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Pro Se Plaintiff-Appellant

JOHN WILLIAM MYERS,

Plaintiff-Appellant,

vs.

GNY MUTUAL INSURANCE COMPANY AND NJM INSURANCE COMPANY

Defendants-Respondents

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-640-23

CIVIL ACTION

ON APPEAL FROM FINAL ORDERS
OF THE SUPERIOR COURT,
LAW DIVISION, SOMERSET COUNTY
DATED AUGUST 7, 2023; AND
OCTOBER 11, 2023

Sat Below: Hon. Robert A. Ballard, Jr., P.J.Cv.
Trial Court Docket No.: SOM-L-1444-22

LEGAL BRIEF

FOR APPELLANT JOHN WILLIAM MYERS

On the Brief:
John W. Myers, ACAS, MAAA, CPCU, ARe
Pro Se Plaintiff

Dated: 2/4/2024

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TABLE OF AUTHORITIES

PRELIMINARY STATEMENT

Plaintiff asks this court to reverse the trial court's decision granting Defendant NJM's motion to dismiss on August 7, 2023; reverse the decision to deny Plaintiff's motion for reconsideration on October 11, 2023; and remand the matter back to the trial court for further proceedings including trial.

PROCEDURAL HISTORY

Plaintiff filed a complaint against defendants on or about December 9, 2022 (Pa1 – Pa251). On March 20, 2023, defendant NJM motioned to dismiss for failure to state a claim (Pa252 – Pa259). Plaintiff filed opposition to defendant NJM's motion on April 18, 2023 (Pa260 – Pa377). The trial judge heard oral argument on May 26, 2023 (1T).[1] The trial judge granted NJM's motion and dismissed plaintiff's complaint with prejudice by way of order filed August 7, 2023 (Pa378 – Pa397). The trial judge granted the same for GNY by way of a second order dated August 7, 2023 (Pa398 – Pa415).

Plaintiff filed motion for reconsideration on August 28, 2023 (Pa416 – Pa516). The trial judge heard oral argument on plaintiff's motion for

[1] 1T refers to the transcript from May 26, 2023, hearing on Defendant NJM's motion to dismiss for failure to state a claim.

reconsideration on October 11, 2023 (2T).[2] The trial judge denied Plaintiff's motion for reconsideration, upheld the prior orders, and dismissed plaintiff's complaints against GNY and NJM with prejudice (Pa520 – Pa521). Plaintiff filed a Notice of Appeal on October 30, 2023 (Pa522 – Pa524).

STATEMENT OF FACTS

This matter arises out of a dispute over an insurance claim with New Jersey Manufacturers Insurance Company (NJM), whereby Plaintiff is alleging that NJM "wrongfully denied his claims for coverage, including defense, indemnification and reimbursement, stemming from a lawsuit against him... related to his condominium homeowners association." (Pa380). Plaintiff is seeking declaratory judgment that the NJM policy applies to the complaint filed against him in Docket No. SOM-L-1520-16. (Pa380).

NJM is the insurance carrier for Myers' Condo Owners Insurance Policy. (Pa4, Pa216). On April 26, 2013, Myers entered into a contract of indemnity with NJM, agreeing to make cash payments in exchange for NJM's promise to provide legal defense, indemnification, and medical payments- even if a suit is groundless, false or fraudulent. (Pa27). The NJM Policy has been in effect since April 26, 2013, and remains in effect to this day. (Pa28).

[2] 2T refers to the transcript from the October 11, 2023, hearing on Plaintiff's motion to for reconsideration.

The dispute centers on whether the allegations underlying the complaint allege at least one "potentially" covered claim (Pa419). Defendant GNY is the insurance carrier for the Association's Commercial General Liability (CGL) policy which was endorsed to insure members including Myers with respect to liability for bodily injury including "mental anguish". (Pa4, Pa16, Pa17).

An HO-6 Condo Owner's Policy works in tandem with the Association's Master Policy. (Pa28). NJM's Policy provides "Personal Liability" coverage if a claim or suit is brought against an insured for damages because of bodily injury caused by an occurrence. (Pa28). NJM's Policy provides liability coverage on an "all risks" basis including "off the insured location, if the bodily injury is caused by the activities of an insured." (Pa28).

When used in tandem with the Association's insurance, one should have full coverage. (Pa28). NJM's Policy is specifically designed to "dove-tail" with the Association's CGL Policy. (Pa29). NJM's Policy states that if there is other insurance in the name of a corporation or association of property owners covering same property, "this insurance will be excess over the amount recoverable under such other insurance or service agreement". (Pa28).

In the underlying action, Defendant/Third Party Plaintiff Myers alleged the Association breached its duty by failing to comply with N.J.S.A. 46:8B-

14(e)(f)(i) which mandates insurance to protect unit owners against liability for personal injury for accidents occurring within the "common elements" including legal defense. (Pa6). Specifically, the Association refused to provide service, unreasonably denied Myers' request for insurance protection, and concealed the Association's Liability Policy until August 2017. (Pa6).

As a result of the Association's improper conduct, Myers was forced to privately retain counsel and defend himself against numerous court cases and motions. (Pa7). See Myers Cert ¶56, 120, 130, 200, 283, 293, 296, 322, 326, 329. (Pa7, Pa93, Pa104, Pa106, Pa124, Pa143, Pa145, Pa146, Pa155, Pa156).

Despite agreeing to provide liability insurance for all risks of loss, Defendants denied Myers' claims for legal defense, indemnification, and reimbursement. (Pa3). Defendants' decision to deny coverage was unreasonable. (Pa3). Defendant NJM chose to insure Myers for personal liability and provide medical payment protection against allegations of bodily injury. (Pa4). As a result, Myers is entitled to recover damages and seeks the Court's declaration of the parties' rights and duties under their respective policies pursuant to N.J.S.A. 2A:16-50 et seq. (Pa4, Pa37, Pa44).

On December 2, 2016, the Association commenced litigation by way of Verified Complaint and Order to Show Cause. (Pa11). However, Association

Counsel Robert Griffin did not disclose the "Name of defendant's primary insurance company" on the Civil Case Information Form. (Pa11).

In the Underlying Complaint, Plaintiffs were "the Association, four members of the Board of Trustees (Stoneley, Carmen, Carriere and Whyte), Taylor Management Company, which is the Association's management company; and Taylor employee Terri L. Reddell, whose role is to serve as the on-site property manager for the Association." (Pa380, Pa381).

Given that the allegations took place on the "common elements", the GNY policy was/is responsible to provide defense and indemnification. (Pa11, Pa15). However, the Association intentionally concealed the Association's policies until August 2017. (Pa15). As a result of the Association's action, Myers was forced to privately retain counsel. (Pa11). Even though the Association intentionally concealed the Association's insurance policies, Myers asserted that Defendant GNY is liable for damages to Myers. (Pa15).

In the 2016 lawsuit against John William Myers, the three counts against him are: (1) Intentional Interference with Contractual Relations; (2) Assault; and (3) Harassment. (Pa381). The First Count alleged that Myers "has wantonly, willfully and intentionally disrupted the ongoing contractual

relationships between, Reddell and Taylor, Taylor and the Association and the Association and its membership." (Pa381).

Each allegation of the First Count was repeated and re-alleged for the Second. (Pa188). Similarly, each allegation of the First and Second Counts was repeated and re-alleged for the Third. (Pa189). All three counts allege Myers "wantonly" disrupted contractual relations. (Pa184, Pa188, Pa189).

Reddell alleged in the Second Count that Myers assaulted her by "word and deed" designed to scare her, placing her in "fear of imminent battery". (Pa12, Pa188). The alleged wrongful acts included "staring at her angrily, insulting her, leaning over her desk to put his face closer... then standing up to tower over her, blocking her exit, and refusing to leave her office..." (Pa188).

Plaintiffs sought injunctive relief, compensatory damages, and punitive damages based upon N.J.S.A. 2C:12-1 which provides that a person is guilty of assault if he "recklessly" causes bodily injury. (Pa13).

The Third Count is Harassment, and Reddell alleged that Myers committed acts of harassment by "making communications in offensively course language and in a fashion likely to cause annoyance or alarm". (Pa190). Reddell further alleged that Myers engaged in alarming conduct by communicating with her in course language, and scaring and intimidating her

in her office, staring at her in an angry fashion, leaning over her desk to put his face closer to hers and staring, then standing up and blocking her from exiting, and refusing to leave when she demanded that he do so. (Pa190).

The Underlying Complaint alleged that Reddell could not perform certain duties as the property manager for the Association because she was fearful of Myers, "and consequently Taylor is unable to fulfill its contractual obligation to the Association and its members to staff the office." (Pa381). Reddell's fear of physical harm is so great that "Taylor has not been allowing her to staff the on-site office since November 17, 2016. (Pa12, Pa187).

The acts of Myers alleged to have interfered with "Plaintiff Reddell" in the course of her work have included, but are not limited to the following: (1) Intimidating her on at least three occasions; (2) Intimidating a Board member with his size; (3) Disrupting the Annual Meeting of the Members; (4) Returning to the Association's clubhouse and threatening three Board members; (5) Sending emails in great volume, several of which contained threats and several of which sought to get Plaintiff fired; (6) Contacting the Association's legal counsel and Taylor in attempts to get her fired; (7) Insulting her and others; (8) Cursing Mr. Stoneley; (9) Screaming at her and others; (10) Refusing to leave the Annual Meeting. (Pa185, Pa186; Pa381).

Plaintiff Reddell's certification included allegations of bodily injury including mental anguish. (Pa11, Pa12, Pa13). Of note, the complaint did not allege Myers' conduct was "without justification" and did not allege that Myers "expected or intended" to inflict bodily injury. (Pa265). Myers swore that he did not "expect or intend" to cause any harm. (Pa265, Pa294).

Alexander's statement that Myers "cannot view himself as having done anything wrong" supports Myers' position that he did "not expect or intend" to cause bodily harm." (Pa294). Alexander alleged that Myers "pays attention to no one"; "has no insight into the effect he has upon other people"; and he cannot "view himself as having an intimidating or scary demeanor." (Pa212).

On August 3, 2018, Count Three was dismissed with prejudice. (Pa511). Based upon answers to interrogatories, the trial judge agreed that "there is no evidence that Plaintiffs experienced any physical or psychological illness as a result of Defendant's action" and "there is no tangible, concrete and or specific fact or document sustaining Plaintiffs' allegations." (Pa511).

Judge Ballard opined, "The vagueness of such a claim unfairly puts the Defendant Myers in the position of defending against undefinable charges that contain no identifiable elements that are capable of being adequately and sufficiently defined." (Pa511).

On December 6, 2018, Myers notified NJM of his claim over the phone. (Pa29). On December 13, 2018, NJM sent denial letter which stated, "Unfortunately... coverage for this claim is not provided under the terms of your HO6 homeowners policy." (Pa30). See Exhibit "U.2". (Pa30, Pa241).

NJM's first reason for denying coverage erroneously asserts that the behavior underlying the allegations in the Complaint "would not be considered an accident." (Pa30). NJM's second reason for denying coverage falsely proclaims that "Even if the matter was considered an occurrence, the alleged harm is not considered... bodily injury as defined in the policy." (Pa31). NJM's third reason for denying coverage misleading states "There have been no allegations against you for...bodily injury." (Pa31). NJM's fourth reason for denying coverage incorrectly declares that Myers "failed to comply with the condition" of the policy by not giving NJM prompt notice. (Pa32). NJM's fifth reason for denying coverage wrongly declares that coverage does not apply because the "allegations in the Complaint are for intentional acts" and the policy excludes bodily injury that is "expected or intended". (Pa32). On December 13, 2018, Myers sent an email to NJM Insurance expressing his dissatisfaction and requested an internal appeal. (Pa33).

On December 28, 2018, NJM stated that the Internal Appeal Panel, "made a decision to uphold the Company's determination to deny liability coverage..." (Pa33, Pa245). In reaching its decision, "the Panel reviewed your Homeowners Policy; pleadings and other documents filed with the Superior Court of New Jersey (Docket No. SOM-L-1520-16); and your 12/18/18 request for an Internal Appeal with attachments; and your 12/20 and 12/21/18 supplements to the Internal Appeal request." (Pa246).

At the time of claim denial, Defendant NJM was aware of additional information outside the four corners of the complaint which triggered coverage including Judge Ballard's August 3, 2018 Order dismissing Plaintiff's harassment claim (Count Three) and December 19, 2018 Order clarifying that Plaintiff's interference with contractual relations claim (First Count) has also been dismissed. (Pa246, Pa510 – Pa511).

Defendant NJM was aware of **Video Evidence** at the time of claim denial which Myers asserted, "proves that Terri Reddell lied to her employer and made false statements". (Pa249, Pa417, Pa433, Pa518, Pa527).

At the time of claim denial, Defendant NJM was also aware of "other documents" including Myers 2017 certification in opposition to Plaintiff's motion for order to show cause. (Pa246; Pa365-Pa377). Myers stated that the

allegations in Reddell's certification are false; he did not corner Reddell in her office, nor did he continually insult, threaten, or do anything to make her feel threatened or fearful of him. (Pa366, Pa367). Myers stated that Reddell is afraid to lose her job because of her incompetence; and in order to protect "her turf" has defamed him by making false statements to her employer and law enforcement authorities. (Pa368). Those complaints, filed on January 29, 2016, contained false statements by both Mr. Stoneley and Ms. Reddell. (Pa369). Myers was found not guilty of harassment because there was no evidence that suggested that he intended to harass anyone. (Pa369). Subsequently, Reddell dropped her complaint because it was based on false statements and not out of the goodness of her heart. (Pa 369).

Myers never intended to harass anyone. (Pa376). The only tangible evidence was provided by Myers. (Pa376). Reddell lied about recording video in her office and filed false reports with law enforcement officials. (Pa376). Myers has video evidence- which he provided to the Prosecuting Attorney- which contradicts the description of events in the underlying complaint. (Pa275). Reddell informed Myers that she was also recording video in her office; but she failed to produce any evidence during Discovery. (Pa275).

