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September 27, 2023

Clerk Appellate Division

Box 006

Hughes Justice Complex

25 West Market St.

Trenton NJ 08625-006

RE: Tania Barone Plaintiff-appellants v AAA Insurance and or CSAA General Insurance Company and APLUS Contents, In Defendants-respondents

A-002919-22; Appeal from orders of entering summary judgment against the Plaintiff, entered in the law div. Hudson County

Sat Below Judge D'Elia, JSC HUD 528-20

LETTER BRIEF OF APPELLANT

Of Counsel and on Brief
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To the Honorable Judges of the Appellate Division:

Please accept the following letter brief in support of a the Appeal of Plaintiff-Appellant.

TABLE OF JUDGMENTS ORDERS AND RULINGS

TABLE OF TRANSCRIPTS

Procedural History

Plaintiff Tania Barone filed this lawsuit against the defendants in Superior court of Jersey, Law div. Hudson County. (Aa137). The complaint against the defendant was amended. (Aa). Both defendants AAA Insurance and or CSAA General Insurance (hereinafter CSAA) and A Plus Contents Inc. (Hereinafter A Plus) filed answer to the original complaint and the amended complaint. (Aa14;Aaa142;Aa158).

CSAA filed a counterclaim against the Plaintiff seeking damages for what they considered fraudulent representations by Plaintiff in her insurance claim submitted after a flood in her home in Jersey City. Barone answered the counterclaim. (Aa174).

Defendants both moved for summary judgment. (Aa1; Aa127). The motions were opposed by the Plaintiff. (Aa344). Orders were entered against the Plaintiff and her complaint was dismissed. (T; Aa411-Aa414). Plaintiff moved for reconsideration and defendants both opposed that motion; (Aa415: Aa449-Aa451). That motion was denied. (Aa452) (2T).

The defendant CSAA moved for summary judgment on its counterclaim and that motion was opposed. (Aa453). The court entered the order on the motion. (Aa538). (3T). This appeal follows (Aa540).

STATEMENT OF FACTS

Plaintiff filed suit against her homeowner's carrier (CSAA) seeking compensation for damages sustained from a water leak occurring on January 14, 2019 (Aa3). A Plus was added as a defendant alleging that they had improperly clean and restore items of Plaintiff. (Aa9). A Plus denied that there was any contractual relationship between Plaintiff and APlus (Aa4). They argued that they were retained to perform a site inspection and to perform an inventory. (Aa4). They alleged that they transported items to the dry cleaner as a courtesy to Plaintiff. (Aa4) Restoration work at the home was performed by 911 Restoration. (Aa5). The allegations against CSAA were that they refused to reimburse the Plaintiff in accordance with the terms of her policy. Plaintiff alleged Bad faith, breach of contract, failure to provide alternative housing and personal injuries. (Aa9-Aa11). CSAA filed an answer and counterclaim wherein they alleged that Plaintiff made misrepresentations when the claim was submitted (Aa168). They claim she misrepresented her health when she asked for alternate living arrangements; That she could not work due to mold exposure; claimed that certain items were a total loss when they were not; misrepresented the value of certain items including an I Phone and claimed she was an expert in oriental rugs. (Aa168). They sought a judgment against her. (Aa169).

At the close of discovery both defendants moved for summary judgment. (Aa1; Aa127). The motions were opposed by the Plaintiff who submitted opposition indicating that she lived in the lower unit of the Hancock Ave Property and that she had no other property. (Aa350). She disputed that the claim was about a water leak and that it was a flood. (Aa350). She was directed by A Plus to leave the premises when they conducted the inventory. She wtched them go through her drawer an other areas where there was no flooding. (Aa350)She alleges that they stole many items that never made the inventory list. This included items that were locked in a storage unit. They took items from her medicine cabinet. They damaged skin care items that thet she was never paid for. She was told that they were retained to inventory repair and restoration. (A351). They took items that were never repaired. (Aa351). And new items that were ripped and torn. (Aa351). Furs were taken and required ripped and damaged. (Aa351). She had knowledge of all items that were taken and not returned and items that were returned ripped or tags off. (aa351 Issues of fact were raised as to the claim against A Plus.

