in its response to Plaintiff's Statement of Undisputed Material Facts in Support of His Cross-Motion for Summary Judgment, that: (i) "No money or any other thing of value was transferred, released, or exchanged as a result of the resolutions" adopted December 19, 2019: and (ii) "The resolutions . . . did not, and did not purport to, alter or affect any legal rights or claims that SCCA then held vis à vis any person." Pa455 ¶¶ 18–19; Pa1041 ¶¶18–19.

In its reply brief below, Ohio asserted that there were *factual* distinctions between the present case and *Pharmacists*, but Ohio has never argued that the *legal standard* articulated in *Pharmacists* was satisfied in this case. It was not.

As of March 5, 2021, there clearly were at least "*reasonable grounds to believe* that the insured's interests *might be served* by an appeal." *Pharmacists*, 187 Vt. at 334, 993 A.2d at 421 (emphasis added). Ohio has never contested this point: not in its Denial Letter, and not in this case. The Challenged Decision's failure to address the duty to appeal articulated in *Pharmacists* and insurance treatises was prejudicial legal error. Reversal, accordingly, is warranted.

II. As Conceded by Ohio in Defending the HCH Action, the Complaint in the HCH Action Alleged Negligent Acts Which Triggered Ohio's Duty to Defend. (Pa1 and Pa3).

The complaint in the HCH Action clearly alleged negligent acts on Dabney's part. *See* Pa317–18 ¶ 19.e (alleging that Dabney owed a legal duty to act "with the care an ordinarily prudent person in a like position would exercise under similar circumstances"); Pa327 ¶ 54) (alleging that Dabney owed a "duty of care"); *id*. ¶ 55 (alleging duty to exercise "the degree of care. . . required" under Vermont law); *id*. ¶ 56 (alleging that Dabney violated his duty of "care"). The Trial Court here correctly stated that: "the allegations of breach as to the fiduciary care may be supported by a theory of negligence." T83-6 to T83-7.

The Trial Court erred, however, in stating that the HCH parties "withdrew" their negligence claim "warranting a denial in coverage." T83-14 to T83-16. They did not. Pa484 ¶ 49. The complaint in the HCH Action was never amended. Pa484 ¶ 49. The negligence basis of liability alleged in ¶¶ 19.e and 54–57 of the HCH Action complaint was never waived, abandoned, released, or extinguished by judgment. Pa484 ¶ 49. Ohio thus had a continuing duty to appeal the Vermont Trial Court's rulings as of March 5, 2021, for a possibility of coverage continued to exist then.

A. The Vermont Trial Court's Summary Judgment Ruling Did Not Cut Off the Possibility of Indemnity Coverage, Which Is All That Is Necessary for a Duty to Defend to Continue in Existence. (Pa1 and Pa3).

The Trial Court here held that, once the Vermont Trial Court ruled that there supposedly was no genuine issue of fact as to the "obvious purpose" of certain actions of Barr Law Group on December 19, 2019 (T80-1), Ohio's duty to defend the HCH Action evaporated. T83-6 to T83-16. This was error. As shown in Part I, above, the Challenged Decision fails to consider whether, as of March 5, 2021, there *then* existed "*reasonable grounds to believe that the insured's interests might be served by an appeal.*" *Pharmacists*, 187 Vt. at 334, 993 A.2d at 421; *see also* Pa1023–39 (insurance law treatise excerpts stating same principle). Because an appeal (authorized by Ohio) was pending as of

March 5, 2021, the possibility of indemnity coverage remained and Ohio could not rightly fail to appeal the adverse Vermont Trial Court rulings.

An insurance company's duty to defend is to be broadly construed. In *Town of Windsor, Vt. v. Hartford Acc. Co.*, 885 F. Supp. 666, 669 (D. Vt. 1995), the Court succinctly held as follows:

> Under Vermont law, an 'insurer's duty to defend is independent of and broader than its duty to indemnify.' An insurer has a duty to defend an insured whenever there is a possibility that a claim falls within the coverage of an insurance policy. In order to escape the duty to defend, the burden is on the insurer to show that the claims against the insured are entirely excluded from coverage. (Citations omitted.)

In addition, the "labels" used in the underlying complaint are irrelevant. If <u>any</u> of the allegations contained in the underlying complaint are potentially covered, the insurance company must defend the entire suit. In *R.L. Vallee v. A. International Specialty Lines Insurance*, 431 F. Supp. 2d 428 (D. Vt. 2006), the court stated:

> 'The duty to defend is triggered if any claim against the insured potentially comes within the policy's coverage.' Hence, once the insurer's duty to defend is triggered, the insurer must defend the entire suit including any claims that might not be covered by the policy. (Citations omitted.)

Id. at 440; *accord SL Indus., Inc. v. Am. Motorists Ins. Co.*, 128 N.J. 188, 198-99, 607 A.2d 1266, 1272 (1992) ("Insureds expect their coverage and defense benefits to be determined by the nature of the claim against them, not by the

fortuity of how the plaintiff, a third party, chooses to phrase the complaint against the insured").

Here, the Policy insured against liabilities associated with "any negligent act(s), error(s), or omission(s) directly related to the operations of the condominium property of the Named Insured." The complaint in the HCH Action contained express allegations of negligence on the part of Dabney and his co-defendants. Pa317–18 ¶ 19.e; Pa327 ¶¶ 54–56. "Duty of care" is a negligence standard, which is presumably why Ohio agreed to defend the HCH Action in the first place. *See Baisley v. Missisquoi Cemetery Ass'n*, 167 Vt. 473, 477, 708 A.2d 924, 926 (1998) ("To prove negligence, plaintiffs must show a duty of care on the part of defendants, failure to perform that duty, and injury resulting from the breach of that duty").

Even assuming that the Vermont Trial Court's summary judgment decision could rightly be characterized as resting solely on an alleged "breach of the duty of loyalty" (T83-8), such a characterization would not terminate Ohio's duty to defend because the HCH Action continued to be a "*suit*" that Ohio was duty-bound to defend, *i.e.,* one "in which 'loss' because of '*wrongful acts*' to which this insurance applies *are alleged*." Pa787 ¶ 8 (emphasis added).

The complaint in the HCH Action *alleged* breach of a "duty of care" by Dabney (Pa317–18 ¶ 19.e; Pa327 ¶¶ 54–56), which the Challenged Decision

correctly states "may be supported by a theory of negligence." T83-6 to T83-7. HCH's expressly pleaded negligence theory of liability was never waived, abandoned, released, or extinguished by judgment. Pa484 ¶ 49.

Vacatur or reversal of the Vermont Trial Court's summary judgment decision would have left the HCH Parties free to pursue their pleaded negligence theory (assuming it survived the appeal). *Id.* The HCH Action thus plainly remained a "suit" that Ohio was duty-bound to continue to defend even if the Vermont Trial Court's summary judgment decision had rested solely on the "duty of loyalty" prong of HCH's claim for alleged breach of fiduciary duty (T83-8), which is debatable.

In short, unless and until an appeal from the Vermont Trial Court's summary judgment decision was fully and finally resolved in favor of the HCH Parties, coverage potentially existed under the Policy because the Supreme Court of Vermont could have concluded, as the docketing statement in the appeal heralded, *see* Pa970–1012, that (a) Dabney and his Vermont co-defendants did not owe the HCH Parties any duty to refrain from voting at the Association unit owners' meeting held December 19, 2019, *cf. Solomon v. Atl. Dev., Inc.*, 147 Vt. 349, 355, 516 A.2d 132, 136 (1986) ("A stockholder is not automatically disqualified from voting on matters affecting his self-interest"); or alternatively (b) Dabney and his Vermont co-defendants were at worst negligent in believing that

the unit owner votes cast on December 19, 2019, were valid and that the post-vote actions of the Association's new President and Barr Law Group taken December 19, 2019, were in the best interests of the Association in seeking recovery from VMIC for the cost of restoring damaged Association drainage systems and in holding VMIC and former Association officers accountable for the wrongful acts alleged in the Derivative Action.

B. Insurance Companies Must Exercise Good Faith in Withdrawing Coverage Provided Under a Reservation-of-Rights Letter; They Cannot Withdraw Coverage in Violation of Applicable Law, Which Is What Ohio Did Here. (Pa3).

In the proceedings below, both Ohio and the Trial Court suggested that, because Ohio had defended Dabney under a reservation-of-rights letter, Ohio could withdraw coverage at any time, for any reason or for no reason. That is not the law. Insurance companies that issue reservation-of-rights letters are still obligated to handle and process claims in good faith and cannot simply withdraw coverage with no legally supportable basis for doing so. Some decisions, in fact, have held that an insurance company defending under a reservation-of-rights letter has a heightened duty of good faith, due to the type of conflict of interest that Ohio's conduct in this case illustrates.

The purpose of reservation-of-rights letters is to avoid estoppel issues; that is to say, insurance companies who provide a defense to their policyholders

usually wish to retain the right to deny coverage later if facts justify such a denial. *See, e.g., O'Dowd v. American Sur. Co. of N.Y.*, 3 N.Y.2d 347, 165 N.Y.S.2d 458, 144 N.E.2d 952 (1944). Reservation-of-rights letters are designed to preserve potential coverage defenses. In this case, Ohio's issuance of a reservation of rights letter meant that its supporting an appeal of the Vermont Trial Court's summary judgment decision would not have impaired any coverage defenses that Ohio might have had.

Issuance of a reservation of rights letter clearly does not eviscerate the insurance company's duty of good faith and fair dealing. *Tank v. State Farm Fire & Cas. Co.*, 105 Wash. 2d 381, 715 P.2d 1133 (1986) (en banc), is instructive. There, the Court held as follows:

> A reservation of rights agreement is not a license for an insurer to conduct the defense of an action in a manner other than [the manner in which] it would normally be required to defend. The basic obligations of the insurer to the insured remain in effect. The 'basic obligations' … amount to a duty of good faith…the same standard of fair dealing and equal consideration is unquestionably applicable to a reservation of rights defense. We find, however, that the potential conflicts of interest between insurer and insured inherent in this type of defense mandate an even higher standard…an insurance company must refrain from engaging in any action which would demonstrate a greater concern for the insurer's monetary interest than for the insured's financial risk.

Id. at 387-88, 715 P.2d at 1137 (citations omitted); *see also Beukas v. Fairleigh Dickinson Univ*, 255 N.J. Super. 420, 422, 605 A.2d 708, 709 (App. Div.

1992) ("freedom of action under [a] reservation of rights was limited by an implied covenant of good faith and fair dealing"); *L S Roofing v. St. Paul Fire Marine*, 521 So. 2d 1298, 1304 (Ala. 1988) ("The objective in a reservation-of-rights situation is to put in place a procedure by which the insured can be confident that his interests will not be compromised nor in any way subordinated to those of the insurer"): *American Fire Cas. v. Roller*, 860 N.E.2d 1275, 1280 (Ind. Ct. App. 2007) ("when an insurer undertakes to defend its insured under a reservation of rights, it must proceed in good faith").