On January 13, 2016, Myers went to the Association's office to discuss issues with HDTV cable installation. (Pa366). While the discussion may have escalated with each person raising their voice, Myers did not threaten Reddell, nor did he say or do anything to make her feel threatened or fearful of him. (Pa367). Myers recorded the latter half of the conversation with the property manager on video to document Reddell's behavior and her refusal to provide service. (Pa198, Pa357, Pa367). See Video Evidence (Pa526).

None of this would have happened but for Reddell's lack of understanding of her duties. (Pa367). Regardless, having realized that the argument had been a heated one, Myers wrote to Reddell to defuse the situation. (Pa199, Pa367). Reddell's version of events (Pa196 to Pa199).

On January 26, 2016, Officer King called Myers and said, "Terri [Reddell] asked me to speak with you." (Pa355). Thereafter, Myers called the Board President to find out why the Police were coming to his home and calling him; but Hilary Carmen did not answer her phone, so later that evening Myers walked to her nearby townhouse. (Pa200, Pa355, Pa359).

Myers did not know who was trying to file charges and wanted an explanation to clarify if it was Reddell, Stoneley, or someone else. (Pa360).

Further, Myers wanted an explanation as to why his communication must go through legal counsel. (Pa360).

Myers recorded a video to document the conversation and contends that Carmen made false statements to the police. (Pa357, Pa361, Pa526). Myers spoke to Carmen to find out if "this is something Terri did" because he did not understand why the police were coming to his house. (Pa361).

Carmen informed Myers that she would call him the next day, but instead she called the police to file a harassment complaint against him. (Pa88, Pa363). Later, Myers went to the police station to talk to Officer King and was informed that the Police would not get involved, so instead Reddell and Stoneley filed private Citizen's Complaints. (Pa362).

On January 27, 2016, Myers went to the Association's office at approximately 4:15pm which contradicts Reddell's cert that he showed up "after dark, at 5:15pm". (Pa200, Pa351). Reddell's version of events is described in paragraph 10 (Pa200, Pa351). Myers recorded a video to document the meeting; and maintains that Reddell made false statements. (Pa356, Pa358). See Video Evidence (Pa526).

Myers while standing "outside in the hallway" spoke to Reddell who was in her office and asked for a copy of the member list. (Pa352). Myers tone

was "very soft", as he could barely get any words out because he was afraid of Reddell given she's been "nasty" to him in the past. (Pa352). In response to Myers' request for the member list, Reddell immediately raised her voice and told Myers that he would "have to talk to the association's attorney." (Pa352).

Myers asked Reddell to call the association's attorney and she refused; but Reddell said, "if you give me a copy of that [Bylaws §5.06], I will provide one for the attorney." (Pa353, Pa354). Thereafter, Reddell invited Myers into her office. (Pa356). Myers was confused who called the police and was trying to discuss with Reddell to find out who it was. (Pa355). Reddell again got nasty and very defensive. (Pa356). Myers "left peacefully, and that was it." (Pa356). Reddell did not repeatedly ask Myers to leave; lied about recording a video of this incident and filed false reports. (Pa356). The citizens complaints filed by Stoneley and Reddell on January 29, 2016, contained false statements. (Pa368). Myers "never threatened anyone and certainly not Ms. Reddell." (Pa368).

Defendant NJM acknowledged that "emotional injuries that are not accompanied by physical injuries are not covered as a bodily injury" (Pa263). This proves NJM recklessly disregarded Myers' rights given that the

allegations clearly included bodily injury with physical manifestations. (Pa263). See Myers verified complaint ¶49-26. (Pa11 -Pa13).

NJM's Appeal Panel concluded that (a) the Complaint does not assert an accidental occurrence; (b) Plaintiffs are not alleging acts or omissions that are covered and the policy excludes liability for damages which are "expected or intended"; (c) if liability coverage did exist, it would be limited to compensatory damages; (d) NJM was not promptly notified of the pending lawsuit. (Pa33). Same reasons except the third reason was omitted (Pa33).

Had defendant not conducted an inadequate and improper investigation of Myers' claims then defendant would have realized that no debatable reason exists for the denial of Myers' insurance claims. (Pa34). It is quite apparent, based upon the face of NJM's denial letters (Exhibits "U.2" and "U.3) that defendant did not conduct a thorough investigation into the merits of Myers' claims and never intended to insure such claim(s)... (Pa34, Pa241, Pa245).

NJM recklessly disregarded its duty to provide legal defense and pay claims without conducting a reasonable investigation based upon all available information. (Pa34). NJM misrepresented facts and policy provisions to wrongfully deny coverage. (Pa34). An insurance company acts with good faith when it assists the policyholder with locating coverage for the claimed

loss, such as when the insurer scours its policy for coverage rather than exclusions. (Pa35). Defendant NJM did not search its policy for coverage that would protect its policyholder (Myers). (Pa36). Instead, Defendant NJM searched for policy exclusions and unreasonably denied benefits. (Pa36).

On January 28, 2019, Myers notified GNY and requested legal defense until the completion of the lawsuit and reimbursement for all legal expenses already incurred. (Pa20). On February 4, 2019, Myers received a denial letter from GNY. (Pa20). On February 6, 2019, Myers appealed the decision. (Pa24). On February 19, 2019, GNY reviewed the claim appeal and concluded that the company had correctly decided the matter. (Pa24).

Plaintiff filed a verified complaint against Defendants on December 9, 2022 (Pa1). On March 20, 2023, NJM filed a motion to dismiss pursuant to Rule 4:6-2(e). (Pa255). On April 18, 2023, Plaintiff submitted certification in opposition asserting the complaint lacks the particulars and the Counts were dismissed. (Pa290). Plaintiff further asserts that per Banco Popular North America (2005), the Court may consider "allegations in the complaint, exhibits attached to the complaint, matters of public record, and documents that form the basis of a claim." (Pa290). Myers certification included a list of documents forming the basis of his claims including trial transcripts, USB

Memory stick with evidence from municipal court, certifications, depositions, and Court Orders. (Pa295-Pa296).

Contrary to Defendants position, Myers did provide his version of events. (Pa293). The bodily injury alleged in the underlying complaint arises from multiple accidental occurrences based upon the events surrounding three (3) separate Municipal Court Trial which spanned multiple policy periods. (Pa293). The events involved multiple occurrences on various dates in January 2016; and the other occurrences took place on the night of the election November 2016. (Pa293).

Judge Bogosian found Myers not guilty by direct verdict regarding Stoneley's harassment complaints; subsequently Terri Reddell voluntarily withdrew her harassment complaints based upon the advice of the prosecuting attorney. (Pa293). And yet, these same groundless allegations were brought forth again in the underlying complaint. (Pa293). Of note, the underlying complaint was not supported by a certification from Stoneley. (Pa293).

The transcript from Municipal Court is relevant as it demonstrates that Myers did not intend to harass Stoneley and his email communications with Reddell were done in a cordial and professional manner. (Pa298, Pa321,

Pa344). Exhibits "D-1" through "D-5" shows emails to/from Reddell. (Pa298, Pa309, Pa313, Pa316, Pa317, Pa417).

As to Stoneley's harassment allegations, Myers' attorney summarizes (Pa338-339):

> Speaking to someone about snow removal moving your parking space – two grown men having an argument where one says lazy, another says idiot is not criminal harassment. If that's criminal harassment, Judge, you and I are going to be here every day for the -- in New Jersey with road rage, with – at the Giants games. Can you imagine if every time people have words we're going to be filing harassment criminal charges?
> ...
> So he's pissed off, of course. So this is two grown men having words, that's it. That's not harassment. There's no purpose to harass. He e-mailed the Terri lady very friendly four or five times, clearly documenting that it's all about the snow. The video is about the snow. The pictures are about the snow. The emails to Terri about the snow. Everything is about the snow. That's it.
>
> No purpose to harass. Thank you, have a nice day. He's very cordial to the lady. And that's it. So no way is this criminal harassment. Thank you.

Judge Bogosian replied, "I've got to tell you, the one thing that bothers me about all your comments, Counsel...You're alluding that Giants fans are unruly, and I personally take offense to that. (Pa340). Tormey replied, "I'm in East Rutherford every week, Judge, honestly." (Pa340). The Court concluded, "And we never have arguments at the stadium, never." (Pa340).

Stoneley testified that he stood "toe to toe" with Myers yelling at him. (Pa306). Myers provided the municipal court prosecutor a very large file with evidence including photos, videos, and archived e-mail documents via USB memory stick and CD. (Pa295, Pa307, Pa312, Pa315, Pa316, Pa317). The reason for taking pictures and recording video was to document the snow issues; and to present his proposed solution. (Pa315, Pa316, Pa317).

Stoneley approached Myers and told him not to interfere with the driver of the snowplow truck. (Pa311, Pa331). Myers had no intention of speaking with Stoneley. (Pa327). Myers did not pin Stoneley against a car. (Pa332, Pa367). Myers did not yell obscenities. (Pa324, Pa329). Myers knocked on Stoneley's door to discuss the snow removal process because of the e-mails from Terri. (Pa323, Pa329). During cross examination, when asked what he thought Myers' purpose was of going down there to speak with him, Stoneley replied, "Your dissatisfaction with snow removal." (Pa376).

Municipal Court Exhibit D-1 demonstrates that Myers was responding to Reddell's email to let her know there were no workers and no snowplow truck on their street, despite Reddell's email stating that the Association had contractors removing snow all night and the process was in full swing. (Pa309, Pa320). The purpose of the emails D-1 through D-5 was to express

concerns regarding the snow removal process; and to propose a solution. (Pa313, Pa316, Pa317).

Plaintiff cites "NJM's internal appeal letter" in his opposition, which upheld the decision to deny liability coverage for essentially the same four reasons as the denial letter. (Pa271, Pa387). Plaintiff asserts that by disproving the four (4) reasons in the denial letter, it unequivocally demonstrates that coverage applies. (Pa271 – Pa 282).

Plaintiff further asserts under the "Doctrine of Reasonable Expectations" that it is "unreasonable to deny coverage based upon ambiguous policy language and ambiguities in the complaint." (Pa282). Had NJM intended its policy to exclude coverage for intentional torts such as interference with contractual relations, assault, and harassment, then it was obligated to unambiguously state that in the policy (which it did not do). (Pa273, Pa282).

Oral argument for defendant NJM's motion to dismiss was heard on May 26, 2023. See 1T.

On August 7, 2023, two (2) Orders were entered by the Court: one granting GNY's motion to dismiss; and one granting NJM's motion to dismiss. (Pa378, Pa398).

On August 28, 2023, Plaintiff filed motion for reconsideration. (Pa416). Plaintiff asserted that the Court overlooked material facts, failed to consider evidence and erred in granting defendants motion to dismiss. (Pa421). Plaintiff raised the following legal arguments: (1) The duty to defend is broader than the duty to indemnify; (2) Flaws in the statement of reasons; (3) The complaint did not allege interference with contractual relations was without justification or excuse; (4) A modern pleading of an intentional wrong inherently carries the potential for recovery under the lesser thesis of a negligent injury; (5) The allegations underlying the harassment count are vague and undefinable, and such ambiguity triggers coverage; (6) The allegations underlying the complaint arise directly from the parties condominium relationship; (7) The doctrine of reasonable expectations; (8) Pre-Discovery dismissal denies Plaintiff's right to demonstrate basis of relief; (9) The Court failed to consider extrinsic evidence including video evidence which contradicts the statements made by the property manager; (10) The Court erred in granting defendant's motion to dismiss because the reasoning is inconsistent with the Order dated August 3, 2018 which dismissed the harassment claim. (Pa421 – Pa431).

On September 18, 2023, Plaintiff submitted reply brief and requested oral argument to present video evidence. (Pa517). Plaintiff clarified that he is not asking the Court to expand the record, but rather to review the evidence that it knew existed at the time of its decision- including video evidence- which Myers alleged in his pleadings proves that the property manager made false statements; and thus, triggered coverage." (Pa518). Plaintiff contends that a motion for reconsideration provides an opportunity for the court to either reinforce and better explain why the Order(s) granting dismissal were appropriate or correct a prior erroneous decision. (Pa519). Myers contends that the Court acted in an "arbitrary, capricious, or unreasonable matter" by (a) not treating all factual allegations are true; (b) failing to consider relevant evidence; and (c) misapplying relevant case law. (Pa519).

Oral argument for Plaintiff's motion for reconsideration was heard on October 11, 2023. See 2T. The Court denied Plaintiff's motion for reconsideration for "reasons stated on the record." (Pa520). Although Defendants were allowed a rebuttal for their motion (1T14), Myers was not granted a final rebuttal for his motion (2T: 14-15). Moreover, the Court failed to consider relevant evidence- known to the parties at the time of claim denial which was part of the "pleadings". (2T: 5-6, 8-9); (Pa87, Pa88, Pa89, Pa249).

LEGAL ARGUMENT

I. THE TRIAL COURT'S DECISION WAS ERRONEOUS BECAUSE THE DUTY TO DEFEND IS BROADER THAN THE DUTY TO INDEMNIFY (Raised Below: Pa421; 2T:4,6; 1T12)

In New Jersey, an insurance company's duty to defend is broader than its duty to indemnify. See Polarome Int'l v. Greenwich Ins. Co., 404 N.J. Super. 241, 272-73 (App. Div. 2008). The duty to defend applies whether or not the third-party claim has merit, even if the cause of action against the insured is groundless, false, or fraudulent. Unlike the indemnification clause, the duty-to-defend clause does not require the existence of an occurrence. See Voorhees v. Preferred Mut. Ins. Co., 128 N.J. at 173-74, 180.