As to CSAA the following was offered relative to their motion. Many of the items never made the inventory list as they were lost or stolen. She was told to hand over the keys to her property and leave during the inventory process. (Aa352). The 8K Ipod was one such item that was taken and never made the list. She looked up the value on Ebay. (Aa352). She submitted expert testimony that she suffered a loss of $32,000.00 (Aa352). She attached photos and her arbitration statement showing her basis for her claim. (Aa352-53). She provided to Defendant's her paystubs showing what she made as an actress. (Aa353). She supplied medial information documentation about her illness. (Aa353-Aa354). She never had allergies with clean dogs or cats. She was not able to work because the health issues regarding this incident. (Aa354).

She was asked to help prepare a list of items but the list was prepared by A Plus. She was unable to determine the missing items that did not make the list. (Aa355). She certified that the IPod never made the list along with other items from a separate locked storage closet which A Plus, unlocked and stole from. She never portray herself as a rug expert but said she grww up around these items and has knowledge of them. (Aa 356). She was never reimbursed for damages to her rugs. (Aa356.

The court granted both defense Motions. (T12-T19). The court held that the motion was not properly opposed by the Plaintiff as there was a failure to comply with R 4: 46-2b. (Aa411-Aa414). Plaintiff filed for reconsideration which was denied by the Court. (Aa452). That motion was supported by a certification of Plaintiff (Aa416-A448). The court's decision was that the original opposition was not a sham affidavit but that there was not enough there to defeat the summary judgment. (2T9-2T10). Defendant CSAA then moved for judgment on its counterclaim (Aa453). This motion as opposed but the court ruled on April 14, 2023 that same was unopposed. (3T3) (Aa353)

Legal Argument

POINT I
THE COURT ERRED IN GRANTING SUMMARY JUDGMENT TO DEFENDANTS AND ERRED IN DENYING THE MOTION FOR RECONSIDERATION (Aa411; Aa413; Aa452)(T12-T19) 2T9-2T10)

The court below granted both defense motions for summary judgment and dismissed the Plaintiff's complaint. (Aa411; Aa414 (T12-T19)

The court was highly critical of the opposition submitted by the Plaintiff which defendant CSAA claimed constituted a sham affidavit. The court was obligated under Brill v Guardian Life Insurance 142 N.J. 520 (1995) and R. 4: 46-2. The movant is entitled to summary judgment if on a full record the adverse party who is entitled to have facts and inferences viewed most favorably to it has not demonstrated the existence of a dispute whose resolution will in his favor will ultimately entitle him to judgment.

Summary judgment should be denied where the determination ofa a material fact depends primarily on a credibility determination. See Parks v Rogers, 176 N.J. 491 (2003).

The motion should be denied where an action or defense requires determination Of a state of mind or intent such as claims such as waiver bad faith fraud or duress. See <u>Auto Lenders v Gentilini Fors</u>, 181 N.J. 245 (2004)

Based on this standard, A Plus's motion at least as it relates to negligence should not have been granted by the court. A Plus argued that Plaintiff could not prove negligence claim. (Aa3-Aa6). The Plaintiff's certification and opposition to the statement of material facts show that Plaintiff has raised issues of facts on every element of the causes of action against A Plus. (Aa344-Aa357). Whatever their defense is it must be weighed in the context of the allegations set forth in her submissions. They assumed a duty to her which duty they breached and which breach caused her damages. She has expert testimony that shows the extent of her loss and photos. She can testify about items that were taken by them, items that were destroyed and or damaged. She was capable to testify as to the losses. All of this information set forth in her certification and statement of material facts was ignored by the court below. It should have been accepted for summary judgment purposes. It was not. Summary judgment shouldn't have been granted by the court and the claim against A Plus should have survived/

Likewise, her contract claim should have survived summary judgment. They assumed certain duties to her and therefore had a contractual duty to perform and can be liable based on the breach of same.

CSAA MOTION SHOULD HAVE BEEN DENEID

As stated above, claims regarding state of mind are not candidates for summary judgment. This defendant has asserted fraud and unclean hands. Both are matters that delve into the state of mind of my client. See Auto Lenders, supra.

First, Plaintiff contends that she didn't work during the time of the mitigation period, and she didn't lie about mold exposure or her illness related to same. (Aa350-Aa357). Defendant has not eliminated the possibility that a jury could find in her favor. There are issues of fact that prevent summary judgment.

