Superior Court of New Jersey
Appellate Division

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Docket No. A-001918

UNITED STATES FIRE INSURANCE COMPANY,

Plaintiff-Respondent,

v.

MACHANE OF RICHMOND, LLC,

Defendant-Respondent.

and

ELIYAHU KORENFELD,

Intervenor-Appellant.

MACHANE OF RICHMOND, LLC,

Third-Party Plaintiff

v.

Gross & Co., LLC,

Third-Party Defendant.

CIVIL ACTION

ON APPEAL FROM THE SUPERIOR COURT OF NEW JERSEY LAW DIVISION, OCEAN COUNTY

Trial Court Docket No. OCN-L-1465-20

Sat Below:
HON. CRAIG L. WELLERSON, J.S.C.

AMENDED BRIEF & APPENDIX (Pages Ia001-Ia148) FOR INTERVENOR-APPELLANT ELIYAHU KORENFELD

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PRELIMINARY STATEMENT

Intervenor-Appellant, Eliyahu Korenfeld, a camper who was seriously injured in an automobile accident in August, 2019 while attending camp at Camp Machane of Richmond, seeks to reverse the lower's court's decision granting Plaintiff United States Fire Insurance Company's Motion for Summary Judgment and rescinding Defendant Camp Machane of Richmond, LLC's insurance policy, finding it *void ab initio* as a result of the camp owner's innocent misrepresentation when applying for supplemental insurance.

While filling out an application for $1 million in supplemental insurance coverage for 12-15 passenger vans he had already leased to be used to transport summer camp children, the owner of Camp Machane of Richmond misinterpreted a question asked on a one-page questionnaire as to whether it rents/hires 12-15 passenger vans. The insurer does not offer coverage in excess of $500,000 on 12-15 passenger vans; however, the camp owner was never adequately informed that those types of vans were not eligible for $1,000,000 supplemental coverage.

The court erred in granting summary judgment because the questions on the questionnaire were vague and ambiguous, leading the camp owner to misinterpret them. Pursuant to New Jersey law, ambiguous questions in an insurance application are construed against the insurer and can only lead to rescission if the policyholder, in answering the question, was intentionally misleading the insurance company,

which was not the case here. Moreover, in the light most favorable to the opposing parties, there were material issues of fact and issues of reliance as to whether the camp owner's answer to the vague question on the one-page questionnaire should disqualify the camp and all the injured campers from the $1 million in coverage that is afforded to them.

Additionally, U.S. Fire's own policy in the relevant section provided that the automobile coverage is "void" if the insured *intentionally* misrepresented a material fact about the insured vehicles. The insured's state of mind is a factual issue not to be decided in summary judgment, particularly where the record shows, at most, an innocent mistake in answering the question by the insured.

Finally, U.S. Fire's policy also did not exclude coverage for 12-15 passenger vans. An innocent, injured party should not be punished as a matter of public policy and equity, particularly where the insured made an innocent mistake in answering a questionnaire and was never provided with any notice either when filling out the application for supplemental insurance or in the policy itself that 12-15 passenger vans were not eligible for coverage.

PROCEDURAL HISTORY

On June 22, 2020, Plaintiff United States Fire Insurance Company ("U.S. Fire") filed a complaint for recission, declaratory judgment and reimbursement

against Defendant Machane of Richmond, LLC ("Machane").[1] (Ia001). U.S. Fire asserted that the liability certificate of coverage issued to Machane, under a master policy, was void *ab initio* due to Machane's material misrepresentations of fact and, therefore, it was not obligated to provide Machane with a defense or indemnification under the policy. (Ia001).

Machane filed an answer to the complaint on September 29, 2020. (Ia023). Eliyahu Korenfeld ("Korenfeld") filed a motion to intervene, which was granted on February 25, 2021. (Ia033).

On June 14, 2021, Machane filed an amended answer and third-party complaint against third-party defendant Gross & Co., LLC ("Gross") alleging breach of contract and related claims for failing to obtain coverage for Machane's 15-passenger vans. (Ia035).

On July 1, 2022, U.S. Fire moved for summary judgment. (Ia052; Ia070). Following oral argument, the trial court reserved its decision and requested supplemental briefing on the issue of equitable fraud, *i.e.*, whether or not an innocent mistake on an automobile insurance application can result in the policy being rescinded. (1Tr64-66). Following supplemental briefing and a second round of oral

[1] On June 30, 2020, Korenfeld filed a personal injury complaint against Defendants Machane of Richmond, LLC; Alexander Guttman; and Camp Machane, LLC. in the United States District Court for the District of New Jersey.

argument, the Honorable Craig L. Wellerson, on October 21, 2022, held that there was a material misrepresentation that would support rescission and granted the motion for summary judgment. (2Tr46-50). The U.S. Fire insurance policy issued by U.S. Fire to Machane was rescinded and declared void *ab initio*. (Ia051).

On November 16, 2022, U.S. Fire moved to have the summary judgment order certified as a final judgment or to sever the third-party action instituted by Machane against Gross. (Ia052). On January 19, 2023, Machane and Gross settled their third-party action and filed a notice of voluntary dismissal. (Ia054). On January 20, 2023, the trial court entered an order certifying the October 21, 2022 summary judgment order as a final judgment. (Ia052). Korenfeld was not invited to sign the voluntary dismissal and objected to the dismissal. (Ia056). On March 2, 2023, Korenfeld filed a Notice of Appeal. (Ia058).

STATEMENT OF THE FACTS

In 2018, and a few summers prior to that, Alexander Guttman ("Guttman") (prior to becoming owner of Camp Machane and the applicant of the insurance policy at issue) worked as the Program Director at Camp Chaburas Bein Hazmanin ("CBH") in Virginia for young boys from New York and New Jersey. (Ia325-327). Guttman was responsible for, *inter alia*, organizing field trips and providing transportation. (Ia327). To transport campers, Guttman used vans, including 12 to 15-passenger vans. (Ia327). In later summers, Guttman was responsible for renting

such vans from Hertz. (Ia327).

CBH always procured insurance from Gross, an insurance broker, but Guttman was never personally involved in obtaining the insurance. (Ia331).

In May of 2019, Guttman, along with his wife, formed Camp Machane, LLC (hereinafter referred to interchangeably as "Guttman" or "Machane"). (Ia344; Ia085). The summer camp was modeled after Camp CBH, but was intended for high-school aged youths, and was scheduled to operate in Virginia from August 6, 2019, through August 26, 2019. (Ia101). According to the camp's application, transportation for certain activities would be arranged by the camp. (Ia101). To effectuate the camp's transportation needs, Guttman rented four twelve (12) to fifteen (15) seat "Ford Transit vans" and one "Full-size Sedan". (Ia332; 334; Ia114-117). They were to be driven by camp staff. (Ia338; Ia012).

On May 30, 2019, Guttman communicated by phone and by email with a representative from Gross to procure insurance coverage for the 2019 summer camp operations. (Ia331-332; Ia335-336; Ia276-280). In the email, Guttman wrote that "per our conversation earlier today, [l]ast summer we had a camp policy under the name CHABURAS BEIN HAZMANIM LLC" and that "[w]e would like to renew our summer policy under the name Machane Of Richmond LLC[.]" (Ia276). Also in the May 30, 2019 email from Guttman to Gross, he asked the representative he spoke with to "[p]lease send over what kind of policy we had last summer for reference."

(Ia276). According to Guttman's testimony, Guttman contacted Gross for the express purpose of obtaining "general liability" insurance, as well as "extra insurance for vans". (Ia332). Guttman stated that he informed Gross that he was "planning to use vans to transport campers to activities and events". (Ia332).

On June 20, 2019, Gross's employee, Devora Rosenthal ("Rosenthal"), contacted Guttman and asked if he was "interested in obtaining a [General Liability] policy for the summer of 2019". (Ia332).

On June 28, 2019, Rosenthal emailed Guttman, attaching the master policy from U.S. Fire and explaining that coverage for "Non-Owned & Hired auto liability" could be added to the general liability policy to cover for "bodily injury and property damage caused by a vehicle you hire (including rented or borrowed vehicles) or caused by non-owned vehicles". (Ia119). Rosenthal explained that "[c]overage kicks in if there is an auto accident and you are sued." (Ia119). Rosenthal's June 28, 2019 communication makes no mention whatsoever that the Non-Owned & Hired auto liability policy excluded coverage of the 15 passenger vans. (Ia119).[2] Guttman told Rosenthal that he wanted at least $1 million in liability coverage for vans that he would be renting. (Ia345). With the exception of these two emails, Guttman

[2] Rosenthal's June 28, 2019, email makes reference to "the attached master Policy (pg 423 and on) that explains the Hired and Non owned Auto". The version of the "master Policy" attached to Rosenthal's June 28, 2019, email, however, was not included as part of U.S. Fire's motion for summary judgment.

communicated "mostly over the phone" with Rosenthal regarding quotes for general liability insurance and "extra insurance" for rented vans. (Ia336).

Guttman leased the 4 vans from Hertz on July 9, 2019. (Ia114-117). Guttman was told to apply online with U.S. Fire's underwriter for the extra insurance. (Ia409). Guttman subsequently completed Dean's "Camps, Clinics and Conferences Application" online. (Ia336; 122-126; 409-411; 456-463; 582-586). The application states that "[a]ccident and liability insurance coverage is offered as a standard product with optional coverage also available such as . . . hired and non-owned automobile" (Ia582), however, there is nothing in the application excluding 12-15 passenger vans. (Ia582-586). Applicants are permitted to select hired and non-owned auto liability coverage in the amount of $150,000 or $500,000 without being subject to additional underwriting. (Ia585).[3] There is an additional note that "$1,000,000 hired and non-owned automobile liability coverage is available but subject to additional underwriting." (Ia585). This paragraph does not indicate that 12 to 15 passenger vans are ineligible at the $1,000,000 coverage option, nor does it make any reference at all to 12 to 15 passenger vans. (Ia585).

On July 30, 2019, Rosenthal sent an email to Kristin Hockemeyer, the

[3] In the 2022 version of the same application is the following: "*12 or 15 plus passenger vans are ineligible for this program*". (Ia592). The 2019 version of the "Camps, Clinics & Conferences Application", however, did not contain any such ineligibility clause. Gross "suspect[s] that this change…in the form application…was added because of the events in this case." (Ia579).

underwriter on this case for Francis L. Dean & Associates, LLC ("FL Dean"),[4] enclosing Guttman's completed insurance application (Ia336; 122-126; 590-594; 581-590[5]). The application Gross sent FL Dean included the $1 million in "Non-Owned/Hired Auto" coverage. (Ia122-126). FL Dean was the national program administrator for U.S. Fire's sports and entertainment insurance program. (122-126; 481). According to FL Dean, this "specialty insurance program [was] developed to cover the inherent risks involved for the schools, park districts, coaches, directors and participants of today's conferences, sports camps and clinics". (Ia581-590). The FL Dean application states that "[a]ccident and liability insurance coverage is offered as a standard product with optional coverage also available such as . . . hired and non-owned automobiles". (Ia582).

FL Dean's application states "Hired and Non-Owned Automobile Liability Coverage", "provides protection for rented, borrowed and other non-owned vehicles driven on camp, clinic or conference business". (Ia583). That same page with respect to the "General Liability Coverage" portion of the application, is a section entitled

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[4] FL Dean is the underwriter and program administrator for U.S. Fire's Sports and Entertainment Insurance Program. (Ia481) In this role, FL Dean, *inter alia*, underwrote policies pursuant to underwriting guidelines established by U.S. Fire. (Ia481; 490).

[5] U.S. Fire failed to submit as part of its motion the completed version of the application that Guttman submitted to Gross in 2019, nor did U.S. Fire provide a blank copy of the Dean application as it existed in **2019**. Instead, U.S. Fire submitted only the July 31, 2019, email from Rosenthal to Hockemeyer, which U.S. Fire claims includes the information that Guttman provided to Gross in the 2019 application. (Ia122-126).

"Exclusions" and states in bold, black letters that "[t]his program is not available for surfing activities, ice hockey, lacrosse, rugby or tackle football camps and clinics" (Ia583). Conspicuously absent from that page or in anywhere in the application is any reference to, or mention of, 12 to 15 passenger vans. (Ia583-586).

The next page of FL Dean's application, entitled "Proposed Policyholder," requires applicants to provide certain information concerning their camp, clinic, or conference. (Ia583). This page also contains extensive lists of "Ineligible Activity Types," including such things as "High Ropes Courses, Zip Lines, Trampolines, Mechanical Bulls, Rock Climbing, Firearms/Riflery, Surfing Activities, Whitewater Rafting, Gymnastics, Jet Skis, Motorized Boats…." (Ia583). Once again, neither list references or mentions 12 to 15 passenger vans being excluded.

Guttman testified that he filled out the application on July 30, 2019 in order to "obtain insurance coverage for the vans". (Ia337). Machane's application requested general liability coverage in the aggregate amount of $2,000,000, as well as "Optional Coverage[]" for "Non-Owned Hired Auto Coverage" in the amount of $1,000,000. (Ia122-126). The application informed Dean that Machane was seeking Non-Owned Hired Auto coverage for an overnight camp running from August 6, 2019, just one week away, to August 27, 2019, and consisting of fifty (50) campers and five (5) staff members. (Id.). The application revealed Machane's 2019 summer camp activities, which included sporting events at "local parks," as well as other

"[o]ffsite activities" like "Motor Boating, Ziplining, Ropes course, Paintball shooting and Swimming etc." (Id).

On July 31, 2019, Dean sent Rosenthal an email informing her that, if Machane wished to obtain the $1,000,000 in Non-Owned/Hired Auto coverage, Guttman would have to complete a Non-Owned/Hired Auto Questionnaire ("Questionnaire")". (Ia124). Despite having received Machane's application seeking Non-Owned/Hired Auto coverage for an overnight summer camp with approximately fifty-five (55) campers and staff that would be engaging in, among other things, "[o]ffsite activities," Dean's email to Rosenthal did not reference or discuss 12-15 passenger vans, or otherwise mention that such high-capacity passenger vehicles would be excluded from, or ineligible for, coverage. (Ia124).

Later that day, Rosenthal emailed the Questionnaire to Guttman and asked that it be filled out "so we can proceed with your quote". (Ia337-338; 139; 012). Guttman completed and signed the Questionnaire on behalf of Machane and returned it to Rosenthal the following day. (Ia337-338; 012; 139).

The Questionnaire was titled "Non-Owned/hired Auto Supplement". (Ia012). When filling out the form, Guttman was not sure what the industry term "hired auto supplement" meant, but in seeing the word "Non-owned", Guttman presumed that word meant the same thing as rental vehicles, such as the passenger vans for transporting campers about which he had already communicated with Rosenthal.

(Ia344-345; Ia012). The form consisted of six questions with subparts. (Ia012). The first question asked if the organization "own[ed] or lease[d]" the vehicles that were to be insured. (Ia012). He answered "No" to this question that made no sense because the sole purpose of the non-owner hired application was to obtain insurance for leased motor vehicles. Guttman thought he was confirming, by answering "No" that it was his intention to rent vehicles. (Ia012; Ia124-125). Therefore, it was a confusing question. Guttman answered "yes" to the second question "[d]o employees or volunteers regularly use their autos for company business. (Ia012). That response was not correct as he had leased vehicles to be used and staff were not going to use their own vehicles. (Ia012; Ia344-345). Guttman believed, however, that "their autos" referred to the vans that would be rented and not to the employees' own personal vehicles, since he had decided that he was renting vans. (Ia344-345). Thus, the second question combined with the first one should have put Dean on notice that something was amiss. Although an insurer has no duty to undertake an investigation, where there was a statement that suggests the need for further investigation, an insurer may then incur such a duty.

Above question 4 in bold were the words "**Hired Auto Liability**". (Ia012). Without any definition or explanation provided in the form, Guttman assumed that "hired auto" meant hiring a driver to transport campers in a commercial vehicle such as a van, bus, or limousine service. (Ia012; 344-345). So when asked the first part of

question 4, "Do you *hire or rent* vehicles *during* your fair/festival/event," (emphasis added) Guttman responded "No". (Ia337; 344-347). Guttman testified, however, that he did not believe question 4 was referring to vans he had *already rented* for the 2019 *summer camp* season. (Ia338). Because his answer was "No" to the first part of Question 4, Guttman responded "N/A" to the second part of Question 4 – "*If yes*, please describe vehicle types, estimated number, duration and usage" (emphasis added) (Ia338). Likewise, Guttman provided no response to the third part of Question 4, which asks, "*If yes* to #4, are any of these vehicles 12 or 15-passenger vans?" (emphasis added). (Ia012). Again, Guttman made no response to that question because asked, "If yes to #4…."