Quoting Voorhees at 173-74 (***emphasis added***):

> "[T]he duty to defend comes into being when the complaint states a claim constituting a risk insured against." *Danek v. Hommer*, 28 N.J. Super. 68, 77, 100 A.2d 198 (App. Div. 1953), aff'd o.b., 15 N.J. 573, 105 A.2d 677 (1954). Whether an insurer has a duty to defend is determined by comparing the allegations in the complaint with the language of the policy. When the two correspond, the duty to defend arises, irrespective of the claim's actual merit. Id. 28 N.J. Super. at 76-77, 100 A.2d 198. **If the complaint is ambiguous, doubts should be resolved in favor of the insured and thus in favor**

of coverage. *Central Nat'l Ins. Co. v. Utica Nat'l Ins. Group*, 232 N.J. Super. 467, 470, 557 A.2d 693 (App. Div. 1989). **When multiple alternative causes of action are stated, the duty to defend will continue until every covered claim is eliminated.** *Mt. Hope Inn v. Travelers Indemn. Co.*, 157 N.J. Super. 431, 440-41, 384 A.2d 1159 (Law Div. 1978). As one court has stated:

> To hold otherwise would be to place upon the insured the burden of demonstrating in advance of the underlying litigation which of the competing theories of recovery against it was applicable for the purposes of insurance, thereby frustrating one of the basic purposes of such a clause in the insurance contract – protection of the insured from the expense of litigation. [*Solo Cup Co. v. Federal Ins. Co.*, 619 F.2d 1178, 1185 (7th Cir. 1980).]

That the claims are poorly developed and almost sure to fail is irrelevant to the insurance company's initial duty to defend. The duty to defend

> is not abrogated by the fact that the cause of action stated cannot be maintained against the insured either in law or in fact — in other words, because the cause is groundless, false or fraudulent. Liability of the insured to the plaintiff is not the criterion: it is the allegation in the

> complaint of a cause of action which, if sustained, will impose a liability covered by the policy.
> [*Danek v. Hommer*, *supra*, 28 N.J. Super at 76-77, 100 A.2d 198.]

There is little dispute that the complaint was inartfully drafted. It does not clearly articulate the facts necessary to prove any specific cause of action. The duty to defend, however, is determined by *whether* a covered claims is made, not by how well it is made. A third party does not write the complaint to apprise the defendant's insurer of potential coverage; fundamentally, a complaint need only apprise the opposing party of disputed claims and issues. *Jardine Estates, Inc. v Koppel*, 24 N.J. 536, 542, 133 A.2d 1 (1957); *Miltz v. Borroughs-Shelving*, 203 N.J. Super. 451, 458, 497 A.2d 516 (App. Div. 1985).

As written, the complaint alleges outrage and negligent infliction of emotional distress just as convincingly or unconvincingly as it does defamation. It states that Voorhees made statements "serving to * * * inflict upon her humiliation, embarrassment, emotional distress and mental anguish." And that Voorhees' conduct was "willfull, deliberate, reckless, and negligent."

In the instant matter, like Voorhees (shown above), Plaintiff John William Myers alleges that the allegations are ambiguous which triggers coverage. See underlying complaint (Pa182) and certification of Reddell (Pa194). As drafted, the allegations in the underlying complaint against Myers allege outrage, negligent infliction of emotional distress, negligence, and negligent interference with contractual relations just as convincingly or unconvincingly as it does "intentional interference with contractual relations" and "harassment"— which is not recognized as a viable cause of action in New Jersey.

As more fully stated herein, the complaint alleges various alternative causes of action which "potentially" fall within the policy's coverage and triggers the duty-to-defend. If a claim is based on two conflicting theories, one requiring coverage and the other not, the insurer must defend the claim. See SL Indus., 128 N.J. at 214 (citing Mt. Hope Inn v. Travelers Indem. Co., 157 N.J. Super. 431, 439 (Law Div. 1978).

Two key rulings from Flomerfelt v. Cardiello, 202 N.J. at 444, 447 (2010), "In evaluating the complaint... doubts are resolved in favor of the insured and, therefore, in favor of reading claims that are **ambiguously pleaded**, but potentially covered, in a manner that obligates the insurer to

provide a defense. The Court (applying Burd) held that "in circumstances in which the underlying coverage question cannot be decided from the face of the complaint, the insurer is obligated **to provide a defense until all potentially coverage claims are resolved...**" Also see Stafford (1998) at 130.

In New Jersey, an insurer must provide a policyholder with a defense against any claims that are potentially (not even actually) covered by the policy. An insurer's duty to defend is triggered whenever a complaint filed against an insured contains allegations that may be covered by the policy. The duty to defend applies whether or not the third-party claim has merit, even if the cause of action against the insured is groundless, false, or fraudulent. Voorhees v. Preferred Mut. Ins. Co., 128 N.J. 165 (1992). See 1T16, 2T6.

New Jersey is not an "four corners" or "eight" corners state in which all the court considers is the four corners of the policy and the four corners of the complaint. New Jersey courts also consider extrinsic evidence presented by the insured when determining if a duty to defend exists. See SL Industries, Inc. v. American Motorists Insurance, 128 N.J. 188, 198-200 (N.J. 1992) which held that facts outside the complaint may trigger the duty to defend. See also Norman International, Inc. v. Admiral Insurance Co. (2022). (2T7).

As the Court in SL Industries points out at 199-200:

> We stress that the duty to defend is triggered by facts *known* to the insurer. Although the insurer cannot ignore known information simply because it is not included in the complaint, the insurer has no duty to investigate possible ramifications of the underlying suit that could trigger coverage. Rather, the insured being sued is responsible for promptly conveying to its insurance company the information that it believes will trigger coverage. If it conveys that information properly and promptly, it will be reimbursed for previously-expended defense costs. Cf. Burd v. Sussex Mut. Ins. Co., 56 N.J. 383, 390, 267 A.2d 7 (1970) (where insurer did not undertake defense initially, duty to defend translated into duty to reimburse insured).

As the Court ruled in SL Industries, an insurer may not ignore unpled facts it has knowledge of if those facts would require it to provide a defense (as is the case here). Myers notified NJM of his claims as soon as practical. Defendants were aware of undisputed facts outside the complaint including Myers' video evidence. See Video Evidence (Pa526); (2T:4,8); (Pa249).

At the time of claim denial, the Defendants were also aware of Judge Ballard's Orders dated August 3, 2018, and December 16, 2018, which dismissed the harassment allegations because the complaint was vague,

undefined, and ambiguous; and interrogatories were deficient to substantiate such serious allegations against Myers. (Pa246, Pa510 – Pa511). This fact alone triggered coverage; and under the Burd Rule, triggers reimbursement for previously covered legal expenses. (2T9).

Under these circumstances, it is reasonable for one to expect coverage to apply. Moreover, the case law speaks for itself. Norman (2022), quoting Flomerfelt at 444 "In evaluating the complaint...doubts are resolved in favor of the insured and, therefore, in favor of reading claims that are ambiguously pleaded, but potentially covered, in a manner that obligates the insurer to provide a defense. The Court (applying Burd) held that 'in circumstances in which the underlying coverage question cannot be decided from the face of the complaint, the insurer is obligated to provide a defense until all potentially covered claims are resolved. (2T:10-11).

Plaintiff asserts that the trial court failed to appreciate the long-standing case law whereby the duty to defend is enforceable if there is a "potentially" coverable occurrence that would be indemnified if proved valid.

II. THE TRIAL COURT ERRED IN GRANTING DEFENDANT NJM'S MOTION TO DISMISS AND THE ORDERS SHOULD BE VACATED DUE TO FLAWS IN THE STATEMENT OF REASONS (Raised Below: Pa424; 2T4)

The Court's Statement of Reasons (SOR) at Pa380 is faulty because it overlooked:

A. The Complaint did not allege Myers "Expected or Intended" to cause injury (Pa424); (1T13), (2T12)

B. The Trial Court failed to consider Plaintiff's opposition Brief (Pa260) and Certification (Pa289)- specifically the "Additional Statement of Facts" (Pa290) and Evidence "List of Relevant Documents" (Pa295). (Pa424)

C. The Court in SOR failed to appreciate Voorhees at 180 "Interpreting Occurrence" whereby the Court ruled that the duty-to-defend, unlike the indemnification clause, does not require the existence of an occurrence to trigger coverage. (Pa277, Pa424).

D. The Court incorrectly states Plaintiff's third argument as "the NJM policy provides coverage on an 'all risks' basis..." (Pa391). Rather Plaintiff's argument is "the NJM policy provides *liability* coverage on an 'all risks' basis..." (Pa425, Pa28).

E. The Court in SOR failed to appreciate Abouzaid at 81 which ruled that coverage is triggered "where the complaint does not state facts with sufficient definiteness to clearly bring the claim within or without coverage." (Pa282, Pa425)

F. The Court in SOR failed to appreciate the "Comparison to Voorhees" (Pa284) and the ambiguity in the pleadings which triggers coverage. (Pa425, Pa511).

G. The Court in SOR cites Voorhees; yet failed to state what standard it applied to determine whether the alleged conduct was "intentional" and failed to explain its reasonings and why it departed from the "subjective" standard (Pa396, Pa425)

H. The allegations against Myers do not justify a departure from the general rule requiring an inquiry into the insured's "subjective" intent to injure. (Pa279, Pa425). The facts are disputed, the Court failed to consider relevant evidence, and failed to make an inquiry into the actor's subjective intent to cause injury." (Pa425, Pa426)

J. The Trial Court limited its findings and failed to consider each allegation in the complaint separately to determine whether coverage was possibly triggered (Pa426).

III. THE COMPLAINT DID NOT ALLEGE THAT THE INTERFERENCE WAS WITHOUT JUSTIFICATION OR EXCUSE LEAVING OPEN THE POSSIBILITY FOR A CAUSE OF ACTION FOR NEGLIGENT INTERFERENCE WHICH TRIGGERS COVERAGE (Raised Below: Pa426; 2T4)

The complaint failed to allege a critical element of the tortious interference count. Specifically, the complaint did not allege that Myers' interference was without justification or excuse leaving open the possibility for a cause of action for negligent interference of contractual relations which triggers coverage. See underlying complaint (Pa182, Pa294).

IV. A MODERN PLEADING OF AN INTENTIONAL WRONG INHERENTLY CARRIES THE POTENTIAL OF RECOVERY UPON THE LESSER THESIS OF A NEGLIGENT INJURY WHICH TRIGGERS COVERAGE (Raised Below: Pa426; 2T4)

A modern pleading of an intentional wrong leaves open the possibility of alternative causes of action including but not limited to negligence, negligent interference with contractual relations, negligent infliction of emotional distress, and outrage which are all covered causes of loss and not subject to any policy exclusions. Regardless of how the causes of action were "labelled", the complaint sounds of multiple theories of liability which triggers coverage; and requires the insurer to provide immediate defense. See "Additional Statement of Facts" statement #3. (Pa290).

V. THE ALLEGATIONS ARE VAGUE AND UNDEFINABLE; AND SUCH AMBIGUITY IN THE PLEADING INDICATES THE POSSIBILITY OF LIABLITY WHICH TRIGGERS COVERAGE (Raised Below: Pa427; 2T:4,10-11)

New Jersey law has not recognized harassment as a free-standing civil cause of action for damages. See, e.g., Juzwiak v. Doe, 415 N.J. Super. 442, 454-55 (App. Div. 2010); Aly v. Garcia, 333 N.J. Super. 195, 203-04 (App. Div. 2000), certif. denied, 167 N.J. 87 (2001); Hodge v. McGrath, 2014 WL 6909499, at 1 (App. Div. Dec. 10, 2014).

Some courts in New Jersey have also noted that, though a civil cause of action for harassment has not been recognized, "[i]t suffices to recognize... that a civil claim of harassment would be subject to the same analysis given to an intentional infliction of emotional distress claim...which requires evidence of physical illness or serious psychological sequelae capable of being diagnosed by trained professionals." Griffin v. Royle, No. 133-11, 2013 WL 5337527, at 1 (App. Div. Sept. 25, 2013). Thus, even if the Court were to construe Plaintiff's harassment claim as a claim for intentional infliction or negligent infliction of emotional distress, it would fail because there is no evidence that Plaintiff's experienced any physical or psychological illness as a result of Myers' actions.

There is no tangible, concrete and or specific fact or document sustaining Plaintiff's allegations. There are no experts named; there is no report; there is no document showing what physical or psychological illness has ANY of these Plaintiff's suffered to date. There is not one scintilla of proof showing what damages, if any, have these Plaintiffs sustained.

The vagueness of such a claim unfairly puts Myers in the position of defending against undefinable charges that contain no identifiable elements that are capable of being adequately and sufficiently defined. Such ambiguity in the complaint triggers coverage.

VI. THE NJM POLICY PROVIDES LIABILITY COVERAGE ON AN "ALL RISKS" BASIS AND NO EXCLUSIONS APPLY (Raised Below: Pa279, Pa280, Pa281, Pa290, Pa291, Pa292)

The NJM policy provides liability coverage on an "all risks" basis whereby the burden of proof shifts to the insurer to prove that the loss was not covered (which NJM has not done). Defendant NJM's denial letter mentioned only one exclusion, the "Expected or Intended Injury" injury exclusion. Defendant NJM's whole argument hinges on this one exclusion. Plaintiff swore that he did not expect or intend to cause injury. A reasonable person, under similar circumstances would expect coverage to apply here given the "exception to the exclusion" which brings coverage within the policy.

Myers was protecting his property rights and has video evidence which proves the property manager made false statements. Nevertheless, Myers' conduct was justified because he used reasonable "force of speech" or "force of communication" in protecting his ownership interest. Plaintiff failed to produce any evidence to demonstrate Myers intended to inflict bodily injury, therefore, the exclusion does not apply. And even if there was evidence to demonstrate Myers inflicted injury, under these circumstances one would expect coverage to apply given Myers' force of communication was not unreasonable and there is no evidence on the record to prove otherwise.

VII. THE DOCTRINE OF REASONABLE EXPECTATIONS (Raised Below: Pa428; 2T:10-11)

Based upon the ambiguous complaint and policy language, it is unreasonable to deny coverage. Had Defendant NJM intended its policy to exclude liability coverage for "alleged" intentional acts such as "Interference with Contractual Relations, "Assault", and "Harassment", then NJM was obligated to define its policy exclusions more clearly. Wakefern Food Corp. v. Libery Mutual Fire Ins. Co., 406 N.J. Super.524, 541 (App. Div. 2009).

Sending numerous emails, attempting to get the property manager fired, disrupting the Annual Meeting of the Members, and contacting the Association's legal counsel are not wrongful acts that "carry with them the

intention or expectation" that bodily injury will result. The Court's decision is faulty because the underlying complaint did not allege Myers intended to inflict emotional distress or mental anguish or any other form of bodily injury. Based upon the facts, one should expect the claims to fall within coverage.

