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ALSOL CORPORATION, Plaintiffs/Appellants, v. STATE OF NEW JERSEY, DEPARTMENT OF ENVIRONMENTAL PROTECTION, Defendants/Respondents.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION APPELLATE DOCKET NO.: A-002758-22 CIVIL ACTION Appeal of the Opinion and Orders of the Hon. Robert J. Jones, J.S.C., entered March 30, 2023. Sat Below: Hon. Robert J. Jones, J.S.C.; Municipal Court Docket No.: MA-7-2022

APPELLANT'S AMENDED BRIEF

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PROCEDURAL HISTORY AND STATEMENT OF FACTS[1]

This action was commenced on or about March 15, 2017 by the State of New Jersey through the Department of Environmental Protection, by filing of a "Complaint" in the form of a Municipal Ticket (similar to those used for parking violations) with the Milltown Municipal Court against Defendant/Appellant, Alsol Corp ("Alsol"). The ticket contained no allegations except a cursory statement: "Failure to Remediate the property at BL 58 Lot 1.01 (Ford Avenue & Main Street)". (Pa 1)

The State alleges that there was a discharge of a hazardous materials in violation of the New Jersey Spill Compensation and Control Act (N.J.S.A. 58:10-22 *et seq.*) caused by a third party known as Cobra Enterprises ("COBRA") on property allegedly owned by Defendant, Alsol, in the Borough of Milltown. Two weeks after filing the ticket, on March 27, 2017, the State submitted to the Milltown Municipal Court Judge a letter in which it conceded that Alsol was not being charged as the alleged discharger of a hazardous substance, but solely as the alleged owner of the property on which the discharge supposedly occurred. The Attorney General's March 27, 2017 letter stated:

> N.J.S.A. 58:10-23.11g(c)(1) makes Alsol, as the owner of the Property when the discharge occurred, and COBRA,

[1] Because the procedural history and factual background are so closely interrelated, we have combined them for the convenience of the Court.

> as the person who has discharged a hazardous substance, the persons responsible for conducting a remediation. (Pa 3)(emphasis added).

The sole basis of the State's claim against Alsol is that mere ownership of a property on which an alleged spill of a hazardous substance occurred automatically makes the property owner a "person in any way responsible for the discharge" under the Spill Act[2], regardless of whether the property owner had anything to do with the discharge.

On May 5, 2021, Alsol filed a motion to dismiss the State's complaint with the Milltown Municipal Court. In its motion papers, Alsol cited two grounds for the dismissal of the State's Complaint. The first was that Alsol was not strictly liable for the clean-up of the alleged spill merely because it was the alleged owner of the property on which the spill allegedly occurred. The second grounds set forth in Alsol's motion for the dismissal of the Complaint was that the State was precluded under the Doctrines of Judicial Estoppel and the Square Corners Doctrine from taking the position that mere ownership of a property on which a discharge of hazardous substances has occurred imposes liability on the property owner under the Spill Act.[3]

---

[2] "Spill Act", as said term is used herein, refers to the aforesaid New Jersey Spill Compensation and Control Act (N.J.S.A. 58:10-23.11 *et seq.*). Alsol has never conceded that there was a discharge of hazardous substances on the property on which the State claims there was a spill.

[3] As we discuss below, the Municipal Court dismissed the State's Complaint based on Alsol's first argument that it was not responsible for the alleged spill merely because it allegedly owned the property on which the alleged discharge occurred. The Municipal Court Judge, did not rule on Alsol's Judicial Estoppel claim.

The Milltown Municipal Court Judge transferred the case to the Sayreville Municipal Court due to a possible conflict of interest that the Milltown Municipal Court Judge believed she had. After considering the arguments of the parties in their papers, as well as hearing oral argument on April 14, 2022, the Sayreville Municipal Court Judge, the Honorable James J. Weber, J.M.C., dismissed the State's complaint on grounds that mere ownership of the property on which an alleged spill occurred did not subject Alsol to liability under the Spill Act. Judge Weber entered his written decision on April 14, 2022. (Pa 79)[4]. The State appealed Judge Weber's decision to the Law Division, Middlesex County on May 4, 2022. (Pa 24).

The Honorable Robert J. Jones, J.S.C., a Law Division Judge in the Middlesex Vicinage, presided over the State's appeal. Judge Jones found that the State had not established a factual record on which Judge Jones believed he could make any rulings because the "allegations" set forth in the State's March 27, 2017 letter contained only legally incompetent hearsay. In his Remand Order of July 5, 2022, Judge Jones found:

> The complaint-summons only includes the name and address of the defendant, the name and address of the complaining witness, a summary of the type of offense, and a statutory reference to the offense, all of which were certified to by the complaining witness. It does not contain the factual basis for the offense. The letter to the court is not certified and was written by Deputy Attorney General

[4] The following hearings were held: hearing before Judge Weber on April 14, 2022 ("1T"), hearing before the Honorable Robert J. Jones, J.S.C. on July 1, 2022 ("2T"), hearing before Judge Weber on October 27, 2022 ("3T"), and hearing before Judge Jones on March 37, 2023 ("4T").

> Robert G. Lamilla – not someone with firsthand knowledge of the facts leading to the charge. (Pa 34).

Judge Jones remanded the case to Judge Weber to develop a factual record requiring the following:

> On remand, the DEP is required to submit an affidavit from a witness with firsthand knowledge containing its factual allegations. *See* Michal S. Richmond & Keith J. Burns, N.J. Municipal Court Practice, 324 (Gann, 2022) (citing Rule 7:7-2(a) for the proposition that "[t]he municipal court…has the discretion to require oral testimony or affidavits in support of or in opposition to any motion"). The municipality should amend its decision once the record is properly developed. The deadline to complete the remand is 45 days. This court retains jurisdiction. (Pa 35)

The State submitted its alleged basis for its complaint to Judge Weber on August 4, 2022. The State's submission included affidavits from two of its employees. (Pa 36 – Pa 78). On August 16, 2022, Alsol filed a response to the State's submission to Judge Weber. Alsol argued, as it had previously done throughout the entire six years of this case, that (1) the State had presented no factual basis that Alsol owns the property on which the alleged spill occurred; and (2) the State has presented no factual basis that there was a spill of hazardous substances which would implicate the Spill Act.

After reviewing the responsive papers submitted by Alsol to Judge Weber, the State claimed that it had determined that Alsol does not own the property on which the State alleges that a discharge of hazardous substances occurred. Since the State's

sole basis for its claim against Alsol was that Alsol was the owner of the property on which it believed a spill occurred, the State asked Judge Weber to dismiss the complaint without prejudice. (Pa 118).

The problem with the State's request was twofold. First, Judge Weber had already rendered his decision on the merits of the case and already had dismissed the State's Complaint on the merits before the State's request for dismissal.[5] Second, even though the State admitted it had no factual basis for naming Alsol as a defendant in this action, the State, nevertheless inexplicably sought a dismissal *without prejudice*.

At the hearing on remand before Judge Weber on October 27, 2022, Judge Weber denied, on the record, the State's request for a retroactive dismissal of the case. On November 14, 2022, the State filed a second civil appeal challenging Judge Weber's denial of the State's request for a retroactive dismissal of the case. Subsequent to the filing by the State of its second civil appeal, Judge Weber issued a written decision on December 7, 2022 in which Judge Weber confirmed his ruling from the bench denying the State's application for retroactive dismissal of its Complaint. Judge Weber further reaffirmed his prior decision of April 14, 2022 in which he found that Alsol was not a responsible party under the Spill act solely by virtue of its alleged ownership of a property on which an alleged Spill occurred.

[5] In other words, the State was asking the Court to dismiss a case that had already been dismissed.

On January 9, 2023, Judge Weber entered an Order (Pa 146) that confirmed that the State's application for retroactive dismissal of its complaint was denied for the reasons set forth on the record at the October 27, 2022 hearing and in Judge Weber's December 7, 2022 written opinion.[6] (Pa 142).

After the submission by the parties of additional papers to the Law Division on the two appeals, Judge Jones held another hearing on March 17, 2023. In its papers filed with Judge Jones, Alsol argued against retroactive dismissal of the State's Compalint and further argued that, if Judge Jones were inclined to grant the State's request, that he do so, as authorized by the Court Rules, conditioned on an award of legal fees to Alsol based on Alsol having had to defend a baseless lawsuit for six years. Judge Jones entered an Order and written Decision dated March 30, 2023 (Pa 178) in which he dismissed with prejudice the State's Complaint against Alsol solely by reason of the fact that the property owner (Alsol) did not own the property on which an alleged spill occurred. Judge Jones further dismissed the State's second appeal which appealed Judge Weber's October 27, 2022 decision to not allow the State to retroactively dismiss the previously dismissed Complaint, based on the fact that he dismissed the Complaint against Alsol with prejudice relating to the first appeal. (Pa 178).

Alsol filed its Notice of Appeal on May 12, 2023.

[6] Judge Weber's order was entered on January 9, 2023 but was inadvertently dated January 9, 2022.

LEGAL ARGUMENT

POINT ONE

THE LAW DIVISION'S DECISION TO DISMISS THE STATE'S COMPLAINT ON GROUNDS THAT THE STATE HAD NO FACTUAL BASIS TO BRING AN ACTION AGAINST ALSOL BECAUSE ALSOL WAS NOT THE OWNER OF THE PROPERTY ON WHICH AN ALLEGED SPILL OF A HAZARDOUS SUBSTANCE OCCURRED CONTAINS INCONSISTENCIES, DICTA, AND AN ERRONIOUS VIEW OF THE LAW THAT SHOULD BE ADDRESSED BY THIS COURT. (PA 178 – PA 182).

Judge Jones dismissed the State's Complaint based on the fact that Alsol does not own the property on which the State alleges a spill of hazardous substances occurred. In other words, Judge Jones resolved the case because the State determined Alsol did not own the property that was the subject matter of the State's claim. Despite Judge Jones's holding, Judge Jones nonetheless presented his view on the law as to whether a property owner is strictly liable for a spill that occurs on its property. In this context, Judge Jones stated that he disagreed with the Municipal Court's legal conclusion that mere ownership of a property on which a spill allegedly occurs does not subject the property owner to strict liability under the Spill Act.

Judge Jones "opined":

> The law is clear: a property owner is strictly liable for a spill that takes place while it owns the property. Fault is not relevant. That being the case, I disagree with the municipal court. Alsol could be liable for the spill if the spill took place on its property.

> But Alsol does not own the property. DEP acknowledges this. Nothing in the law allows DEP to hold Alsol responsible for property it doesn't own. What's more, even if Lawrence Berger has some type of interest in both Alsol and in SB Milltown Industrial Realty Holdings, LLC, as the DEP suggest, that is irrelevant. Corporations and their shareholders are distinct entities and are not responsible one another's liabilities. *Ventron*, 94 N.J. at 500. (Pa 159).

Judge Jones's "ruling" that property owners are strictly liable for discharges of hazardous substances on their property, regardless of the circumstances or whether the property owner had anything to do with the discharge of hazardous substances, is clearly dicta. Dicta in a judicial opinion refers to a comment, suggestion, or observation made by a judge that is not necessary to resolve the case, and as such, it is not legally binding on other courts but may still be cited as persuasive authority in future litigation. See, e.g., *Cornell Legal Information Institute,* definitions of legal terms, law.cornell.edu (2023). It is clear that Judge Jones's purported opinion on strict liability under the Spill Act for property owners on which an alleged discharge of hazardous substances occurred was neither needed, nor necessary, to resolve the case.

