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MAKAYLA BUNTING, Administratrix and Administratrix ad Prosequendum for the ESTATE OF MICHAEL BUNTING,

Plaintiff-Appellant,

v.

EMIL A. SCHROTH, INC.; NEW JERSEY MANUFACTURERS INSURANCE COMPANY; GREAT NORTHERN INSURANCE COMPANY; CHUBB INSURANCE COMPANY OF NEW JERSEY and JOHN DOES 1-10,

Defendants-Respondents.

SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION

DOCKET NO. A-001972-23T1

CIVIL ACTION

On Appeal from the Law Division, Monmouth County

Docket No. MON-L-1035-22

Sat Below:

Hon. Richard W. English, J.S.C.

BRIEF IN SUPPORT OF THE APPEAL

On the brief and of counsel:

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PRELIMINARY STATEMENT

Plaintiff, Mykayla Bunting, as administratrix and administratrix ad prosequendem for the Estate of Michael Bunting ("Plaintiff"), appeals the orders of the trial court granting the dismissal of her Complaint and denying summary judgment in her favor. The issue on appeal is whether an exclusion contained in a Workers Compensation and Employers Liability Insurance Policy issued by defendant, New Jersey Manufacturers Insurance Co. ("NJM"), to Mr. Bunting's employer, Emil A. Schroth, Inc. ("Schroth"), is enforceable. The C5 exclusion at issue seeks to exclude from coverage any claims for "intentional wrongs" that are excluded from coverage under N.J.S.A. 34:15-8.

Pursuant to N.J.S.A. 34:15-70 et seq., otherwise known as the Employers' Liability Insurance Law, an employer is obligated to "make sufficient provision for the **complete payment of any obligation** which he may incur to an injured employee." Coverage under such insurance contracts may not limit "the liability of the insurer to an amount less than that payable by the assured on account of his entire liability" to his employee. N.J.S.A. 34:15-87. The terms of an insurance policy issued pursuant to the Workers Compensation Act ("WCA") and the Employers' Liability Insurance Law cannot conflict with the statutory mandate that coverage be provided for the **complete payment of any obligation** of the employer to the injured employee.

The trial court erred in holding that the exclusion was enforceable, finding that the "removal of exclusion C5 would lead to an increase in moral hazard, going against public policy." Stated another way, the trial court accepted the unsubstantiated premise that having insurance will promote bad behavior and the lack of insurance will deter such behavior. There is no empirical evidence to support either supposition. Moreover, even *arguendo* if that constituted a legitimate concern, the competing public policy in fully compensating injured workers and the statutory mandate that there be coverage for **any** obligation incurred by an employer for injuries to his employee overrides any such concern.

That an insurer cannot contract out of its statutory obligations is well settled. A policy exclusion "that conflicts with statutorily mandated coverage will not be enforced." Potenzone v. Annin Flag Co., 191 N.J. 147, 150 (2007). As a matter of law, the C5 exclusion is unenforceable. The trial court's orders should be reversed, and summary judgment should be granted to plaintiff.

PROCEDURAL HISTORY

On September 28, 2020, Mr. Bunting was injured while in the course of his employment with Emil A. Schroth, Inc. ("Schroth"). Pa17. Mr. Bunting was feeding copper through a baler when part of the baler broke, falling on his foot and amputating several toes. Pa17-18. Prior to the incident, Schroth knew the machine was broken but refused to fix it. Pa18.

Michael Bunting initiated suit against Schroth by Complaint dated April 13, 2022. Pa17. On June 3, 2022, Schroth answered. Pa32. On July 7, 2023, following extensive discovery and settlement negotiations between the parties, plaintiff and Schroth entered into a Consent Judgment for $1,250,000.00 pursuant to Griggs v. Bertram, 88 N.J. 347 (1982). Pa40. The Consent Judgment contains an assignment of Schroth's rights to pursue coverage from their insurer, defendant NJM, and excess carriers, defendants Great Northern Insurance Company and Chubb Insurance Company of New Jersey ("Chubb"). Pa41. By Order dated July 26, 2023, plaintiff was granted leave to file a First Amended Complaint. Pa43.

On July 27, 2023, plaintiff filed his First Amended Complaint against defendants NJM and Chubb seeking a declaratory judgment to compel coverage and that the C5 exclusion used by defendants to disclaim coverage for Mr. Bunting's workplace injury was void as against public policy. Pa44. On September 5, 2023, defendant NJM moved to dismiss the First Amended Complaint pursuant to Rule 4:6-2(e). Pa62. On September 11, 2023, defendant Chubb also filed a Motion to Dismiss. Pa86. On October 10, 2023, plaintiff cross-moved for partial summary judgment. Pa431. Mr. Bunting died while the motions were pending. On November 3, 2023, plaintiff was granted leave to file a Second Amended Complaint to substitute Mykayla Bunting as administratrix and administratrix ad prosequendem for the Estate of Michael Bunting. Pa525. On

January 19, 2024, oral argument took place before the Honorable Richard English, J.S.C. 1T (Transcript of Hearing dated January 19, 2024). By Order and Rider dated January 29, 2024, the trial court granted defendants' motions to dismiss and denied plaintiff's motion for partial summary judgment. This appeal followed.

STATEMENT OF FACTS

NJM issued to Schroth a Workers Compensation and Employers Liability Insurance Policy. Pa67. That insurance was meant to provide coverage to Schroth in accordance with New Jersey's Workers Compensation Act and Employers Liability Insurance Law. Pa68. Part One of the policy provides coverage pursuant to the Workers Compensation Act, and Part Two of the policy provides coverage pursuant to the Employers Liability Insurance Law. Pa68. Part Two expressly provides coverage for bodily injury arising out of and in the course of the injured employee's employment "when the employee has a legally recognized right to bring a Superior Court action for damages." Pa437.

The policy contains an exclusion under C5 for "Bodily injury intentionally caused or aggravated by" Schroth. Pa80. In an Endorsement entitled "New Jersey Part Two Employers Liability Endorsement," NJM writes as follows: "With respect to Exclusion C5, this insurance does not cover any and all intentional wrongs within the exception allowed by N.J.S.A. 34:15-8 including but not limited to bodily injury caused or aggravated by an intentional wrong committed by you or

your employees or bodily injury resulting from an act or omission by you or your employees, which is substantially certain to result in injury." Pa76.

On September 19, 2022, NJM sent a denial of coverage letter to Schroth. Pa435. Although NJM denied coverage and that it had a duty to defend, it offered Schroth the "accommodation" of using Mr. Williams, NJM's counsel at bar, at no cost to Schroth. Pa440.

On May 24, 2023, Schroth's personal counsel advised NJM of the Griggs settlement demand of $2,700,000 and demanded coverage asserting that the C5 exclusion violated public policy. Pa445. By letter dated June 9, 2023, Mr. Williams restated NJM's denial of coverage and, once again, offered his services at no charge to Schroth. Pa451.

Defendant Chubb insured Schroth under an excess follow-form and umbrella coverage policy. Pa90-394. On April 26, 2022, defendant Chubb denied coverage of plaintiff's claim against Schroth while at the same time acknowledging it had not "reviewed coverage under the excess and umbrella policy with respect to the Employers Liability Insurance Policy with NJMIC." Pa456. On May 24, 2023, Schroth's personal counsel advised defendant Chubb of the Griggs demand and demanded coverage. Pa462. By letter dated June 19, 2023, Chubb's counsel reaffirmed the refusal of coverage. Pa469.

LEGAL ARGUMENT

POINT I

THE C5 EXCLUSIONARY CLAUSE AT ISSUE IS UNENFORCEABLE. (PA1-3)

A. Standard of Review.

Regarding this appeal, the principles governing a motion to dismiss for failure to state a claim and a motion for summary judgment align. Review of the trial court's orders is de novo. See Samolyk v. Berthe, 251 N.J. 73, 78 (2022); Baskin v. P.C. Richard & Son, LLC, 246 N.J. 157, 171 (2021).

B. Insurance Contract Interpretation.

The interpretation of an insurance policy is a question of law that is reviewed de novo. Selective Ins. Co. of Am. v. Hudson E. Pain Mgmt. Osteopathic Med., 210 N.J. 597, 605 (2012). In performing that interpretation, courts look first to the plain language of the contract. Courts are guided by general principles: "coverage provisions are to be read broadly, exclusions are to be read narrowly, potential ambiguities must be resolved in favor of the insured, and the policy is to be read in a manner that fulfills the insured's reasonable expectations." Selective Ins. Co., supra, 210 N.J. at 605. The insurer bears the burden to establish that an exclusion applies. Flomerfelt v. Cardiello, 202 N.J. 432, 442 (2010). Moreover, exclusions in insurance policies are enforceable only "if they are 'specific, plain, clear, prominent, **and not contrary to public policy**.'"

Flomerfelt, supra, 202 N.J. at 441 (quoting Princeton Ins. Co. v. Chunmuang, 151 N.J. 80, 95 (1997)) (emphasis supplied).

C. The Exclusion Denies Statutorily Mandated Coverage and Is Unenforceable.

An insurer cannot contract out of its statutory obligations. Ryder/P.I.E. Nationwide, Inc. v. Harbor Bay Corp., 119 N.J. 402, 407 (1990) (Ryder/P.I.E.). A policy exclusion "that conflicts with statutorily mandated coverage will not be enforced." Potenzone v. Annin Flag Co., 191 N.J. 147, 150 (2007). When interpreting a statute, a court "begin[s] with the statute's plain language — our polestar in discerning the Legislature's intent." L.W. v. Toms River Reg'l Schools Bd. of Educ., 189 N.J. 381, 400 (2007). "If the language is plain and clearly reveals the statute's meaning, the [c]ourt's sole function is to enforce the statute according to its terms." Ibid. (quotation omitted).

Recognizing this State's public policy in fully compensating its injured employees and in protecting employers from financial ruin potentially resulting therefrom, the Legislature created a system of **compulsory insurance** for **all** workplace injuries. The Workers' Compensation Act "makes insurance carriers directly responsible to the employer's workers." American Millennium Ins. Co. v. Berganza, 386 N.J. Super. 485, 489 (App. Div. 2006).

> Every contract of insurance covering the liability of an employer for compensation to injured employees or their dependents, * * * shall provide, or be construed to provide, that it is created for the benefit of the several employees of the insured employer and their dependents,

> and that such contract may be enforced by any of such employees or their dependents, suing thereon in his or their names as though distinctly made a party thereto.

N.J.S.A. 34:15-83.

Further, N.J.S.A. 34:15-84 states that an injured employee of a covered employer may enforce the provisions of such a contract to his benefit "by joining the insurance carrier with the employer in his petition filed for the purpose of enforcing his claim for compensation[.]" On an insured employer's "death, insolvency, or bankruptcy[,]" an insurance carrier becomes "directly liable for all compensation payments due to any injured employee or his dependents by virtue of prior agreement[.]" N.J.S.A. 34:15-86. Finally,

> **No policy of insurance against liability arising under this chapter shall contain any limitation of the liability of the insurer to an amount less than that payable by the assured on account of his entire liability under [Title 34].**

N.J.S.A. 34:15-87 (emphasis supplied).

The purpose of those statutory provisions is to codify "mandatory" and comprehensive workers' compensation insurance for New Jersey employers, and, to reject any workers' compensation insurance policy that would limit an employer's liability under the workers' compensation scheme. See Lohmeyer v. Frontier Ins. Co., 294 N.J. Super. 547, 555-56 (App. Div. 1996) (describing the "mandatory coverage requirement of N.J.S.A. 34:15-87" and noting "[an insurance] policy which purports to provide workers' compensation coverage is

governed by the workers' compensation laws and must conform with its regulatory policy.").

Pursuant to the Employers' Liability Insurance Law, also part of Title 34, employers are required to make "sufficient provision for the **complete payment of any obligation** which [the employer] may incur to an injured employee, or his dependents" for claims prosecuted in the workers compensation courts. N.J.S.A. 34:15-71 (emphasis added). An employer may do so by self-insuring if they have the financial capacity, N.J.S.A. 34:15-77, or by obtaining insurance, N.J.S.A. 34:15-78. Additionally, employers are required to "make sufficient provision for the **complete payment of any obligation** which [the employer] may incur to an injured employee or his administrators or next of kin" for work-related injuries maintained in a common law court. N.J.S.A. 34:15-72 (emphasis added); see Schmidt v. Smith, 155 N.J. 44, 49 (1998) ("Those policies must cover not only claims for compensation prosecuted in the Workers' Compensation court, but also claims for work-related injuries asserted in a common law court.").

The insurance policy at issue, per statute, **must** provide complete coverage to employees injured in the course of employment. Per statute, the policy **must** provide for the "**complete payment of any obligation**" of the employer. The statute prohibits NJM – and by extension Chubb – from limiting its liability to an amount less than that payable by the employer. The use of the term "any" further

underscores that there is **no** limitation on the type of injury covered by the employer's obligation and, concomitantly, the insurer's obligation. "In short, the terms of a policy issued pursuant to N.J.S.A. 34:15-78 cannot conflict with the statutory mandate that there be coverage provided for **all** occupational injuries." Ibid. (emphasis supplied).

In Schmidt, a case involving a claim for bodily injury arising out of acts of sexual harassment, the Court held that "N.J.S.A. 34:15-72 required [the employer] to obtain sufficient coverage for the payment of **any** obligation it might incur on account of bodily injuries to an employee." 155 N.J. at 51 (emphasis added). The Court noted that the employer, like the employer at bar, obtained a combined workers' compensation and employer's liability policy, thus contracting with its insurer "for the coverage of bodily injuries falling both inside and outside of the workers' compensation structure." Ibid. Particularly, "[t]he employers liability section of the contract was to provide compensation for bodily injuries to workers falling outside the workers' compensation system." Id. at 51-52. According to the Schmidt Court, that included "injuries intentionally caused by fellow employees, for example." Id. at 52.

Stated differently, the coverage **included** claims placed outside the exclusivity provision of N.J.S.A. 34:15-8. That provision states pertinently: "If an injury or death is compensable under this article, a person shall not be liable to

anyone at common law or otherwise on account of such injury or death for any act or omission occurring while such person was in the same employ as the person injured or killed, **except for intentional wrong**." N.J.S.A. 34:15-8 (emphasis supplied). According to the Schmidt Court, then, bodily injuries arising out of an intentional wrong are covered under an employer's liability policy.

The Schmidt Court explained that the Legislature required employers to obtain insurance "to assure that this statutory remedy [of workers' compensation] given in lieu of a common law remedy is not illusory." Id. at 49. The employer's liability coverage "is intended to serve as a 'gap-filler' providing protection to the employer in those situations where the employee has a right to bring a tort action despite provisions of the workers' compensation statute." Id. at 49-50 (citation omitted). The Schmidt Court confirmed the long-held tenet that policies issued pursuant to compulsory insurance requirements could not undermine that goal. "In short, the terms of a policy issued pursuant to N.J.S.A. 34:15-78 cannot conflict with the statutory mandate that there be coverage provided for **all** occupational injuries." Id. at 49 (emphasis added). Any effort to exclude coverage for work-related injury claims resulting in bodily injury is a violation of N.J.S.A. 34:15-72. Id. at 51-52.

In analogous circumstances, this Court in Bellafronte v. Gen. Motors Corp., 151 N.J. Super. 377 (App. Div.), certif. denied, 75 N.J. 533 (1977), held that

coverage arising from statute cannot be limited by an insurance contract. In Bellafronte, NJM, the same insurer at bar, sought to exclude from coverage in its automobile liability policy any liability for loading and unloading injuries. Mr. Bellafronte was a truck driver employed by Morrison Steel Company (Morrison), making a delivery to General Motors Corporation (GMC). During the course of unloading his truck, a negligent GMC crane operator injured him. Mr. Bellafronte sued GMC, which impleaded Morrison, alleging that Morrison's liability carrier, NJM, should provide coverage for GMC as an "other insured." NJM argued that Morrison's policy excluded coverage explicitly to a person loading or unloading the vehicle. Id. at 380.

The court first noted that N.J.S.A. 39:6-46(a), a provision of the Motor Vehicle Security Responsibility Law, specifically required an insurance policy to cover those persons "using or responsible for the use of any such motor vehicle with the * * * consent of the insured." Ibid. "[I]n order to effectuate the overriding legislative policy of assuring financial protection for the innocent victims of motor vehicle accidents," the Bellafronte court opined that "the substantive content of statutorily required coverage must be broadly construed." Id. at 382 (citing Motor Club of Am. Ins. Co. v. Phillips, 66 N.J. 277, 293 (1974)). The court reasoned that one "who is in the process of unloading cargo from the vehicle is, for purposes of the omnibus coverage, a user of the vehicle." Id. at 382-

83. The court then concluded that because "the statute mandated coverage for GMC's crane operator so using Morrison's truck, the crane operator must be deemed an 'other insured' of NJM." Id. at 383. The court accordingly struck the policy exclusion, ruling that it was an "unwarranted attempt to diminish the extent of coverage required by statute." Ibid.

The same reasoning applies at bar. To effectuate the overriding legislative policy of assuring financial responsibility for the innocent victims of workplace accidents, the substantive content of the statutorily required coverage must be broadly construed. Schroth purchased insurance from NJM and Chubb to assure its financial obligations to its employees arising out of workplace injuries were fully met. The insurance purchased is clearly meant to provide protection under the Workers Compensation Act and the Employers' Liability Insurance Law and is designated as such. The overwhelming expression of public policy underlying our workers compensation laws is to ensure full coverage for **any** injury and **any** obligation to pay arising therefrom. The Legislature expressly excluded coverage for intentional wrongs under the WCA, N.J.S.A. 35:15-8. It did not include that exclusion in the employers' liability insurance law and instead mandated coverage for the **complete payment of any obligation**. N.J.S.A. 35:15-71; N.J.S.A. 35:15-72. The Legislature meant for financial obligations arising out of intentional wrongs to be covered. The Legislature could easily have included an exclusion for

intentional wrongs in the employers' liability section of the statute but deliberately did not.