VIII. PRE-DISCOVERY DISMISSAL DENIES PLAINTIFF'S RIGHT TO DEMONSTRATE BASIS OF RELIEF (Raised Below (Pa429; 2T5)

The allegations underlying the complaint are unresolved and disputed; and pre-discovery dismissal denies Plaintiff's right to demonstrate the basis or relief. The Court has not conducted any findings of fact which prove subjective bad faith or intent to injure. The Court in SOR did not identify a single date and time of any alleged wrongful conduct. There are no particulars. If the Court does not vacate its Orders and complete fact finding and discovery, it will result in an unjust decision.

IX. THE COURT FAILED TO CONSIDER EXTRINSIC EVIDENCE INCLUDING VIDEO EVIDENCE WHICH CONTRADICTS THE STATEMENTS MADE BY THE PROPERTY MANAGER AND TRIGGERS COVERAGE (Raised Below: Pa429; 2T: 5-6, 8, 9, 13-14)

Plaintiff has video evidence which contradicts the statements made by the property manager and demonstrates that the allegations are false, fraudulent, and groundless, and triggers coverage. In the interest of justice, Plaintiff should be granted a hearing to present evidence. New Jersey Courts

also consider extrinsic evidence presented by the insured when determining if a duty to defend exists. SL Industries, Inc. v. American Motorists Insurance., 128 N.J. at 198-99 holding that facts outside the complaint may trigger the duty to defend. See Video (Pa526). Defendants were aware of additional facts at the time of claim denial which triggered coverage. (Pa249).

X. THE COURT'S REASONING IS INCONSITENT WITH ITS ORDER DATED AUGUST 3, 2018 – WHICH DISMISSED THE HARASSMENT CLAIM (Raised Below: Pa429; 2T9)

The Trial Court under Docket No.: SOM-L-1520-16, the Honorable Robert A. Ballard, Jr., (same as instant matter) opined at Pa510 – Pa511 (***emphasis added***):

> ***Defendant Myers claims that the Plaintiff's "harassment claim" must be dismissed as it is not recognized as a viable cause of action in New Jersey.*** New Jersey law has not recognized harassment as a free-standing civil cause for damages. See, e.g., Juzwiak v. Doe, 415 N.J. Super. 442, 454-55 (App. Div. 2010); Aly v. Garcia, 333 N.J. Super. 195, 203-04 (App. Div. 2000), certif. denied, 167 N.J. 87 (2001); Hodge v. McGrath, 2014 WL 6909499, at 1 (App. Div. Dec. 10, 2014).
>
> Some courts in New Jersey have also noted that, though a civil cause of action for harassment has not been recognized, "[i]t suffices to recognize...that a civil claim of harassment would be subject to the same analysis given to intentional infliction of emotional distress claim... which requires evidence of physical illness or serious psychological sequelae capable of being diagnosed by trained professionals." Griffin v. Royle, No. 133-11, 2013 WL 5337527, at 1 (App. Div. Sept. 25, 2013). Thus, even if the Court were to construe Plaintiff's harassment claims as a claim for intentional infliction of emotional distress, it would fail because there is no evidence that Plaintiff's experienced any physical or psychological illness as a result of Defendant's actions.

> Defendant Myers indicates that a reading of the answers to interrogatories (which Myers points out were late and were to be forced via a motion granted to Defendant/Third Party Plaintiff) "reveals nothing as to that very specific question."
>
> ***He submits that there is no tangible, concrete and or specific fact or document sustaining Plaintiff's allegations***. There are no experts named; there is no report; there is no document showing what physical or psychological illness has ANY of these Plaintiffs suffered to date. He also asserts that there is not one scintilla of proof has been provided showing what damages, if any, have these Plaintiff sustained.
>
> ***This Court agrees. The vagueness of such a claim unfairly puts the Defendant Myers in the position of defending against undefinable charges that contain no identifiable elements that are capable of being adequately and sufficiently defined.***
>
> ***The Plaintiffs' harassment claims (Count Three) will be dismissed with prejudice.***

In summary, an ambiguous complaint with undefinable charges triggers coverage. See Abouzaid v. Mansard Gardens Association, 207 N.J. 67 (2011) at 81 which notes that coverage is triggered "where the complaint does not state facts with sufficient definiteness to clearly bring the claim within or without coverage". "**If the complaint is ambiguous, doubts should be resolved in favor of the insured and thus in favor of coverage (emphasis added).**" See Voorhees at 173 (citations omitted).

Lastly, there is simply no cause of action for harassment. (Pa510). The Court failed to consider the possibility of additional pleadings such as an amended complaint for viable causes of action which triggers coverage

including negligence, negligent interference with contractual relations, negligent infliction of emotional distress, and outrage. An allegation of negligence presumes the absence of an intent to injure and triggers coverage.

The duty to defend was "potentially" triggered by the claim for harassment or intentional infliction of emotional distress, known as "outrage" in New Jersey. Although "outrage" is considered an intentional tort, it is recognized not only where conduct is intentional but also where it is "reckless." It is critical to note that a "reckless" act under tort law does not meet the subjective intent-to-injure requirement under insurance law. Voorhees at 185. Therefore, the Defendants have a duty to defend unless and until a "subjective" intent to injury has been demonstrated (which has not been done).

XI. THE TRIAL COURT INCORRECTLY DECIDED THE FACTS; MISAPPLIED RELEVANT CASE LAW; AND APPLIED THE WRONG LEGAL STANDARD TO DETERMINE IF THE "EXPECTED OR INTENDED" INJURY EXCLUSION APPLIES
(Raised Below: Pa519; 2T:12-13)

Plaintiff/Appellant asked the trial court to clarify what standard it applied to determine whether the "Expected or Intended" exclusion applies. The trial court did not articulate its reasons and appears to have relied on the Defendants arguments which are insufficient to dispose claims. Judge

Ballard's Order dated August 7, 2023, (Pa395) mentions the NJM policy exclusion entitled, "Expected or Intended Injury" and stated, "Given the written [Expected or Intended Injury] exclusion to the homeowners' policy, the policy is not an 'all-risks' policy and does not include coverage for intended injuries."

Plaintiff/Appellant does not dispute that the policy is not an "all-risks" policy and that it does not include coverage for intended injuries. Rather Plaintiff/Appellant asserts the policy provides *liability coverage* on an "all-risks" basis as defined by Victory Peach Group, Inc. v. Greater New York Mut. Ins. Co., 310 N.J. Super. 82, 87 (App. Div. 1998). In other words, the policy provides "liability" coverage on an "open peril" basis which provides coverage unless a policy exclusion applies. (1T: 5-6, 8-9, 13-14); (Pa262).

Plaintiff/Appellant asserts that "liability" coverage applies because he did not intend to cause body injury and "the policy does not specifically exclude allegations for counts of intentional interference with contractual relations, assault, harassment, or intentional infliction of emotional distress or negligent infliction of emotional distress however labeled." (1T14); (2T8).

If Defendants wanted to exclude those types of causes of action, then it was incumbent upon the insurer to clearly draft its policy to avoid any possibility of ambiguity (which Defendants did not do). (1T14).

Of note, all three (3) counts in the complaint alleged Myers acted "wantonly". Specifically listed under Count 1; and repeated for Counts 2-3, "wantonly" implies "reckless" interference with contractual relations which presumes coverage applies. Moreover, there is an "exception" to the exclusion which must be construed liberally in accordance with an insured's "objectively reasonable" expectations which establishes that the claim lies within the policy's scope of coverage. (2T: 8-9).

In the SOR (Pa396), the trial court cited Voorhees (1992) and erroneously concluded that Plaintiff Myers' actions "do not constitute an occurrence, for they were not an 'accident that causes bodily injury.' Instead, the acts of assault and harassment are not acts that constitute an accident under the policy." Plaintiff/Appellant asserts the trial court's reasoning is flawed. See Pa284 for "Comparison to Voorhees".

The trial court also cited Harleysville v. Garitta (2001) which relied on the principles articulated in Voorhees (1992) and SL Industries, Inc. v. American Motorists Insurance,128 N.J. 188 (1992). Similar to Harleysville,

which also adopted the Karlinski standard (or test), at the heart of this appeal is the policy's "expected or intended" injury exclusion.

In Harleysville, the court was forced to decide a single claim whether the injury was expected or intended; whereas, in the instant case there were multiple occurrences or potential claims and the court failed to consider each occurrence separately when determining the insurer's duty to defend.

In the SOR (Pa396), the trial court essentially concluded that the intent element in the "counts" of assault and harassment are not acts that constitute an accident under the policy. However, the court failed to explain its rationale and overlooked the first count which was labeled "intentional interference with contractual relations". Regardless of how the counts were labeled, each count in the complaint alleged that, "Defendant has wantonly, willfully and intentionally disrupted the ongoing contractual relationships..."

The above statement triggers the duty to defend because it brings the complaint within coverage. The Courts generally have held that the insurer must defend an insured who is accused of reckless conduct. See SL Industries (1992) at 208.

The legal definition of wanton is "manifesting extreme indifference to a risk of injury to another that is known or should have been known;

characterized by knowledge of and utter disregard for probability of resulting harm. See also **RECKLESS**. NOTE: *Wanton*, *reckless*, and *willful* are often used to refer to an aggravated level of negligence that borders on intent and that is often ground for an award of punitive damages." See "Wanton." Merriam-Webster.com Dictionary, Merriam-Webster, https://www.merriam-webster.com/dictionary/wanton. Accessed 13 Jan. 2024.

The definition of wanton is ambiguous given it can take on many meanings including merciless, inhumane, having no just foundation or provocation, being without check or limitation, lewd, bawdy, playfully mean or cruel, mischievous, hard to control, undisciplined, unruly. Synonyms for the adverb "wantonly" include recklessly, heedlessly, desperately, uncontrollably, confusedly, agitatedly. For a complete list please see "Wantonly" Merriam-Webster.com Thesaurus, Merriam-Webster, http://werriam-webster.com/thesaurus/wantonly, Accessed 1/13/2024.

The trial court's decision was flawed because the complaint's allegation of "wantonly" presupposes that Myers did not have a subjective intent to injure. See SL Industries (1992) at 209. Instead, the trial court incorrectly presupposed a subjective intent to injure and adopted the following standard in Harleysville (2001) at 232:

> [W]hen a coverage exclusion is expressed in terms of bodily injury expected or intended by the insured, and where the intentional act does not have an inherent probability of causing the degree of injury actually inflicted, a factual inquiry into actual intent of the actor to cause *that* injury is necessary.

The trial court found that Myers' conduct of "screaming, cursing, assuming threatening postures, [and] refusing to leave a private office when asked" did precipitate reactions in the underlying Plaintiffs of such behavior that were indeed inherently probable consequences of Myers' action. However, the trial court did not explain its rationale. Furthermore, the trial court completely ignored the "many other examples cited"; as noted by comparing Defendant NJM (Pa386) versus the trial court's findings (Pa396) which is glaringly missing the "many other examples cited."

In the SOR (Pa397), the trial court concluded that "Myers' actions in the Underlying Complaint 'carry with them the intention or expectation that the recipient of the behavior will have a reaction as a result." This statement fails to satisfy the criteria in Harleysville (assuming it applies). Harleysville at 232 states in relevant part, "and where the intentional act does not have an inherent probability of causing the degree of injury actually inflicted, a factual inquiry into actual intent of the actor to cause injury is necessary."

The Court did not state what injury was "actually inflicted" or the "degree of injury actually inflicted", which is presumed not to exist because the interrogatories were deficient and there were no medical records produced to substantiate the allegations. Although there were allegations in the pleadings of mental injuries, there was no medical proof of "actual" injury or damages so there is no reason to apply the Karlinski test.

A factual inquiry into the actual intent of the actor to cause injury is necessary where the intentional act does not have an inherent probability of causing the degree of injury actually inflicted. Here, there is no evidence of "actual" injury – notwithstanding the fact that the Plaintiff was never granted an opportunity to present evidence and give testimony. (2T-13).

Harleysville at 234 states in relevant part:

> Courts ordinarily should refrain from summary judgment in respect of whether an insured intended or expected to cause the actual injury to a third party unless the record undisputedly demonstrates that such injury was an inherently probably consequence of the insured's conduct. In that latter circumstance, a trial may not be necessary to determine the applicability of the exclusion, provided that there has been a sufficient demonstration of the insured's subjective intent to cause some degree of injury. When the insured's conduct is particularly reprehensible, courts may presume an intent to injure without inquiring into the actor's actual intent.

The trial court's decision is flawed because Defendants have not demonstrated intent to cause an injury- only a normal "reaction" which is insufficient as a matter of law. There is a factual dispute regarding whether the allegations of emotional distress injuries were expected or intended.

Evidence on the record is insufficient to support Defendants motion. There is no proof of medical records which demonstrates to the Court that an injury was inflicted. Defendants were aware of evidence at the time of claim denial which proves that the extent of the injuries was improbable. (2T9). The "actual" injuries sustained, if any, were not an inherently probable consequence of Myers' alleged conduct. There were no actual injuries (only allegations). The defendants have a duty to defend and reimburse given the allegations were ambiguous and it was impossible to determine the specific injury any potential claimant suffered. (2T7).

Given there were no "actual injuries", the different approaches evaluated by the court to answer the question, "Was There a Specific Intent to Cause Emotional Distress?" are unnecessary. See SL Industries (1992) at 209.

The underlying complaint was a shotgun of allegations sounding of negligence or recklessness which triggers immediate legal defense. The property manager made false statements. Counts 1-3 against Myers were

dismissed as the Court found no valid claims, so it is illogical for the trial court to now conclude Myers acts constituted a "subjective" intent to injure.

Assuming that the Karlinski test presents the most reasonable approach in the instant matter, the trial court must then determine whether the alleged injured person's "emotional distress" was a probable consequence of Myers' actions. As stated in SL Industries at 212: "Assuming the wrongdoer subjectively intends or expects to cause some sort of injury, that intent will generally preclude coverage. If there is evidence that the extent of the injuries was improbable, however, then the court must inquire as to whether the insured subjectively intended or expected to cause that injury. Lacking that intent, the injury was 'accidental' and coverage will be provided."