Secondly, Plaintiff's certification and accompanying documents show the basis of the fact that she was not properly paid on her claim. She has fact testimony, expert testimony and photos to establish same. All of the items that alleges make up a part of her claim she either certifies to and or finds support in the report of her expert. (Aa350-Aa407)

Summary judgment is only permitted where there are no genuine issues of material facts. CSAA made arguments for sure, and asked the court to accept them. But that is not the standard. The standard is to accept the evidential materials from the party opposing the motion. If the court applies that standard the motion should have been denied. (T12-T19)

Plaintiff asks that this court reverse the order below. Plaintiff raised issue of fact and the court ignored them.

Likewise and for similar reasons the court should have granted the motion for reconsideration. (2T9-2T10). Plaintiff's certification for that motion attached deposition testimony which confirmed that 1) She had no input in the inventory of A Plus. (Aa417); A Plus stole items that never made it to the list; they took items from her medicine cabinet and was told that APlus was there to inventory, repair and restore her property.She testified as to damaged items. And tags that were ripped off clothes; (Aa417-Aa418). She has knowledge of the value of the items and hired and an expert. (Aa419). All of this information was provided to the court and the court overlooked it. The court should have relied on R 4:49-2 and granted the motion and vacated it previous orders. This cour should review her ample certification and come to the conclusion that an error was made.

POINT II
THE COURT ERRED IN GRANTING THE DEFENSE MOTION FOR SUMMARY JUDGMENT ON ITS COUNTERCLAIM AND AWARDING DAMAGES TO THE DEFENDANT (A538-A539 3T3)

The defendant CSAA moved for summary judgment on its counterclaim. (Aa456-Aa460). In doing so, they argued that the court could find as a matter of law based on its earlier rulings that Plaintiff had committed fraud in the claim process so that all of the money paid should be paid back.

In August 2022 CSAA filed a motion to dismiss the Plaintiff. That motion didn't seek any ruling by CSAA for claims against Plaintiff. The proposed order asked for the complaint to be dismissed and nothing more. The motion was granted and a motion for reconsideration was denied. When the court originally ruled on the motion, there was no findings of fact or conclusions of law that Plaintiff that Plaintiff violated the insurance policy by fraudulently concealing anything. Nor did it rule on the causes of action that make up the defendant's CSAA's counterclaim. The court can search the transcript vain for any mention of the fact that Plaintiff committed fraud or concealed anything (T1-T20).

The **Longobardi v Chubb** matter states that the law abhors a forfeiture, and that policy provision should be construed, if possible, to sustain coverage. See 121 N.J. 537 (1990). The clause is triggered when the insured has " intentionally concealed or misrepresented any material fact or circumstance relating to the insurance." Id. For the insurer to void a policy because of a post loss misrepresentation, it must be " knowing and material." Id at 540. There has been no finding of either by the court, contrary to what is argued in CSAA's brief. According to **Longobardi**, the lie must be willful. Id at 540. There has been no finding that Plaintiff willfully lied. Additionally, forfeiture results only when the fact misrepresented is material. Id at 540. An insured's misstatement is material if when made a reasonable insurer would have considered the misrepresented fact relevant to its concerns and important in determining its course of action. Id at 542.

There was no determination made by the court below on whether the concealed or misrepresented fact was knowing and material. The motion should be denied. Additionally the attached certification by offered by CSAA by Mr. Davis makes no mention of the materiality of the alleged statements of the Plaintiff. (Aa461). The motion should have been denied for that reason alone.

Additionally, CSAA moved for a declaratory judgment arguing that same results in a forfeiture of all mines paid. There was no case cited. The remedy is for a jury and not a court on summary judgment. CSSA claimed unjust enrichment and that Plaintiff was entitled to nothing. There was no precise description of the benefits, and any determination was to be made by a jury and not by the court. Finally, CSAA alleged breach of implied covenant of good faith and fair dealing. Again, this is a jury question. CSAA claimed isolated incidents of fraud which a jury would need to evaluate to determine the remedy.

The court articulated no findings or conclusions. It claimed the motion was unopposed. It wasn't and even it was unopposed there was no basis to decide the matter in defendant's favor.

Conclusion

The order below must be vacated and the matter remanded on all issues.