In checking off "No", Guttman was not trying to mislead Dean or his broker or anyone else when answering the question, nor was he attempting to hide the fact that he was renting 15-passenger vans. (Ia337; 344-347). To the contrary, Guttman testified that he believed the purpose of the application and Questionnaire was "to get insurance on it for people that are going to be driving my rented vehicles". (Ia338). Indeed, his sole purpose in filling out the Questionnaire and spending an additional $850 in premiums was only to obtain liability coverage for the 12-15 passenger vans he had rented from Hertz.

Rosenthal emailed the completed Questionnaire to Hockemeyer later in the day on August 1, 2019, now just five days until camp opening, and asked that she

quote the total cost for the premium. (Ia124). On August 6, 2019, the day the camp opened, Hockemeyer emailed Rosenthal a four page "Quotation" and asked that she contact Dean if she "would like to bind coverage". (Ia122-124; 145-148).

The four-page quotation attached to Hockemeyer's email contained various price quotations for Dean's "Camps, Clinics & Conferences Application" (145-148). The first page or "Cover Sheet" stated, in bold letters and in a separate, individual paragraph, the following:

> **Exclusions: In addition, scheduled activities exclusion endorsement applies: Ropes Course, Tackle Football, Motor Boating, Inflatable Amusement Devices, Carnival Rides, Knockerball/Bubble Soccer, Bungee Devices, Fireworks [sic], Mechanical Bucking Devices: including Multi Ride Attachments, Permanent & Mobile Rock Wall Structures, Security Services Other Than Contracted Law Enforcement Officers, Trampolines, and Zip Lines.**

(Ia145). On the second page of the quotation, again in bold letters and a separate, individual paragraph, Dean provides a second list of exclusions. (Ia146). This paragraph reads:

> **In addition, scheduled activities exclusion endorsement applies: Ropes Course, Tackle Football, Motor Boating, Inflatable Amusement Devices, Carnival Rides, Knockerball/Bubble Soccer, Bungee Devices, Fireworks [sic], Mechanical Bucking Devices: including Multi Ride Attachments, Permanent & Mobile Rock Wall Structures, Security Services Other Than Contracted Law Enforcement Officers, Trampolines, and Zip Lines.**

(Ia146).

Nothing was mentioned about vans.

Optional "Hired/Nonowned Auto Liability Coverage" is listed on page three of the Quote (Ia146). This section provides as follows:

> **Hired/Nonowned Auto Liability Coverage Options**
>
> Option 1: $150,000 Hired/Non-owned Auto Liability Coverage can be added for an additional premium of $225.00.
>
> Option 2: $500,000 Hired/Non-owned Auto Liability Coverage can be added for an additional premium of $500.00
>
> Option 3: $1,000,000 Hired/Non-owned Auto Liability coverage is available for additional premium subject to a Minimum Premium of $850.00 and our receipt and approval of our Hired/Non-owned Auto supplemental application. Please note that 12 and 15+ Passenger Vans are excluded. Please contact me if you would like this application. **Please note all HNOA premiums are Fully Earned at Inception**

(emphasis in original) (Ia147). Hidden in "Option 3" is that "12 and 15+ Passenger Vans are excluded," however, the language is not in bold text, nor does it appear in a separate, individual paragraph. (Ia147). Moreover, unlike the application, the language does not specify whether or not the exclusion applies to the option for $150,000, $500,000, or only $1,000,000. (Ia147).

Later on August 6th, it was confirmed between Rosenthal and Hockemeyer that coverage was bound effective that day with $1 million HNOA. (Ia124). August 6, 2019 was the day the camp had opened and campers had already been transported in the vans to the camp.

Nine days later, on August 15, 2019, one of the four 15-passenger vans rented by Machane and being driven by a Machane employee was involved in a car

accident, severely injuring, among others, Intervenor-Appellant Korenfeld. (Ia014-015).

LEGAL ARGUMENTS

I. STANDARD OF REVIEW

This Court reviews a grant of summary judgment *de novo*, using the same standard that governed the trial court's decision. *Samolyk v. Berthe*, 251 N.J. 73, 78 (2022). Summary judgment is a drastic remedy and should only be granted if the competent evidentiary materials are sufficient to demonstrate that there are no genuine issues of material fact remaining for trial. *See Brill v. Guardian Life Ins. Co. of Am.*, 142 N.J. 520, 540 (1995); *see also R*. 4:46–2(c). If a reasonable factfinder could resolve the disputed issue in favor of the non-moving party, summary judgment must be denied. *Globe Motor Co. v. Igdalev*, 225 N.J. 469, 481 (2016), *citing Bhagat v. Bhagat*, 217 N.J. 22, 38 (2014).

II. THE COURT ERRED IN GRANTING SUMMARY JUDGMENT

A. The Trial Court Erred In Finding That The Question At Issue On The Insurance Policy Application Was Unambiguous. (Raised below: Ia012; 1T61, 64; 2T:4-5)

During both the September 23, 2022 and October 22, 2022 hearings on U.S. Fire's motion for summary judgment, Judge Wellerson focused on Question 4 of the Questionnaire and said he did not believe it was ambiguous. (Ia012; 1Tr., 61:10-13; 64:22-65:11; 2Tr., 4:22-5:4). However, because the Questionnaire used boilerplate

language with insider terminology such as "Non-Owned Vehicles" and "Hired Auto", language unfamiliar to the average layperson, combined with the 2019 Dean Application (Ia012; 582-586) which failed to highlight any 12-15 passenger van exclusions, the question was indeed ambiguous and, therefore, the court erred in granting summary judgment. The lower court overlooked all of the other paperwork and communications between the parties which laid the groundwork for Guttman's misunderstanding of question 4. Especially grievous to this case was the Quote he received which listed numerous Exclusions but said nothing about 12-15 passenger vans. (Ia140), and the fact that the Master policy also did not contain such an Exclusion.

It is well settled in New Jersey that ambiguities in an insurance contract are construed against the insurance company. This principle is likewise applicable when construing an insurance application. *Fellippello v. Allsate Ins. Co*., 172 N.J. Super. 249, 257 (App. Div. 1979). Thus, although intentional acts designed to mislead an insurance company justify rescission[6], rescission is not appropriate if the insured's misrepresentation results from an ambiguity in the insurer's questions on the application for insurance. *American Policyholders' Ins. Co. v. Portale*, 88 N.J. Super. 429 (App. Div. 1965, *overruled on other grounds*, *State Farm v. Wall*, 92

[6] *Pioneer National Title Ins. Co. v. Lucas*, 155 N.J. Super. 332 (App. Div.), *aff'd o.b.,* 78 N.J. 320 (1978) (rescission of title insurance policy justified where attorney ordering search asked for standard 60-year search when he knew of alleged title claims more than 60 years old).

N.J. Super. 92 (1966) (finding insured could misunderstand meaning of word "conviction" relating to disclosure of motor vehicle violations in insurance application, and rescission was not warranted).

The determination of whether terms in a contract are ambiguous is a question of law. *Taylor v. Continental Group Change in Control Severance Pay Plan*, 933 F. 2d 1227, 1232 (3d. Cir. 1991). When "determining whether there is ambiguity [in an insurance contract, courts] consider whether an average policyholder could reasonably understand the scope of coverage, and whether better drafting could [have] put the issue beyond debate." *Sosa v. Massachusetts Bay Ins. Co.*, 458 N.J. Super. 639, 646 (App. Div. 2019). "When an insurance policy's language fairly supports two meanings, one that favors the insurer, and the other that favors the insured, the policy should be construed to sustain coverage." *President v. Jenkins*, 180 N.J. 550, 563 (2004); *see Sosa*, 458 N.J. Super. at 646-47 ("'[I]f there is more than one possible interpretation of the language, courts apply the meaning that supports coverage rather than the one that limits it'"), *quoting Flomerfelt v. Cardiello*, 202 N.J. 432, 442 (2010); *Voorhees v. Preferred Mut. Ins. Co.*, 128 N.J. 165, 175 (1992) (holding that, "[w]hen the meaning of a phrase is ambiguous, the ambiguity is resolved in favor of the insured . . . and in line with an insured's objectively-reasonable expectations (internal quotation marks and citations omitted)"); *see also U.S. v. Pantelidis*, 335 F.3d 226, 235 (3d. Cir. 2003) ("A

contract is ambiguous where the contract is susceptible of more than one meaning or if it is subject to reasonable alternative interpretations (internal quotation marks and citations omitted)."

In the case *sub judice*, when analyzing the ambiguity of the Questionnaire, it was critical for the court to consider not only the language of the Questionnaire but the context in which the insured answered the questions. Here, Guttman was told he would need a separate insurance supplement for the vans. Guttman went online and filled out the Questionnaire for the sole purpose of securing motor vehicle insurance for four 12-15 passenger vans that he had *already leased* from Hertz.

In filling out the Dean application online on July 30, 2019, U.S. Fire merely alerted Guttman about the following "ineligible" activities that were excluded under this policy: "High Ropes Courses, Zip Lines, Trampolines, Mechanical Bulls, Rock Climbing, Firearms/Riflery, Surfing Activities, Whitewater Rafting, Gymnastics, Jet Skis, Motorized Boats…." (Ia578; 584). Yet, that 2019 application with regard to Hired and non-owned auto insurance ("HNOA") coverage said nothing about "exclusions" or "ineligibility" of any non-owned vehicles. The application implied that a camp could lease or rent for coverage limits of $150,000 or $500,000. To obtain $1 million in limits, the application only said "coverage is available but subject to additional underwriting." (Ia585). Thus, it was not clear to Guttman on the online HNOA application that 12-15 passenger vans were excluded from $1

million coverage.

Any applicant filling out the online application could reasonably think that because the application enumerated 19 ineligible activities noted above, he would be able to get coverage including the $1 million HNOA for 12-15 passenger vans. In fact, nothing in the 2019 application would have given the applicant pause or concern as there were no warnings about excluding coverage for 12-15 passenger vans.

Turning to the Questionnaire, which Guttman filled out to obtain additional coverage and returned two days after the initial application, the very first question under the title "Non-Owned/Hired Auto Supplement" asks about owning or long-term leasing of vehicles. It then *warns* the applicant in bold letters and larger print that if the applicant does own or lease vehicles, "**you must obtain a Business Auto policy, elsewhere**." (Ia585) *(emphasis in original)).* Curiously, when Question 4 asked about whether any of the rented vehicles were "12 or 15-passenger vans," it did not contain a similar warning to the applicant that "**you must obtain a Business Auto policy, elsewhere.**" Instead, the application misleadingly asked, "How many?" (Ia585) (emphasis in original)). That implies those vehicles are allowed but may be limited in number. That too is misleading.

The next section on the Questionnaire was titled "Non-Owned Vehicles." Question 2 asked if Guttman's employees "use their autos for company business"

and Guttman answered "yes," even though his employees were not using their own vehicles, but rather were using Guttman's Hertz vans. (Ia345). The reason, Guttman explained, was that he believed the word "their" in Question 2 referred to the vans Guttman was renting and not to the employees' personal vehicles since the question was under the heading of "Non-Owned Vehicles", and Guttman interpreted "Non-Owned" to mean rentals. (Ia345).

For the same reason, Guttman answered "yes" to question 3, which asked "[d]o you verify that insurance is in place with limits of at least $300,000 before employees or volunteers can use their vehicles? (Ia012). Guttman testified that he also answered "yes" to this question because it fell under the heading "Non-Owned Vehicles," and because he had asked Rosenthal to bind coverage for the rental vehicles for at least $1 million, "which was way over 300,000." (Ia345).

With regard to the question at issue – Question 4 in the Questionnaire – Guttman testified that because Question 4 fell under a heading titled "Hired Auto Liability," he believed that by asking about a "Hired" or "Rented" vehicle, Question 4 was asking if he was going to be using a bus, car, or limousine service. (Ia344-345; 012). As a result, in response to the first question, "Do you *hire or rent* vehicles *during* your *fair/festival/event*," Guttman responded "No" (*Id (emphasis added)*). Because he answered "No" to the first part, Guttman responded "N/A" to the second part of Question 4 – "*[i]f yes*, please describe vehicle types, estimated number,

duration and usage" (emphasis added) (*Id*.). Likewise, Guttman provided no response to the third part of Question 4, which asks, "*[i]f yes* to #4, are any of these vehicles 12 or 15-passenger vans?" (emphasis added) (*Id*.).

If the application were simply worded it would have asked if Guttman was going to use 12-15 passenger vans. Instead, the application asks, "Do you hire or rent vehicles *during* your *fair/festival/event*" (Ia012) (emphasis added). The Questionnaire does not ask about vehicles hired or rented during a summer camp, nor is a definition of "fair/festival/event" provided. Further, the question refers to vehicles hired or rented *during*, but not *before*, a *fair/festival/event*. As discussed, Guttman had already leased the vans for use in connection with the 2019 Summer Camp prior to submitting the Questionnaire. In fact, the vans were used on August 6, 2019 to bring campers to camp before the policy was even issued.

Question 4 also does not ask Guttman to disclose whether he was going to *use* rental vehicles at the 2019 *summer camp*, [or] whether any of the rental vehicles it *used* were 12-15 passenger vans (emphasis added). (Ia012). The verb "use" does not appear anywhere in Question 4, and while the question's third part does state "*[i]f yes* to #4, are any of these vehicles 12 or 15-passenger vans," Guttman was not required to provide a response thereto because of his previous answer of "No" to the first part. (Ia012).

Especially ambiguous is Question 4's inclusion of the polysemes "hire" and

"rent," in the question "Do you hire or rent vehicles during your fair/festival/event. Both words are subject to at least two meanings. "Hire" and "rent" can mean the *obtainment* of a temporary use of someone or something for an agreed upon payment. But it can also mean the *granting* of a temporary use of something to another. That was exactly how Guttman understood the terms. As Guttman testified, he replied "No" when faced with the first part of Question 4 because he would not be renting, hiring, or otherwise granting the use of the 12-15 passenger vans to others outside of the summer camp:

> Q: And you didn't describe any vehicles that you would be renting for camp operations, correct?
>
> * * *
>
> A: I did not assume that that paragraph was referring to rentals. You're saying rentals.
>
> Q: What do you mean you did not assume that paragraph referred to rentals, sir?
>
> A: It states "Do you hire?" I was under the assumption the hiring – **I don't hire vans as a driving service, so the answer to that was no.**
>
> Q: Sir, what was your understanding of the purpose of filling out this application?
>
> A: That I am – the fact that I'm renting vans and I would like to get insurance on it for people that are going to be driving my rented vehicles.

(Ia337-338) (emphasis added).

Giving that the concept of "hiring" a vehicle has changed over the last 20 years with the advent of Uber and Lyft, "hiring" a vehicle can mean getting a car service to drive the campers, which is what Guttman could have reasonably thought when answering the question. *See, e.g., Fairlawn Indus. v. Gerling America Ins. Co*., 342 N.J. Super. 113, 117 (App. Div. 2001) ("Generally, the words of an insurance policy are to be given their plain and ordinary meaning.").

In *Merchants Indemnity Corp. of New York v. Eggleston*, 37 N.J. 114 (1962), similar to the instant matter, the insurance company sought rescission of an automobile policy to avoid coverage involving a serious accident. The insurance applicant claimed the car was "solely owned" by her. However, the insurer argued that she misled them as they believed her brother was in fact that true owner. Our Supreme Court thoroughly analyzed whether a misrepresentation had been made and stated that in general "an insured is chargeable with knowledge of the contents of a policy," but this "rule does not reflect a judicial belief that the average purchaser of insurance reads the contract in full or understands all that he reads. Rather the rules rests upon business utility." *Id*. at 121.

The Supreme Court then stated:

> A rule which rests upon the necessities of the business scene should not be applied when there is no need for it. So, it being **thoroughly feasible for the carrier to alert an insured** with respect to changes in the renewal policy, we held it must do so.

Beneath all this is the concept that good faith is the essence of

> insurance contracts, and this means that good faith is required of the insurer as well as of the insured. Good faith demands that the insurer deal with laymen as laymen and not as experts in the subtleties of law and underwriting. **The insurer knows what it deems to be material to the risks. It should ask for the information in understandable terms.**

[*Eggleston* at 121-22 (citations omitted; emphasis added)].