The court in SL Industries further opined:

> In the areas of employment discrimination and unlawful discharges, courts have hesitated to find emotional distress and/or bodily injuries a 'probable' outcome of wrongful behavior. As one article has noted:
>
> > [C]ourts may be unlikely to infer an intent to cause bodily injury in any but the most egregious wrongful termination or employment discrimination actions. Consequently, * * * the standard 'occurrence' requirement may not preclude coverage for these types of claims. [Peer Mallen *supra*, 54 *Defense Counsel* J. At 475.]

> See, e.g., *Interco v. Mission Ins. Co.*, 808 F.2d 682, 685-86 (8th Cir. 1987) (concluding that intent to cause severe emotional damage could not be inferred from insured's firing plaintiff).

In the instant matter, the result of the alleged action does not conform to that which one would predict, and these are not "normal circumstances". Attempting to get the property manager fired for refusing to do her job, for example, is simply not sufficient as a matter of law to infer Myers had an intent to cause bodily injury. There is no evidence of actual injuries, and the complaint did not specifically allege that Myers intended to inflict injury.

Consistent with SL Industries and Voorhees, a factual inquiry is necessary to determine whether the "expected or intended" injury exclusion applies. Another relevant case is Hambsch v. Harrsch (1991) whereby Harrsch was insured under an NJM policy which had an exclusion for bodily harm "which is expected or intended by the insured." NJM refused to indemnify Harrsch for committing the intentional "act" of discharging an airhorn; which unfortunately occurred near plaintiff's face resulting in physical injury to Hambsch's right ear. Defendant NJM's motion for summary judgment was denied so that "a jury may determine whether the policy exclusion is applicable to defendant Harrsch's actions." Hambsch at 228. Myers' NJM policy has similar language; and likewise, the matter should be remanded.

XII. THE TRIAL COURT ABUSED ITS DISCRETION (NOT RAISED BELOW)

The trial court repeatedly interrupted plaintiff on May 26, 2023 (1T: 8-13). Despite "coming on a bit early" (1T3), the Court said, "Let's get to it. I've got ten oral arguments today." (1T11). Simply put the Court did not allow Myers sufficient time to present his arguments. The same thing occurred at oral argument on October 11, 2023. The trial court interrupted Plaintiff and said, "I'm running late." The trial court's decision was biased. Defendants were allowed a rebuttal for their motion (1T14), but Myers was not granted a final rebuttal for his motion (2T: 14-15). Moreover, the Court failed to consider relevant evidence, known to the parties at the time of claim denial, which was part of the "pleadings". (2T: 5-6, 8-9); (Pa87, Pa88, Pa89, Pa249).

CONCLUSION

Under the de novo standard of review, the Appellate Division gives no deference to the trial court's determination. The de novo standard applies to contract interpretations. See Kieffer v. Best Buy, 205 N.J. 213, 222-23 (2011). The de novo standard also applies to rulings on motions to dismiss. See Dimitrakopoulos v. Borrus, Goldin, Foley, Vignuolo, Hyman & Stahl, PC, 237 N.J. 91, 108 (2019). Also see Baskin v. P.C. Richard & Son (2021).

As noted by the Supreme Court of New Jersey in Printing Mart v. Sharp Electronics, 116 N.J. 739, 746 (1989), on a motion brought pursuant to Rule 4:6-2(e) the complaint must be searched in depth and with liberality to determine if a cause of action can be gleaned even from an obscure statement, particularly if further discovery is taken. Every reasonable inference is therefore accorded the plaintiff and the motion granted only in rare instances and without prejudice. Moreover, a complaint should not be dismissed under this rule where a cause of action is suggested by the facts and a theory of actionability may be articulated by amendment of the complaint.

For reasons stated herein, it is respectfully submitted that the trial court incorrectly decided the facts, failed to consider evidence known to the insurer at the time of claim denial, and misapplied relevant case law.

RELIEF REQUESTED

Plaintiff respectfully asks this court to reverse; and remand the matter for additional proceedings and trial.

Respectfully Submitted,

/s/ John W. Myers
John William Myers

Dated: February 4, 2024

JOHN WILLIAM MYERS, Plaintiff/Appellant(s), v. GNY MUTUAL INSURANCE COMPANY AND NJM INSURANCE COMPANY Defendant/Respondent(s).	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO. A-00640-23 ON APPEAL FROM SUPERIOR COURT OF NEW JERSEY LAW DIVISION: SOMERSET COUNTY DOCKET NO: SOM-L-1444-22 SAT BELOW: HON. ROBERT A. BALLARD, JR., P.J.Cv.

DEFENDANT-RESPONDENT GREATER NEW YORK MUTUAL INSURANCE COMPANY'S BRIEF IN OPPOSITION TO PLAINTIFF'S APPEAL

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PRELIMINARY STATEMENT

Plaintiff has waived his right to appeal from the trial court's dismissal of Plaintiff's complaint as against defendant GNY and this court should deem the issue abandoned. Plaintiff's Notice of Appeal specifically waives his right to appeal from any Order in favor of GNY by its failure to include any mention of the GNY Orders and instead, specifically states that Plaintiff is appealing from the trial court's August 7, 2023 and October 11, 2023 Orders in favor of *NJM* Insurance Company. Moreover, Plaintiff further waived any potential appeal from the Orders in favor of GNY by failing to brief any issue in the Appellate brief related to the dismissal of GNY. Accordingly, those issues are waived and should be deemed abandoned.

Plaintiff's Notice of Appeal and brief are specific to NJM and fail to include any request for relief from the trial court's August 7, 2023 or October 11, 2023 Orders in favor of GNY. Moreover, Plaintiff listed the August 7, 2023 GNY Order for the first time in his *revised* brief and appendix *only after* he was instructed to do so by the Court Clerk. Plaintiff's focus solely on requesting relief from the Orders in favor of defendant NJM demonstrate Plaintiff's intentional and voluntary waiver of any appeal from the Orders in favor of GNY.

PROCEDURAL HISTORY

On December 9, 2022, Plaintiff filed a Verified Complaint against New Jersey Manufacturers Insurance Company (hereinafter "NJM") and Greater New York Mutual Insurance Company (hereinafter "GNY") (together "defendants"), under Docket Number SOM-L-1444-22, seeking a declaratory judgment that defendants' policy exclusions do not apply to the coverage sought by Plaintiff, alleging breach of contract, and breach of the covenant of good faith and fair dealing. (Pa01). Defendant GNY's Motion to Dismiss was based on plaintiff's failure to state a claim upon which relief can be granted. (Da001). On February 20, 2023, Plaintiff filed opposition to GNY's Motion to Dismiss. (Da11) On August 7, 2023, the Hon. Robert A. Ballard, Jr., J.S.C. entered an Order granting GNY's Motion, dismissing Plaintiff's Complaint against GNY with prejudice. (Pa398). On August 28, 2023, Plaintiff filed a motion for reconsideration of the August 7, 2023 Orders dismissing the complaint against defendants with prejudice. (Pa416.) On October 11, 2023, the Hon. Robert A. Ballard, Jr., J.S.C. heard oral argument on Plaintiff's motion for reconsideration and denied the motion. (2T15-1;[1] Pa520).

On October 30, 2023, Plaintiff filed a Notice of Appeal, "Appealing Orders dated 8-7-23 and 10-11-23 in favor of NJM Insurance Company." (Notice, ¶ 8). On January 22, 2024, Plaintiff filed a legal brief which was deemed deficient on January 26, 2024,

[1] 1T refers to the 5/26/23 motion hearing transcript; 2T refers to the 10/11/23 motion hearing transcript.

by the Brief Deficiency Letter filed by the Clerk instructing Plaintiff, among other things, to "Add a copy of the order dated 08/07/23 dismissing GNY Mutual Insurance Company to the appendix," and "Add the order dated 08/07/23 dismissing GNY Mutual Insurance Company to the Table of Contents for the appendix." (1/26/24 Deficiency Letter, pp. 1, 2). On February 16, 2024, Plaintiff's revised brief and appendix were accepted for filing. (Pb, Pa1-Pa528).

STATEMENT OF FACTS

Plaintiff's Verified Complaint seeks a declaratory judgment against defendant, GNY, as the insurer for the Commercial General Liability Policy for the insured, Society Hill at Bernards 1 Condominium Association, Inc., Plaintiff's condominium association. (Pa3, Pa4, Pa15). Plaintiff's complaint alleges that as an owner of a condominium, GNY owes Plaintiff a duty to defend, indemnify, and reimburse Plaintiff, for allegations against Plaintiff related to Docket Number: SOM-L-1520-16 and in several Bernards Township Municipal Court complaints. (Pa3, Pa8, Pa15, Pa16). Defendant, GNY, filed a motion to dismiss the complaint for failure to state a claim for which relief can be granted, pursuant to R. 4:6-2(e). (Da01). The trial court granted GNY's motion on August 7, 2023, finding that Plaintiff had failed to plead sufficient factual allegations to support a claim upon which relief can be granted. (Pa398, Pa412).

Plaintiff filed a Motion for Reconsideration on August 28, 2023. (Pa416). The trial court denied the Plaintiff's Motion for Reconsideration stating that "This was a motion to dismiss on the pleadings as I have iterated several times. It was not expanded

to a summary judgment motion, which it shouldn't be. But it goes to the pleadings and any documents referenced in the complaint." (2T14-17; Pa520). Plaintiff's 10/30/23 Notice of Appeal states, "Appealing Orders dated 8-7-23 and 10-11-23 in favor of NJM Insurance Company." (Notice, ¶ 8).

ARGUMENT

POINT I

STANDARD OF REVIEW [Issue not raised below]

Plaintiff appeals from both the trial court's Order dismissing the complaint under Rule 4:6-2(e) and the trial court's Order denying Plaintiff's motion for reconsideration.

A. R. 4:6-2(e) Motion To Dismiss [Issue not raised below]

"We review de novo a trial court's denial of a motion to dismiss a complaint for failure to state a claim under Rule 4:6-2(e)." W.S. v. Hildreth, 252 N.J. 506, 518 (2023)(internal citation omitted).

"The invocation of that rule requires an assumption that the allegations of the pleading are true and affords the pleader all reasonable factual inferences." Seidenberg v. Summit Bank, 348 N.J. Super. 243, 249-50 (App. Div. 2002). "Appellate review of an order dismissing an action on this basis is governed by a standard no different than that applied by the trial courts. Accordingly, we base our review of the order in question in light of the facts pleaded by plaintiffs and the reasonable inferences that may be drawn therefrom." Id. at 50.

Here, Plaintiff's argument that the court's failure to consider extrinsic evidence in its decision to grant defendant's motion to dismiss justifies Plaintiff's appeal of that Order demonstrates a fundamental misunderstanding of the scope of analysis for a dismissal on the pleadings, under R. 4:2-6(e). See Ibid. The trial court's Orders dismissing Plaintiff's complaint was properly decided in light of the facts pleaded by plaintiff and the reasonable inferences drawn therefrom.

B. Motion For Reconsideration [Issue not raised below]

The appellate standard of review for a denial of a motion for reconsideration is under the abuse of discretion standard. Cummings v. Bahr, 295 N.J. Super. 374, 389 (App. Div. 1996) ("We now adopt that standard as the appropriate norm for appellate review of a denial of a motion for reconsideration."). "We will not disturb the trial court's reconsideration decision 'unless it represents a clear abuse of discretion.'" Kornbleuth v. Westover, 241 N.J. 289, 301 (2020).

> Reconsideration should be utilized only for those cases which fall into that narrow corridor in which either 1) the Court has expressed its decision based upon a palpably incorrect or irrational basis, or 2) it is obvious that the Court either did not consider, or failed to appreciate the significance of probative, competent evidence. . . .
> [Cummings, 295 N.J. Super. at 384].

Plaintiff's appeal fails to present any basis in fact or law to show that the trail court abused its discretion in denying Plaintiff's motion for reconsideration.

POINT II

PLAINTIFF HAS WAIVED HIS RIGHT TO APPEAL FROM THE ORDERS IN FAVOR OF DEFENDANT GNY [Issue not raised below]

A. Orders In Favor of GNY Are Not Before This Court On Appeal Because Plaintiff Failed To Identify Any In His Notice Of Appeal. [Issue not raised below]

"An appellant [] proceeds at his or her peril by insufficiently completing the notice of appeal or CIS. The appellant should explicitly designate all judgments, orders and issues on appeal in order to assure preservation of their rights on appeal. *R.* 2:5-1(f)." Fusco v. Bd. of Educ. of City of Newark, 349 N.J. Super. 455, 461 n.1 (App. Div.) *certif. denied,* 174 N.J. 544, 810 A.2d 64 (2002). "A party's failure to seek review of cognizable trial court orders or determinations — by identifying them in the notice of appeal — is largely fatal." Park Crest Cleaners, LLC v. A Plus Cleaners & Alterations Corp., 458 N.J. Super. 465, 472 (App. Div. 2019); see also Nielsen v. Wal-Mart Store #2171, 429 N.J. Super. 251, 256 n.3 (App. Div. 2013) ("We also note that Walmart did not preserve this issue for review because it did not identify the December 17, 2010 order in its notice of appeal.")

Here, just like defendant Wal-mart, Plaintiff failed to identify the 8/7/23 and 10/11/23 Orders in favor of GNY in his Notice of Appeal and has failed to preserve that issue for review. See Ibid.; Fusco, 349 N.J. Super at 461 n.1. Plaintiff's Notice of Appeal specifically states that Plaintiff is "Appealing Orders

dated 8-7-23 and 10-11-23 in favor of NJM Insurance Company." (¶ 8).

In Campagna ex rel. Greco v. Am. Cyanamid Co., the Appellate Division found that an order not identified in Plaintiffs' notice of appeal was not properly before the court for review stating, "The comment to the relevant court rule states that 'it is clear that it is only the judgments or orders or parts thereof designated in the notice of appeal which are subject to the appeal process and review.' *See Sikes v. Township of Rockaway*, 269 N.J. Super. 463, 465-466, 635 A.2d 1004 (App.Div.), *aff'd o.b.* 138 N.J. 41, 648 A.2d 482 (1994); Pressler, *Current N.J. Court Rules*, comment 6 on *R. 2:5-1(f)(3)(i)* (2001)." Campagna, 337 N.J. Super. 530, 550 (App. Div. 2001); see also 30 River Court E. Urban Renewal Co. v. Capograsso, 383 N.J. Super. 470, 473-74 (App. Div. 2006) (*citing to* R. 2:5-1(f)(3)(i), Appellate Division determined that orders not included in appellant's notice of appeal were not within the scope of her appeal and did not address them.).

