STATE FARM FIRE & CASUALTY CO., Plaintiff, vs. DR. ROBERT HOLE, M.D., DR. MICHAEL RUSSONELLA, D.O., AND NORTH JERSEY ORTHOPAEDIC AND SPORTS MEDICINE INSTITUTE, LLC, Defendants.	DOCKET NO.: AM-2522-22 CIVIL ACTION ON APPEAL FROM SUPERIOR COURT OF NEW JERSEY, LAW DIVISION, ESSEX COUNTY DOCKET NO. ESX-L-3885-20 Sat Below: Hon. Robert H. Gardner, J.S.C.

BRIEF ON BEHALF OF ROBERT HOLE, M.D.

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Dated: July 25, 2023

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PRELIMINARY STATEMENT

This case stems from a separate matter filed against Robert L. Hole, M.D. ("Dr. Hole") by Michael Russonella, D.O. ("Dr. Russonella"), alleging a claim of tortious interference . See Michael Russonella, D.O. et al. v. Robert Hole, M.D., Docket No. ESX-L-4528-17 (the "Underlying Action"). The Underlying Action relates to statements allegedly made by Dr. Hole to St. Mary's General Hospital ("St. Mary's") related to Dr. Russonella's misconduct. Dr. Hole had a reasonable and good faith belief that Dr. Russonella had conducted himself in a manner that violated medical standards and put patient safety at risk, which Dr. Hole felt triggered an obligation to inform St. Mary's of these risks.

In that matter, State Farm Fire and Casualty ("State Farm") agreed to represent Dr. Hole and thereafter undertook complete control of the defense of those claims. State Farm has undertaken and completely controlled Dr. Hole's defense for over five (5) years, and Dr. Hole has relied on them to do so. Notwithstanding this reliance, in June 2020, State Farm filed the instant declaratory action (the "Declaratory Action") seeking to disclaim coverage .

In addition, on January 5, 2023 — after two and a half years of agreement among the parties that disposition of the Underlying Action would be dispositive of the Declaratory Action, and mere months before the Underlying Action was

scheduled for trial — State Farm sought and obtained summary judgment on its declaratory judgment claim and dismissal of Dr. Hole's counterclaims..

The entry of summary judgment in this matter was, as a matter of law, error. As a matter of law, State Farm did not sustain its burden to show that the exclusions cited in the applicable insurance policy apply to a claim of tortious interference. The exclusions require an intent to injure to disclaim coverage, but a claim of tortious interference does not require an intent to injure as an element. The exclusions, by their plain language, do not apply to a claim of tortious interference, and, thus, State Farm should be required to defend the Underlying Action. The trial court did not clearly state why it found to the contrary.

Moreover, State Farm and the trial court relied exclusively on mere allegations in the pleadings of the Underlying Action — a standard which the Supreme Court of New Jersey has expressly rejected when it comes to intent based policy exclusions. Rather than mere allegations of intent, the trial court was required to look at Dr. Hole's purported subjective intent to injure. The only proofs on record before the trial court regarding subjective intent showed that Dr. Hole's intentions were to ensure patient safety and compliance with the laws that apply to St. Mary's, including anti-kickback laws and the Health Insurance Portability and Accountability Act ("HIPAA").

For these reasons, and those more fully articulated below, the trial court committed reversible error in granting State Farm's motion for summary judgment. Dr. Hole therefore respectfully requests this Court reverse the summary judgment order dated March 17, 2023 granting summary judgment to State Farm and remand for further proceedings.

STATEMENT OF FACTS AND PROCEDURAL HISTORY[1]

In July 2017, Dr. Russonella filed the Underlying Action, which initially alleged a single cause of action for defamation for conduct allegedly occurring in October 2015. (Da60-63.) Upon receipt of the complaint in the Underlying Action, Dr. Hole immediately spoke with his insurance agent, Burt Sweeny, who informed him in no uncertain terms that his policy with State Farm (the "Policy") would cover defense of the Underlying Action. (Da207 at 11:20 to 12:18.)

I. THE UNDERLYING ACTION

The Underlying Action is premised on allegations that Dr. Hole purportedly reported Dr. Russonella to St. Mary's on a number of occasions. (See Generally Da71-74.) Contrary to those allegations, Dr. Hole reasonably believed that Dr. Russonella's misconduct endangered the safety of patients or and ethical practice of medicine. (See generally Da20-204.) Dr. Hole raised these complaints directly with

[1] For purposes of clarity and for the convenience of the Court, counsel for Dr. Hole has combined the Procedural History and Statement of Facts in this brief.

St. Mary's in his professional capacity and subject to his obligations to ensure patient safety and compliance with the bylaws governing St. Mary's, as well as to ensure compliance with the law, including anti-kickback laws and HIPAA. (Da203 at ¶5.) Dr. Hole believed that raising such concerns with the hospital was necessary, and he did so with the good faith belief that the facts underlying his concerns were true and accurate. (Da203 at ¶¶6-7.) Critically, Dr. Hole's intention was certainly not to inflict any injury on Dr. Russonella. (Da203 at ¶8.)

II. THE PURPORTED "RESERVATION OF RIGHTS" AND THE DECLARATORY ACTION

On July 14, 2017 and July 17, 2017, State Farm issued letters to Dr. Hole regarding the Underlying Action, with the July 17, 2017 letter stating that State Farm was "handling" the matter. (Da291-93.)

On July 20, 2017, State Farm allegedly sent a letter which simultaneously appointed insurance counsel — the Law Offices of O'Toole, Couch, & Della Rovere, LLC — and purported to provide a "reservation of rights" under the Policy. (Da64-68.) This letter purported to reserve the right to "deny defense or indemnity" of the Underlying Action claiming that it potentially fell within the policy's exclusion, as follows:

> Applicable to Coverage L – **Business Liability**, this insurance does not apply to:
>
> . . . .

17. **Personal And Advertising Injury**

a. Caused by or at the direction of the insured with the knowledge that the act would violate the rights of another and would inflict "personal and advertising injury";

b. Arising out of oral or written publication of material, if done by or at the direction of the insured with knowledge of its falsity.

(Da182.)

No proofs were provided in discovery to show that Dr. Hole received the July 20, 2017 letter, and Dr. Hole does not recall receiving same. (Da203.)

On September 1, 2017, the Honorable Annette Scoca, J.S.C. entered an order dismissing Dr. Russonella's complaint in the Underlying Action as barred by the statute of limitations for defamation, but allowed him to file an amended complaint. (Da69-70.) The order specifically stated that defamation and false light were not to be included in the amended pleading. (Da69-70.) Nevertheless, on September 17, 2017, Dr. Russonella filed an amended complaint alleging (1) libel and slander, (2) tortious interference with business, and (3) false light. (Da71-75.) The parties to the Declaratory Action agree that Dr. Russonella is only pursuing claims of tortious interference in the Underlying Action at this time. The Underlying Action remains pending as of the time of this filing.

State Farm purports to have served another letter of reservation in September 2017 regarding the amended pleading in the Underlying Action. During his

deposition, Dr. Hole testified that he did not receive this letter. (Da210 at 23:12-17.) State Farm did not produce this letter or any proof it was sent during the course of discovery. Instead, it attached a letter and return receipt to its March 13, 2023 reply brief in further support of its motion. (Da296-303.) Obviously, due to the late production of this information, no discovery could be taken on it. Nevertheless, Dr. Hole's deposition testimony was clear that he was not familiar with the letter. (Da210 at 23:12-17.)

Critically, Dr. Hole was not aware that State Farm's defense of the Underlying Action was made under a reservation of its rights to disclaim coverage as to the amended pleading. (Da204 at ¶16.) Dr. Hole's understanding from his insurance agent, Mr. Sweeny, was that the Underlying Action would certainly fall within the scope of his policy and be covered. (Da203 at ¶10; see also Da207 at 11:20 to 12:18.) Based upon that information, and upon the appointment of counsel, Dr. Hole has relied upon State Farm and its appointed counsel to conduct his defense in the Underlying Action. (Da203 at ¶11.)

State Farm has had exclusive control of the scope of the defense in the Declaratory Action — it has hand-picked counsel and controlled decisions regarding defenses and discovery. (Da203-04 at ¶¶9, 12-14.) Moreover, State Farm covered this action for nearly three years without any indication that it would disclaim coverage prior to filing the instant Declaratory Action. (Da204 at ¶15.)

On June 9, 2020, State farm filed the instant complaint seeking declaratory relief. (Da11-25.) It was not until the filing of the Declaratory Action that Dr. Hole had any indication that State Farm may be disclaiming coverage regarding the amended pleading in the Underlying Action. (Da204 at ¶16.) Thereafter, on September 29, 2020, Dr. Hole filed his answer, affirmative defenses, and counterclaims and crossclaims. (Da26-38.) On October 27, 2020, State Farm answered the counterclaims. (Da39-47.) Thereafter, the parties engaged in discovery including the exchange of documents and the taking of depositions, with the acknowledgment that the determination of the Underlying Action was likely to be dispositive of this action. (Da201 at ¶¶6-7.)

In fact, during the course of the Declaratory Action, State Farm repeatedly expressed its belief that the determination of the Underlying Action was likely to be dispositive of this matter. (See, e.g., Da231-33 (declaration on behalf of State Farm seeking discovery extension in part because discovery in the Underlying Matter "may impact the coverage issues in dispute in this matter."); Da234-36 (requests for trial adjournments from both parties reflecting the parties mutual agreement that disposition of the Underlying Action would likely be dispositive of the Declaratory Action).)

III. THE MOTION FOR SUMMARY JUDGMENT

On January 5, 2023, State Farm filed a motion for summary judgment in the Declaratory Action.. (Da50-51.) The Honorable Robert H. Gardner, J.S.C. heard oral argument on March 17, 2023. (See Generally 1T.) Following oral argument, the trial court summarized the issue as being solely one of whether "the Business liability Coverage L exclusion . . . applies here." (1T at 22:8-11.) The trial court found that the provision was unambiguous and in line with public policy, and "looking at the allegations in this particular suit," he found "the exclusion in this particular case applies." (1T at 22:14-20.) With that finding, he granted summary judgment. (1T at 22:20.)

In making this finding, the trial court's analysis focused solely on "the allegations in the complaint and . . . the policy," and "whether it falls within [the policy]," which the trial Judge "believe[d] in this particular case the allegations made here do fall within the exclusion." (1T at 22:21-25.) It is unclear from the trial court's statements on the record which policy exclusion applied. Further, it is unclear which allegations in the Underlying Action the trial court found fell within any of the exclusions.

The trial court's statements on the record were silent as to Dr. Hole's legal arguments regarding intent in the Underlying Action and disputed issues of material fact, except to state: "the issues with regard to denial and all the other stuff - - the

reservation of rights letters, this is what declaratory judgment suits are for." (1T at 23:3-6.) Regarding Dr. Hole's argument as to the timeliness of the summary judgment motion in the Declaratory Action prior to a determination of the Underlying Action, the trial judge stated: "I don't think it really matters in this particular case[.]" (1T at 23:10-12.)

This appeal was thereafter timely filed on April 26, 2023. (Da3-6; see also Da7-10.)

LEGAL STANDARD

The Appellate Division reviews a trial court's conclusions of law, including its interpretations of insurance agreements, de novo. Kieffer v. Best Buy, 205 N.J. 213, 222 (2011); see also Simonetti v. Selective Ins. Co., 372 N.J. Super. 421, 428 (App. Div. 2004) ("As a threshold matter, the interpretation of an insurance contract is a question of law which we decide independent of the trial court's conclusions.")

A trial court's grant or denial of a motion for summary judgment pursuant to Rule 4:46-2 is also reviewed de novo. Branch v. Cream-O-Land Dairy, 244 N.J. 567, 582 (2021); Christian Mission John 3:16 v. 63 Passaic City, 243 N.J. 175, 184 (2020); Templo Fuente De Vida Corp. v. Nat'l Union Fire Ins. Co. of Pittsburgh, 224 N.J. 189, 199 (2016).The Appellate Court applies the same standard as the trial court, i.e., it weighs "whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit

a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party." Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995). See Rozenblit v. Lyles, 245 N.J. 105, 121 (2021); Friedman v. Martinez, 242 N.J. 450, 472 (2020); Shields v. Ramslee Motors, 240 N.J. 479, 487 (2020); Globe Motor Co. v. Igdalev, 225 N.J. 469, 479 (2016). At the summary judgment stage, the trial court is not permitted to make credibility determinations, as such determinations are reserved for trial. Brill, 142 N.J. at 536; see also Judson v. Peoples Bank & Tr. Co., 17 N.J. 67, 76 (1954) ("[I]n any case where the subjective elements of willfulness, intent or good faith of the moving party are material to the claim or defense of the opposing party, a conclusion from papers alone that palpably there exists no genuine issue of material fact will ordinarily be very difficult to sustain.")

A trial court's findings of fact are afforded deference only when they are "supported by sufficient credible evidence in the record." State v. Mohammed, 226 N.J. 71, 88 (2016) (quoting State v. Gamble, 218 N.J. 412, 424 (2014)). See also Balducci v. Cige, 240 N.J. 574, 595 (2020); State v. McNeil-Thomas, 238 N.J. 256, 271 (2019).