"Because of statutorily imposed omnibus requirements, any contractual attempt to exclude coverage for an [] insured will be held invalid. Moreover, all parties subject to omnibus coverage requirements * * * must provide coverage." Ryder/P.I.E., supra, 119 N.J. at 408 (1990). The policy exclusion at bar is an "unwarranted attempt to diminish the extent of coverage required by statute" and must be held invalid as contrary to the Legislature's expression of public policy.

POINT II

THE PUBLIC POLICY OF NEW JERSEY MANDATES INSURANCE COVERAGE FOR ALL OCCUPATIONAL INJURIES. (PA1-3)

Arguments asserting that public policy disfavors allowing insurance for workplace injuries intentionally caused, like the argument accepted by the trial court here, are not well founded. There is little, if any, evidence that establishes that policyholders engage in reckless behavior or intentionally cause injuries because they are insured. Certainly, there is no actual evidence to support such a conclusion in the record of this appeal. There are, moreover, many deterrents to bad behavior unrelated to insurance. For example, assault and battery are criminal offenses that can result in jail time. Thus, it seems unlikely that the loss of insurance to cover the injuries caused by an insured's assault or battery on a victim

would be more of a deterrent than the prospect of prison. Similarly, because imprisonment is a significant punishment for a crime, it is not as though an employer that commits assault and battery will go unpunished if his insurer compensates the victim for his injuries. Violations of workplace safety rules and OSHA regulations carry fines and penalties to deter improper behavior without leaving an injured employee or his dependents without complete justice.

On the other hand, there are sound public policy reasons that support allowing insurance for intentional injuries to employees. Public policy dictates that victims should be compensated for their injuries. The statute at issue makes abundantly clear that the public policy of this State mandates compulsory insurance coverage for any work-related injuries, regardless of the cause. After all, the entire point of the statutory workers compensation and employer liability construct is that the insurer stands in the shoes of the employer in its obligations to its employees. Just as the employer cannot limit its payment obligations to its employees, the insurer cannot limit its payment obligations to victims of workplace injury.

The public policy in insuring workplace injuries is so strong that **even actual fraud in securing the insurance by the employer does not invalidate the policy**. In Berganza, supra, 386 N.J. Super. at 490-91, this court held that fraudulent statements made in an application for a workers' compensation

insurance policy will not void the policy. Citing N.J.S.A. 34:15-83 and -84, which create a direct relationship between the insurer and the insured's employees, the court noted that "[w]hatever the rights may be between the carrier and the insured employer, so long as the policy, once it is issued, is outstanding, the carrier's liability to the injured employee remains. No question of warranties or of false representations made by the employer in securing the policy and no stipulations of the policy as between the employer and carrier have force or effect as between the carrier and such an employee who was injured while the policy is outstanding * * * . [A]s between the insurance carrier and the employee[,] the fact that a policy is issued upon untrue statements made by the employer [to the insurance carrier] is no defense [to liability]." Id. at 490-91 (citations and quotations omitted). See also Bates v. Nelson, 240 Iowa 926, 38 N.W.2d 631, 635 (1940) ("We are abidingly convinced that under our statutes the liability of the insurance carrier to the injured employee depends only upon the liability of the employer to the employee, regardless of any question that may arise between the employer and such insurer.").

If a policy cannot be voided for actual fraud, it follows that such a policy of insurance cannot exclude liability for intentional wrongs of the employer against its employees. Further, the insurance company is in the best position to deal with losses caused by those payouts. Rates and premiums can be adjusted. An injured

employee has no such remedy. Public policy considerations weigh in favor of coverage for the employee/victim.

CONCLUSION

For the foregoing reasons, plaintiff is entitled to an order reversing the trial court's orders and entering summary judgment in plaintiff's favor.

Respectfully submitted,

REBENACK, ARONOW & MASCOLO, LLP
Counsel for Plaintiff-Appellant

By: */s Matthew G. Bonanno*
Matthew G. Bonanno, Esq.

DATED: June 10, 2024

Superior Court of New Jersey

Appellate Division

Docket No. A-001972-23T1

MAKAYLA BUNTING, Administratrix and Administratrix ad Prosequendum for the ESTATE OF MICHAEL BUNTING, *Plaintiff-Appellant,* vs. EMIL A. SCHROTH, INC.; NEW JERSEY MANUFACTURERS INSURANCE COMPANY; GREAT NORTHERN INSURANCE COMPANY; CHUBB INSURANCE COMPANY OF NEW JERSEY and JOHN DOES 1-10, *Defendants-Respondents.*	:	CIVIL ACTION ON APPEAL FROM THE ORDER OF JUDGMENT OF THE SUPERIOR COURT OF NEW JERSEY, LAW DIVISION, MONMOUTH COUNTY DOCKET NO. MON-L-1035-22 Sat Below: HON. RICHARD W. ENGLISH, J.S.C.

BRIEF AND APPENDIX FOR DEFENDANTS-RESPONDENTS GREAT NORTHERN INSURANCE COMPANY AND CHUBB INSURANCE COMPANY OF NEW JERSEY

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PRELIMINARY STATEMENT

Plaintiff Michael Bunting seriously injured his foot at work. He received full worker's compensation benefits through his employer's insurance policy issued for that purpose by Defendant New Jersey Manufacturers Insurance Company ("NJM"). Seeking additional monetary compensation, Bunting filed suit against his employer, Emil A. Schroth, Inc., alleging that the accident occurred because of the employer's intentional conduct in failing to correct a defect in the machine that caused his injury.

NJM denied insurance coverage to Schroth for Bunting's additional tort claim. After Bunting and Schroth entered into a settlement agreement, the trial court correctly dismissed Bunting's claim for insurance payments from NJM's Workers Compensation and Employers Liability Insurance Policy. The part of that policy that applies to employers liability ("NJM Employers Liability Policy") contains a plainly-worded, unambiguous exclusion for all intentional conduct of the employer, including express reference to the kind of intentional conduct that Bunting alleged in his lawsuit. The trial court also dismissed Bunting's claims against the excess and umbrella insurance policy issued to Schroth by Chubb Insurance Company of New Jersey ("Chubb"), and his claims against Great Northern Insurance Company ("Great Northern"), as to which no claim for coverage was articulated in Bunting's pleading.

On this appeal, Plaintiff Bunting presents essentially a single argument: that New Jersey statutory law prohibits employers liability insurance policies from excluding coverage for employer conduct that is substantially certain to result in injury to an employee. No court has so held in the past. No court has declined to enforce the exclusion on the basis of the statutes Plaintiff cites.

The challenged exclusionary language has its genesis in decisions of the New Jersey Supreme Court regarding employer's liability policies. In those decisions, the Court noted the distinction between intentional conduct that is subjectively intended to cause injury and intentional conduct that is not intended to cause injury but is substantially certain to result in injury. Both kinds of intentional conduct are exceptions from the statutory bar of New Jersey's Workers Compensation Act against an injured employee suing his own employer for causing the injury. The Supreme Court has held that employer's liability insurance policies that generally exclude coverage for intentional conduct exclude only the first type of conduct, where the employer subjectively intends to cause injury. Policies with only the generally-worded exclusionary language do not exclude coverage for employer conduct that is not intended to cause injury but is substantially certain to do so.

In response to these decisions, amended exclusionary language was proposed to address the second type of intentional conduct and approved by the

New Jersey Department of Banking and Insurance ("DOBI") in 2007. The revised exclusion prevents coverage for both kinds of intentional employer conduct.

The revised Exclusion C.5 is consistent with the public policy of this State of encouraging employers to correct defects and hazards in their workplace and also, maintaining the costs of insurance coverage for injury to workers. The C.5 exclusion as approved by the State's insurance regulators is required in all employers liability policies such as the ones in this case.

That required provision is precisely the exclusionary language that Plaintiff challenges in this appeal. But in the seventeen years since State regulators approved and required the revised C.5 exclusion, no legislation, regulation, or case law has found fault with it. Nevertheless, Plaintiff argues that statutes that pre-existed the adoption of the revised exclusion prohibit its application to conduct of the employer that is substantially certain to result in injury to an employee. Plaintiff further argues that the public policy of the State to encourage employers to prevent hazardous workplaces does not support enforcement of the exclusion.

The trial court correctly concluded otherwise. So should this Court. The judgment of the trial court dismissing Plaintiff's insurance coverage claims for failure to state a claim should be affirmed.

PROCEDURAL HISTORY AND STATEMENT OF FACTS[1]

Plaintiff Michael Bunting and his wife filed a personal injury Complaint on April 13, 2022, against Bunting's employer, Schroth. Ja17-31. The Complaint alleged that, on September 28, 2020, Bunting's foot was seriously injured when part of a machine described as a bailer broke and fell on his foot as he was feeding copper through the machine. Ja17-18 ¶4. The Complaint further alleged that Schroth "knew, or had reason to know, that the . . . bailer was damaged and could not be used safely," and that the employer intentionally used "dangerous equipment in an ultra-hazardous and unsafe manner." Ja18 ¶6. Next, the Complaint alleged that a reasonable person would "conclude with practical certainty that some employee of Defendant, Schroth [sic] would be injured . . . " by the machine. Ja18 ¶7. Thus, Bunting sought to pursue tort claims against his employer based on the exception for intentional conduct in the section of the Workers Compensation Act that prohibits such lawsuits, N.J.S.A. 34:15-8.

Schroth sought insurance coverage for Bunting's Complaint from Defendants in this appeal, NJM, Chubb, and Great Northern. NJM had issued

[1] The facts of Bunting's personal injury case are not in dispute in this insurance coverage appeal, and the facts relevant to the coverage action are derived from undisputed documents, namely, the pleadings and insurance policies in issue. For a concise recitation of the chronology of the case on appeal, this brief combines in a joint narrative its procedural history and statement of facts.

to Schroth a standard Workers Compensation and Employers Liability Insurance Policy. Ja67-82. The NJM Employers Liability Policy provided primary coverage up to a limit of $1,000,000 per claim. Ja68. It also included a mandatory endorsement, which stated:

> With respect to Exclusion C5, this insurance does not cover any and all intentional wrongs within the exception allowed by N.J.S.A. 34:15-8 including but not limited to bodily injury caused or aggravated by an intentional wrong committed by you or your employees, or bodily injury resulting from an act or omission by you or your employees, which is substantially certain to result in injury.
>
> [Ja76.]

The Chubb policy provided $2,000,000 of excess and umbrella insurance for losses above the limit of the NJM Employers Liability Policy, as well as other underlying insurance policies. Ja91, 97-99. The Chubb policy followed form to the underlying NJM policy, Ja104, meaning that it adopted the coverage and exclusionary terms of the NJM Employers Liability Policy.

NJM had provided workers compensation benefits to Bunting under the part of its policy that applied to such benefits. Ja16, 436-37. NJM declined to cover Schroth for Bunting's lawsuit alleging intentional conduct of the employer, including on the ground that Exclusion C.5 as amended by an endorsement to the policy excluded from coverage any and all intentional wrongs of the employer or its agents. Ja435-42. Chubb and Great Northern also

denied coverage to Schroth on the ground that their umbrella and comprehensive general liability policies did not provide coverage for injury to employees of Schroth. Ja456-59. In addition, Chubb denied coverage under its excess policy on the ground that it incorporated Exclusion C.5 of the NJM Employers Liability Policy and thus did not cover any kind of intentional conduct of the employer, whether subjectively intended to cause injury or substantially certain to cause injury. Ja469-73.

Having been denied insurance coverage, Schroth entered into a settlement agreement with Bunting in accordance with Griggs v. Bertram, 88 N.J. 347 (1982). On July 7, 2023, the court entered a consent judgment for Bunting and against Schroth for $1,250,000, subject to a covenant by Bunting not to execute the judgment against Schroth but instead to take an assignment of Schroth's claims against its insurance policies. Ja40-42.

On July 21, 2023, the trial court entered an order granting Bunting leave to file a First-Amended Complaint, Ja43, which Bunting filed on July 27, 2023, Ja44-61. In addition to Schroth, the Amended Complaint named as defendants NJM and Chubb and sought benefits under the NJM Employers Liability Policy and the Chubb excess policy. The Amended Complaint also named Great Northern, but articulated no specific basis for coverage under Great Northern's comprehensive general liability policy. Ja44-61. By a new Third Count of the

Amended Complaint, Bunting sought a declaratory judgment that NJM and Chubb were required to provide coverage for Schroth's liability in the personal injury action. Ja47-48. By a new Fourth Count, Bunting alleged that NJM's and Chubb's basis for denying coverage under the C.5 exclusion of the NJM policy violates public policy and N.J.S.A. 34:15-72. Ja48-49. Bunting sought compensatory damages, attorney's fees, interest, and other monetary remedies from NJM and Chubb. Ja48-49.

On September 5, 2023, in lieu of an Answer, NJM filed a motion to dismiss Bunting's coverage claims. Ja62-63. Chubb and Great Northern then filed a joint motion on September 11, 2023, to dismiss the claims against them under Rule 4:6-2(e) for failure to state a claim. Ja84-85. On October 10, 2023, Bunting filed opposition to Defendant insurers' motions and his own cross-motion for partial summary judgment in his favor. Ja431-32. Defendant insurers filed oppositions to the cross-motion and reply arguments on their motions to dismiss. Ja488-524.

While the motions were pending, Bunting died. There is no evidence or allegation made in the record that the cause of his death is related to the workplace accident. Makayla Bunting, the administratrix of Bunting's estate, was substituted as Plaintiff by consent of the parties and an Order of the trial court dated November 3, 2023. Ja525-26.

On January 19, 2024, the trial court heard oral argument on the motions. 1T. The court issued an Order on January 29, 2024, granting Defendant insurers' motions to dismiss Plaintiff's coverage action with prejudice, and denying Plaintiff's cross-motion for partial summary judgment. Ja1-3. The trial court's order was accompanied by a thirteen-page written decision analyzing the issues and stating the court's reasoning in dismissing Plaintiff's claims for insurance coverage. Ja4-16.

Plaintiff filed a timely Notice of Appeal on March 5, 2024. Ja527-32.

LEGAL ARGUMENT

I. STANDARD OF REVIEW.

This Court conducts plenary review of an appeal from a Rule 4:6-2(e) order. Rezem Fam. Assocs., LP v. Borough of Millstone, 423 N.J. Super. 103, 114 (App. Div.), certif. denied, 208 N.J. 366, 368 (2011). The Court reviews *de novo* the trial court's decision to grant a motion to dismiss for failure to state a claim. Baskin v. P.C. Richard & Son, LLC, 246 N.J. 157, 171 (2021).

On such an appeal, this Court evaluates the challenged pleading by the same standard as the trial court. Sickles v. Cabot Corp., 379 N.J. Super. 100, 106 (App. Div), certif. denied, 185 N.J. 297 (2005). The Court must search the allegations of the pleading in depth and with liberality to determine whether a

cause of action is "'suggested' by the facts." Printing Mart-Morristown v. Sharp Elecs. Corp., 116 N.J. 739, 746 (1989) (quoting Velantzas v. Colgate-Palmolive Co., 109 N.J. 189, 192 (1988)). A pleading should be dismissed if it states no basis for relief and discovery would not provide one. Camden Cnty. Energy Recovery Assoc., L.P. v. N.J. Dep't of Env't Prot., 320 N.J. Super. 59, 64 (App. Div. 1999), aff'd, 170 N.J. 246 (2001).

In addition to the Complaint, the Court "may consider documents specifically referenced in the complaint." Myska v. N.J. Mfrs. Ins. Co., 440 N.J. Super. 458, 482 (App. Div.), appeal dism., 224 N.J. 523 (2015) (quoting E. Dickerson & Son, Inc. v. Ernst & Young, LLP, 361 N.J. Super. 362, 365 n.1 (App. Div. 2003), aff'd, 179 N.J. 500 (2004)). In Banco Popular North America v. Gandhi, 184 N.J. 161, 183 (2005), the Supreme Court listed the types of information that a court may review in ruling on a motion to dismiss under Rule 4:6-2(e): "allegations in the complaint, exhibits attached to the complaint, matters of public record, and documents that form the basis of a claim."

Here, the trial court appropriately considered the insurance policies that were referenced in Plaintiff's Amended Complaint and compared them to the allegations of Plaintiff's pleading. In addition, the court was alerted to and could properly consider matters of public record that pertain to the disputed exclusionary provision in those insurance policies, namely, their approval and

adoption by DOBI, and appellate briefs in prior related cases before the New Jersey Supreme Court as evidence of arguments that were previously presented before that Court. There is no dispute presented on this appeal regarding the trial court's consideration of appropriate evidence and information in ruling that Plaintiff's claims against Defendant insurance providers fail to state a claim upon which relief may be granted, and so, should be dismissed.

II. EMPLOYERS LIABILITY STATUTES DO NOT REQUIRE INSURANCE POLICIES TO COVER THE INTENTIONAL EMPLOYER CONDUCT ALLEGED IN PLAINTIFF'S COMPLAINT.