The parameters of an insurance company's duty of good faith and fair dealing are reflected in the Unfair Claims Settlement Act ("UCSPA"), N.J. Stat. Ann. § 17:29B-4(9), which "declare[s] state policy." *Pickett v. Lloyd's*, 131 N.J. 457, 468, 621 A.2d 445, 451 (1993). Under UCSPA, insurance companies must resolve claims in accordance with "facts or applicable law." N.J. Stat. Ann. §17:29B-4(9)(n). Vermont law with respect to the good faith expected of insurance companies is identical. *See* Vt. Stat. tit. 8 § 4724 (insurance companies must "promptly provide a reasonable explanation on the basis in the insurance policy in relation to the facts or applicable law for denial of a claim or for the offer of a compromise settlement").

Here, the facts were clear. Ohio initially supported and authorized an appeal of the Vermont Trial Court's summary judgment rulings but then, after a

monetary award was made against its insureds, Ohio suddenly professed to realize for the first time that the Vermont Trial Court's summary judgment decision issued six months previously, on August 3, 2020, had purportedly terminated Ohio's duty to appeal that decision. Ohio's Denial Letter dated March 5, 2021 (Pa357–58) did not even suggest that there were not then "reasonable grounds to believe that the insured's interests might be served by an appeal." *Pharmacists*, 187 Vt. at 334, 993 A.2d at 421.

Instead, Ohio cited *appealable* trial court rulings as justifying withdrawal of support for a pending appeal contesting, as erroneous, those very rulings. The record overwhelmingly supports an inference that Ohio succumbed to conflict of interest and wrongfully attempted to exploit, for its own benefit, disputed summary judgment rulings that Ohio was duty bound to appeal for its insured's benefit. Ohio clearly breached its duty to defend the HCH Action and must now live with the consequences of its wrongful, self-interested action.

The remedy for breach of the duty to defend is clear: Ohio is "is liable for the amount of the judgment obtained against the insured or of the settlement made by him." *Griggs v. Bertram*, 88 N.J. 347, 364, 443 A.2d 163, 172 (1982); *accord Passaic Valley Sewerage Comm'rs v. St. Paul Fire & Marine Ins. Co.*, 206 N.J. 596, 615, 21 A.3d 1151, 1162 (2011) ("A breach of the duty to defend will trigger indemnification of the Spectraserv settlement, and *will not be limited*

to the Coregis Policy's definition of 'loss.''') (emphasis added); *R.L. Vallee*, 431 F. Supp. 2d at 437 ("when the court later rules the insurer has the obligation to defend and unjustifiably failed to do so, the insurer is on the hook for the amount of the settlement, so long as the settlement is fair and reasonable."); *Cathay Mortuary,* 582 F. Supp. at 660 ("an insurer who wrongfully refuses to defend is also liable for the amount of any reasonable settlement that the insured makes in good faith").

III. Under Relevant and Binding Insurance Law, the Underlying Judgment Awarded "Damages" Against Dabney. (Pa3).

Although not explained or supported by citation of authority, the Challenged Decision states that Dabney "fail[ed] to meet his burden, of characterizing the award of attorneys' fees as damages." T85-5 to T85-7. This ruling is erroneous.

Under both New Jersey and Vermont law, when attorneys' fees are made recoverable as compensation for loss due to another's breach of legal duty, they constitute "damages." *See, e.g., In re Estate of Lash*, 169 N.J. 20, 26, 776 A.2d 765, 769 (2001) ("Those [attorney] fees are merely a portion of the damages the plaintiff suffered at the hands of the tortfeasor"); *Fleury v. Kessel/Duff Constr. Co*., 149 Vt. 360, 264, 543 A.2d 703, 705 (Vt. 1988) ("Although Vermont adheres to the 'American rule' as a matter of policy, we have long recognized the

power of the Legislature by statute to make attorney's fees an item of recoverable damages or costs.").

In the specific context of a comprehensive general liability ("CGL") insurance policy like the one at issue here, the Supreme Court of New Jersey has held that: "'Damages' means money to most people." *Morton Int'l, Inc. v. Gen. Accident Ins. Co. of Am.*, 134 N.J. 1, 27, 629 A.2d 831, 846 (1993) (citation omitted). *Morton* rejected, as contrary to "[t]he clear weight of authority," the notion that "damages" in a CGL policy excludes "equitable monetary relief." *Id*. at 24, 629 A.2d at 845 (*quoting Cont'l Ins. Cos. v. Ne. Pharm. & Chem. Co.*, 842 F.2d 977, 985 (8th Cir. 1988)). The undefined term "damages" in a liability insurance policy is to be given its "plain, non-technical meaning." *Id*. at 25, 629 A.2d at 845 (1993); *accord Hardwick Recycling & Salvage, Inc. v. Acadia Ins. Co.*, 177 Vt. 421, 431, 869 A.2d 82, 90 (2004) ("In construing an insurance policy, we construe disputed terms according to their plain, ordinary, and popular meaning.")

Vermont law is identical to New Jersey law on the meaning of "damages" in the context of a liability insurance policy. In *Hardwick*, Vermont's highest court held that the term "damages" in a liability insurance policy included "financial loss without regard to the basis upon which its liability might technically be premised." 177 Vt. at 433, 869 A.2d at 91 (quoting *Village of Morrisville*

Water & Light Dep't v. U.S. Fid. & Guar. Co., 775 F. Supp. 718, 727 (D. Vt. 1991)).

Hardwick held that the policy term "damages" encompassed "costs incurred in complying with a government order to take actions aimed at cleaning up contamination that he [the insured] caused." *Id.* at 435, 869 A.2d at 93. *Hardwick* construed the term "damages" in a liability insurance policy as having the same "plain, non-technical meaning" that the Supreme Court of New Jersey ascribed to the word "damages" in *Morton International.* 134 N.J. at 25, 629 A.2d at 845. *Hardwick* reversed a trial court's contrary judgment which had applied "an overly technical interpretation of the operative policy term 'damages.'" *Id.* at 439, 869 A.2d at 96.

The overwhelming weight of authority similarly holds that "an award of attorneys' fees is indistinguishable from a damages award for coverage purposes." *Hyatt Corp. v. Occidental Fire & Cas. Co. of N.C.*, 801 S.W.2d 382, 393–94 (Mo. Ct. App. 1990) (*citing City of Ypsilanti v. Appalachian Ins. Co.*, 547 F. Supp. 823, 828 (E.D. Mich. 1982), *aff'd mem.*, 725 F.2d 682 (6th Cir. 1983)); *accord Hollybrook Cottonseed Processing, L.L.C. v. Am. Guar. & Liab. Ins. Co*., 772 F.3d 1031, 1036 (5th Cir. 2014) (statutory award of attorneys' fees held to constitute insured "damages"); *XL Specialty Ins. Co. v. Loral Space & Commc'n, Inc.*, 918 N.Y.S.2d 57, 62 (N.Y. App. Div. 1st Dept. 2011) (same);

Neal-Pettit v. Lahman, 928 N.E.2d 421, 424 (Ohio 2010) (same); *Pac. Ins. Co. v. Burnet Title, Inc.*, 380 F.3d 1061, 1066 (8th Cir. 2004) (same); *Sokolowski on Behalf of M.M. & P. Pension Plan v. Aetna Life & Cas. Co.*, 670 F. Supp. 1199, 1210 (S.D.N.Y. 1987) (same). These case decisions apply definitions of "damages" and rules of insurance policy construction similar to those prescribed by both New Jersey and Vermont law.

Leading dictionary definitions of "damages" are of record (Pa483 ¶¶ 34–36; Pa857–73) and support charactering *compensatory* awards of attorneys' fees as "damages" within the plain meaning of that term. *See Webster's Third New Int'l Dictionary of the English Language (Unabridged*) 527 (1961) (defining "damages" as meaning "the estimated reparation in money for detriment or injury sustained" and "compensation or satisfaction imposed by law for a wrong or injury caused by a violation of a legal right"); *The Random House Dictionary of the English Language Unabridged* 504 (2d ed. 1987) (defining "damages" as meaning "the estimated money equivalent for detriment or injury sustained"); *Webster's New World College Dictionary* 365 (4th ed. 2005) (defining "damages" as meaning "money claimed by, or ordered paid to, a person to compensate for injury or loss caused by the wrong of the opposite party or parties").

Even assuming, for purposes of argument, that some archaic, technical meaning could be ascribed to the word "damages" which excluded

compensatory awards of attorneys' fees, the Court would be required to reject any such meaning in favor of one that supports coverage in this case. *See, e.g., Mazzilli v. Acc. & Cas. Co. of Winterthur, Switz.*, 35 N.J. 1, 7, 170 A.2d 800, 803 (1961) ("If the controlling language will support two meanings, one favorable to the insurer, and the other favorable to the insured, the interpretation sustaining coverage must be applied."); *Cypress Point Condo. Ass'n, Inc. v. Adria Towers, L.L.C.*, 226 N.J. 403, 416, 143 A.3d 273, 280 (2016) (same).

Vermont law similarly holds that "[a]n insurance policy 'is to be strictly construed against the insurer.'" *Rainforest Chocolate, LLC v. Sentinel Ins. Co.*, 209 Vt. 232, 235, 204 A.3d 1109, 1111 (Vt. 2018). Under this standard, the undefined term "damages" in the Policy clearly must be construed to have a meaning, consistent with standard dictionary definitions, that encompasses the monies that Dabney and his assignor were ordered to pay in the Vermont suit.

Before the Trial Court, Ohio miscited *Murphy v. Stowe Club Highlands*, 171 Vt. 144, 761 A.2d 688 (2000), as supposedly supporting a conclusion that the undefined term "damages" in the Policy does not include the monies awarded against Dabney in this case, but *Murphy* in fact provides no support for Ohio's position. At issue in *Murphy* was whether a contract-based claim for "prevailing party" attorneys' fees was subject to trial by jury. *Id.* at 159–63, 761 A.2d at 699–702. The Supreme Court of Vermont held that such a claim was not subject

to trial by jury, so that a "prevailing" party was free to seek such fees by post-trial motion to the Court. *Id*. at 162–63, 761 A.2d at 701–02.

The holding in *Murphy* as to "prevailing party" attorneys' fee recovery *procedure* is totally irrelevant to the proper construction of the word "damages" in a CGL policy. As noted above, Vermont law holds that: "In construing an insurance policy, we read disputed terms according to their plain, ordinary, and popular meaning." *Hardwick*, 177 Vt. at 431, 869 A.2d at 90. Unlike *Murphy*, the *Hardwick* decision involved a liability insurance policy and specifically addressed the proper meaning of "damages" as used in such a policy. *See id*. at 430–39, 869 A.2d at 89–96.