As a preliminary matter, we seek a ruling from this Court that Judge Jones's statement has no precedential effect and is not legally binding on any other court for the reasons set forth below.

Judge Jones's dicta is particularly dangerous because it constitutes what legal scholars call "judicial efficiency dicta". See *Judith M. Stinson, Preemptive Dicta: The Problem Created by Judicial Efficiency,* 54 Loyola L. Rev. 587 (2021). "Judicial efficiency dicta are statements made in judicial opinions about issues involved in the case that are likely to present themselves in the future, but these statements are not necessary for the outcome of the particular case before the court." *Stinson, supra,* at 589. The problem with judicial efficiency dicta is that such statements may result in a prejudicial impact on future courts that will likely address the issue espoused in the dicta in a subsequent related case between the parties:[7]

> Because judicial efficiency dicta are unnecessary to the outcome of the case, these statements…exceed courts' authority by having judges essentially legislate the results in future disputes not before them. These statements are also…more likely than actual case holdings to be incorrect because they do not impact the result. In addition to suffering from the same problems as other forms of dicta, the conventional wisdom suggesting that this type of dicta is less problematic than traditional obiter dicta ignores one key fact: judicial efficiency dicta essentially bind judges in future proceedings.
>
> When courts espouse these dicta in an attempt to provide guidance to the parties and future courts, the consequences are significant. The first problem is that subsequent courts are not likely to identify these statements as dicta and will therefore treat them as

[7] Although it is clear that Alsol never owned the property on which the Spill occurred, it is possible that affiliates of Alsol did.

> though they are binding—even though the issues were never properly before the court. Judges and scholars regularly comment on the difficulty in distinguishing between a court's holding and dictum, but judicial efficiency dicta are even more difficult to identify because they seem to be "rules" and often look like the considered judgment of the court, as opposed to the type of off-handed comments more easily labeled as dicta.
>
> And even if the subsequent court identifies the statements as dicta and therefore recognizes it has the power to ignore them, the court also would recognize that doing so would be unwise. Courts will be reluctant to deviate from the espoused dicta in part because individuals may have relied on those statements, and even though those statements are not technically binding, lower courts may simply defer to higher courts and will be loath to rule contrary to the previous dicta because doing so will very likely result in reversal. Therefore, because judicial efficiency dicta are most likely to cut off debate, stunt the natural progression of the law, and become binding, this "preemptive dicta"—dicta espoused for the purpose of judicial efficiency—is, in fact, a very troublesome form of dicta. *Stinson, surpa,* at 590-591.

What Judge Jones did by attempting to make a "holding" on the issue of strict liability of property owners under the Spill Act, is further known as "judicial dicta planting":

> All dicta exceed the courts' authority. Most dictum is likely unintentional, but some instances of judicial efficiency dicta may be what has been described as "judicial dicta-planting," whereby judges intentionally "plant dicta into their opinions to subtly influence the law's development." Judicial dicta-planting "will continue precisely because it is effective."

> Dicta exceed courts' authority even when the reasons for espousing the dictum are understandable and the result of good intentions. Our common law system demands an incremental approach to the law. The law develops progressively, in steps, from one issue to another until, over time, broader principles—rules— emerge. This occurs within the context of courts' mandate to resolve particular, individual cases. Espousing dictum that circumvents or expedites that natural progression of the law is beyond the authority of the courts. Judges must therefore be especially wary of exceeding their authority. And in appropriate situations, legislatures can intervene if there is a will to change the law that is developing in the courts. Because the statements are not needed to resolve the case or controversy before the court, they are not necessary to the result and a court exceeds its authority by espousing dictum, whether for judicial efficiency purposes or otherwise. *Stinson, supra* at 597.

The risk that needs to be avoided occurs when dicta is followed by a subsequent court in the same or a related matter is clear:

> That dictum becomes especially problematic when it is blindly followed by a subsequent court. In that instance, the earlier court has exceeded its judicial authority, and the subsequent court has abdicated its judicial authority. Separation of powers principles dictate that courts are empowered to resolve the cases before them, and legislatures are empowered to enact prospective laws. Despite judges not having legislative powers, when they control future disputes with their dicta, they are for all practical purposes legislating. In addition to legislatures being the appropriate body to enact prospective laws, legislatures occupy a better position in which to do this. They can hold hearings, hear from a variety of experts, and seek broad input from an array of stakeholders. They can consider future disputes beyond the confines of a narrow case that may come before a particular judge

> based on one controversy, where the information presented is specifically limited to that case. *Stinson, supra* at 598.

Judge Jones's attempted holding on an important matter on the interpretation of the Spill Act is a blatant attempt to legislate in order to control the decisions of a future court, and such action should be rebuked by this Court. Another important reason for the importance of rebuking Judge Jones's dicta (i.e. his attempted holding on the law in order to control future proceedings in this case) is that dicta is generally unreliable in terms of its accuracy and appropriateness:

> In terms of accuracy, dictum is less likely to be accurate than the court's actual holding. When judges espouse dicta—even for reasons of judicial efficiency, and even when the court has actually considered the issue—they are simply more likely to be inaccurate because the statements have no impact on the outcome of the case. "[W]hen courts declare rules that have no consequence for the case, their cautionary mechanism is often not engaged. They are far more likely in these circumstances to fashion defective rules, and to assert misguided propositions, which have not been fully thought through."
>
> Judicial efficiency dicta may, of course, be accurate. But the likelihood of a *more* accurate decision increases when the statements are essential to the outcome and the result of the full adversarial process, developing over time and tested at each turn. When dicta impede this considered development of the law, the resulting rules are less likely to be correct. *Stinson, supra* at 600-601.

The risk that Judge Jones's dicta will impact future litigation between appellant and respondent is more than theoretical. The State has filed a new lawsuit in the Law Division[8] based on the same facts and circumstances of the within action (i.e. the alleged spill that occurred in Milltown). There is little doubt that the State will cite to Judge Jones's dicta to influence the Judge in the newly filed case. We therefore respectfully ask this Court to rule that Judge Jones's dicta is not binding in any subsequent proceedings related to this case.

POINT TWO

JUDGE JONES'S PURPORTED RULING THAT PROPERTY OWNERS ARE STRICTLY LIABLE FOR DISCHARGES OF HAZARDOUS SUBSTANCES ON THEIR PROPERTY REGARDLESS OF THE CIRCUMSTANCES IS INCORRECT. (PA 178 – PA 182).

Section 58:10-23.11g(c)(1) of the Spill Act provides: "Any person who has discharged a hazardous substance or is in any way responsible for any hazardous substance" is strictly liable for cleanup and removal costs. There is no definition of the term "Any person who is in any way responsible for any hazardous substance" anywhere in the Spill Act.

As the basis for its only allegation against Alsol, the State alleged that "N.J.S.A. 50:10-23.11g(c)(1) makes Alsol, as the owner of the Property when the

[8] NJDEP, et al. v. SB Milltown Industrial Realty Holdings, L.L.C.; et al. MID-L-002227-23.

discharge occurred… the [person] responsible for conducting a remediation." (Pa 3).

As discussed below, this was the same argument rejected by the Honorable Douglas Wolfson in *N.L. Industries v. State of New Jersey,* 442 N.J. Super 428 (Law Division 2014), aff'd in *toto*, 442 N.J. Super 403 (App. Div. 2015), rev. on other grounds 228 N.J. 280 (2017), at the urging of the State of New Jersey.[9] Judge Wolfson concluded that mere ownership of the Property where the discharge of hazardous substances occurred does not, by itself, impose liability under N.J. S.A. 58:10-23.11g(c)(1). Judge Wolfson found that a property owner "who was not directly responsible for the discharge that occurred" needs a greater connection to the discharge (i.e. control over) to be liable under the Spill Act. *N.L. Industries, supra,* at 419.

Further, N.J.S.A. 58:10-23.11g(c)(1) does not provide that a person who owns a property when a discharge occurs on that property is a person "in any way responsible" for the discharge.

N.J.S.A. 58:10-23.11g(c)(1) does not make a person "who owns real property on which there has been a discharge" strictly liable for the discharge. The

[9] As discussed in Point Four below, when the State seeks to avoid liability under the Spill Act when a spill occurs on the State's property, it takes the position that ownership of the property is not sufficient for there to be any liability, but when the State seeks to impose liability under the Spill Act, it argues that alone property owners are strictly liable for spills on their property.

omission of any reference to a property owner in N.J.S.A. 58:10-23.11g(c)(1) is significant and demonstrates that the statute did not intend to make the owner of a property on which a discharge occurs during its ownership strictly liable for the clean-up and further supports the holding in *N.L. Industries.* If the Legislature intended for a property owner to be strictly liable for a clean-up for any discharge of hazardous substances occurring on its property during its ownership, it would have so provided.

We know this because just below in the very same section of the Spill Act (N.J.S.A. 58:10-23.11g(d)(2)), the Legislature provides that a "person… who owns real property" and acquired the property after there had been a discharge is not liable for the discharge under certain circumstances. The point is that when the Legislature wanted to include the concept of liability as a result of ownership of real property in the Spill Act, it expressly did so. The Spill Act does reference property ownership in the context of a person who acquired a property after a discharge occurred, and in such situations, depending on the circumstances, imposes (or does not impose) liability based on a number of factors including whether the owner was an "innocent purchaser".

In sum, the language of the Spill Act does not impose liability on a property owner, whose property experienced a discharge caused by a third-party discharger during the property owner's ownership, based solely on ownership of the property.

In *N.L. Industries*, the court accepted the State's position that mere ownership of a property on which a discharge of hazardous substances occurred did not make the State responsible for the discharge because the court ruled that more than ownership of the property on which the discharge occurred is needed for responsible person status and that control over the discharge is required for a party to be liable under the Spill Act. *N.L. Industries*, 442 N.J. Super. at 448-449. Judge Wolfson agreed with the State's then position and found that there must be more than ownership of the property on which a discharge of hazardous substances allegedly occurred and that there is a nexus requirement concerning "the distinctly separate question about holding liable a party who was not directly responsible for the discharge that had occurred, but who nevertheless had some control over the direct discharger in each matter". Id. at 448-449, quoting *New Jersey Department of Environmental Protection v. Dimant*, 212 N.J. 153, 176 (2012).

The State's argument succeeded in *N.L. Industries* because Judge Wolfson agreed with the State's then position and found that the Spill Act requires more than just ownership of the property on which the discharge occurred; Judge Wolfson required proof of control by the landowner for any liability to be asserted against the State for the discharge that emanated from the landowner' s property. *N.L. Industries v. State of New Jersey, supra,* 442 N.J. Super. at 447- 449.

As Judge Wolfson found in *N.L. Industries:*

> In determining whether a contributing party may be held liable, the New Jersey Supreme Court has set forth a two-prong nexus test. The first prong "requires some connection between the discharge complained of and the alleged *discharger*. " *Id.* (Emphasis in the original). The nexus requirement concerns "the distinctly separate question about holding liable a party who was not directly responsible for the discharge that occurred, but who nevertheless had some control over the direct discharger in each matter." Id. at 449 .

In denying summary judgment to the State, Judge Wolfson said:

> While the State may not be "directly responsible for the discharge that had occurred [it] nevertheless had some control over [Sea-Land] in each matter. Id. at 449. (brackets in original) .