Respectfully

Peter A. Ouda

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
Docket No. A-002919-22

		Civil Action
TANIA BARONE, Plaintiff/Appellant,	:	On Appeal From:
vs.	:	SUPERIOR COURT OF NEW JERSEY - LAW DIVISION
CSAA GENERAL INSURANCE COMPANY and A PLUS CONTENTS SERVICES, INC., Defendants/Respondents.	:	HUDSON COUNTY
	:	DOCKET NO.: HUD-L-528-20
	:	Sat Below:
	:	Hon. Anthony V. D'Elia, J.S.C.

BRIEF OF DEFENDANT/RESPONDENT, A PLUS CONTENTS SERVICES, INC.

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PRELIMINARY STATEMENT

This litigation arises out of an incident occurring on January 14, 2019, at which time Appellant, Tania Barone ("Barone"), claims to have sustained property damage as the result of a water leak at her home in Jersey City, New Jersey. Respondent, CSAA General Insurance Company ("CSAA"), Barone's homeowner's insurance carrier, retained Respondent, A Plus Contents Services, Inc. ("A Plus"), to inspect Barone's home, and to photograph, inventory and provide research to CSAA regarding the condition and value of the items of personal property Barone claimed were damaged as the result of the water leak.

A Plus is engaged in the business of providing investigative and evaluation services to property and casualty insurance companies. A Plus was not retained by any party and did not undertake to restore, repair or clean Barone's property. A Plus is not an insurance adjusting firm. Pursuant to its contract with CSAA, A Plus provided its findings and recommendations to CSAA concerning the items that Barone claimed were damaged, and whether those items should be repaired or replaced. CSAA made the decision as to whether to restore, repair or replace an item. A Plus furnished CSAA with research regarding the value of the items Barone claimed were damaged. CSAA made the ultimate determination as to what compensation, if any, Barone should receive for any particular item.

Barone acknowledged that there was no contract between her and A Plus, and that A Plus was not engaged to restore, repair or clean her property.

As a courtesy, A Plus, at Barone's request and at no cost to her, arranged for some of Barone's damaged garments to be transported to a local dry cleaner. Prior to these items being removed from her home and taken to the dry cleaner, Barone had already certified to CSAA that they were damaged as the result of the water leak and flooding.

Barone claims that some the garments transported to the dry cleaner were not returned to her. She also alleges that some of the items were damaged when they were returned from the dry cleaner. However, Barone has not produced any credible evidence establishing which of the items that were transported to the dry cleaner were not later returned to her. She has produced no evidence establishing the value of any of the items she alleges were damaged or lost. In addition, Barone has not, and under the fact of this case cannot, demonstrate that any conduct by or for which A Plus is responsible is causally related to any damage she claims was present when items of her personal property were returned to her from the dry cleaner.

For the reasons expressed more fully below, Barone's appeal of the Trial Court's Orders should be denied and dismissed because there are no material issues of fact for trial as Barone is unable to establish a cause of action, whether based in negligence or contractual theories, against A Plus.

PROCEDURAL HISTORY

Barone commenced this action by filing a Complaint against CSAA on February 7, 2020. Pa137. A Plus was brought into this case by way of an Amended Complaint filed by Barone on February 25, 2020. Pa9. A Plus filed its Answer, with Affirmative Defenses, to Barone's Amended Complaint on March 23, 2020. Pa14. Barone was initially deposed on September 22, 2020. Pa26. That deposition was adjourned to permit Barone additional time to compile information pertinent to her claims against A Plus and to permit Barone to further amend her Complaint to add the company responsible for performing restoration services at her home. See Pa26, at pages 155-157, inclusive. Barone's deposition was resumed on January 8, 2021, at which time Barone stated, once again, that she needed additional time to compile information pertinent to her claims against A Plus. See Pa67, at pages 59-61, inclusive. The discovery deadline in this matter expired on April 30, 2021, pursuant to the Trial Court's Order of March 5, 2021. At no time did Barone identify an expert upon whose testimony she intended to rely at the time of the trial of this matter.

Barone's Complaint against CSAA was dismissed, without prejudice, as a discovery sanction on June 11, 2021. On August 4, 2021, Barone's claims against A Plus were submitted to an arbitration hearing. Following the filing of the Report and Award of the Arbitrator on August 4, 2021, Barone filed a Demand for Trial De Novo on August 9, 2021. On September 9, 2021, the Court reinstated Barone's Complaint against CSAA. The trial of this matter was scheduled to begin on October 12, 2022.