LEGAL ARGUMENT

I. THE TRIAL COURT ERRED AS A MATTER OF LAW BY FINDING THE POLICY EXCLUSIONS APPLIED TO BAR COVERAGE TO A TORTIOUS INTERFERENCE CLAIM (1T at 22:4 to 23:18.)

Insurance contracts are contracts of adhesion, and therefore "courts must assume a particularly vigilant role in ensuring their conformity to public policy and principles of fairness." Voorhees v. Preferred Mut. Ins. Co., 128 N.J. 165, 175 (1992). Exclusions to insurance coverage "must be narrowly construed," and the burden of establishing that the exclusion applies is on the insurer. Princeton Ins. Co. v. Chunmuang, 151 N.J. 80, 95 (1997). Accordingly, State Farm had the burden at summary judgment of showing that the claims in the Underlying Action — namely, tortious interference — fell within the Policy's exclusion such that it could disclaim coverage.

The relevant exclusions require that State Farm show that the injury complained of either (1) was "caused by or at the direction of the insured with knowledge that the act would violate the rights of another and would inflict personal and advertising injury," or (2) that the injury arose "out of oral or written publication of material, if done by or at the direction of the insured with knowledge of its falsity." (Da182.)

Based on the below, the exclusions do not apply to claims of tortious interference and, in any event, material issues of fact preclude State Farm's motion for summary judgment.

A. The Policy Does Not Exclude Tortious Interference Claims

In order to impose liability for tortious interference, a finder of fact must find four elements: (1) interference with a prospective economic advantage or contractual relationship; (2) that the interference was done intentionally and with malice; (3) a loss; and (4) the loss was caused by the interference. Macdougall v. Weichert, 144 N.J. 380, 403-404 (1996).[2] As such, a tortious interference claim does not require an intention to cause the injury alleged. Stated differently, tortious interference claims do not require that the injury claimed be "[c]aused by or at the direction of the insured *with the knowledge*" that the injury would result, nor do they require the injury claimed arise out of material published "*with knowledge* of its falsity." (Da182.) By the plain language of the exclusions cited by State Farm, tortious interference is not an excluded claim, as it does not require that the intent be to cause

[2] Moreover, a party, in exercising a right he retains, such as the right to engage in fair competition with a competitor, a tortious interference claim cannot be sustained. See Ideal Dairy Farms, Inc. v. Farmland Dairy Farms, Inc., 282 N.J. Super., 204-05 (App. Div. 1995) (holding that undercutting a competitors price was fair competition and cautioning against a "broad rule which could potentially interfere with legitimate competition").

an injury. Instead, the intent required in tortious interference claims is an intent to interfere.

In seeking summary judgment below, State Farm provided no binding authority from the State of New Jersey holding that tortious interference claims were excluded under similar policies. Instead, State Farm relied on an unpublished, fifteen-year-old authority from the District of New Jersey, N. Plainfield Board of Educ. V. Zurich Am. Ins. Co., No. 05-4398 (MLC), 2008 U.S. Dist. LEXIS 39555 (D.N.J. 2008). Despite its age, no Court in the State of New Jersey has adopted its analysis, and for good reason: the analysis in N. Plainfield Board of Education is contrary to the Supreme Court of New Jersey's decision in SL Industries and the New Jersey Appellate Division's decision in Superior Integrated Solutions.

As more fully set forth below (infra §I.B), in SL Industries v. American Motorist Insurance Company, the Supreme Court of New Jersey held that, in applying insurance policy exclusions that disclaimed coverage based on the ill intent of the insured, the court's analysis must focus on "the insured's intent *to cause the injury* rather than on its intent to commit the act that resulted in the injury." 128 N.J. 188, 207 (1992). This distinction is critical to the instant matter. Notwithstanding this clear guidance, the District Court in N. Plainfield Board of Education completely ignored any requirement of an "intent to injure", focusing instead on the allegations that the defendant intended to commit an act that resulted in injury. Because the

District Court in N. Plainfield Board of Education did not consider the authority set forth in SL Industries, the decision should be afforded no persuasive value.

Here, the exclusions apply only to injuries caused by the insured with *"the knowledge* that the injury would result" or arising out of the publication of material published "*with knowledge* of its falsity," and, therefore, those exclusions apply only to conduct that is intended to cause the injury alleged. Tortious interference, on the other hand, does not require any intent to injure. Since the elements of a tortious interference claim do not fall within the exclusions at issue, it was an error of law for the trial court to hold that the Policy's exclusions applied to disclaim coverage in the Underlying Action.

B. The Trial Court Erred by Entering Summary Judgment Based on Mere Allegations in the Underlying Action

As a separate reason, the trial court erred by relying on mere allegations. As set forth in the Policy, the exclusions at issue apply to conduct that is intended to cause injury. To determine whether the exclusions apply to the Underlying Action, the trial court was required to make findings regarding Dr. Hole's subjective intent. See, e.g., SL Indus. V. Am. Motorists Ins. Co., 128 N.J. 188, 209 (1992). The trial court made no such inquiry. Indeed, to the extent such findings would have required credibility determinations, such determinations are reserved for trial and should not be resolved on summary judgment.

In SL Industries v. American Motorists Insurance Company, the Supreme Court of New Jersey held that, where a cause of action against an insured had an intent requirement, the court was required to make determinations regarding "the insured's intent to cause the injury rather than on its intent to commit the act that resulted in the injury." 128 N.J. 188, 207 (1992). Reviewing a claim wherein an insured was sued for purported fraud, the Supreme Court held that review of an insurance policy's exclusions where issues of intent were raised, a court must evaluate the insured's "intent to injure or expectation of injuring," the plaintiff. Id. at 212 (remanding for a determination of whether the insured intended to cause the harms alleged).

In Superior Integrated Sols. V. Mercer Ins. Co. of N.J., No. A-1027-18T4, 2020 N.J. Super. Unpub. LEXIS 2147 (App. Div. Nov. 10, 2020), the Appellate Division analyzed a policy exclusion nearly identical to the exclusion in the instant matter. In that regard, the policy in Superior Integrated Solutions excluded an injury "arising out of oral or written publication of material, done by or at the direction of any insured with knowledge that such is false or such would violate the rights of another and would inflict the injury." The Appellate Division held that to enforce such an exclusion, the insurer could not merely rely on the allegations in the complaint, but instead, had to prove, among other things, that the insured intended to cause the injury at issue. Superior Integrated Sols. V. Mercer Ins. Co. of N.J., No.

A-1027-18T4, 2020 N.J. Super. Unpub. LEXIS 2147, at *22. The Appellate Division held that the insurer failed to show that the insured intended the injury and, therefore, was obligated to cover the costs of the insured's defense. Id. at *23-24.

Here, the language of the exclusion in Superior Integrated Solutions is nearly identical to the exclusion in Dr. Hole's Policy. The exclusion at issue here excludes injuries either "[c]aused by or at the direction of the insured with the knowledge that the act would violate the rights of another and would inflict 'personal and advertising injury"' or "[a]rising out of oral or written publication of material, if done by or at the direction of the insured with knowledge of its falsity." (Da182).

Based on the holding in Superior Integrated Solutions, in order to deny coverage, State Farm must show not only that Dr. Hole intended to violate the rights of another, but also, that Dr. Hole intended to cause the particular injury alleged. It is not sufficient to merely accept the allegations of the Underlying Action as plead because New Jersey precedent requires more than "mere allegations." See, e.g., Superior Integrated Sols., 2020 N.J. Super. Unpub. LEXIS 2147, at *23 ("A claimant's mere allegation of intentional harm does not alone justify an insurer's refusal to provide a defense. In order to bring the insured's conduct within the exclusion there must be evidence that the insured subjectively intended to injure the claimant." (citing SL Indus. V. Am. Motorists Ins. Co., 128 N.J. 188, 212 (1992)).

Notwithstanding, State Farm based its entire motion on the mere allegations raised by the claimant in the Underlying Action, and the trial court granted summary judgment based on its review of the allegations in the Underlying Action. (See 1T at 22:20-23 ("You take the complaint - - the allegations in the complaint and you take the policy and you look at each other and see whether it falls within it . . . .").)

By granting State Farm's motion for summary judgment based on the mere allegations in the Underlying Action and failing to conduct any analysis regarding subjective intent, the trial court erred as a matter of law. Dr. Hole therefore respectfully requests this Court reverse the summary judgment order dated March 17, 2023.

II. THE TRIAL COURT ERRED AS A MATTER OF LAW IN FINDING THE EXCLUSION IS UNAMBIGUOUS (1T at 22:4 to 23:18)

"When the meaning of a phrase is ambiguous, the ambiguity is resolved in favor of the insured . . . and in line with an insured's objectively-reasonable expectations. Voorhees, 128 N.J. at 175 (internal citations omitted). "[E]xclusions are ordinarily strictly construed against the insurer . . . and if there is more than one possible interpretation of the language, courts apply the meaning that supports coverage rather than the one that limits it." Flomerfelt v. Cardiello, 202 N.J. 432, 442 (2010) (internal citations omitted). If a "fair interpretation" of the language of an exclusion shows the exclusion to be ambiguous, it will be interpreted strictly against the insurer. Id. 442-43. See also Cumberland Mut. Fire Ins. Co. v. Murphy,

183 N.J. 344, 351 (2005) (holding that a provision which simultaneously did not require injury to be "expected or intended" but still required "willful harm" was ambiguous).

In the instant matter, there are two exclusions, both of which suffer from ambiguity. The exclusions preclude coverage only for injuries "caused by or at the direction of the insured *with knowledge that the act would violate the rights of another and would inflict "personal and advertising injury*," or that arose "out of oral or written publication of material, *if done by or at the direction of the insured with knowledge of its falsity*." (Da182 (emphasis added).) Both of these exclusions are unclear and ambiguous, which may explain why Courts of New Jersey have not enforced such exclusions.

The trial court, in passing and without analysis, stated that the policy was unambiguous. (1T at 22:12-13 ("In this Court's opinion, I don't find that particular - - that clause [referring to both exclusions] to be ambiguous in any way.").) A fair reading of the Policy, however, shows that the exclusions at issue are susceptible to multiple meanings and are ambiguous. The trial court thus erred as a matter of law in finding the exclusions unambiguous.

III. THE TRIAL COURT ERRED AS A MATTER OF LAW IN FINDING THE EXCLUSIONS DID NOT VIOLATE THE PUBLIC POLICY (1T at 22:4 to 23:18)

As a mater of public policy, an insurance company is not free to any policy exclusions it sees fit — such exclusions must be "specific, plain, clear, prominent and not contrary to public policy." Mem'l Props., LLC v. Zurich Am. Ins. Co., 210 N.J. 512, 528 (2012) (quoting Princeton Ins. Co. v. Chunmuang, 151 N.J. 80, 95 (1997)). Moreover, because insurance contracts are contracts of adhesion, "courts must assume a particularly vigilant role in ensuring their conformity to public policy and principles of fairness." Voorhees, 128 N.J. at 175.

In the instant matter, public policy dictates that coverage should be extended to causes of action stemming from the same conduct that would otherwise have indisputably been covered. Said differently, the policy at issue covered the original complaint for defamation. "A defamation claim has three elements: '(1) the assertion of a false and defamatory statement concerning another; (2) the unprivileged publication of that statement to a third party; and (3) fault amounting at least to negligence by the publisher.'" G.D. v. Kenny, 411 N.J. Super. 176, 186 (App. Div. 2009) (Leang v. Jersey City Bd. Of Educ., 198 N.J. 557, 585 (2009)). Because defamation does not require (1) any level of intent, or (2) knowledge of falsity, the exclusions cited by State Farm would not have barred coverage for that claim.

After the defamation claim was dismissed as violative of the statute of limitations, Dr. Russonella simply recast the exact same facts into a tortious interference claim. There is no dispute that the complaint for defamation would have been covered by the Policy. Therefore it is axiomatic that a mere recasting of the same facts into a different claim would likewise be covered. If State Farm were allowed to disclaim coverage by such mere recasting of allegations, then such a holding would condone an unfair litigation tactic of pleading claims to fit into an exclusion so that insurance coverage will be denied, thereby imposing the punishment of litigation fees and any potential monetary award on an individual.

In addition and ironically, State Farm relied heavily on N. Plainfield in its moving papers, but ignores other aspects of the District Court's opinion. The District Court applied a breach of contract exclusion to numerous tort claims because the tort claims were based on the same set of facts as the breach of contract claim. N. Plainfield Board of Educ., 2008 U.S. Dist. LEXIS 39555 at *44-45. If such a holding is accurate, then the inverse should be true. In other words, State Farm cannot disclaim coverage on a claim that is based on the same set of facts as a claim that requires coverage.

As such, the trial court erred as a matter of law in holding the Policy's exclusions were in line with the public policy regarding insurance agreements.