If mere ownership of a property on which a hazardous discharge occurs renders the property owner strictly liable as "a person in any way responsible for the discharge under the Spill Act", Judge Wolfson would not have had to address the relationship between the actual discharger, the discharge itself and the property, or the level of control exercised by the property owner over the direct discharger.

The Appellate Division affirmed Judge Wolfson's decision, *in* toto, and stated:

> We have considered the arguments of the State in light of the facts and the law, and we affirm the order of the motion court substantially for the reasons set forth by Judge Douglas K. Wolfson in his thoughtful and erudite written opinion which accompanied the order. *N.L. Industries,* 442 N.J. Super. 403, 404 (App. Div. 2015) (emphasis added).

Judge Wolfson's decision that a property owner is not strictly liable for a spill of hazardous substances on its property without there being a further nexus to the property owner was reviewed by both this Court and the New Jersey Supreme Court. This Court not only affirmed Judge Wolfson's decision, it commended him on his thoughtful analysis. The New Jersey Supreme Court had the opportunity to reverse or comment on Judge Wolfson's analysis on strict liability of property owners under the Spill Act, but chose not to disturb that ruling.[10]

Judge Jones based his dicta on an incorrect interpretation of *Marsh v. New Jersey Department of Environmental Protection,* 152 N.J. 137 (1997).

The *Marsh* case involved a suit by an owner of a contaminated property seeking compensation from the New Jersey Spill Compensation Fund (the "Spill Act Fund") for clean-up costs with respect to liability for clean-up under the Spill Act.

After finding that "Consequently, ownership alone, even during a period when more than *de minimus* discharge occurs is not sufficient to make the owner liable", this Court ruled that the plaintiff, Marsh, was not entitled to compensation from the Spill Act Fund for clean-up costs. *Marsh v. New Jersey Spill Act Compensation Fund and Environmental Claims Administration*, 286 N.J. Super.

[10] The New Jersey Supreme Court in *N.L. Industries* reversed this Court on other grounds related to the Doctrine of Sovereign Immunity.

620, 629 (App. Div. 1996). This Court held that the recipient of a gift of contaminated property from a donor who knew of and contributed to the contamination was not entitled to compensation from the Spill Act Fund:

> We will not interpret the Spill Act to permit a property owner who has profited by contaminating or permitting the contamination of property to obtain public financing for cleaning up the pollution by the expedient of making a gift of the property to her daughter or other close family member. Id. at 632.

When the New Jersey Supreme Court reviewed this Court's decision in *Marsh*, the Supreme Court limited its decision to a determination of the circumstances under which a property owner is entitled to receive clean-up costs from the Spill Act Fund, as opposed to the circumstances under which a property owner is liable to a third party for clean-up costs under the Fund:

> This appeal concerns the right of one who has acquired property, without knowledge of the presence on the property of hazardous substances to seek reimbursement of the costs of remediation under the New Jersey Spill Compensation and Control Act, N.J.S.A. 58:10-23.11to-23.24. *Marsh v. Dept. of Environmental Protection Claims Administration Spill Compensation Fund*, 152 N.J. 137, 139 (1997).

The New Jersey Supreme Court described the case before it and this Court's decision below in the following terms:

> The panel would not interpret the Spill Act to permit a property owner who has profited by contamination or permitted the contamination of a property to obtain public financing for the cleanup of pollution by the expedient of

> making a gift of the property to a family member. Consequently, it held that a donee's right to recover reimbursement form the Spill Fund is no greater than the entitlement of a donor. *Marsh, supra*, 152 N.J. at 143-144.

The focus of the New Jersey Supreme Court's decision (and this Court's decision) was whether the plaintiff, Marsh, was entitled to reimbursement from the Spill Act Fund for clean-up costs associated with contamination which occurred prior to the ownership of property "gifted" to her by her mother. The New Jersey Supreme Court held that Marsh could not recover from the Spill Act Fund:

> The drafters of the pre-ISRA Spill Act clearly could not have intended that purchasers of property indifferent to the presence of contamination should be able to clean up their land with public funds. Id. at 149. (emphasis added).

The New Jersey Supreme Court went on to say:

> Whether DEP would exercise its discretion to impose personal responsibility on such a party to clean up past pollution is a different question from whether such a party may recover the costs of remediation from the Fund. Id. at 150. (emphasis added).

The New Jersey Supreme Court's holding in *Marsh* was clearly limited to circumstances under which a property owner can recover funds from the Spill Act Fund and, in the New Jersey Supreme Court's words, the Court did not decide when a property owner can be held liable to third parties under the Spill Act. The New Jersey Supreme Court recognized that these are two different issues, and

thus, the holding in *Marsh* is inapplicable to the issue of Spill Act liability of a third-party property owner in the case at bar.[11]

In *N.L. Industries* (decided some 17 years after *Marsh*), Judge Wolfson was aware of the New Jersey Supreme Court's decision in *Marsh* and, in fact, cited to it:

> The Spill Act was enacted in 1976 as a "pioneering effort by the government to provide monies for a swift and sure response to environmental contamination." *N.L. Industries, supra*, 442 N.J. Super. at 445-446 quoting *Marsh v. N.J. Dept. of Environ. Prot., supra*, 152 N.J. at 144.

Judge Wolfson must also have read *Marsh* as a case about a property owner's entitlement to monies from the Spill Act Fund, not a directive on when a property owner is liable under the Spill Act, or he would have to have dealt with *Marsh* in his opinion, further demonstrating that the State's reliance on *Marsh* in its opposition brief is misplaced.[12]

Judge Weber got it right in his analysis of *N.L. Industries* (Pa 81 – Pa 85):

> The Defendant's motion according to the State is tantamount to an application under New Jersey Court Rule 4:6-2(e), failure to state a claim upon which relief can be granted. The rule requires that court view with great liberty the facts as pled and that a case be dismissed only when there are no facts that would support a cause of action

[11] Unlike *Marsh*, the case at bar involves an alleged discharge of hazardous substances by a third party occurring several years after the Property was acquired by Alsol, and Alsol is not seeking compensation from the Spill Act fund.

[12] As discussed above, Judge Wolfson's decision on strict liability of property owners under the Spill Act (after having considered *Marsh*) was not disturbed by either this Court or the New Jersey Supreme Court.

against defendant. The case law is clear that "every reasonable inference will be accorded the Plaintiff" (in this case the State of New Jersey), in considering whether a complaint should be dismissed.

In the present case, the facts seem to be clear, even though no certifications or affidavits have been presented. Essentially there is no dispute that Alsol owns the affected land.[13] There is also no question that Cobra Enterprises, a contractor hired by Alsol, performed work in a negligent and careless manner which resulted in the spillage of a considerable amount of oil, some of which leaked into Farrington Lake.

The States position is that Alsol, regardless of the action of Cobra Enterprises, is responsible for the Spill under the New Jersey Spill Compensation and Control Act (Spill Act) (NJSA 58:10-23.11 to 23.24). In reviewing the Spill Act, the language of the act does not indicate that ownership of property alone is satisfactory to establish liability.

In reviewing N.J.A.C. 7:26c-2.3(a)-Failure to remediate, the language there is similarly devoid of language that would ascribe responsibility to a landowner simply due to ownership of the land. In fact neither the NJSA 58:10-23.11 et-seq., or N.J.A.C. 7:26 attribute strict liability to a landowner.

The defendant's reliance on Judge Wolfson decision in N.L. Industries 442 N.J. Super. 428 (Law Div., 2014), afff'd in toto, 442 N.J. Super 403 (App. Div. 2015) is not misplaced. Perhaps the clearest decision of responsibility under the Spill Act was provided by Judge Wolfson in his Law Division opinion, and which was later accepted by the Appellate division.

[13] It was later determined that Alsol did not own the land as discussed above.

Judge Wolfson's opinion which was praised by the Appellate Division in its affirming decisions meticulously addressed responsibility of landowners and their responsibility under the Spill Act.

In his decision, Judge Wolfson accepted the moving parties argument that "Where no action or omission of the State (owner of the land) is directly responsible for a discharge, the State should not be liable merely because of a discharged emanated from the land it owns, N.L. Industries v. State of New Jersey, 442 N.J. Super 428 (Law Div. 2014) at 447. (Emphasis Added).

The court found that in the case of a discharge more than ownership was needed to determine the responsibility of a person and that control over the discharge is a requirement of a person to be responsible under the Spill Act. N.L. Industries at 448-449.

Judge Wolfson applied the nexus standard to address the question "more than ownership" which standard was set forth by our Supreme Court using a two prong tests to find a sufficient "nexus".

In determining whether a contributing party may be held liable, the New Jersey Supreme Court's nexus test requires a determination a connection with the discharge and control. Specifically, the first spring "Requires some connection between the discharge complained of and the alleged discharger." (Emphasis in the original). The nexus requirement concerns "the distinctly separate question about holding liable a party who was not directly responsible for the discharge that had occurred, but who nevertheless had some control over the direct discharger in each matter." The second prong is that "[a] nexus also must be demonstrated to exist between the discharger for which one is responsible – in any way – and the contaminated site for which cleanup and other related authorized costs are incurred."

The focus of all decisions where the "person" is held liable centers on the direct actor and sets forth that the responsible person will be strictly liable. The New Jersey Supreme Court in the Appeal of the N.L. Industries case at 228 N.J. 280 (NJ 2017) stated that "In 1976, the New Jersey Legislature enacted the Spill Act. L. 1976, c. 141 (codified at N.J.S.A. 58:10-23.11 to 23.24). The innovative nature and breadth of that enactment has been examined by this Court before. See, e.g., Morristown Assocs. v. Grant Oil Co., 220 N.J. 360, 364-65, 106 A.3d 1176 (2015)(collecting cases)."

The court concluded further that:

"from its origin, the Act provided that "any person" responsible for a discharge of a hazardous substance into State waters or onto lands leading to those water "shall be strictly liable … for all cleanup and removal costs." L. 1976, c. 141, § 8(c). Section 8 of the original enactment rendered the Act's newly non-lapsing fund (Spill Fund or the Fund), *see L.* 1976, c. 141, § 10, strictly liable, without fault, for all costs of cleanup and removal of such discharges and for all direct and indirect damages stemming from the removal of hazardous discharges,. 1976, c. 141, § 8(a). Removal and cleanup activities were placed under NJDEP control through Section 7 of the Act. See L. 1976, c. 141, § 7 (codified at N.J.S.A 58:10-23.11f). Section 8 established the liability provisions of the Spill Act (codified at N.J.S.A. 59:10-23.11g).

In 1979, the Legislature amended the Spill Act in several important ways.

Section 8 of the Act – the provision addressing liability – was amended to impose strict liability on "[a]ny person who has discharged a hazardous substance or is in any way responsible for any hazardous substance which [the NJDEP] has removed or is removing" pursuant to Section 7(b) of the 1979 amendments. L. 1979, c. 346, §

5(c)(codified at N.J.S.A. 58.10-23.11g(c)(1)) (New material in bold and underlined).