Awards of attorneys' fees under Vt. Stat. Ann. tit. 27A, § 4-117(a) are compensatory in nature; "no showing of bad faith or deliberate misconduct . . . is required" to sustain such awards. *Arapaho Owners Ass'n Inc. v. Alpert*, 199 Vt. 553, 566, 128 A.3d 397, 406 (2015). Compensatory awards of attorneys' fees fall squarely within the plain, non-technical meaning of "damages" as set forth above. The same is true of monies awarded as taxable "costs" to prevailing litigants. *Cf. Peyton v. William C. Peyton Corp*., 8 A.2d 89, 91 (Del. 1939) ("Costs are allowances in the nature of *incidental damages* awarded by law to reimburse the prevailing party for expenses necessarily incurred in the assertion of his rights in court.") (emphasis added).

Ohio's contention that the sums of money awarded by the Vermont Trial Court did not even arguably constitute insured "damages" under the Policy, and thus entitled Ohio to take the law into its own hands, disregards both the undisputed facts and applicable law and, as a result, once again violates the Unfair Claims Settlement Practices Act and similar Vermont statutory law. *See* N.J. Stat. Ann. §17:29B-4(9)(n); Vt. Stat. tit. 8 § 4724. (While Dabney does not seek relief under UCSPA, which does not provide a private right of action, UCSPA provides clear guidance as to how insurance claims are required to be resolved, as the New Jersey Supreme Court held in *Pickett*, 131 N.J. at 468, 621 A.2d at 451.)

The Trial Court's conclusion that the monies awarded against Dabney in this case were not encompassed by the undefined Policy term "damages" (T85-5 to T85-7) is unsupported by citation of authority and plainly conflicts with both New Jersey and Vermont law as set forth above.

IV. Under Relevant and Binding Insurance Law, the Underlying Judgment Did Not Impose a "Fine" or a "Penalty" and Is Therefore Not Excluded From Coverage. (Pa3).

Without analysis or explanation, the Trial Court stated (T85-1 to T85-4) that the monies awarded against Dabney in this case fell within Exclusion 2.o of the Policy, which applies to "[f]ines or penalties imposed by law." In fact, the

Vermont Trial Court's monetary award (Pa369–74) was issued under two no-fault fee-shifting provisions.

To begin with, like New Jersey law, "Vermont law provides that policy terms in an insurance contract should be interpreted consistent with the purpose of providing coverage, therefore, limitations and exclusions should be strictly construed." *City of Burlington v. Glens Falls Ins. Co.,* 133 Vt. 423, 424, 340 A.2d 89, 90 (1975); *see Gerrish Corp. v. Universal Underwriters Ins.*, 754 F. Supp. 358, 366 (D. Vt. 1991) (citing *City of Burlington* for the same proposition); *see also Princeton Ins. Co. v. Chunmuang*, 151 N.J. 80, 95, 698 A.2d 9, 16–17 (1997) ("insurance policy exclusions must be narrowly construed; the burden is on the insurer to bring the case within the exclusion").

Here, the Vermont Trial Court held Dabney liable to pay sums of money to the HCH Parties under Vt. Stat. Ann. tit. 27A, § 4-117(a), which provides: "A declarant, association, unit owner, or any other person subject to this title may bring an action to enforce a right granted or obligation imposed by this title, the declaration, or the bylaws. The court may award reasonable attorney fees and costs." Under this statute, "no showing of bad faith or deliberate misconduct . . . is required" to recover attorneys' fees. *Arapaho,* 199 Vt. at 566, 128 A.3d at 406.

The Vermont Trial Court's monetary award also invoked Section 12.1(d) of the SCCA Declaration of Condominium, which provides: "In any proceeding of an alleged failure of a Unit Owner to comply with the terms of this Declaration, the Bylaws, or the Rules and Regulations of the Association, the prevailing party shall be entitled to recover the costs of the proceeding and reasonable attorneys' fees." Pa564. Once again, no showing of bad faith or deliberate misconduct is required for a "prevailing party" to recover attorneys' fees.

Ohio wholly failed to carry its burden of demonstrating that Exclusion 2.o applied to the monetary awards in the Vermont suit. The Trial Court erred in accepting Ohio's contention on that point without analysis. T85-1 to T85-5.

V. Because the HCH Action Plaintiffs Sued in Their Individual Capacity and Not as Board Members, the "Insured v. Insured" Exclusion Does Not Apply. (Pa3).

The Trial Court Ohio also stated, without analysis or explanation (T85-1 to T85-5), that the monies awarded against Dabney in the Vermont suit fell within Exclusion 2.o of the Policy, which applies to "[a]ny 'claim' or 'suit' that is brought by or on behalf of any insured or any person or organization which is controlled by, controls, or is under common control with [the insured]." But the Complaint in the HCH Action specifically states that the HCH Parties filed the Vermont suit "<u>individually</u> and derivatively on behalf of the [Association]."

Pa314 (emphasis added). Since insurance coverage must be construed expansively in favor of the insured, and since the duty to defend is triggered if there is any possibility of coverage, that ends the inquiry.

To the extent that Ohio argues that Exclusion 2.q applies because the Vermont Court appointed a "Litigation Receiver" as a remedy for alleged breach of fiduciary duty, that argument fails as well. The Litigation Receiver did not "bring" the lawsuit. Under the "Order Appointing Litigation Receiver" (Pa477 ¶ 17; Pa696–99), the "Litigation Receiver" acted an agent of the Vermont Court and completely outside of the control of any insured. Pa485 ¶ 52.

VI. Dabney's Decision to Settle the HCH Action by Paying Off the Judgment After Ohio Improperly Withdrew Its Defense Was Made in Good Faith, and Ohio Is Therefore Liable for the Settlement as Well as Unreimbursed Defense Costs. (Pa1 and Pa3).

Once Ohio withdrew coverage for the appeal that it had earlier authorized, Dabney was faced with the following Hobson's choice: (a) continue prosecuting the appeal at his own personal expense and face the risk of an additional substantial fee-shifting award in the event of an unfavorable outcome, plus statutory judgment interest at 12% under Vt. Stat. Ann. tit. 9, § 41a, or (b) cut his losses, pay off the judgment, and attempt to recoup his loss from Ohio. Pa481 ¶ 28.

Dabney opted for the more conservative option, moved for voluntary dismissal of the then-pending appeal (Pa481 ¶ 28; Pa1017–22), and settled the judgment debts that he owed. Pa481–82 ¶ 29. Neither Ohio nor the Trial Court has ever suggested that his decision was made in bad faith or was collusive. Given the level of enmity between the parties to the Vermont suit, any such suggestion would be ludicrous.

As noted above, "when a civil action is brought in New Jersey, we use New Jersey choice-of-law rules to decide whether this state's or another state's legal framework should be applied. *Cont'l Ins.*, 234 N.J. at 46, 188 A.3d at 311. "The first step in a conflicts analysis is to decide whether there is any actual conflict between the laws of the states with interests in the litigation." *Id.* "If there is no actual conflict, then the choice-of-law question is inconsequential, and the forum state applies its own law to resolve the disputed issue." *Id.*

Here, there is no conflict between New Jersey and Vermont law with respect to the consequences of an insurance company breaching its duty to defend: Ohio "is liable for the amount of the judgment obtained against the insured or of the settlement made by him" so long as the latter is "reasonable in amount and entered into in good faith." *Griggs,* 88 N.J. at 364, 368, 443 A.2d at 172, 174; *accord Passaic Valley*, 206 N.J. at 615, 21 A.3d at 1162 ("A breach of the duty to defend will trigger indemnification of the Spectraserv settlement,

and *will not be limited to the Coregis Policy's definition of 'loss.'*'") (emphasis added); *Fireman's Fund Ins. Co. v. Security Ins. Co. of Hartford*, 72 N.J. 63, 71, 367 A.2d 864, 868 (1976) ("While the right to control settlements reserved to insurers is an important and significant provision of the policy contract, it is a right which an insurer forfeits when it violates its own contractual obligation to the insured [citation omitted]").

Vermont law is identical. *R.L. Vallee,* 431 F. Supp. 2d at 437; *see also Cathay Mortuary,* 582 F. Supp. 650, 660 (N.D. Cal. 1984) ("an insurer who wrongfully refuses to defend is also liable for the amount of any reasonable settlement that the insured makes in good faith").

The liability rule stated in *Griggs*, *R.L. Vallee*, and *Cathay Mortuary* is both well-settled and, as this case illustrates, plainly necessary to police insurance company conflicts of interest. Dabney offered an uncontradicted Certification (Pa481 ¶ 28), as a member of the Bar of this State, that he decided to settle and pay the monies awarded against him in the Vermont suit to mitigate his damages flowing from Ohio's breach of its duty to defend and to limit exposure of his personal assets to further liability. There is no evidence of record, or any suggestion, that Dabney's decision to settle was collusive or anything but fair and reasonable under the circumstances.

Ohio is obligated to reimburse Dabney for the full amount of his settlement payment, plus the unreimbursed defense costs that Ohio was obligated to pay. Specifically, Dabney and his assignor paid a grand total of $382,152.12 to settle judgment debts incurred in the HCH Action. Pa481–82 ¶ 29. Dabney and his assignor additionally incurred and paid $17,198.22 in HCH Action defense costs after March 5, 2021, for a total loss of $399,352.34. Pa481–82 ¶¶ 29, 31–32; Pa794–856. That loss is Ohio's responsibility.

Conclusion

Ohio had a legal duty to appeal the Vermont Trial Court's adverse rulings against Dabney and his co-defendant Directors; and Ohio clearly breached that duty. As of March 5, 2021, there were at least "reasonable grounds to believe that the insured's interests might be served by an appeal." *Pharmacists*, 187 Vt. at 334, 993 A.2d at 421. Ohio has never even argued otherwise. Ohio's premature, wrongful withdrawal of its defense of the HCH Action on March 5, 2021, forced Dabney and his assignor to pay money to settle the case that Ohio had been defending. Ohio is liable to pay that loss.

Ohio's summary judgment motion should have been denied, and Dabney's cross-motion for summary judgment should have been granted. We ask this Court to rectify the error.

Dated: December 11, 2023

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FILED, Clerk of the Appellate Division, February 15, 2024, **A-000120-23**, AMENDED

JAMES W. DABNEY, Plaintiff/Appellant, v. THE OHIO CASUALTY INSURANCE COMPANY, Defendant/Respondent.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO.: A-000120-23T4 ON APPEAL FROM THE FINAL ORDERS OF THE SUPERIOR COURT OF NEW JERSEY, LAW DIVISION, BERGEN COUNTY DOCKET NO.: BER-L-1487-22 Sat Below: Hon. Michael N. Beukas, J.S.C.