IV. THE TRIAL COURT ERRED IN GRANTING STATE FARM'S MOTION FOR SUMMARY JUDGMENT BY DISREGARDING MATERIAL ISSUES OF FACT (1T at 22:4 to 23:18)

A. Material Issue of Fact Exist Regarding Dr. Hole's Subjective Intent

In the Underlying Action, Dr. Hole has unequivocally denied that his statements were false, made with malice, or made with any intention to injure Dr. Russonella. As set forth above, Dr. Hole's intention was to ensure patient safety and compliance with the law, including anti-kickback laws and HIPAA. In order to do so, Dr. Hole made true and accurate statements to St. Mary's. As set forth above, "mere allegations" of intentional conduct or intent to injure is not sufficient to invoke the exclusions in the Policy, even assuming such exclusions applied to intentional interference claims. See, Superior Integrated Sols., 2020 N.J. Super. Unpub. LEXIS 2147, at *23 ("A claimant's mere allegation of intentional harm does not alone justify an insurer's refusal to provide a defense."). When dealing with policy exclusions requiring intentional injuries, such as those here, the Court must inquire into the actor's subjective intent. Voorhees v. Preferred Mut. Ins. Co., 128 N.J. 165, 184-185 (1992) ("Absent exceptional circumstances that objectively establish the insured's intent to injure, [the Court] will look to the insured's subjective intent to determine intent to injure."); Cumberland Mut. Fire Ins. Co. v. Murphy, 183 N.J. 344, 349-50 (2005) (finding a policy exclusion did not apply, which precluded coverage for injuries stemming from "an insured's willful harm or knowing endangerment" or

"knowing violation of penal law," when an insured fired a BB-Gun into a jeep as a prank, accidentally injuring the driver due to the jeep's soft top).

While Dr. Russonella may allege that Dr. Hole's actions were intended to cause injury, Dr. Russonella certainly is not privy to Dr. Hole's thought processes and cannot opine on his subjective intentions. State Farm provided no undisputed facts that shed any light on Dr. Hole's subjective intentions, nor did it proffer any evidence that Dr. Hole intended to inflict an injury on Dr. Russonella.[3] Having no proofs on the issue of subjective intent, and with the understanding that all facts must be viewed in a light most favorable to Dr. Hole on State Farm's motion for summary judgment, it was reversible error to grant summary judgment, especially in light of the fact that the trial court did not make findings of fact on this issue.

B. Material Issues of Fact Preclude Summary Judgment Regarding the Claims in the Underlying Action

The parties to the Declaratory Action have always taken the position that to conserve resources, including judicial resources, the trial of the Underlying Action should proceed first as it may impact the Declaratory Action. For instance, Dr. Hole

[3] It should be noted that even officials from St. Mary's stated that its relationship with Dr. Russonella was not determined by Dr. Hole's letters to St. Mary. (See Da242 at 18:3-23; Da246 at 34:24 to 35:3.) It is thus unclear what "right" Dr. Russonella is asserting was violated in the Underlying Action which would have purportedly been violated by any of Dr. Hole's conduct. Indeed, reporting misconduct was an expected function of medical professionals at St. Mary's. (See Da245 at 31:10-20.)

is fully confident that a jury in the Underlying Action will find that he did not commit tortious interference and, such a finding, would terminate the Declaratory Action. Where a fact finder in the underlying action can, but has not, made findings that would so impact a declaratory action, summary judgment is inappropriate. For example, in Flomerfelt v. Cardiello, the Court held that the record in a declaratory action was insufficient to determine whether the duty to defend was triggered or whether the alleged conduct fell within one of the policy exclusions. 202 N.J. 432, 457 (2010).

As noted above, throughout the duration of this litigation, the parties have conducted themselves with the understanding that the Underlying Action is likely to be dispositive of the issues raised in the Declaratory Action. This is supported by State Farm's conduct throughout the duration of this litigation, where multiple extensions and adjournments were obtained with the consent of all parties to allow for the conclusion of the Underlying Action.

Because of these clear issues of fact, the trial court erred as a matter of law in granting State Farm's motion for summary judgment.

V. THE TRIAL COURT ERRED BY FAILING TO CONSIDER DR. HOLE'S DETRIMENTAL RELIANCE ON STATE FARM (Raised below, Not Decided)

The trial court failed to make any findings of fact or conclusions of law regarding Dr. Hole's detrimental reliance on State Farm. State Farm has completely controlled the defense of the Underlying Action, and it is disputed that State Farm did so pursuant to a reservation of rights. While State Farm alleges to have issued a reservation of rights letter on July 20, 2017, regarding the initial complaint in the Underlying Action, Dr. Hole does not recall receiving such a letter and no proofs have been provided to show the letter was actually sent or actually received. Moreover, upon filing the amended pleading in the Underlying Action, State Farm alleges to have sent a second reservation of rights letter in October 2017, which was not produced until State Farm filed its reply papers in further support of its motion for summary judgment. Obviously, no discovery could have been taken at that point on whether the letter was actually received, and Dr. Hole testified at his deposition that he was not familiar with the letter. Thus, Dr. Hole had no reason to know that State Farm would deny him coverage as to the newly added cause of action for tortious interference. Under such circumstances, State Farm should have been estopped from disclaiming coverage.

The test to determine whether an insurer should be estopped from disclaiming coverage due to prejudice is whether the insurer's conduct "constitute[s] a material

encroachment upon the rights of an insured to protect itself by handling the claim directly and independently of the insurer." Griggs v. Bertram, 88 N.J. 347, 359 (1982). Prejudice is presumed where "there has been a long lapse of time without any indication by the insurance carrier of a loss or rejection of coverage, during which the insured justifiably expects to be protected by the carrier and cannot, except at the risk of forfeiting coverage, act for itself under the policy [because] . . . there is a realistic restraint upon the insured's contractual freedom of action and a significant incursion upon its legitimate, protectable interests." Id. at 362. "Control of the defense is vitally connected with the obligation to pay the judgment. . . . Just as a carrier would hardly agree to pay a judgment after defense by the insured, so it cannot expect the insured to pay for a judgment when it controlled the litigation." Merchs. Indem. Corp. v. Eggleston, 37 N.J. 114, 127-28 (1962) ("Control of the defense is coupled with the duty to pay. The carrier cannot sever them by its unilateral action.")

It is "universally agreed" that, when an insurer takes control of the defense of an action, disclaiming coverage is inappropriate "unless the carrier has reserved the issue of its liability by appropriate measures." Id. at 126-27. If an insurer wants to "control the defense and simultaneously reserve a right to dispute liability, it can do so only with the consent of the insured." Id. In order to reserve the right to dispute

liability, a carrier must "fairly inform the insured that the offer [to defend] may be accepted or rejected." Id.

Dr. Hole stated at his deposition that he did not recall receiving any reservation of rights letters in the Underlying Action and, therefore, his acceptance of State Farm's defense was not made with consent regarding such a reservation. It cannot be said, therefore, that he was "fairly informed" of the right to separate counsel. Under such circumstances, prejudice to Dr. Hole in allowing State Farm to deny coverage at this late stage is presumed. At a minimum, the scope of the prejudice incurred by State Farm's failure to properly reserve its rights to withdraw a defense is a material issue of fact, the existence of which ought to have precluded summary judgment.

Even assuming Dr. Hole had been properly apprised of State Farm's reservations as to the amended pleading, State Farm should still be estopped from disclaiming coverage at this late stage of the Underlying Action. Even when a reservation of rights letter is issued, and a defense is undertaken subject to that reservation, the insurer may still be estopped from disclaiming coverage upon a showing of prejudice to the insured. Northfield Ins. Co. v. Mt. Hawley Ins. Co., 454 N.J. Super. 135, 142 (App. Div. 2018). Such a determination is fact-intensive and is not an appropriate determination to be made on summary judgment. Id. at 146.

For example, Dr. Hole would clearly be prejudiced if State Farm disclaimed coverage this late in the litigation as Dr. Hole would have to hire new counsel who would have to get up to speed on the Underlying Action. In addition, Dr. Hole would be entitled to show that he relied on the defense provided by State Farm to his detriment, meaning that Dr. Hole would have taken different steps in defending the Underlying Action than that taken by coverage counsel. Id. Since the facts must be interpreted in a light most favorable to Dr. Hole, it should be assumed that Dr. Hole could make such a showing based upon State Farm's near-total control of the defense of the Underlying Action. Moreover, whether such a showing can be made is a clear question of fact, thus precluding summary judgment at this point. In addition, since the Underlying Action is still pending and set for trial in July, there are questions of fact regarding the defenses at trial which cannot be resolved prior to the trial itself.

The trial court disregarded this argument entirely, making no findings of fact and drawing no conclusions of law regarding Dr. Hole's detrimental reliance on State Farm or the prejudice Dr. Hole would suffer if State Farm were allowed to disclaim coverage at this late stage of the Underlying Action.

VI. THE TRIAL COURT ERRED IN DISMISSING DR. HOLE'S COUNTERCLAIMS (Da1-2)

Dr. Hole's counterclaims below were adequately pled and should have been sustained. For the reasons set forth above, and those further articulated below, there are many disputed issues of material fact regarding the Declaratory Action, and thus, it was error to grant summary judgment in State Farm's favor and dismiss Dr. Hole's counterclaims. Moreover, the trial court's statement of reasons on the record is devoid of any analysis as to Dr. Hole's counterclaims.

A. Dr. Hole's Counterclaim for Declaratory Judgment is Adequately Pled

With respect to the counterclaim for declaratory judgment, such a pleading was appropriate and should have been sustained. State Farm argued below that the claim for declaratory relief should be dismissed as "redundant and unnecessary," but provided no legal authority for this argument. Declaratory Judgment actions are appropriate when there is an actual controversy regarding the rights of a party under a contract. See N.J.S.A. 2A:16-51, et. seq.; Stop & Shop Supermarket Co., LLC v. Cty. of Bergen, 450 N.J. Super. 286, 294 (App. Div. 2017). Here, Dr. Hole sought a declaration that State Farm is obligated to defend him in the Underlying Action, which State Farm had attempted to deny. Thus, the counterclaim contains an adequately pled cause of action for declaratory judgment, and the dismissal of same was error, especially in light of the fact that no statement of reasons or statement on the record provided a basis for dismissal.

B. Material Issues of Fact Preclude Summary Judgment on Dr. Hole's Counterclaim for Breach of Contract

The sole argument put forward below in support of dismissal of the counterclaim for breach of contract is that, because State Farm is not obligated to defend Dr. Hole, there can be no breach of contract. Accordingly, for all the reasons set forth above regarding State Farm's duty to defend Dr. Hole in the Underlying Action, as well as all the issues of disputed material fact, the trial court erred as a matter of law by dismissing Dr. Hole's counterclaim for breach of contract.

C. Material Issues of Fact Preclude Summary Judgment on Dr. Hole's Counterclaims for Breach of the Covenant of Good Faith and Fair Dealing and Bad Faith Denial

For the same reasons as set forth above with respect to the breach of contract counterclaim, material issues of fact preclude summary judgment in favor of State Farm on the issue of breach of the covenant of good faith and fair dealing and bad faith denial of coverage.

In pursuing a cause of action for bad faith denial of insurance coverage, an insured must show "the absence of a reasonable basis for denying benefits of the policy and the defendant's knowledge or reckless disregard of the lack of a reasonable basis for denying the claim." Wadeer v. N.J. Mfrs. Ins. Co., 220 N.J. 591, 604 (2015) (citing Pickett v. Lloyd's, 131 N.J. 457, 467 (1993)). A lack of a reasonable basis can be "inferred and imputed to the insurance company where there

is a reckless . . . indifference to facts or to proofs," submitted to it. Id. (internal quotations admitted).

In the instant matter, Dr. Hole's counterclaim for bad faith denial of insurance coverage stems from State Farm's filing of the instant Declaratory Action, which was done with clear disregard to the rights of Dr. Hole to maintain such coverage in light of the facts and circumstances of the Underlying Action. For example, it is undisputed in the Underlying Action that Dr. Russonella's status with St. Mary's ended for reasons unrelated to Dr. Hole. This lends credibility to the argument that Dr. Russonella has failed to plead a cause of action for tortious interference, and State Farm was aware of this fact at the time it sought to disclaim coverage for the Underlying Action.

Moreover, Dr. Hole has maintained his position that his statements were true and accurate and necessary to protect patient safety and ensure compliance with the law, and State Farm was aware of this fact at the time it sought to disclaim coverage for the Underlying Action. Finally, Dr. Hole made State Farm aware that he had never received a reservation of rights letter, but nevertheless, State Farm maintained the Declaratory Action and moreover sought summary judgment on its complaint. Such facts create an inference that State Farm acted with "reckless . . . disregard to the proofs," and, when viewed in a light most favorable to Dr. Hole as the non-

moving party, this inference ought to have barred summary judgment on the bad faith claims.

VII. THE TRIAL COURT ERRED AS A MATTER OF LAW BY NOT PROVIDING A CLEAR STATEMENT OF REASONS AS TO WHY THE MOTION SHOULD BE GRANTED (Not Raised Below)

The trial court's statement of reasons on the record on March 17, 2023 did not address numerous arguments made by Dr. Hole, as set forth above. (Supra, §§I.B, IV, V, VI.) Nor did his statements on the record make it clear which allegations in the Underlying Action were found to fall within which exclusion of the Policy. (See generally 1T at 22:4 to 23:18.) The order does not include a separate statement of reasons, but instead states that the reasons were set forth on the record. The trial court's reasoning on the record was limited to articulating that it "believe[d] in this particular case the allegations made here do fall within the exclusion," and with that explanation, it granted State Farm's motion for summary judgment on its declaratory judgment pleading and dismissed Dr. Hole's counterclaims in their entirety. (1T at 22:21-25.)