Here, like the appellant in Campagna, Plaintiff's Notice of Appeal fails to identify either the August 7, 2023 Order dismissing the Complaint against GNY with prejudice, or the October 11, 2023 Order denying Plaintiff's motion for reconsideration of the August 7, 2023 Order in favor of GNY such that those Orders are not within the scope of Plaintiff's appeal and not properly before this court. See Campagna, 337 N.J. Super. at 550.

B. Plaintiff Has Waived His Right To Appeal The Trial Court's Orders Dismissing The Complaint Against GNY By Failing To Seek Relief Or Brief Any Issue Regarding Defendant GNY. [Issue not raised below]

Although "[t]he comment to the relevant court rule states that 'it is clear that it is only the judgment or orders or parts thereof designated in the notice of appeal which are subject to the appeal process and review,'" Campagna ex rel. Greco v. American Cyanamid Co., 337 N.J. Super. 530, 550 (App. Div. 2001), courts generally favor a "public policy that, *whenever possible*, litigation should be resolved on the merits rather than on procedural violations." The Tr. Co. of N.J. v. Sliwinski, 350 N.J. Super. 187, 192 (App. Div. 2002)(emphasis added).

"An issue not briefed on appeal is deemed waived." Green Knight Capital, LLC v. Calderon, 469 N.J. Super. 390, 396 (App. Div. 2021); see also Comprehensive Psychology Sys., P.C. v. Prince, 375 N.J. Super. 273, 274 n.1 (App. Div. 2005) (where court only considered the issue briefed in the appeal and deemed all other issues abandoned).

Here, Plaintiff's brief specifically "asks this court to reverse the trial court's decision granting *Defendant NJM's motion to dismiss* on August 7, 2023; reverse the decision to deny Plaintiff's motion for reconsideration on October 11, 2023; and remand the matter back to the trial court for further proceedings including trial." (Pb9). (emphasis added). Not only did Plaintiff omit the GNY Orders from his Notice of Appeal, but Plaintiff's appeal also fails to seek relief from those Orders, or to brief any

issue of fact or law related to those Orders. The only references made to GNY in Plaintiff's brief are to allegations in the complaint and to the dates of those Orders. (Pb9-Pb11, Pb13, Pb24, Pb28). Plaintiff's Legal Argument fails to include any reference, whatsoever to GNY. (Pb31-Pb58). Indeed, the August 7, 2023 Order dismissing Plaintiff's Complaint against GNY was only identified in Plaintiff's Table of Orders, Judgments and Rulings and included in the appendix, *after* the court Clerk instructed Plaintiff to do so. (See Clerk 1/26/24 Letter).

Accordingly, Plaintiff's right to appeal should be deemed waived and abandoned. Green Knight Capital, 469 N.J. Super. at 396.

Our judicial system "contemplates one appeal as of right to a court of general appellate jurisdiction." Midler v. Heinowitz, 10 N.J. 123, 129 (1952). "A party is required to raise in a single appeal all of his challenges to the judgment appealed from." Matter of Unanue, 311 N.J. Super. 589, 598-99 (App. Div.) *certif. den.* 157 N.J. 541 (1998) *cert. den.* 526 U.S. 10051 (1999).

Based upon Plaintiff's intentional and voluntary waiver of his right to seek relief from the Orders in favor of GNY in this appeal, Plaintiff should be foreclosed from bringing a second appeal against the Orders in favor of GNY. Ibid.

C. Plaintiff Improperly Included His Trial Court Briefs In The Appendix In Violation Of R. 2:6-1(A)(2) And They Should Not Be Considered. [Issue not raised below]

Plaintiff's inclusion of his legal briefs in the appendix is nothing more than a veiled attempt at a second bite at the apple to present his opposing arguments in the trial

court to this court and should not be permitted. (Pa260-Pa288; Pa418-Pa431; Pa517-Pa519). Plaintiff's footnote in the Table of Appendix is incorrect and demonstrates a misunderstanding of the Court Rule permitting the inclusion of trial briefs:

> *Pursuant to Rule 2:6-2(a)(2), briefs are included given that the trial court referenced the brief in its decision which is being challenged on appeal and the briefs are also necessary to demonstrate specific issue was raised.*
> [Pb6].

Rule 2:6-1(a)(1) specifically *excludes* briefs from the appendix *unless* they meet the criteria set forth in R. 2:6-2(a)(2), which requires:

> Prohibited Contents. Briefs submitted to the trial court *shall not be included in the appendix, unless either the brief is referred to in the decision of the court* or agency, *or the question of whether an issue was raised in the trial court is germane to the appeal*, in which event only the material pertinent to that issue shall be included.
> [R. 2:6-1(a)(2)(emphasis added)].

Neither of the situations set forth in the above exception Rule apply here. Plaintiff's briefs were not referred to in the May 26, 2023 hearing on defendants' motions to dismiss, they were not mentioned in the August 7, 2023 Order and Statements of Reasons, and they were not mentioned in the October 11, 2023 decision of the court delivered from the bench. (1T; Pa378-Pa415; 2T). Neither counsels' references to their briefs during oral argument on May 26, 2023 and October 11, 2023, nor the court's statement that His Honor "read the briefs" meets the criteria set forth in the Rule to permit Plaintiff to include his briefs in the appendix. (Ibid.; 1T11-5).

There is no question as to whether an issue was raised in the trial court that is

germane to the appeal to justify the inclusion of any portion of Plaintiff's brief, let alone his entire brief, under the Rule. There is simply no factual or legal basis for Plaintiff's briefs to be included in the appendix and they should be stricken.

CONCLUSION

For the reasons set forth above, Defendant Greater New York Mutual Insurance Company respectfully requests that this court affirm the trial court's decision.

Respectfully submitted,

SCHENCK, PRICE, SMITH & KING, LLP
Attorneys for Defendant, Greater New York Mutual Insurance Company

By:_____
Catherine P. O'Hern

Dated: March 21, 2024

Superior Court of New Jersey

Appellate Division

Docket No. A-000640-23

JOHN WILLIAM MYERS,	:	CIVIL ACTION
	:	
	:	ON APPEAL FROM FINAL
Plaintiff-Appellant,	:	ORDERS OF THE
	:	SUPERIOR COURT
	:	OF NEW JERSEY,
vs.	:	LAW DIVISION,
	:	SOMERSET COUNTY
	:	
GNY MUTUAL INSURANCE COMPANY and NJM INSURANCE COMPANY,	:	DOCKET NO. SOM-L-1444-22
	:	
	:	Sat Below:
	:	
	:	HON. ROBERT A. BALLARD, JR.,
Defendants-Respondents.	:	P.J.Cv.

BRIEF AND APPENDIX ON BEHALF OF DEFENDANT-RESPONDENT NEW JERSEY MANUFACTURERS INSURANCE COMPANY

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PRELIMINARY STATEMENT

Pro se plaintiff John William Myers has filed a lawsuit against New Jersey Manufacturers Insurance Company (hereinafter "NJM"), alleging that NJM wrongfully denied his claims for coverage, including defense, indemnification and reimbursement, stemming from a lawsuit filed against him in connection with his actions related to his condominium homeowners association. The allegations of the lawsuit for which plaintiff sought coverage under his NJM homeowners insurance policy plainly and simply do not come within the coverage of that policy, and the lower court thus correctly found that plaintiff is not entitled to a defense or indemnity under his homeowners policy for the allegations of the lawsuit against him.

NJM's motion was based on the simple premise, long-settled in New Jersey, that insurance policies issued with clear terms must be enforced as written. Plaintiff's NJM homeowners insurance policy clearly and expressly covers liability arising from accidental occurrences, and the allegations of the underlying complaint uniformly involved conduct that was not an "accident." Accordingly, the lower court correctly found that there was no coverage for these events under the NJM policy. Moreover, even if the allegations regarding plaintiff's conduct towards the underlying litigants could somehow be viewed as constituting an occurrence, the lower court determined that the NJM policy

exclusion for expected or intended injuries was applicable here, where the underlying lawsuit specifically described a course of conduct designed to impact the litigants in that matter. Under these circumstances, the lower court correctly granted NJM's motion to dismiss for failure to state a claim, pursuant to Rule 4:6-2(e), and thereafter appropriately denied plaintiff's motion for reconsideration. There exists no basis upon which to disturb the lower court's rulings.

PROCEDURAL HISTORY

In this action against NJM, plaintiff appeals from the order of the Law Division, Somerset County (Honorable Robert A. Ballard, Jr., P.J.Cv.), entered August 7, 2023, that granted NJM's motion to dismiss plaintiff's complaint for failure to state a claim, pursuant to Rule 4:6-2(e) (Pa378[1]-Pa379). Plaintiff further appeals from Judge Ballard's October 11, 2023 order that denied his motion for reconsideration of the order granting NJM's motion to dismiss (Pa520-Pa521).

The complaint, seeking coverage for the underlying lawsuit against plaintiff

Plaintiff commenced this action against NJM, seeking coverage under his homeowners insurance policy, and defendant GNY Mutual Insurance Company ("GNY"), which issued an insurance policy to the Society Hill at Bernards 1 Condominium Association ("the Association"), claiming he is entitled to liability coverage pursuant to the GNY policy, filing a complaint against the two carriers on December 9, 2022 (Pa1-Pa79).

The complaint against NJM filed by plaintiff sought a declaratory judgment with respect to the rights and obligations of the parties pursuant to the

[1] Numbers in parentheses preceded by "Pa" refer to pages of the appendix to the plaintiff's brief.

policy[2] of homeowners insurance (Da1-Da26[3]) NJM issued to plaintiff and his wife. (Pa44-Pa47). Claiming that the NJM policy provides coverage on an "all risks" basis (Pa3, ¶1, ¶3; Pa28, ¶168), plaintiff alleged that the NJM policy should apply to an underlying lawsuit filed against him by the Association, four members of the Board of Trustees for the Association (Bruce Stoneley, Hilary Carmen, Nannette Carriere and Valerie Whyte), Taylor Management Company ("Taylor"), which was the Association's management company; and Taylor employee Terri L. Reddell, whose role was to serve as the on-site property manager for the Association. Plaintiff's complaint against NJM alleged that the allegations of the underlying lawsuit, bearing Docket No. SOM-L-1520-16, therein amount to an occurrence under the NJM policy and that no exclusions apply (Pa44-Pa47). Count Five of plaintiff's verified complaint alleged breach of contract against NJM (Pa47-Pa48), and Count Six alleged that NJM breached the covenant of good faith and fair dealing (Pa48-Pa51).

---

[2] In support of its motion to dismiss, NJM relied on a certified copy of the policy issued to plaintiff. The version of the NJM policy that is included in plaintiff's appendix, at Pa216-Pa240, is a document that plaintiff filed as an exhibit to his complaint. For the sake of a complete and accurate record, we have included the certified copy of the NJM policy that was before the lower court on NJM's motion in an appendix to this brief, at Da1-Da26.

[3] Numbers in parentheses preceded by "Da" refer to pages of the appendix to this brief.

NJM's motion to dismiss,
granted by the lower court

In lieu of answer, NJM moved to dismiss plaintiff's complaint against it, on the ground that the allegations of the underlying lawsuit (Docket No. SOM-L-1520-16) brought against plaintiff Myers by his condominium homeowners' association and several individuals with whom he had contact were not covered by the "Unit-Owners" policy issued by NJM to plaintiff and his spouse (Pa252-Pa259). NJM's motion demonstrated that Myers' menacing, frightening, intimidating conduct towards the individual plaintiffs described throughout the underlying complaint – conduct Myers did not dispute occurred as described – simply does not fall within the insuring agreement of the personal liability section of the policy, because these action did not amount to "occurrences" under the policy definition of which an intrinsic element is that the event be an accident. Further, NJM demonstrated that Myers' actions were done on purpose, rather than accidentally, and that they further allegedly resulted in harm to the underlying plaintiffs that was neither plainly bodily injury nor property damage. In addition, the NJM policy included a valid and enforceable exclusion for expected and intended injury that would further apply to bar coverage.

The lower court heard oral argument[4] on May 26, 2023 and reserved decision. Thereafter, on August 7, 2023, the lower court issued an order granting NJM's motion, dismissing plaintiff's complaint against it with prejudice (Pa378-Pa379). The lower court's Statement of Reasons (Pa380-Pa397) made clear that plaintiff's conduct as alleged in the underlying complaint "does not constitute an 'accidental occurrence'" and thus is not covered by plaintiff's NJM policy (Pa394). The lower court further rejected plaintiff's claim that the NJM policy is an "all-risks" policy entitling him to coverage, and held that the policy exclusion for expected and intended injury applied (Pa395).

Plaintiff's motion for reconsideration

Thereafter, plaintiff filed a motion for reconsideration (Pa416-Pa516), which was opposed by the defendants. The lower court heard oral argument[5] on the motion on October 11, 2023, and ruled from the bench, denying plaintiff's motion. 2T.14-15. The lower court (Honorable Robert A. Ballard, Jr., P.J.Cv.) entered an order that same day, denying plaintiff's motion for reconsideration

[4] The designation "1T." will refer to the transcript of the motion proceedings held before the Honorable Robert A. Ballard, Jr., P.J.Cv., on May 26, 2023.
[5] The designation "2T" will refer to the transcript of the motion proceedings held before the Honorable Robert A. Ballard, Jr., P.J.Cv., on October 11, 2023.

of the orders that granted the motions to dismiss of both NJM and defendant GNY Mutual Insurance (Pa520-Pa521).