BRIEF OF DEFENDANT-RESPONDENT
THE OHIO CASUALTY INSURANCE COMPANY
IN OPPOSITION TO APPEAL

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Preliminary Statement

Defendant-respondent, The Ohio Casualty Insurance Company ("Ohio"), hereby opposes the appeal filed by plaintiff-appellant, James Dabney, a director of the Shelburne Cliffs Condominium Association (the "Association"). Dabney was sued in the Vermont Superior Court by former directors in the matter of Hokenson, et al. v. Malovany, et al., (the "Underlying Hokenson Action"). Prior to entry of judgment against Dabney, Ohio funded his defense subject to a reservation of rights. Following a ruling included an express factual finding of self-dealing by Dabney and the underlying plaintiffs' subsequent abandonment of their other claims, Ohio ceased funding Dabney's defense and declined to indemnify him against the attorneys' and receiver's fee awards entered against him. Dabney then sued seeking reimbursement for his settlement of the fee claims. The Law Division correctly found that Dabney is not entitled to coverage. As detailed below, the Law Division determined that there are four (4) independent policy provisions that serve to extinguish coverage.

As a threshold matter, the D&O Form in the Ohio policy affords coverage for "sums that the insured becomes legally obligated to pay because of 'loss' due to 'wrongful acts' committed by the insured…" The D&O Form defines "wrongful acts" as "any negligent act(s), error(s), or omission(s) directly related to the operations of the condominium property…". The claims against

Dabney were premised exclusively on alleged conflicts of interests and self-dealing; the Underlying Complaint contained no allegations of "negligence" and, thus, were beyond the scope of the insuring grant in the D&O Form. Dabney has argued that negligence can be implicit in a breach of fiduciary claim. As the Vermont Court correctly found, however, the claim against Dabney was premised on self-dealing and breach of the duty of loyalty and cannot be spun as negligence-based. Thus, when Ohio ceased its defense of Dabney, there were no potentially covered claims remaining in the litigation.

Even if the terms of the insuring grant were satisfied, coverage would be barred by Exclusion (g). Again, all of the claims against Dabney were based entirely on assertions that he placed his personal financial interests above the Association's pecuniary interests. Exclusion (g), the personal profit exclusion, bars coverage of claims "based on … the insured gaining any personal profit … or advantage…" The Vermont Court made express factual findings that Dabney and his wife placed their interests above the Association's through management of Association litigation with an eye towards avoidance of personal liability for attorneys' fees and collection of personal attorneys' fees, both at the direct expense of the Association. As the Law Division correctly found, exclusion (g) eliminates coverage of such claims. On appeal, Dabney seizes upon the assertion that, notwithstanding the express

findings of disloyalty, the exclusion does not apply because no monies actually changed hands. That is of no moment; it simply means that the effort was halted, through litigation of the underlying claims, before the plan came to fruition.

In addition to those grounds above that bar coverage for all amounts sought by Dabney in this case, there are other terms in the D&O Form that bar coverage for the fees awarded by the Vermont Court. The Vermont Court did not award any compensatory damages, granting only injunctive relief. Following the grant of injunctive relief, the underlying plaintiffs abandoned their claims for damages. The Vermont Court also found Dabney and co-directors responsible for fees and costs incurred by the Association's counsel in pursuit of affirmative claims and by the Association's receiver in management of litigation. The sole reason for appointment of the receiver was to block Dabney and his faction from carrying out their self-interested plans. Those awards are outside the definition of "loss" and not covered for that reason.

Additionally, the award of fees and costs to the Association's litigation receiver is not covered per exclusion (q), the insured vs. insured exclusion. The receiver acted on behalf of the Association at all relevant times. The Association was the first named insured under the Ohio policy. Any claim by the litigation receiver against Dabney is within the scope of the insured vs. insured exclusion and not covered.

I. Procedural History

Ohio incorporates by reference the Procedural History in Dabney's brief.

II. Statement of Facts

In this declaratory judgment action, plaintiff, James Dabney, seeks reimbursement for sums incurred by and awarded against him in an underlying suit against him and other then-members of the Board of Directors of the Association. Pa310.

Ohio issued to the Association a policy incorporating a Condominium Association Directors and Officers Liability Coverage Form ("D&O Form"). Da197.

The D&O Form provides in pertinent part:

> PROFESSIONAL LIABILITY COVERAGE PART
>
> CONDOMINIUM ASSOCIATION DIRECTORS AND OFFICERS LIABILITY COVERAGE FORM
>
> * * *
>
> Throughout this policy the words "you" and "your" refer to the Named Insured shown in the Declarations. The words "we," "us" and "our" refer to the Company providing this insurance.
>
> The word "insured" means any person or organization qualifying as such under Section II – Who Is An Insured.
>
> * * *
>
> SECTION I – COVERAGE
>
> 1. Insuring Agreement
>
> We will pay those sums that the insured becomes legally obligated to pay because of a "loss" due

to "wrongful acts" committed by the insured's "directors and officers" solely in the conduct of their management responsibilities for the condominium association. This insurance applies only to "wrongful acts" that occur during the policy period. In the event the same "wrongful act" is repeated multiple times or results in multiple "claims" or "suits", the coverage and limit applicable to the first occurrence of the "wrongful act" shall also apply to all resultant "losses". The "wrongful acts" must take place in the "coverage territory." We will have the right and duty to defend any "suit" seeking those damages.

* * *

2. Exclusions

This insurance does not apply to:

* * *

g. "Losses" based upon or attributable to the insured gaining any personal profit, remuneration or advantage which is not shared equitably by the condominium association or to which the insured is not legally entitled.

* * *

o. Fines or penalties imposed by law.

* * *

q. Any "claim" or "suit" that is brought by or on behalf of any insured or any person or organization which is controlled by, controls, or is under common control with you.

* * *

SECTION V – DEFINITIONS

* * *

5. "Loss" or "losses" means damages, settlements, and/or defense costs.

* * *

> 9. "Wrongful acts" means any negligent act(s), error(s), or omission(s) directly related to the operations of the condominium property of the Named Insured.

In the "Underlying Hokenson Action", plaintiffs asserted that the "composition of the Board", which included Dabney and his wife, Virginia Gardner, "created grave risks of self-dealing, conflicts of interest, and the likelihood that the Board, and its individual members, would breach their fiduciary duties to the Association's members." Pa321 at para. 28. The Underlying Hokenson Action included no claims premised on alleged "negligence" and the term "negligent" does not appear anywhere in the Complaint.

The Underlying Complaint went on to allege that Dabney and others "breached their fiduciary duties by self-dealing, engaging the [Association] in transactions in which they have conflicts of interest, and otherwise violating their duties of good faith, care, and loyalty to Plaintiffs and the [Association.]". Pa327 at para. 56. In the Underlying Hokenson Action, plaintiffs' objective was to "enjoin [Dabney, Gardner and others] from actions that Plaintiffs allege to be self-dealing…" Pa391

Ohio agreed to defend Dabney against the claims asserted in the Underlying Hokenson Action subject to detailed written reservations of rights dated March 5, 2020; March 17, 2020; and April 28, 2020. Pa333. In the aforementioned letters, Ohio

specifically reserved the right to withdraw coverage to the extent the claims were outside the scope of the insuring grant of the D&O Form or within the scope of policy exclusions, including the "personal profit" exclusion (letter (g)); the "fines or penalties" exclusion (letter (o)); and the "insured vs. insured exclusion (letter (q)) in the policy. Pa333-351.

On January 30, 2020, the Vermont Superior Court ruled upon a motion seeking a preliminary injunction against Dabney and fellow directors. The motion was based on alleged mismanagement of litigation to which the Association was a party such that the outcome would be steered to benefit Dabney, his wife and other directors personally, contrary to the interests of the Association as a whole. The Court found:

> … it is clear that Plaintiffs are likely to succeed on the merits of their claim that the vote to retain the Barr Law Group and fire Attorney Flynn was a conflict of interest for the Gardner/Dabneys and the Malovanys, because the benefits [in the form of recovery of attorneys' fees and avoidance of personal liability for adversaries' attorneys' fees] would flow entirely to them as individuals and against the Association as explained above. The decision to have new counsel withdraw filings that had put Malovany and Gardner at financial risk, to the detriment of the Association's financial interests, is on its face a breach of fiduciary duty. No evidence was presented that Malovany's and Gardner's spouses had interests divergent from theirs. Any financial award against them can be presumed, absent evidence to the contrary, to impact their spouses as well. Therefore, all of them had a personal interest in not paying the Association any

> money, in direct conflict with the Association's interest in collecting any such funds. The same is true of the $1 to $2 million in attorney's fees that Gardner and Malovany wish to recover for from the Association in Shelburne Cliffs I if they succeed on appeal – a substantial portion of which would go to Dabney as counsel in that case. Such a result would clearly by in the interests of the Gardner/Dabneys, and antithetical to the interests of the Association. Thus, plaintiffs are likely to succeed on their claims that the Malovanys and Gardner/Dabneys breached their fiduciary duties and that their six votes could not be counted towards ratification.

Pa398.

On March 2, 2020, the Vermont Superior Court appointed a litigation receiver to act "on behalf of" the Association. Pa385 at para. 23. The Vermont Superior Court invoked its "inherent power in a proper case to appoint a receiver … on the ground of gross or fraudulent mismanagement by corporate officers or gross abuse of trust or general dereliction of duty." Pa379. The Vermont Superior Court found that appointment of a receiver was appropriate because Dabney, Gardner and others "had breached their fiduciary duties [in order] to protect their own financial interests…" Pa380. The Court further concluded that the interests of Dabney and Gardner were "in direct conflict with the interests of the Association" as evidenced by their "brazen attempts to undercut the Association's position in litigation to benefit [themselves] personally." Pa382.

In an August 3, 2020 summary judgment ruling, the Vermont Superior Court found:

> … based upon the now undisputed facts, the court's legal conclusions are as follows, and the court refers the reader to its earlier ruling for a full analysis. The Defendants had a right as the new directors of the board to hire and fire litigation counsel. Defendant Malovany has submitted an affidavit here in which he proffers what could be considered legitimate reasons to hire new counsel. Thus, the court cannot conclude that there are undisputed facts proving that the hiring/firing was itself a breach of duty. However, despite Defendants offering a tangled theory about all the benefits to the Association if the results in Cliffs I could be changed, they fail to acknowledge that they were personally in an *adversary* role against the Association in that case. Directing new counsel to withdraw legal filings for the obvious purpose of personally benefiting the Defendants financially, and harming the Association financially, was a clear violation of Defendants' duties to the Association.

Pa363-364. Thereafter, the Association withdrew its remaining claims against Dabney and the other directors, leaving only their applications for attorneys' fees and costs.

In its February 10, 2021 ruling, the Vermont Superior Court found Dabney and other ex-directors jointly-and-severally liable for attorneys' fees and costs, stating:

> The motions [for recovery of attorneys' fees] are granted. Defendants Howard Malovany, Cynthia Malovany, James Dabney, and Virginia Gardner shall within 30 days pay Plaintiffs $208,847 in fees ($193,887 for Attorney Ellis and $14,960 for Attorney Windish) and $2,520.77 in costs, and shall pay the Association (by Payment to the Receiver) $59,937.42. The four defendants are jointly and severally liable for these payments.