(Ja1-16)

The Workers Compensation Act bars a lawsuit for personal injury against the employer of the injured person "except for intentional wrong." N.J.S.A. 34:15-8. As previously stated, Bunting's Complaint alleges that his employer, Schroth, "knew, or had reason to know, that the . . . bailer was damaged and could not be used safely," and intentionally used "dangerous equipment in an ultra-hazardous and unsafe manner." Ja18 ¶6. The Complaint further alleges that a reasonable person would "conclude with practical certainty that some employee of Defendant, Schroth [sic]would be injured . . . " by the machine. Ja18 ¶7. Thus, Bunting's Complaint alleged a personal injury tort claim against his employer for conduct that has been recognized to be an intentional wrong

and thus outside the bar of the Workers Compensation Act. See Laidlow v. Hariton Mach. Co., Inc., 170 N.J. 602 (2002); Millison v. E.I. du Pont de Nemours & Co., 101 N.J. 161 (1985).

Plaintiff does not argue factual grounds against application of Exclusion C.5 of the NJM and Chubb policies to his claims. Plaintiff never contended in the trial court that the employer conduct alleged in his Complaint is distinguishable from the language and applicability of Exclusion C.5 in the NJM and Chubb policies.

Plaintiff also does not argue, as is typical in many insurance coverage actions, that an ambiguity in Exclusion C.5 requires that it be construed in Plaintiff's favor to afford insurance coverage. Nothing in Exclusion C.5 is ambiguous. Its language expressly applies to conduct of the employer or its agent that is substantially certain to result in injury. Consequently, case law Plaintiff cites regarding interpretation of insurance policies and their exclusions has no relevance in this appeal.

In addition, as previously stated, Plaintiff does not argue that the trial court improperly reviewed the motion to dismiss under Rule 4:6-2(e), or considered materials or information that was not appropriate. Nor does Plaintiff argue that the trial court applied an incorrect standard of review to the insurers' motions to dismiss for failure to state a claim against the insurers.

This appeal presents a single narrow challenge to the C.5 Exclusion of the NJM and Chubb policies. Plaintiff argues that statutory sections of New Jersey's Workers Compensation Act, namely, N.J.S.A. 34:15-72 and -87, require that the Employers Liability Policy issued by NJM, to which the Chubb policy follows form, cover Bunting's claim against Schroth. Pb8-9. Plaintiff also argues that the public policy of this State does not support exclusion of coverage in the circumstances of his claims. Pb14-17.

Plaintiff misreads the statutes and discounts the contrary public policy of this State as established by legislation, case law, and regulation of workers compensation and employers liability insurance policies. Plaintiff has not and cannot point to a single case that has agreed with his arguments and found Exclusion C.5, as adopted in 2007 by DOBI, to be in violation of any statute.

Plaintiff's personal injury tort claims arise out of commonly-encountered allegations regarding injuries in the workplace. The absence of on-point legal authority, despite the frequent occurrence of similar accidents, reveals that Plaintiff's argument lacks merit. The statutes Plaintiff cites pre-existed the adoption of the revised Exclusion C.5 language, but, in the seventeen years that the challenged exclusion has been required in standard employers liability policies, no other injured worker has successfully obtained a favorable judicial decision on the grounds raised by Plaintiff.

A. Statutory Sections of the Workers Compensation Act Do Not Require Insurance Coverage for the Employer's Alleged Intentional Wrong That Caused Injury.

Plaintiff's primary statutory argument on appeal is that the C.5 Exclusion violates the requirements of N.J.S.A. 34:15-72 and -87 for employers' insurance coverage. As stated, no prior decision of a court or other legal authority has reached that conclusion about the statutes that Plaintiff relies upon.

N.J.S.A. 34:15-87 states in relevant part:

> No policy of insurance against liability arising under this chapter shall contain any limitation of the liability of the insurer to an amount less than that payable by the assured on account of his entire liability under this chapter . . . .

Plaintiff argues this statute requires an employer's insurance policy to provide coverage for any and all grounds of liability that an employer has to its employees for bodily injury, whether under the workers compensation scheme or under common law claim for personal injury caused by the employer. Pb8-9. Plaintiff contends that because the employer can be held liable for intentional acts or omissions that are substantially certain to result in injury to employees, the statute requires employers liability policies to cover the employer for such wrongs.

But that is not what the statute states or how it has been interpreted by the courts. The statute applies to insurance policies "against liability arising under

this chapter." N.J.S.A. 34:15-87 (emphasis added). It prohibits workers compensation insurance policies from containing any "limitation of the liability of the insurer to an amount less than that payable by the assured on account of his entire liability under this chapter." Ibid. (emphasis added). The "under this chapter" phrase means that the policy can have no limitation on payment of benefits that the employer may become liable to pay in accordance with the Workers Compensation Act. In this case, however, Bunting seeks compensation not for workers compensation benefits in accordance with the provisions of the Workers Compensation Act, but for an alleged tort that is not within the liability of the employer under the law that applies to such benefits.

The Workers Compensation "chapter" provides two bases for the employer's liability to an injured employee. Article 2 of the chapter, N.J.S.A. 34:15-7 to -35.22, is the familiar system of no-fault claims for workers compensation benefits when an employee claims a work-related injury or illness. Article 1 of the chapter, N.J.S.A. 34:15-1 to -6, allows employers and employees to opt out of the workers compensation no-fault scheme and instead to provide a right of the employee to sue the employer for the employer's negligent causing of injury or illness to the employee. See N.J.S.A. 34:15-1 and -7; see also Peck v. Newark Morning Ledger Co., 344 N.J. Super. 169, 179-83 (App. Div. 2001) (explaining the process by which employers and employees can elect Article 1

rights of the employee to sue for negligence rather than agree to Article 2 for no-fault compensation through claims made in the Workers Compensation Court).

Here, Bunting's claim is for compensation outside either of these two Articles of the Workers Compensation Act. His claim is brought under the common law tort duty of his employer not to engage in intentional conduct that is substantially certain to result in injury to its employees. That cause of action does not arise under the "chapter" designated as the Workers Compensation Act.

The correct reading of N.J.S.A. 34:15-87 is that it does not apply to and does not require insurance coverage for intentional conduct that is excepted from N.J.S.A. 34:15-8's bar of common law causes of action against the employer for personal injury. If it did, not only would insurance policies such as the NJM and Chubb policies be unable to exclude from coverage employer conduct that is substantially certain to result in injury, but they would be unable to exclude employer conduct that is subjectively intended to cause injury to employees. It is the long-established public policy of this State, however, that insurance policies will not cover conduct that is actually intended to cause injury. See Harleysville Ins. Cos. v. Garitta, 170 N.J. 223, 231 (2001); Allstate Ins. Co. v. Malec, 104 N.J. 1, 6 (1986); Ambassador Ins. Co. v. Montes, 76 N.J. 477, 483 (1978); Ruvolo v. Am. Cas. Co., 39 N.J. 490, 496 (1963). If insurance policies

covered conduct that is intended to cause injury, there would be less deterrence of such conduct.

In sum, N.J.S.A. 34:15-87 requires full coverage for all benefits that an employee is entitled to receive because of an employer's liability under the Workers Compensation Act. Tort recovery for an employer's intentional conduct is not such an entitlement.

Nor does N.J.S.A. 34:15-72 require that employers liability policies provide coverage for intentional conduct of the employer that causes injury to employees. That statute states in relevant part:

> [E]very employer . . . who is now or hereafter becomes subject to the provisions of article 1 of this chapter (34:15-1 et seq.) shall forthwith make sufficient provisions for the complete payment of any obligation which he may incur to an injured employee . . . under said article 1 of this chapter.
>
> [N.J.S.A. 34:15-72.]

This statute also does not apply to Bunting's claim against Schroth. Bunting and Schroth did not elect Article 1 (opt out of workers compensation law benefits) for Bunting's potential workplace injuries. They were subject to Article 2 (workers compensation law benefits), and Bunting received typical no-fault workers compensation benefits through those sections of the Workers Compensation Act. Plaintiff seeks to apply the requirements of N.J.S.A. 34:15-

72 to an employer that was subject to Article 2 of the Act, but the statute by its own terms does not apply to that Article.

In addition, the right created by Article 1 for those who opt out of Article 2 is the right to sue for negligence. The right to sue for intentional conduct is not conferred by Article 1. N.J.S.A 34:15-1 provides in relevant part:

> When personal injury is caused to an employee by accident arising out of and in the course of his employment, of which the actual or lawfully imputed negligence of the employer is the natural and proximate cause, he shall receive compensation therefor from his employer . . . .
>
> [(emphasis added).]

Thus, even if Schroth and Bunting had opted out of Article 2, the requirement that Schroth make "sufficient provision for the complete payment of any obligation which he may incur to an injured employee . . . under said article 1 of this chapter," N.J.S.A. 34:15-72, applies to claims of negligence, not intentional wrongs.

By its own terms, N.J.S.A. 34:15-72 has no application to Bunting's claims for intentional bodily injury caused by Schroth.

Neither statute upon which Plaintiff relies mandates that insurance policies cover intentional conduct of the employer that causes injury to an employee.

B. The Case Law Does Not Support Plaintiff's Argument for Mandatory Insurance Coverage for the Employer's Alleged Intentional Wrong That Caused Injury.

Plaintiff relies primarily on Schmidt v. Smith, 155 N.J. 44 (1997), for his contention that the Workers Compensation Act mandates insurance coverage for the intentional conduct of Schroth as alleged in Bunting's Complaint. But Schmidt did not address the intentional conduct of the employer itself, as Bunting alleges in this case. Schmidt involved a claim for insurance coverage where the plaintiff alleged bodily injury caused by sexual harassment committed by Smith, the president of the plaintiff's employer. Id. at 47. The employers liability insurance policy in that case provided coverage for bodily injury to employees but also contained the generally worded, pre-2007 C.5 exclusion for intentional wrongs of the employer. It also contained an exclusion for damages arising out of harassment, discrimination, and similar acts. Id. at 50.

In its decision, the Supreme Court only minimally addressed the pre-2007 Exclusion C.5 of the insurance policy, stating that it "does not apply because there is no evidence that [the employer] intended to harass" the plaintiff. Id. at 51. Rather, the Court in Schmidt concluded that the policy's exclusion for damages arising out of harassment, discrimination, and similar wrongful acts was unenforceable where that conduct was alleged to have caused bodily injury to the employee. The Court focused on whether there was sufficient allegation

of "bodily injury" to require coverage. Id. at 52 and n.1. The Court concluded that damages for bodily injury had to be covered for the vicariously liable employer in accordance with N.J.S.A. 34:15-72 and the specific coverage terms of the insurance policy at issue. Id. at 51-52.

In reaching its conclusions, the Court in Schmidt quoted a decision of the California Supreme Court to describe employers liability policies as "gap-filler[s] providing protection to the employer in those situations where the employee has a right to bring a tort action despite provisions of the workers' compensation statute." Id. at 49 (quoting Producers Dairy Delivery Co. v. Sentry Ins. Co., 41 Cal. 3d 903, 718 P.2d 920, 927 (1986)). The California decision in Producers Dairy, however, does not support the proposition that employers liability insurance policies must respond with coverage for claims arising from an employer's own intentional wrongful conduct. In fact, coverage for such claims is forbidden under California law. The California Insurance Code provides that "[an] insurer is not liable for a loss caused by the wilful act of the insured." Cal. Ins. Code § 533. The California Court of Appeal stated that "[a] 'wilful act' under section 533 must mean an act deliberately done for the express purpose of causing damage or intentionally performed with knowledge that damage is highly probable or substantially certain to result." Shell Oil Co. v. Winterthur Swiss Ins. Co., 12 Cal. App. 4th 715, 742 (Ct. App.)

(emphasis added), review denied, 1993 Cal. LEXIS 2542 (Cal. 1993). Section 533's prohibition of insurance coverage for "substantially certain" intentional torts extends to the coverage provided by an employer's liability policy. Seneca Ins. Co. v. Cybernet Ent., LLC, 760 F.App'x 541, 544 (9th Cir. 2019). Thus, Producers Dairy, the source of the over-broad "gap-filler" argument Plaintiff makes, provides no support for Bunting's claim that employers' liability policies must respond with coverage for any workplace injury that is not subject to the exclusivity provisions of the Workers Compensation Act.

The Court in Schmidt never stated that the employers liability policy in that case must cover intentional wrongs of the employer itself under N.J.S.A. 34:15-72 or any other statute. In fact, the Court's discussion of coverage for Smith, the allegedly intentional actor, demonstrates that the Court did not view N.J.S.A. 34:15-72 or any other statute as requiring such coverage. The Court concluded that the insurance policies in issue required coverage of defense costs on behalf of both the vicariously liable employer and the directly liable Smith, but only because their defense was presented jointly and could not be separated into costs that were covered for the employer and costs that were not covered for the intentional actor Smith. Id. at 53. Moreover, the Court stated that the insurer's coverage obligations for Smith arose only when the plaintiff's amended complaint alleged negligence, not when the plaintiff's original

complaint alleged intentional conduct by Smith. Ibid. By inference, the insurer would have had no obligation to provide coverage for Smith's defense so long as the only allegation against him was his own intentional wrong and he was not jointly defended with the vicariously liable employer. The Court's reliance on N.J.S.A. 34:15-72 to require coverage for the employer did not lead it to conclude that the statute required coverage of an insured's intentional wrong. Coverage was required because the employer was only vicariously liable for Smith's sexual harassment and had not itself acted intentionally to sexually harass the plaintiff.

The Supreme Court's opinions in Charles Beseler Co. v. O'Gorman & Young, Inc., 188 N.J. 542 (2006), and New Jersey Manufacturers Insurance Co. v. Delta Plastics Corp., 188 N.J. 582 (2006), further demonstrate that the Court has declined to apply the statutes Plaintiff cites to require insurance coverage for intentional wrongs. In Charles Beseler, the Court was reviewing application of the pre-2007 C.5 Exclusion to allegations of conduct that was substantially certain to result in injury to an employee. The Court held: "[D]ue to its lack of express language excluding conduct substantially certain to result in injury, we find C.5's exclusion to be ambiguous and construe it, as we must, in favor of the insured." 188 N.J. at 548. In Delta Plastics, the Court reached the same

conclusion on the basis of its reasoning in Charles Beseler. 188 N.J. at 583. Coverage was required because of the ambiguity of the pre-2007 C.5 exclusion.

In Charles Beseler and Delta Plastics, the insureds made the same arguments as Bunting does here regarding the Schmidt case as controlling authority. In Charles Beseler, the insured argued:

> Schmidt . . . controls, that it should be enforced against [NJM] by this Court, that the purported coverage gap created by [NJM] should be filled and that the seamless coverage that is provided by law [i.e., N.J.S.A 34:15-72] and was expected by Charles Beseler Company should be implemented.
>
> [Ja516, 2006 NJ S. Ct. Briefs LEXIS 150.2.]

In Delta Plastics, the insured argued that if Exclusion C.5 had been substantively addressed in Schmidt, 155 N.J. at 51, the Court would have held it to be void under N.J.S.A. 34:15-72. Ja508, 2006 NJ S. Ct. Briefs LEXIS 159. Bunting makes those same arguments in this appeal. Pb11.

The Supreme Court, however, did not adopt the insureds' arguments and concluded that the exclusion as it existed at that time violated statutory requirements for insurance coverage. In neither Charles Beseler nor Delta Plastics did the Supreme Court rely upon or otherwise suggest that N.J.S.A. 34:15-72 or -87 required coverage for the intentional conduct of the employer. The opinions were based on the ambiguity of the exclusionary language in the policies, not on statutory requirements of the Workers Compensation Act.

This Court's unpublished decision cited in Plaintiff's brief, Rodriguez-Ortiz v. Interstate Racking & Shelving, 2021 N.J. Super. Unpub. LEXIS 2072 (App. Div. Sept. 3, 2021), certif. denied, 249 N.J. 90 (2021), Ja475-82, does not decide the issue Plaintiff presents on this appeal. The Appellate Division in that case considered but did not decide whether statutory provisions, or public policy as discussed in Schmidt, 155 N.J. at 51-52, void Exclusion C.5. Rodriguez-Ortiz, 2021 N.J. Super. Unpub. LEXIS 2072 at *21; Ja481. The Court denied coverage of the employer's defense costs in the underlying personal injury case on other grounds.

Subsequently, in Rodriguez v. Shelbourne Spring, LLC, 2023 N.J. Super. Unpub. LEXIS 2386, at *18 (App. Div. Dec. 22, 2023), leave to appeal granted, 257 N.J. 247 (2024), another Appellate Division panel considered but did not further pursue the discussion in Rodriguez-Ortiz regarding statutory or public policy prohibition of the C.5 exclusion. The Court in Shelbourne Spring held that exclusionary language of the insurance policy identical to the C.5 exclusion in this case, see id. at **4-5, unambiguously precluded coverage for all claims of intentional wrong by the employer. Id. at *20, *24. The facts of the Shelbourne Spring case are very similar to those of this case. The Court considered the same arguments for mandated insurance coverage as those Plaintiff makes in this case and rejected those arguments. Specifically, the Court

considered the Supreme Court's decisions in Charles Beseler and Delta Plastics and distinguished those cases on the same grounds as discussed in this brief. The Court also noted DOBI's approval of the revised C.5 exclusion. See id. at *20.

In sum, no case, whether in this Court or elsewhere, has agreed with Plaintiff's arguments and concluded that the C.5 Exclusion violates any statute or public policy. This Court should reach the same conclusion.

C. The Exclusion Plaintiff Challenges Is the Same One that DOBI Approved and Required to Be Included in Standard Employers Liability Policies.