Additionally, the court observed that:

"Section 7 of the Act – the provision addressing NJDEP authority under the Act – was modified to clarify the nature of the NJDEP's responsibility for cleanups. L. 1979, c. 346, § 4 (codified at N.J.S.A. 58:10023.11f). With additions in bold and underlined and omissions in angle brackets, the provision was amended to read as follows:

Whenever any hazardous substance is discharged, the department [i.e., the NJDEP] <shall> may in its discretion act to remove or arrange for the removal of such discharge or may direct the discharger to remove, or arrange for the removal of, such discharge, <unless it determines such removals will be done properly and expeditiously by the owner or operator of the major facility or any source from which the discharge occurs>. Any discharger who fails to comply with such a directive shall be liable to the [NJDEP] in an amount equal to three times the cost of such removal. [L. 1979, c. 346, § 4(a) (codified at N.J.S.A. 58:10023.11f(c)(1)).]

The other amendment of significance in our analysis occurred in April 1991, when the Legislature revisited the liability section of the Spill Act. *See* N.J.S.A. 58:10-23.11g(c)(1). That amendment is set forth in full, with additions in bold and underlined and omissions in angle brackets to facilitate identification of the alterations to the provision.

Any person who has discharged a hazardous substance, or is in any way responsible for any hazardous substance <which the [NJDEP] has removed or is removing pursuant to subsection b. of section 7 of this act>, shall be strictly liable, jointly and severally, without regard to fault, for all cleanup and removal costs no matter by

whom incurred. Such person shall also be strictly liable, jointly and severally, without regard to fault, for all cleanup and removal costs incurred by the [NJDEP] or a local unit pursuant to [N.J.S.A. 58:10-23.11f]. [L. 1991, c. 85, § 4(c)(codified at N.J.S.A. 58:10-23.11g(c)(1)).]"

The analysis and decisions all refer to the "discharger" "person who has discharged" or person "who is in any way responsible for any hazardous substance". The facts in this case clearly indicate that the "person" responsible, as concluded by the State of Jersey was Alex Abdalla and Cobra Enterprises as the DISCHARGERS and hence violators of the Spill Act. In fact the States conclusion was indeed that Abdalla and Cobra were the dischargers. In applying the "two prong nexus test the State cannot meet the burden to show the defendant Alsol, simply as the owner, is in any way responsible for the spill caused by Cobra Enterprises.

Cobra has been firmly established as the alleged DISCHARGER. In order to find that Alsol as the owner bears the same responsibility. The nexus requirement requires that Alsol had some control over the direct discharger (Cobra). The second prong is that "[a] nexus also must be demonstrated to exist between the discharge for which one is responsible – in any way – and the contaiminated site for which cleanup and other related authorized costs are incurred." In the present case, there is no allegation that Alsol had ANY control over Cobra. There are no facts to suggest that Alsol or its, agents employees or servants were present when Cobra caused the spill. Moreover there is no evidence that Alsol had any knowledge of Cobras activities prior to the negligence and careless actions by Cobra in causing the spill.

After giving every reasonable inference to the Complainant State of New Jersey Department of Environmental Protection it is clear that the State has failed to support a claim upon which relief can be

> granted. Accordingly the complaint against Alsol is hereby dismissed, without prejudice.

POINT THREE

JUDGE JONES IGNORED ALSOL'S REQUEST FOR LEGAL FEES PURSUANT TO RULE 4:37-1(b) PRESUMABLY BASED ON THE FALSE PREMISE THAT THE CASE AT BAR IS NOT A CIVIL ACTION. (PA 178 – PA 182).

Alsol argued before Judge Jones that if he were inclined to grant the State's request to retroactively withdraw its Complaint that Alsol, as a condition to the withdrawal, be awarded the legal fees it incurred defending this baseless case for the last six years, as permitted by Court Rule 4:37-1(b). Rule 4:37-1(b) provides:

> By Order of Court. Except as provided by paragraph (a) hereof, an action shall be dismissed at the Plaintiff's instance only by leave of court and upon such terms and conditions as the court deems appropriate.

The State should be held responsible for the breach of its duty to have performed the simple due diligence of determining whether Alsol owned the property on which the alleged spill occurred. The State's breach of this duty is particularly egregious considering that ownership of the property (on which an alleged discharge of hazardous substance occurred) was the sole basis for the State's Complaint against Alsol.

Judge Jones did not address Alsol's application for legal fees under Rule 4:37-1(b) in his decision, despite the fact that the State failed for over a six year

period to determine whether it had any factual basis to bring this action against Alsol (which was the purpose of Judge Jones's Remand Order). Although we do not know for certain why Judge Jones failed to consider Alsol's request in his written decision, we speculate, that he was doubtful that Rule 4:37-1(b) was applicable to this case which Judge Jones mistakenly believed to be a criminal action not a civil action. Part IV of the New Jersey Court Rules, in which Rule 4:37-1(b) is included, pertains to Civil Actions. Judge Jones's apparent view that the case before him was not a civil action is wrong for several reasons.

First, Judge Jones previously confirmed that this action is a Civil Action. On March 5, 2018, Judge Jones entered an Order in this case captioned "Order Civil Action" in which he reversed the Milltown Municipal Court Judge's prior ruling that municipal courts do not have jurisdiction to adjudicate Spill Act claims. (Pa 161).

Second, the appeals in this action filed by the State were clearly filed as Civil Actions because the State's primary claim in this action is for the imposition of "an administrative civil penalty" under the Spill Act which is further confirmation that this case is a Civil Action.[14] (Pa 26) The State speficially termed this case as a "Environmental Civil Penalty Action". (Pa 26).

[14] Judge Jones generally hears criminal cases in the performance of his day to day judicial duties, and it may well be that many of the appeals of Municipal Court rulings heard by Judge Jones are criminal in nature because they

We ask this Court to rule on Alsol's application under Rule 4:37-1(b) for legal fees in consideration of the fact that Alsol expended substantial time, money, and resources to defend an action that the State knew, or should have known, was wrongly brought. Again, the State's sole "reason" for bringing this action was its erroneous claim that Alsol owned a property on which the State believed a discharge of hazardous substances occurred. The State had six years to investigate its claim, but it never did. There should be a consequence for the State's total disregard of the facts and its failure to perform any due diligence which failure directly caused Alsol to incur unnecessary legal fees and expenses.

POINT FOUR

THE STATE'S COMPLAINT SHOULD HAVE BEEN DISMISSED ON JUDICIAL ESTOPPEL GROUNDS. (PA 178 – PA 182).

Alsol's motion to dismiss was predicated on two separate and distinct grounds. The second ground for dismissal of the Complaint was that the State is precluded under the Doctrine of Judicial Estoppel and the Square Corners Doctrine from taking the position that mere ownership of a property on which a discharge of hazardous substances has occured imposes liability on the property owner under the Spill Act. Judge Weber, in the Municipal Court proceeding, never addressed

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involve punitive sanctions or imprisonment. The case at bar, however, does not fall within the criminal paradigm because it does not implicate any criminal consequences. As a result, this case constitutes a Civil Action that is subject to Part IV of the Court Rules, including Rule 4:37-1(b). See Rule 4:1.

Alsol's arguments on Judicial Estoppel presumably because he dismissed the State's Complaint on grounds that the Spill Act did not impose strict liability on Alsol.

Although Judge Jones reviewed the Municipal Court's decision, *de novo*, he also did not address Alsol's Judicial Estoppel argument. We bring this to this Court's attention because Alsol intends to make the same argument in any future related proceeding brought by the State. We summarize Alsol's arguments on the Judicial Estoppel and Square Corners Doctrines below in the event this Court is inclined to address this issue at this time.

The basis of the State's claim against Alsol is that mere ownership of a property on which an alleged spill of hazardous substances occurred automatically makes the property owner a "person in any way responsible for the discharge" under the Spill Act, regardless of whether the property owner is otherwise responsible for or had control over the discharge.

Not only is the State's argument wrong on the law as set forth in *N.L. Industries v. State of New* Jersey, *supra,* but the State is precluded under the Doctrine of Judicial Estoppel and the Square Corners from taking the position that mere ownership of a property on which a discharge of hazardous substances has occurred imposes liability on the property owner under the Spill Act.

In N.*L. Industries* the State successfully argued that the State cannot be liable as a person responsible for the discharge of a hazardous substance under the Spill Act "merely because a discharge emanated from lands it owns" because the Spill Act requires more than just ownership of the property from which a discharge emanates for a finding of "responsible person liability". Id. at 447.

The State further argued in N.*L. Industries* (and as the Law Division and this Court both agreed), the Spill Act requires some control over the activities which resulted in the discharge for the owner of a property to be a responsible person under the Spill Act . (See *N.L. Industries, supra,* 442 N. J. Super . at 447; see also pages 39 and 42 of the State of New Jersey Appellate Merits Brief filed with the this Court in *N.L. Industries* and reproduced at Pa 17).

Under the Doctrine of Judicial Estoppel, "a party who advances a position in any earlier litigation that is accepted by the court .. . is barred from advocating a contrary position in a subsequent litigation to the prejudice of the adverse party." *Bhagat v. Bhagat,* 217 N. J. 22, 28 (2014).

In a recent decision, this Court affirmed a decision of the Law Division (Middlesex County) which recognized Judicial Estoppel as a defense to a claim against a defendant for liability under the Spill Act. *Terranova v. GE Pension Trust,* 45 N.J. Super. 404 (App. Div. 2019). The *Terranova* panel explained:

> Judicial estoppel most commonly applies when a party takes inconsistent positions in different legal actions,

> *ibid.*, and the party succeeds in maintaining one of those positions. *Id. 295* N.J. *Super. at 386.* "If a court has based a final decision, even in part, on a party's assertion, that same party is thereafter precluded from asserting a contradictory position. *Id. 295* N.J. *Super. at 387-388.* Our Supreme Court explained the salutory policy considerations underpinning the application of the doctrine:
>
> [W]here a party has prevailed on a litigated point, principles of judicial estoppel demand that such party be bound by its earlier representations. *See McCurrie v. Town of Kearny, 174* N.J. *523, 533, 809 A.2d 789 (2002)* (concluding that "judicial estoppel [.. .] precludes a party from taking a position contrary to the position he has already successfully espoused in the same or prior litigation") .
>
> *[Guido v. Duane Morris LLP, 202* N.J. *79, 94-95, 995 A.2d 844 (2010)* .] Id. at 413 .

In *N.L. Industries,* the State successfully took the position that it could not be held liable under the Spill Act merely because a discharge emanated from its lands. *N.L. Industries, supra,* 442 N.J. Super. at 447. In the case at bar, the State took the diametrically opposite position that ownership of land from which a discharge of hazardous substances emanated imposes strict liability upon the owner of that land.

When the State sought to avoid liability under the Spill Act , it took the position that ownership of a property (upon which a discharge occurs) is not, by itself, sufficient to impose liability under the Spill Act, but when the State seeks to impose liability on someone else, it argues the opposite - - that ownership of the

property (on which a discharge occurs) is alone sufficient to impose Spill Act liability on the property owner.

The Doctrine of Judicial Estoppel "looks to the connection between the litigant and the judicial system." *Terranova v. GE Pension Trust, supra,* 457 N.J. Super. at 412; quoting *Cummings v. Bahr,* 295 N.J. Super. 374, 385 (App. Div. 1996). Judicial Estoppel "arises when a party takes inconsistent positions in different litigations", as in the case before Your Honor. *Cummings v. Bahr, supra,* 295 N.J. Super. at 385. The *Cummings* panel concluded:

> It is the integrity of the judicial process that is protected by the doctrine of judicial estoppel Parties should not be allowed "to play fast and loose" with the judicial system." Id. at 387. (internal citations omitted).