> The Supreme Court concluded:
>
> It is not difficult to frame questions which will elicit such facts concerning the subject as bear upon the acceptance of the risk. If a carrier is content to ask only for a conclusional statement as to ownership, it should not complain that an untutored insured did not correctly anticipate the view which the highest court of the State might hold. **Controversy could be avoided by the use of applications, plainly worded.**

[*Eggleston* at 123-24 (emphasis added)].

By asking an unclear or ambiguous question in an application, especially one for motor vehicles for a children's camp, and failing to alert Guttman of the importance of the information sought, U.S. Fire invited the error which Guttman made when he misunderstood the question and failed to disclose that he had already rented four 15 passenger vans. *See also Progressive Cas. Ins. Co. v. Hanna*, 316 N.J. Super. 63, 74 (App. Div. 1998) (because "insurance policies are contracts of adhesion, construed favorably to the insured…all ambiguities are resolved in favor of coverage," especially "where…the rights of innocent parties who have sustained injuries will be affected by rescission *ab initio*.") (citations omitted). If the question had been clearer Guttman would have answered correctly and U.S. Fire and Dean

could have timely advised him that it would not provide insurance for the vans. Guttman could have obtained coverage elsewhere before the camp began. This option was taken away from Guttman because the policy was not issued until the day camp started. Also, the master policy did not contain any Exclusion for 12-15 passenger vans. For this alone, the lower court should have denied the motion.

An insurance company cannot obtain rescission based upon an ambiguous or subjective application question where there has been an innocent misrepresentation. *Liebling v. Garden State Indemnity*, 337 N.J. Super. 447, 543-55, *certif. denied*, 169 N.J. 606 (App. Div. 2001) (finding that attorney's answer to subjective question did not support rescission). Rather, U.S. Fire should have been required to prove that Guttman *intentionally* misled it in order to obtain rescission because there was no evidence to mislead by Guttman. The policy did not contain any Exclusion for such vans and the application said nothing about 12-15 passenger vans being excluded. Thus, the trial court erred by granting summary judgment and rescinding the policy. Rescission under these circumstances should not be permitted, especially where the insurer left the entire application process to a third party, Dean, which issued the policy.

B. U.S. Fire Failed to Establish a Material Misrepresentation and Reliance by its Underwriter And, Therefore, The Court Erred by Granting Summary Judgment. (Raised below: Ia122; 2Tr. 47-50)

Assuming *arguendo* the Questionnaire was not ambiguous, the lower court overlooked the insufficient proof of any material misrepresentation and reliance. U.S. Fire failed to provide admissible evidence from the one individual with first-hand, personal knowledge of the facts and circumstances surrounding the issuance of the policy, Hockemeyer Dean's own underwriter. Hockemeyer was the person Gross communicated with and she eventually quoted and issued the policy.

In New Jersey, an insurer may rescind an insurance contract on equitable fraud grounds. *See Ledley v. William Penn. Life Ins. Co.*, 138 N.J. 627, 635 (1995). "In general, equitable fraud requires proof of (1) a material misrepresentation of a presently existing or past fact; (2) the maker's intent that the other party rely on it; and (3) detrimental reliance by the other party." *Liebling*, 337 N.J. Super. at 453. In "the context of an insurance contract, 'a representation by the insured, whether contained in the policy itself or in the application for insurance, will support the forfeiture of the insured's rights under the policy if it is untruthful, material to the particular risk assumed by the insurer, and actually and reasonably relied upon by the insurer in the issuance of the policy.'" *Lawson*, 177 N.J. at 137, *quoting Allstate Ins. Co. v. Meloni*, 98 N.J.Super. 154, 158-159 (App.Div. 1967); N.J.S.A. 17B:24-3(d).

"A misrepresentation is material if it 'naturally and reasonably influence[d] the judgment of the underwriter in making the contract at all, or in estimating the degree or character of the risk, or in fixing the rate of premium.'" *Ledley v. William Penn Life Ins. Co*., 138 N.J. 627, 637-38 (1995) (brackets in original) (quoting *Massachusetts Mut. Life Ins. Co. v. Manzo*, 122 N.J. 104, 108 (1991)).

In most cases, materiality is usually proven with an underwriter's affidavit. In *Ledley*, 138 N.J. at 641, the materiality of a misrepresentation in a health policy was established beyond dispute based in part on the uncontradicted affidavit from the insurer's underwriter "that had [the insurer] known of the insured's [condition], it would not have issued the policy."

Here, U.S. Fire's failure to submit any admissible evidence from the one individual with first-hand, personal knowledge of the facts and circumstances surrounding the subject policy and Questionnaire, Dean's underwriter, Hockemeyer, who was never deposed and never submitted an affidavit, should have been fatal to their motion. In particular, U.S. Fire failed to establish that Guttman's alleged misrepresentations were material, or that they influenced U.S. Fire or Dean's decision to issue the subject policy. *See e.g., Mass. Mut. Ins. Co. v. Manzo,* 122 N.J. 104, 115 (1991) (if found on an application, a misrepresentation is material only if it "influenced the judgment of the underwriter in making the contract at all, or in estimating the degree or character of the risk, or in fixing the rate of premium").

U.S. Fire argued to the lower court that it would not have issued the subject policy if Machane had disclosed its intention to use 12-15 passenger vans. But, in support, U.S. Fire only submitted portions of the deposition testimony of Michael Dean, Principal of the Dean Insurance Company, which is the administrator of the camp program not the insurer (Ia481-482; 490). Even when viewed in its entirety, however, Dean's deposition testimony is insufficient to establish materiality or reliance. Although Dean testified that the program administrator's guidelines would preclude such coverage as a general matter, he also testified that he was not personally involved in underwriting, monitoring, or issuing Guttman's policy, which was instead handled by his underwriter, Hockemeyer. (Ia519-520; 526; 536-539). Dean did not take part in any of the communications between Hockemeyer and Rosenthal, he was not aware if Hockemeyer ever informed Gross about a coverage exclusion for 12-15 passenger vans prior to the policy's inception, and he did not know if his company had ever provided HNOA coverage that included 12 to 15 passenger vans. (Ia519-520; 526; 523; 536-538; 556-561).

Even if Dean had been personally involved in the policy's purchase – which he admittedly was not – his testimony does not establish that U.S. Fire reasonably relied upon the actual misrepresentation that Guttman is alleged to have made. "A misrepresentation is material if it naturally and reasonably influence(s) the judgment of the underwriter in making the contract at all, or in estimating the degree or

character of the risk, or in fixing the rate of premium." *Ledley*, 138 N.J. at 638.

Despite Dean's testimony that the purchase and issuance of the subject policy was the result of communications between Rosenthal and Hockemeyer, neither individual was deposed, nor were Affidavits submitted on their behalf.[7] U.S. Fire's submission of some documentary evidence in the form of electronic mail communications between Rosenthal and Guttman, and between Rosenthal and Hockemeyer, is patently insufficient to a establish a question of fact concerning materiality or detrimental reliance. These emails do not indicate that Hockemeyer ever directly communicated to Rosenthal that 12-15 passenger vans were excluded from coverage, or that the policy would not be issued if such coverage was contemplated. Even Gross' Principal, Judah Gross, testified at his deposition that he was not aware of any such exclusion and he had been selling this policy for years. (Ia416; 460-461). His Certification stated that there was no warning that to applicants that 12-15 passenger vans would not be covered. (Ia576). The only place that mentioned any such limitation existed as of July 2019 was in FL Dean's underwriting guidelines and those were not shared with anyone else, including U.S. Fire claims personnel, and were filed under seal with the court. (Ia576). Further,

[7] The absence of such testimonial evidence is particularly significant where, as here, Guttman testified that he communicated "mostly over the phone" with Rosenthal regarding quotes for general liability insurance and "extra insurance" for rented vans. (Ia336).

Dean testified at his deposition that the U.S. Fire Master Policy does not have a specific exclusion for 12-15 passenger vans. (Ia539).

U.S. Fire's failure to provide testimony from Rosenthal, Hockemeyer, or any other individual with first-hand, personal knowledge of the circumstances surrounding Guttman's purchase of the subject policy, the execution of the supplemental application and Questionnaire is dispositive. "Evidence presented to support or defeat summary judgment motion should be the best there is short of live testimony characteristic of full trial." *Fargas v. Gorham*, 276 N.J. Super. 135, 140 (Law Div. 1994).

An affidavit "must be made on personal knowledge, setting forth only facts which are admissible in evidence to which the affiant is competent to testify (internal quotation marks and citations omitted)." *Sellers v. Schonfeld*, 270 N.J. Super. 424, 427 (App. Div. 1993). "Thus, if the allegations of pleadings are to be pierced for summary judgment purposes, the affidavits in support are limited to the affiant's personal knowledge of such facts as he is competent to testify to and as are admissible in evidence." *Sellers, at 427.* An individual "who has no knowledge of a fact except for what he has read or for what another has told him cannot provide evidence to support a favorable disposition of a summary judgment" motion. *Sellers, at* 428; *Katsoufris v. Adamo*, 216 N.J. Super. 84, 88 (1987) (testimony from an individual that was not personally involved in the transactions at issue was

insufficient to support a motion for summary judgment).

The record is devoid of any evidence of any agent, employee, or representative of U.S. Fire (or Dean or Gross) informing Guttman that the $1 million insurance coverage would not bind, or that the premium would change, if Guttman was planning to use 12 to 15-passenger vans. Nor are there any sworn statements from any underwriter stating retrospectively that the policy would not have been issued but for the "misrepresentation" of fact. Guttman made clear to all the insurance professionals with whom he communicated, such as Rosenthal, that he wanted coverage for 15-passenger vans. (Ia347; 124-125). Because U.S. Fire failed to establish materiality and reliance, the court erred in granting summary judgment.

C. The Lower Court Erred In Granting Summary Judgment Because The U.S. Fire Insurance Master Policy Itself Requires A Finding of *Intentional* Fraud by Guttman To Void The Policy. (Raised below by Third Party Defendant Gross; 2Tr6-13)

"Insurance policies are contracts…subject to general principles of contract law." *Botti v. CAN Ins. Co*., 361 N.J. Super. 217, 224 (App. Div. 2003). Although the court granted summary judgment on an equitable rescission theory, the U.S. Fire Master Policy at Section IV(B)(2) requires that the insurance company prove that Guttman intentionally misled them about the 12-15 passenger vans on the application. The policy language states as follows:

2. Concealment, Misrepresentation Or Fraud

This Coverage Form is void in any case of fraud by you at any time as it relates to this Coverage Form. It is also void if you or any other "insured", at any time, intentionally conceals or misrepresents a material fact concerning:

a. This Coverage Form;
b. The covered "auto";
c. Your interest in the covered "auto"; or
d. A claim under this Coverage Form.

This policy language provides that coverage is void due to an *intentional* misrepresentation. There is no evidence in this case of an intentional misrepresentation and no dispute here that Guttman's misrepresentation on the application was an innocent one. Thus, he should not lose $1 million in auto coverage because the court applied a lesser standard than the one dictated by its own insurance policy. *See, e.g., Clarendon National Ins. Co. v. The Insurance Company of the West*, 442 F. Supp. 2d. 914 (E.D. Cal. 2006) and *RLI Ins. Co. v. Klinsky*, 771 F. Supp. 2d. 314 (D. Ver. 2011) (finding that despite insureds' misrepresentations, there was coverage as the broader language in the policy trumped the insurer's common law or statutory right.). The clause in the U.S. Fire policy should trump the supplemental application.

The court erred by granting the motion and, at the very least, by not holding a bench trial on all the issues herein.

D. An Exclusion In An Automobile Policy Must Appear On The Declaration Page To Be Effective And, Thus, The Exclusion Of 12-15 Passenger Vans Is Violative Of New Jersey Public Policy. (Not raised below)

The fundamental rule laid down in *Zacarias v. Allstate ins. Co*., 168 N.J.590 (2001) is that members of the public purchasing policies of insurance are entitled to the broad measure of protection necessary to fulfill their reasonable expectations. The goal in construing an accident insurance policy is to effectuate the reasonable expectations of the average member of the public who buys it. This is particularly true when the insured is the owner of a children's camp and the policy involved is one to protect the campers in case of a motor vehicle accident.

Here, the lower court found the Questionnaire was not ambiguous. But even if this Court agrees, an unambiguous exclusion is not fatal to the "reasonable expectations" rule. Nowhere in any of the documents produced is there any notice to the policy holder that 12-15 passenger vans are excluded from coverage. In *Lehrhoff v. Aetna Cas. & Sur. Co*., 271 N.J. Super. 340, 346 (App. Div. 1994), the court noted the importance of the declaration page of an insurance policy and its capacity to define the insured's reasonable expectations of coverage. Here, the declaration page was not produced, but there is no doubt that it did not have any Exclusion. *See section B, supra*. The accident here did not occur for almost 2 weeks after the policy went into effect. Guttman, the camp owner, prior to the issuance of the policy did not have a declaration page noting that there was no Exclusion and

the master policy has not Exclusion for such vans. Had the declaration page or the policy itself contained an Exclusion of 12-15 passenger vans, Guttman might have realized he and his drivers were not covered, giving him two weeks to remedy the situation.

The reasonable expectations of coverage under the policy cannot be contradicted by the failure of the insurer to have a sufficient notice to the policyholder in the policy and the declaration page that there is an Exclusion for 12-15 passenger vans.

E. Strong Public Policy Favoring the Assurance of Financial Protection For Innocent Victims of Automobile Accidents Warrants Denying Summary Judgment. (Raised below: 2T44)

As recognized by the New Jersey Supreme Court, rescission is "an equitable remedy, which properly depends on the totality of circumstances in a given case and resides within a court's discretion." *Lawson*, 177 N.J. at 143. Moreover, "[i]n the case of automobile liability insurance, the interests concerned are not limited to those of the insured and the insurer; also involved are the interests of those who have suffered injury as a result of the operation of the insured automobile . . . and of the 'strong legislative policy' (of this State) of assuring financial protection for innocent victims of automobile accidents." *State Farm Mut. Auto. Ins. Co. v. Wall*, 87 N.J. Super. 543, 558 (1965) (citations omitted). Indeed, "because insurance policies are adhesion contracts, courts must assume a particularly vigilant role in ensuring their

conformity to public policy and principles of fairness." *Voorhees v. Preferred Mut. Ins. Co.*, 128 N.J. 165, 175 (1992); *see also Hawkins v. Globe Life Ins. Co.*, 105 F.Supp.3d 430, 438-39 (2015) (noting that New Jersey courts interpret insurance policies, which are "often the result of technical semantic constructions and unequal bargaining power . . . to give effect to the reasonable expectations of an objectively reasonable policy holder"). "Such policies are often 'prepared unilaterally by the insurer, and have always been subjected to careful judicial scrutiny to avoid injury to the public.'" *President v. Jenkins*, 180 N.J. 550, 562 (2004), *quoting Sparks v. St. Paul Ins. Co.*, 100 N.J. 325, 335 (1985). "Moreover, policies are frequently not read by the insured, 'whose understanding is often impeded by the complex terminology used in the standardized forms.'" *Jenkins*, 180 N.J. at 563, *quoting Doto v. Russo*, 140 N.J. 544, 555 (1995).

In *Lawson*, our Supreme Court addressed the issue of rescinding a legal malpractice policy issued to a New Jersey law firm with three partners, Wheeler, Lawson and Snyder. Wheeler, the firm's managing partner, who was largely responsible for the firm's trust account and business records, had been improperly transferring money between various client trust accounts to cover firm expenses. This was discovered by Lawson, the only partner licensed to practice in New Jersey, who then agreed to participate. During this time frame, Wheeler filled out an application for malpractice insurance. The application asked whether the firm knew

of any "error or omissions in professional services that may reasonably be expected to be the basis of a professional liability claim, to which Wheeler answered "no" and then signed a warranty statement. A policy was subsequently issued.

As a result of the firm numerous defalcations with respect to real estate transactions, several title insurers paid claims and in turn sought recover against the firm and its individual partners. Subsequently, the legal malpractice carrier filed a declaratory judgment action seeking to void the policy due to the material misrepresentation in the application and seeking rescission.