As stated, the revision of Exclusion C.5 to its present form was a response to the Supreme Court's decisions in Charles Beseler, 188 N.J. 542, and Delta Plastics, 188 N.J. 582. See Rodriguez-Ortiz, 2021 N.J. Super. Unpub. LEXIS 2072 at *15 n.6; Ja479; Shelbourne Spring, 2023 N.J. Super. Unpub. LEXIS 2386, at *20. In a bulletin issued on DOBI letterhead, Ja498-503, the New Jersey Compensation Rating and Inspection Bureau ("CRIB")[2] stated:

> The change to the C.5 language is necessary since recent rulings by the New Jersey Supreme Court have

[2] The Workers Compensation Act created CRIB and vested it with specified powers, including the power to "[p]repare and file, for the approval of the Commissioner, and for the use by all of its members, any amendments to its policy forms." N.J.S.A. 34:15-90 (repealed in 2008, after events relevant to this appeal, and replaced by N.J.S.A. 34:15-90.1 and 90.2). The Commissioner of Banking and Insurance or his designee serves as an ex-officio director on CRIB's board of directors. N.J.S.A. 34:15-90.1.

> increased the scope of coverage for intentional injury under Part Two of the policy. The rulings represent a significant erosion of the exclusive remedy provision of the Law and may lead to increased costs in the price of workers compensation and employers liability insurance. The new language is meant to address the findings of the Court and to restore the intent of the policy exclusion for intentional injury.
>
> [Ja498.]

Approval of the revised exclusion by the Commissioner of Banking and Insurance leads to the presumption that DOBI did not view it as contrary to the Workers Compensation Act, or that the exclusion violates public policy. See Parkway Ins. Co. v. N.J. Neck & Back, 330 N.J. Super. 172, 184 (Law Div. 1998) ("Commissioner [of DOBI] is the administrative agent of the Legislature, pursuing its public policy").

Despite seventeen years in standard employers liability insurance policies, no case, legislative action, or regulatory action has concluded that the State approved revised Exclusion C.5 is contrary to a statute or public policy.

III. THE C.5 EXCLUSION IS CONSISTENT WITH THE PUBLIC POLICY OF THIS STATE AS EXPRESSED IN THE WORKERS COMPENSATION ACT.

(Ja1-16)

Contrary to Plaintiff's argument, the revised C.5 Exclusion furthers both the public policy goal of workplace safety and the important objective of controlling the cost of workers compensation and employers liability insurance.

In the leading Supreme Court cases applying the N.J.S.A. 34:15-8 exception for intentional conduct, the employer had allegedly acted or failed to act intentionally for financial and efficiency reasons, and with disregard of workers' safety. See Laidlow, 170 N.J. at 620-21 (employer inactivated safety guard for machine for many years, except during OSHA inspections); Millson, 101 N.J. at 165 (employer allegedly exposed employees to asbestos deliberately and the employers' company physicians allegedly concealed the risks of the exposure); Mull v. Zeta Consumer Prods., 176 N.J. 385, 393 (2003) (employer removed machine's safety devices to increase production); Crippen v. Cent. Jersey Concrete Pipe Co., 176 N.J. 397, 400 (2003) (employer deliberately failed to correct OSHA violations relating to a piece of dangerous machinery). In these cases, and many others, the employers prioritized their desire for productivity and cost savings over the health and safety of their employees. In such circumstances, permitting common law tort claims against an employer creates

a financial disincentive from that harmful ordering of priorities and is consistent with the public policy goal of enhancing workplace safety.

Without any evidence, Plaintiff argues that these public policy goals are not advanced by excluding the kind of conduct described in Bunting's Complaint from mandatory insurance coverage. Pb14-15. Plaintiff favors providing insurance coverage that would insulate those employers who intentionally fail to prevent workplace hazards against the financial consequences of their wrongful conduct. But insurance coverage for such actions will encourage unscrupulous employers to disregard the safety of their employees in favor of increased profits and productivity. It would interfere with the public policy of this State to enhance safe workplaces. See Paul Revere Life Ins. Co. v. Haas, 137 N.J. 190, 208 (1994) ("insurers should compensate victims to the extent that compensation will not condone and encourage intentionally wrongful conduct") (internal quotation marks and citation omitted); Montes, 76 N.J. at 483 ("were a person able to insure himself against the economic consequences of his intentional wrongdoing, the deterrence attributable to financial responsibility would be missing"); Cumberland Mut. Fire Ins. Co. v. Dahl, 362 N.J. Super. 91, 97 (App. Div. 2003) ("providing insurance coverage for intentional wrongs would encourage such conduct, without regard for pecuniary consequences, and is against public policy").

The public policy of this State to promote worker safety weighs against insurance coverage for claims like those in Laidlow, Millison, Mull, and Crippen. With the "deterrence attributable to financial responsibility" removed, Montes, 76 N.J. at 483, employers are more likely to engage in actions that increase profits and efficiency and to disregard the substantial certainty that their actions will injure their employees. Where insurance will indemnify the costs of the wrongful conduct, worker safety may take a back seat to productivity and profit. On the other hand, the uninsured financial risk of failing to give adequate attention to worker safety is an incentive for employers to prevent employee injuries. Exclusion C.5 supports the important public policy aims of workplace safety.

Excluding such insurance coverage is also consistent with New Jersey's policy of prohibiting coverage for punitive damages. Insurance coverage for punitive damage awards is prohibited "because such a result offends public policy and frustrates the purposes of punitive damage awards," namely the "deterrence of egregious misconduct and the punishment of the offender." Johnson & Johnson v. Aetna Cas. & Sur. Co., 285 N.J. Super. 575, 583 (App. Div. 1995) (citing Leimgruber v. Claridge Assocs., 73 N.J. 450, 454 (1977)). Plaintiff's argument invites rather than deters the employers' intentional wrongs that are substantially certain to result in injury.

Plaintiff's contention that Exclusion C.5 is not supported by and in fact violates public policy is further belied by the fact that DOBI approved the revised exclusion. DOBI's reasoning includes, as a secondary consideration, the public policy of keeping workers compensation premiums affordable for the many business enterprises that operate in New Jersey and provide employment for New Jersey residents. The Workers Compensation Act vests the Commissioner of Banking and Insurance with the power to "promulgate such rules and regulations . . . as he deems necessary to effectuate the provisions of [the Workers Compensation Act]." N.J.S.A 34:15- 77.8. "The principle that the insurance business is strongly affected with a public interest and therefore properly subject to comprehensive regulation in protecting the public welfare is long-settled and well-established. To safeguard that public welfare, DOBI has broad and comprehensive regulatory authority . . . over the business of insurance . . . . This regulatory authority extends to workers' compensation insurance." Applied Underwriters Captive Risk Assurance Co., Inc. v. N.J. Dep't of Banking & Ins., 472 N.J. Super. 26, 41-42 (App. Div. 2022) (internal quotation marks and citation omitted). "[I]n the field of insurance, the expertise and judgment of the [DOBI] Commissioner may be given great weight." Coalition for Quality Health Care v. N.J. Dep't of Banking & Ins., 348 N.J. Super. 272, 301 (App. Div.) (quotation marks and citation omitted), certif. denied, 174 N.J. 194 (2002).

Courts have recognized that if the DOBI Commissioner approves a policy form, then there is a presumption that the policy form does not contravene public policy. See Jones v. Heymann, 127 N.J. Super. 542, 547 (App. Div. 1974) (presumption that Commissioner did not view a policy form to be against public policy where he "has not made any change in that endorsement nor withdrawn his approval thereof"); Smith v. Motor Club of Am. Ins. Co., 54 N.J. Super. 37 (Ch. Div.), aff'd, 56 N.J. Super. 203 (App. Div. 1959) ("[t]he Legislature, having vested the Commissioner of Banking and Insurance with authority to strike from policies any clauses he deems to be unfair or inequitable, and the Commissioner having taken no such action with respect to the clause in question, it must be presumed that he did not consider it unfair or inequitable and that it is not against public policy").

Both because Exclusion C.5 enhances worker safety and because it controls the costs of workers' compensation and employers' liability insurance, it is consistent with the public policy of this State. This Court should reject Plaintiff's argument to the contrary.

IV. PLAINTIFF'S CLAIMS AGAINST GREAT NORTHERN WERE ALSO CORRECTLY DISMISSED SINCE PLAINTIFF MADE NO CLAIM AGAINST THE GREAT NORTHERN COMPREHENSIVE GENERAL LIABILITY POLICY AND HAS MADE NO ARGUMENT TO THE CONTRARY IN THIS APPEAL.

(Ja1-16)

In the Amended Complaint and in its submissions before the trial court, Plaintiff made no claim that the Great Northern comprehensive general liability policy issued to Schroth had any coverage obligation for Bunting's accident and injury. Great Northern argued in its motion for dismissal that its policy did not provide coverage for injury to employees of Schroth. (1T15:3-8). The trial court did not specifically address Great Northern's argument in its decision, but its Order of January 29, 2024, specifically included dismissal with prejudice of Plaintiff's claims against Great Northern. Ja2-3.

In its brief on appeal, Plaintiff makes no argument that the Order as to Great Northern was entered in error. In fact, Plaintiff never mentions Great Northern in its appellate brief's legal arguments at all. For this additional reason, the Order dismissing Plaintiff's cause of action against Great Northern should be affirmed.

CONCLUSION

Defendants Chubb Insurance Company of New Jersey and Great Northern Insurance Company respectfully request that the Court affirm the trial court's Order dismissing with prejudice Plaintiff Bunting's claims for insurance coverage under the Chubb policy.

Respectfully submitted,

RIKER DANZIG LLP
Attorneys for Defendants
Great Northern Insurance Company
and Chubb Insurance Company of
New Jersey

By: */s/ Michael J. Rossignol*___
Michael J. Rossignol

Date: August 9, 2024

4856-6374-7791, v. 2

MAKAYLA BUNTING, Administratrix and Administratrix ad Prosequendum for the ESTATE OF MICHAEL BUNTING, Plaintiff-Appellant, v. EMIL A. SCHROTH, INC.; NEW JERSEY MANUFACTURERS INSURANCE COMPANY; GREAT NORTHERN INSURANCE COMPANY; CHUBB INSURANCE COMPANY OF NEW JERSEY; and JOHN DOES 1-10, Defendants-Respondents.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET No. A-1972-23T1 Civil Action On Appeal from the Law Division – Monmouth County Docket No.: MON-L-1035-22 Sat Below: Hon. Richard W. English, J.S.C.

DEFENDANT-RESPONDENT, NEW JERSEY MANUFACTURERS INSURANCE COMPANY'S BRIEF AND APPENDIX

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PRELIMINARY STATEMENT

Defendant-Respondent, New Jersey Manufacturers Insurance Company ("NJM") submits this brief in opposition to the appeal filed by Plaintiff-Appellant, Makayla Bunting, as Administratrix ad Prosequendum for the Estate of Michael Bunting ("Bunting" or "Plaintiff"), in the above-captioned matter. Plaintiff's appeal is premised on a mischaracterization of the compulsory insurance provisions of the Workers' Compensation Act ("the Act") and ignores that Mr. Bunting was paid workers' compensation benefits for the injuries suffered as a result of his workplace accident. Plaintiff also ignores the established body of law in New Jersey that favors insurance policy exclusions that exclude coverage for intentional torts. Stated simply, the Act does not compel an insurer to provide coverage for an employer's intentional misconduct and New Jersey public policy favors insurance policy exclusions that exclude coverage for liability arising out of such conduct.

Plaintiff's arguments are premised on a misreading of numerous judicial decisions and misquoted references to the Act. Plaintiff cites various compulsory insurance provisions in the Act but misquotes those statutes and omits critical language. The Act does not mandate that an employer maintain insurance for every conceivable claim an injured worker might assert. Rather, the Act requires that injured workers have a guaranteed means of recovery for injuries or illnesses

sustained in the course and scope of employment. That does not mean that an employer must maintain insurance for every possible claim an injured worker might assert.

Additionally, Plaintiff simply ignores the fact that NJM paid Mr. Bunting over $120,000 in workers' compensation benefits before he passed. The payment of those benefits fulfills the promise of the Act and vindicates the public policy that animates the Act. Requiring a workers' compensation insurer that has paid workers' compensation benefits to an injured worker to also insure a claim of intentional wrong asserted against the employer undermines the delicate balance of interests struck by the Act. Injured workers are not guaranteed the most lucrative recovery for their injuries. Rather, the Act guarantees that injured workers will have an avenue of recovery and access to medical care that is admittedly limited. That is the historic trade-off that is the very foundation of the workers' compensation system – i.e., in exchange for relinquishing the right to seek a more lucrative common law recovery, injured workers are guaranteed certain reduced benefits that are payable regardless of fault.

The plain language of the Act and judicial decisions interpreting and defining its public policy simply do not require an employer to maintain insurance coverage for claims of intentional wrongdoing. That is not what the Act says. Moreover, New Jersey law has long favored insurance policy exclusions for claims

of intentional wrongdoing. Plaintiff's suggestion that there is no empirical data to support such a public policy ignores the legion of judicial decisions handed down for decades in this state that have enforced such a public policy. Plaintiff seeks additional compensation beyond what the Act provides because she believes that Mr. Bunting's injury was caused by intentionally wrongful conduct by his employer, and therefore, he was entitled to recover more than what the Act provides. The fact that Plaintiff, and Mr. Bunting during his lifetime, may have been entitled to recover damages beyond what the Act provides does not justify obliterating the true public policy of the Act and ignoring the established principles of law that govern the Act. There is no public policy or rational justification for obligating a workers' compensation insurer to provide insurance coverage for an employer's intentionally wrongful acts. The trial court's decision is well-reasoned and fully consistent with both public policy and the many judicial decisions interpreting the Act. Accordingly, the trial court's decision should be affirmed in all respects.

PROCEDURAL HISTORY

NJM adopts the Procedural History as recited in Plaintiff's merits brief.

STATEMENT OF FACTS

A. Plaintiff's First Amended Complaint

This matter arises out of a work-place accident that occurred on September 28, 2020. Ja44. Plaintiff alleges that he was injured by a bailer during the course of his employment with Defendant, Emil A. Schroth, Inc. Ibid. More specifically, Plaintiff alleges that he suffered injuries to his right foot when a part of the bailer he was feeding copper into fell and landed on his foot. Ibid. The only defendants named in Plaintiff's First Amended Complaint are Plaintiff's employer, Schroth, and Schroth's insurers. Ibid.

Plaintiff's primary cause of action is an intentional wrong claim against his employer, Schroth, for which Plaintiff now seeks coverage under Schroth's Workers' Compensation and Employer's Liability Insurance Policy, which was issued by NJM, and an excess liability insurance policy issued by Chubb Insurance Company of New Jersey. Plaintiff's First Amended Complaint states her claim against Schroth as follows:

> 5. At all times herein relevant, Defendant, Schroth, as Plaintiff's employer, was responsible for the training and supervision of its employees and was also responsible for the inspection, maintenance, repair, supervision and proper working condition of the subject bailer and was responsible for providing a safe and hazard-free work environment.
>
> 6. At all times mentioned and specifically on September 28, 2020, Defendant, Schroth, knew, or had reason to know, that the aforesaid bailer was damaged

> and could not be safely used as intended at the time of the subject accident, thereby causing the intentional use of damaged, defective, substandard and dangerous equipment in an ultra-hazardous and unsafe manner.
>
> 7. The aforesaid conduct of Defendant, Schroth was so egregious as to cause a reasonable person to conclude with practical certainty that some employee of Defendant, Schroth would be injured in the very manner that occurred to the Plaintiff.
>
> 8. As a result of the aforesaid grossly negligent and/or intentional wrongdoing of Defendant, Schroth, Plaintiff has suffered severe and permanent bodily injuries for which he has obtained medical treatment and which caused him great pain and suffering, incapacitated him from pursing usual activities and left him with permanent disabilities that will in the future similarly incapacitate him, cause him pain and suffering, and require medical attention and has caused him to accumulate medical expenses.
>
> [Ja45, ¶¶5-8 (emphasis added).]

The Second Count of the First Amended Complaint alleges that Schroth's conduct violated the New Jersey Worker Health and Safety Act, N.J.S.A. 34:6A et seq. Ja46, ¶2. The alleged violations include failing to provide a place of employment that was reasonably safe, failing to install and maintain protective devices and safeguards, rendering safety devices and safeguards ineffective, and numerous unidentified regulations adopted pursuant to the Occupational Safety and Health Act. Id. at ¶2(a)-(d). Plaintiff contends that this conduct "resulted in a substantial risk of physical injury inherent in the nature of the specific work operation assigned to Plaintiff." Id. at ¶3. It is then alleged that as a result of this

"grossly negligent and/or intentional wrongdoing" by Schroth Plaintiff suffered significant injuries. Id. at ¶4.

The Third Count of the First Amended Complaint asserts a claim for coverage against NJM. Plaintiff alleges that NJM issued a Workers' Compensation and Employer's Liability Insurance Policy to Schroth with a limit of liability of $1,000,000. Ja47 at ¶2. Plaintiff identifies this as the "NJM Policy." Ibid. Plaintiff states that NJM disclaimed coverage pursuant to Exclusion C.5 of the NJM Policy. Id. at ¶3. Plaintiff identifies a second insurance policy issued to Schroth by Chubb Insurance Company of New Jersey, which provided excess and umbrella insurance coverage to Schroth. Id. at ¶4. It is alleged that Chubb disclaimed coverage under the excess, umbrella policy based on NJM's disclaimer. The Third Count then explains that Plaintiff and Defendant Schroth agreed to a settlement pursuant to Griggs v. Bertram, 88 N.J. 347 (1982), pursuant to which a consent judgment in the amount of $1,250,000 was entered against Schroth. Ja47-48, ¶6. Pursuant to the terms of the settlement Plaintiff's wife, Leigh Ann Bunting, agreed to voluntarily dismiss her claims for loss of consortium and Schroth agreed to assign to Plaintiff its rights under the insurance policies issued by NJM and Chubb. Ja48, ¶¶7-8. Plaintiff further agreed "not to execute the judgment against Defendant, Emil A. Schroth, Inc." Id. at ¶9. Through the "WHEREFORE" clause in the Third Count Plaintiff seeks a declaratory judgment that the insurance policies issued by NJM

and Chubb to Schroth provide coverage for the claims asserted against Schroth in the Complaint. Ja48.