Playing fast and loose with the judicial system is exactly what the State did in this case. Contrary to the position that the State took in *N.L. Industries* when the State owned the Property in question, in the case at bar, the State takes the position that a property owner on whose property a discharge of hazardous materials occurred is liable for the discharge based solely on the fact that the defendant allegedly owns the property on which the discharge occurred. (Pa 3).

Before Judge Wolfson in the Law Division, the State argued that under the Spill Act:

> Where no action or omission of the State is directly responsible for a discharge, the State should not be liable merely because a discharge emanated from lands it owns

> *N.L. Industries v . State of New Jersey, supra,* 442 N.J. Super . at 447.

The State doubled down in the *N.L. Industries* case in the Appellate Division and reiterated its position:

> [The] State should not be deemed a party "in any way responsible" [for a discharge under the Spill Act] on the basis of mere ownership of riparian lands ....
>
> Although the phrase has not been given a precise definition, under the Supreme Court's decision in Dimant, a "connection" or "nexus" between the party, the discharge and the contaminated site is required to establish liability ...
>
> In sum, where no action or omission of the State directly causes a discharge, the State should not be liable merely because a discharge emanated from its public trust lands .. . N.L.'s allegations amount to no more than this (Pa 18 – Pa 23).

The State took the position in *N.L. Industries* that as a party who did not directly control the discharge, the State's mere ownership of land on which a discharge of hazardous materials has occurred does not render it responsible for the discharge under .the Spill Act and that the State had to have control over the discharge for there to be liability on the State.

In *Cummings v. Barr,* this Court stated "there is the oft-cited requirement that in order to be judicially estopped from asserting a position, a party must have "succeeded in maintaining that position."" *Cummings v. Bahr,* supra, 295 N.J. Super. at 386.

The *Cummings* panel then explained what it meant by "a party must have succeeded in maintaining" its contrary position to invoke Judicial Estoppel:

> We agree that a party must successfully assert a position in order to be estopped from asserting a contrary position in future proceedings. What "successfully assert" means, however, needs further discussion . ..
>
> Prior success does not mean that a party prevailed in the the underlying action, it only means that the party was allowed by the court to maintain the position.
>
> Thus, we conclude that a position has been "successfully asserted" if it has helped form the basis of a judicial determination. The judicial determination does not have to be in favor of the party making the assertion. If a court has based a final decision, even in part, on a party's assertion, that same party is thereafter precluded from asserting a contradictory position. Id. at 387-399. (emphasis added).

Clearly, the position taken by the State in *N.L. Industries* that ownership of property alone does not impose Spill Act liability as "a person in any way responsible for a discharge" helped form the basis for Judge Wolfson's decision in *N.L. Industries* that ownership alone is not sufficient for responsible party status and that the party must have had control over the discharge to be liable under the Spill Act. *N.L. Industries v. State of New Jersey, supra,* 442 N.J. Super. at 448-449.

Therefore, the State is barred from asserting in the case at bar the State's diametrically contrary position that Alsol is liable as a responsible party based solely on its ownership of the property on which a discharge allegedly occurred.

We briefly note two additional precepts of the Doctrine of Judicial Estoppel. First, the doctrine *is* applicable against the State and its subdivisions. *State v. Reid,* 456 N.J. Super. 44, 66 (App. Div. 2018) ("Like any other litigant, the State is estopped from taking inconsistent positions that are relied upon by the tribunal.") . Second, the doctrine is applicable as a defense against Spill Act claims. *Terranova v. GE Pension Trust, supra,* 457 N.J. Super. at 409 ("Judicial estoppel is a defense to Spill Act claims ....) .

Finally, the State should also be precluded from taking its inconsistent position in this case pursuant to the "Square Corners Doctrine".

The Square Corners Doctrine was described by the New Jersey Supreme Court in *F.M.C. Stores* Co. *v. Borough of Morris Plains,* 100 N.J. 418, 426-427 (1985):

> We have in a variety of contexts insisted that governmental officials act solely in the public interest. In dealing with the public, government must "turn square corners". *Gruber v . Mayor and Tp. Comm. of Raritan Tp., 73 N.J. Super. 120* (App. Div.); aff'd., *39 N.J. 1 (1962).* This applies, for example, in government contracts. *See Keyes Martin v. Director, Div. of Purchase and Property, 99 N.J. 244 (1985).* Also, in the condemnation field, government has an overriding obligation to deal forthrightly and fairly with property owners. *See Rockaway v. Donofrio, 186 N.J. Super. 344 (App. Div. 1982); State v. Siris, 191 N.J. Super. 261 (1983).* It may not conduct itself so as to achieve or preserve any kind if bargaining or litigational advantage

> over the property owner. Its primary obligation is to comport itself with compunction and integrity, and in doing so government may have to forego the freedom of action that private citizens may employ in dealing with one another.

The Square Corners Doctrine is "premised on the concept that the government "will act scrupulously, correctly, efficiently, and honestly" and that the government will act "in good faith and without ulterior motives". Id. at 427.

In the matter before this Court, the State has failed to turn square corners because it has taken a position in this case which is diametrically opposed to the position it took in *N.L. Industries.* The State has not acted in the "public interest" or "comported itself with compunction and integrity" when it argues that more than ownership of a property on which a discharge occurs (i .e. control over the discharge) is required to subject the property owner to liability as a responsible person under the Spill Act when the State faces a Spill Act claim, but argues that ownership alone imposes liability under the Spill Act when it asserts a Spill Act cl aim against a member of the public .

The State' s argument should also be barred under the Square Corners Doctrine.

CONCLUSION

For the foregoing reasons, we respectfully request that this Court (1) rule that Judge Jones's dicta below is not binding in any subsequent proceedings, (2)

reverse Judge Jones's purported "holding' that, under the Spill Act, property owners are strictly liable for discharges of hazardous substances on their property regardless of the circumstances, (3) reinstate Judge Weber's decision on the merits of this case, (4) if the Court is inclined to affirm Judge Jones's decision to allow the State to retroactively withdraw its complaint, award Alsol under Rule 4:37-1(b), the legal fees and costs it incurred defending this baseless case for the last six years, and (5) rule that the State is barred from arguing that mere ownership of a property on which an alleged spill of hazardous substances had occurred automatically makes the property owner "a person in any way responsible" for the alleged discharge under the Spill Act regardless of whether the property owner is otherwise responsible for, or had control over, the discharge, pursuant to the Doctrine of Judicial Estoppel and the Square Corners Doctrine.

Respectfully Submitted,

September 12, 2023

Lawrence S. Berger, Esq.
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ALSOL CORPORATION, Appellant, v. STATE OF NEW JERSEY, DEPARTMENT OF ENVIRONMENTAL PROTECTION, Respondent.	:	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO. A-002758-22T2 CIVIL ACTION On Appeal from the March 30, 2023 Order and Opinion entered under Docket Nos. MID-MA-7-2022; MID-MA-1-2023 Sat below: Honorable Robert J. Jones, J.S.C.

BRIEF AND APPENDIX OF RESPONDENT STATE OF NEW JERSEY, DEPARTMENT OF ENVIRONMENTAL PROTECTION

Date Submitted: November 13, 2023

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[1] The Department has included this excerpt from a trial court brief because it is germane to Alsol's claim that the Department's position in this case is barred by judicial estoppel, and to provide full context to the portions reproduced in Alsol's appendix between Pa16 and Pa23. See R. 2:6-1(a)(2).

PRELIMINARY STATEMENT

In 2016, a contractor caused an unauthorized discharge of hazardous substances in Milltown, Middlesex County when an electric transformer collapsed, resulting in transformer oil entering the environment. While the New Jersey Department of Environmental Protection ("Department") was aware of the location where the discharge occurred because it performed emergency cleanup activities related to the discharge that same day, it identified the wrong lot, which was adjacent to where the discharge occurred when it later issued a municipal complaint. For reasons that remain unclear, for the last five years, Appellant Alsol Corporation ("Alsol"), the named defendant on the municipal complaint, did not raise the fact that the incorrect lot number was identified in the municipal complaint. As soon as the error was brought to the Department's attention in 2022, it filed a request with the municipal court to voluntarily procedurally dismiss the municipal complaint.

After the municipal court denied the Department's motion and issued a decision on the merits dismissing the complaint with prejudice, the Department appealed to the Law Division. On March 30, 2023, the Law Division issued a written decision and order affirming the dismissal with prejudice because the Department had named the wrong lot and owner in its complaint, but disagreeing with the municipal court's analysis that Alsol would not have been strictly liable

even if it had been the owner of the property on which the spill took place. Alsol appeals from the Law Division's order and decision, seeking attorney's fees and a decision that the Law Division's analysis of the strict liability issue, which has no bearing on the ultimate relief awarded, was incorrect.

The Law Division's decision should be affirmed. Alsol's request for attorney's fees should be denied because an award here would not serve the purposes of Rule 4:37-1(b), which is to protect a party from defending litigation on two fronts or in subsequent suits, and its argument on the merits of the Law Division's decision seeks an advisory opinion from this court that has no bearing on Alsol's interests going forward. Because this court affirms orders and judgments, not reasons, and because neither Alsol nor the Department are challenging the relief awarded in this case—dismissal with prejudice—this court should affirm the Law Division's decision.

PROCEDURAL HISTORY AND COUNTERSTATEMENT OF FACTS[2]

On March 13, 2017, the Department filed a municipal complaint in the Borough of Milltown Municipal Court naming Alsol as the defendant and citing a "[f]ailure to remediate the property located at Block 58 Lot 1.01 Ford Ave &

[2] Because the procedural history and counterstatement of facts are closely related, they are combined to avoid repetition and for the court's convenience.

Main St." (Pa1).[3] In the initial municipal proceeding, Alsol disputed the Department's authority to bring a New Jersey Spill Compensation and Control Act ("Spill Act"), N.J.S.A. 58:10-23.11 to -23.24, civil penalty enforcement action in the municipal courts and the Milltown Municipal Court dismissed the Department's complaint on jurisdictional grounds.

On March 6, 2018, the Law Division reversed the dismissal, finding that the municipal court had jurisdiction to hear the matter under the Spill Act. (Pa183-84). On November 13, 2019, this court issued a published decision affirming the Law Division's decision, and on May 5, 2020, the Supreme Court denied certification. N.J. Dept. of Environmental Protection v. Alsol Corp., 461 N.J. Super 354 (App. Div. 2019), certif. denied, 241 N.J. 400 (2020). After three years of litigation over jurisdiction, the matter was remanded back to the Milltown Municipal Court in essentially the same posture as it began.

On May 4, 2021, Alsol filed a new motion to dismiss on the grounds that it is not a responsible party under the Spill Act. That motion was briefed by both parties, but before reaching a decision, Hon. Christine Heitmann, J.M.C., of the Milltown Municipal Court recused herself due to a possible conflict of interest. (Ra23). The case was transferred to the Sayreville Municipal Court,

[3] "Pa" refers to the appendix submitted by Alsol; "Pb" refers to its brief. "Ra" refers to the appendix to the Department's brief.

which ruled on April 14, 2022 that a property owner is not strictly liable for a discharge that occurs at the property during its ownership, and granted Alsol's motion to dismiss on the merits. (Pa79-85). The Department appealed to the Middlesex County Superior Court, Law Division, under docket number MID-MA-7-2022. (Pa24-31).

The Law Division received briefs and heard oral argument, this time on the merits of the motion to dismiss, and, after determining that the record below was insufficient to decide the appeal, remanded the matter back to the Sayreville Municipal Court on July 5, 2022 in an order requiring the Department to submit an affidavit from a firsthand witness. (Pa32-35).