"When a trial court issues reasons for its decision, it 'must state clearly [its] factual findings and correlate them with relevant legal conclusions, so that parties and the appellate courts [are] informed of the rationale underlying th[ose] conclusion[s].'" Avelino-Catabran v. Catabran, 445 N.J. Super. 574, 594-95 (App. Div. 2016) (alterations in original) (quoting Monte v. Monte, 212 N.J. Super. 557,

565 (App. Div. 1986)). Failure to do so may result in a remand for a further articulation of the trial court's reasons for deciding as it did.

Dr. Hole maintains that the trial court's decision was reversible error, as set forth at length above, and therefore should be reversed in its entirety and remanded for further proceedings. However, in the event this Court determines it cannot decide this appeal on the statement of reasons read into the record on March 17, 2023 (see generally 1T at 22:4 to 23:18), Dr. Hole requests that the Court remand to allow the trial court to submit a more comprehensive statement of reasons.

CONCLUSION

For the reasons set forth above, Dr. Hole respectfully requests the Court reverse the trial court's determination on summary judgment below and remand for further proceedings.

Respectfully submitted,

RIKER DANZIG LLP

Attorneys for Robert Hole, M.D.

By: /s/ Khaled J. Klele
Khaled J. Klele, Esq.

Date: July 19, 2023

4872-2523-2241, v. 5

STATE FARM FIRE & CASUALTY CO. *Plaintiffs* v. DR. ROBERT HOLE, M.D., DR. MICHAEL RUSSONELLA, D.O., and NORTH JERSEY ORTHOPAEDIC AND SPORTS MEDICINE INSTITUTE, LLC *Defendants*	: SUPERIOR COURT OF NEW JERSEY : APPELLATE DIVISION : : DOCKET NO.: A-002522-22T4 : : CIVIL ACTION : : ON APPEAL FROM THE SUPERIOR COURT OF NEW JERSEY, LAW DIVISION, ESSEX COUNTY : : DOCKET NO.: ESX-L-3885-20 : : Sat Below: : : Hon. Robert H. Garner, J.S.C. :

BRIEF ON BEHALF OF PLAINTIFF-RESPONDENT STATE FARM FIRE AND CASUALTY COMPANY

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PRELIMINARY STATEMENT

After Dr. Hole was sued by a competitor, he sought coverage from his insurer, State Farm Fire and Casualty Company. State Farm initially defended the action under a reservation of rights. When the only remaining claim was for tortious interference with a competitor's business, State Farm sought to withdraw its defense. That tort requires an intent to injure which is excluded under the State Farm policy. In response to State Farm's declaratory judgment action, Dr. Hole contended that the underlying plaintiffs could not prove intent to injure. Therefore, according to Dr. Hole, his insurer could not withdraw the defense. That is not the law in New Jersey.

The strength of the competitor's claims is irrelevant when analyzing whether the insurer has a duty to defend. The relevant question is whether coverage exists if Dr. Hole should be found liable. Here, there can be no coverage.

To establish tortious interference with a business relationship, a plaintiff must show that the interference was done intentionally and with malice. To show malice, the plaintiff must show that defendant intentionally inflicted the injury. Dr. Hole's policy excludes coverage for such a claim. Therefore, no coverage exists for that claim and the trial court was correct in finding that his insurer, State Farm, had no duty to defend or indemnify Dr. Hole.

For these reasons and others stated below, the trial court properly found that State Farm could withdraw its defense and had no duty to indemnify.

COUNTERSTATEMENT OF FACTUAL HISTORY

A. State Farm Insures Dr. Hole for Personal and Advertising Agency

On July 9, 2017, State Farm issued Policy No. 90-BJ-N315-7 (the "Policy") to Dr. Hole which provided coverage for those sums that Dr. Hole becomes legally obligated to pay as damages because of covered "bodily injury," "property damage," or "personal and advertising injury." (Da176).[1] The Policy further provided that State Farm has, "no duty to defend the insured against any 'suit' seeking damages for 'bodily injury', 'property damage' or 'personal and advertising injury', to which this insurance does not apply." (Da176). Here, the underlying plaintiffs allege "personal and advertising injury." Coverage for "personal and advertising injury" under the Policy is subject to the following exclusions:

> Applicable to **Coverage L – Business Liability**, this insurance does not apply to:
>
> **Personal And Advertising Injury:**
>
> a. Caused by or at the direction of the insured with the knowledge that the act would violate the

[1] State Farm adopts the following citation form:
"Da" – Defendant's Appendix;
"Db" – Defendant's Brief;
"1T" – March 17, 2023 Hearing on State Farm's Motion for Summary Judgment.

> rights of another and would inflict "personal and advertising injury";
>
> b. Arising out of oral or written publication of material, if done by or at the direction of the insured with knowledge of its falsity.

(Da182).

B. State Farm Initially Agreed to Defend Dr. Hole Under a Reservation of Rights When the Underlying Plaintiffs Alleged Causes of Action that Did Not Necessarily Require a Showing that Dr. Hole Intended to Cause the Underlying Plaintiffs Harm

Dr. Michael Russonella and his medical practice, the North Jersey Orthopaedic & Sports Medicine Institute (collectively, the "Russonella Plaintiffs"), sued Dr. Robert Hole. (Da60). The Russonella Plaintiffs identified Dr. Hole as a "competing physician" at St. Mary's Hospital who engaged in a "scheme" to attempt "to interfere with the business relationship that Dr. Russonella has with St. Mary's Hospital by fabricating allegations of inappropriate conduct and misrepresentation." (Da60). The Russonella Plaintiffs accused Dr. Hole of writing "scurrilous letter(s) to" the chair of St. Mary's credentials committee, which questioned Dr. Russonella's "character and veracity." (Da60). The Russonella Plaintiffs further contended that Dr. Hole undertook to slander Dr. Russonella's professional judgment and credentials by writing and by making inappropriate statements to fellow physicians practicing at St. Mary's. (Da60). They further alleged that Dr. Hole knowingly made these untrue statements with the "malicious[] inten[t] to injure . . . [Dr.

Russonella]'s . . . practice[,] good name and profession" by causing Dr. Russonella "infamy and disgrace." (Da60). Further still, the Russonella Plaintiffs alleged that Dr. Hole intended to "vex, harass, oppress, and totally ruin [Dr. Russonella's] profession." (Da60).

On July 20, 2017—eleven days after the filing of the Complaint—State Farm issued a reservation of rights letter to Dr. Hole. (Da64-68). State Farm assigned counsel to Dr. Hole and advised Dr. Hole that while State Farm was agreeing to provide Dr. Hole a defense in the underlying matter, State Farm was reserving its right to deny defense and/or indemnity under the Policy. (Da64). State Farm provided the following four reasons why its Policy might not cover the underlying claim:

- The alleged injury was caused "by or at the direction of the insured with the knowledge that the act would violate the rights of another and would inflict 'personal and advertising injury'";
- The allegations of "personal advertising injury" potentially "arose out of oral or written publication of material, if done by or at the direction of the insured with knowledge of its falsity";
- Other insurance might apply; and
- Punitive damages are uninsurable. (Da64).

The Reservation of Rights letter cited directly to the relevant Policy provisions and further advised Dr. Hole of his right to obtain personal counsel and that he had the right to accept or reject the offer to defend under these circumstances. (Da68). The letter further still advised Dr. Hole that if State Farm did not hear from him, it would assume that he accepts State Farm's offer to defend under those conditions. (Da68).

C. The Competing Physician Amends His Complaint to Include a Claim for Tortious Interference with Business

The trial judge dismissed any claims pertaining to defamation and false light arising out of the October 2015 letter because the statute of limitations had lapsed. (Da69). The trial judge permitted the Russonella Plaintiffs to amend their complaint but barred them from repleading any defamation or false-light claim arising from the October 2015 letter. (Da70)

The Russonella Plaintiffs then amended their complaint asserting a count for tortious interference with business. In the Amended Complaint, the Russonella Plaintiffs continued to allege that Dr. Hole acted with intent to cause injury to Dr. Hole. (Da71-75). Specifically, they alleged that Dr. Hole fabricat[ed] allegations of inappropriate conduct and misrepresentations. . . ." (Da72). The Russonella Plaintiffs repeated their allegations from the initial complaint that Dr. Hole knowingly made these untrue statements with the "malicious[] inten[t] to injure . . . [Dr. Russonella]'s . . . practice[,] good name and profession " by causing Dr. Russonella "infamy and disgrace." (Da73). And further repeated that Dr. Hole

intended to "vex, harass, oppress, and totally ruin [Dr. Rusonnella's] profession." (Da73). Moreover, they alleged that Dr. Hole "intentionally and without justification or excuse interfered with Plaintiffs['] pursuit [of] then current and prospective business relationships, including, but not limited to the hospital." (Da73). Dr. Hole concedes that the Russonella Plaintiffs were only pursuing claims of tortious interference at the time the trial court ruled on summary judgment. (Db, p. 5).

In September 2017, State Farm acknowledged receipt of an amended complaint, noted that the July 20, 2017 reservation of rights was still applicable to the amended complaint, and resent the initial reservation of rights letter with that letter. (Da296-301). State Farm also produced a signed returned certified mail receipt for that September 2017 mailing. (Da302-303).

COUNTERSTATEMENT OF PROCEDURAL HISTORY

State Farm Received a Judicial Declaration that It Had No Duty to Defend or Indemnify Dr. Hole in the Underlying Action

On June 9, 2020, State Farm filed this declaratory judgment action, seeking a determination of its rights and obligations to Dr. Hole with respect to the remaining tortious interference claim. (Da11-19). More specifically, State Farm asserts that the Russonella Plaintiffs allege that Dr. Hole acted intentionally and with the intent to injure them. (Da11-19). State Farm alleged that these types of allegations are

excluded from coverage under the Policy's "Knowing Violation of the Rights of Another" and "With Knowledge of Falsity" exclusions. (Da16-17). In response, Dr. Hole filed counterclaims against State Farm seeking damages for breach of contract and bad faith as well as declaratory judgment as to the breach of contract and bad faith. (Da31-36).

The trial court ruled in favor of State Farm. (Da1-2). It found that Dr. Hole was not entitled to coverage or a defense under the State Farm Policy for the claims pursued by the Russonella Plaintiffs. (Da1-2). This appeal followed. (Da3-6).

STANDARD OF REVIEW ON APPEAL

"The standards governing the disposition of a summary judgment motion are to be applied with discriminating care so as not to defeat a summary judgment if the movant is justly entitled to one." Ziemba v. Riverview Med. Ctr., 275 N.J. Super. 293, 301 (App. Div. 1994). Under the well-established standards governing summary judgment, the trial court and this Court are required to grant summary judgment when:

> the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law.

R. 4:46-2(c). See Liberty Surplus Ins. Corp. v. Nowell Amoroso, 189 N.J. 436, 445-46 (2007).

An issue of fact is not "genuine" unless the competent evidence is sufficient to permit a rational factfinder to resolve the issue in favor of the non-moving party. Brill v. Guardian Life Ins. Co. of Amer., 142 N.J. 520, 540 (1993). A "genuine issue of material fact" cannot be based on the mere argument of counsel or the bare assertion of a conclusion opposite the factual position of the adversary. Amabile v. Lerner, 74 N.J. Super. 443 (App. Div. 1962); N.J. Mortg. Corp. v. Masefield Corp., 63 N.J. Super. 369 (App. Div. 1960). The non-moving party cannot avoid summary judgment when the evidence is so one-sided that the moving party must prevail as a matter of law. Brill, supra, 142 N.J. at 536. Rather, summary judgment should be granted where reasonable minds cannot differ on the outcome of the matter. Id. at 535-36.

The purpose of the summary judgment procedure is to provide a prompt, businesslike and inexpensive means of disposing of a case where no genuine issue requires disposition at trial. Judson v. People's Bank & Trust Co. of Westfield, 17 N.J. 67, 75 (1955). The right to summary judgment is a "substantial one" that is "more than a token procedural remedy under our rules, for it not only affords protection against groundless claims and frivolous defenses, saving the antagonists the time and expense of protracted litigation, but it also reserves judicial manpower and facilities to cases which meritoriously command attention." State v. South Amboy Trust Co., 46 N.J. Super. 497, 501 (Law Div. 1957).

LEGAL ANALYSIS

POINT 1 - To Succeed with a Claim for Tortious Interference with Business, Plaintiff Must Allege then Show that Defendant Intended to Cause the Injury—Such an Allegation or Showing Precludes Coverage under Dr. Hole's Policy

The crux of this appeal is whether a cause of action for tortious interference with business is insurable under Dr. Hole's Policy. A claim for tortious interference with business requires proof of (1) a reasonable expectation of economic advantage to Plaintiff; (2) interference done intentionally and with malice; (3) causal connection between the interference and loss of prospective gain and 4) actual damages. E.g., Printing Mart-Morristown v. Sharp Electronics Corp., 116 N.J. 739, 751-52 (1989). Dr. Hole reads these elements and argues that a tortious interference claim does not require an intention to cause the injury alleged. (Db, p. 12). Dr. Hole believes this is important because his Policy excludes coverage if he intended to cause harm. (Db, pp. 12-13).