The Fourth Count of the First Amended Complaint addresses the nature of the coverage provided by the respective insurance policies. Plaintiff alleges as follows: "The C5 exclusion relied upon by Defendants, NJM and Chubb to deny coverage violates public policy by restricting compulsory coverage which Defendants are obligated to provide." Id. at ¶2. Plaintiff then alleges that NJM's and Chubb's disclaimer of coverage was improper and constitutes a breach of the duty of good faith and fair dealing because NJM and Chubb knew that N.J.S.A. 34:15-72 compels coverage for the claim asserted against Schroth at the time they disclaimed coverage. Ja48-49, ¶¶3-4. Plaintiff seeks compensatory and extra-contractual damages, as well as punitive damages for this alleged breach, but does not allege anywhere in the Fourth Count what damages were sustained. Ja49.

The Fifth Count of the First Amended Complaint asserts claims against fictitious defendants. John Does 1-10 are described as additional persons or entities that may have caused Plaintiff's accident. Ja49-50, ¶¶1-4. Plaintiff does not specifically identify or describe who these fictitious defendants may be.

B. The NJM Policy

NJM issued a Standard Workers' Compensation and Employer's Liability Insurance Policy to Schroth under policy number WXXX47-1-20. Ja67. The NJM

Policy was effective from January 1, 2020, to January 1, 2021. Ja68. The named insured on the Policy is Emil A. Schroth, Inc. Ibid.

The Standard Workers' Compensation and Employer's Liability Insurance Policy is divided into two coverage parts. Part One of the Policy, titled "Workers' Compensation Insurance," provides coverage for "the benefits required of you by the workers' compensation law." Ja79. The workers' compensation law identified on the Information Page of the Policy is New Jersey. Ja68. Part Two, titled "Employers Liability Insurance," provides coverage for claims of bodily injury asserted against Schroth by an employee "where recovery is permitted by law." Ja80. Part Two provides coverage for that category of claims in which an employee is legally permitted to assert a claim for bodily injury against his or her employer in lieu of the statutory benefits covered under Part One of the Policy, subject to the exclusions contained in Part Two.

The coverage afforded by Part Two of the NJM Policy is subject to various exclusions.

> **C.** Exclusions
> This insurance does not cover:
> . . . .
> . . . .
> . . . .
> 4. Any obligation imposed by a workers compensation, occupational disease, unemployment compensation, or disability benefits law or any similar law;

> 5. Bodily injury intentionally caused or aggravated by you . . . .
>
> [Ibid.]

Exclusion C.5., which is cited by Plaintiff in the First Amended Complaint, was amended by the adoption of an endorsement. In 2007 the New Jersey Department of Banking and Insurance through the Compensation Rating and Inspection Bureau adopted the following endorsement, which is now a part of every Workers' Compensation and Employer's Liability Insurance Policy issued in the State of New Jersey:

> With respect to Exclusion C5, this insurance does not cover any and all intentional wrongs within the exception allowed by N.J.S.A. 34:15-8 including but not limited to bodily injury caused or aggravated by an intentional wrong committed by you or your employees, or bodily injury resulting from an act or omission by you or your employees, which is substantially certain to result in injury.
>
> [Ja76.]

It is worth emphasizing that the adoption of this endorsement is not unique to NJM. The Part Two Employers Liability Insurance Endorsement was made part of the New Jersey Workers' Compensation and Employers Liability Insurance Manual, which governs all workers compensation insurance policies issued in the State of New Jersey. Every workers' compensation insurance policy issued in the State of New Jersey is required to follow the forms contained in the Workers

Compensation Manual, including the Part Two Employers Liability Insurance Endorsement. N.J.S.A. 34:15-90.1, -90.2.[1] Moreover, the policy form is a national form policy drafted by the National Council on Compensation Insurance and is used in many different States throughout the United States.

C. Decedent's Workers' Compensation Claim

Completely absent from Plaintiff's brief is any mention of the fact that NJM paid Mr. Bunting substantial workers' compensation benefits under Part One of the Policy. Mr. Bunting filed a workers' compensation claim under Article 2 of the Act. Mr. Bunting's medical expenses were paid and NJM paid disability benefits to Mr. Bunting in accordance with Article 2 of the Act and Part One of the NJM Policy. Pa437. At the time of the disclaimer, NJM had paid over $120,000 in benefits. Ibid.[2] The payment of these benefits constitutes the guaranteed compensation promised by the Act and fulfills its public policy objectives.

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[1] New Jersey Workers Compensation and Employers Liability Insurance Manual, Part 3, sec. 1, ¶1. A copy of the New Jersey Workers Compensation and Employers Liability Insurance Manual is available online at www.njcrib.com/DocumentsLibrary/NJManual.

[2] The disclaimer cited included in Plaintiff's opposition to NJM's motion references the "net total incurred payment," which includes anticipated future benefits. The actual amount paid to Petitioner at the time of the disclaimer was approximatley $123,000.

D. The Trial Court's Decision

Plaintiff's brief fails to discuss the content of the trial court's decision or identify any specific aspect of the trial court's reasoning that Plaintiff contends is erroneous. In fact, the trial court's sound decision is well-supported by the Policy language and the requirements of the Act. After reviewing the parties' respective arguments and reciting the legal principles that govern the interpretation of insurance policies, the trial court observed, "The core objective of workers' compensation is to adhere to public policy by ensuring that every injured worker has an avenue for seeking redress in cases of work-related injuries, and the plaintiff did have such recourse in the present case." Ja14. The trial court also distinguished cases such as Charles Beseler Company v. O'Gorman & Young, Inc., 188 N.J. 542 (2006), and Schmidt v. Smith, 144 N.J. 50 (1998). Notably, Plaintiff has abandoned many of the arguments submitted to the trial court, including the contention that the Charles Beseler decision compelled coverage for Plaintiff's claim in this case. The trial court correctly noted that the intentional wrong exclusion adopted by the Commissioner of Banking and Insurance in 2007 removed all ambiguity from the exclusion that was the basis of the Court's decision in Charles Beseler. Ja14-15.

The trial court also rejected the contention that the Supreme Court's decision in Schmidt v. Smith compelled coverage for Plaintiff's intentional wrong claim.

The trial court correctly noted that in Schmidt the plaintiff's claim for bodily injuries would have gone uncompensated if no coverage was found to exist. The same outcome would have resulted from a finding of no coverage in Variety Farms, Inc. v. New Jersey Manufacturers Insurance Company, 172 N.J. Super. 10 (App. Div. 1980), in which a 15-year-old boy lost an arm while operating machinery in violation of the child labor laws. The trial court's decision acknowledges the critical fact that Mr. Bunting's injuries were compensated and that NJM's payment of workers' compensation benefits to Mr. Bunting, including the payment of his medical bills and disability benefits, fulfilled the public policy objectives of the Act. Plaintiff completely ignores this dispositive fact. Pa15-16.

It is also notable that Plaintiff has abandoned her reliance on the unpublished decision in Rodriguez-Ortiz v. Interstate Racking & Shelving, No. A-1614-19 N.J. Super. LEXIS 2072 (App. Div. September 3, 2021). Ja475. Plaintiff argued before the trial court that this unpublished decision held that public policy required coverage for intentional wrong claims. The trial court correctly rejected this argument and noted that the court in Rodriguez-Ortiz expressly stated that it was not deciding that issue. Pa15. Plaintiff has abandoned this argument in her merits brief filed with this Court.

Lastly, the trial court concluded that the NJM Policy's exclusion for intentional wrongs is fully consistent with public policy. It is a long-standing

public policy of New Jersey that insurance provisions that exclude coverage for intentional acts are enforceable. As observed by the trial court,

> The removal of Exclusion C5 would lead to an increase in moral hazard, going against public policy. Employers are explicitly warned that they cannot jeopardize their employee's well-being through intentional wrongs without consequences. Exclusion C5 acts as a safeguard, preventing insurers from becoming a safety net for employers who permit the use of hazardous or malfunctioning equipment, remove safety guards from machines, or deceive employees about work-related illnesses. Therefore, Exclusion C5 establishes a standard that holds employers accountable for maintaining the utmost safety and preventing incidents classified as "intentional wrongs."
>
> [Pa16.]

The sole issue raised by Plaintiff's appeal is whether the Act and public policy it promotes mandate coverage for an employer's alleged intentional wrong such that Exclusion C.5 is unenforceable. Pb6-17.

STANDARD OF REVIEW

The standard of review on a motion to dismiss for failure to state a claim upon which relief may be granted pursuant to Rule 4:6-1(e) is de novo. W.S. v. Hildreth, 252 N.J. 506, 518 (2023); Baskin v. P.C. Richard & Son, 245 N.J. 157, 171 (2021). Rule 4:6-2 states, in pertinent part, that:

> [e]very defense . . . to a claim for relief . . . shall be asserted in the answer thereto, except that the following defenses . . . may . . . be made by motion, with briefs: . . .

> (e) failure to state a claim upon which relief can be granted.

Rule 4:6-2(e) requires that the Complaint must be searched in depth, and with liberality, in order to determine if a cause of action may be gleaned. Printing Mart v. Sharp Electronics, 116 N.J. 739, 746 (1989). When assessing the appropriateness of dismissal under R. 4:6-2(e), the inquiry is limited to an examination of the legal sufficiency of the facts alleged in the Complaint. Rieder v. Department of Transp., 221 N.J. Super. 547, 552 (App. Div. 1987). When evaluating a motion to dismiss the Complaint, the Plaintiffs are entitled to every reasonable inference of fact. Independent Dairy Workers Union v. Milk Drivers Local 680, 23 N.J. 85, 89 (1956). Dismissal is appropriate in the event that the complaint states no basis for relief and discovery would not provide one. Energy Rec. v. Dept of Env. Prot., 320 N.J. Super. 59, 64 (App. Div. 1999).

It is an established principle of law in New Jersey that the Court may consider documents referenced in or upon which the allegations of a complaint are based when deciding a motion to dismiss under Rule 4:6-2(e):

> In its review, a court may consider documents specifically referenced in the complaint "without converting the motion into one for summary judgment." E. Dickerson & Son, Inc. v. Ernst & Young, LLP, 361 N.J. Super. 362, 365 n.1, 825 A.2d 585 (App. Div. 2003), aff'd, 179 N.J. 500, 846 A.2d 1237 (2004). "In evaluating motions to dismiss, courts consider 'allegations in the complaint, exhibits attached to the complaint, matters of public record, and documents that form the basis of a

> claim.'" Banco Popular N. Am. v. Gandi, 184 N.J. 161, 183 876 A.2d 253 (2005) (quoting Lum v. Bank of Am., 361 F.3d 217, 222 n.3 (3d Cir.), cert. denied, 534 U.S. 918, 125 S.Ct. 271, 160 L.Ed.2d 203 (2004)). "It is the existence of the fundament of a cause of action in those documents that is pivotal; the ability of the plaintiff to prove its allegations is not at issue." Ibid.
>
> [Myska v. New Jersey Mfrs. Ins. Co., 440 N.J. Super. 458, 482 (App. Div.) app. dismissed 224 N.J. 523 (2015) (emphasis added).]

The Court may consider documents referenced in the Complaint or upon which the allegations of the Complaint are based because "the motion is based upon the content of the pleading in and of itself. A motion to dismiss 'may not be denied based on the possibility that discovery may establish the requisite claim; rather, the legal requisites for plaintiff's claim must be apparent from the complaint itself.'" N.J. Sports Productions, Inc. v. Bobby Bostick Promotions, LLC, 405 N.J. Super. 173, 178-179 (Ch. Div. 2007) (emphasis added) (quoting Edward Prudential Prop. & Cas. Co., 357 N.J. Super. 196, 202 (App. Div. 2003)). The First Amended Complaint explicitly references the Policy, including Exclusion C5 contained in Part Two of the Policy. See Ja47, ¶¶2-4. Accordingly, it is proper for NJM and the Court to rely on the actual language of the Policy referenced in the Complaint and upon which the Plaintiff's claim is based.

LEGAL ARGUMENT

I. THE TRIAL COURT PROPERLY DISMISSED PLAINTIFF'S AMENDED COMPLAINT BECAUSE THERE IS NO COVERAGE FOR PLAINTIFF'S CLAIMS OF INTENTIONAL WRONG AS A MATTER OF LAW. (Pa1-16).

The trial court properly dismissed Plaintiff's First Amended Complaint because the First Amended Complaint fails to state a claim upon which relief may be granted. Both causes of action asserted against NJM are premised on the assertion that the Standard Workers' Compensation and Employer's Liability Insurance Policy issued to Schroth provides coverage for Plaintiff's claim of intentional wrong. Plaintiff asserts that the Act and public policy require NJM to provide coverage for the Estate's claim of intentional wrong. However, neither the Act nor New Jersey public policy require coverage for an intentional tort such as this and the claim asserted by Plaintiff against Schroth is expressly excluded from coverage. Accordingly, there is no coverage for Plaintiff's intentional wrong claim as a matter of law and no relief may be granted to Plaintiff based on the allegations contained in the First Amended Complaint.

A. Coverage Afforded by the NJM Policy

The nature and extent of the coverage provided by an insurance policy is determined by the terms of the policy. Adron, Inc. v. Home Ins. Co., 292 N.J.

Super. 463, 473 (App. Div. 1996); Rena, Inc. v. Brien, 310 N.J. Super. 304, 321 (App. Div. 1998). The words of the insurance policy should be given their plain, ordinary meaning. Voorhees v. Preferred Mut. Ins. Co., 128 N.J. 165, 175 (1992); Harleysville Ins. Cos. v. Garitta, 170 N.J. 223, 231 (2001); Aetna Cas. & Surety Co. v. Simone, 340 N.J. Super. 19, 24 (App. Div. 2001), aff'd o.b., 170 N.J. 438 (2002). When the terms of an insurance contract are clear, it is the function of a court to enforce it as written and not to make a better contract for either of the parties. Chubb Custom Ins. Co. v. Prudential Ins. Co. of Am., 195 N.J. 231, 238 (2008); Zacarias v. Allstate Ins. Co., 168 N.J. 590, 594-95 (2001). In the absence of any ambiguity, courts will not write a better policy of insurance than the one purchased. Longobardi v. Chubb Ins. Co. of N.J., 121 N.J. 530, 537 (1990); Gibson v. Callaghan, 158 N.J. 662, 670 (1999). Only where there are genuine ambiguities in a policy will the "doctrine of ambiguity" be invoked to interpret a policy in favor of coverage. Am. White Cross v. Continental Ins. Co., 202 N.J. Super. 372, 381 (App. Div. 1985). A "genuine ambiguity" arises only "where the phrasing of the policy is so confusing that the average policyholder cannot make out the boundaries of coverage." Ibid.

As stated above, the NJM Policy is written in two separate, mutually exclusive parts. Part One covers an employer's statutory obligations under the Act to pay benefits to an injured worker. See Pa78-82. Specifically, Part One provides,

"We will pay promptly when due the benefits required of you by the workers compensation law." Pa79. Plaintiff's civil action does not assert a claim against Schroth for benefits under the Act. Therefore, there can be no coverage under Part One for the claims asserted against Schroth in Plaintiff's First Amended Complaint.

Part Two covers certain legally recognized liabilities of an employer to its employees but does not provide coverage and/or a defense for civil suits improperly brought against the employer. Central Natl. Ins. Co. v. Utica Natl. Ins. Group, 232 N.J. Super. 467, 471-72 (App. Div. 1989). In Central National, the Appellate Division addressed the purposes of Part Two coverage. The plaintiff in Central National argued that "Coverage B" (now Part Two) obligated the workers' compensation insurer to defend and indemnify all damage actions brought against an employer by an injured worker. Id. at 470-71. In Central National, an employee died when he fell from an elevated roadway after attending a Christmas party organized by a group of co-workers. Id. at 468.

Holding that the workers' compensation carrier had no obligation to defend the action filed against the employer in Central National, the Appellate Division noted that coverage under then Coverage B was limited to claims that arose out of and in the course of employment. Id. at 471. After recognizing this limitation, the court asked, "If Coverage B(a) is thus limited, what does it include"? Ibid. The

court then enumerated the types of claims that are covered by Part Two of the policy:

> There are some accidental injuries arising out of and in the course of employment for which statutory benefits are not the remedy. The Workers' Compensation Law permits employer and employee to elect in writing to reject the statutory-compensation-without-fault provisions in Article 2 of Title 34. See N.J.S.A. 34:15-7 and 15-9. In case of such an election, an employee who is not willfully negligent has a negligence action against the employer for damages for injuries "by accident arising out and in the course of ... employment." N.J.S.A. 34:15-1. Assumption of the risk and fellow employee negligence are not available defenses in such actions. N.J.S.A. 34:15-2. Employers, unless permissibly self-insured, are required to insure against such liabilities. N.J.S.A. 34:15-72, -77, -78. An infant employee may always elect to pursue a common law action for injuries. N.J.S.A. 34:15-10. National Grange Mutual Ins. Co. v. Schneider, 162 N.J. Super. 227, 231 (Law Div. 1978). See also Variety Farms, Inc. v. New Jersey Mfrs. Inc. Co., 172 N.J. Super. 10 (App. Div. 1980). A "casual employee" has no such choice. Such an employee can suffer injury by accident arising out of and in the course of employment, but since he is not an "employee" within the statute and thus not entitled to benefits, Stein v. Felden, 17 N.J. Super. 311 (App. Div. 1952), the casual employee is not barred from pursuing other remedies. N.J.S.A. 34:15-8.
>
> Without ruling on particular applications, we note only that there are a number of opportunities for damage awards for local employee injuries by accident arising out of and in the course of employment.
>
> [Id. at 471-472.]