On remand, the Department submitted two affidavits from Department investigators who personally witnessed the discharged hazardous substances at the subject property. (Pa51-78). On August 18, 2022, counsel for the Department received a letter brief and certification from Lawrence Berger that, for the first time in the case's five-year history, pointed out that the alleged spill did not occur on Block 58.01, Lot 1.01 as the Department had alleged in the complaint, but had actually occurred on the adjacent property, 2 Ford Ave., Block 58.01, Lot 1.02, which was owned by SB Milltown Industrial Realty Holdings at the time of the discharge. (Pa179-81; Ra22). Berger is the President and principal of Alsol, and the President or authorized signatory with

constructive control of SB Milltown Industrial Realty Holdings. (Ra1-2). Consequently, Berger knew or should have known on which of his properties the discharge of hazardous substances and subsequent multi-day cleanup operation by the Department occurred. However, despite ample opportunity to do so after 2017, Berger did not inform the Department or any of the three courts that presided over this matter of the correct block and lot address or corporate owner of the discharge site until 2022.

The Department acknowledged its mistake in naming the wrong lot, and the wrong corporate defendant, in the original municipal complaint and sought to voluntarily procedurally dismiss the matter without prejudice pursuant to Directive #02-08 of the Administrative Office of the Courts for the State of New Jersey ("Directive #02-08"). (Pa179-81; Ra3-11). Under Directive #02-08, a law enforcement officer can, by the submission of a specified form, request that a municipal ticket be dismissed. Ibid. As an example of an appropriate voluntary dismissal, the Directive offers the scenario where "an officer may have completed and signed a ticket for failure to produce a driver's license, but then the driver finds the license at the scene and the officer does not want to proceed with prosecution of the complaint." (Ra4).

On October 27, 2022, the Sayreville Municipal Court verbally denied the Department's request to voluntarily procedurally dismiss, without explanation,

and instead dismissed the complaint with prejudice for substantially the same reasons cited in its April 14, 2022 decision. (2T6-1-3;[4] Pa79-85). It later issued a written decision dated December 7, 2022. (Pa142-45).

On November 14, 2022, while the Department's appeal of the Sayreville Municipal Court's April 14, 2022 decision was still pending, the Department submitted a notice of appeal of the Sayreville Municipal Court's October 27, 2022 decision under docket number MID-MA-1-2023. (Ra12-13). On January 9, 2023, at the Law Division's urging, the Sayreville Municipal Court entered an order supplementing its December 7, 2022 decision. (Pa146-50).

The Law Division considered the two municipal appeals together and, on March 30, 2023, entered an order and decision dismissing the municipal complaint issued to Alsol with prejudice. (Pa178). In its analysis, court addressed the appeals in turn. As to the Department's first appeal, which challenged the Sayreville Municipal Court's holding that a property owner cannot be strictly liable under the Spill Act, the court found that the Municipal Court erred. (Pa181). Recognizing that the Spill Act "should be interpreted liberally and consistent with its purpose, and relying on both New Jersey Dep't of Environmental Protection v. Ventron Corp., 94 N.J. 473 (1983), and Marsh

[4] "2T" refers to the transcript of the October 27, 2023 proceeding of the Sayreville Municipal Court.

v. New Jersey Dep't of Environmental Protection, 152 N.J. 137 (1997), the court found that "[t]he law is clear: a property owner is strictly liable for a spill that takes place while it owns the property." (Pa181). But because Alsol did not own the property, the court dismissed the case with prejudice and dismissed the second appeal as moot. Ibid.

This appeal follows.

ARGUMENT

POINT I

ALSOL IS NOT ENTITLED TO LEGAL FEES BECAUSE THE MUNICIPAL COMPLAINT WAS DISMISSED WITH PREJUDICE. (Addressing Alsol's Point III).

This court should affirm the Law Division's dismissal of Alsol's complaint without attorney's fees because this case was dismissed with prejudice and because awarding fees in this posture would enrich Alsol for its decision to withhold information that would have expedited dismissal and reduced the quantum of fees it needed to spend on this matter to begin with.

New Jersey generally follows the "American Rule," which "provides that litigants must bear the cost of their own attorneys' fees." Innes v. Marzano-Lesnevich, 224 N.J. 584, 592 (2016); see also Gannett Satellite Info. Network v. Twp. of Neptune, 254 N.J. 242, 258 (2023). The purposes behind the American Rule are three-fold. As the Supreme Court has recognized, requiring

a litigant to bear his or her own costs will (1) ensure unrestricted access to the courts; (2) guarantee equity by not penalizing a party for exercising their right to litigate a dispute; and (3) promote administrative convenience. Gannett, 254 N.J. at 258. Exceptions to the American Rule fall under four general categories, including the authorization of attorney's fees pursuant to a fee-shifting statute; by court rule; by contract; or by judicial case law in the "tightly circumscribed" common law exception dealing with fiduciary malfeasance cases. Id. at 258-59.

Rule 4:37-1(b), which governs voluntary dismissals, permits the Superior Court to dismiss an action "upon such terms and conditions as the court deems appropriate." Among the terms and conditions a court may impose is an award for attorney's fees incurred by the defendant. See, e.g. Mack Auto Imports v. Jaguar Cars, 244 N.J. Super. 254 (App. Div. 1990) ("A court may impose counsel fees as a condition of a voluntary dismissal."); Union Carbide Corp. v. Litton Prec. Prods., Inc., 94 N.J. Super. 315, 317 (Ch. Div. 1967) (denying the defendant's request for attorney's fees, but implying that in appropriate circumstances such a condition of dismissal would be proper).

An award of attorney's fees under Rule 4:37-1(b) is not automatic. As with counsel fees generally, it is left to the court's discretion. See Rendine v. Pantzer, 141 N.J. 292, 317 (1995). An award of attorney's fees is disturbed only where the trial court relies on "irrelevant or inappropriate factors," or has

engaged in a "clear error in judgment[.]" Garmeaux v. DNC Concepts, Inc., 448 N.J. Super. 148, 155-56 (App. Div. 2016).

In determining whether counsel fees are merited under Rule 4:37-1(b), courts have historically considered the Rule's purpose. As the court in Union Carbide explained:

> The evil aimed at by the rule "is present in any instance in which a defendant is damaged by being dragged into court and put to expense with no chance whatever (if there is a dismissal without prejudice) of having the suit determined in his favor." McCann v. Bentley Stores Corporation, 34 F. Supp. 234 (W.D. Mo. 1940). The obvious purport of our rule is to protect a litigant where a termination of the proceedings without prejudice will place him in the probable position of having to defend, at additional expense, another action based upon similar charges at another time.
>
> [94 N.J. Super. at 317.]

Here, the Law Division dismissed the municipal complaint with prejudice. Therefore, unlike in Mack, where this court awarded counsel fees under Rule 4:37-1(b) because "the defendant incurred fees defending the action and would "have to duplicate its effort in the federal action," 244 N.J. Super. at 260, Alsol is not at risk of "having to defend, at additional expense, another action based upon similar charges at another time[,]" Union Carbide, 94 N.J. Super. at 317. An award of attorney's fees is thus not appropriate under the facts of this case because it would not serve the purposes of the Rule.

Even if Alsol did somehow face the risk of incurring duplicate legal expenses, the Department's mistake that led to the voluntary dismissal of this action was reasonable, and could have been corrected at any time by Alsol. The Department alleged in the municipal complaint that the discharge occurred at Block 58, Lot 1.01 on the Milltown Tax Map, which is owned by Alsol. (Pa1, 52, 180). In fact, the discharge occurred mere feet from that parcel, on the adjacent Block 58, Lot 1.02. (Pa52, 118, 180). The two lots exist next to one another on the same general property, and both are owned by companies controlled by Berger. (Pa180-81). And when the Department finally became aware of the issue in 2022—five years after Alsol was named as a defendant—it immediately moved for dismissal of this action. (Pa118-131).

Alsol contends that the Department had a duty to perform "the simple due diligence of determining whether Alsol owned the property on which the alleged spill occurred." (Pb27).[5] But this does not explain why Alsol did not bring this

[5] Alsol also mischaracterizes its ownership of the property as the sole basis for the Department's complaint against it. (Pb27). The Spill Act provides that any person who discharges a hazardous substance or is "in any way responsible" for any hazardous substance that is discharged, "shall be strictly liable, jointly and severally, without regard to fault, for all cleanup and removal costs no matter by whom incurred." N.J.S.A. 58:10-23.11g(c). Liability is not "limited to those who were active participants in the discharge of hazardous substances." N.J. Dep't of Envtl. Prot. v. Dimant, 212 N.J. 153, 175 (2012). While the Department alleged that Alsol was liable under the Spill Act upon the mistaken belief that it owned the lot on which hazardous substances were discharged, it also alleged

to the Department's attention at any time during the five years that this case has lingered, during which time the fees that Alsol now seeks reimbursement for continued to amount. Alsol's conduct is indisputably relevant to the reasonableness of attorney's fees. See Borzillo v. Borzillo, 259 N.J. Super. 286, 291-94 (Ch. Div. 1992) ("One consideration in making an award of fees is whether a party acted in bad faith throughout the litigation."); see also Marx v. Marx, 265 N.J. Super. 418, 429 (Ch. Div. 1993) (considering whether a party has "unnecessarily prolonged the litigation" when assessing the award of attorney's fees). Because awarding fees in this scenario would neither advance the purpose of Rule 4:37-1(b), nor would it serve any of the principal goals of the American Rule, Alsol's request should be denied and the Law Division's decision affirmed.

POINT II

THE LAW DIVISION'S DECISION TO DISMISS THIS CASE SHOULD BE AFFIRMED BECAUSE THE COMPLAINT WAS FACTUALLY INACCURATE.

that it was liable under the Spill Act under a theory of vicarious liability because it hired the contractor that caused the discharge. This allegation might have been accurate, but the Department never had that opportunity to explore who hired the discharging contractor because two (since overturned) motions to dismiss were granted before the Department could request discovery.

This court should affirm the Law Division's decision to dismiss the Department's municipal complaint because, as the Department conceded below, the complaint alleged that the spill occurred on the wrong block.

This court "affirm[s] or reverse[s] judgments and orders, not reasons." State v. Maples, 346 N.J. Super 408, 417 (App. Div. 2002); see also Do-Wop Corp. v. City of Rahway, 168 N.J. 191, 199 (2001) ("[I]t is well-settled that appeals are taken from orders and judgments and not from opinions, oral decisions, informal written decisions, or reasons given for the ultimate conclusion."). Here, while the Department maintains that the complaint issued to Alsol should have been procedurally dismissed pursuant to Directive #02-08 because it contained a factual inaccuracy, rather than on the merits, the Superior Court nonetheless ordered the proper outcome—that the complaint issued to Alsol be dismissed. This decision should be affirmed.