On August 1, 2022, A Plus filed a motion for summary judgment. See Pa1. Following a hearing on the motion, the Trial Court entered an Order on September 26, 2022, granting summary judgment in favor of A Plus and dismissing Barone's claims against A Plus, with prejudice. Pa413.

Barone filed a motion on October 17, 2022, seeking reconsideration of the Trial Court's Order granting summary judgment. Pa415. A Plus opposed Barone's motion by way of a Letter Brief filed with the Trial Court on October 27, 2022. Following oral argument on November 18, 2022, the Trial Court issued an Order, dated November 18, 2022, denying Barone's motion for reconsideration. Pa452. This appeal followed.

COUNTER STATEMENT OF MATERIAL FACTS

Barone commenced this litigation by filing a Complaint against CSAA seeking compensation under the terms of her homeowner's insurance policy with CSAA for damages she allegedly sustained as the result of a water leak occurring on January 14, 2019, at Barone's home in Jersey City, New Jersey. Barone subsequently filed an Amended Complaint, adding A Plus as a defendant. In her Amended Complaint, Barone sought damages from A Plus for its alleged negligence and breach of contract due to A Plus's alleged failure to clean and restore Barone's personal property. See Pa9, 11-12, Fifth Count and Sixth Count.

A Plus is in the business of providing investigative and evaluation services to property and casualty insurance companies. Pa23. Following incidents such as the one that occurred at Barone's home, A Plus is retained by a home owner's insurance carrier to inspect the insured's property, and to photograph, inventory and provide research to the insurance carrier regarding the condition and value of the damaged contents. Pa23 -24. In this particular case, A Plus was retained by CSAA to perform a site inspection and to inventory the property that Barone alleges was damaged following the water leak at her home. A Plus was not retained to restore, repair or clean Barone's property. Pa24. There was no contractual agreement between A Plus and Barone. Id. Moreover, A Plus did not undertake to restore, repair or clean Barone's property or any of the items Barone contends were damaged. Pa25.

As a courtesy to Barone, and at no cost to her, A Plus arranged for some of Barone's damaged garments to be transported to and from a local dry cleaner. When making a claim for reimbursement from CSAA, Barone certified that these garments were already damaged as the result of the incident at her home before they were taken to the dry cleaner. Pa25.

Barone acknowledged in her deposition on September 22, 2022, that she did not enter into a contract with A Plus. See Pa62, page 142; Pa94. Barone understood that A Plus was engaged by CSAA to inventory and assess the items of personal property that Barone claimed were damaged as the result of the incident at her home. Pa62, page 142. Barone further acknowledged that A Plus had no responsibility to clean any items of her personal property. Pa65, page 155. Barone later testified that she believed A Plus was supposed to clean her personal property but ultimately conceded that she had no idea why she thought that. Pa95. Barone and her counsel understood that A Plus was not retained and did not undertake to perform any restoration work at Barone's home or with respect to any items of Barone's personal property that were damaged as the result of the water leak. And Barone and her counsel both knew that multiple companies other than A Plus were involved in the restoration and cleaning of Barone's property. Pa65, page 156.

In accordance with its contractual obligations to CSAA, A Plus performed a site inspection of Barone's property and provided CSAA with an inventory, together with A Plus's recommendations relative to the condition and value of the items of personal property that Barone claimed were damaged as the result of the water leak at her home. Pa24. The information concerning the value of the damaged items was a combination of input from Barone and the independent investigation and research conducted by A Plus. Id.

At the time of her deposition on January 8, 2021, Barone contended that A Plus failed to clean items of her damaged personal property. Barone further contended that A Plus caused additional damage to some of those items of her personal property that were already damaged as the result of the water leak. Pa70-80, inclusive. But when asked Barone was unable to identify with any degree of specificity the particular items she contends A Plus damaged. In addition, she conceded that all of the items in question were already damaged as the result of the water leak at her property, and she was not able to differentiate between damage done by the water leak and damage purportedly done by A Plus. Id.; See also, Pa97-98.