Although the trial court granted summary judgment against the legal malpractice insurer, the Appellate Division reversed and voided the policy due to the material misrepresentation. However, our Supreme Court then modified the Appellate Division holding that rescission was an appropriate remedy for Wheeler and Lawson and the law firm. Snyder, however, who had no responsibility with respect to the trust account, was an innocent partner and an "insured" under the policy and, therefore, the policy could not be rescinded as to Snyder. The Supreme Court stated:

> The remaining issue concerning Snyder's coverage is the most difficult….
>
> Those facts require us to consider Snyder an innocent partner for purposes of balancing the equities attendant in these circumstances….
>
> **Thus, applying the rule of law advocated by Underwriters could leave members of the public, whom Snyder had represented**

> **throughout that period, unprotected even though the insured himself committed no fraud.** In our view, that harsh and sweeping result would be contrary to the public interest. More specifically, it would be inconsistent with the policies underlying our Rules of Court that seek to protect consumers of legal services by requiring attorneys to maintain adequate insurance in this setting. Cf. Fisher v. New Jersey Auto. Full Ins. Underwriting Ass'n., 224 N.J. Super. 552, 557-58 (App. Div. 1988) (allowing PIP benefits for innocent third parties even when underlying insurance policy otherwise is void due to policyholder's misrepresentations).
>
> We thus conclude that the equities do not warrant rescission of Snyder's coverage….
>
> Lastly, we acknowledge that rescinding the policy in respect of Lawson, Wheeler, and the firm as an entity, but not in respect of Snyder, encompasses a certain degree of line drawing. Unlike the dissent, however, we are convinced that **our disposition is consistent with rescission as an equitable remedy, which properly depends on the totality of the circumstances in a given case** and resides within a court's discretion. Here, those circumstances include **our concern for the public**, which distinguishes this matter from the more typical contract case. As the trial court succinctly observed: "Equitable relief does not mean automatic relief."

[*Id*. at 141-42 (emphasis added)].

Similarly, in *Rutgers Cas. Ins. Co. v. Lacroix*, 194 N.J. 515 (2008), our Supreme Court applied a partial rescission of an automobile policy in order to provide PIP benefits to an 18-year-old girl whose father had mispresented his daughter's status in the insurance application to lower his auto premium, stating that "we have never turned a deaf ear to the equities when plainly innocent parties cry out for relief." *Lacroix* at 530. The Court in *Lacroix* also noted that when providing equitable relief:

> Rescission remains a form of equitable relief in whatever setting its need arises, and courts wielding that remedy retain the discretion and judgment required to ensure that equity is done. In furtherance of that objective, a court may shape the rescission remedy in order to serve substantial. The power to mold the rescission remedy to do justice under the circumstances is perforce available when rescission is employed in the insurance context. *See, e.g., First Am. Title Ins. Co. v. Lawson*, 177 N.J. 125, 129 (2003) (voiding legal malpractice insurance coverage *ab initio* as to law firm and defalcating partners because of equitable fraud, but retaining coverage under policy "in respect of any innocent partner.").

[*Id.* at 529 (some internal citations omitted)].

In both *Lawson* and *Lacroix*, unlike the case *sub judice*, the courts had a full record and had determined the proper remedy after a plenary hearing as to what had happened related to the application for insurance. The elements of a claim of equitable fraud must be established by clear and convincing evidence. *Daibo v. Kirsch*, 316 N.J. Super. 580, 591-92 (App. Div. 1998).

Thus, even if the basic elements of equitable fraud have been established here, public policy considerations support a balancing of the equities in favor of Mr. Korenfeld, an innocent party who would be negatively impacted by the rescission of U.S. Fire's policy. Here, this Court should reverse the lower court and find that the policy by U.S. Fire covering Machane is valid and enforceable, or, at a minimum, the matter should be reversed and set down for a plenary hearing to examine the circumstances surrounding the Supplemental Application and U.S. Fire's internal underwriting guidelines and how they were applied in practice.

CONCLUSION

The court erred in granting summary judgment because the questions on the Questionnaire were vague and ambiguous and, as such, the insurance policy cannot be rescinded as there was no *intentional* misrepresentation made by Guttman. Moreover, there were material issues of fact and U.S. Fire wholly failed to meet its burden on the issue of reliance as the record is devoid of any evidence of any agent, employee, or representative of U.S. Fire (or Dean or Gross) informing Guttman that the $1 million insurance coverage would not bind, or that the premium would change, if Guttman was planning to use 12 to 15-passenger vans. Nor are there any sworn statements from any underwriter, or anyone with first-hand knowledge stating retrospectively that the policy would not have been issued but for the "misrepresentation" of fact.

Further, U.S. Fire's own policy provides that automobile coverage is "void" if the insured *intentionally* misrepresented a material fact about the insured vehicles, which is not the case here, further necessitating reversal. Moreover, public policy dictates that where the insured made an innocent mistake and was never provided with any notice of ineligibility for coverage, rescission is unwarranted.

For all of the foregoing reasons, rescission was inappropriate and the lower court's decision to grant U.S. Fire's Motion for Summary Judgment should be reversed.

Dated: June 22, 2023

Respectfully submitted,

/s/ Bharati O. Sharma
Bharati O. Sharma

UNITED STATES FIRE INSURANCE COMPANY, Plaintiff-Respondent, v. MACHANE OF RICHMOND, LLC, Defendant. and ELIYAHU KORENFELD, Intervenor-Appellant.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO.: A-001918-22T4 Civil Action **ON APPEAL FROM THE ORDERS ENTERED IN THE SUPERIOR COURT OF NEW JERSEY, LAW DIVISION, OCEAN COUNTY, DOCKET NO. OCN-L-1465-20 GRANTING SUMMARY JUDGMENT AND FINAL JUDGMENT TO PLAINTIFF, DATED AND FILED OCTOBER 21, 2022 AND JANUARY 20, 2023**
MACHANE OF RICHMOND, LLC, Defendant/Third-Party Plaintiff, v. GROSS & CO., LLC, Third-Party Defendant.	Sat Below: Hon. Craig L. Wellerson, J.S.C., P.J. Cv.

BRIEF OF PLAINTIFF-RESPONDENT UNITED STATES FIRE INSURANCE COMPANY

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PRELIMINARY STATEMENT

Plaintiff-Respondent United States Fire Insurance Company ("US Fire") respectfully submits this memorandum of law in opposition to the appeal filed by Intervenor Eliyahu Korenfeld ("Intervenor"). Intervenor seeks reversal of the trial court's Order granting rescission of a commercial general liability policy, with a non-owned/hired auto supplement, that was procured based on misrepresentations.

As a threshold matter, the Intervenor has no standing to be before this Court. New Jersey law does not permit the Intervenor to pursue an appeal directly against US Fire. Intervenor seeks to affect rights under an insurance policy to which he is a complete stranger, despite the fact that the insured, Machane of Richmond, LLC ("Machane"), has made clear that it will not pursue an appeal. Thus, this appeal amounts to a direct action that is prohibited under the New Jersey Direct Action Statute, N.J.S.A. 17:28-2.

Substantively, Intervenor's appeal necessarily fails. Indeed, in response to a question on an insurance application form (referred to herein as the "Supplemental Form") asking "do you hire or rent vehicles during your fair/festival/event?," Machane answered "No." Machane then did not answer an application question asking if any of the vehicles rented were "12 or 15-passenger vans." It is undisputed that Machane's answers to these application questions were false because Machane had already rented several 12-15 passenger vans for its summer camp operations.

US Fire's underwriting guidelines expressly state that US Fire will not issue non-owned/hired auto coverage for insureds that hire or rent 12 to 15-passenger vans. US Fire relied on Machane's representations that it did not hire or rent such vehicles in issuing the Policy to Machane, as attested to by US Fire's underwriter, Francis L. Dean & Associates, LLC ("FL Dean").

These undisputed facts clearly satisfy New Jersey's equitable fraud standard supporting rescission. There was: (1) a misrepresentation in an insurance application; (2) that was material to the risk insured by US Fire, and (3) that was relied upon by US Fire when issuing the Policy to Machane. Accordingly, the trial court properly granted US Fire's summary judgment motion and ordered rescission of the Policy.

Intervenor devotes pages of his brief to a tortured analysis of Machane's purported thought process in filling out the Supplemental Form. This argument is belied by the record evidence establishing that the questions on the Supplemental Form were unambiguous, and that Machane's broker explained non-owned/hired auto coverage to Machane before Machane completed this simple one-page document. Further, even if Machane's purported confusion over the unambiguous Supplemental Form is to be believed, such confusion is irrelevant. Given that the question at issue is an objective question (*i.e.*, it called for objective information

within Machane's knowledge – not Machane's subjective opinions or beliefs), Machane's state of mind in answering the question is immaterial.

Intervenor also attempts to challenge the "materiality" of Machane's misrepresentations, but fails to address the substance of the testimony from FL Dean's owner, and the underwriting guidelines that dictated what coverage FL Dean could, and could not, write on behalf of US Fire. Again, the materiality of Machane's misrepresentation is plainly established through these guidelines, which specifically state that 12 or 15 passenger vans are ineligible for non-owned/hired auto coverage, and through FL Dean's testimony regarding the impact of those guidelines.

Finally, Intervenor argues that the US Fire Policy requires an intentional misrepresentation by the insured in order to support a cause of action for rescission. This argument is contradicted by the plain language of the Policy, which states, "[t]his coverage form is void ***in any case of fraud*** by you at any time as it relates to this coverage form." The record clearly demonstrates that Machane committed equitable fraud necessitating rescission under the terms of the US Fire Policy and New Jersey law.

Accordingly, US Fire respectfully submits that the decision below must be affirmed.

STATEMENT OF FACTS

A. MACHANE'S SUMMER CAMP OPERATIONS

Alexander and Sara Guttman formed Camp Machane, LLC, in New Jersey on May 22, 2019. (Ia074 at ¶ 1; Ia085). US Fire's named insured, Machane of Richmond, LLC, is a "doing business as" name for Camp Machane, LLC. (Ia075 at ¶ 2; Ia090 at 13:15-18).

In 2019, the first summer that Machane operated a camp, it was scheduled to run from August 6, 2019 to August 26, 2019 (the "2019 Summer Camp"). (Ia075 at ¶ 3; Ia101). Machane began distributing the application for the 2019 Summer Camp in or around April or May 2019. (Ia075 at ¶ 4; Ia091 at 24:18-22). The application included a "Transportation" section which read: "Transportation will be arranged from Lakewood/Brooklyn to Richmond, VA on Tuesday morning, August 6th, and from Richmond, VA to Lakewood/Brooklyn on August 26th. You will be contacted with exact pick up times and locations. Transportation from other cities and/or airports will be determined based upon demand." (Ia075 at ¶ 5; Ia101).

In order to meet its transportation needs, Machane intended to rent "larger vans, 12 to 15 seaters." (Ia075 at ¶ 6; Ia092 at 27:10-11; Ia110). Indeed, Machane did not own any vehicles in 2019 and, therefore, exclusively used rental vehicles in its operations. (Ia075 at ¶ 7; Ia098 at 75:22-24.)

On July 9, 2019, Mr. Guttman emailed Hertz Entertainment Services ("Hertz"), a vehicle rental company, with the following reservation request:

> We would Like to reserve 4 fifteen seater Transit vans with delivery to Lakewood NJ
>
> Our Delivery date would be Friday Aug 2nd for the month at the Camp monthly rate. to 35 Waterview Dr Lakewood NJ, 08701
>
> Please see attached CC authorization form and Master agreement, please advise if there is anything more that we need to do.

(Ia075 at ¶ 8; Ia114.)[1]

On July 10, 2019, Hertz responded to Mr. Guttman's email by providing reservation numbers for four 15-passenger vans. Mr. Guttman and Hertz continued to communicate regarding the rental vans through the end of July 2019, and details regarding the rentals were confirmed by the end of July 2019. (Ia076 at ¶ 9; Ia116).

B. MACHANE'S APPLICATION FOR THE US FIRE POLICY

Mr. Guttman, on behalf of Machane, contacted an insurance broker, Gross & Co., LLC ("Gross"), to procure coverage for its 2019 Summer Camp operations, including non-owned/hired auto coverage. (Ia076 at ¶ 10; Ia093 at 36:23-37:7;

[1] Intervenor's Appendix includes a number of page numbers which repeat. The subject exhibit appears at the second "Ia114" in Intervenor's Appendix.

Ia111). On June 28, 2019, in an email to Machane, Devora Rosenthal, an employee of Gross, plainly explained the function of non-owned/hired auto coverage:

> Non-Owned & Hired auto liability covers bodily injury and property damage caused by a vehicle you hire (including rented or borrowed vehicles) or caused by non-owned vehicles (vehicles owned by others, including vehicles owned by your employees).

(Ia076 at ¶ 11; Ia119).

On July 30, 2019, Gross submitted a multi-part application for insurance on behalf of Machane to FL Dean, the national program administrator for US Fire's Sports and Entertainment Insurance Program.[2] (Ia076 at ¶ 12; Ia125; Ia130 at 8:8-14). In its insurance application, Machane requested coverage for the 2019 Summer Camp, and specifically requested $1,000,000 in non-owned/hired auto coverage.[3] (Ia076 at ¶ 13; Ia126). The record reflects that by this point in time, FL Dean did not

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[2] In its role as national program administrator for US Fire's Sports and Entertainment Insurance Program, FL Dean solicited, underwrote, quoted, bound, issued, cancelled, reinstated, non-renewed, and endorsed policies pursuant to underwriting guidelines established by US Fire. (Ia076 at ¶ 14; Ia130 at 8:20-25; Ia131 at 17:7-12; Pa001; Pa006).

3 In his Brief, Intervenor appears to draw a comparison between the application filled out by Machane in 2019, and a 2022 application (downloaded by the Intervenor from the internet) for an entirely different program underwritten by FL Dean that bears no relation to US Fire. It pertains to an entirely different insurance product and type of coverage, not offered by US Fire. This document was not produced or authenticated in discovery. The record reflects that US Fire, in its briefing below and supported by affidavit, explained that the 2022 application had no relationship to any program underwritten on behalf of US Fire. (Pa004). In fact, the form itself indicates Great American Insurance Group as the insurance carrier. (Ia471). No contrary record evidence was supplied. Now, in what can only be described as an effort to mislead this Court, the Intervenor again brings up this 2022 application, without providing the Court with US Fire's previous affidavit, or other material evidence. (Pa001).

know, and had no way of knowing, that Machane had rented 12-15 passenger vans. The only way for FL Dean to learn this information is through the non-owned/hired auto Supplemental Form ("Supplemental Form"), which is part of an additional underwriting process that FL Dean requires in the event that an applicant requests high non-owned/hired auto limits. (Ia124; Ia143).

On July 31, 2019, Kristin Hockemeyer, an employee of FL Dean, advised Gross that, if Machane wanted to obtain $1,000,000 in Non-Owned/Hired Auto coverage, it must complete a Supplemental Form. Ms. Hockemeyer sent the Supplemental Form to Gross as an email attachment. (Ia077 at ¶ 15; Ia124; Ia132 at 51:8-52:5). The same day, Ms. Rosenthal emailed the Supplemental Form to Machane instructing Machane to complete the Supplemental Form in order to proceed with obtaining a quote for non-owned/hired auto coverage. (Ia077 at ¶ 16; Ia139).

The Supplemental Form consisted of six questions with subparts. (Ia077 at ¶ 17; Ia143). Question Number 4, which appears under a "Hired Auto Liability" subheading, reads as follows:

> 4. Do you hire or rent vehicles during your fair/festival/event?
> □ Yes □ No
>
> If yes, please describe vehicle types, estimated number, duration and usage.
>
> _____
> _____

> If yes to #4, are any of these vehicles 12 or 15-passenger vans?
> □ Yes (How many?)
> □ No

(Ia077 at ¶ 17; Ia143).

Machane filled out the Supplemental Form with the express intention of securing insurance for the rental of 12-15 passenger vans. (Ia077 at ¶ 18; Ia095 at 59:2-18; Ia099 at 87:12-16). Indeed, Machane had already rented the vans at the time it completed the Supplemental Form, thus the nature of the questions was unmistakable:

> **Q:** Sir, there's a signature at the bottom of the document. Do you know whose signature that is?
> **A.** Yes.
> **Q.** Whose signature is it?
> **A.** Mine.
>
> ***
>
> **Q.** And sir, you signed this document after you rented the four vans already, correct?
> **A.** Correct.

(Ia078 at ¶ 19; Ia096 at 60:3-25).