But Dr. Hole misreads the elements. The second element of the tort requires a plaintiff to prove that defendant intentionally caused an injury. The key is the inclusion of a malice component. "Malice" is not used literally as requiring "ill will toward plaintiff." Printing Mart, 116 N.J. at 751. Rather, malice is defined to mean that "*defendant inflicted the harm intentionally and without justification or excuse*. Id. (emphasis added). See MacDougall v. Weichert, 144 N.J. 380, 404 (1996). Plaintiff must show that defendant "crosse[d] the line from competition to tortious

injury." Inventiv Health Consulting, Inc. v. Atkinson, Civil Action No. 18-12560 (ES) (SCM), 2019 U.S. Dist. LEXIS 208787, at *12 (D.N.J. Dec. 3, 2019). "What is actionable is the luring away, by devious, improper or unrighteous means, of the customer of another." See Lightening Lube, Inc. v. Witco Corp., 4 F.3d 1153, 1167 (3d Cir. 1993).

Dr. Hole's brief focuses on the second prong and whether there is a showing of intentionality to cause harm. The Amended Complaint is packed with allegations of intentional harm. The Russonella Plaintiffs alleged that Dr. Hole knowingly violated their rights when he, "intentionally and without justification or excuse interfered with Plaintiffs['] pursuit [of] then current and prospective relationships, including, but not limited to the hospital." (Da73). More pointedly, the Russonella Plaintiffs pleaded that Dr. Hole intended to injure Plaintiff's good name, profession, and medical practice.[2] (Da73). As explained in the next section, State Farm contends that the trial court correctly limited its review to the allegations in the Complaint. However, it is worth noting that Dr. Russonella confirmed that he contends that the statements by Dr. Hole were not made negligently or accidently but were done in a malicious fashion with the intent to injure him. (Da77).

[2] Although this allegation was alleged in support of an earlier cause of action in the Amended Complaint, the Russonella Plaintiffs included a paragraph in the Tortious Interference with Business claim that incorporated previous allegations. (Da73).

As to whether Dr. Hole has coverage, the case of N. Plainfield Board of Educ.v. Zurich Am. Ins. Co., No. 05-4398 (MLC), 2008 U.S. Dist. LEXIS 39555 (D.N.J. 2008) is instructive. That case concerned a soured relationship between a board of education ("Board") and a contractor hired to renovate and expand five of the Board's schools. Id. at *8-10. In a lawsuit between the parties, the contractor alleged tortious interference—claiming that the Board published untrue statements about the contractor that harmed its reputation and interfered with its contracts and business arrangements. Id. at *71.

In a related coverage action, the Board's insurance carrier contended that the "knowing violation of rights of another" exclusion barred coverage for the tortious interference claim. The Board's "knowing violation of rights of another exclusion" stated that Coverage B does not apply to "'[p]ersonal and advertising injury' caused by or at the direction of the insured with the knowledge that the act would violate the rights of another and would inflict 'personal and advertising injury.'" Id. at *72.

The district court compared the elements of a tortious interference claim with the "knowing violation of rights of another exclusion" and found that the exclusion applied to such claims because of the intent element. N. Plainfield, 2008 U.S. Dist. LEXIS 39555 at *74-75. Accord United States Fire Ins. Co. v. Cyanotech Corp., No. 12-00537 JMS-BMK, 2013 U.S. Dist. LEXIS 152160, *1 (D. Hawaii 2013) (applying the "Knowing Violation of Rights of Another" exclusion where the

underlying complaint alleged that the insured "intentionally and knowingly interfered" with a business relationship); See also Grange Ins. Ass'n v. Roberts, 179 Wn. App. 739 (Wash. Ct. App. 2013) (holding that there was no duty to defend where the underlying complaint alleged intentionally and deliberately interfered with the plaintiff's expected inheritance). To establish that the contractor's allegations were consistent with a tortious interference claim, the district court cited the pleadings and found that the contractor in the underlying litigation did indeed allege that it had a reasonable expectation of economic advantage and that the Board acted with "malice," as the word is used for this cause of action. N. Plainfield, 2008 U.S. Dist. LEXIS 39555 at *73-74. As a result, the district court entered summary judgment on behalf of the Board's insurance carrier. Id.

In his brief, Dr. Hole preemptively attempted to distinguish N. Plainfield alleging the district court "completely ignored any requirement of an 'intent to injure', focusing instead on the allegations that the defendant intended to commit an act that resulted in injury." (Db, p. 13). But, as demonstrated above, that is not so.

Here, the Russonella Plaintiffs similarly pleaded that Dr. Hole intended to injure Dr. Russonella's name, profession, medical practice, and business relationships. (Da71-75). Specifically, they allege that Dr. Hole fabricat[ed] allegations of inappropriate conduct and misrepresentations. . . ." (Da72). The Russonella Plaintiffs alleged that Dr. Hole knowingly made these untrue statements

with the "malicious[] inten[t] to injure . . . [Dr. Russonella]'s . . . practice[,] good name and profession " by causing Dr. Russonella "infamy and disgrace." (Da73). And they further alleged that Dr. Hole intended to "vex, harass, oppress, and totally ruin [Dr. Rusonnella's] profession." (Da73). Moreover, they alleged that Dr. Hole "intentionally and without justification or excuse interfered with Plaintiffs['] pursuit [of] then current and prospective business relationships, including, but not limited to the hospital." (Da73).

The applicable exclusion considered in N. Plainfield is similar to the exclusions here. Under the first relevant exclusion, State Farm provides no coverage if the Russonella Plaintiffs' injuries were "[c]aused by or at the direction of the insured with the knowledge that the act would violate the rights of another and would inflict 'personal and advertising injury.'" (Da182). The Russonella Plaintiffs pulled no punches. They allege that Dr. Hole acted intentionally and without justification with the intent to cause them injury. (Da73).

The Policy also excluded coverage for the Russonella Plaintiffs' injuries if they "[a]ris[e] out of oral or written publication of material if done or at the direction of the insured with knowledge of its falsity." (Da182). A similarly worded exclusion was discussed by the Appellate Division in Superior Integrated Solutions v. Mercer Ins. Co. of N.J., No. A-1027-18T4, 2020 N.J. Super. Unpub. LEXIS 2147, *1 (N.J. Super. Ct. App. 2020). In that case, the Appellate Division held that an

exclusion for the publication of materials made "with knowledge of its falsity" will apply where the claimant alleges that the insured acted with intent to injure the claimant. Id. at *22. Here, as detailed above, the Russonella Plaintiffs alleged that Dr. Hole knew what he was publishing was false. State Farm has met its burden that the exclusions apply.

POINT 2 - The Trial Court Properly Relied on the Allegations in the Underlying Complaint When Determining Whether State Farm Owed Any Duty under the Policy

"The duty to defend extends only to claims on which there would be a duty to indemnify in the event of a judgment adverse to the insured." Trs. of Princeton Univ. v. Aetna Cas. & Sur. Co., 293 N.J. Super. 296, 297 (App. Div. 1996). Here, the only remaining claim in the underlying litigation is tortious interference with business. To succeed, the Russonella Plaintiffs must show that Dr. Hole acted maliciously, that is, he intended to injure them. Printing Mart, 116 N.J. at 751. As mentioned above, Dr. Hole's Policy does not cover advertising injuries that were intended. (Da182). Since there was no chance that the Policy might cover the loss, State Farm has no duty to provide a *gratis* defense to Dr. Hole just because Dr. Hole believes the allegations have no merit. See Central Nat'l Ins. Co. v. Utica Nat'l Ins. Group, 232 N.J. Super. 467 (App. Div. 1989).

Dr. Hole believes he has discovered an exception to this entrenched rule. Namely, Dr. Hole contends that if the alleged claim includes an intent element the

Court must look to the subjective intent of the insured and not the allegations in the complaint. To support its legal theory, Dr. Hole first cites to an unpublished case from this Court, Superior Integrated Sols., supra.

The facts in Superior Integrated Sols. concerned whether the insured infringed on a competitor's copyrighted computer software. Id. at *5-7. When the insured sought coverage for the infringement lawsuit, the carrier denied coverage under an "intentional acts" exclusion. Id. at *21-22. The Appellate Division concluded that the insurer did have coverage. But its conclusion was not based on an examination of extrinsic evidence. Id. at *23-24. Rather, it found that the burden was on the insurer to establish that the competitor's "complaint alleged an intentionally caused injury." Id. at *22 (citing Hammer v. Thomas, 415 N.J. Super. 237, 249 (App. Div. 2010)). This Court in Superior Integrated Sols. then provided a summary of the pleadings and concluded that the competitor "never alleged that it suffered an intentional injury." Id. at *23. Rather, the Court found that the motive for the infringement was alleged to be "profit driven." Id. The Court was further persuaded to find coverage because the underlying claim was intentional copyright infringement, a strict-liability tort that does not require an intent to injure. Id. at *24.

This matter is distinguishable from Superior Integrated Solutions in two ways. First, the tortious interference claim is not a strict-liability claim and does require an

intent to injure. Second, the Russonella Plaintiffs unambiguously alleged the Dr. Hole acted with an intent to injure.

State Farm recognizes there is some *dicta* in the opinion that suggests that mere allegations of intent are an insufficient basis to refuse to provide a defense. Rather, the underlying plaintiff must present some evidence that the insured subjectively intended to injure the claimant. Id. at *23 (citing SL Indus., Inc. v. Am. Motorists Ins., 128 N.J. 188, 212 (1992). Despite this statement, this Court in Superior Integrated Solutions relied only on the allegations of the complaint. And, as mentioned in the last paragraph, in Superior Integrated Solutions, the underlying plaintiffs' claims could survive a finding there was no intent to injure because it was a strict liability claim. That is not the case here.

In Superior Integrated Solutions, this Court cited to SL Industries, supra. SL Industries did not concern the application of an exclusion like here. Rather, the Supreme Court had to consider whether the injuries caused by the insured were accidental enough to constitute an "occurrence" as defined in the policy. SL Industries, 128 N.J. at 193. The underlying lawsuit concerned the alleged emotional distress experienced by an employee who alleged that he was asked to leave the company because of his age. Id. at 193-94. The employee alleged common-law fraud as well as a violation of a federal employment statute. Id. at 194.

The employer sought a defense and possible indemnity from its insurer. The insurer declined to defend alleging, in part, that the employee had not alleged a bodily or personal injury from the common-law fraud as required by the policy's definition of "occurrence." Id. at 194-97. During discovery, it was learned that the employee did indeed experience physical manifestations from the fraud. Id. at 196. The Court held that was sufficient to establish a duty to defend. Id.

When discussing how to determine whether the facts meet the definition of an "occurrence," the Court found that a valid claim of intentional fraud presupposes a subjective intent to injure. Id. at 209. But the Court found that it must also decide whether "any intent to injure will render the resulting injury intentional, whether the wrongdoer must intend the specific injury that results. . . ." Id.

Because the Supreme Court was considering a provision concerning a grant of insurance, the Supreme Court was inclined to interpret it broadly. Id. at 210-212 (citing Prudential Property & Casualty Ins. Co. v. Karlinski, 251 N.J. Super. 457, 598 A.2d 918 (App.Div.1991)). The inclination to interpret a coverage provision broadly has no place here when an exclusion is at issue. Swarner v. Mut. Benefit Grp., 72 A.3d 641, 649 (Pa. Super. 2013) (noting the exclusion must be narrowly construed while coverage clauses must be broadly construed). The Supreme Court adopted this Court's holding in Karlinski, which held that "under normal circumstances, when the result of an action conforms to that which one would

predict, the demonstration of a subjective intent to injure is sufficient to preclude coverage without further inquiry into the intent to cause the actual injury that resulted." SL Industries, 128 N.J. at 210. It is only when the facts indicate that the injury was unlikely to result from the alleged acts must there be an "inquiry into the subjective intent to cause the resulting injury is in order." Id.; see also id. at 212 (adopting Karlinski, supra).

Put another way, there are times when the objective conduct of the actor also determines the actor's subjective intent to injure. Merrimack Mut. Fire Ins. Co. v. Coppola, 299 N.J. Super. 219, 227 (App. Div. 1997) (citing Malanga v. Manufacturers Cas. Ins. Co., 28 N.J. 220, 225 (1958)). "Where, as here, the plaintiffs claim no more than the type of injuries that are inherently probable from such conduct there is no need to inquire into defendant's subjective intent." Id.

When, like here, an excluded act is an essential element to the lone theory of relief, there is no reason for the trial court to probe the subjective intent of the insured. In such a case, the insured is not covered if found liable. N. Plainfield, 2008 U.S. Dist. LEXIS 39555 at *74-75. But even if this Court were to disagree, under the reasoning of SL Industries, there is still no reason to evaluate the subjective intent of Dr. Hole because the Russonella Plaintiffs claim no more than the type of injuries inherently probable from the alleged conduct. That is, the Russonella Plaintiffs allege that Dr. Hole made false statements about his medical competency

in order "to injure . . . [Dr. Russonella]'s . . . practice[,] good name and profession " by causing Dr. Russonella "infamy and disgrace." (Da60). No one wants to treat with a physician who is perceived to be incompetent or unethical. Therefore, the types of injuries alleged by the Russonella Plaintiffs are exactly the injuries you would expect by an attempt to blacken Dr. Russonella's reputation as a medical professional.