Barone testified that the first time A Plus came out to her home to perform an inventory was approximately three (3) months after the water leak occurred. Pa86. Immediately following the incident, an entity doing business as 911 Restoration came to Barone's home to perform cleaning and restoration work. Pa34, page 33. While at Barone's home, 911 Restoration cut a whole in the wall of a closet that contained items of Barone's personal property and clothing. Pa37, page 42-43. Remarkably, Barone did not remove any of the items of her personal property from that closet before 911 Restoration began its work. Id. She does not even recall if the items of personal property in that closet, or anywhere else in her home, were ever covered with plastic prior to 911 Restoration doing its work in Barone's home. Id.

Barone admitted that items of her personal property, such as coats, fur coats and other clothing were damaged both as the result of the water leak and as a result of the work performed by 911 Restoration. Pa40, page 54. Barone further admitted that the items of personal property which are the subject of her claims against A Plus were already damaged. Pa74. Barone is unable to state, with any degree of specificity or certainty, which items were removed to be cleaned, which items were not returned, and which items were returned to her damaged. See Pa41, pages 60 - 61; Pa42, pages 62; Pa43, pages 67 - 69; Pa44 70 - 73; Pa45, page 75. She claims, without any supporting evidence, that the skins of certain "fur items" were cracked when they were returned to her. Pa43, page 67.

In addition to 911 Restoration, an entity doing business as Got Trash came to Barone's home following the water leak and removed damaged and destroyed items of Barone's personal property. Pa56, page 120. Barone does not remember and apparently did not record what items of her personal property Got Trash removed. Significantly, she has no idea if Got Trash removed any of the items on the contents list submitted to CSAA at issue in this litigation. Pa56, page 121.

LEGAL ARGUMENT

I. THE TRIAL JUDGE PROPERLY GRANTED SUMMARY JUDGMENT SINCE BARONE PRESENTED NO CREDIBLE EVIDENCE DEMONSTRATING THAT A PLUS WAS NEGLIGENT

AND THAT THE UNREASONABLE ACTS OR OMISSIONS BY A PLUS CAUSED BARONE'S ALLEGED DAMAGES.

A. The Standard of Review.

This Court's review of the grant of a summary judgment is de novo and is based on the same standards governing the Trial Court's consideration of the facts. *Turner v. Wong*, 363 N.J. Super. 186, 198-99 (App. Div. 2003).

The pleadings and discovery conducted in this matter support the Trial Court's summary judgment in favor of A Plus. In opposing summary judgment, Barone did not and under the facts of this case cannot come forward with credible evidence demonstrating a genuine issue for trial relative to her claims against A Plus.

The procedures and standards governing a motion for summary judgment are set forth in Rule 4:46-2, which provides, in pertinent part, as follows:

> The judgment or order sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law. An issue of fact is genuine only if, considering the burden of persuasion at trial, the evidence submitted by the parties on the motion, together with all legitimate inferences therefrom favoring the non-moving party, would require submission of the issue to the trier of fact.

Rule 4:46-2(c).

As observed by the court in *Brill v. Guardian Life Ins. Co. of America*, 142 N.J.

520, 529 (1995):

> [A] court should deny a summary judgment motion <u>only</u> where the party opposing the motion has come forward with evidence that creates a 'genuine issue as to any material fact challenged.' That means a non-moving party cannot defeat a motion for summary judgment merely by pointing to <u>any</u> fact in dispute. . . . [I]f the opposing party in a summary judgment motion offers . . . only facts which are immaterial or of an insubstantial nature, a mere scintilla, 'fanciful, frivolous, gauzy or merely suspicious,' he will not be heard to complain if the court grants summary judgment, taking as true the statement of uncontradicted facts in the papers relied upon by the moving party, such papers themselves not otherwise showing the existence of an issue of material fact.

Brill, 142 N.J. 520, 529 (1995)(emphasis in original), citing *Judson v. Peoples Bank & Trust Co. of Westfield*, 17 N.J. 67, 75 (1954). A responding party may not rely upon "bare conclusions" in her pleadings to overcome a motion for summary judgment. Rather, she must produce credible factual support showing that there is a genuine issue for trial. *Sullivan v. Port Auth. Of NY & NJ*, 449 N.J. Super. 276, 279-280 (App. Div. 2017). Further, self-serving assertions without more do not suffice to create a genuine question of material fact. *Fargas v. Gorham*, 276 N.J. Super. 135 (Law Div. 1994). In order to stave off summary judgment a respondent must present credible evidence showing a significant dispute in the factual record as to substantial facts. *Investors Bank v. Torres*, 457 N.J.Super. 53, 64-65 (App. Div. 2018), aff'd 243 N.J. 25 (2020)(a litigant may not defeat a motion for summary judgment by "the identification of a disputed fact of an insubstantial nature"); Pressler & Verniero, *Current N.J. Court Rules*, Rule 4:46-2, comment 2.2. (2024)("the respondent must do more than show that there is some metaphysical doubt as to the material facts").