Machane answered the first part of Question Number 4 with a "no." Machane answered the second part of the question with "N/A". Machane did not answer the final part of the question regarding 12-15 passenger vans. (Ia078 at ¶ 20; Ia143). On August 1, 2019, Gross returned the Supplemental Form completed by Machane to FL Dean. (Ia078 at ¶ 21; Ia124; Ia143).

Machane's principal conceded in deposition that the answers provided on the Supplemental Form were materially incorrect:

> **Q.** And sir, dropping down to Item 4, you did not answer the question there regarding 12 to 15 passenger vans, correct?
> **A.** That's correct.
> **Q.** But Camp Machane was in fact using 12 to 15 passenger vans that were rented by Camp Machane, correct?
> **A.** Correct.

(Ia078 at ¶ 22; Ia097 at 64:4-11).

On August 6, 2019, FL Dean provided Gross with a price quotation (the "Quote"), which included Accident, General Liability, and non-owned/hired auto coverages. (Ia078 at ¶ 23; Ia140; Ia147). The Quote explicitly stated, ***properly within the portion of the Quote detailing Non-Owned/Hired Auto coverages***, that "12 and 15+ Passenger Vans are excluded" from this coverage. (Ia078 at ¶ 24; Ia147). The Quote did discuss other available coverages and exclusions relevant thereto separately. On August 6, 2019, Gross requested that FL Dean bind coverage pursuant to the Quote. (Ia078 at ¶ 25; Ia122).

C. ISSUANCE OF THE US FIRE POLICY

FL Dean relied upon the information provided by Machane in the Supplemental Form in order to bind coverage. (Ia078 at ¶ 26; Ia124; Ia134 at 62:23-64:3; Pa002). Specifically, FL Dean underwrites policies for U.S. Fire pursuant to a set of underwriting guidelines. As FL Dean's principal testified, "[t]he underwriting

guidelines are the instructions from United States Fire Insurance Company on what we can and cannot insure." (Ia078 at ¶ 27; Ia131 at 17:7-12). The underwriting guidelines provide that non-owned/hired auto coverage is available at the following limits: $150,000, $500,000, or $1,000,000. (Ia079 at ¶ 28; Pa008). Importantly, the underwriting guidelines explicitly state that "**12 or 15 plus passenger vans are ineligible for this program*." (Ia079 at ¶ 29; Pa008).

In the Supplemental Form, which Machane specifically filled out for the purpose of obtaining and non-owned/hired auto coverage, Machane stated that it did not hire or rent 12-15 passenger vans. (Ia079 at ¶ 30; Ia097 at 64:4-11; Ia143.) Relying on this inaccurate and material information in the Supplemental Form, US Fire issued certificate number 972303011, to Machane as a named insured member under master policy number SRPGAPML 101 0719, which was issued to Sports and Recreation Providers Association Purchasing Group (together, the "US Fire Policy"). (Ia079 at ¶ 31; Ia134 at 62:23-64:3; Ia143; Ia151).

The US Fire Policy provides Commercial General Liability coverage which could, for example, provide Machane with liability coverage if a camper were to slip and fall on Machane's premises. (Ia079 at ¶ 32; Ia161). However, non-owned/hired auto coverage is a coverage extension added to the Policy which solely provides the insured with coverage for "autos" that the insured "leases, hires, rents, or borrows" in connection with its business operations. (Ia079 at ¶ 33; Ia163; Ia164). The US

Fire Policy does not provide any coverage for "autos" that are owned by the insured. (Ia163; Ia164).

D. THE ACCIDENT

On August 15, 2019, one of the four 15-passenger vans rented by Machane and being driven by a Machane employee was involved in a single-vehicle accident in Henrico, North Carolina (the "Accident"). Multiple passengers, including Intervenor, allegedly sustained injuries as a result of the Accident and have pursued claims against Machane. (Ia080 at ¶ 35; Ia167). A police report regarding the accident identifies the owner of the van as "Hertz Vehicles LLC", and identifies the insurance company providing owned auto coverage for the van as "ACE American Ins Co". (Ia167).

PROCEDURAL HISTORY

Following its investigation of the Accident, and before any personal injury lawsuits regarding the Accident had been filed, on June 22, 2020, US Fire commenced this action in the Superior Court of New Jersey, Law Division, Ocean County (the "Declaratory Judgment Action"), seeking a declaration that the U.S. Fire Policy is void *ab initio* due to Machane's material misrepresentations made when applying for the U.S. Fire Policy. (Ia001). Machane filed an Answer to the Complaint on September 29, 2020. (Ia023). Machane actively participated in discovery in the Declaratory Judgment Action, exchanging written discovery

requests and responses, document productions, and appearing for depositions, but has elected not to participate in this appeal. (Pa009).

One day after US Fire commenced the Declaratory Judgment Action, on June 23, 2020, Intervenor, a camper who was in the van at the time of the Accident, filed a Complaint against Machane in the United States District Court for the District of New Jersey (the "Underlying Action"), seeking damages for injuries Intervenor allegedly sustained in the accident. (Pa010). Intervenor asserted three causes of action against Machane: negligence, negligent entrustment, and punitive damages. (Pa011-Pa014).

On January 19, 2021, Intervenor filed a motion to intervene in the Declaratory Judgment Action on the basis that he sustained injuries in the Accident and had an interest in the property at issue in the Declaratory Judgment Action. (Ia033). US Fire opposed the motion, but it was ultimately granted by Order dated February 25, 2021. (Ia033).

Intervenor subsequently filed an Answer to the Complaint on March 29, 2021. (Pa017). Intervenor did not assert any affirmative claims against US Fire in the Declaratory Judgment Action. (Pa017).

On June 14, 2021, Machane filed an Amended Answer and Third-Party Complaint. (Ia035). Machane's Third-Party Complaint asserted claims against Gross for breach of contract, breach of the implied covenant of good faith and fair

dealing, and professional negligence. (Ia045-49). Machane's Third-Party Complaint alleged that Gross, "did not explain the various subsections or language" in the Supplemental Form to Machane. (Ia044). Machane further alleged it had informed Gross that it was intending to rent and use 15 passenger vans, but that Gross did not raise any issue with Machane's answers on the Supplemental Form, or take appropriate actions in order to secure coverage for the 15 passenger vans rented by Machane. (Ia044).

On July 1, 2022, US Fire filed a motion for summary judgment in the Declaratory Judgment Action, seeking a ruling that the US Fire Policy is void *ab initio*. (Ia070.) Machane, Intervenor, and Gross opposed the motion and participated in oral argument in connection with the motion. (1T; 2T).

The trial court first held oral argument on US Fire's motion on September 23, 2022 (the "First Argument"). (1T). During the First Argument, the trial court concluded that the questions on the Supplemental Form were unambiguous, and that Machane had answered those questions falsely. "The question was clear. It wasn't a trick question. It couldn't be interpreted in four, or five, or six different ways. The question was do you rent automobiles and he said no." (1T61-10). The trial court also inquired with US Fire's counsel as to whether there was evidence that the misrepresentations made by Machane were material, and relied upon by US Fire when issuing the US Fire Policy. In response to these questions, US Fire provided a

list of evidence establishing these elements of equitable fraud had been satisfied. This evidence included a deposition transcript of the owner of FL Dean, an affidavit from the owner of FL Dean, and "underwriting guidelines that say black and white, this program . . . will not write coverage if there's a 12- to 15-passenger van implicated." (1T63-5). At conclusion of the First Argument, the trial court requested supplemental briefing on a narrow issue:

> I want to say this, I'm going to give you the opportunity to supplement your papers if you wish. The issue in the Court's mind is under circumstances where the Court declares the question as plain on its face and it is not ambiguous, if the Court makes that conclusion, it's not ambiguous, it's plain on its face . . . If the answers is inaccurate, I'm not saying fraudulent, just inaccurate is the carrier entitled to rescind coverage. That's the only thing that I'm struggling with. I'll look at that. I don't think I am going to change my mind. I've already made the ruling. It's not an ambiguous question.

(1T64:22). Machane, Intervenor, and Gross did not limit their supplemental briefing to this narrow issue, but instead briefed a variety of issues not raised when originally opposing US Fire's motion.

Following supplemental briefing, the trial court heard a second round of argument on US Fire's summary judgment motion on October 21, 2022 (the "Second Argument"). (2T). During the Second Argument, the trial court reiterated its finding that the question at issue was unambiguous, found New Jersey's equitable fraud standard applicable to the case, and held that "[s]cienter is not an essential element

of equitable fraud." (2T46:5-48:2). The trial court also rejected a contention, made by Gross, that the "Concealment, Misrepresentation or Fraud" Policy condition changed New Jersey's equitable fraud standard. The trial court stated that equitable fraud was present here, and that the cases cited by Gross for this contention were from out of state. (2T12:23). The trial court further rejected the argument that reformation of the Policy, rather than rescission, was a more equitable remedy. The trial court stated, "[t]he Court's obligation here is to blindly and equally apply the law to all that come before it." (2T48:11). The trial court concluded by stating that whether Gross should have "flagged" the issue of coverage for the 15 passenger vans was a separate issue, and held that the "questions were specific. They were tailored to this situation. They asked the insured. It was responded to in the negative. The carrier had the right to rely upon that information, and the Court accordingly is rescinding that contract of insurance that was granted in a million dollars." (2T49:7-50:5).

The trial court properly granted US Fire's summary judgment motion by Order dated October 21, 2022, and the US Fire Policy was rescinded and declared void *ab initio*. (Ia050).

On November 16, 2022, US Fire filed a motion seeking to have the trial court's summary judgment Order certified as a final judgment, or in the alternative to sever Machane's third-party action against Gross. (Pa025).

While this motion was pending, Gross wrote to the trial court on December 14, 2022, requesting US Fire's motion for final judgment be adjourned to allow Machane and Gross to negotiate a settlement of Machane's third-party broker malpractice action. (Pa027).

On January 19, 2023, Machane filed a "dismissal of third-party complaint by stipulation" which represented that Gross and Machane had settled the third-party broker malpractice action. (Ia054). Intervenor filed an objection to this dismissal, asserting that he had an interest in the property that was the subject matter of the third-party broker malpractice action. (Ia056). The trial court dismissed the third-party action, and granted US Fire's motion for final judgment on January 20, 2023. (Ia052).

On March 2, 2023, Intervenor filed a notice of appeal of the January 20, 2023 Order. (Ia058.) On June 1, 2023, Machane filed a letter with this Court advising that it will not participate in the Intervenor's appeal. (Pa009). To date, Gross has not participated in Intervenor's appeal.

LEGAL ARGUMENT

A. This Appeal is Barred by the Direct Action Statute.

Intervenor is a third-party tort claimant, is not an insured under the US Fire Policy and, therefore, has no standing to pursue this appeal. Stated differently,

Intervenor cannot maintain this action against US Fire because he has no direct rights under the former US Fire Policy.

Indeed, it is well-settled under New Jersey law that a non-party to an insurance contract may not maintain a direct action against an insurer unless such action is permitted by statute or the insurance contract. N.J.S.A. 17:28-2; Ross v. Lowitz, 222 N.J. 494, 511 (2015). "In general, 'a stranger to an insurance policy has no right to recover the policy proceeds.'" Crystal Point Condo. Ass'n, Inc. v. Kinsale Ins. Co., 251 N.J. 437, 448 (2022) (quoting Ross, 222 N.J. at 512); see also Cruz-Mendez v. ISU/Ins. Servs., 156 N.J. 556, 566-67 (1999) ("Generally, plaintiffs in tort actions may not directly sue insurers."); Tuckey v. Harleysville Ins. Co., 236 N.J. Super. 221, 226 (App. Div. 1989) (holding that direct action against insurer failed to state a cause of action). New Jersey courts have found that third parties that have allegedly been damaged, but are strangers to an insurance policy (such as injured plaintiffs in a tort action) are not in privity of contract with the insurer, and are not third-party beneficiaries of the alleged tortfeasor's insurance policy, such that they lack standing to sue. Ross, 222 N.J. at 513 (finding that a tort claim does not retroactively confer third-party beneficiary status on the plaintiffs).

The limited exception to New Jersey's prohibition on direct actions is where an insured is in bankruptcy and/or insolvent, and execution of a judgment has been returned unsatisfied. N.J.S.A. 17:28-2; Cruz-Mendez, 156 N.J. at 565; 313 Jefferson

Tr., LLC v. Mercer Ins. Cos., 2018 WL 316972 (N.J. Super. Ct. App. Div. Jan. 8, 2018) (holding that a non-party to an insurance policy only had standing to bring a direct action against an insurer after a final judgment had been entered against the insured); Ferguson v. Travelers Indem. Co., 2014 WL 3798524, at *3 (N.J. Super. Ct. App. Div. Aug. 4, 2014); Maertin v. Armstrong World Industries, Inc., 241 F. Supp. 2d 434 (D.N.J. 2002); Caldwell Trucking PRP Grp. v. Spaulding Composites, Co., 890 F. Supp. 1247, 1253 (D.N.J. 1995); Kabinski v. Employers' Liab. Assur. Corp., 123 N.J.L. 377 (1939) (requiring an unsatisfied judgment against the insured); Univ. Indem. Ins. Co. v. Caltagirone, 119 N.J. Eq. 491 (1936) (stating that it is "quite apparent that the condition precedent to a legal action" against the insurer "is the return unsatisfied of an execution against the insured").

In a recent decision, the New Jersey Supreme Court reaffirmed that a third-party claimant, such as Intervenor, "has no claim under the statute absent proof 'that the assured was insolvent or bankrupt, or that an execution was returned unsatisfied because of the insolvency or bankruptcy of the assured.'" Crystal Point, 251 N.J. at 451 (quoting Saxon v. U.S. Fid. & Guar. Co., 107 N.J.L. 266, 268 (E. & A. 1931)). Thus, to maintain an action against an insurer under the Direct Action Statute, a claimant must present "prima facie evidence of the insolvency of the insured in the context of an unsatisfied judgment, such as by returning unsatisfied writs of execution." Id. at 454.

Here, Intervenor is attempting to pursue an appeal directly against US Fire to obtain the benefits from the voided US Fire Policy. Thus, this appeal constitutes a direct action because Machane has expressed that it will have no involvement in the appeal. (Pa009.) Machane's lack of interest in this appeal, and its conduct in settling its claims with Gross and abandoning any claim for coverage, calls for the application of the direct action statute.

Intervenor has not, and cannot, meet the requirements for pursuing a direct action against US Fire because Intervenor has not obtained a judgment against Machane that Intervenor is unable to collect upon. In fact, Intervenor's claims against Machane are currently stayed pending the outcome of this appeal. Therefore, Intervenor does not currently have and will not obtain a judgment against Machane at any time before its appeal is decided, a necessary prerequisite to pursuing a direct action against US Fire.

Intervenor cannot circumvent the requirement that he first obtain a judgment against Machane and assert direct claims against US Fire for the first time in the Appellate Division. Therefore, New Jersey law requires that Intervenor's attempt to pursue a direct action against US Fire through this appeal be rejected.

B. US Fire Established the Elements of Equitable Fraud.

Under New Jersey law, the standard governing rescission of an insurance policy based on misrepresentations in a policy application is equitable fraud. Ledley

v. William Penn Life Ins. Co., 138 N.J. 627, 635 (1995). The trial court's decision was correct because US Fire established the elements of equitable fraud. Specifically, in response to a clear, objective question, Machane failed to disclose the fact that it would use rental 12-15 passenger vans. (Ia143). This constitutes a material misrepresentation that warranted the trial court's rescission of the US Fire Policy.

The insured has an "obligation when asked a specific question in the insurance application, to respond truthfully." Progressive Cas. Ins. Co. v. Hanna, 316 N.J.Super. 63, 70 (App. Div. 1998). "The prospective insured must not misrepresent or conceal information concerning risks entailed in coverage under an insurance policy." Sears Mortg. Corp. v. Rose, 134 N.J. 326, 347 (1993). "Fair dealing requires the insured to state everything which might, and probably would, influence the insurer in entering into or declining the risk, and in disclosing all information material to the risk about which information is sought." In re Tri-State Armored Servs., Inc., 332 B.R. 690, 710 (Bankr. D.N.J. 2005), aff'd, 366 B.R. 326 (D.N.J. 2007) (quoting 12A John Alan Appleman & Jean Appleman, Insurance Law and Practice with Forms, § 7271 at 302–03 (Rev.Vol.2005)).