STATEMENT OF FACTS

The underlying lawsuit against plaintiff, for which he sought defense and indemnity in this matter, was an action that was filed in the Chancery Division, and soon thereafter transferred to the Law Division under Docket No. SOM-L-1520-16 (Pa183-Pa193). The underlying plaintiffs were the Association, four members of the Board of Trustees for the Association (Bruce Stoneley, Hilary Carmen, Nannette Carriere and Valerie Whyte), Taylor Management Company ("Taylor"), which is the Association's management company; and Taylor employee Terri L. Reddell, the on-site property manager for the Association (Pa183-Pa193). Myers was the sole defendant in the underlying lawsuit, which set forth three (3) counts against him (Pa183-Pa193).

The First Count of the underlying lawsuit against Myers was entitled Intentional Interference with Contractual Relations (Pa184-Pa188). In that regard, the First Count alleged that Myers "has wantonly, willfully and intentionally disrupted the ongoing contractual relationships between" Reddell and Taylor, Taylor and the Association, and the Association and its membership (Pa184-Pa188). Indeed, the underlying complaint alleged that Reddell was

unable to perform certain duties as the property manager for the Association because she was fearful of "having a violent, harassing or assaultive confrontation" with Myers (Pa185, ¶8), and consequently Taylor was unable to fulfill its contractual obligation to the Association and its members to staff the office (Pa185, ¶9).

The First Count of the Underlying Complaint listed Myers' specific conduct that has allegedly interfered with these contractual relationships:

> a. Intimidating [Reddell], by leaning over her desk in a threatening manner and, thereafter, while blocking her exit, refused to leave until she threatened on at least 3 occasions to call the Police.
>
> b. Intimidating a Board member with his size, particularly Mr. Stoneley by getting in his face and pinning him against a truck while screaming vile and personal insults at him.
>
> c. Disrupting the Annual Meeting of the Members to the point at which Defendant had to be arrested and charged with Disorderly Conduct, Defiant Trespass, Disrupting Meetings and Disturbing Assembly, and then resisting arrest resulting in an additional charge.
>
> d. Returning to the Association clubhouse immediately following his release from custody after his arrest (subparagraph c above) and threatening three Board Members.
>
> e. Sending emails in great volume, several of which contained threats and several of which sought to get Plaintiff Reddell fired.

> f. Contacting the Association's legal counsel and Taylor in attempts to get her fired.
>
> g. Insulting her and others.
>
> h. Cursing Mr. Stoneley.
>
> i. Screaming at her and others.
>
> j. Refusing to leave the Annual Meeting when repeatedly asked to do so by a Police Detective.

(Pa185-Pa186, ¶12). The underlying complaint alleged that as a result of Myers' conduct, Taylor was prevented from staffing the on-site office (Pa185, ¶9, Pa187, ¶14).

The Second Count of the underlying complaint was entitled Assault, and alleged that Myers assaulted each of the individual underlying plaintiffs, again listing Myers' specific conduct alleged to constitute assault:

> a. Defendant committed an assault against Bruce Stoneley by screaming at him approximately one foot from his face, pinning him against a truck and placing him in fear of imminent battery;
>
> b. Defendant committed an assault against Terri Reddell by word and deed designed to scare her, placing her in fear of imminent battery. The actions of the Defendant included, staring at her angrily, insulting her, leaning over her desk to put his face closer to hers, then standing up to tower over her, blocking her exit, and refusing to leave her office when Ms. Reddell demanded that he do so, even after saying on 3 occasions that if he did not leave, she would call the police;

> c. Defendant committed an assault against Board Members Valerie Whyte, Nannette Carriere and Hilary Carmen by, immediately after Defendant's release from arrest for creating a disturbance at the Association's Annual Meeting, and resisting arrest, returned to the Association clubhouse, driving at high speed, storming up to the clubhouse door, which Carmen closed in front of them as he approached, and threatened the Board Members, placing them in fear of imminent battery.

(Pa188-Pa189, ¶¶ 17, 18, 19).

The Third Count of the underlying complaint was entitled Harassment, and alleged that Myers committed acts of harassment by communications in offensively coarse language and in a fashion to cause annoyance or alarm (Pa189-Pa191). The underlying complaint further alleged that Myers engaged in a course of "alarming conduct" towards each of the individual plaintiffs in the underlying lawsuit (Pa190). In that regard, the underlying complaint listed Myers' specific conduct alleged to constitute harassment as to each plaintiff (Pa190).

As to Stoneley, the underlying complaint alleged that Myers "engaged in a course of alarming conduct with purpose to alarm or seriously annoy, by repeatedly approaching Stoneley in an angry fashion on 5 occasions in a single day, screaming at him, insulting him, using foul language and demeaning him personally. On one of these occasions, he put his face within 12 inches of

Stoneley's face, pinning him up against a truck, until he was rescued by a neighbor." (Pa190, ¶23).

As to Reddell, the underlying complaint alleged that Myers "engaged in a course of alarming conduct by communicating with her in coarse language, and scaring and intimidating her in her office, by staring at her in an angry fashion, leaning over her desk so as to put his face closer to hers and staring, then standing up and blocking her from exiting, and refusing to leave when she demanded that he do so. The conduct was so alarming that Reddell had to threaten to call the police, on at least 3 occasions." (Pa190, ¶24).

As to plaintiffs Whyte, Carriere and Carmen, the underlying complaint alleged that Myers "engaged in a course of alarming conduct by disrupting the Annual Meeting of the Association, creating a disturbance in front of the Association membership, and having to be arrested in their presence, in the front row of the room, and in proximity to others. Defendant further engaged in a course of alarming conduct when, immediately after being released from his arrest, returned to the Clubhouse using course [*sic*] language and threatened Hilary Carmen, Nannette Carriere, and Valerie Whyte, such that they had to be escorted home by the Police." (Pa190, ¶25).

The underlying lawsuit sought certain injunctive relief, compensatory damages and punitive damages (Pa183-Pa193).

The NJM policy

NJM issued a Homeowners Policy to John W. Myers and Laura A. Myers, for the policy period of April 26, 2016 to April 26, 2017, which was in effect on the relevant dates involved in the underlying lawsuit (Da1-Da26). The NJM policy was applicable to the premises at 16 Woodward Lane, Building 11, Basking Ridge, New Jersey 07920 (Da1-Da2). The NJM policy provided "Unit-Owners Coverage," which included first-party coverage for certain risks to the property itself, as well as coverage for the personal possessions of the policyholders and coverage for loss of use (Da1-Da2). In addition, Coverage E of the NJM policy provided coverage for personal liability in the amount of $100,000 for each occurrence (Da1-Da2).

Section II of the NJM policy sets forth the liability coverages. In that regard, Section II, subsection A, entitled "Coverage E – Personal Liability," provides, in pertinent part, that:

> If a claim is made or a suit is brought against an **insured** for damages because of **bodily injury** or **property damage** caused by an **occurrence** to which this coverage applies, [NJM] will:
>
> 1. Pay up to our limit of liability for damages for which an **insured** is legally liable; and
>
> 2. Provide a defense at our expense by counsel of our choice, even if the suit is groundless, false or fraudulent....

(Da17). The NJM policy defines "**occurrence**" as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions, which results, during the policy period, in: a. **Bodily injury**; or b. **Property damage**." (Da8). "**Bodily injury**" is defined as "bodily harm, sickness or disease, including required care, loss of services and death that results." (Da7). "**Property damage**" is defined as "physical injury to, destruction of, or loss of use of tangible property." (Da8).

The NJM policy contains an exclusion applicable to Coverage E -- Personal Liability. Section II, Exclusion E, paragraph 1, entitled "Expected or Intended Injury," provides that Coverage E does not apply to:

> **Bodily injury** or **property damage**, with respect to all **insureds**, which is expected or intended by an **insured** even if the **bodily injury** or **property damage**:
>
> > a. is of a different kind, quality or degree than initially expected or intended; or
> >
> > b. is sustained by a different person, entity, real or personal property than initially expected or intended.
>
> However this Exclusion "E.1." does not apply to **bodily injury** resulting from the use of reasonable force by an **insured** to protect persons or property.

(Da19, Exclusions, ¶ E.1).

In addition, the NJM policy requires that an insured give written notice of an alleged "occurrence" as soon as practicable, "[c]ooperate [with NJM] in the

investigation, settlement or defense of any claim or suit" and "promptly forward to [NJM] every notice, demand, summons or other process relating to the **occurrence**." (Da21-Da22).

On December 6, 2018, plaintiff provided NJM with its first notice of the 2016 underlying lawsuit against him, seeking defense and indemnity under his NJM homeowners policy. NJM issued correspondence to Myers on December 13, 2018, informing him that coverage for the claim is not provided by his homeowners policy (Pa242-Pa244). Thereafter, plaintiff sought an Internal Appeal review by NJM, which was completed and denied in writing on December 28, 2018 (Pa246-Pa251).

ARGUMENT

POINT I

THE LOWER COURT'S ORDERS DISMISSING THE COMPLAINT AGAINST NJM PURSUANT TO RULE 4:6-2(e) FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED SHOULD BE AFFIRMED IN ALL RESPECTS, AS SHOULD THE LOWER COURT'S DENIAL OF PLAINTIFF'S MOTION FOR RECONSIDERATION.

Pursuant to Rule 4:6-2(e), a plaintiff's complaint must be dismissed if it has failed to articulate a legal basis entitling plaintiff to relief. Myska v. New Jersey Mfrs. Ins. Co., 440 N.J. Super. 458, 472-73 (App. Div. 2015), app. dsmd. as improvidently granted, 224 N.J. 523 (2016); Sickles v. Cabot Corp., 379 N.J. Super. 100, 106 (App. Div. 2005), certif. denied, 185 N.J. 297 (2005) (reversing trial court's denial of defendant's motion to dismiss for failure to state a claim). In Edwards v. Prudential Prop. & Cas. Co., 357 N.J. Super. 196, 202 (App. Div. 2003), certif. denied, 176 N.J. 278 (2003), the Court succinctly stated that "the motion should be granted if even a generous reading of the allegations does not reveal a legal basis for recovery," citing Camden County Energy Recovery Assocs. v. N.J. Dep't of Environmental Protection, 320 N.J. Super. 59, 64-65 (App. Div. 1999), aff'd o.b., 170 N.J. 246 (2001), and further noted that "[t]he motion may not be denied based on the possibility that discovery may establish

the requisite claim; rather, the legal requisites for plaintiff's claim must be apparent from the complaint itself."

It is well-settled that for the purposes of the early-stage analysis of whether a complaint contains sufficient legal requisites to warrant denial of a motion to dismiss filed in lieu of answer, plaintiffs are to be given "every reasonable inference of fact." Printing Mart-Morristown v. Sharp Electronics Corp., 116 N.J. 739, 746 (1989). Yet courts considering motions to dismiss have long stressed that while they must accept "all well-pleaded facts as true," they "need not credit a complaint's 'bald assertions' or 'legal conclusions.'" In re Burlington Coat Factory Securities Litig., 114 F.3d 1410, 1429 (3d Cir. 1997), noting further that "plaintiffs simply mouth the required conclusion of law," a shortcoming that rendered their allegation that there was no reasonable basis for an earnings projection set forth by defendant patently insufficient. 114 F.3d at 1430. Similarly, "legal conclusions draped in the guise of factual allegations do not benefit from the presumption of truthfulness." Jones v. Intelli-Check, Inc., 274 F. Supp.2d 615, 625 (D.N.J. 2003).

Here, plaintiff filed a complaint that, with respect to NJM, was based entirely on a legal conclusion – that his condo owners insurance policy entitled him to defense and indemnification for a lawsuit against him. The underlying lawsuit was grounded entirely on plaintiff's own conduct that, by any definition,

cannot be considered to constitute an accidental occurrence. NJM's motion to dismiss demonstrated that the allegations of the underlying complaint simply did not come within the plain language of the NJM liability coverage, which pertains only to "occurrences," expressly defined in the policy as "accidental." The lower court thus correctly ruled that the allegations of the underlying complaint, describing specific conduct by plaintiff Myers, do not come within the liability coverage of his NJM policy. As such, the lower court correctly determined that the NJM policy does not insure the risk for which plaintiff sought coverage, and further, even if that were not the case, a valid, unambiguous and enforceable exclusion applies here.

In reviewing a trial court's rulings, New Jersey appellate courts will defer to the trial judge's factual findings so long as they are supported by sufficient credible evidence (see, e.g., State v. Mohammed, 226 N.J. 71, 88 [2016]), and review the trial court's legal interpretations *de novo*. State v. Hathaway, 222 N.J. 453, 467 (2015).

The circumstances of this case, viewed through the lens of the applicable NJM policy language, reveal plainly that there exists no legal basis for the allegations against NJM contained in the plaintiff's verified complaint. Indeed, the lower court carefully examined the NJM policy language in conjunction with the allegations of the underlying complaint, correctly concluding that there is no

manner in which the NJM policy (or likely, any liability policy) provides coverage for the allegations of the lawsuit against Myers, all of which were premised on his own voluntary and intentional conduct. Plaintiff's arguments on appeal provide no basis upon which the lower court's conclusions should be disturbed.

The lower court correctly determined that the NJM policy is not an "all-risks" policy.

The lower court rejected plaintiff's claim that his NJM "unit-owners" insurance policy is an "all-risks" policy, one that plaintiff's complaint alleged covers "all fortuitous losses, in the absence of fraud or other intentional misconduct of the insured" (Pa3, ¶3), unless a specific exclusion applies (Pa395). On appeal, plaintiff continues to insist that the NJM policy provides liability coverage on an "all-risks" basis. Pb11, Pb38, Pb42, Pb48. Plaintiff's insistence in that regard is unfounded. The NJM policy's liability coverage applies only to accidental "occurrences" allegedly causing bodily injury or property damage (Da8, Da11).

In Victory Peach Group, Inc. v. Greater New York Mut. Ins. Co., 310 N.J. Super. 82, 87 (App. Div. 1998), the Court explained the distinction between an "all-risks" policy and a "named peril" policy:

> An "all-risk" policy creates a "special type of insurance extending to risks not usually contemplated, and

> recovery under the policy will generally be allowed, at least for all losses of a fortuitous nature, in the absence of fraud or other intentional misconduct of the insured, unless the policy contains a specific provision expressly excluding the loss from coverage." 43 Am.Jur.2d Insurance § 505 (1982).