As observed by the court in *Brill v. Guardian Life Ins. Co. of America*, 142 N.J. 520, 540 (1995), when reviewing a motion for summary judgment, the motion judge must "consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational fact finder to resolve the alleged disputed issue in favor of the non-moving party."

The same standard which governed the Trial Court is applied on appeal. The evidence is viewed in the light most favorable to Barone, and she must be given 'the benefit of all favorable evidence and inferences presented in the record.' *State v. Quaker Valley Farms, LLC*, 235 N.J. 37, 54-55 (2018), quoting *Murray v. Plainfield Rescue Squad*, 210 N.J. 581, 584-585 (2012).

Even when viewed in a light most favorable to Barone, both the evidence in the record and Barone's failure to credibly dispute that evidence establish that the Trial Court correctly granted judgment in favor of A Plus as a matter of law.

B. Barone did not present any credible evidence establishing negligence on the part of A Plus.

Barone's answers to written discovery requests, the various certifications she filed in this matter and her deposition testimony lack any credible evidence establishing that the damages she alleges to have sustained were the natural and probable consequences of any thing A Plus did or failed to do. Barone claims that certain garments were removed and not returned by A Plus. However, despite having been given repeated opportunities to do so during the course of discovery in this matter and, in particular, when she was deposed, Barone was not able to specifically identify which items were not returned to her. Barone is unable to prove A Plus is responsible for those items she claims are missing. Both 911 Restoration and Got Trash were in her home and removed items following the incident months before A Plus first came to Barone's home.

Barone further contends that certain items that were removed from her home for cleaning were returned to her in a damaged condition. Yet Barone has not and under the fact of this case cannot produce any credible evidence establishing that A Plus caused any such damage.

Barone has produced no credible evidence establishing the value of any of the items she claims were damaged or lost. Barone certified to CSAA and testified under oath that these items were already damaged by the water leak and by the activities of 911 Restoration. In addition, Barone acknowledged during her deposition that she does not know if these items were actually discarded by Got Trash. In opposing A

Plus's motion, Barone did not and under the facts of this case cannot point to any facts which prove that A Plus was negligent and that the unreasonable acts or omissions by A Plus caused her alleged damages.

It is axiomatic that "[i]n order to establish a claim of negligence, a plaintiff must demonstrate: 'a duty of care, (2) that the duty has been breached, (3) proximate causation, and (4) injury.' . . A plaintiff bears the burden of proving negligence . . . and must prove that unreasonable acts or omissions by the defendant proximately caused his or her injuries." *Underhill v. Borough of Caldwell*, 463 N.J. Super. 548, 554, 233 A.2d 594 (App. Div. 2020)(quoting *Townsend v. Pierre*, 221 N.J. 36, 51, 110 A.3d 52 (2015)(citations omitted.) As observed by the Court in *Camp v. Jiffy Lube #114*, 309 N.J.Super. 305, 309, 706 A.2d 1193 (App. Div. 1998), "[p]roximate cause is a limitation the common law has placed on an actor's responsibility for the consequences of the actor's conduct."

Barone bears the burden of proving, by a preponderance of the evidence, that A Plus breached a duty of care it owed to her relative to her personal property, and further, that A Plus's negligence proximately caused the damage to Barone's property. Barone must show that the alleged damage to her personal property is reasonably connected with the unreasonable actions or inactions of A Plus. <u>See</u> <u>eg</u>, *Model Civil Jury Charges*, §6.10 (Revised 11/2019). As is clear from her discovery responses and deposition testimony, Barone is not able to meet her burden of proof in this case.

A Plus was not retained to restore, repair or clean Barone's property. Moreover, A Plus did not undertake to restore, repair or clean Barone's property or any of the items Barone contends were damaged. During her deposition, Barone acknowledged that she did not enter into a contract with A Plus. And she acknowledged that A Plus was not engaged to restore, repair or clean her property. Accordingly, A Plus owed no duty of care to Barone with regard to the restoration, repair or cleaning of her property.