New Jersey courts have found that rescission of an insurance policy is appropriate "if the insured's application for coverage included a misrepresentation of fact that materially affects the insurer's decision to enter the contract, the

estimation of the risk or the rate of the premium." Chen v. Vigilant Ins. Co., 2009 WL 2341444 at *3 (N.J. Super. Ct. App. Div. July 31, 2009); see also First Am. Title Ins. Co. v. Lawson, 177 N.J. 125, 135 (2003); Ledley, 138 N.J. 627, 637-39 (1995).

A misrepresentation on an application for insurance is considered to be "material" if it "naturally and reasonably influenced the judgment of the underwriter in making the contract at all, or in estimating the degree or character of the risk, or in fixing the rate of premiums." Mass. Mutual Ins. Co. v. Manzo, 122 N.J. 104, 115 (1991); see also Longobardi v. Chubb Ins. Co. of N.J., 121 N.J. 530, 542 (1990) (finding that a misrepresentation is material if, when made, "a reasonable insurer would have considered the misrepresented fact relevant to its concerns and important in determining its course of action").

To establish a claim for rescission based on material misrepresentations in a policy application, an insurer needs to prove equitable fraud, but not legal fraud. See Ledley, 138 N.J. 627, 635. To find equitable fraud, "[u]nlike legal fraud, there need not be proof that the statement was made with knowledge that it was false." Liebling v. Garden State Indem., 337 N.J. Super. 447, 453 (App. Div. 2001) (citing Jewish Center of Sussex Cty. v. Whale, 86 N.J. 619, 624 (1981)). "In other words, a party seeking rescission based on equitable fraud need not prove 'knowledge of the falsity and an intention to obtain an undue advantage therefrom.'" Id. (quoting Bonnco Petrol, Inc. v. Epstein, 115 N.J. 599, 609 (1989)). See also Palisades Safety & Ins.

Assoc. v. Bastien, 175 N.J. 144, 148 (2003); Lovett v. Alan Lazaroff & Co., 244 N.J. Super. 510, 513 (App. Div. 1990); Fisher v. N.J. Auto Full Ins. Underwriting Ass'n, 224 N.J. Super. 552, 557 (App. Div. 1988); Allstate Ins. Co. v. Meloni, 98 N.J. Super. 154, 158-59 (App. Div. 1967).

Where an objective question is posed, "[e]ven an innocent misrepresentation can constitute equitable fraud justifying rescission." Ledley, 138 N.J. at 635. "Objective questions call for information within the applicant's knowledge." Id. at 636. To the contrary, "[e]xamples of subjective information include when an insurer asks an insured to indicate a belief about the status of his or her health." Lawson, 177 N.J. 125, 137.

Machane's misrepresentations easily satisfy this standard. The questions on the Supplemental Form asking whether Machane would use rental vehicles, and whether it would use 12-15 passenger vans at the 2019 Summer Camp, are objective questions seeking information within the applicant's knowledge. See Ledley, 138 N.J. at 636. Machane was specifically required to disclose whether it would use rental vehicles at the 2019 Summer Camp, and whether any of the rental vehicles it used were 12-15 passenger vans. It is undisputed that Machane: 1) did not disclose its use of rental vehicles; or 2) reveal that it would use 12-15 passenger vans. (Ia143). These are clear misrepresentations in response to simple, objective questions.

Machane's state of mind and whether it intended to defraud US Fire is irrelevant under decades of binding legal precedent. Equally irrelevant are pages upon pages of speculations in the Intervenor's brief – with no citations to the record – regarding purported implications in the Supplemental Form, the distinctions between renting vans before and during the camp period, or what the word "hiring" might mean when applied to Uber or Lyft. (Ib23). The issue here is whether Machane's responses to the straightforward questions on the Supplemental Form were objectively untruthful. See Tri-State Armored Servs., Inc., 332 B.R. at 710-11. They plainly were.

Moreover, completely undermining any arguments regarding Machane's purported misunderstanding of the Supplemental Form is the fact that Ms. Rosenthal, on behalf of Gross, explained the nature of non-owned/hired auto coverage to Machane before the Supplemental Form was submitted. (Ia076 at ¶ 11; Ia119). She expressly demonstrated the difference between the two parts of the Supplemental Form, advising: "Non-Owned & Hired auto liability covers bodily injury and property damage caused by a vehicle you hire (including rented or borrowed vehicles) or caused by non-owned vehicles (vehicles owned by others, including vehicles owned by your employees)." (Ia076 at ¶ 11; Ia119). Mr. Guttman, on behalf of Machane, simply did not disclose material information regarding the vans that Machane had hired/rented.

To compare, in Tri-State Armored Servs., Inc., the insured, Tri-State, did not properly disclose prior losses in response to an insurance application question that required it to "provide descriptions of all losses in excess of $5,000, including corrective action[.]" 332 B.R. at 709. When addressing the response, the insured's representative, William Mottin, gave to this question, the court stated that "the failure by Tri–State, through Mottin, to provide a response to the second 'Loss History' question on the Great American renewal application, which called for a description of all losses over $5,000, was objectively untruthful." Id. at 710. The court stated that "failure to provide a description of losses over $5,000 for each of the renewal periods constitutes 'blatant and direct misrepresentations' for equitable fraud purposes, both as to individual occurrences of loss occasioned by employee theft, and as to losses occasioned by the conversion of customer funds by management for operational purposes." Id. (citing Lawson, 177 N.J. at 140). Moreover, the court stated that there was "no basis" to conclude the question at issue was ambiguous, "or that it should be construed in favor of the insured [.]" Id. at 711. As such, the Court held "Tri–State's answer to the question by the insurer for a description of all losses over $5,000 was **objectively untruthful, constituting equitable fraud justifying rescission even if the answer was an innocent misrepresentation**." Id. at 713 (emphasis added) (citing Liebling, 337 N.J.Super.

at 453). Similarly, Machane cannot be excused for responding untruthfully to a simple and objective application question.

Finally, the information sought in the Supplemental Form was material and relied upon by US Fire when issuing the US Fire Policy, which is precisely why the information was requested in the first place. As will be detailed further below, US Fire's underwriting guidelines specifically provide that 12 to 15 passenger vans are ineligible for non-owned/hired auto coverage. (Ia134 at 62:23-64:3; Pa008). Consequently, US Fire could not have issued non-owned/hired auto coverage to Machane if it had known that Machane would be using 15-passenger vans in connection with the camp, thus making the misrepresentation material. Further, FL Dean specifically requested the Supplemental Form before writing non-owed/hired auto coverage, and the president of FL Dean affirmed that FL Dean relies on information in the Supplemental Form in its underwriting process. (Ia124; Ia134 at 62:23-64:3; Pa002).

Simply put, U.S. Fire cannot be required to provide coverage for a risk that it was not aware of, and which was not disclosed, despite clear, objective and highly relevant questions that were specifically asked during the application process. Thus, the trial court correctly granted rescission of the US Fire Policy.

C. The Supplemental Form is Objective and Unambiguous.

Intervenor does not dispute that Machane provided false information in response to an application question. Rather, Intervenor asserts that New Jersey's well-established equitable fraud standard does not apply because the Supplemental Form was somehow "ambiguous." As the trial court found, this assertion is contradicted by the plain language of the Supplemental Form. (1T61-10).

Initially, the Intervenor misguidedly relies upon New Jersey case law addressing how ambiguities in policies should be construed. As detailed below, such case law does not apply here because this case does not involve policy interpretation. Rather, it involves a misrepresentation in an application form.

The relevant issue in this case concerns Question 4 on the Supplemental Form. There is nothing ambiguous about this Question. It asks whether "you ***hire or rent*** vehicles during your fair/festival/event." (Ia143) (emphasis added). The word "rent" is in the Question and Machane expressly testified that it filled out the Supplemental Form with the understanding that it was "renting vans and would like to get insurance on it for people that are going to be driving my rented vehicles." (Ib22; Ia337-38). Further, Question 4 does not require the applicant to speculate as to the information requested. It is a simple "yes" or "no" question, that can only be answered by checking boxes that state "yes" or "no". (Ia143). Machane answered this plain, objective, yes or no question inaccurately. As highlighted by the trial

court, "The question was clear. It wasn't a trick question. It couldn't be interpreted in four, or five, or six different ways. The question was do you rent automobiles and he said no." (1T61-10).

Additionally, the use of the terms "fair, festival, and event" does not create an ambiguity. Gross informed Machane that because of the amount of non-owned/hired auto coverage it requested, it had to submit the Supplemental Form. (Ia077 at ¶ 16; Ia139). Machane's principal, Alexander Guttman, testified that he knew he needed to submit the Supplemental Form in order to obtain non-owned/hired auto coverage for rental vehicles used for the 2019 Summer Camp. (Ia095 at 59:2-5). The terms "fair, festival, and event" can only be understood to mean the 2019 Summer Camp in this context.

Intervenor is plainly attempting to create an ambiguity where none exists. New Jersey case law is clear that the Intervenor's efforts should be rejected, as courts are not to indulge in strained or distorted constructions, or read documents in such a way as to create an ambiguity that does not exist. See U.S. Bronze Powders, Inc. v. Commerce & Industry Ins. Co., 259 N.J. Super. 109, 115-16 (Law. Div. 1992), aff'd, 293 N.J. Super. 12 (App. Div. 1996) (citing Wells v. Wilbur B. Driver Co., 121 N.J. Super. 185 (Law Div. 1972); First State Underwriters v. Travelers Ins. Co., 803 F.2d 1308, 1311 (3d Cir. 1986)).

Intervenor's attempts to create an ambiguity strain credulity. The phrases "Non-Owned Vehicles" and "Hired Auto" are not indecipherable industry jargon. (Ib16). They are plain, everyday terms and are especially easily understood here because Machane knew it had to fill out the Supplemental Form to obtain coverage for the rented vans, and Gross has previously informed Machane of the purpose of non-owned/hired auto coverage. (Ia076 at ¶ 11; Ia095 at 59:2-5; Ia119).

Intervenor's assertions that the entirety of the Supplemental Form creates ambiguity are similarly unavailing. (Ib19). Again, the context of the Supplemental Form was apparent to Machane, i.e., it knew it had to fill out the Form for rental van coverage. (Ia076 at ¶ 11; Ia095 at 59:2-5; Ia119). Moreover, the Supplemental Form immediately inquires as to the relevant material information – whether any vehicles rented are 12-15 passenger vans. (Ia143). As the trial court stated, the "questions were specific. They were tailored to this situation." (2T49:24). Any reasonable person filling out the Supplemental Form, after already renting 12-15 passenger vans, and knowing they had to fill out the Supplemental Form to obtain coverage for those vans, would understand the information requested.

Moreover, to the extent that Intervenor is suggesting that US Fire should have worded its questions differently, New Jersey's courts have repeatedly rejected arguments that rescission is not available because an insurer should have been "more circumspect or astute." Pioneer Nat'l Title Ins. Co. v. Lucas, 155 N.J. Super. 332,

342 (App. Div.), aff'd, 78 N.J. 320 (1978). See also Guilford v. First Am. Title Ins. Co., 2012 WL 3030250, at *5, n.4 (N.J. Super. Ct. App. Div. July 26, 2012) ("Plaintiff's argument that [the insurer] was misled because it failed to ask the right questions or conduct appropriate investigations is similarly unavailing. 'An insurer is entitled to relief when it relies on incorrect information provided by an insured in an insurance application if the information was material either to the insurer's decision to insure or to the terms of the contract.'") (quoting Manzo, 122 N.J. 104, 118). Intervenor's argument is based on nothing more than rank speculation about how the application question "should have" been worded. There is no need to engage in this guesswork in light of Question 4's plain and unambiguous nature.

Further, the cases cited by Intervenor are inapposite. This case does not involve an endorsement, inserted into a renewal policy without the insured's knowledge, which required a statement as to "sole and unconditional" vehicle ownership. Cf. Merchants Indem. Corp. v. Eggleston, 37 N.J. 114, 121 (1962). This case also does not involve a commonly misunderstood word in the auto context, like "conviction". Cf. Am. Policyholders' Ins. Co. v. Portale, 88 N.J. Super. 429, 433 (App. Div. 1965). Here, Question 4 asked if Machane rented vehicles. The Question can have only one possible meaning in the context it was presented to Machane.

Question 4 is further distinguishable from the questions at issue in the cases cited by Intervenor, because Question 4 is an objective question. Cf. Liebling, 337

N.J. Super at 543-55. Question 4 is objective because it seeks to obtain information within the applicant's knowledge.[4] In response to this objective question, it was incumbent on Machane to provide the information within its knowledge responsive to the question. "Fair dealing requires the insured to state everything which might, and probably would, influence the insurer in entering into or declining the risk, and in disclosing all information material to the risk about which information is sought." Tri-State, 332 B.R. 690, 710; see also Ledley, 138 N.J. 627, 637 ("misrepresentation or concealment" in response to an objective question "is inexcusable.") Thus, Machane's state of mind in answering Question 4 on the Supplemental Form is irrelevant. Intervenor does not cite to any case law stating otherwise.

Finally, even if Machane was confused by this simple, objective question, it was Gross' role to exercise the "requisite skill and diligence" as Machane's insurance broker to identify the risks for which Machane sought insurance coverage (i.e., rental vehicles), and to then ensure Machane provided the material information within its knowledge necessary to obtain coverage for such risks. E.g., Triarsi v. BSC Grp. Servs., LLC, 422 N.J. Super. 104, 116 (App. Div. 2011); see also Rider v.

[4] Examples of objective questions are "whether the applicant has been examined or treated by a physician[,]" Formosa v. Equitable Life Assur. Soc. of U.S., 166 N.J. Super. 8, 15 (App. Div. 1979), and whether prescription medications are taken by an applicant, Russ v. Metropolitan Life Ins. Co., 112 N.J. Super. 265, 271 (Law Div. 1970). A subjective question, on the other hand, seeks to probe the applicant's state of mind. An example of a subjective question is "when an insurer asks an insured to indicate a belief about the status of his or her health" or if the applicant "is aware of any circumstances which may result in a claim being made against the firm." Lawson, 177 N.J. at 137.

Lynch, 42 N.J. 465, 476 (1964) (one of an insurance broker's obligations is to ensure that a policy "is [not] void or materially deficient.") Indeed, Gross' failure to provide any guidance to Machane whatsoever when Machane filled out the Supplemental Form was one of the bases for Machane's broker malpractice third-party action. (Ia044). US Fire had no obligation to step into Gross' shoes.

The trial court's holding that the Supplemental Form was plain and unambiguous was unequivocal and exact. "The question was clear. It wasn't a trick question. It couldn't be interpreted in four, or five, or six different ways. The question was do you rent automobiles and he said no." (1T61-10). That holding must be affirmed here.

D. US Fire Established Materiality and Reliance.

Intervenor contends that US Fire did not prove two elements of equitable fraud: materiality of the misrepresentation, and reliance on that misrepresentation. This argument wholly fails to address the competent evidence produced by US Fire establishing these elements.

As an initial matter, Intervenor's appeal fails to comply with Rule 2:6-1(a) because it does not include "all items submitted to the court on the summary judgment motion[.]" Specifically, Intervenor has not submitted Exhibit J to US Fire's summary judgment motion, US Fire's Commercial General Liability

Underwriting Rules and Rates (Pa006),[5] or the Affidavit of Michael Dean, the owner of FL Dean. (Pa001). These are the materials relied upon by US Fire and accepted by the trial court on the subject of whether US Fire established materiality and reliance, and Intervenor's failure to include them in the record before this Court eviscerates its arguments on these elements of equitable fraud. (1T63-5).

Intervenor's arguments are also inaccurate. For instance, Intervenor's assertion that there is no "sworn statement from any underwriter stating retrospectively that the policy would not have been issued but for the 'misrepresentation' of fact" (Ib31), is patently false. (See Pa003, affidavit of owner of US Fire's underwriting agency stating, "Had FL Dean been informed of Machane's intention to use 12 or 15-passenger rental vans, FL Dean would not have written Hired and Non-Owned Auto coverage for Machane.")

When all of the evidence before the trial court is properly considered, it is evident that US Fire established materiality and reliance. With respect to materiality, a misrepresentation on an application for insurance is considered to be "material" if it "naturally and reasonably influenced the judgment of the underwriter in making the contract at all, or in estimating the degree or character of the risk, or in fixing the rate of premiums." Manzo, 122 N.J. 104, 115. Here, U.S Fire's underwriting

[5] Exhibit J was submitted to the trial court by email to account for confidential portions thereof not pertinent to this appeal. The relevant portions of Exhibit J are filed herewith as part of Plaintiff's Appendix.

guidelines specifically provide that 12-15 passenger vans are ineligible for non-owned/hired auto coverage. (Pa008). Thus, US Fire would not have made "the contract at all" if accurate information had been provided. Manzo, 122 N.J. 104, 115. This fact is further established by Mr. Dean's testimony and affidavit. (Ia134 at 62:23-64:3; Pa001).