Pa373. Ohio denied coverage of the fee award by letter dated March 5, 2021, stating:

> Based on the information now known to us, including plaintiff's voluntary dismissal of the damages claims and the Court's orders and decisions sets forth above, we have determined that there is no obligation to defend Defendants in the Lawsuit or the associated appeal, and that there is no coverage for the Lawsuit and, in turn, the Award. As set forth below, there is no longer a "suit" seeking "those damages" set forth in the insuring agreement. Therefore, please be advised that we are ceasing reimbursement for defense costs and expenses incurred by independent defense counsel in the Lawsuit at this time. We request that independent defense counsel submit a final invoice for costs of defending the Lawsuit as of March 15, 2021. We confirm our understanding that defense counsel will remain counsel of record for Defendants and will direct further requests for payment to Defendants.
>
> The claims in the Lawsuit were based upon allegations that Defendants breached their fiduciary duty and that they were personally in an adversary role against the Shelburne Cliffs Condo Association ("Association"). On August 3, 2020, the Court ruled, concluding that these allegations were true. The Court granted summary judgment on Plaintiffs' claim for breach of fiduciary duty with respect to Defendants' conduct "personally benefitting the Defendants financially, and harming the Association financially." Notably, the remaining claims in the Lawsuit, including intentional conversion, have since been dismissed. Thus the Lawsuit, as confirmed by the Court's findings, falls within exclusion g, which precludes "losses' based upon or attributable to the insured gaining any personal profit, remuneration or advantage which is not shared equitably by the condominium association or to which the insured is not legally entitled." Given that this determination

> is the sole basis for the Award, the Award is likewise precluded by exclusion g.
>
> Even more preliminarily, if all of claims in the Lawsuit did not fall within exclusion g, the Lawsuit ceased falling within the insuring agreement of the Policy's Condominium Association Directors and Officer Liability Coverage Form when the Court granted Plaintiffs' voluntary dismissal of all their damages counts on November 5, 2020. The Lawsuit was no longer for "loss," meaning "damages, settlements, and/or defense costs." As such, the Insuring Agreement was not satisfied and coverage is not implicated.
>
> Plaintiffs' award of the attorneys' fees and costs they incurred in bringing the Lawsuit against Defendants does not qualify as "damages, settlements, and/or defense costs." Further, while Plaintiffs' were also awarded their attorneys' fees and costs in defending against counterclaims, the counterclaims (and all Plaintiffs' fees and costs arising therefrom) are precluded from coverage. Exclusion q bars coverage for any "claim" or "suit" that is brought by or on behalf of any insured. . . . "
>
> Similarly, the award of the litigation receiver's fees and costs is precluded by exclusion q. The request that the litigation receiver's fees and costs be assessed against the non-prevailing party was made by the Association through its receiver. The Court adopted the receiver's request in awarding these fees and costs. Coverage for this award is barred by exclusion q because the award is based on a "claim . . . brought by or on behalf of an [] insured."
>
> Lastly, the award of fees and costs under 17A V.S.A. Section 4-117(a) are precluded under exclusion o, as a penalty imposed by law.

Pa356-358.

Legal Argument

POINT I

BECAUSE ALL CLAIMS AGAINST DABNEY WERE BASED ON WHAT THE VERMONT SUPERIOR COURT DETERMINED TO HAVE BEEN CONFLICTS OF INTEREST AND SELF-DEALING, THE COURT BELOW CORRECTLY FOUND THAT OHIO CASUALTY APPROPRIATELY CEASED FUNDING OF DABNEY'S DEFENSE AND DENIED ANY DUTY TO INDEMNIFY HIM AGAINST THE FEE AWARDS

The Association is headquartered in Vermont. The policy was issued in that state through an agent located in Vermont. The Underlying Hokenson Action was venued in Vermont and all events giving rise to that litigation occurred in Vermont. The only connection to New Jersey is that it is the state of Dabney's residency. That is outweighed by Vermont's relationship to the coverage dispute. To the extent there is any conflict between Vermont law and New Jersey law, the coverage issues, therefore, should be adjudicated under Vermont law. Under either state's law, the framework for policy interpretation is straightforward and, plainly, there is no coverage on the theories of recovery successfully pursued by plaintiffs in the Underlying Hokenson Action. As respects the duty to appeal a ruling that imposes non-covered liability for injunctive and ancillary relief, Vermont and New Jersey law lead to the same conclusion: there is no duty to appeal. The route to that destination, however, differs depending upon choice of law. As detailed below, under Vermont law specifically addressing an insurer's duty to appeal, the absence

of such a duty derives from the uncontrovertible fact that the judgment was not covered. Under New Jersey law, the termination of the defense is supported by more general authority permitting withdrawal of the defense when all potentially-covered claims "drop out" of a suit.

A. Vermont Law Regarding Insurance Policy Interpretation

In Huntington Ingalls Industries, Inc. v. Ace American Ins. Co., 287 A.3d 515 (Vt. 2022), the Vermont Supreme Court stated:

> "An insurance policy is construed according to its terms and the evident intent of the parties as expressed in the policy language." Cincinnati Specialty Underwriters Ins. Co. v. Energy Wise Holmes, Inc., 2015 VT 52, ¶ 16, 199 Vt. 104, 120 A.3d 1160 (quotation omitted). Policy provisions must be "read together and viewed as an integrated whole." Progressive N. Ins. Co. v. Muller, 2020 VT 76, ¶ 11, 213 Vt. 145, 249 A.3d 24 (quotation omitted). We interpret terms in an insurance policy "according to their plain, ordinary, and popular meaning," and will enforce unambiguous terms as written. Brillman v. New Eng. Guar. Ins. Co., 2020 VT 16, ¶ 19, 211 Vt. 550, 228 A.3d 636 (quotation omitted). "Words or phrases in an insurance policy are ambiguous if they are fairly susceptible to more than one reasonable interpretation." Whitney, 2015 VT 140, ¶ 16, 201 Vt. 29, 135 A.3d 272. When the language is ambiguous, we construe the terms "liberally in favor of the insured and full coverage." Pharmacists Mut. Ins. Co. v. Myer, 2010 VT 10, ¶ 10, 187 Vt. 323, 993 A.2d 413. "However, the fact that a dispute has arisen as to proper interpretation does not automatically render the language ambiguous." Rainforest Chocolate, LLC v. Sentinel Ins. Co., 2018 VT 140, ¶ 7, 209 Vt. 232, 204 A.3d 1109 (quotation omitted). The insured has the burden of proving coverage

> under the policy, and once coverage is shown, the insurer has the burden of proving any exceptions to coverage apply. N. Sec. Ins. Co. v. Stanhope, 2010 VT 92, ¶ 10, 188 Vt. 520, 14 A.3d 257.

B. Ohio Casualty's Denial of Coverage

Following the Vermont Superior Court's rulings of August 3, 2020 – including the unambiguous determination that Dabney's actions were motivated by his own financial interests which conflicted with the Association's - the Hokenson Plaintiffs, via motion filed on October 9, 2020, sought to withdraw all remaining claims for damages. The Vermont Superior Court granted that motion by order entered on November 5, 2020. Thereafter, on November 24, 2020, the Hokenson Plaintiffs filed a motion for attorneys' fees and costs. In a February 10, 2021 written decision, the Vermont Superior Court held Dabney and fellow directors responsible for fees and costs incurred by the Hokenson Plaintiffs and the Association's litigation receiver. Ohio then denied coverage by letter dated March 5, 2021. The court below properly found that the denial of coverage was justified on four independent grounds.

C. Ohio Casualty Policy Terms

1. "Wrongful Acts" Definition

The term "wrongful acts" is defined in the D&O Form as "any negligent act(s), error(s), or omission(s) directly related to the operations of the condominium property of the Named Insured". This definition unambiguously limits coverage for

directors, making clear that only "negligent" acts are within its scope. Courts have had little trouble grasping the import of the highlighted term. In Acordia Northeast, Inc. v. Thesseus International Asset Fund, NV, Inc., 2003 WL 22057003 (S.D.N.Y. Sept. 4, 2003), the court stated:

> Significantly, Acordia does not allege that Thesseus's act, error or omission was negligent. It claims the opposite. Rather, Acordia urges the court to interpret the clause "negligent act, error or omission," so that the word "negligent" only modifies the word "act" and does not modify "error" or "omission." Under this interpretation, Thesseus would be liable for its allegedly deliberate omission, namely, the failure to remit premiums. Defendants claim that the word "negligent" modifies all three of the nouns that follow it.
>
> Insurance policies that provide coverage for negligent acts, errors or omissions are quite common. This court has assumed, without deciding that the clause applies only to negligent behavior. See Jacobson v. Fed. Ins. Co., 95 Civ. 4343, 1999 WL 893045, at *3 (S.D.N.Y. Oct. 15, 1999) (Knapp J.).
>
> Courts in other jurisdictions that have explicitly addressed the issue have almost uniformly held that "negligent act, error or omission" means "negligent act, negligent error, or negligent omission." These courts reasoned that it would be self-defeating for the insurers who draft these contracts to limit coverage for intentional acts, while at the same time covering intentional errors and omissions. See, e.g., Employer's Reinsurance Corp. v. Teague, 972 F.2d 339 (4th Cir. 1992); U.S. Fid. & Guar. Co. v. Fireman's Fund Ins. Co. 896 F.2d 200, 203 (6th Cir. 1990); Group Voyagers, Inc. v. Employers Ins. of Wausau, C 01-0400, 2002 WL 356653 (N.D. Cal. March 4,

> 2002); TIG Ins. Co. v. Joe Rizza Lincoln-Mercury, Inc. 00 C 5182, 2002 WL 406982 at *9 (N.D. Ill. March 14, 2002); City of Dillingham v. CH2M Hill N.W., Inc., 873 P.2d 1271, 1275 (Alaska 1994); Golf Course Superintendents Ass'n v. Underwriters at Lloyd's London, 761 F.Supp. 1485, 1490 (D.Kan. 1991). Cf. Connecticut Indem. Co. v. DER Travel Serv., Inc., 328 F.3d 347 (7th Cir. 2003) (assuming that the clause applies only to negligence).