Central National demonstrates that the purpose of Part Two coverage is to insure an employer's obligations under the Act for payment of damages for which an employer may legally be responsible in lieu of the traditional statutory benefits that are covered by Part One of the NJM Policy. More specifically, the scope of coverage under Part Two is designed to cover those limited circumstances in which an employer may be legally liable for damages to an injured employee in lieu of the statutory benefits provided by the traditional workers' compensation system.

It is also important to note that the NJM Policy is a national form policy written by the National Council on Compensation Insurance. As such, the NJM Policy applies in many different states, some of which permit different types of third-party claims for contribution against an employer for which Part Two sometimes provides coverage. The point is that coverage under Part Two of the NJM Policy is limited insurance that is designed to insure a very specific category of liability.

Furthermore, Part Two of the Policy expressly excludes coverage for certain types of claims, including intentional wrongs and conduct that is substantially certain to result in injury. In New Jersey, unless the employee or employer has opted out of the Article 2 system, the only claim an adult employee may legally assert against his or her employer outside the statutory system governed by Article 2 of the Act is an intentional wrong claim. N.J.S.A. 34:15-8. However, a claim of

intentional wrong, no matter how it is pleaded, is expressly excluded from coverage under Part Two of the Policy. Pa76. Exclusion C.5 of Part Two generally excludes "[b]odily injury intentionally caused or aggravated by you." Pa80. Additionally, the New Jersey Part Two Employers Liability Endorsement expressly excludes from coverage any and all claims of intentional wrong, including claims that the employer's conduct created a substantial certainty of injury:

> With respect to Exclusion C5, this insurance does not cover any and all intentional wrongs within the exception allowed by N.J.S.A 34:15-8 including but not limited to bodily injury caused or aggravated by an intentional wrong committed by you or your employees, or bodily injury resulting from an act or omission by you or your employees, which is substantially certain to result in injury.
>
> [Ja76.]

Notably, the language of the New Jersey Part Two Employers Liability Endorsement excludes from the coverage of the Policy any allegation of intentional wrong, no matter how the allegation is phrased, and specifically excludes from coverage any allegations that the employer's conduct was "substantially certain to result in injury." Ibid.

Based on the Policy's clear, unambiguous language, Plaintiff's claims against Schroth, consisting only of intentional wrongs and conduct substantially certain to cause injury, are expressly excluded from coverage. With respect to each

count of the First Amended Complaint asserted against Schroth, Plaintiff alleges that Schroth's conduct "was so egregious as to cause a reasonable person to conclude with practical certainty that some employee of Defendant, Schroth would be injured in the very manner that occurred to the Plaintiff." Ja45. In the Second Count Plaintiff alleges, "All of these acts resulted in a substantial risk of physical injury inherent in the nature of the specific work operation assigned to Plaintiff," and describes Schroth's conduct as "intentional wrongdoing." Ja46. Thus, Plaintiff has premised his entire theory of liability against Schroth on the very type of conduct expressly excluded by the New Jersey Part Two Employers Liability Endorsement.

Plaintiff alleges that Schroth "knew, or had reason to know, that the aforesaid bailer was damaged and could not be safely used as intended at the time of the subject accident, thereby causing the intentional use of damaged, defective, substandard and dangerous equipment in an ultra-hazardous and unsafe manner." Pa45. In the Second Count Plaintiff further details Schroth's alleged intentional wrongdoing. Plaintiff alleges that Schroth "failed to install, maintain and use protective devices and safeguards for its employees to protect against recognized hazards," and "rendered ineffective those respective devices or safeguards originally available." Ja46, ¶2(b)-(c). The obvious intent and purpose of the allegations contained in the First Amended Complaint is to assert a claim of

intentional wrong pursuant to N.J.S.A. 34:15-8. Such claims are expressly excluded from coverage.

B. The Act Does Not Mandate Coverage for Claims of Intentional Wrongdoing

Contrary to Plaintiff's contentions, the Act does not mandate coverage for intentional wrongs and does not require the NJM Policy to cover every possible type of claim an injured worker might assert against his or her employer. Indeed, the Act merely requires an employer to "make sufficient provisions for the complete payment of any obligation which he may incur to an injured employee, or his dependents under the provisions of said Article 2, by one of the methods hereinafter set forth in sections 34:15-77 and 34:15-78 of this title." N.J.S.A. 34:15-71 (emphasis added).

Plaintiff cites to N.J.S.A. 34:15-72 in support of the contention that an employer is obligated to insure any and all claims that an injured worker might assert against an employer for injuries sustained during the course of employment. N.J.S.A. 34:15-72 does not obligate an employer to maintain insurance for liability resulting from intentional wrongdoing under N.J.S.A. 34:15-8 and has no application to this case. Section 72 provides that "every employer . . . shall forthwith make sufficient provision for the complete payment of any obligation which he may incur to an injured employee or his administrator or next of kin under said Article 1 of this chapter." Ibid. (emphasis added). Article 1 of the Act

(N.J.S.A. 34:15-1 to -6) provides for the assertion of a claim of negligence against an employer where either the employer or the employee has opted out of the statutory system of compensation created by Article 2 of the Act. N.J.S.A. 34:15-9. Plaintiff's claim against Schroth is an intentional wrong claim brought pursuant to the exception to the exclusive-remedy provision of Article 2. N.J.S.A. 34:15-8. Generally, an adult employee's exclusive remedy for bodily injuries sustained during the course and scope of employment is limited to the statutory remedies provided by Article 2. Ibid. However, if an employer engages in conduct that rises to the level of an intentional wrong, the exclusive-remedy provision does not apply, and such a worker may pursue both a claim for statutory workers' compensation benefits and an intentional wrong claim. Millison v. E.I. du Pont de Nemours & Co. 101 N.J. 161, 187 (1985). Accordingly, a claim of intentional wrong, if successful, does not impose liability on an employer under Article 2 of the Act. Such a claim falls outside of Article 2 and is in addition to the benefits provided by the Act. Moreover, it is not a claim asserted under Article 1 of the Act. As such it is not a claim to which the compulsory insurance provisions of the Act apply. N.J.S.A. 34:15-72 has no application to this case and is wholly irrelevant to the claims asserted against Schroth.

Plaintiff misquotes section 72 and omits the statute's reference to "Article 1 of this chapter." N.J.S.A. 34:15-72. Plaintiff states that section 72 requires an

employer to maintain insurance for any and all claims arising out of a work-related accident, even those that fall outside the parameters of the Act. The plain language of section 72 of the Act does not impose any such requirement on an employer. First, section 72 merely requires an employer to make sufficient payment for liability imposed under Article 1 of the Act, not liability that is imposed at common law for claims falling outside the workers' compensation scheme. Ibid. Article 1 of the Act sets forth a specific type of claim that may be asserted against an employer in the Superior Court that is subject to limited defenses and places the burden proof on the employer. N.J.S.A. 34:15-1 to -6. Because the employer has limited defenses and carries the burden of proof, a claim under Article 1 is not a traditional common-law negligence cause of action. Ibid. Second, section 72 does not require an employer to maintain workers compensation insurance to meet those obligations. N.J.S.A. 34:15-71 states that an employer "must make sufficient provision for the complete payment of any obligation which he may incur . . . under the provisions of said Article 2, by one of the methods hereinafter set forth in sections 34:15-77 and 34:15-78 of this title." Ibid. (emphasis added). Section 77 and 78 of the Act require an employer to either be permissibly self-insured or purchase workers' compensation insurance. N.J.S.A. 34:15-77, -78. N.J.S.A. 34:15-72 does not require an employer to satisfy its obligations under Article 1 through one of the methods set forth in sections 77 or 78. N.J.S.A. 34:15-72. There

is no reference to section 77 or 78 in N.J.S.A. 34:15-72. Plaintiff ignores the plain language of the statutes and omits reference to the clarifying language cited above.

Plaintiff's citation to N.J.S.A. 34:15-87 is also incorrect and based on a mischaracterization of the statute. Like N.J.S.A. 34:15-71, section 87 applies exclusively to liability imposed by the Act. A workers' compensation policy may not limit the amount or scope of the coverage provided by the policy such that an employer's liability under the Act is left uninsured. N.J.S.A. 34:15-87 ("No policy of insurance against liability arising under this chapter shall contain any limitation on liability of the insurer to an amount less than that payable by the assured on account of his entire liability under this chapter . . . ." (emphasis added)). An intentional wrong claim falls outside of the Act and is liability imposed on an employer for egregious, intentionally wrongful conduct that is in addition to the liability imposed on an employer by Article 1 or Article 2 of the Act. Millison, 101 N.J. at 187 ("[T]he best approach is to allow a plaintiff to process his workers' compensation claim without forfeiting the opportunity to establish that he was injured as a result of conduct that amounted to an intentional wrong, entitling him to seek damages beyond those available in workers' compensation." (emphasis

added)).[3] Accordingly, section 87 does not compel insurance coverage for a claim of intentional wrong.

C. Schmidt & Variety Farms

Plaintiff's argument that the Act's compulsory insurance provisions mandate coverage for intentional wrong claims is premised on a misreading of the decisions in Schmidt v. Smith and Variety Farms. In Variety Farms the Appellate Division examined whether the Policy, as it existed at that time, provided coverage for a negligence claim brought by a minor employee against his employer. Alan Sindoni, a 15-year-old boy suffered a traumatic amputation of his left arm when it was caught in a moving coveyor roller during the course of his employement for Variety Farms, Inc., which packaged agricultural products. 172 N.J. Super. at 13-14. Variety Farms' workers' compensation insurer, NJM, denied coverage based on an exclusion contained in then Coverage B of the standard workers' compensation policy, now known as Part Two, that excluded coverage for liability to an "employee employed in violation of law with the knowledge or acquiescence of the insured or any executive officer thereof." Id. at 14. Sindoni, only 15 years old at the time of the accident, was illegally employed in violation of N.J.S.A.

[3]Notably, the Millison Court also recognized that a claim for additional damages beyond the compensation provided by the Act by way of a claim for intentional wrongdoing was subject to N.J.S.A. 34:15-40, which precludes a double recovery and requires reimbursement of the employer's or its insurer's lien from the proceeds of any recovery in an intentional-wrong lawsuit.

34:2-21.17, which prohibited the employment of a minor under the age of 16 "in connection with power-driven machinery." Id. at 15. The trial court denied NJM's motion for summary judgment concluding that NJM had failed to produce competent evidence that Variety Farms knew or acquiesced in the illegal employment of Sindoni. Id. at 16.

The Appellate Division affirmed the trial court's decision concluding that NJM was obligated to provide coverage to Variety Farms for Sindoni's claim, but rejected the trial court's reasoning. The Appellate Division observed that the factual disputes about Variety Farms' knowledge that Sindoni's employment violated the child labor laws were ultimatley irrelvant and concluded that the exclusion was unenforcable. The court began its analysis by noting the following:

> But if NJM's position is sound, assuming the relevancy of Coverage B, and this would be the logical extension of the trial judge's reasoning, an injured minor knowingly employed 'in violation of law' would be denied protection of statutorily mandated insurance coverage under a policy such as the one herein involved. We cannot suppose that the Legislature ever intended such a result.
>
> [Id. at 17.]

The court observed that a minor was granted special rights under the Act. N.J.S.A. 34:15-10 grants a minor the right to opt out of the Article 2 statutory compensation system and pursue a common-law negligence claim in lieu of a statutory claim. A minor employee, however, may not collect both statutory and common-law

damages and must elect one or the other remedy. Variety Farms, 172 N.J. Super. at 18 (citing Watson v. Stagg, 108 N.J.L. 444, 446 (Sup. Ct. 1932)). Moreover, a minor that is injured while illegally employed is entitled to double the amount provided for under the statutory compensation scheme. N.J.S.A. 34:15-10. Signficantly, an employer who is liable to a minor who is awarded double the benefits under N.J.S.A. 34:15-10 because they were illegally employed is required to pay those additional benefits and the employer's insurer is not liable for such additional benefits. N.J.S.A. 34:15-10 ("The employer alone and not the insurance carrier shall be liable for the extra compensation or death benefit which is over and above the amount of the compensation or death benefit provied by R.S. 34:15-12 or R.S. 34:15-13.").

The Variety Farms court's analysis very carefully recognizes the discrete purposes of Part One and Part Two coverage under the standard workers' compensation policy. At the time of the Variety Farms decision Part One was known as Coverage A and Part Two was known as Coverage B. 172 N.J. Super. at 18-20. The court recognized that Coverage A fulfills an employer's obligation to maintain insurance coverage for the liability imposed by Artice 2 of the Act. Id. at 18. The court expressly recognized that Coverage B, now Part Two, was "intended to apply to an employer who is or may become subject to Article 1 of the statute." Id. at 19. Recognizing that one could argue that Coverage B or Part Two has no

application to a claim by a minor brought under N.J.S.A. 34:15-10, which is contained in Article 2 of the Act, the court nevertheless concluded that it simply was not possible that the Legislature intended for an injured minor's claim to go uncompensated.

> But we have no hesitancy in concluding that the minor's common law, negligence action must in any event come within the purview of the standard policy such as the one issued by NJM, whether encompassed by Coverage A or Coverage B. This is so because the employer's statutory duty, under both Article 1 and Aritcle 2, to provide for the complete payment of any obligation he may incur to an injured employee by virtue of the Workers' Compensation Law. Since this duty must be implemented, if not by self-insurance, then by insurance from a company authorized "to engage in workmen's compensation or employer's liability insurance in this state," N.J.S.A. 34:15-78, we cannot conceive of a legislative intent not to include somewhere within such policy the claim of a minor who is injured while at work and opts to pursue his common law remedy for damages against the employer.
>
> [Id. at 19-20 (emphasis added).]

The essence of the court's holding in Variety Farms is that the Act requires an employer to guarantee payment of compensation to an injured worker as proscribed by the Act. That public policy required that the workers' compensation insurer in Variety Farms to provide coverage for the claim of the minor worker because a ruling that there was no coverage would have frustrated the compensation system codified by the Act and left the injured minor's claim

uncompensated. The purpose of the compulsory insurance provisions of the Act is to guarantee the promise of the Act that every injured worker will have a remedy for work-related injuries and illnesses. Variety Farms, 172 N.J. Super. at 19-20. The compulsory insurance provisions of the Act do not guarantee that every possible claim an injured worker might assert will be insured. The compulsory insurance provisions of the Act simply guarantee that an injured worker will have an avenue of recovery for his or her injury. That policy objective has been achieved in this case because Plaintiff has been paid the workers' compensation benefits to which he was entitled for his work-related accident. See Pa437. Nothing in the Act guarantees that Plaintiff's intentional wrong claim, which is asserted in addition to his workers' compensation claim, will be insured.

Plaintiff's misinterpretation of the Act's compulsory insurance provisions is also fueled by a similar misunderstanding and misreading of the Supreme Court's decision in Schmidt v. Smith. Like the minor plaintiff in Variety Farms, the injured worker in Schmidt was not limited to the compensation provided by the Act for her alleged bodily injuries associated with alleged sexual harassment in the workplace. 155 N.J. at 51. Relying on the reasoning of the court in Variety Farms, the Schmidt Court concluded that the workers' compensation insurer in Schmidt was required to provide coverage for the same reasons that the insurer in Variety Farms was required to provide coverage for the claims of the minor plaintiff. Ibid. The Court

reasoned, "The Legislature, by way of N.J.S.A. 34:15-72, required PAV [the employer] to obtain sufficient coverage for the payment of any obligation it might incur on account of bodily injuries to an employee." Ibid. The Court's relatively brief decision does not quote N.J.S.A. 34:15-72 and does not acknowledge, as the Variety Farms court did, that sections 71 and 72 of the Act only obligate an employer to secure insurance coverage for its liability imposed by the system of compensation contained in the Act.

Moreover, the Schmidt Court readily acknowledged that Exclusion C5, which excludes coverage for injuries intentionally caused by the insured, did not apply to the facts of that case. Schmidt, 155 N.J. at 51. Notwithstanding the fact that Exclusion C5 had nothing to do with the issue before the Court, the Schmidt Court then commented on the purpose of Part Two coverage and suggested, without legal citation or any factual basis, that Part Two of the Policy was intended to provide coverage for claims falling outside the statutory system of compensation, including injuries intentionally caused by fellow employees. Id. at 52. This statement is pure dicta and has no basis in the law or the language of the Policy. The Schmidt Court did not examine the compulsory insurance provisions of the Act, the language of Exclusion C.5 or the public policy considerations relevant to enforcement of an insurance policy exclusion that excludes coverage for intentional wrongdoing. The Schmidt decision is based on the Court's reading

of Variety Farms and the public policy of the Act that all work-related bodily injuries suffered by a worker will be compensated. In both Schmidt and Variety Farms the injured worker's only claim for bodily injuries was asserted through a legally permitted claim that fell outside the Act and that was asserted in lieu of a claim for statutory workers' compensation benefits. As explained by the Variety Farms court, the Act's policy objectives require coverage for such a claim to avoid the anomaly of allowing an injured workers' claim for bodily injuries sustained during the course and scope of employment to go uncompensated. That policy objective has no relevance in this case because Plaintiff has been compensated for his injuries under the Act. Pa437.