Turning to reliance, this element is established by the fact that FL Dean required the Supplemental Form be completed before it would write non-owned/hired auto coverage, thus indicating FL Dean's intention to rely on the information in the Supplemental Form. (Ia077 at ¶ 16; Ia134 at 62:23-64:3; Ia139). This element is also plainly established by Mr. Dean's affidavit, wherein he repeatedly affirms FL Dean relied on the Supplemental Form to bind coverage. (Pa001).

The gist of Intervenor's argument appears to be that "first-hand" testimony from Ms. Rosenthal, the involved Gross employee, or Ms. Hockemeyer, a FL Dean underwriter, was required.[6] Mr. Dean, however, personally supervised Ms. Hockemeyer and he was the owner of FL Dean. In other words, he was the individual with the most relevant knowledge of FL Dean's underwriting practices. (Pa001).

[6] Neither Ms. Hockemeyer nor Ms. Rosenthal were employed by their respective companies at the time depositions were conducted.

In any event, Sellers v. Schonfeld, 270 N.J. Super. 424 (1993), the case Intervenor primarily relies upon for his argument, is completely inapposite. The Sellers case has nothing to do with the issuance of an insurance policy or the testimony of brokers or underwriters. Moreover, the court in Sellers took issue with the documents that were attached to an attorney certification because none of those documents were certified as true "nor was there any authentication of the documents." Id. at 428.

Here, unlike in Sellers, Mr. Dean testified as to the authenticity and impact of the underwriting guidelines, a business record of the company that Mr. Dean owns. Indeed, the Intervenor has not disputed the authenticity of the guidelines or the language contained therein (or addressed the guidelines at all).

Moreover, contrary to the Intervenor's contention, what Ms. Rosenthal and Ms. Hockemeyer might have testified to does not change the fact that US Fire has proven the elements of equitable fraud as a matter of law. Indeed, Intervenor fails to address the following evidence that was before the trial court: (1) the testimony of the principal of Machane, authenticating the Supplemental Form and admitting that he was advised that he had to submit the Supplemental Form in order to obtain $1,000,000 in non-owned/hired auto coverage (Ia076 at ¶ 11; Ia095 at 59:2-5; Ia337-38); (2) the underwriting guidelines that inform FL Dean what coverage it can, and cannot, offer (on behalf of US Fire) and which specifically state that non-

owned/hired auto coverage is not available for 12 or 15 passenger vans (Pa008); and (3) the affidavit of Mr. Dean, principal of FL Dean, the company that underwrote the US Fire Policy, authenticating the underwriting guidelines and stating that pursuant to those underwriting guidelines, the US Fire Policy could not have been written had Machane truthfully responded that it rented 12-15 passenger vans for use at its summer camp. (Pa001).

Unlike the undisputed, material evidence presented by US Fire, what Ms. Rosenthal and Ms. Hockemeyer may have said if deposed (or in an affidavit) is complete speculation and entirely irrelevant. See Merchants Express Money Ord. Co. v. Sun Nat. Bank, 374 N.J. Super. 556, 563 (App. Div. 2005) ("speculation does not meet the evidential requirements which would allow it to defeat a summary judgment"); Hoffman v. Asseenontv.Com, Inc., 404 N.J. Super. 415, 426 (App. Div. 2009) (citing Merchants Express, 374 N.J. Super. at 563) ("[c]ompetent opposition requires 'competent evidential material' beyond mere 'speculation' and 'fanciful arguments'"). If Intervenor thought that Ms. Rosenthal's and/or Ms. Hockemeyer's testimony was of such importance in this case, he could have deposed them, but he chose not to. In any event, the substance of any such testimony cannot change the plain language of the underwriting guidelines.

The evidence that US Fire submitted in support of its summary judgment motion plainly satisfies the standard for seeking rescission as a matter of law. See

e.g., Ledley, 138 N.J. 627 (granting summary judgment in favor of insurer on rescission claim where the insurer submitted an affidavit by a senior life underwriter wherein he concluded that if the insured had answered the question accurately, the insurer would not have issued the policy); Scalia v. Lafayette Ins. Co., 1995 WL 631841, at *9 (D.N.J. Oct. 23, 1995) (granting summary judgment to an insurer that submitted an affidavit from the Director of Individual Underwriting stating that had the insured disclosed the facts sought to be elicited by the insurer, the insurer would not have issued the policy).

Here, like in Scalia and Ledley, US Fire submitted an affidavit from a senior underwriting employee. Intervenor's failure to address this affidavit, or the contents of US Fire's underwriting guidelines, necessitates denial of his appeal.

E. The Terms of the US Fire Policy Do Not Impact the Application of the Equitable Fraud Standard.

Intervenor contends that the equitable fraud standard does not apply because the US Fire Policy requires intent. The relevant provision, however, is as follows:

> **2. Concealment, Misrepresentation or Fraud**
>
> This coverage form is void ***in any case of fraud by you*** at any time as it relates to this coverage form. It is also void if you or any other "insured," at any time, intentionally conceals or misrepresents a material fact concerning:
>
> **a.** This coverage form;
> **b.** The covered "auto";
> **c.** Your interest in the covered "auto"; or

d. A claim under this coverage form.

(Ia618) (emphasis added).

To be clear, US Fire does not rely upon this provision for its rescission claim. US Fire relies upon New Jersey's well-established, common law equitable fraud standard. This Policy provision was raised for the first time by Gross (who has not participated in this appeal) during supplemental briefing on an entirely separate issue. (2T12:23).

Regardless, Intervenor's argument fails because it is not supported by the very language of the provision on which it is premised. The US Fire Policy clearly provides that the coverage form is void "in any case of fraud by you [i.e., the named insured.]" New Jersey permits rescission on the basis of equitable fraud, and equitable fraud is "any case of fraud." E.g., Ledley, 138 N.J. at 635.

The second sentence of this condition is not specific to the named insured, i.e., "you." Rather, it states that if "**any other 'insured,'** at any time, intentionally conceals or misrepresents a material fact" the Policy may be voided (emphasis added). The phrase "any other insured" is important because it signifies a broader application. E.g., Am. Wrecking Corp. v. Burlington Ins. Co., 400 N.J. Super. 276, 283 (App. Div. 2008) (discussing the significance of policy provisions which use the phrase "any insured"). For example, if an additional insured intentionally concealed a material fact, this policy language could be satisfied.

New Jersey courts have not addressed this specific condition, but other courts have rejected the exact argument the Intervenor has presented here, specifically in the context of equitable fraud:

> This language [i.e., any case of fraud by you at any time] provides that concealing or misrepresenting a material fact at any time will void the policy. Clearly, therefore, the policy provides that falsity through either concealment or misrepresentation will void the policy. Therefore, ***Plaintiff need not establish fraudulent intent on the part of Defendant in order for the insurance policy to be rendered void.***

Northland Ins. Companies v. Fantasy Bus Serv., Inc., 1996 WL 115515, at *6 (E.D. Mo. Jan. 9, 1996) (emphasis added).

At bottom, Intervenor's argument that the standard for rescission can be changed by policy language is contradicted by the policy provision on which the argument is premised, and is unsupported by New Jersey's common law, equitable fraud standard.

F. US Fire Does Not Rely on an Exclusion.

Intervenor's reliance on the "reasonable expectations" doctrine, and the principle that exclusions must appear on a declarations page, is without basis because US Fire does not rely on an exclusion. Rescission is an equitable remedy that is not premised on contract language.

Under New Jersey law, the reasonable expectations doctrine and the clear and conspicuous standard apply for the limited purpose of interpreting policy language,

including exclusions under certain circumstances. See e.g., Zacarias v. Allstate Ins. Co., 168 N.J. 590, 601 (2001) ("When there is ambiguity in an insurance contract, courts interpret the contract to comport with the reasonable expectations of the insured, even if a close reading of the written text reveals a contrary meaning."); Sosa v. Massachusetts Bay Ins. Co., 458 N.J. Super. 639, 652 (App. Div. 2019 (referencing the rule that "exclusionary clauses must be 'conspicuous, plain and clear'") Neither doctrine applies here because, as set forth throughout this brief, this case is not about interpreting any policy language or exclusions. This case is solely about a material misrepresentation in an application form.

Moreover, the reasonable expectations doctrine is premised on the reasonable expectations of the policyholder, *i.e.*, Machane. See Zacarias, 168 N.J. at 595. As such, Intervenor's arguments in this context must be rejected. See Kievit v. Loyal Protective Life Ins. Co., 34 N.J. 475, 482 (1961) (explaining the doctrine of reasonable expectations and noting it can only apply to "members of the public [who] ***purchase*** policies of insurance [.]") (emphasis added).

Finally, the reasonable expectations doctrine, when applied in the proper context, by the proper party, only applies where policy language is ambiguous, technical, or contains hidden pitfalls. Zacarias, 168 N.J. at 601. As set forth above, the language contained in Question 4 clearly and simply asked whether Machane rented vehicles in connection with its event and if so, whether those vehicles

included 12 to 15 passenger vans. (Ia143). There was nothing ambiguous or technical about the Question and it did not contain any hidden pitfalls.

G. The US Fire Policy is Not Subject to Financial Protection Laws.

Intervenor concludes by arguing that "public policy" somehow warrants imposition of liability on US Fire under a Policy that was procured on the basis of blatant and material misrepresentations. Intervenor's argument is misplaced because the US Fire Policy was a general liability policy which provided limited automobile liability coverage for vehicles that the insured "leases, hires, rents, or borrows" in connection with its business operations. (Ia163; Ia164). It was not an automobile policy.

New Jersey, like most states, has enacted financial responsibility laws requiring a mandatory minimum amount of automobile insurance. However, these laws are limited to a vehicle's owner. See N.J.S.A. 39:6B-1 ("Every owner or registered owner of a motor vehicle registered or principally garaged in this State shall maintain motor vehicle liability insurance coverage [.]") See also Huggins v. Aquilar, 246 N.J. 75, 82 (2021) (there is a "statutory requirement that every automobile be insured by its owner, not its driver [.]") North Carolina, where this accident occurred, likewise has financial responsibility laws specific to vehicle owners. N.C. Gen. Stat. Ann. § 20-279.21(b).

In recognition of financial responsibility laws, police reports concerning auto accidents will identify a vehicle owner, and the owner's insurance policy. The police report regarding the Accident did so in this case, identifying "Hertz Vehicles LLC" as the vehicle owner, and "ACE American Ins Co" ("ACE") as the insurer for financial responsibility purposes. (Ia167).[7]

Accordingly, Intervenor's assertion that he is an innocent party who will be left without protection if rescission is affirmed (Ib38), is incorrect. Intervenor has the ability to pursue the financial responsibility coverage which, by law, Hertz Vehicles LLC was required to, and did obtain. The facts here are simply not comparable to the equities or legislative mandates at issue in the cases cited by Intervenor.

For instance, in Lawson, the Supreme Court shaped a remedy of rescission to allow an innocent insured, who would be left without any coverage at all if the policy were rescinded, to claim coverage. Here, on the other hand, Machane (and Intervenor) will not be left without coverage following rescission. The policy issued to Hertz insures the vehicle owner as required by law, and thus Machane and the Intervenor may call upon it to respond if they so wish.

[7] Machane also obtained an "American Express Premium Rental Protection Insurance Policy". (Ia108). It is not clear if Machane ever noticed the Accident under this Policy.

Similarly, in Rutgers Cas. Ins. Co. v. LaCroix, 194 N.J. 515, 523 (2008), the Supreme Court did allow for PIP benefits despite the rescission of a policy, but it did so based on New Jersey's no-fault financial responsibility laws, which are, again, limited to "standard automobile liability insurance polic[ies]" and vehicle owners. Id. The US Fire Policy is not a standard automobile liability policy – it is a commercial general liability policy that provided non-owner/hired auto coverage as a supplemental coverage. It also does not insure any vehicles owned by the insured. LaCroix has no application here.

Intervenor has failed to identify a single case refusing rescission of a commercial general liability policy. There is also no legislative support for Intervenor's position, and it is contradicted by the fact that financial protection is, in fact, available to the Intervenor from other sources.

CONCLUSION

For the foregoing reasons, U.S. Fire respectfully requests that this Court dismiss the present appeal because the Intervenor has no standing to bring it. Should the Court consider the substantive issues, US Fire respectfully asks that this Court affirm the trial court's Order granting US Fire summary judgment, and declaring the US Fire Policy void *ab initio*.

Respectfully submitted,

KENNEDYS CMK LLP

/s/ Kristin V. Gallagher
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Attorneys for Plaintiff,
United States Fire Insurance Company

Dated: October 19, 2023

Superior Court of New Jersey
Appellate Division
❖ ❖ ❖
Docket No. A-001918

UNITED STATES FIRE INSURANCE COMPANY,
Plaintiff-Respondent,
v.
MACHANE OF RICHMOND, LLC,
Defendant-Respondent.
and
ELIYAHU KORENFELD,
Intervenor-Appellant.

MACHANE OF RICHMOND, LLC,
Third-Party Plaintiff
v.
Gross & Co., LLC,
Third-Party Defendant.

CIVIL ACTION

ON APPEAL FROM THE SUPERIOR COURT OF NEW JERSEY LAW DIVISION, OCEAN COUNTY

Trial Court Docket No. OCN-L-1465-20

Sat Below:
HON. CRAIG L. WELLERSON, J.S.C.

REPLY BRIEF FOR INTERVENOR-APPELLANT ELIYAHU KORENFELD

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LEGAL ARGUMENTS

I. Intervenor's Appeal is Not Barred by the Direct-Action Statute.

US Fire filed a Motion to Dismiss Intervenor's Appeal and Motion for Summary Disposition on July 7, 2023, arguing that Intervenor's appeal is prohibited by the Direct Action Statute and that Intervenor does not have standing to appeal. Intervenor opposed this motion on July 24, 2023 and this Court denied the motion on August 14, 2023. As this Court has denied US Fire's motion, this Court should reject US Fire's argument for that reason and the reasons argued in Intervenor's July 24, 2023 opposition.

II. That Guttman Was Confused and Answered the Questionnaire Incorrectly Does Not Negate His Reasonable Expectation of Coverage Given the Totality of the Circumstances.

No one is disputing that Guttman inaccurately answered Question 4 of the Questionnaire. Nor is any party asserting that he intentionally answered Question 4 incorrectly. However, the fact that he made an innocent mistake in answering the Questionnaire does not override his reasonable expectation of coverage when the totality of events are taken into consideration:

June 28, 2019 - In procuring general liability insurance for the summer camp, Guttman received a copy of the Master Policy from Gross. (Ia119). The Master Policy is a General Liability Policy and does not pertain to motor vehicles (i.e., there is nothing in the policy excluding coverage of 12-15+ passenger vans). Gross recommended Guttman procure extra insurance that would cover the 12-15+ passenger rental vans that would be used to transport campers to activities and events. (Ia332). Guttman wanted at least $1 million in liability coverage for the vans

that he would be renting. (Ia345).

July 9-10, 2019 - Guttman reserved four 12-15+ passenger vans from Hertz. (Ia336).

July 30, 2019 - Guttman filled out FL Dean's online application to obtain insurance for the vans. (Ia337). The application permits insurance for 12-15+ passenger vans for $150,000 to $500,000 but merely requires "additional underwriting" if $1 million is requested. The application states nothing about excluding 12-15+ passenger vans. (Ia585).

July 31, 2019 – FL Dean informs Gross that if Guttman wants $1 million in coverage, he would have to complete a supplemental questionnaire (the "Questionnaire"). (Ia124). Guttman completes the Questionnaire which makes no mention that 12-15+ passenger vans are excluded from coverage. (Ia143).

August 1, 2019 – Gross submits the Questionnaire to FL Dean. (Ia124).

August 6, 2019 - Camp opens and the 12-15+ passenger vans pick up campers in the morning to bring them to camp. FL Dean sends a 4-page price quotation to Gross for a $1 million policy. (Ia101-104; 147). Later that day, coverage is bound. (Ia147).

After August 6, 2019 - Guttman receives a Certificate of Coverage stating that he has $1 million Hired/Non-owned Automobile coverage ("HNOA"). The Certificate does not state 12-15+ passenger vans are excluded or otherwise ineligible for coverage. (Ia151).