Accord Oak Park Calabasas Condo. Assn. v. State Farm Fire & Casualty Co., 137 Cal.App.4th 557 (2006); (stating that, if the association's "construction of the company were correct", then "any condominium association" could incur a debt "and then decide not to pay the bill, thus shifting the obligation to its insurer. No rational insurer would wish to undertake such an insuring obligation. It would be literally impossible, from an actuarial standpoint, to set appropriate premiums to guard against the risk that an association would enter into multimillion dollar construction contracts, and then not pay for the construction work. That type of risk would be virtually impossible to underwrite.") Catlin Specialty Ins. Co. v. CBL & Associates Properties, Inc., 2017 WL 4784432 (Del. Sup. Sept. 20, 2017) ("CBL Defendants argue that there is a possibility that they could be liable based on a finding that they just erroneously overcharged tenants in a way that was negligent or unintentionally misleading. But that's not how the Underlying Action's allegations read. In its complaint, Salon Adrian asserts no theory of recovery

that the Court could reasonably deem mere (or any other sort of) negligence. And 'courts around the nation are in general agreement that a [professional liability] policy covering 'negligent acts, errors or omissions' does not cover intentionally wrongful conduct.' The Underlying Action alleges no negligent (or even grossly negligent) conduct. Instead, it is based on a plainly pled theory that CBL Defendants engaged in a pattern of intentional, knowing, wrongful, fraudulent conduct. There is no hint in the Underlying Action's claims that CBL Defendants acted in a negligent fashion.") (quoting Matthew T. Szura & Co., Inc. v. General Ins. Co. of American, 543 Fed.Appx. 538, 543 (6th Cir. 2013)); see Harleysville Ins. Cos. v, Garitta, 170 N.J. 223, 238 (2001) (stating that, for purposes of evaluating duty to defend, focus should be on "gravamen" of the complaint against the insured); Albion Engineering Co. v. Hartford Fire Ins. Co., 779 Fed.Appx. 85 n.20 (3rd Cir. 2019) ("conclusory labels" absent "factual references" do not trigger duty to defend).

In the Underlying Hokenson Action, the claims against Dabney were premised exclusively on conflicts of interest and self-dealing. The Hokenson Complaint did not contain any allegation of "negligent" conduct. Dabney was sued for self-dealing and breach of the duty of loyalty. As alleged in the Underlying Complaint and as is inherent in the nature of the claims, those theories necessarily flow from calculated and deliberate misconduct, and

nothing resembling mere negligence. Moreover, the Vermont Superior Court repeatedly found, Dabney consciously placed his financial interests above those of the Association. By the time Ohio withdrew its defense of Dabney, there can be no debate that the claims were outside of the "wrongful acts" definition and not covered under the policy.

2. "Loss" Definition

It is the insured's burden to establish that claims are within the scope of the insuring grant. Huntington Ingalls, 287 A.3d 515 (citing Northern Security Ins. Co. v. Stanhope, 14 A.3d 257 (Vt. 2010)). As a threshold matter, the awards of attorneys' fees and costs were based exclusively on non-covered claims for self-dealing and breach of the duty of loyalty which resulted in an award of injunctive relief, not any directive to pay monies that could be regarded as the equivalent of compensatory damages. The award of fees on an otherwise non-covered claim cannot give rise to a coverage obligation that did not previously exist. Under Vermont law, statutory and equitable awards of attorneys' fees and expenses are not "damages" within the meaning of a liability insurance policy. Rather, they are considered "costs." See Murphy v. Stowe Club Highlands, 761 A.2d 698 (Vt. 2000); Vermont Mutual Ins. Co. v. Poirier, 189 N.E.3d 306 (Mass. 2022). As noted above, the definition of "loss" includes "defense costs", not other

"costs." The insuring agreement of the D&O Form, in relevant part, states as follows:

> SECTION I – COVERAGE
>
> 1. Insuring Agreement
>
> We will pay those sums that the insured becomes legally obligated to pay because of a "loss" due to "wrongful acts" committed by the insured's "directors and officers" solely in the conduct of their management responsibilities for the condominium association.
>
> * * *

"Loss" is defined as "damages, settlements and/or defense costs." The fees awarded by the Vermont Superior Court do not constitute "damages" and were not for "defense" of any claims by the Association or receiver, and, thus, are outside the scope of the "loss" definition and not covered for that reason. See also Feb. 10, 2021 Decision of Vermont Superior Court (Pa371)("Defendants point out that the complaint sought multiple remedies for breach of fiduciary duty, but only injunctive relief was awarded. The court, however, did not deny other relief – Plaintiffs chose not to seek it.") The foregoing confirms that the damage claims had been abandoned and that an appeal, even if successful, only would have served to overturn a non-covered award of injunctive relief which is outside the definition of "loss", particularly considering that the equitable relief awarded did not require Dabney to expend any monies; it merely blocked his effort to

manipulate the Association's litigation positions to benefit himself and his wife. Because damage claims had been voluntarily dismissed, there was, of course, no prospect of their resurrection even if an appeal were successful. See Passaic Valley Sewerage Commissioners v. St. Paul Fire and Marine Ins. Co., 206 N.J. 596 (2011) (discussing at length distinction between monetary damages and injunctive relief and finding no coverage because award fell into latter category); see also Abouzaid v. Mansard Gardens, LLC, 207 N.J. 67, 70 (2011) (stating that duty to defend ends where potentially-covered claim "drops out" of case).

3. Exclusions

a. Personal Profit

Personal profit exclusions are common in D&O policies and routinely enforced. See, e.g., TIG Specialty Ins. Co. v Pinkmonkey.com, Inc., 375 F.3d 365 (5th Cir. 2004); Brown & LaCounte, LLP v. Westport Ins. Corp., 307 F.3d 660 (7th Cir. 2002). The D&O Form contains the following personal profit exclusion:

> 2. Exclusions
>
> This insurance does not apply to:
>
> * * *
>
> g. "Losses" based upon or attributable to the insured gaining any personal profit, remuneration or advantage which is not shared equitably by the condominium association or to which the insured is not legally entitled.

* * *

As repeatedly found by the Vermont Superior Court, the claims against Dabney, his wife and fellow directors in the Underlying Hokenson Action were premised on self-dealing which was contrary to the Association's interests. Though Dabney may continue to disagree with the findings, the key point is that they were unequivocally made. The "personal profit" exclusion clearly applies and eliminated all coverage of claims for relief, including attorneys' and receiver's fees and costs that flowed from the August 3, 2020 ruling on the merits.

b. Insured vs. Insured

The receiver's fees and costs are not covered for an additional reason. That is, the receiver, at all relevant times, of course, was acting "on behalf of" the Association. The Association was the named insured under the policy. The D&O Form excludes "[a]ny 'claim' or 'suit' that is brought by or on behalf of any insured or any person or organization which is controlled by, controls, or is under common control with you." Thus, the "insured vs. insured" exclusion eliminates coverage of that portion of the award against Dabney and others. See, e.g., Indian Harbor Ins. Co. v. Zucker for Liquidation Trust of Capitol Bancorp., Ltd., 860 F.3d 373 (6th Cir. 2017).

FILED, Clerk of the Appellate Division, February 15, 2024, **A-000120-23**, AMENDED

POINT II

BECAUSE THE JUDGMENT AGAINST DABNEY WAS PREMISED ON CLAIMS FOR BREACH OF THE DUTY OF LOYALTY AND SELF-DEALING, OHIO HAD NO DUTY TO APPEAL

With respect to the alleged duty to appeal the adverse findings, Dabney concedes an absence of on-point New Jersey authority and seeks, conveniently, to rely on a Vermont case, Pharmacists Mutual Ins. Co. v. Myer, 993 A.2d 413 (Vt. 2010). That decision, however, is distinguishable in multiple respects. First, in Myer, the claims that triggered a defense obligation under the homeowners policy were premised on defamation. Plaintiff prevailed on those claims against the insured and the basis for the insurer's refusal to fund an appeal of the adverse verdict was the erroneous conclusion that the jury found the defamation to be entirely intentional, bringing them within the scope of a policy exclusion. The court noted at several points that the insurer had misinterpreted the jury's verdict which – contrary to the insurer's assertion – responded to special interrogatories that did not use the same mental state test for all of the various defamatory statements. As to some statements, the trial court used a negligence standard and did not inquire about intent (thus, leaving open the possibility that the insured may have known those statements to be false). As to other statements, however, the court used only an intentional wrong standard. Judgment was rendered in plaintiff's favor on both sets of claims under different mental

states. In finding a duty to appeal existed, the Vermont Supreme Court emphasized that the verdict did not definitively place all claims beyond coverage. Here, by contrast, the judgment against Dabney rested exclusively on findings of self-dealing and unequivocally placed all claims beyond coverage.

Second, in Myer, when the insurer declined to pursue an appeal, the insured himself took the laboring oar. The appeal was ultimately unsuccessful. Even though finding that, because the negligence-based verdict obligated the insurer to fund an appeal, the court did not saddle the insurer with the entirety of the underlying verdict. The court expressly permitted the insurer, on remand, to demonstrate that – although the jury found that certain defamatory statements were merely negligent (the only option given to the jury for those statements) – that, in fact, all of the defamatory statements were knowingly false. Unlike the insured in Myer, Dabney did not pursue an appeal of the underlying verdict.

Dabney incorrectly states, in proceedings below, Ohio failed to address Pharmacists and the contours of the duty to appeal under Vermont law. In fact, Ohio, in its August 21, 2023 reply brief, relied heavily on Pharmacists because the decision is quite supportive of Ohio's position regarding the absence of a duty to appeal a judgment imposing liability on exclusively non-covered claims.

For the proposition that a duty to appeal existed, Dabney cited several treatises. Pb21. Those citations, however, actually support Ohio's position. See 22 E.Holmes, Appleman on Insurance, Section 136.11 (2nd ed. 2002)("[T]he duty to defend clause does not necessarily obligate the insurer to prosecute every appeal. For example, there is no duty to defend the insured on appeal when the issues being appealed do not relate to claims covered by the policy."); Couch on Insurance, Section 20:49 (3rd ed. 2005) (stating that interlocutory partial summary judgment ruling may not terminate duty to defend). Here, however, the circumstances are fundamentally different. Ohio's withdrawal postdated both the Vermont Superior Court's rulings on non-covered claims and the underlying plaintiffs' withdrawal of remaining claims. The combination of factors extinguished any further potential duty to indemnify and, therefore, justified withdrawal of the defense. See also Co-operative Ins. Cos. v. Woodward, 45 A.3d 89, 93 (Vt. 2012)(if there is "no possible factual or legal basis on which the insurer may be required to indemnify", then there is no duty to defend).

Dabney claims that uncertainty of outcome and magnitude of expense deterred him from funding his own appeal of the rulings in the Underlying Hokenson Action. Those arguments would not carry the day under New Jersey law. In New Jersey, when coverage is uncertain, New Jersey courts routinely require insureds to assume

the costs of defense subject to potential reimbursement if, at the conclusion of the liability action, the claims are determined to have been within the scope of the duty to indemnify. Passaic Valley Sewerage Commission v. St. Paul Fire and Marine Ins. Co., 206 N.J. 596, 616, (2011)("Where there is a dispute regarding coverage, 'the practical effect of Burd [v. Sussex Mutual Ins. Co., 56 N.J. 383 (1970)] is that an insured must initially assume the costs of defense ... subject to reimbursement by the insurer if the insured prevails on the coverage question'."); Surety Mechanical Services, Inc. v. The Phoenix Ins. Co., 2014 WL 2921015 (D.N.J. June 27, 2014) ("[W]hen the insurer intends to dispute coverage based on an issue that is not material to the underlying case, the insured must bear the initial burden of defending itself, but the carrier must reimburse the insured if it is later determined that the claim is covered by the policy.")(citations omitted). Ohio did exactly what it was obligated to do. It defended when presented with a mix of allegations against Dabney, appropriately reserving rights. When those allegations became adjudications, Ohio withdrew its defense because the judicial findings, coupled with the underlying plaintiffs' abandonment of then-pending other claims, so clearly eliminated the possibility of any duty to indemnify.