POINT 3 - Dr. Hole Has Not Alleged How the Exclusions Relied on by State Farm are Ambiguous and Therefore He Has Waived Its Ambiguity Claim

Dr. Hole contends that the exclusions relied upon by State Farm are ambiguous. What is conspicuously lacking from the ambiguity section is any argument supporting the conclusion that the exclusions were ambiguous. Instead, Dr. Hole states the general rules regarding inspecting policies for ambiguity, concludes without analysis that the exclusions are ambiguous, and then cites to the exclusionary language. (Db, pp. 17-18).

Dr. Hole simply did not brief this issue. "Briefing an issue requires more than a mere mention." Khawaja v. Butt, No. A-2828-20, 2022 N.J. Super. Unpub. LEXIS 51, at *11 (App. Div. Jan. 14, 2022) (quoting Telebright Corp. v. Dir., N.J. Div. of Tax'n, 424 N.J. Super. 384, 393 (App. Div. 2012) (deeming an issue waived when the brief included only "one sentence in the conclusion section" with respect to the issue)). To avoid waiver, a plaintiff must assert a position on an issue and present

"arguments in support of its contention." Telebright, 424 N.J. Super. at 393. Even reading the brief as indulgently as possible, the reader can discern no argument from Dr. Hole that explains why the exclusions are potentially ambiguous. State Farm is not going to take it upon itself to conjure some kind of potential ambiguity and then refute it. Under New Jersey law, Dr. Hole has not done enough to preserve the ambiguity argument and this Court should find it waived.

POINT 4 - Dr. Hole Has Provided No Support for His Position that Public Policy Requires State Farm to Provide a Defense and Possible Indemnification When a Dismissed Theory of Recovery Was Potentially Covered

It hardly needs to be said that one set of facts may give rise to several different theories of recovery. E.g., Nader v. Gen. Motors Corp., 292 N.Y.S.2d 514, 515 (Sup. Ct. 1968); People ex rel. Burris v. Progressive Land Developers, Inc., 151 Ill. 2d 285, 295 (Ill. 1992). In the initial complaint, the Russonella Plaintiffs alleged defamation. As pointed out by Dr. Hole in his brief, to succeed with a cause of action for defamation, the Russonella Plaintiffs would not have to establish any level of intent to injure. (Db, p. 19). When forced to forego the defamation claim, counsel for the Russonella Plaintiffs pleaded another potential cause of action, tortious interference with business. (Da73). As discussed above, this cause of action requires a defendant to have an intent to injure. E.g., Printing Mart, 116 N.J. at 751. When the only remaining viable claim was precluded from coverage under an exclusion, State Farm sought to withdraw its defense of Dr. Hole. It is well settled

that when only uncovered claims remain, the insurer's duty to defend "dissipates unless there remains other viable grounds for coverage." Sears Roebuck & Co. v. Nat'l Union Fire Ins. Co., 340 N.J. Super. at 242 (App. Div. 2001).

Dr. Hole looks to create an exception to this long-standing insurance principal. He contends that as long as the facts support a coverable cause of action, State Farm must provide a defense even if the underlying plaintiff elected not to pursue that coverable claim or the judge in the underlying litigation has dismissed that coverable claim as non-viable. (Db, p. 19). Dr. Hole cites no case law for this exception. And none exists.

For these reasons, Dr. Hole has not provided this Court with any reason why it should overturn years of precedent and insurance practice.

POINT 5 - No Dispute Exists Regarding Genuine Material Facts That Would Prevent the Entry of Summary Judgment

Dr. Hole contends that his denial of culpability creates a genuine issue of material fact as to whether he had the subjective intent to injure the Russonella Plaintiffs. (Db, p. 21). Essentially, Dr. Hole contends that as long as an insured denies the allegation made against him, his insurer has a duty to defend him in the lawsuit. That position turns the law on its head. If all it took to ensure coverage in an underlying litigation was to deny the underlying plaintiff's allegations there would hardly be a time when an insurance carrier could refuse to defend.

The key inquiry is not whether a possibility exists that the insured will ultimately be found not liable. Presumably, that is always the case. Indeed, the merits of the underlying plaintiffs' allegations are irrelevant to this analysis. E.g., Voorhees v. Preferred Mut. Ins. Co., 128 N.J. 165, 173 (1992) ("Whether an insurer has a duty to defend is determined by comparing the allegations in the complaint with the language of the policy. When the two correspond, the duty to defend arises, irrespective of the claim's actual merit."); Ohio Cas. Ins. Co. v. Flanagin, 44 N.J. 504, 512 (1965). Rather, a duty-to-defend analysis focuses on whether coverage could exist if the insured is found liable. E.g., Abouzaid v. Mansard Gardens Assocs., LLC, 207 N.J. 67, 81 (2011) (citing Robert R. Keaton & Alan L. Widiss, Insurance Law, A Guide to Fundamental Principles, Legal Doctrines and Commercial Practices 1020-21 (1988)). No possibility of coverage exists for Dr. Hole. As conceded by Dr. Hole, the Russonella Plaintiffs were only pursuing a claim of tortious interference. (Db, p. 5). To succeed with a tortious-interference claim, plaintiff must show an intent to injure. Printing Mart, 116 N.J. at 751. Dr. Hole's Policy excludes coverage for injuries caused by the insured "with the knowledge that the act . . . would inflict 'personal and advertising injury[.]'" (Da182). According, no possibility of coverage remains and a declaration acknowledging this is appropriate.

Dr. Hole also contends that principles of efficiency require that the underlying case resolve before the Court decides whether a duty to defend and indemnify exists. (Db, 22-23). But no reason supports the trial court waiting for the underlying case. As stated above, the underlying plaintiffs had no viable claim that could trigger coverage. That is enough to conclude that State Farm no longer owed to Dr. Hole a duty to defend. E.g., Abouzaid, 207 N.J. at 81.

To support its opposing position, Dr. Hole cites to Flomerfelt v. Cardiello, 202 N.J. 432 (2010). But the differences between Flomerfelt and this case demonstrate why the trial court correctly granted summary judgment. In Flomerfelt, homeowners were seeking a defense from their insurer after being sued by a houseguest who alleged she was injured due to an overdose of alcohol or drugs provided to her by the insureds. See id. at 436. The insurer refused to provide a defense because the policy included an exclusion for claims "'[a]rising out of the use, . . . transfer or possession' of controlled dangerous substances." Id. The Court found that the duty to defend remained because some of the theories of liability did not fall within the reach of the dangerous-substance exclusion. Id. at 457-58. For example, the underlying plaintiff included a claim that she was injured by the homeowners' failure to promptly summon aid. Id. at 457. Here, Dr. Hole has not showed any possibility that he could be held liable for tortious interference without

a showing of intent to injure. Accordingly, Flomerfelt is distinguishable, and the trial court's actions were proper.

POINT 6 – Dr. Hole Has Provided No Basis For This Court to Apply Estoppel

Dr. Hole alleges that the trial court should not have entered summary judgment because State Farm is estopped from withdrawing its defense. (Db, p. 24-27). While Dr. Hole listed estoppel as a separate defense in his pleading, Dr. Hole did not allege estoppel in his counterclaims against State Farm. (Da29, Da31-36). Dr. Hole also never cross-moved for summary judgment on estoppel grounds. Because estoppel was not pleaded below and Dr. Hole never moved for summary judgment, it should be considered waived here. To the extent that Dr. Hole is permitted to proceed with this unpleaded cause of action, the facts must be considered in the light most favorable to the insurer, State Farm. Northfield Ins. Co. v. Mt. Hawley Ins. Co., 454 N.J. Super. 135, 138 (App. Div. 2018).

A great deal of the estoppel argument is supported by Dr. Hole's speculation that State Farm never sent a reservation of rights letter. But a plaintiff must do more that raise mere speculation and conjecture when opposing summary judgment. Bass v. House of Prayer Cogic of Orange, No. A-1284-20, 2021 N.J. Super. Unpub. LEXIS 3173, at *6 (App. Div. Dec. 29, 2021) (citing R. 4:46-2(c)). A plaintiff must provide some factual support to bolster his speculation. E.g., Brae Asset Fund. L.P.

v. Newman, 327 N.J. Super. 129, 134 (App. Div. 1999) (requiring submission of factual support in affidavits to oppose summary judgment motion).

In July 2017, State Farm sent to Dr. Hole a reservation of rights letter. (Da64-68). In September 2017, State Farm acknowledged receipt of an amended complaint, stated that the initial reservation of rights still applied, and resent the initial reservation of rights letter with that letter. (Da296-301). State Farm also produced a signed returned certified receipt for that September 2017 mailing. (Da302-303).

In his counterclaim, Dr. Hole admitted that "[o]n July 20, 2017, nearly three years before initiating this action, State Farm sent Dr. Hole a Reservation of Rights letter." (Da31). At Dr. Hole's deposition, his counsel stated on the record that he does not dispute that State Farm sent the July 20, 2017 reservation of rights letter. (Defendant Opposition Exhibit A, T.13:13). Still, later in that deposition Dr. Hole testified that he simply does not recall whether he did or did not receive the letter. See Id. at T.14:2-11. Additionally, in the Certification attached to his opposition to the summary judgment motion, Dr. Hole only certifies that he does not recall receiving the July 20, 2017 reservation of rights letter, or the September 25, 2017 reservation of rights regarding the amended complaint filed in connection with the underlying action. (Da203).

New Jersey recognizes a presumption that mail properly addressed, stamped, and posted was received by the party to whom it was addressed. SSI Med. Servs., Inc. v. Dep't of Human Servs., 146 N.J. 614, 621 (1996). To invoke the presumption, the party must show: "(1) that the mailing was correctly addressed; (2) that proper postage was affixed; (3) that the return address was correct; and (4) that the mailing was deposited in a proper mail receptacle or at the post office." Id. The presumption is based on "the probability that officers and employees of the postal department will do their duty, and by the regularity and certainty with which, according to common experience, the mail is delivered." Szczesny v. Vasquez, 71 N.J. Super. 347, 354 (App. Div. 1962). The "presumption is rebuttable and may be overcome by evidence that the notice was never in fact received." Id.

"[H]aving a receipt from the Post Office demonstrating that [the mailing party] sent the document by certified mail . . . [is] prima facie evidence that the document was delivered." Scotty Pine, Inc. v. Director, Div. of Taxation, 2017 N.J. Tax Unpub. LEXIS 21, *14 (Tax Ct. March 30, 2017). State Farm provided such a receipt. (Da302-303). Further, the mailing of the reservation of rights letter is corroborated by the certification of State Farm Casualty Claim Specialist, Mary Villano-Dye, she spoke to Dr. Hole on July 17, 2017 and advised him that State Farm would be defending him under a reservation of rights and that would be outlined in a letter to be sent to him by Jason Ballou or his manager. (Da. 294-95).

Further still, Dr. Hole has never claimed that the address on the certified mail receipt was incorrect or that the signatory on the certified receipt was unknown to him. Under these circumstances, the trial court was correct to discount Dr. Hole's contention that State Farm is estopped from withdrawing its defense based on Dr. Hole's failure to remember receiving the reservation of rights letter.

New Jersey law is also clear that an insurer cannot be deemed to have abandoned its insured while offering a defense under a reservation of rights. New Jersey Eye Center v. Princeton Insurance Company, 394 N.J. Super. 557, 569 (App. Div. 2007). Dr. Hole has cited to no law disputing the above well-settled legal principle. Instead, Dr. Hole argues that State Farm acted in bad faith simply by seeking a declaration as to coverage after providing Dr. Hole a defense, under a reservation of rights, for over three years. But New Jersey law recognizes that the parties have discretion in timing the commencement of a declaratory judgment action. See Burd v. Sussex Mut. Ins. Co., 56 N.J. 383 (1970) ("the better course is to leave it to the [parties] to decide for themselves if and when to sue" for a declaratory judgment); New Jersey Eye Center, 394 N.J. Super. at 570. See also 1-8 LexisNexis Practice Guide NJ Insurance Litigation § 8.20 (2017). No law dictates when State Farm could have brought this declaratory judgment action. Id. State Farm provided a defense to Dr. Hole, under a reservation of rights, with respect to the initial Complaint. State Farm did not withdraw the defense when the defamation

and false light claims were dismissed. Rather, State Farm continued to offer a defense under a reservation of rights, which Dr. Hole accepted, and then filed a Declaratory Judgment requesting a declaration from the trial court as to whether it had a continuing obligation to defend or indemnify. Such conduct cannot be considered bad faith.