A. That Guttman Was Never Notified that 12-15+ Passenger Vans Were Excluded or Otherwise Ineligible for Coverage Combined with the Fact that the Insurance Policy and Related Forms Were Confusing, Contradictory, and Misleading Provided Him With A Reasonable Expectation of Coverage.

"When there is ambiguity in an insurance contract, courts interpret the contract to comport with the reasonable expectations of the insured, even if a close reading of the written text reveals a contrary meaning." *Zacarias v. Allstate Ins. Co*.,

168 N.J. 590, 595 (2001) (citations omitted). A genuine ambiguity arises **"where the phrasing of the policy is so confusing that the average policyholder cannot make out the boundaries of coverage.** In that instance, application of the test of the objectively reasonable expectation of the insured often will result in benefits coverage never intended from the insurer's point of view." *Zacarias*, 168 N.J. at 598 (emphasis added)(quotation omitted).

Nowhere at any point during the application process identified above was Guttman, who was overtly attempting to obtain $1 million in insurance *specifically* for 12-15+ passenger rental vans, informed that such vans were excluded or otherwise ineligible for coverage. Indeed, US Fire admits that it never informed Guttman that the vans were excluded from coverage or otherwise ineligible for coverage. It relies on only two instances in which it states that the vans are not covered – in its Underwriter's Guidelines and in FL Dean's 4-page price quotation – neither of which were provided to Guttman. (Rb9-10;14; 25). As explained more fully below, Guttman had a reasonable expectation of coverage when the Questionnaire is examined in light of US Fire's misleading and confusing application process and corresponding documents that contradict each other.

1. **The FL Dean application to obtain insurance coverage for the vans did not inform Guttman of the exclusion and contradicted US Fire's own underwriting guidelines.**

As instructed, Guttman went online to fill out FL Dean's application to obtain

HNOA coverage for the vans. (Ia337). On page 5 of the online application (the "Application"), it sets out the options for non-owned automobile liability coverage as follows:

> Part III Optional Liability Coverages (premiums are fully earned)
> Optional $150,000.00 hired and non-owned automobile liability coverage is available for an additional $225.00. = $
> Optional $500,000.00 hired and non-owned automobile liability coverage is available for an additional $500.00.
> • Note: $1,000,000.00 hired and non-owned automobile liability coverage is available but subject to additional underwriting. Please contact your agent if wishing to apply for coverage.

[Ia585].

The Application permits applicants to obtain hired and non-owned auto liability coverage with limits of $150,000 or $500,000 without being subject to additional underwriting. (Ia585). There is an additional note that "$1,000,000 hired and non-owned automobile liability coverage *is available* but subject to additional underwriting." (Ia585)(emphasis added). The application makes no reference at all to 12 to 15+ passenger vans, even though page 4 of the application lists almost 20 exclusions that were ineligible for coverage, such as High Ropes, Courses, Zip Lines, Trampolines, jet skis, climbing wall, gymnastics, etc. The Application gives no notice to any applicant that any type of vehicle is not going to be covered. (Ia581-586). Further, as discussed more fully below, the Application is contradictory to US Fire's own underwriting guidelines. This provided Guttman with a reasonable expectation that the vans would be covered.

2. The Questionnaire at issue did not inform Guttman that the vans were excluded and, further, was misleading and unclear, especially in light of the Application, which stated that 12-15+ passenger vans could be insured in the amount of $150,000 or $500,000.

After filling out the online application which allows 12-15+ passenger vans to be insured for $150,000 or $500,000 without additional underwriting, Guttman then completes the Questionnaire which also fails to state anywhere on it that 12-15+ passenger vans are excluded from coverage at any insurance limit. (Ia143). US Fire is incorrect when it claims that in the Questionnaire, "Machane state[d] that it did not hire or rent 12-15 passenger vans." (Rb10). Guttman's response said nothing of the sort because he was not asked that question. Instead, the Questionnaire asked:

> 4. Do you hire or rent vehicles during your fair/festival/event?
> Yes ___ No _x__
> If yes, please describe vehicle types, estimated number, duration, and usage.
> _____N/A_____
> _____
> If yes to #4, are any of these vehicles 12-15 passenger vans?
> ☐ Yes (How many?__)
> ☐ No

[Ia143]

As discussed in detail in Intervenor's opening brief, Guttman misunderstood the misleading question and answered "No." (Ia143). He never stated or represented, as US Fire suggests, that Machane "did not hire or rent 12-15 passenger vans." In fact, had that been the question, Guttman might have answered differently. Because Guttman misunderstood the question and because both the Application and the

Questionnaire never stated that 12-15+ passenger vans were not covered by insurance, Guttman had a reasonable expectation of coverage.

3. Neither the four page price quotation nor the underwriter's guidelines informed Guttman that the vans were excluded and, together, they contradict each other.

After completing the Questionnaire, Guttman sent it back to Gross on July 31st. Gross sent it to FL Dean on August 1st, but Dean did not send the (4 page) price quotation (the "Quote") until August 6th, the day camp opened. (Ia124; Ia145-148). US Fire points out that the third page of the Quote states that 12-15+ passenger vans were excluded from coverage. (Rb9). However, this Quote was provided only to Gross. (Ia124; Ia145-148). There is no evidence that it was ever provided to Guttman. But, more importantly, the exclusion is only as to $1,000,000 in coverage, not to $150,000 or $500,000 in coverage:

> **Hired/Nonowned Auto Liability Coverage Options**
>
> Option 1: $150,000 Hired/Non-owned Auto Liability Coverage can be added for an additional premium of $225.00.
>
> Option 2: $500,000 Hired/Non-owned Auto Liability Coverage can be added for an additional premium of $500.00
>
> Option 3: $1,000,000 Hired/Non-owned Auto Liability coverage is available for additional premium subject to a Minimum Premium of $850.00 and our receipt and approval of our Hired/Non-owned Auto supplemental application. Please note that 12 and 15+ Passenger Vans are excluded. Please contact me if you would like this application.

[Ia147].

Moreover, the exclusion of the vans provided in the Quote (that was evidently not provided to Guttman) that says $1 million coverage is not available for 12-15+ vans totally conflicts with the Application that Guttman completed, which states that coverage on the vans "*is available* but subject to additional underwriting." (Ia585)(emphasis added). Additionally, the exclusion, if it can be called that, is on page 3 of the Quote hidden in normal print and, therefore, does not adequately warn the applicant that the vans are excluded. Exclusions should be "conspicuous, plain and clear." *Sosa v. Massachusetts Bay Insurance Co.*, 458 NJ. Super. 639, 652 (App. Div. 2019)(quotation omitted). Further, a quote is insufficient to contain an exclusion. Insureds use quotes to decide whether or not the premium is too expensive[1] and not to determine the extent of coverage, especially the day the coverage is to begin.

To communicate to an insured's broker last minute through a Quote that vehicles - rented weeks earlier and already on their way to camp with youngsters - had an exclusion for such vehicles, should not be condoned by this Court. US Fire should not prevail by arguing that a Quote sent last minute to a broker on the day camp opened was sufficient to warn Guttman that the vans were not insured. If this

[1] "An insurance quote is an estimated cost provided by the insurance company for an insurance policy. Insurance companies often provide a quote to prospective policyholders, so they have an idea of the cost of purchasing coverage from that particular insurer." *See* https://www.insuranceopedia.com/definition/476/insurance-quote, visited on 11/10/2023.

Court were to permit such a document to contain exclusions, that would turn the insurance industry on its head. Given the entirety of the circumstances, Guttman had a reasonable expectation of coverage, particularly when he was not given the usual automobile policy that would have contained exclusions and, indeed, was never given any document that said the 12-15+ passenger vans were excluded and, further, received notice that the vans were covered after the vans were already in use. This is literally too little too late.

4. The underwriting guidelines, which contradict the Application, did not inform Guttman that the vans were excluded.

US Fire also argues in support of recission that its Underwriting Guidelines (the Guidelines") advised that "12-15 plus passenger vans are ineligible" for coverage (Rb2-3; 9-10; 25). The Guidelines, however, are for the underwriters' use (Ia481;486-87; 490) and, thus, would never have been provided to Guttman. Moreover, the Guidelines contradict both the Application and the Quote. The Guidelines provide as follows:

> **<u>Hired Non-Owned Automobile Coverage</u>**
>
> Hired and Non-Owned Automobile is available at the following liability limits:
> *$ 150,000*
> *$ 500,000*
> *$1,000,000*
> Hired Car and Non Owned Auto coverage should only be written for those insureds that do not have an owned fleet exposure and do not carry commercial automobile coverage which also provides Hired Car and Non Owned coverage.

**12 or 15 plus passenger vans are ineligible for this program.*

[Pa008].

Thus, according to the Application filled out by Guttman, coverage was available for the vans at $150,000 or $500,000 without being subject to additional underwriting. (Ia585). For $1,000,000 coverage was available but was subject to additional underwriting. According to the Quote, however, provided by FL Dean to Gross, coverage was available for 12-15+ passenger vans in the amount of $150,000 or $500,000 but was *not* available at all in the amount of $1,000,000. However, according to the Guidelines, *no coverage in any amount* is available for 12-15+ passenger vans. [compare Ia545 with Ia147 and Pa008].[2] So which is it – is coverage for the vans available, not available, available at certain amounts but not others? And how was Guttman to know when even the broker did not know the vans were excluded from coverage. Gross testified that:

> From 2014 to 2019, no one from FL Dean or US Fire ever shared with me the "underwriting guidelines" [that have been submitted in this case] or verbally told me what was in them related to 12 or 15 passenger vans. Moreover, no one ever told me verbally or in writing that US Fire was unwilling to insure 12 or 15 passenger vans for non-owned automobile liability coverage. So we could not have told any prospective clients, such as Machane of Richmond, who were applying for camp insurance about such an exclusion because we did not know it was a problem for US Fire.

[2] At summary judgment, the Guidelines were submitted by US Fire under seal. Intervenor did not see the Guidelines until they were submitted as an exhibit to US Fire's brief on appeal.

> Further, …that while there is a large approximate 475 page master policy issued by US Fire that governs the coverage [that] is available to Machane of Richmond, there is no exclusion in that master policy related to 12 or 15 passenger vans and automobile accidents.

[Ia576].

Because Guttman was never provided with the Guidelines, his broker was not even aware of the exclusion in the Guidelines, and because the exclusion in the Guidelines conflict with the information provided in the Application and the Quote regarding the vans, Guttman had a reasonable expectation of coverage.

5. The Certificate of Coverage did not inform Guttman of the exclusion.

After coverage was bound, Guttman received a Certificate of Coverage (the Certificate") stating that he has $1,000,000 HNOA coverage. (Ia151-164). The Certificate does not state that 12-15+ passenger vans are ineligible for coverage. In this case, since it did not involve a traditional automobile policy, no declaration page was issued. Presumably, US Fire wants the Certificate of Coverage substituted for the declaration page and yet the Certificate did not advise of the exclusion contrary to well-settled law. In *Lehrhoff v. Aetna Casualty & Surety Co.,* 271 *N.J. Super.* 340, 346–47 (App. Div.1994), this Court concluded that the reasonable expectations of the insured, as formed on the basis of the declarations sheet, could not be defeated by the boilerplate text contained elsewhere in the policy. This Court stated:

> There has been little judicial consideration of the import of the declaration page of an insurance policy in terms of construction of the

> policy as a whole and in terms of its capacity to define the insured's reasonable expectations of coverage. We, however, regard the declaration page as having signal importance in these respects.... We are, therefore, convinced that it is the declaration page, the one page of the policy tailored to the particular insured and not merely boilerplate, which must be deemed to define coverage and the insured's expectation of coverage. And we are also convinced that reasonable expectations of coverage raised by the declaration page cannot be contradicted by the policy's boilerplate unless the declaration page itself so warns the insured.

[*Id.* at 347.] *See also Gerhardt, supra,* 48 *N.J.* at 298 (observing that policy was ambiguous in part because exclusion was not on declarations sheet).

In this case there was no written policy issued to Guttman related to the vans, only a Certificate of Coverage. Courts should construe insurance policies against the insurer, consistent with the reasonable expectations of insureds, when those policies are overly complicated, unclear, or written as a trap for the unguarded consumer. *Kievit v. Loyal Protective Life Insurance Co.,* 34 N.J. 475 (1961).

B. Any Misrepresentation by Guttman About Not Using 12-15+ Passenger Vans Was Rendered Immaterial When He Said On The Questionnaire That He Was Not Hiring Or Renting Any Vehicles At All.

US Fire argues that the Questionnaire was material and relied upon by FL Dean in deciding whether to bind the coverage. (Rb32-33). The reliance upon statements in the Application must be a *reasonable* reliance. Here, the Questionnaire asked Guttman:

> 4. Do you hire or rent vehicles during your fair/festival/event?
> ___Yes __x__ No

If yes, please describe the vehicle types, estimated number, duration and usage:

N/A

[Ia143]

FL Dean should have automatically denied the application upon seeing the "No" checked off. Indeed, the *sole* purpose of the Questionnaire was to determine if Hired/Non-owned 12-15+ vans were going to be used by the applicant. So, if the applicant denied that it would be hiring or renting *any* non-owned vehicles and used "N/A" to describe them, how could the underwriter even consider issuing the policy? How could reliance by US Fire's underwriter have been reasonable if, on an application for insurance for leased vehicles, it stated there would be no leased vehicles? By saying "No" and "N/A" to Question 4, any alleged misrepresentation about using 12-15+ passenger vehicles became immaterial because the application should have been denied outright.

US Fire would have the Court affirm the rescission of a policy that never should have been issued in the first place. If this Court were to permit such an outcome, it would give free reign to insurance companies to collect a premium for coverage that is not needed. Even worse, it gives insurance companies the ability to insure anything the applicant believes he needs only to later point out that the applicant was not entitled to coverage under the issued policy.

By incorrectly responding "No" to the first question, that had to mean that,

although this Questionnaire was solely for information about renting or hiring motor vehicles for the summer, Guttman mistakenly said he was not hiring *any* at all. But US Fire does not interpret the "No" to mean that he is not hiring or renting *any* vehicles; instead, they collect his money and then conveniently interpret the “No” to mean he was not hiring or renting specifically *12-15+ passenger vans*. This Court should not allow US Fire to hide behind its confusing, contradictory underwriter's forms and sell insurance that is not needed according to the application and collect the premiums only to rescind the insurance policy after an accident.

C. The Reasonable Expectations Doctrine is Applicable to this Type of Insurance Policy.

US Fire argues that the reasonable expectations doctrine does not apply here for several reasons. (Rb38-39). First, because US Fire is claiming rescission based on equity and not based on the contract language. Thus, US Fire asserts, it did not need to communicate exclusionary language to Guttman. This is a puzzling argument given that insurance is based on contract language. However, the reasonable expectation of having insurance is also an equitable doctrine and, therefore, there is no reason for it not to apply here.

Secondly, US Fire argues that the doctrine applies only to those who purchase insurance policies, citing *Kievit,* 34 NJ 482, and not to injured third parties. (Rb38-39). That is incorrect. In *Zacarias*, 168 NJ at 595 (emphasis added), the Court said, "The objectively reasonable expectations of applicants *and intended beneficiaries*"

regarding the terms of insurance will be honored…" Here, Intervenor Korenfeld is an intended beneficiary and should be protected by the doctrine.

Third, US Fire argues that the doctrine does not apply because the Questionnaire was not ambiguous, technical or contained hidden pitfalls. (Rb39). As discussed throughout this appeal, the Questionnaire and related documents were ambiguous and contained hidden pitfalls by, *inter alia*, contradicting each other. Moreover, even if there is no ambiguity, this Court, taking into account the entire application process, can still reverse on equitable grounds. *See Sparks v. St. Paul Ins. Co*., 100 N.J. 325, 326 (1966) (noting in another insurance case "that the language in issue, while perhaps not ambiguous, was nevertheless insufficiently clear to justify depriving the insured of her reasonable expectations that coverage would be provided.")(*quoting Gerhardt v. Continental Ins. Cos*., 48 NJ 291 (1966)).

CONCLUSION

For the reasons stated above, as well as the reasons stated in Intervenor's opening brief, rescission was inappropriate and the lower court's decision to grant US Fire's Motion for Summary Judgment should be reversed.

Dated: December 6, 2023

Respectfully submitted,

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