Ohio's position, of course, is that the judgment below should be affirmed. Even if, however, this Court disagrees, there is no basis for entry of judgment reimbursing him for amounts paid to

settle the claims. Dabney asserts that the Vermont Superior Court in finding that no factual issues precluded entry of judgment in the Underlying Hokenson Action, ignored his certification which offered a theory regarding how the personal interests of him and his wife, Gardner, were aligned with those of the Association. At best, if the Dabney certification were indulged, it would have created a factual dispute; it would not have warranted entry of judgment for Dabney, Gardner and their faction. Also, to infer that the Vermont Superior Court "ignored" the Dabney certification seems to be a leap. The more logical inference is that the Vermont Superior Court dismissed it out of hand. The adversity of the Dabney-Gardner group and the Association is apparent from the face of the Vermont pleadings. In any event, the cases cited by Dabney for the proposition that insurers are bound by reasonable settlements enter by insureds are inapposite. In this case, the settlement followed entry of a judgment that clearly placed the claims beyond coverage. Ohio's position, of course, is that the election not to fund an appeal of the non-covered judgment was appropriate in all respects. Even if, however, the Court were to disagree and find that Ohio's position was incorrect, that does not compel a conclusion that the settled claims were covered. Even if, through an appeal, Dabney were able to overturn the injunctive relief awards against him for self-dealing, the fee awards would then be vacated, as well. It is difficult to envision a

circumstance where, at the end of the day, a potentially-covered financial award (whether within the definition of "loss" or not) could stand. When there is no potential duty to indemnify, there is, of course, no duty to defend (or appeal).

Conclusion

For the foregoing reasons, Ohio requests that the decision below be affirmed.

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Dated: February 15, 2024

4934089

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Superior Court of New Jersey

Appellate Division

Docket No. A-000120-23T4

JAMES W. DADNEY,	:	CIVIL ACTION
	:	
	:	ON APPEAL FROM THE
Plaintiff-Appellant,	:	FINAL ORDERS OF THE
	:	SUPERIOR COURT
	:	OF NEW JERSEY,
vs.	:	LAW DIVISION,
	:	BERGEN COUNTY
	:	
THE OHIO CASUALTY INSURANCE COMPANY,	:	DOCKET NO.: BER-L-1487-22
	:	
	:	Sat Below:
	:	
Defendant-Respondent.		HON. MICHAEL N. BEUKAS, J.S.C.

REPLY BRIEF ON BEHALF OF PLAINTIFF-APPELLANT

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Preliminary Statement

In its opposition to this appeal, Ohio argues that Vermont law governs this case. Vermont's highest Court has held in *Pharmacists* that "an insurer under a general duty to defend is required to bring an appeal on its insured's behalf when there are reasonable grounds to believe that the insured's interests might be served by an appeal."

On this appeal, for the first time, Ohio asserts that the HCH Parties "abandoned their claims for damages," and therefore (according to Ohio) it had no duty to appeal the underlying case on Dabney's behalf. The record contains no support for this newly-minted theory. Further, as previously demonstrated, the monies awarded in the HCH Action *were* "damages" under applicable law.

Ohio also seeks to evade *Pharmacists* based on appealable rulings of the Vermont Trial Court. But Ohio's argument conflicts with both *Pharmacists* and with the broad definition of "suit" in the Policy. In addition, Ohio improperly asks this Court to re-write and expand the "personal profit" exclusion in the Policy. But Ohio has already conceded that Dabney did not gain any personal benefit by reason of the matters complained of in the underlying suit.

A breach of an insurer's duty to defend renders the insurer liable to pay any fair and reasonable settlement that the insured later makes on his own. Ohio does not dispute this principle, and Ohio had a full and fair opportunity to litigate

the issue of damages in the Trial Court. This Court should reject Ohio's request for a "do-over" on the issue of damages, and reverse the Trial Court's decision.

Procedural History

Dabney incorporates by reference the Procedural History set forth at Pb3.

Statement of Facts

Dabney incorporates by reference the Statement of Facts set forth at Pb4–19.

Argument on Reply

I. Ohio Clearly Breached Its Duty to Defend the Underlying Suit. [Pa1, Pa3]

The Ohio Policy provides in part: "We will have the right and duty to defend *any 'suit' seeking those damages*." Pb4–5 (emphasis added). The central liability issue in this appeal is therefore whether the HCH Action constituted "any 'suit' seeking those damages," when Ohio abruptly withdrew its defense of the HCH Action on March 5, 2021, and refused to continue support of an appeal that Ohio had previously authorized. *See* Pb13–17.

Ohio argues that it ceased to have a duty to defend the HCH Action as of March 5, 2021, because (i) "the judgment" of the Vermont Trial Court purportedly "was not covered" (Db12); and because (ii) "the underlying plaintiffs" purportedly "*abandoned* their claims for damages." Db3 (emphasis added); Db25.

Ohio's argument is erroneous, because (i) the HCH Action did not cease to be a "suit," as defined in the Ohio Policy, by reason of appealable rulings of the Vermont Trial Court; and (ii) the record is devoid of evidence that the HCH Parties "abandoned" (Db3) all of their claims "seeking those damages" (Pa783) such that "injunctive and ancillary relief" (Db19) was the only relief they were "seeking" as of March 5, 2021.

A. The HCH Action Did Not Cease to Be a "Suit" by Reason of Appealable Rulings of the Vermont Trial Court [Pa1, Pa3].

The Policy provides: "We will have the right and duty to defend any '*suit*' *seeking those damages*." Pa783 (emphasis added); *see* Pb4–5. The Policy defines the term "suit" as follows: "'Suit' or 'suits' means a civil proceeding(s) in which 'loss' because of 'wrongful acts' to which this insurance applies *are alleged*." Pa787 (emphasis added); *see* Pb5.

Ohio argues that "under Vermont law specifically addressing an insurer's duty to appeal, the absence of such a duty derives from the uncontrovertible [sic] fact that *the judgment* was not covered." Db12–13 (emphasis added). Ohio's argument contravenes Vermont law, which provides that "an insurer under a general duty to defend is required to bring an appeal on its insured's behalf 'when there are reasonable grounds to believe that the insured's interests might be served by an appeal.'" *Pharmacists Mut. Ins. Co. v. Myer*, 187 Vt. 323, 334, 993

A.2d 413, 421 (2010) (quoting 1 A. Windt, Insurance Claims Disputes, § 4:17 at 4-160).

If Ohio had fully defended the HCH Action, and if the Vermont Trial Court's judgment had been affirmed on appeal, it would then become necessary to decide whether the "judicial findings" cited by Ohio (Db25) took the judgment of the Vermont Trial Court outside the scope of Ohio's duty to indemnify. But no such issue need be reached if, as the record here clearly establishes, Ohio breached its duty to defend the HCH Action on appeal. Ohio's breach of its duty to defend gives rise to liability for any fair and reasonable settlement later made by its betrayed insureds, independently of Ohio's separate duty to indemnify. *See* Pb35–36, Pb46–48.

The Vermont Trial Court issued a summary judgment decision on August 3, 2020. Pb11–13. For more than six months thereafter, Ohio supported appellate review of whether the Vermont Trial Court "erred in granting summary judgment in favor of Appellees." Pb14 (quoting Pa976). Ohio's conduct demonstrates that as of March 5, 2021, there were then at least "reasonable grounds to believe that the insured's interests might be served by an appeal." *Pharmacists*, 187 Vt. at 334, 993 A.2d at 421.

On March 5, 2021, in a total reversal of position, Ohio asserted for the first time that certain "findings" in the Vermont Trial Court's summary judgment

decision purportedly established that "there is *no longer a 'suit'* seeking '*those damages*' set forth in the insuring agreement." Pb16 (Ohio emphasis in original). Insofar as Ohio relied on summary judgment "findings" to justify a refusal to support an appeal challenging the legal propriety of those "findings" (*see* Pb14), Ohio's conduct on March 5, 2021 clearly breached its legal duty "to bring an appeal when there are reasonable grounds to believe that the insured's interests might be served by an appeal." *Pharmacists*, 187 Vt. at 334, 993 A.2d at 421.

Ohio asserts that the facts in *Pharmacists* were different (Db22–23), but such differences are irrelevant to the legal standard that *Pharmacists* announced and applied. As a matter of law, the Vermont Trial Court's summary judgment "findings" did not extinguish Ohio's duty to defend the HCH Action on appeal if, as the record shows and Ohio has not disputed, there were "reasonable grounds to believe that the insured's interests might be served by an appeal." *Pharmacists*, 187 Vt. at 334, 993 A.2d at 421.

As of March 5, 2021, the complaint in the HCH Action continued to *allege* "'loss' because of 'wrongful acts' to which this insurance applies" (Pa787); and the HCH Action accordingly continued to be a "suit" that Ohio was contractually obligated to continue defending as of March 5, 2021. Ohio's withdrawal of its defense of March 5, 2021 breached the duty to defend.

B. Ohio's Newly Minted Argument That the HCH Action Plaintiffs "Abandoned" All "Damage Claims" Is Unsupported and Wrong. [Pa1, Pa3]

Ohio also argues that there was a "*voluntary dismissal* of *the damages claims*" in the underlying suit eliminating its duty to indemnify. Db16 (quoting Pa357) (Ohio emphasis in original); Db25. Ohio has made this new argument for the first time on appeal.

The sole alleged support for Ohio's new "abandonment" theory is the following statement made in an Order deeming the HCH Parties as "prevailing" parties: "Defendants point out that the complaint sought multiple remedies for breach of fiduciary duty, but only injunctive relief was awarded. The court, however, did not deny other relief – Plaintiffs chose not to seek it." Pa371. Based on this statement Ohio argues: "The foregoing confirms that *the damage claims had been abandoned* and that an appeal, even if successful, only would have served to overturn a non-covered award of injunctive relief . . ." Db19 (emphasis added). The "abandoned" conclusion simply does not follow from the quoted statement.

HCH's complaint expressly alleged a claim for "actual . . . damages" (Pa328) caused by an alleged breach of "the duty of care." Pa327 ¶ 54; *see* Pb27. Ohio's assertion that the claims in the HCH Action purportedly "cannot be spun as negligence-based" (Db2) was rightly rejected by the Trial Court below. *See*

T83-6 to T83-7 ("the allegations of breach as to fiduciary care may be supported by a theory of negligence."). The negligence basis of liability alleged in the HCH Complaint was never waived or abandoned. Pa484 ¶ 49; *see* Pb28.