The case relied on by Dr. Hole in fact stands for the proposition that the doctrine of estoppel does not apply here. In Northfield, supra, this Court considered whether to apply the estoppel doctrine when an insurer moves for a declaration that it owes no duty to defend after submitting a reservation of rights letter and providing counsel. Id. at *137-41. The Court, citing earlier precedent, held "if a carrier wishes to control the defense and simultaneously reserve a right to dispute liability, it can do so only with the consent of the insured." Id. at 142-43 (citing Merchants Indemnity Corp. v. Eggleston, 37 N.J. 114 (1962)). "Without the insured's consent or circumstances that suggest the insured acquiesced in the insurer's control of the defense, an insurer will be estopped from later disclaiming coverage." Id. at 143 (citing Eggleston, 37 N.J. at 127-29; Griggs v. Bertram, 88 N.J. 347, 356 (1982) and Sneed v. Concord Ins. Co., 98 N.J. Super. 306, 320 (App. Div. 1967)).

In Northfield, the reservation of rights letter was unclear about whether the insured could reject the offer of a defense. Id. at 143-45. Here, State Farm clearly informed Dr. Hole that he could reject the defense that State Farm was providing

under a reservation of rights and that State Farm would assume his consent if he did not object:

> [T]he defense of this action by the [assigned] attorney on your behalf is not to be considered a waiver of such policy defense or of any policy defenses which may be involved in this suit. You have the right to accept or reject this Company's offer to defend this matter subject to these terms. If we do not hear from you to the contrary, we will assume that it is acceptable for us to continue handling the suit on these terms.

(Da297). This language complies with New Jersey law, which provides that State Farm can "properly reserve its rights, so as to control the defense while avoiding estoppel, [by] advis[ing] its insured of the potential of a disclaimer, fairly inform[ing] the insureds of their right to reject the insurer's defense on those terms, and secur[ing] the insureds' explicit or implicit consent." Petersen v. N.J. Mfrs. Ins. Co., No. A-0459-12T4, 2014 N.J. Super. Unpub. LEXIS 995, at *14-15 (App. Div. May 2, 2014) (citing Eggleston, 37 N.J. at 127-28). Therefore, under New Jersey law, State Farm properly protected its right to withdraw a defense.

POINT 7 - The Trial Court Properly Dismissed Dr. Hole's Counterclaims against State Farm

Dr. Hole's counterclaim against State Farm contained four allegations. (Da33-36). Dr. Hole pleaded a counterclaim for breach of contract and a separate counterclaim seeking a declaration that State Farm breached its contract. (Da33,

35). Dr. Hole also pleaded a counterclaim for bad faith and a separate counterclaim seeking a declaration that State Farm committed bad faith. (Da34, 36).

A. Because the Court Properly Found that State Farm Owed No Duty to Dr. Hole Arising Out of the Underlying Litigation, Dr. Hole Cannot Succeed with His Breach-of-Contract-Based Counterclaims

Dr. Hole bases his breach-of-contract argument on the misguided notion that he is still entitled to a defense and possible indemnity under his State Farm Policy. However, for all the reasons stated above, that is not so. Therefore, Dr. Hole has failed to carry his burden of first showing that he is entitled to coverage under the Policy. See Sears Roebuck and Co. v. National Union Fire Ins. Co., 340 N.J. Super. 223, 234 (App.Div.2001) (it is "the insured's burden to bring the claims within the terms of the policy.").

B. Because the Court Properly Found that State Farm Owed No Duty to Dr. Hole Arising Out of the Underlying Litigation, Dr. Hole Cannot Succeed with His Bad-Faith-Based Counterclaims

For similar reasons, Dr. Hole cannot show that he can succeed with his bad-faith-related counterclaims. The basis for bad faith claim is that State Farm lacked a reasonable basis for refusing to provide a defense and indemnity. (Pb29-30). As discussed above, State Farm's basis for refusing to continue to defend Dr. Hole is supported by the facts and law of this case.

POINT 8 - The Trial Court Adequately Stated Its Reasons for Granting Summary Judgment

Dr. Hole also asks this Court to remand this matter to the trial court so that it can provide a more comprehensive statement of the reasons for its decision. (Db, p. 32). Specifically, Dr. Hole is critical of the trial court's failure to address all of Dr. Hole's contentions and further contends the trial court did not make clear which allegations in the underlying complaint were found to fall within which exclusion of the Policy. (Db, p. 32).

While the trial court's opinion may not be comprehensive, it provides adequate notice of the basis for relief. The trial court held that allegations in the pleadings fall within the exclusions in the Policy. 1T:22:21-23:6. While the trial court did not call out a specific allegation that brings the allegations within the exclusion, the pleadings are replete with allegations that Dr. Hole intended to injure the Russonella Plaintiffs. Moreover, the only remaining claim in the underlying action requires a showing of intent to injure. Printing Mart, 116 N.J. at 751.

Put another way, if the trial court's order is deficient, it in no way hampers this Court's ruling on appeal. These issues are thoroughly briefed, and it would waste judicial resources to remand.

CONCLUSION

Based on the foregoing, State Farm respectfully requests that this Court affirm the trial court's entry of summary judgment.

Respectfully submitted,

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DATED: October 18, 2023

CERTIFICATE OF SERVICE

I, Marc L. Penchansky, Esquire, certify that a true and correct copy of the Brief of Defendant/Respondent, State Farm, was served on Plaintiff's counsel via this Court's electronic filing system and email on October 18, 2023.

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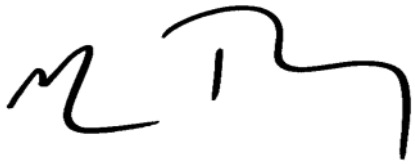

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STATE FARM FIRE & CASUALTY CO., Plaintiff, v. DR. ROBERT HOLE, M.D., DR. MICHAEL RUSSONELLA, D.O., AND NORTH JERSEY ORTHOPAEDIC AND SPORTS MEDICINE INSTITUTE, LLC, Defendants.	DOCKET NO.: A-2522-22 CIVIL ACTION ON APPEAL FROM SUPERIOR COURT OF NEW JERSEY, LAW DIVISION, ESSEX COUNTY DOCKET NO. ESX-L-3885-20 Sat Below: Hon. Robert H. Gardner, J.S.C.

REPLY BRIEF AND APPENDIX ON BEHALF OF ROBERT HOLE, M.D.

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LEGAL ARGUMENT

I. STATE FARM IS REQUIRED TO PROVE MORE THAN MERE ALLEGATIONS. (1T at 22:4 to 23:18).

In opposing Dr. Hole's appeal, State Farm ignores the plain language of the Policy. The Policy issued to Dr. Hole states:

> [t]his insurance does not apply to: 17. Personal And Advertising Injury caused by or at the direction of the insured with knowledge that the act would violate the rights of another and would inflict personal and advertising injury. (Da182)

The word "allege" does not appear in the exclusion whereas other exclusions in the Policy explicitly incorporate "allegations." For example, under the Pollution exclusion, the Policy specifically provides:

> 'Bodily injury' or 'property damage' arising out of the actual, *alleged* or threatened discharge, dispersal, seepage, migration, spill, release or escape of 'pollutants.' (Da179) (emphasis added).

Under the Aircraft, Auto or Watercraft exclusion, the Policy expressly provides: "This exclusion applies even if the claims *allege* negligence or other wrongdoing . . . ." (Da180) (emphasis added). Other exclusions in the Policy also include the word "allege" or "allegations." (See Da181, Provision 11(k); Da183, Provisions 19, 20).

Here, State Farm is attempting to apply the Personal and Advertising Injury exclusion based on allegations of tortious interference alleged by Dr. Russonella in the Underlying Action. That exclusion, however, does not include "allegations."

Thus, the Policy exclusion requires State Farm in this Declaratory Judgment Action to actually prove that the injury complained of by Dr. Russonella was "caused by or at the direction of" Dr. Hole and that Dr. Hole knew "the act would violate the rights of another and would inflict personal and advertising injury."

In addition, State Farm and Dr. Russonella have never proved that Dr. Hole committed tortious interference, and a judgment was never entered against Dr. Hole in the Underlying Action despite six years of litigation and discovery. Currently, the tortious interference claim against Dr. Hole remains unproven.

Moreover, separate and apart from what the Policy exclusion states, New Jersey law required the trial court to make findings regarding Dr. Hole's subjective intent when intent-based exclusions are at issue. See, e.g., SL Indus. v. Am. Motorists Ins. Co., 128 N.J. 188, 209 (1992) (remanding to determine whether the insured intended to cause the harms alleged). The trial court made no such inquiry.

State Farm's entire argument relies on unproven allegations, but New Jersey precedent requires more. See, e.g., Superior Integrated Sols. v. Mercer Ins. Co. of N.J., No. A-1027-18, 2020 N.J. Super. Unpub. LEXIS 2147, *23 (App. Div. Nov. 10, 2020) (citing SL Indus., 128 N.J. at 212) ("A claimant's mere allegation of intentional harm does not alone justify an insurer's refusal to provide a defense. In order to bring the insured's conduct within the exclusion there must be evidence that the insured subjectively intended to injure the claimant.").

Even State Farm recognizes that unproven allegations from the Underlying Action are insufficient (Pb16), but then attempts to avoid the holdings in Superior Integrated Solutions and SL Industries with convoluted arguments that try to distinguish these cases from the instant matter. This attempt should be rejected.

In analyzing an exclusion nearly identical to the instant matter, the Appellate Division explicitly held that to enforce such an exclusion, the insurer could not merely rely on the allegations in the complaint, but had to prove, among other things, that the insured subjectively intended to cause the complained injury. Superior Integrated Sols., 2020 N.J. Super. Unpub. LEXIS 2147, at *22. This Appellate Division made clear the analysis is not limited to allegations in the complaint. Id. at *14 (quoting SL Indus., Inc., 128 N.J. at 198). "Absent exceptional circumstances that objectively establish the insured's intent to injure, we will look to the insured's subjective intent to determine intent to injure." Voorhees, 128 N.J. at 185.[1]

Dr. Hole submitted proof that the alleged conduct did not cause any injury to Dr. Russonella or his practice. Besides Dr. Hole submitting a certification regarding his subjective intent, (Da202-04), St. Mary's admitted that Dr. Hole did not impact Dr. Russonella's relationship with St. Mary's. (Da242 at 18:3-23; Da246 at 34:24 to 35:3). In addition, Dr. Russonella admitted that he could not prove damages when

[1] Dr. Hole does not have access to the policy to determine if the word "allege" or "allegation" was used in the exclusion involved in Superior Integrated Solutions. Even so, the Appellate Division held that more than mere "allegations" was required.

he voluntarily dismissed the Underlying Action on the eve of trial on July 25, 2023 – after six years of litigation.

State Farm also argues that Superior Integrated Solutions does not apply because the underlying claim in that case was a strict liability tort. (Pb16). However, this is inaccurate because the claimant in Superior Integrated Solutions also filed a tortious interference claim, Id. at *7, and the court's analysis of the policy exclusion in that case was in connection with "intentional injuries." Id. at *20-25.

State Farm's attempt – for the first time – to argue that SL Industries requires affirmation of the trial court's grant of summary judgment based on the kind of injuries that a party suffers is also misguided. (Pb17-18). Specifically, Dr. Russonella never pled in the Underlying Action what specific injury he actually suffered. For example, Dr. Russonella never pled in the Underlying Action that Dr. Hole's tortious interference impacted a specific relationship that Dr. Russonella had with a third party and what injury he actually suffered regarding that third party.

In any event, the trial court never conducted a Karlinski analysis, which State Farm now relies on, to compare the injuries that Dr. Russonella claimed he suffered and Dr. Hole's subjective intent. See Prudential Prop. & Cas. Ins. Co. v. Karlinski, 251 N.J. Super 457 (App. Div. 1991).

II. THE POLICY EXCLUSIONS DO NOT APPLY TO BAR COVERAGE FOR ALLEGATIONS OF A TORTIOUS INTERFERENCE CLAIM. (1T at 22:4 to 23:18).

As noted above, the Personal and Advertising Injury exclusion does not apply to allegations. Even assuming arguendo that the exclusion applies to allegations, the Appellate Division should reject State Farm's argument. State Farm has finally acknowledged in its opposition brief that the exclusion in the Policy focuses on the "intent to injure" and not the "intent to interfere."[2]

As stated in Dr. Hole's initial brief, the intent required in tortious interference claims is an "intent to interfere" and not an "intent to injure." As a result, tortious interference claims do not fall within the Policy's exclusion. Faced with this dilemma, State Farm has now pivoted and argues for the first time that under Printing Mart-Morristown v. Sharp Electronics Corp., "malice" is defined as inflicting the harm intentionally and without justification or excuse. 116 N.J. 739, 751 (1989). However, subsequent New Jersey cases quoting Printing Mart define "malice" in a tortious interference claim to only require "a showing not only that the *interference*

[2] By doing so, State Farm also acknowledges that North Plainfield Board of Education, a non-binding federal district court case, does not apply to this issue. No. 05-4398 (MLC), 2008 U.S. Dis t. LEXIS 39555 (D.N.J. 2008). Instead, SL Industries, 128 N.J. at 209 and Superior Integrated Solutions, 2020 N.J. Super. Unpub. LEXIS 2147 apply. The Supreme Court held in SL Industries that in applying policy exclusions that disclaim coverage based on the ill intent of the insured, the court's analysis must focus on "the insured's intent *to cause the injury* rather than on its intent to commit the act that resulted in the injury." 128 N.J. at 207.

was done '*intentionally'* but also that it was 'without justification or excuse.'" E. Penn Sanitation, Inc. v. Grinnell Haulers, Inc., 294 N.J. Super. 158, 179-80 (App. Div. 1996) (emphasis added); Dimaria Constr., Inc. v. Interarch, 351 N.J. Super. 558, 567 (App. Div. 2001) (defining malice as intentional interference).