Additionally, the Schmidt decision provides little guidance to resolving the issues presently before the Court. The public policy considerations and policy language at issue here are all entirely different than those at issue in Schmidt. The Schmidt Court's primary concern was the possibility that a work-related bodily injury claim would be rendered uninsured. Such is not the case here. Although the remedies available to Plaintiff under the Act may be significantly less than the Consent Judgment Schroth agreed to and that might be recoverable in a common law intentional wrong action, the Act provides a defined set of available benefits for injuries arising out of and in the course of employment. See Millison, 101 N.J.

at 179-80. Mr. Bunting was paid those benefits, and his work-related injuries were compensated. Pa437.

Contrary to Plaintiff's arguments, the compulsory insurance provisions of the Act do not establish a public policy that requires an employer to maintain insurance coverage for a claim of intentional wrongdoing. The compulsory insurance provisions of the Act establish a public policy that requires an employer to maintain insurance or be properly self-insured for all obligations imposed by the Act. The purpose of these provisions is to ensure that injured workers have some means of compensation for work-related injuries. However, the workers' compensation system is not designed to ensure recovery for every possible type of claim an injured worker might assert against his or her employer. To the contrary, the public policy on which the Act is based expressly recognizes that the compensation guaranteed by the Act may, at times, leave an injured worker less than fully compensated for his or her injuries.

> We acknowledge a certain anomaly in the notion that employees who are severely ill as a result of their exposure to asbestos in their place of employment are forced to accept the limited benefits available to them through the Compensation Act. Despite the fact that the current system sometimes provides what seems to be, and at times doubtless is, a less-than-adequate remedy to those who have been disabled on the job, all policy arguments regarding any ineffectiveness in the current compensation system as a way to address the problems of industrial diseases and accidents are within the exclusive province of the legislature.

[101 N.J. at 179-80.]

As noted by the Millison Court, the Act "involved an historic trade-off whereby employees relinquished their right to pursue common-law remedies in exchange for automatic entitlement to certain, but reduced, benefits whenever they suffered injuries by accident arising out of and in the course of employment." Id. at 174 (emphasis added). The public policy of the Act rests on this fundamental "trade-off." Plaintiff's position ignores this trade-off and obliterates the true policy objectives of the Act. The Act was laudable social legislation and ensured compensation for workers who prior to its enactment were often left with no means to replace lost wages or access to desperately needed medical care. Ibid. Plaintiff ignores the true public policy of the Act. Requiring coverage for intentional wrong claims would be destructive of the even-handed balance of interests struck by the Act's current system of compensation. It would undermine the balance of interests struck by the Act's system to compensate injured workers without regard to fault while simultaneously mandating that the same insurer paying statutory workers' compensation benefits must also insure liability imposed for the employer's intentional wrongdoing.

Perhaps the most glaring deficiency in Plaintiff's arguments is the failure to acknowledge that Mr. Bunting was paid workers compensation benefits under the NJM Policy for the injuries he sustained during the course of his employment with

Schroth. As noted by the trial court, unlike the plaintiffs in Schmidt or Variety Farms, Mr. Bunting received over $120,000 in workers' compensation benefits from NJM pursuant to the NJM Policy for the injuries he sustained in his September 2020 workplace accident. Ja16; Ja437. The payment of these benefits to and on behalf of Mr. Bunting fulfilled the promise of the Act. Mr. Bunting was not left uncompensated for his injury and all of his medical bills were paid for by his employer's workers' compensation insurance. Payment of the benefits promised an injured worker by the Act is precisely what the Policy is designed to do; it insures an employer's statutory obligations to the full extent of those obligations. Nothing in the Act supports the contention that an employer is obligated to maintain insurance coverage for every possible claim that an injured worker might assert and mandating such coverage would undermine the express purpose and policy objectives of the Act. The Act guarantees injured workers a means of recovery, it does not guarantee that any and all possible claims, including claims of intentional wrongdoing, will be insured.

D. Public Policy Supports Insurance Policy Exclusions for Intentional Wrongs

Schroth alleges in the First Amended Complaint that NJM's denial of coverage for Plaintiff's claims of intentional wrong is contrary to public policy. As noted above there is no public policy that requires insurance coverage for a claim of intentional wrongdoing asserted against an employer by an injured worked.

Moreover, it is a settled principle of law in New Jersey that insurers may exclude coverage for intentional wrongs committed by their insureds. "'Policy provisions that exclude coverage for liability resulting from intentional wrongful acts are 'common,' are 'accepted as valid limitations,' and are 'consistent with public policy.'" Harleysville Ins. Cos. v. Garitta, 170 N.J. 223, 231 (2001) (quoting Allstate Ins. Co. v. Malec, 104 N.J. 1, 6 (1986) (quoting Ruvolo v. American Cas. Co., 39 N.J. 490, 496 (1963)); see also Schmidt v. Smith, 294 N.J. Super. 569, 583 (App. Div. 1996) ("Clearly an insurer can exclude coverage for intentional acts without violating public policy."), aff'd, 155 N.J. 44 (1998); Variety Farms, Inc., 172 N.J. Super. 10, 24-25 (App. Div. 1980) ("We consider the sounder rule to be that public policy does not permit a tortfeasor to shift the burden of punitive damages to his insurer. . . . A person who is able to insure himself against punishment 'gains a freedom inconsistent with the establishing of sanctions against such misconduct.'" (quoting Crull v. Greb, 382 S.W.2d 17, 23 (Mo. Ct. App. 1964)). Public policy discourages insurance coverage for liability arising out of the intentional acts of an insured because such coverage would remove the deterrence financial responsibility for such conduct provides and because such coverage allows for the inequitable recovery of insurance proceeds based on one's own wrongful conduct. Ambassador Ins. Co. v. Montes, 76 N.J. 477, 483 (1978) (citing Ruvolo, 39 N.J. 490)).

The public policy against insuring liability arising out of an insured's intentional acts is so important that our courts have held that in certain circumstances an insurance carrier may exclude coverage for such liability even in the absence of a specific exclusion. Ibid.; Allstate Ins. Co., 104 N.J. at 12-13. Where the policy at issue specifically excludes from coverage liability arising out of the intentional wrongful acts of the insured, public policy supports the insurance policy language and requires that coverage be denied. Allstate Ins. Co., 104 N.J. at 13; New Jersey Mfrs. Ins. Co. v. Brower, 161 N.J. Super. 293, 300 (App. Div. 1978).

Additionally, the approval of the New Jersey Part Two Employers Liability Insurance endorsement and the new exclusion C.5 by the Department of Banking and Insurance gives rise to presumption that the policy language is consistent with public policy. The Commissioner of the Department of Banking and Insurance is responsible for pursing the public policy enacted by the Legislature. Parkway Ins. Co. v. N.J. Neck & Back, 330 N.J. Super. 172, 184 (Law Div. 1998). The Commissioner's regulatory authority includes workers' compensation and employer liability insurance. Applied Underwriters Captive Risk Assurance Co., Inc. v. N.J. Dep't of Banking and Ins., 472 N.J. Super. 26, 41-42 (App. Div. 2022). Moreover, the Commissioner's "experience and judgment" are given "great weight." Coalition for Quality Health Care v. N.J. Dep't of

Banking and Ins., 348 N.J. Super. 272, 301 (App. Div.), certif. denied, 174 N.J. 194 (2002). When the Commissioner of the Department of Banking and Insurance approves a given insurance policy form or endorsement, that approval gives rise to a presumption that the approved language is consistent with public policy. See Jones v. Heymann, 127 N.J. Super. 542, 547 (App. Div. 1974) (presuming the Commissioner did not view a policy form to be against public policy where he "has not made any change in that endorsement nor withdrawn his approval thereof"); Smith v. Motor Club of Am. Ins. Co., 54 N.J. Super. 37 (Ch. Div.), aff'd, 56 N.J. Super. 203 (App. Div. 1959) ("The Legislature, having vested the Commissioner of Banking and Insurance with authority to strike from policies any clauses he deems to be unfair or inequitable, and the Commissioner having taken no such action with respect to the clause in question, it must be presumed that he did not consider it unfair or inequitable and that it is not against public policy."). Plaintiff ignores the fact that the policy language at issue was adopted with the approval of the Commissioner of the Department of Banking and Insurance and that it applies to all workers' compensation insurance policies issued in the State of New Jersey. The exclusion of coverage for injuries intentionally caused by an employer does not contravene public policy. Rather, such an exclusion is fully consistent with the public policy of this State.

The Supreme Court's decision in Charles Beseler Company v. O'Gorman & Young, Inc., 188 N.J. 542 (2006), also makes clear that a policy exclusion that excludes coverage for an employer's intentional wrongs as defined by N.J.S.A. 34:15-8 is not contrary to public policy. The Supreme Court examined whether the then-existing Exclusion C5 language precluded coverage for intentional wrong claims. The Court noted that there are two types of intentional wrong claims: (1) an action where an employee seeks to prove an intentional wrong through the employer's alleged subjective intent to injure; and (2) an action where an employee seeks to prove an intentional wrong by showing that the employer knew with substantial certainty that the injury would occur. The Beseler Court held that Exclusion C5, as it was then written, precluded coverage for claims made by a plaintiff alleging his or her employer acted with a subjective intent to injure. However, the Court held that Exclusion C5, as it was then written, did not exclude coverage for "substantial certainty" intentional wrong claims:

> The C.5. exclusion precludes coverage for bodily injuries "intentionally caused or aggravated by" the employer. That language clearly excludes only injuries that result from a subjective intent to injure. However, once Laidlow was decided, it became clear that there are alternative methods of proving an intentional wrong and avoiding the exclusivity of the workers' compensation remedy. The substantial-certainty method of proof is distinct, but also will demonstrate an "intentional wrong." C.5.'s language does not unambiguously exclude such claims from coverage.

* * *

> In sum, due to its lack of express language excluding injuries substantially certain to result in injury, we find C.5.'s exclusion to be ambiguous and construe it, as we must, in favor of the insured.
>
> [Id. at 548 (emphasis added).]

The same result was reached in N.J. Mfrs. Ins. Co. v. Delta Plastics, 188 N.J. 582 (2006). Following the Supreme Court's decisions in Beseler and Delta Plastics, the New Jersey Compensation Rating and Inspection Bureau, under the authority of the Department of Banking and Insurance, authorized the adoption of the New Jersey Part Two Employers Liability Endorsement, which is now included in all workers' compensation insurance policies issued in the State of New Jersey. See Manual Amendment Bulletin #436, May 24, 2007.[4] Accordingly, the Court's holding in Beseler and Delta Plastics that the policies at issue in those cases required the insurer to defend the insured against an allegation of intentional wrong based on the substantial certainty standard has no application here. The ambiguity in the Policy language on which the Charles Beseler Court's holding rests no longer exists. Through the adoption of the New Jersey Part Two Employers Liability Endorsement the Policy now unambiguously excludes coverage for such

[4]A copy of the NJCRIB Manual Amendment through which the New Jersey Part Two Employers Liability Endorsement was adopted can be found at www.njcrib/DocumentLibraryBulletinsAndCirculars.

claims, including claims that the employer's conduct created a substantial certainty of injury.

Although the Court in Beseler and Delta Plastics required the insurer to provide a defense against claims that the employer's conduct created a substantial certainty of injury, the Court's holdings make clear that the exclusion for intentional wrongs contained in the Policy was a legally valid exclusion insofar as it excluded claims of intentional wrong based on an employer's subjective intent to injure. 188 N.J. at 548. Nowhere in either the Beseler or Delta Plastics decisions did the Court state that such an exclusion was contrary to or inconsistent with New Jersey public policy or the compulsory insurance provisions of the Act. The Court's analysis is limited exclusively to the meaning of the exclusionary language and the perceived ambiguity of that language in light of the common-law definition of an intentional wrong.

Significantly, this Court has recently decided the very issue presented by this appeal and concluded that there is no coverage for a claim of intentional wrongdoing under Part Two of the Policy. In Tejada de Tapia v. 74 Industries, Inc., Docket No. A-2643-21, slip op. (N.J. App. Div. July 12, 2024), this Court held that the Part Two Employers Liability Insurance Endorsement to the Standard Workers' Compensation and Employers Liability Insurance policy excluded

coverage for claims of intentional wrongdoing. DNJMa3-4.[5] Although some of the issues in Tejada were unique to the facts of that case, the dispositive question of insurance coverage was the same as that presented here. Notably, the panel in Tejada observed that the Supreme Court in Schmidt expressly recognized that a claim of intentional wrongdoing was excluded by Exclusion C.5 of the NJM Policy. DNJMa24-25 (citing Schmidt, 155 N.J. at 50-51). The panel cited the Schmidt Court's holding that Exclusion C.5 did not apply to the claims asserted in Schmidt because there was no allegation that the employer acted intentionally. The panel noted that to hold that coverage existed based on wording contained in Exclusion C.7 would be contrary to the holding in Schmidt, which the panel concluded supported the conclusion that a claim of intentional wrongdoing was excluded by the Policy. DNJMa25-26. Most importantly, the Tejada Court concluded that there was no basis to support the contention "that public policy favors coverage for plaintiff's intentional wrong[claim] filed in [the] Law Division." DNJMa26.

Yet another Appellate Division panel recently held that Part Two of the NJM Policy does not provide coverage for claims of intentional wrong asserted under N.J.S.A. 34:15-8. In Rodriguez v. Shelbourne Springs, LLC, A-2079-22, slip

[5]Notably, the Tejada court affirmed the trial court's order granting NJM's motion to dismiss the employer's Third-Party Complaint seeking a declaratory judgment that the NJM Policy provided coverage for the plaintiff's claim of intentional wrongdoing for failure to state claim upon which relief may be granted.

op. (N.J. App. Div. December 22, 2023), this Court held that the plaintiff's employer was not entitled to a defense and indemnification against plaintiff's claims of intentional wrongdoing. DNJMa30. The Court affirmed the trial court's conclusion that, assuming that all of the plaintiff's factual allegations were proven true, there was no resulting liability that would be covered by the workers' compensation policy, and therefore, no coverage and no duty to defend. DNJMa38, DNJMa46. The Court also rejected the contention that Exclusion C.5 as amended by the Department of Banking and Insurance was contrary to public policy. DNJMa49-52. The Court noted that the new exclusionary language followed the dictates of the Supreme Court's decision in Beseler, and therefore, was not contrary to public policy. DNJMa50-51.[6]

There is nothing in the Act or the public policy of New Jersey that requires an employer to maintain insurance coverage for an allegation of intentional wrongdoing made pursuant to N.J.S.A. 34:15-8. Indeed, New Jersey's established public policy contradicts such an assertion and favors the enforcement of insurance policy exclusions that exclude coverage for intentional torts. Harleysville Ins. Cos., 170 N.J. at 231. Moreover, neither the plain language of the Act nor the public policy the Act promotes mandate insurance coverage for an injured worker's claim

[6]The Supreme Court has granted the employer's motion for leave to appeal and the case is now pending before the Supreme Court awaiting an oral argument date. Rodriguez v. Shelbourne Spring, LLC, 257 N.J. 247 (2024).

of intentional wrongdoing. In fact, NJM respectfully submits that to conclude that a workers' compensation insurer is obligated to insure both the statutory benefits awarded to an injured worker under the Act and damages recovered based on a theory of intentional wrongdoing by the employer would undermine and obliterate the even-handed and balanced approach to compensation established by the Act. What Plaintiff perceives as inadequate compensation for Mr. Bunting's work-related injuries, is the very foundation of the "trade-off" on which the Act rests. Schroth is not entitled to indemnification, reimbursement of litigation costs, or a defense under the NJM Policy for Plaintiff's claims of intentional wrongdoing or conduct substantially certain to cause injury, and Plaintiff's First Amended Complaint against NJM was properly dismissed with prejudice for failure to state a claim.

CONCLUSION

For all the foregoing reasons, New Jersey Manufacturers Insurance Company respectfully requests that the Court affirm the trial court's decision granting NJM's motion to dismiss and dismiss Plaintiff's appeal.

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MAKAYLA BUNTING, Administratrix and Administratrix ad Prosequendum for the ESTATE OF MICHAEL BUNTING,

Plaintiff-Appellant,

v.

EMIL A. SCHROTH, INC.; NEW JERSEY MANUFACTURERS INSURANCE COMPANY; GREAT NORTHERN INSURANCE COMPANY; CHUBB INSURANCE COMPANY OF NEW JERSEY and JOHN DOES 1-10,

Defendants-Respondents.

SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION

DOCKET NO. A-001972-23T1

CIVIL ACTION

On Appeal from the Law Division, Monmouth County

Docket No. MON-L-1035-22

Sat Below:

Hon. Richard W. English, J.S.C.

REPLY BRIEF IN SUPPORT OF THE APPEAL

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POINT I

THE ARGUMENTS OF DEFENDANTS NJM AND CHUBB ARE INCONSISTENT AND OTHERWISE LACK MERIT.

As a preliminary matter, defendants misperceive and try to minimize plaintiff's argument and misconstrue the import of Schmidt v. Smith, 155 N.J. 44 (1998). Plaintiff's argument is based not only on the statute itself but the legislative history of that statute, caselaw interpreting that statute and the statute's plain language requiring coverage for the payment of **any** work-related injury or illness. That is the language of the statute. The Workers Compensation portion of Emil A. Schroth, Inc.'s policy, in accordance with the statute, covers all work-related injury and illness except for intentional wrongs. The logical conclusion, then, is that the Employer Liability portion of the policy is meant to fill that gap in coverage. Otherwise, why exactly is Emil A. Schroth, Inc., paying tens of thousands of dollars for one million dollars' worth of coverage under its Employer Liability Insurance? Neither defendant answers that question.