Save for the issue of attorney's fees, Alsol does not disagree with dismissal of this complaint. Instead, it asks this court to address the portion of the court's ruling pertaining to strict liability under the Spill Act. But it is well-settled that "New Jersey courts avoid rendering advisory opinions or functioning in the abstract." Bisbing v. Bisbing, 468 N.J. Super. 112, 119 (App. Div. 2021); see also Indep. Realty Co. v. Twp. of Bergen, 376 N.J. Super. 295, 301 (App. Div. 2005) ("Although there is no express language in New Jersey's

Constitution which confines the exercise of our judicial power to actual cases and controversies . . . nevertheless it is well settled that we will not render advisory opinions or function in the abstract."). Thus, litigation has been appropriately confined to "'those situations where the litigant's concern with the subject matter evidenced a sufficient stake and real adverseness.'" Ibid. (quoting Crescent Park Tenants Ass'n v. Realty Equities Corp., 58 N.J. 98, 107 (1971)). In short, reviewing courts "do not render 'recommendations' but rather 'decide only concrete contested issues conclusively affecting adversary parties in interest.'" Ibid. (quoting N.J. Tpk. Auth. v. Parsons, 3 N.J. 235, 240 (1949)).

This court should not accept Alsol's invitation to render a recommendation on an issue in this case that has no ability to affect either parties' interests. The complaint against Alsol has been dismissed with prejudice, and the Department is not challenging that outcome on appeal. Because a decision in this case on the issue of strict liability under the Spill Act will have no impact on the resolution of this matter, Alsol's appeal fails to present an "actual and bona fide" controversy and this court should decline to address it. Indep. Realty Co., 376 N.J. Super. at 301-02.

POINT III

THE SUPERIOR COURT PROPERLY DETERMINED THAT THE SPILL ACT IS A STRICT LIABILTY STATUTE, AND NEITHER

JUDICIAL ESTOPPEL NOR THE SQUARE CORNERS DOCTRINE APPLIES TO THIS CASE.

If this court nevertheless decides to reach the merits of Alsol's appeal on the issue of strict liability, it should affirm the Law Division's decision.

A. The Spill Act Imposes Strict Liability On The Property Owner.

The Spill Act provides that any person who discharges a hazardous substance or is "in any way responsible" for any hazardous substance that is discharged, "shall be strictly liable, jointly and severally, without regard to fault, for all cleanup and removal costs no matter by whom incurred." N.J.S.A. 58:10-23.11g(c). Liability is not "limited to those who were active participants in the discharge of hazardous substances." Dimant, 212 N.J. 153, 175 (2012). Indeed, the Supreme Court has clearly and consistently held that "one who owned or controlled the property at the time of the pollution [is] a responsible party." Marsh v. N.J. Dep't of Envtl. Prot., 152 N.J. 137, 146-47 (1997); see also N.J. Dep't of Envtl. Prot. v. Ventron Corp., 94 N.J. 473, 502 (1983) ("[T]he legislature intended the Spill Act to be 'liberally construed to effect its purposes.'" And "[o]wnership or control over the property at the time of the discharge [. . .] will suffice" to "hold the owner responsible."); Dimant, 212 N.J. at 175–76 (2012) ("one who owns or controls property at time of discharge is a responsible party for Spill Act purposes.")

Alsol's position that an owner of real property is not necessarily a responsible party under the Spill Act ignores this clear precedent. To support its argument that some greater degree of control over the discharge must be established for an owner of real property to be liable under the Spill Act, Alsol relies on a single Superior Court decision: NL Indus., Inc. v. State, 442 N.J. Super. 428 (Law. Div. 2014) ("NL Industries"), aff'd, 442 N.J. Super. 403 (App. Div. 2015), rev'd, 228 N.J. 280 (2017).

Alsol's reliance on NL Industries is misplaced. Contrary to Alsol's assertions otherwise, (Pb16), nowhere in the decision did the court find that ownership of a property at the time of the discharge of a hazardous substance is insufficient to establish liability under the Spill Act. NL Industries concerned a discharge that occurred on lands held by the State in its sovereign capacity as trustee, including submerged land underneath tidal waters that are held in trust for the public benefit.[6] NL Industries, 442 N.J. Super. at 443, 48 (Law. Div. 2014). Because the State's control over public trust lands differs in several respects from the ordinary private ownership of real property, the State argued "that [public trust] lands should be treated differently than other lands owned by

[6] The public trust doctrine is the time-honored principle that "acknowledges that the ownership, dominion and sovereignty over land flowed by tidal waters, which extend to the mean high water mark, is vested in the State in trust for the people." Matthews v. Bay Head Improv. Ass'n, 95 N.J. 306, 312 (1984).

the State because of the State's unique roles, obligations, and resource constraints." Id. at 447, n.11.

To circumvent the thorny questions of how the Spill Act should apply to the State's sovereign status as public trustee, the court expressly chose not to address the plaintiff's argument that the State should be liable as public trustee of the riparian lands at issue in that case. Ibid. Instead, the court applied the two-prong test established in the Supreme Court of New Jersey's decision in Dimant that (1) there must be "some connection between the discharge complained of and the alleged discharger" and (2) "[a] nexus also must be demonstrated to exist between the discharge for which one is responsible—in any way—and the contaminated site for which cleanup and other related authorized costs are incurred." Id. at 448-49 (Law. Div. 2014) (citing Dimant, 212 N.J. at 177) (emphasis in original). Applying this test, the court found that the plaintiff had alleged other facts sufficient to establish that the State was a "person in any way responsible," regardless of whether New Jersey would be liable as trustee of the public trust lands at issue. Id. at 448-49.

Alsol misinterprets the court's decision in NL Industries as holding that ownership of real property at the time of a discharge of hazardous substances is insufficient to establish that the owner is a "person in any way responsible" for that discharge. (Pb14). In fact, the court circumvented the ownership issue

altogether because the plaintiff's pleadings (and theories of law contained therein) had adequately stated a claim to survive a motion to dismiss. Id. at 448. And Alsol's insistence that NL Industries controls is particularly implausible given that the decision was later reversed on other grounds. NL Indus., Inc. v. State, 228 N.J. 280 (2017) (holding that the Spill Act does not contain a clear expression of a legislative intent to waive the State's sovereign immunity retroactively to cover periods of State activity prior to the Spill Act's enactment). Because NL Industries does not contradict New Jersey's clear precedent establishing that "one who owned or controlled the property at the time of the pollution [is] a responsible party," the Law Division properly held that a property owner is strictly liable for a discharge that takes place during its ownership. Marsh, 152 N.J. at 146-47; see also Dimant, 212 N.J. at 175-76; Ventron Corp., 94 N.J. at 502.

B. Judicial Estoppel Does Not Apply.

Judicial estoppel does not foreclose this result. Under the doctrine of judicial estoppel, "[a] party who advances a position in earlier litigation that is accepted and permits the party to prevail in that litigation is barred from advocating a contrary position in subsequent litigation to the prejudice of the

adverse party." Bhagat v. Bhagat, 217 N.J. 22, 36 (2014).[7] Here, Alsol argues that New Jersey previously took the position in NL Industries that ownership of land on which a discharge of hazardous materials occurred is insufficient to impose liability under the Spill Act and that the court accepted this view. (Pb31). On both points Alsol is incorrect.

In NL Industries, the State argued that "[e]xisting Spill Act jurisprudence on the liability of private property owners should not be read to impose liability on the State for third-party discharges on public trust property over which the State lacks, inter alia, the right to exclude." (Ra19). The State's argument was specific to lands the State holds in the public trust, which are those lands "not held by the State as a private owner would possess property (nor even as the State itself owns other lands for its proprietary use), but in a unique sovereign capacity that dates back to the founding of New Jersey." Ibid. (parenthetical in original). The State explicitly acknowledged that it "can and should be deemed 'responsible' under the Spill Act in certain circumstances, such as when the State itself is a discharger or when the State acts in a proprietary, rather than sovereign, capacity." (Ra17).

[7] Alsol also cites Bhagat, 217 N.J. at 36, but it has cited to an incorrect page of the decision and added the words "by the court" into the quote without any indication that these words are not part of the actual wording of the decision. (Pb31).

The State's position in NL Industries is consistent with the Department's position now: any proprietary owner of property on which a hazardous discharge occurs at the time of the discharge is a person in any way responsible for that discharge and therefore liable under the Spill Act. The State's argument in NL Industries about the applicability of the Spill Act to lands held by the sovereign in the public trust is not relevant to a case involving a private owner of the property. Because the State's argument in NL Industries is consistent with the argument the Department makes in this case, the doctrine of judicial estoppel does not apply.

Furthermore, for the doctrine of judicial estoppel to apply, "a party must have 'succeeded in maintaining that position.'" Cummings v. Bahr, 295 N.J. Super. 374, 386 (App. Div. 1996). The court in NL Industries did not adopt the State's argument that lands held in the public trust are excepted from existing Spill Act jurisprudence on the liability of private property owners. Id. at 447 n.11. Instead, it expressly chose not to address the parties' arguments about whether New Jersey should be liable under the Spill Act because the State held the riparian lands at issue in the public trust. Ibid. Because the court did not adopt the State's view, and in fact expressly declined to rule on the question, the doctrine of judicial estoppel is further inapplicable to this case.

C. The Doctrine of Square Corners Does Not Apply.

Alsol also asserts that the Department should be precluded by the square corners doctrine from taking the position that ownership of a property on which a discharge of hazardous substances has occurred at the time of the discharge imposes Spill Act liability on the owner. (Pb36). Again, Alsol misconstrues the applicability of the doctrine, and therefore the Department is not barred from taking the position it has in this case.

The square corners doctrine is a rarely invoked principle that requires the government "to comport itself with compunction and integrity" such that "[i]t may not conduct itself so as to achieve or preserve any kind of bargaining or litigational advantage over [a] property owner." F.M.C. Stores Co. v. Borough of Morris Plains., 100 N.J. 418, 427 (1985). Alsol contends that the Department has failed to meet its obligation to act with compunction and integrity because its position in this case is inconsistent with that taken by the State in NL Industries. For all of the reasons just articulated, the Department's position in this case is not inconsistent with the State's position in NL Industries and therefore the doctrine of square corners does not apply.

CONCLUSION

For all of these reasons, the Law Division's decision should be affirmed.

Respectfully submitted,

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ALSOL CORPORATION, Plaintiffs/Appellants, v. STATE OF NEW JERSEY, DEPARTMENT OF ENVIRONMENTAL PROTECTION, Defendants/Respondents.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION APPELLATE DOCKET NO.: A-002758-22 CIVIL ACTION Appeal of the Opinion and Orders of the Hon. Robert J. Jones, J.S.C., entered March 30, 2023. Sat Below: Hon. Robert J. Jones, J.S.C.; Municipal Court Docket No.: MA-7-2022

APPELLANT'S REPLY BRIEF AND SUPPLEMENTAL APPENDIX

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POINT ONE

ALSOL IS ENTITLED TO AN AWARD OF LEGAL FEES AS A CONDITION TO THE DISMISSAL OF THE STATE'S COMPLAINT UNDER COURT RULE 4:37-1(b)

The State argues that the sole purpose of Rule 4:37-1(b) is to "protect the litigant where a termination of the proceedings without prejudice will place him in the position of having to defend, at an additional expense, another action based upon similar charges at another time." *See* Db9 citing *Union Carbide Corp. v. Litton Prec. Prods., Inc.* 94 N.J. Super. 315, 317 (Ch. Div. 1967). Despite the State's argument to the contrary in its brief, the case at bar directly implicates the purpose and protections sought to be addressed by Rule 4:37-1(b) because Alsol *is in the position* of having to incur the additional expense to assert its rights and defend itself against the charges wrongfully brought by the State in the case herewith under appeal -- in not one, but two new actions.