Nevertheless, even if a tortious interference claim included an "intent to injure," Dr. Russonella did not assert such allegations in the amended complaint. All of the allegations in the Underlying Action that State Farm relies on were made in support of Dr. Russonella's defamation claim and not Dr. Russonella's tortious interference claim. (Da72-Da73, compare Count I to Count II). For example, State Farm routinely argues that Dr. Russonella generally alleged in his tortious interference claim that "Dr. Hole knowingly made these untrue statements with the 'malcious[] inten[t] to injure . . . [Dr. Russonella]'s . . . practice[,], good name and profession' by causing Dr. Russonella 'infamy and disgrace." (Da61). That allegation, however, as well as the other allegations relied on by State Farm, were alleged by Dr. Russonella in his defamation claim, and not in Dr. Russonella's tortious interference claim. (Da72-Da73, compare Count I and Count II). Indeed, these same allegations were raised by Dr. Russonella in his initial complaint, which only asserted a defamation claim and was ultimately dismissed. (Da60a-63a)

III. DR. HOLE DID NOT WAIVE HIS AMBIGUITY ARGUMENT. (1T at 22:4 to 23:18).

Instead of disputing Dr. Hole's arguments regarding ambiguity, State Farm

simply states that the issue has been waived. (Pb19-20). However, as made clear in the initial brief, the exclusions at issue are susceptible to multiple interpretations, which is why there are two cases in New Jersey that required interpretation of those provisions. Superior Integrated Sols., 2020 N.J. Super. Unpub. LEXIS 2147, at *22; SL Indus., Inc., 128 N.J. at 198. Coverage is only precluded when an injury is caused by the insured with "*the knowledge* that the injury would result" or arises out of the publication of material published "*with knowledge* of its falsity." (Da16-17). A reasonable insured person may easily interpret those exclusions to not apply to tortious interference claims or allegations of tortious interference. See Cumberland Mut. Fire Ins. Co. v. Murphy, 183 N.J. 344, 351 (2005) (holding that a provision which simultaneously did not require injury to be "expected or intended" but still required "willful harm" was ambiguous).

State Farm cannot argue on one hand that the subject exclusions are clear and unambiguous to an insured reading the Policy, but then rely on case law such as North Plainfield to attempt to interpret the exclusions.

IV. AS A MATTER OF PUBLIC POLICY, STATE FARM CANNOT DISCLAIM COVERAGE FOR A CLAIM BASED ON THE SAME SET OF FACTS THAT REQUIRES COVERAGE. (1T at 22:4 to 23:18).

State Farm argues that Dr. Hole failed to provide any legal support for its position. However, as explained in Dr. Hole's initial brief, Dr. Hole relies on a case that State Farm exclusively relies on -- North Plainfield. (Pb20-21). In North

Plainfield, the District Court applied a breach of contract policy exclusion to numerous tort claims because the tort claims were based on the same set of facts as the breach of contract claim. 2008 U.S. Dist. LEXIS 39555 at *44-45. In this case, State Farm, as it has already admitted, would have been required to provide coverage for a defamation claim. When the trial court dismissed the defamation action, Dr. Russonella simply re-casted the same facts into a tortious interference claim. Indeed, Dr. Russonella used the same allegations to support his defamation and tortious interference claims. (Da22 at ¶¶ 4 to 7, titled "Factual Background.")

V. MATERIAL ISSUES OF FACT EXIST REGARDING DR. HOLE'S SUBJECTIVE INTENT. (1T at 22:4 to 23:18).

State Farm's argument regarding this issue is, again, misguided. State Farm continually focuses on the merits of the Underlying Action. (Pb21-22). Although Dr. Hole strongly feels that the Underlying Action was frivolous – demonstrated by Dr. Russonella's last minute dismissal, Dr. Hole's argument as it pertains to this issue is that New Jersey law required the trial court to inquire as to Dr. Hole's subjective intent. See, e.g., Superior Integrated Sols., 2020 N.J. Super. Unpub. LEXIS 2147, at *23 (citing SL Indus., Inc., 128 N.J. at 212). Dr. Hole's intention was to ensure hospital staff and patient safety along with compliance with state and federal laws, including anti-kickback laws and HIPAA, and not to intentionally or maliciously interfere with Dr. Russonella's relationship with St. Mary's. Indeed, St. Mary's confirmed that Dr. Hole did not impact its relationship with Dr. Russonella. (See

Da242 at 18:3-23; Da246 at 34:24 to 35:3).[3] State Farm provided no undisputed facts that shed any light on Dr. Hole's subjective intentions, and State Farm did not proffer any evidence that Dr. Hole intended to inflict an injury on Dr. Russonella. In fact, State Farm has not even identified the relationships that Dr. Hole allegedly interfered with and the impact of that interference to even conduct a Karlinski analysis.

Additionally, State Farm fails to address that, during the duration of this litigation, the parties have conducted themselves with the understanding that the Underlying Action is likely to be dispositive of the issues raised in the Declaratory Action. This is supported by State Farm's conduct, where multiple extensions and adjournments were obtained with the consent of all parties to allow for the conclusion of the Underlying Action so the parties can obtain a better understanding of the basis for Dr. Russonella's claims against Dr. Hole.

VI. DR. HOLE DETRIMENTALLY RELIED ON STATE FARM TO PROVIDE HIS DEFENSE IN THE UNDERLYING ACTION. (Raised below, Not Decided)

Dr. Hole had no reason to know that State Farm would deny him coverage. State Farm covered the Underlying Action for several years even though State Farm claims to have reviewed the matter on two occasions – July 20, 2017 and September 25, 2017 – and never denied coverage. Yet, State Farm now argues that the tortious

[3] Indeed, reporting misconduct was an expected function of medical professionals at St. Mary's. (See Da245 at 31:10-20).

interference claim clearly falls within the subject exclusion, but State Farm fails to explain why it waited several years to take action on such a "clear" position.

In addition, the reason State Farm puts forth as to why it waited to disclaim coverage are, at best, disingenuous. State Farm claims that Dr. Russonella's defamation claim was covered under the Policy because it was different from the tortious interference claim since defamation does not require an intent to injure. However, if that were the case, State Farm should not have sent a reservation of rights letter in July 2017 during a time when the initial complaint only asserted a claim for defamation. State Farm then filed the current Declaratory Action, which disclaimed coverage for the entire amended complaint, including the re-pled defamation claim, which is now contrary to its own position.

While State Farm alleges to have issued a reservation of rights letter on July 20, 2017, regarding the initial complaint in the Underlying Action, Dr. Hole did not recall receiving the letter when it was actually presented to him at his deposition. (Da208 at 14:2-7).[4] In any event, State Farm has provided no proof to show the letter was actually sent or received despite the letter indicating it was sent certified mail. This is a disputed material fact that does not support the grant of summary judgment in State Farm's favor.

[4] Dr. Hole's testimony identified by State Farm in its opposition brief appeared to be referring to the early letters that State Farm sent in July 2017.

Moreover, after Dr. Russonella filed the amended complaint in the Underlying Action, State Farm alleges to have re-sent the same reservation of rights letter on September 25, 2017, proof of which was not produced until State Farm filed its reply papers in further support of its motion for summary judgment. Obviously, no discovery could have been taken on whether the letter was actually received, and Dr. Hole testified at his deposition that he was not familiar with the letter. (Da210 at 23:12-17). At the very least, the trial court should have conducted a Rule 104 hearing to determine the admissibility of the September 25, 2017 letter.

Mary Villano-Dye submitted a certification on behalf of State Farm in connection with State Farm's reply brief in further support of its summary judgment motion. Her certification stated:

> On September 25, 2017, I mailed correspondence to Dr. Hole by way of regular and certified mail. The correspondence advised Dr. Hole that the Reservation of Rights letter of July 20, 2017 (which was enclosed for his reference) was applicable to the Amended Complaint of Plaintiffs. (Exhibit A is a true and correct copy of State Farm's September 25, 2017 correspondence and July 20, 2017 correspondence attached thereto).

(Da294). The July 20, 2017 letter referenced in her certification is not attached to the September 25, 2017 letter but, instead, appears first in the Exhibit. (Da296 to Da301). In addition, the July 20, 2017 contains the statement "Error! Bookmark not defined" and is not executed. Dr. Hole previously testified that he did not recall receiving the July 20, 2017 letter and State Farm never provided proof that it actually

sent that letter. In addition, even if Dr. Hole received the September 25, 2017 letter with the July 20, 2017 letter attached (which he denies), no reasonable person would conclude that it was a legitimate letter when the words "Error! Bookmark not defined" appeared on the letter. Under such circumstances, State Farm should have been estopped from disclaiming coverage

Moreover, the September 25, 2017 letter merely stated that the July 20, 2017 letter applied to the amended complaint. However, the July 20, 2017 letter only applied to the defamation claim set forth in the initial complaint that Dr. Russonella filed in the Underlying Action. The initial complaint did not contain any other claim but a defamation claim. Therefore, State Farm sending a September 25, 2017 letter that merely references the July 20, 2017 letter could only mean that the September 25, 2017 letter applied only to the re-pled defamation claim asserted in the amended complaint – not the tortious interference claim. As noted by State Farm, the re-pled defamation claim remained in the Underlying Action until the time the trial court ruled on a summary judgment motion in June 2022.

In addition, State Farm is not entitled to the presumption articulated by SSI Med. Servs., Inc. v. Dep't of Human Servs, 146 N.J. 614, 621 (1996). Based on her certification, it appears that Ms. Villano-Dye was responsible for communicating with and sending letters to Dr. Hole, including the July 20, 2017 letter. (Da294 at ¶ 2). She never certifies, however, that the July 20, 2017 letter was actually sent to Dr.

Hole. As to the September 25, 2017 letter, Dr. Hole did not execute the return receipt for that letter, and State Farm did not depose "Ashley" – the person whose name appears on the return receipt – to determine if she executed the return receipt for the letter or that she provided the letter to Dr. Hole.

It is "universally agreed" that, when an insurer takes control of the defense of an action, disclaiming coverage is inappropriate "unless the carrier has reserved the issue of its liability by appropriate measures." Merchs. Indem. Corp. v. Eggleston, 37 N.J. 114, 126-27 (1962). If an insurer wants to "control the defense and simultaneously reserve a right to dispute liability, it can do so only with the consent of the insured." Id. In order to reserve the right to dispute liability, a carrier must "fairly inform the insured that the offer [to defend] may be accepted or rejected." Id.

Additionally, State Farm refutes that Northfield Insurance Company applies because in that case, the reservation of rights letter was unclear about whether the insured could reject the offer of a defense. Northfield Insurance Co. v. Mt. Hawley Ins. Co., 454 N.J. Super. 135, 142 (App. Div. 2018). However, the issue in the instant matter is whether State Farm even sent letters that adequately inform Dr. Hole that State Farm could maintain control of the defense while simultaneously reserving its right to dispute liability.

Based on these circumstances, the Policy "should be construed to reflect the reasonable expectations of" Dr. Hole, and reject State Farm's arguments. See

Voorhees, 128 N.J. at 175.

VII. DR. HOLE'S COUNTERCLAIMS SHOULD BE SUSTAINED BECAUSE HE WAS ENTITLED TO COVERAGE UNDER THE POLICY. (Da1-2).

For all the reasons set forth above and in the initial brief, State Farm was required to defend Dr. Hole in the Underlying Action and, therefore, his counterclaims should not have been dismissed.

VIII. THE TRIAL COURT OPINION DOES NOT CLEARLY STATE ITS REASONS FOR GRANTING SUMMARY JUDGMENT. (Not Raised Below).

The trial court did not make it clear which allegations in the Underlying Action were found to fall within the Policy exclusion. (See generally 1T at 22:4 to 23:18.). The trial judge only stated he "believe[d] in this particular case the allegations made here do fall within the exclusion." (1T at 22:21-25). It also did not address numerous arguments made by Dr. Hole, as set forth above.

"When a trial court issues reasons for its decision, it 'must state clearly [its] factual findings and correlate them with relevant legal conclusions, so that parties and the appellate courts [are] informed of the rationale underlying th[ose] conclusion[s].'" Avelino-Catabran v. Catabran, 445 N.J. Super. 574, 594-95 (App. Div. 2016) (alterations in original). Failure to do so may result in a remand for a further articulation of the trial court's reasons for deciding as it did.

Dr. Hole maintains that the trial court's decision was reversible error, and

therefore should be reversed in its entirety and remanded for further proceedings. However, in the event this Court determines it cannot decide this appeal on the statement of reasons read into the record on March 17, 2023 (see generally 1T at 22:4 to 23:18), Dr. Hole requests that the Court remand to allow the trial court to submit a more comprehensive statement of reasons.

CONCLUSION

For the reasons set forth above, Dr. Hole respectfully requests the Court reverse the trial court's determination on summary judgment.

Respectfully submitted,

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Date: November 29, 2023

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