Defendant, New Jersey Manufacturers Insurance Company ("NJM"), states that that insurance is "limited insurance designed to insure a very specific category of liability" but nowhere does NJM recite what that "very specific category" is. Db20. At the same time, NJM admits that the only claim an adult employee may

legally assert against his employer outside the statutory system is an intentional-wrong claim. Ibid. NJM's cite to Central National v. Utica National, 232 N.J. Super. 467 (App. Div. 1989), does not illuminate the matter because that case was decided on grounds that the injury was not suffered in the course of employment. Only in dicta does it speak to certain specific employees to which the insurance may apply but makes no such finding in that regard. Id. at 471. Moreover, New Jersey Mfrs. Ins. Co. v. Delta Plastics, 380 N.J. Super. 532 (App. Div. 2005), aff'd, 188 N.J. 582 (2006), makes clear that even if the insurance did cover those instances discussed in Central Union, the exclusion urged here by defendants "would come very close to eliminating meaningful Part Two coverage." Id. at 540.

Our courts have stated that the two coverages are meant to be considered in tandem to provide "seamless coverage." "The essence of the two-part policy, Part One covering workers' compensation defense and indemnification, and Part Two covering defense and indemnification in other employer liability situations, is seamless coverage." Delta Plastics, supra, 380 N.J. Super. at 542. "Employers liability coverage * * * 'is traditionally written in conjunction with workers' compensation and is intended to serve as a 'gap-filler' providing protection to the employer in those situations where the employee has a right to bring a tort action despite provisions of the workers' compensation statute.'" Schmidt, supra, 155 N.J. at 49-50 (citations omitted). "**Those policies must cover not only claims for**

compensation prosecuted in the Workers' Compensation court, but also claims for work-related injuries asserted in a common law court." Schmidt, supra, 155 N.J. at 48-49 (citing to N.J.S.A. 34:15-72) (emphasis added). No one can dispute that intentional wrongs are asserted in a common law court and not the workers compensation court.

Stripped of their convoluted arguments, there is no explanation of what the Employer Liability insurance insures and no legitimate reason why it should not cover any work-related claims not covered by workers compensation insurance, as the statutory scheme and Schmidt mandate. Just because in other scenarios an insurance provision excluding intentional wrongs is enforceable does not make it legitimate here in light of this comprehensive statutory scheme.

NJM argues that the "dispositive fact" in this appeal is that NJM paid workers compensation benefits. DNJMb12. NJM then claims that the insurance for workers compensation and the employer liability insurance are "mutually exclusive." DNJMb17. If that is the case, that the insurer paid under the workers compensation insurance has **no** bearing on its failure to pay under the employer liability insurance. Those two claims by NJM are patently and irreconcilably inconsistent.

NJM criticizes plaintiff for not discussing the trial court's opinion in its Opening Brief. Appeals are from orders, not opinions. Do-Wop Corp. v. City of

Rahway, 168 N.J. 191, 199 (2001); Marchitto v. Central R.R. Co., 9 N.J. 456, 463 (1952), overruled on other grounds, Donnelly v. United Fruit Co., 40 N.J. 61 (1963). Obviously, plaintiff disagrees with the trial court's opinion and rationale, hence this appeal. Regardless, this Court's review is de novo. The trial court's reasoning, while not entirely irrelevant, is not binding on this Court.

Both defendants and the trial court relied heavily on the fact that the Commissioner of the Department of Banking and Insurance ("DOBI") approved the form endorsement containing Exclusion C5. Their argument is the endorsement cannot possibly violate public policy because the Commissioner approved it. Approval by DOBI, however, is not dispositive. It does not mean the endorsement must be enforced, especially where, as here, the endorsement violates statutory intent. Statutes and legislative intent trump DOBI. Indeed, courts have held that approval by the Commissioner of Insurance of a form endorsement, like the one at bar, is *ultra vires* where the endorsement violates statutory intent. That is exactly the argument plaintiff makes at bar.

Defendants cite to Jones v. Heymann, 127 N.J. Super. 542, 547 (App. Div. 1974), as support for their position that DOBI's approval of the C5 exclusion means that it is consistent with public policy and is enforceable. DNJMb39. Jones was overruled on that point and is not good law. In Jones, the Director of Motor Vehicles claimed that an insurance policy's uninsured motorist endorsement

requiring "corroboration" by third parties in hit and run accident cases as a condition precedent for receiving UM benefits was void as against public policy. The Jones court held that because the Commissioner of Insurance approved the endorsement, it could not be void or against public policy.

That issue was considered anew in Pasterchick v. Insurance Co. of North America, 150 N.J. Super. 90 (App. Div. 1977), which held that the "corroboration" endorsement was void because it imposed "an impermissible qualification of the statutory mandate." Id. at 93. "Read literally, these statutes mandate that coverage must be provided in the case of **all** occurrences * * * resulting in bodily injury caused by an accident involving a motor vehicle the identity of which (or the identity of the operator and owner of which) cannot be ascertained. **For the insurance companies to impose a condition requiring corroboration is for them to condition the coverage and thus to provide coverage in fewer cases and upon different terms from those prescribed by statute."** Ibid. (emphasis supplied); see also Perez v. Am. Bankers Ins. Co., 81 N.J. 415, 419 (1979) ("Imposition of the requirement of corroboration in noncontact cases adds a substantial condition to the mandated coverage not sanctioned by the Legislature.").

Specifically, the Pasterchick court parted company with the reasoning in the Jones case and found that "**approval of a provision by the Commissioner of**

Insurance is *ultra vires* with respect to provisions violative of statutory intent." 150 N.J. Super. at 94 (emphasis supplied). "[A]ny attempt by an insurance company to dilute or diminish statutory provisions applicable to its contract of insurance is contrary to public policy." Ibid.

For that proposition, the Pasterchick court relied on the New Jersey Supreme Court case of Motor Club of Am. Ins. Co. v. Philips, 66 N.J. 277 (1974), another case where the Commissioner of Insurance approved an illegal endorsement. The Motor Club Court stated:

> Although the statute calls for approval by the Commissioner of the policy provisions, and the Commissioner concededly approved the blanket UM form, including the other insurance exclusion, tendered him by the insurance representatives when the act went into effect, see Obst v. State Farm Mut. Auto Ins., [123 N.J. Super. 60, 65-66 (Ch. Div. 1973), aff'd o.b., 127 N.J. Super. 458 (App. Div. 1974)], **the Commissioner obviously had no power to approve a provision violative of the statutory intent.** See Walton v. State Farm Mutual Automobile Ins. Co., 518 P. 2d 1399, 1400-1401 (Sup. Ct. Hawaii 1974); Simpson v. State Farm Automobile Insurance Co., 318 F. Supp. 1152, 1156 (S.D. Ind. 1970).

66 N.J. at 286 (emphasis supplied). Accordingly, DOBI's approval of the C5 exclusion does not imbue that exclusion with legitimacy where it is contrary to statutory intent. DOBI's approval is not sacrosanct and, in this instance, was *ultra vires* because it violated the statutory mandate requiring coverage for the complete payment of any obligation by an employer to an employee for occupational injuries.

Plaintiff is also chastised for failing to mention an unpublished case cited in the trial court. DNJMb12. As a preliminary matter, an unreported decision "serve[s] no precedential value, and cannot reliably be considered part of our common law." Trinity Cemetery Ass'n v. Twp. of Wall, 170 N.J. 39, 48 (2001); see R. 1:36-3. Because defendants rely on unpublished cases despite the law and Rules of Court, plaintiff will discuss Rodriguez-Ortiz v. Interstate Racking & Shelving, A-1614-19 (N.J. App. Div. Sep. 3, 2021) (Pa475), because its reasoning is in line with plaintiff's position even though it did not reach the ultimate issue at bar.

The case arose out of the employer's demand for reimbursement of defense costs for a lawsuit brought by its employee alleging, *inter alia*, compensation for intentional wrongs alleged against the employer as responsible for the employee's workplace injuries. The insurer had already paid out over $1,000,000 in workers compensation benefits to the employee. **Interestingly, contrary to NJM's position, the court did not consider that payout to be "dispositive" or to have any impact on the insurer's obligation under the employer liability insurance policy.** Slip. op. at 3 (Pa476). Ultimately, the court held the defense costs were not payable under the employer's liability insurance and were payable under the workers compensation insurance. Slip op. at 14 (Pa479). Moreover, the court found that the C5 exclusion, the identical exclusion at bar, as it related to defense

costs did not violate public policy because "the compulsory insurance [the employer] invokes **assures employees' recoveries against their employers**, not employers' recoveries against their insurers. Therefore, we are unconvinced that the employer's liability policy's duty-to-defend exclusion is void as against public policy.**"** Slip op. at 17 (Pa480) (emphasis supplied).

For our purposes, the relevant part of Rodriguez-Ortiz is the discussion that concludes that: "This broad view of the scope of mandated coverage may well override the [the insurer's] exclusion of claims for intentional wrongs or actions substantially certain to cause injury**."** Slip Op at 20-21 (Pa481). Although the court did not have to decide that issue in that case, its analysis is compelling. The court first examined the history of the Act.

> Soon after the Workers' Compensation Act was in place, there were calls to implement "a system of compulsory insurance '**to assure that workers received compensation if their employers became insolvent, and to assure that employers could manage the risk of payouts to employees.'** The commission that recommended adoption of New Jersey's workers' compensation system and then monitored its implementation concluded 'the law was gravely defective in that the injured person or his dependents had no assurance of payment in the event of the insolvency of the employer.' Report of the Employers' Liability Comm'n For the Year 1914 at 6 (1915). The Commission stated:
>
> As this serious defect can only be remedied by a system of compulsory insurance, we now recommend the passage of a compulsory insurance act, **for the protection of the employer from financial disaster and the assurance to those persons entitled to compensation, of the payments provided by law. In recommending this, we have in mind the fact that it is quite as necessary for the protection of the**

> **employer as for the employee, as otherwise he may be forced out of business and into bankruptcy owing to his failure to voluntarily cover his liability by insurance.**

Slip op. at 17-18 (Pa480) (emphasis added).

As a result, the Legislature created a compulsory system of insurance to compensate injured employees claiming under the workers compensation system and to compensate employees claiming outside of the workers compensation system. "Our modern law continues to require employers to make "sufficient provision for the complete payment of **any** obligation which he [or she] may incur *to an injured employee, or his [or her] dependents* under the provisions of said article 2 [the workers' compensation system]." N.J.S.A. 34:15-71 (emphasis added)." Slip Op. at 18-19 (Pa480) (bold added). "Likewise, employers are required to "make sufficient provision for the complete payment of **any** obligation which [the employer] may incur *to an injured employee or his [or her] administrators or next of kin* under said article 1 of this chapter [N.J.S.A. 34:15-1 to -6, the tort system for those employees who opt out of workers' compensation]." N.J.S.A. 34:15-72 (emphasis added)." Slip Op. at 19 (Pa481) (bold added).

The Rodriguez-Ortiz court went on to note that our Supreme Court in Schmidt "broadly read these compulsory insurance provisions." Slip Op. at 19 (Pa481). The court found that Schmidt stands for the proposition that coverage provided under a combined workers compensation and employer liability policy

"included claims placed outside the exclusivity provision by N.J.S.A. 34:15-8." Slip Op. at 20 (Pa481). "The employer's liability coverage 'is intended to serve as a 'gap-filler' providing protection to the employer in those situations where the employee has a right to bring a tort action despite provisions of the workers' compensation statute.' [Schmidt, supra, 155 N.J.] at 49-50." Slip Op. at 20 (Pa481) (citation omitted). "The Court also held that policies issued pursuant to the compulsory insurance requirements could not undermine that goal: 'In short, the terms of a policy issued pursuant to N.J.S.A. 34:15-78 cannot conflict with the statutory mandate that there be coverage provided for *all* occupational injuries.' *Id.* at 49 (emphasis added)." Slip Op. at 20 (Pa481).

The Rodriguez-Ortiz court read Schmidt the same way plaintiff reads Schmidt and not in the convoluted and confusing way defendants read Schmidt and the statutory provisions on which Schmidt relied. Schmidt relies on N.J.S.A. 34:15-72 for the same proposition as plaintiff, that the policy at issue **"must cover not only claims for compensation prosecuted in the Workers' Compensation court, but also claims for work-related injuries asserted in a common law court**." Schmidt, supra, 155 N.J. at 48-49 (citing to N.J.S.A. 34:15-72) (emphasis added). Defendants' aspersions aside, our Supreme Court in Schmidt was correct in its reading of the statute. That expansive or broad view of the scope of mandated coverage may well override the C5 exclusion of claims for intentional

wrongs or actions substantially certain to cause injury. Having granted the employer's motion for leave to appeal this Court's decision in Rodriguez v. Shelbourne Spring, LLC, DNJMa28, our Supreme Court will likely be deciding the issue definitively soon.

NJM claims that the public policy of the Act rests on the fundamental "trade-off" referenced in Millison v. E.I. du Pont de Nemours & Co., 101 N.J. 161, 174 (1985), wherein injured workers lose their right to pursue common-law remedies in exchange for automatic entitlement to reduced workers compensation benefits. NJM then claims, rather dramatically, that "[p]laintiff's position ignores this trade-off and obliterates the true policy objectives of the Act." DNJMb35. Again, the law does not support its position. NJM fails to acknowledge that "[w]hen a worker's injuries have been caused by an employer's "intentional wrong," **that "intentional wrong" voids the "trade-off" and the employee may seek both workers' compensation benefits and common-law remedies. N.J.S.A. 34:15-8**." Charles Beseler Co. v. O'Gorman & Young, 188 N.J. 542 (2006). Plaintiff well understands the true policy objectives of the Act – comprehensive coverage for employee losses in the workplace.

Finally, regarding Charles Beseler Co. and Delta Plastics, to suggest, as defendants have, that those courts meant to advise insurers on how to exclude coverage for all Laidlow claims is absurd. Rather, those cases were decided on the

narrow issue of the ambiguity of the exclusion, without regard to whether such an exclusion would be void because it violates statutory intent.

The majority opinion of the Appellate Division that was affirmed in Delta Plastics, moreover, made clear that even if the C5 exclusion were unambiguous, as the insurance industry claims it has now drafted it to be, the reasonable expectations of the insured would not be met. "Moreover, even if the language is deemed unambiguous, the reasonable expectations of the insured must be considered. See, e.g., Zacarias v. Allstate Ins. Co., 168 N.J. 590, 595 (2001); Salem Group [v. Oliver], 128 N.J. [1,] 4 [(1992)]; see also Schmidt, supra, 155 N.J. at 51; Beseler, supra, 380 N.J. Super. at 200. The essence of the two-part policy, Part One covering workers' compensation defense and indemnification, and Part Two covering defense and indemnification in other employer liability situations, is seamless coverage. Part Two coverage has been described as a "gap filler." Schmidt, supra, 155 N.J. at 4950. **NJM's interpretation of Part Two would widen rather than fill the gap**." Delta Plastics, supra, 380 N.J. Super. at 542 (bold added).

CONCLUSION

Contrary to defendant NJM's oft-repeated argument, that NJM paid workers compensation benefits is not only not dispositive of the matter; it is irrelevant. Nor are the provisions of the policy "mutually exclusive." There is one policy of

insurance for which one premium was paid. That policy of insurance is entitled "Workers Compensation **and** Employer Liability Insurance Policy." Schroth did not pay separately for separate coverages. Rather, Schroth paid over $34,000.00 to be covered for the "complete payment of any obligation" for work-related injuries prosecuted in the workers compensation courts and for work-related injuries maintained in a common law court, as mandated by statute. Under the Employer Liability Insurance, Schroth was to be covered for bodily injury by accident for $1,000,000 each accident and bodily injury by disease for $1,000,000 per employee. There is one policy of insurance, and the contract should be read as a whole. Hardy ex rel. Dowdell v. Abdul-Matin, 198 N.J. 95, 103 (2009). If the policy does not protect the insured from common-law suits alleging intentional wrongs, it is illusory. Insurance companies do not get to collect insurance premiums only to refuse to pay their insured when they need it most. That type of conduct, as Judge Baime aptly noted, gives rise to the insurance industry's "unholy mantra" of "we collect premiums, we do not pay claims." Lehroff v. Aetna Casualty & Surety Ins. Co., 217 N.J. Super. 340, 346-47 (App. Div. 1994) (citing Owens-Illinois, Inc. v. United Ins. Co., 264 N.J. Super. 460, 491 (App. Div. 1993)). Defendants' position seems to be exactly that.

For the foregoing reasons and those stated in plaintiff's Opening brief, the C5 exclusion is contrary to the legislative intent and the comprehensive statutory

scheme for "seamless coverage" of workplace injuries. Plaintiff is entitled to summary judgment in his favor. The Order granting dismissal should be reversed.

Respectfully submitted,

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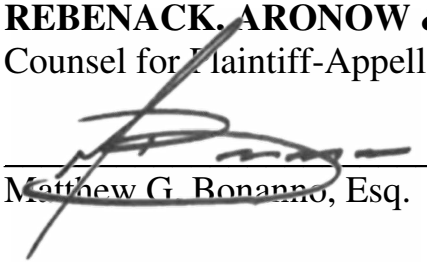

Matthew G. Bonanno, Esq.

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