The first action, as described below, was precipitated by the unlawful filing by the State of two liens against Alsol's property related to the alleged spill of hazardous substances on Alsol's property (i.e. the property on which it has been judicially determined, and which the State admits, that no spill of hazardous substances occurred). (Supp. Pa 1). On November 14, 2017, a notice of the first priority lien (NJEMSPI# 512861) was filed by the State against Alsol and Alsol's

real property located at Ford Avenue, Milltown, Middlesex County, New Jersey, Block 58, Lot 1.01 on the Tax Map of Milltown. (Supp. Pa 52). The filed property lien (the "First Lien") was alleged for "all alleged expenditures made as of October 23, 2017, in connection with the discharge of hazardous substances at the subject property, which totaled $96,159.68". (Supp. Pa 52). The filing of the First Lien (and its continuing encumbrance on Alsol's property) was and remains unlawful and invalid because no spill of hazardous substances occurred on Alsol's property as determined by Judge Jones and as admitted by the State. There is not and has never been a factual or legal basis for the filing of the First Lien.

On December 14, 2017, the State filed a second notice of lien (NJEMSPI# 512861) against Cobra Enterprises LLC, the alleged actual discharger of hazardous substances. (Supp. Pa 52). The State claimed a lien pursuant to the New Jersey Spill Compensation and Control Act, N.J.S.A. 58:10-23.11 to 23.14, against Alsol's Property. (Supp. Pa 52). The Second Lien was for "all alleged expenditures made as of November 27, 2017, in connection with the discharge of hazardous substances at the subject property, which totaled $96,159.68". (Supp. Pa 52). The filing of the Second Lien (and its continuing encumbrance on Alsol's property) was and remains unlawful and invalid because no spill of hazardous substances occurred on Alsol's Property as determined by Judge Jones and as admitted by the

State. Further, there has never been a factual or legal basis for the filing of the Second Lien.[1]

In order to, *inter alia*, obtain judicial relief to compel the State to discharge the two unlawful liens it placed on Alsol's Property, Alsol filed an action against the State and its constituent entities on October 11, 2023 in the Superior Court of New Jersey, Middlesex County Law Division, under Docket # MID-L-005757-23, which action is pending before the Law Division. (Supp. Pa 1). The unlawful liens put Alsol in the position of having to re-litigate and reassert the same defenses and rights it asserted in the action which is before this Court. If the purpose of Court Rule 4:37-1(b) is to protect a litigant from re-incurring legal costs and expenditures in a subsequent action after the initial action has been dismissed with prejudice, as the State argues, then Alsol is clearly entitled to an award of the legal fees and costs it needlessly expended in litigating the State's baseless claim for over six years.

As we discuss in our prior Appellate Brief (Pb 13), the State also filed a new lawsuit in the Law Division based on the same facts and circumstances of the within action. (*New Jersey Department of Environmental Protection, et al. v. SB Milltown Industrial Realty Holdings, LLC, et al.*, MID-L-002227-23 (the

[1] The Second Lien was filed against Cobra which has never had any interest in Alsol's Property and therefore there is no basis for the filing, the alleged discharges, of a lien against Alsol's Property.

"Reinstituted Action"). As the State points out in its Complaint in the Reinstituted Action, Alsol Corp., the Appellant in the action before this Court, was merged with two other entities pursuant to an Order of the United States Bankruptcy Court for the District of New Jersey, SB Building Associates Limited Partnership and SB Milltown Industrial Realty Holdings, LLC., each of which were named as defendants in the Reinstituted Action. (Supp. Pa 30). The Reinstituted Action restates the same Spill Act claims made by the State in the Municipal Court action which is under Appeal. (Supp. Pa 19-47). In effect, Alsol will be defending itself against the same claims that were dismissed with prejudice by virtue of the fact that Alsol and the other two entities have been merged into a single entity. Alsol will need to duplicate its legal efforts in the Reinstituted Action and therefore the protections afforded by Rule 4:37-1(b) are again implicated in the Reinstituted Action.[2]

The State seeks to shift the blame for the State's gross negligence (and failure to perform due diligence) to Alsol for not discovering sooner that the State had named the wrong party in this lawsuit. We note that no discovery has ever been conducted in this case, and it was not until Judge Jones, after reviewing the record below, ordered the State to file affidavits setting forth the factual basis supporting

[2] We further point out that we see nothing in the Rule that limits a Court's discretion to award legal fees in a case like this where the State was grossly negligent in pursuing an action for six years without having performed even a modicum of due diligence to determine if it had a factual basis to bring the action in the first place.

the State's claims that it became clear that the State had the wrong defendant and property. The State's submissions proved that it had no basis for naming Alsol as a Defendant in this matter, as Alsol *immediately* pointed out to the court upon its receipt and review of the State's court-mandated affidavits. (Pa 91-99). Even after it became indisputable that the State had named the wrong party, it nevertheless took the State another six weeks to request a dismissal of this action.[3] (Pa 118).

POINT TWO

THE LAW DIVISION'S PURPORTED RULING ON PROPERTY OWNER STRICT LIABILITY UNDER THE NEW JERSEY SPILL COMPENSATION AND CONTROL ACT WAS CLEAR DICTUM AND IS NOT BINDING IN ANY SUBSEQUENT PROCEEDINGS.

In his opinion dismissing the action before him, Judge Jones made an unnecessary ruling on responsible party status under the Spill Act.

The Court should make it clear that this is dicta.

POINT THREE

THE STATE SHOULD BE JUDICIALLY ESTOPPED FROM ARGUING THAT MERE OWNERSHIP OF A PROPERTY ON WHICH AN ALLEGED SPILL OF HAZARDOUS SUBSTANCES OCCURRED ESTABLISHES STRICT LIABILITY FOR THE PROPERTY OWNER

In *N.L. Industries v. State of New Jersey,* 442 N.J. Super. 428 (Law Division, 2014), aff'd in *toto*, 442 N.J. Super. 403 (App. Div. 2015), reversed on other

[3] Even after its mistake was revealed, the State nonetheless asked that the case be dismissed without prejudice causing Alsol to incur further unnecessary legal fees. (Pa 118).

grounds, 228 N.J. 280 (2017), Judge Wolfson quotes the exact argument the State made in that case:

> Specifically, the State urges, "Where no action or omission of the State is directly responsible for a discharge, the State should not be liable merely because of a discharge emanated from lands it owns and some alternative exercise of its regulatory powers could have prevented the discharge." Id. at 447, (emphasis added; quotations in original).

In its opposition brief, the State fails to address the fact that the State explicitly argued to the court in *N.L. Industries*, as Judge Wolfson quoted verbatim in his opinion, that ownership of the land from which a discharge of hazardous substances occurred did not make the State "a person in any way responsible" for the discharge of a hazardous substance under the Spill Act, and now the State makes the exact opposite argument in the case at bar, i.e. that ownership of the land from which a discharge of hazardous substances occurred is by itself sufficient to make "a person in any way responsible" for a discharge.

In order for a party to be judicially estopped for asserting a position, the party must have succeeded in maintaining that position in a prior litigation. A position taken in a prior litigation has been successfully asserted "if it has helped form the basis of a judicial determination". *Cummings v. Bahr,* 295 N.J. Super. 374, 387 (App. Div. 1996).

In *N.L. Industries*, the court accepted the State's position that mere ownership of a property on which a discharge of hazardous substances occurred did not make the State responsible for the discharge because the court ruled that more than ownership of the property on which the discharge occurred is needed for responsible person status and that control over the discharge is required for a party to be liable under the Spill Act. *N.L. Industries*, 442 N.J. Super. at 448-449. Judge Wolfson found that there must be more than ownership of the property on which a discharge of hazardous substances allegedly occurred and that there is a nexus requirement concerning "the distinctly separate question about holding liable a party who was not directly responsible for the discharge that had occurred, but who nevertheless had some control over the direct discharger in each matter". Id. at 448-449, quoting *New Jersey Department of Enviromental Protection v. Diamant*, 212 N.J. 153, 176 (2012).

In *N.L. Industries*, the State convinced the court that mere ownership of the property by the State was not enough for Spill Act liability. If that were not the case, the court would not have needed to have set the case down for trial on the issue of whether the property owner (the State) had control over the discharge.[4]

[4] Contrary to the State's untrue statement in its opposition brief, Alsol was not charged as the alleged discharger of hazardous materials, but solely as the alleged owner of the property on which the alleged discharge occurred. (Pa 3).

Judicial Estoppel applies in this case because the State previously argued before the trial court in *N.L. Industries*, that the State is not liable under the Spill Act solely because a discharge emanated from lands the State owned and the State's argument clearly formed the basis for Judge Wolfson's determination that more than ownership of the property (i.e. control over the discharge) must be proved for there to be responsible person liability under the Spill Act.

The State's argument before this Court that Judicial Estoppel is inapplicable is disingenuous because it ignores the fact that the State successfully argued (before the Law Division in *N.L. Industries*) that ownership of the land on which a discharge occurred does not by itself make the property owner a person responsible for the discharge.

The bottom line is that the State maintained a position before the trial court in *N.L. Industries* that is clearly contrary to the position it is trying to maintain in the case at bar, and the position it took in that prior litigation helped form the basis for Judge Wolfson's judicial determination. Therefore, the State is Judicially Estopped from arguing that Alsol's alleged ownership of property on which a discharge of hazardous materials allegedly occurred makes it a person responsible for the discharge under the Spill Act.[5]

[5] When the State seeks liability under the Spill Act, it contends all that is required is ownership of the property, but when it wants to evade liability under the Spill Act it contends that there must be a greater connection between the property owner and the discharger.

In its opposition brief, the State serves up a red herring by referring to a footnote in Judge Wolfson's opinion. In footnote 11 of his opinion, Judge Wolfson states that *N.L. Industries* made an alternative argument (in addition to its ownership argument) that the State should be liable under the Spill Act because the alleged discharge may have occurred on riparian lands and the State has certain additional responsibilities for public trust lands. The State objected to this argument. Id. at 447 (footnote 11).

Judge Wolfson's decision not to address *N.L. Industries*' alternative "public trust lands" argument (or the State's objection thereto) does nothing to change the fact that the State argued in *N.L. Industries* that mere ownership of a property on which a discharge occurred does not render the property owner liable under the Spill Act and that said argument helped form the basis of Judge Wolfson's judicial determination. The fact that Judge Wolfson did not address *N.L. Industries*' alternative argument does not change Judge Wolfson's reliance on the State's argument that ownership of property alone is not sufficient for responsible person statue.

In affirming Judge Wolfson's opinion, and commending Judge Wolfson for his "thoughtful and erudite" opinion, the Appellate Division further confirmed that the State's public trust doctrine argument was an alternative theory posited in the case, and separate and distinct from its argument that a further nexus requirement

is needed for a property owner to be deemed a responsible party under the Spill Act. *NL Industries v. State*, 442 N.J. Super 403, 404-405 (App. Div. 2015).

CONCLUSION

We respectfully request that this Court rule that Judge Jones's dicta is not binding in any subsequent proceedings and that Alsol should be awarded its legal fees and costs under Rule 4:37-1(b). To the extent that the Court is not inclined to rule on the dicta issue, we respectfully request that the Court reverse Judge Jones's purported "holding" on Spill Act liability, and decide whether the State is barred from bringing its claim that property owners on whose land a discharge occurred are strictly liable under the Spill Act based on the Doctrine of Judicial Estoppel.

Respectfully Submitted,

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