Moreover, even if the NJM policy's liability coverage was somehow considered to be an "all-risks" endorsement, the courts have made clear that the fact that a policy is considered to provide "all-risks" coverage does not mean that every risk is automatically covered. In that regard, the Court in Ariston Airline & Catering Supply Co. v. Forbes, 211 N.J. Super. 472, 479 (Law Div. 1986), stated quite succinctly that "[t]he label 'all risk' is essentially a misnomer. All risk policies are not 'all loss' policies; all risk policies…contain express written exclusions and implied exceptions which have been developed by the courts over years." As the lower court determined, this is precisely the case in this instance, where the NJM policy does not include coverage for plaintiff's non-accidental conduct (nor for the purported consequences of such conduct), and expressly excludes alleged injuries that are expected or intended by the insured.

The lower court correctly ruled that the NJM policy provides no liability coverage for the events set forth in the underlying lawsuit.

The issue before the lower court in this declaratory judgment action was whether the personal liability coverage of Myers' condo-owners policy applied to require NJM to provide a defense and indemnification for any liability assessed against the *pro se* plaintiff in this matter, for the allegations of the underlying lawsuit. Relying on the policy language in conjunction with the allegations of the underlying complaint, the lower court appropriately determined that no coverage was owed in this instance. The lower court's findings in that regard are fully supported, and should be affirmed in every respect.

The NJM policy only applies to liability for bodily injury that results from an "occurrence," unequivocally defined as "an accident" that causes "bodily injury," which is defined as "bodily harm, sickness or disease, including required care, loss of services and death that results." (Da7, Da8). In this instance, the underlying complaint specifically described conduct by Myers that was voluntary and intentional – regardless of what was exactly his intent towards the recipient of his actions – and not by any definition an "accident." (Pa183-Pa193). The underlying complaint sought injunctive relief and damages for contract shortcomings occasioned by Myers' behavior, as well as for assault and

harassment (Pa183-Pa193). Bodily injury was not the basis upon which damages were sought.

Plaintiff Myers has never offered an alternative version of his conduct as it was detailed in the underlying lawsuit. Instead, Myers relied on – and repeatedly cited, throughout his voluminous submissions to the lower court – a statement made by Association Counsel Jennifer Alexander in a certification, to the effect that Myers "cannot view himself as having done anything wrong," and does not appreciate the effect he has on other people. See e.g., Pa21, ¶106; see also Pb16. The comments of an attorney for the Association regarding Myers' psyche are hardly dispositive of anything, but even the implication that Myers was unaware of his demeanor does not transform the described actions, which were undeniably voluntary and done on purpose, into actions of an "accidental" nature. The detailed account set forth in the underlying complaint – to the extent it can be said that such conduct caused bodily injury to any of the plaintiffs in that matter – precludes a determination that any such injuries were caused by an accident, as the lower court correctly determined. Myers' brief on appeal similarly contains numerous statements to the effect that he simply did not intend or expect that his conduct would be injurious in any way. See, e.g., Pb42, Pb48. Nor does plaintiff's attempt to transform what occurred into covered occurrences by referring to the conduct described in the underlying complaint

as "accidental occurrences" (Pb25) convert what is objectively intentional conduct to anything else.

It is well-settled that when there is a dispute regarding the applicability of a liability policy, it is the insured's burden to establish that the claim lies within the policy's scope of coverage. Shaler ex rel. Shaler v. Toms River Obstetrics & Gynecology Associates, 383 N.J. Super. 650, 662 (App. Div. 2006), certif. denied, 187 N.J. 82 (2006); F.S. v. L.D., 362 N.J. Super. 161, 166 (App. Div. 2003); Sears Roebuck and Co. v. Nat'l Union Fire Ins. Co., 340 N.J. Super. 223, 234 (App. Div.), certif. denied, 169 N.J. 608 (2001). Moreover, the courts have made clear that policy terms setting forth coverage that are clear and unambiguous must be enforced as written, in accordance with their "plain, ordinary meaning," rather than writing for the insured a better insurance policy than the one purchased. Harleysville Ins. Cos. v. Garitta, 170 N.J. 223, 231 (2001); Zacarias v. Allstate Ins. Co., 168 N.J. 590, 595 (2001); Gibson v. Callaghan, 158 N.J. 662, 670 (1999).

In Sinopoli v. North River Ins. Co., 244 N.J. Super. 245, 250-51 (App. Div. 1990), certif. denied, 127 N.J. 325 (1991), while recognizing that "the language of liability insurance policies should be construed liberally in favor of the insured," this Court nevertheless cautioned that "the rule of liberal construction cannot operate to authorize a perversion of the language and the

intention of the contracting parties." 244 N.J. Super. at 250. In that regard, the Sinopoli panel made clear that courts "cannot rewrite the contract for the parties," noting that neither "is a court permitted, even under the guise of good faith and peculiar circumstances, to alter the terms of an otherwise unambiguous contract. If plainly expressed, the insurers are entitled to have liability limitations construed and enforced as expressed." 244 N.J. Super. at 250-51. The Court further explained that while "a liability policy covers all losses which are fairly within the terms of the policy, it cannot be extended to liabilities or losses which are neither expressly or impliedly within its terms." 244 N.J. Super. at 251.

In this case, plaintiff filed a complaint seeking a determination that NJM was obligated to provide him a defense and indemnity for the underlying lawsuit, which itself alleged entirely intentional conduct amounting to assault and harassment, as well as resulting in interference with contractual relations. The lower court correctly recognized that the account of Myers' specific conduct set forth in the underlying complaint was simply not one that left room to argue that there was "an accident," within the meaning of the policy definition of "occurrence" (Da8). The NJM liability coverage is triggered only when "a claim is made or a suit is brought against an **insured** for damages because of **bodily injury** or **property damage** caused by an **occurrence** to which this coverage

applies" (Da17). Here, as the lower court correctly determined, Myers' conduct, as described in the underlying complaint, was entirely contrary to the existence of a covered "**occurrence**" under the liability endorsement of his NJM policy. Thus, Myers failed in his burden to establish that the underlying lawsuit was within the policy's scope of coverage.

It is a basic tenet of insurance coverage law that coverage cannot be provided for damages that are allegedly the result of an insured's willful wrongdoing; such coverage would contravene public policy. Voorhees v. Preferred Mutual Ins. Co., 128 N.J. 165, 181 (1992); Ruvolo v. American Casualty Co., 39 N.J. 490, 496 (1963); Malanga v. Manufacturers Casualty Ins. Co., 28 N.J. 220, 225 (1958); Merrimack Mutual Fire Ins. Co. v. Coppola, 299 N.J. Super. 219, 227 (App. Div. 1997); Atlantic Employers Ins. Co. v. Tots & Toddlers Pre-school Day Care Center, Inc., 239 N.J. Super. 276, 284 (App. Div. 1990), certif. denied, 122 N.J. 147 (1990). The long-standing public policy barring coverage for intentionally-inflicted injuries "stems from a fear that an individual might be encouraged to inflict injury intentionally if he was assured against the dollar consequences." Burd v. Sussex Mutual Ins. Co., 56 N.J. 383, 398 (1970).

In Voorhees v. Preferred Mutual Ins. Co., supra, the Supreme Court considered the question of when an insurer can refuse to provide coverage for

the intentional action of an insured on the ground that the alleged damages did not result from a covered occurrence, defined in that policy and in the NJM policy as "an accident." The Court concluded that a determination of the accidental nature of alleged wrongdoing rests on an analysis of whether the insured intended or expected to cause an injury. 128 N.J. at 183.

Although generally the courts will look to the subjective intent of the insured to cause an injury by his intentional actions, under certain circumstances, it has been held that "the objective conduct of the actor also determines the actor's subjective intent to injure." Merrimack Mutual Fire Ins. Co. v. Coppola, supra, 299 N.J. Super. at 227. In such cases, "[t]he very nature of the conduct imputes the actor's subjective intent to cause some injury to the victim." 299 N.J. Super. at 227.

That was the case in Harleysville Insurance Companies v. Garitta, supra, where the Court determined that the trial court correctly granted summary judgment declaring that there was no homeowners liability insurance coverage for the death of a visitor who became embroiled in an altercation with the insured's son and was stabbed with a kitchen knife, albeit purportedly without any true intent to cause him serious harm. The Court made clear that while the issue of whether the insured expected or intended to cause the actual injury to a third party is ordinarily not one that may be determined as a matter of law,

summary judgment should be granted where "the record undisputedly demonstrates that such injury was an inherently probable consequence of the insured's conduct." Harleysville Insurance Companies v. Garitta, supra, 170 N.J. at 234.

The lower court correctly reached the same result here, where the descriptions of Myers' conduct made clear that intimidation and scaring the underlying plaintiffs was the inherently probably consequence of his threatening actions. The lower court noted in that regard that "Myers' conduct of 'screaming, cursing, assuming threatening postures, [and] refusing to leave a private office when asked,' did precipitate reactions in the underlying Plaintiffs 'of such behavior that were indeed inherently probable consequences of Myers' action.'" (Pa396). As such, Myers' actions can in no way be the result of an accident or negligence.

Even if Myers could somehow demonstrate that the allegations of the underlying lawsuit come within the insuring agreement of his NJM homeowners policy, the policy's expected or intended injury exclusion applies to bar coverage in that regard. That exclusion, which provides there is no coverage for bodily injury that is "expected or intended" by the insured, specifically sets forth that it applies even if the bodily injury "is of a different kind, quality or degree than initially expected or intended." (Da19).

The Supreme Court of New Jersey has provided guidance with respect to the enforceability of policy exclusions. In that regard, the Court has repeatedly emphasized that "exclusions are presumptively valid and will be given effect if 'specific, plain, clear, prominent, and not contrary to public policy.'" Princeton Ins. Co. v. Chunmuang, 151 N.J. 80, 95 (1997), quoting Doto v. Russo, 140 N.J. 544, 559 (1995). Thus, "if the words used in an exclusionary clause are clear and unambiguous, 'a court should not engage in a strained construction to support the imposition of liability.'" Flomerfelt v. Cardiello, 202 N.J. 432, 442 (2010), quoting Longobardi v. Chubb Ins. Co., 121 N.J. 530, 537 (1990). Rather, "courts must be careful not to disregard the 'clear import and intent' of a policy's exclusion (citing Westchester Fire Ins. Co. v. Cont'l Ins. Cos., 126 N.J. Super. 29, 41 [App. Div. 1973]), and "evaluate whether, utilizing a 'fair interpretation' of the language, it is ambiguous'" (citing Stafford v. T.H.E. Ins. Co., 309 N.J. Super. 97, 105 [App. Div. 1998]). Flomerfelt v. Cardiello, supra, 202 N.J. at 442.

The expected or intended injury exclusion contained in the NJM policy has indeed been the subject of such an evaluation by the courts of our state, and has been found to be enforceable. In Harleysville Ins. Cos. v. Garitta, supra, 170 N.J. at 231, the Court made clear this was so, stating unequivocally that "policy provisions that exclude coverage resulting from intentional wrongful

acts are 'common,' are 'accepted as valid limitations,' and are consistent with public policy." 170 N.J. at 231, quoting Allstate Ins. Co. v. Malec, 104 N.J. 1, 6 (1986) (citing Ruvolo v. Am. Cas. Co., supra, 39 N.J. at 496). Accordingly, the lower court expressly found that the exclusion contained in the NJM policy was valid, noting that the exclusion is "'specific, plain, clear, prominent, and not contrary to public policy.'" (Pa396).

The NJM policy contains a valid exclusion from liability coverage that applies to bar coverage for bodily injury that is "expected or intended" by the insured, even if the bodily injury "is of a different kind, quality or degree than initially expected or intended." (Da19). Thus, even if it could somehow be determined that the allegations of the underlying complaint amounted to an "occurrence" under Myers' homeowners policy, liability for any alleged injuries the underlying plaintiffs sustained as a result of Myers' behavior – intimidating postures, threatening acts, screaming and cursing, et al. – all of which are acts that inherently carry with them the intention or expectation that the recipient of the behavior will have a reaction as a result, unquestionably are barred from the coverage of the NJM policy by the operation of the "intentional acts" exclusion.

Under these circumstances, the lower court appropriately determined that there exists no legal basis for the allegations against NJM contained in plaintiff's complaint, and accordingly dismissed plaintiff's complaint against NJM with

prejudice. Plaintiff's submission on appeal provides no basis upon which to disturb the orders below.

Plaintiff's motion for reconsideration (Pa416-Pa417) of the dismissal of his complaint was little more than a rehash of his earlier arguments in opposition to NJM's motion to dismiss, and does not warrant significant discussion. We note however, that plaintiff attempted to submit certain "video evidence" that could have been, but was not, submitted in opposition to NJM's motion to dismiss. That "video evidence" has now found its way to the record[6] in this matter. It remains the position of NJM that the 2016 "video evidence" was submitted in this case for the first time on plaintiff's motion for reconsideration, was rejected by the motion judge (2T.5-6, 2T.8-9), and is not properly before this Court.

[6] By motion filed on February 27, 2024, NJM sought to strike the so-called "video evidence" submitted by plaintiff, as well as all references to the "video evidence" throughout the appellant's brief (Pb18, Pb20, Pb21, Pb29-30, Pb43, Pb44, Pb45), and in the appendix to the brief (Pa526, Pa527). The motion was denied by order entered March 18, 2024.

CONCLUSION

Plaintiff brought this action alleging that NJM should be responsible, under a homeowners insurance policy it issued to cover his condominium unit, for defense and indemnity arising out of a lawsuit brought against him by the homeowners association, its on-site manager, and several other individuals. The lower court granted NJM's motion to dismiss pursuant to Rule 4:6-2(e), determining that the allegations of the underlying lawsuit do not fall within the liability coverage insuring agreement of plaintiff's policy because they all allege intentional conduct and specifically describe behavior that could not be accidental and was the product of plaintiff's voluntary actions. The lower court thus found that NJM had no obligation to plaintiff Myers, with respect to the underlying lawsuit, dismissing the complaint against it with prejudice and later denying plaintiff's motion for reconsideration. We respectfully request that this Court affirm the orders of the lower court in all respects.

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Dated: May 6, 2024