A successful appeal would have negated the cited "prevailing" party determination and would have left the HCH Parties free to resume pursuit of their expressly pleaded claim for "actual . . . damages" (Pa328) caused by an alleged breach of "the duty of care." Pa327 ¶ 54; *see* Pb27. As is demonstrated by Ohio's having defended the HCH Action for nearly fifteen (15) months, the plaintiffs' allegations of breach of "the duty of care" (Pa327 ¶¶ 54–57) and their prayer for "actual . . . damages" (Pa328) brought the HCH Action within Ohio's contractual obligation to defend "any 'Suit' seeking those damages." Pa787; *see* Pa27–32.

In addition, under both Vermont and New Jersey law, the undefined term "damages" in the Policy must be construed to encompass a compensatory award of attorneys' fees to a "prevailing" plaintiff. *See* Pb36–42. Even if some archaic, technical meaning could be ascribed to the undefined term "damages" in the Policy, the law would require rejection of any such construction in favor of one that supported coverage. Pb39–40.

C. Ohio's Withdrawal of Its Defense of the HCH Action Was Not Justified by Mere Uncertainty as to Potential Indemnity Coverage. [Pa1, Pa3]

Ohio concedes that it agreed to defend Dabney in the HCH Action subject to a reservation of rights. Db6. "By reserving rights and providing defense costs on covered claims, an insurer fulfills its defense obligations." *Passaic Valley Sewerage Comm'rs v. St. Paul Fire & Marine Ins. Co.*, 206 N.J. 596, 616, 21 A.3d 1151, 1162 (2011) (citing *Burd v. Sussex Mut. Ins. Co.*, 56 N.J. 383, 267 A.2d 7 (1970)). But Ohio also argues that the express terms of the Policy were subject to an extra-contractual right to refuse to defend the HCH Action if Ohio's duty to indemnify Dabney was "uncertain." Db24. The argument is insupportable.

In the first place, Ohio has argued that Vermont law governs this case. Db12. Insofar as Ohio is asking this Court to reject *Pharmacists* in favor of some radically different legal rule that purportedly finds support in *Passaic Valley* or *Burd*, Ohio's argument is meritless.

Under a proper reading of *Burd*, "if a claim is stated in two conflicting theories in a complaint for damages, one of which requires coverage and the other which does not, the carrier must defend and may do so under reservation of rights." *L.C.S., Inc. v. Lexington Ins. Co.*, 371 N.J. Super. 482, 497, 853 A.2d 974, 984 (App. Div. 2004) (citing and interpreting *Burd*). Insofar as there may

be an exception to this rule in the event of "a question of fact that is not material to the litigation," *Surety Mech. Servs., Inc. v. Phx. Ins. Co.*, No. 1:12-cv-3242, 2014 WL 2921015 at *3 (D.N.J. June 27, 2014), no such exception is raised by this case.

In *Passaic Valley*, the Court held that the defendant insurer had "acted appropriately in *proffering a defense* while reserving its rights through the issuance of reservations of rights letters." 206 N.J. at 616, 21 A.3d at 1162 (emphasis added). That is, *Passaic Valley* approved of what Ohio initially did in this case, *i.e.*, pay independent counsel, chosen by the insureds, to defend the HCH Action in view of the "mix of allegations" (Db25) in Count I of the HCH Action complaint.

Nothing in *Passaic Valley* or *Burd* empowers an insurer to flout an express policy definition of "suit" or to refuse to defend a "suit" *even though* the insured agreed to a reservation of rights. Ohio withdrew its defense of the HCH Action not based on some wishful interpretation of dicta in *Burd*, but rather based on a contention that post-complaint events demonstrated that there was no "suit" for "damages," which, as seen above, is wrong.

The claim for breach of fiduciary duty in the HCH Action was presented as a single "COUNT I" asserting multiple theories of liability, one of which was negligence. Pa327–28; *see* Pb27; T83-6 to T83-7 ("the allegations of breach as

to the fiduciary care may be support by a theory of negligence.”). Ohio defended the HCH Action for nearly fifteen (15) months, not as charity, but because the complaint in the HCH Action brought that action within the Ohio Policy definition of “suit” *and still did* when Ohio wrongfully abandoned its insureds on March 5, 2021.

II. Ohio Wrongly Asks This Court to Re-Write the “Personal Profit” Exclusion to Include a Mere Risk That a Policyholder Might, in the Future, Gain an Personal Advantage to Which He Was Not Entitled. [Pa1, Pa3]

Ohio’s breach of its duty to defend is dispositive and obviates any need for this Court to decide whether Ohio *also* breached its *separate* duty to “pay those sums that the insured becomes legally obligated to pay because of a ‘loss’ due to ‘wrongful acts’ committed by the insured’s ‘directors and officers’ solely in the conduct of their management responsibilities for the condominium association.” Pa783. The Ohio Policy defined “loss” as including “settlements” (Pa787); and after Ohio prematurely and wrongfully withdrew its defense of the HCH Action, Dabney settled the HCH Action on his own. Pb17–18; Pb45–48.

Even assuming, for purposes of argument, that an exclusion to indemnity coverage could justify an insurer’s refusal to support an appeal of a decision that it asserts establishes the exclusion (and it cannot as set forth in Part I, above), Ohio improperly invites this Court to re-write and drastically expand the

"personal profit" exclusion ("PPE") in the Ohio Policy. The Court should decline the invitation.

Ohio has admitted for purposes of this appeal that (i) no money or any other thing of value was transferred, released, or exchanged as a result of the unit owner resolutions challenged in the HHC Action; (ii) the unit owner resolutions challenged in the HCH Action did not and did not alter or affect any legal rights or claims that the Association then held against any person; (iii) the Barr Law Group actions challenged in the HCH Action did not alter or affect any legal rights or claims that the Association then held against any person; and (iv) Dabney did not personally participate in any Association activity on December 19, 2019. Pb11–12 (citing Pa454–56 ¶¶ 16–26; Pa1041–42 ¶¶ 16–26).

Despite these admissions, Ohio argues that the Vermont Trial Court's summary judgment decision contained "findings" that, under the PPE, "clearly eliminated the possibility of any duty to indemnify" (Db25) and thus purportedly extinguished Ohio's duty to defend. Ohio is wrong for four independent reasons.

First, as set forth in Part I, the HCH Action did not cease to be a "suit" as of March 5, 2021, by reason of summary judgment "findings" that, as of March 5, 2021, were subject to appellate review and vacatur.

Second, the cited "findings" do not "find" that Dabney received any "personal profit, remuneration, or advantage," but at most suggest that Dabney or

his spouse might, in the future, possibly gain some "advantage" if then-pending claims against Vermont Mutual Insurance Company and certain former Association officers were pressed to a successful conclusion with legal assistance from Dabney. Pb6–13.

Third, the posited hypothetical future "advantage" did not exist when Ohio withdrew its defense of the HCH Action, and Ohio could not and did not show below that such "advantage" was one to which Dabney would not have been entitled to receive in the event that it ever materialized.

Fourth, the Ohio Policy language, "'Losses' based upon or attributable to the insured gaining any personal profit, remuneration or advantage which is not shared equitably by the condominium association or to which the insured is not legally entitled" (Pa784), does not necessarily or even reasonably describe fees that the plaintiffs paid to their own attorneys to launch and press what Ohio has admitted for purposes of this appeal was a "hostile takeover bid." Pb9.

TIG Specialty Insurance Co. v. PinkMonkey.com Inc., 375 F.3d 365 (5th Cir. 2004), cited by Ohio at Db20, is instructive. In *TIG*, the insured had engaged in securities fraud which resulted in the insured *actuall*y gaining advantage: "[The insured] gained a personal advantage from the opportunity to own and participate in a successful business *when PinkMonkey was infused with capital as a result of his fraud*." *Id. at* 370 (emphasis added). Here, in contrast, Ohio

has *admitted* for purposes of this appeal that Dabney gained no such "ad-vantage." *See* Pb11–12 (citing Pa454–56 ¶¶ 16–26; Pa1041–42 ¶¶ 16–26).

Brown & Lacounte, L.L.P. v. Westport Insurance Corp., 307 F.3d 660 (7th Cir. 2002), also cited by Ohio, Db20, is also instructive. In *Brown*, as in *TIG*, the insured was alleged to have obtained a definite and quantifiable profit or advantage, *i.e.*, the insured "improperly received and kept payments for legal services rendered under a void contract." *Id.* at 661. Here, in sharp contrast, Ohio presented no evidence that Dabney improperly received any personal profit, money, or property.

Ohio asks this Court to re-write the PPE to encompass possible future "advantage" whose substance and legal status cannot now be ascertained. Such a hypothetical future "advantage" falls outside the PPE, especially in view of Vermont and New Jersey law holding that "if the clause in question is one of exclusion or exception, designed to limit the protection, a strict interpretation is applied." *Mazzilli v. Accident & Cas. Ins. Co.*, 35 N.J. 1, 8, 170 A.2d 800, 804 (1961); *accord Rainforest Chocolate, LLC v. Sentinel Ins. Co*., 209 Vt. 232, 235, 204 A.3d 1109 1111 (Vt. 2018) ("An insurance policy 'is to be construed against the insurer.'") (quoting *Simpson v. State Mut. Life Assur. Co. of Am.*, 135 Vt. 554, 556, 382 A.2d 198, 199 (Vt. 1977)).

Ohio's brief points to nothing that could be constituted "personal profit, remuneration, or advantage" (Pa784) that Dabney actually received, for good reason: Ohio has admitted for purposes of this appeal that the corporate actions challenged in the HCH Action did not and did not alter or affect any person's legal rights whatsoever. Pb11–12 (citing Pa454–56 ¶¶ 16–26; Pa1041–42 ¶¶ 16–26). Whatever legal rights or claims that the Association held prior to December 19, 2019, the Association held equally after December 19, 2019. *Id*.

Notably, the HCH Parties did not press or recover relief on their claim that a $7,500 retainer paid to independent outside counsel, Barr Law Group, rendered Dabney and others liable for having "intentionally used, misappropriated, and converted for their own purposes and uses funds belonging to the [Association]." Pa328 ¶ 62. Rather, plaintiffs in the underlying suit recovered statutorily and contractually authorized damages based on attorneys' fees they incurred launching and pressing a "hostile takeover bid." Pb9.

As noted above, the Court need not reach the PPE issue because Ohio's breach of its duty to defend is an independent basis of liability to pay any fair and reasonable settlement later made by a betrayed insured. Ohio has, at all events, failed to carry its burden of proving that the PPE exclusion encompasses the loss that Dabney and his assignor sustained by settling the HCH Action following Ohio's breach of its duty to defend.

Conclusion

Ohio's appellate arguments are foreclosed by *Pharmacists* and the plain terms of the Policy. For the reasons set forth in this Reply Brief and in Dabney's Opening Brief, the decision of the Trial Court was incorrect and should be reversed.

Ohio's request to re-litigate the issue of damages should be rejected. Reversal should be ordered with instructions that the Trial Court enter judgment that Plaintiff recover $399,352.34 in damages from Ohio, and with leave for Plaintiff to apply for "successful claimant" attorneys' fees under *R.* 4:42-9(a)(6).

Dated: March 11, 2024

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