As a courtesy, A Plus, at Barone's request and at no cost to her, arranged for some of the garments that had been damaged as the result of the water leak at Barone's home to be transported to a dry cleaner. Even if one were to assume that this act established the necessary predicate of whether A Plus owed a duty to Barone, she still must prove that the unreasonable acts or omissions by A Plus in performing this act proximately caused damage to or the loss of her personal property.

Before A Plus arranged for certain items of Barone's personal property to be transported to a dry cleaner, Barone certified to CSAA that all of the items were damaged. In addition, she stated during her deposition that her personal property, including her coats, fur coats and other clothing, were damaged both as the result of the water leak and as a result of the work performed by 911 Restoration. See Pa70-80; Pa97-98; Pa37, pages 42-43.

Barone claims that there were certain items that were not returned to her, or when returned, were damaged. But she is not able to state, with any degree of specificity or certainty, which of her items were removed to be cleaned, which items were not returned, and which items were returned to her damaged. See Pa41, pages 60 - 61; Pa42, pages 62; Pa43, pages 67 - 69; Pa44 70 - 73; Pa45, page 75. She claims, without any supporting evidence, that the skins of certain “fur items” were cracked when they were returned to her. Pa43, page 67. However, Barone has not and cannot establish that any unreasonable action or inaction on the part of A Plus caused this alleged cracking. In fact, Barone admitted that these items were already damaged as the result of the water leak and the activities of 911 Restoration following the incident. See Pa70-80; Pa97-98; Pa37, pages 42-43.

In addition to 911 Restoration, an entity doing business as Got Trash came to Barone’s home immediately following the water leak and removed damaged and destroyed items of Barone’s personal property. Pa56, page 120. Barone does not remember and apparently did not record what items of her personal property Got Trash removed. Significantly, she has no idea if Got Trash removed any of the items on the contents list submitted to CSAA at issue in this litigation. Pa56, page 121.

Barone simply has not offered any credible evidence that the damages and losses she alleges to have sustained were the natural and probable consequences of any thing A Plus did or failed to do. She is not able to specifically identify which items were not returned to her and, as such, is unable to prove that A Plus is responsible for any alleged missing items. Barone is unable to prove A Plus is responsible for any alleged missing items, as both 911 Restoration and Got Trash were in her home and removed items following the incident months before the commencement of A Plus's activities there. Barone has not and under the fact of this case cannot produce any credible evidence establishing that A Plus is responsible for any alleged damage to her personal property. Her own testimony establishes that those items were damaged by the water leak and the activities of 911 Restoration. Moreover, Barone is unable to differentiate between any damage allegedly caused by A Plus and that damage that was already done by the water leak and the activities of 911 Restoration.

Based on the foregoing, the Trial Court properly granted granting summary judgment in favor of A Plus on Barone's negligence claims.

II. THE TRIAL JUDGE PROPERLY GRANTED SUMMARY JUDGMENT SINCE THERE WAS NO EXPRESS CONTRACT BETWEEN BARONE AND A PLUS, AND BARONE PRESENTED NO CREDIBLE EVIDENCE THAT A PLUS UNDERTOOK ANY CONTRACTUAL OBLIGATIONS WITH RESPECT TO BARONE.

A. There was no contractual relationship between Barone and A Plus.

In order to prevail on her breach of contract claims against A Plus, Barone must be able to demonstrate the following:

> "first, that the parties entered into a contract containing certain terms; second, that [Barone] did what the contract required [her] to do; third, that [A Plus] did not do what the contract required [A Plus] to do, defined as the breach of the contract; and fourth, that [A Plus's] breach, or failure to do what the contract required, caused a loss to [Barone].

Woytas v. Greenwood Tree Experts, Inc., 237 N.J. 501, 512 (2019).

Barone is not able to establish the essential elements of a breach of contract claim against A Plus. A Plus was retained by CSAA to perform a site inspection and inventory the property that Barone alleges was damaged following the water leak at her home. A Plus was not retained to restore, repair or clean Barone's property. Pa24. There was no contractual agreement between A Plus and Barone. Id. Moreover, A Plus did not undertake to restore, repair or clean Barone's property or any of the items Barone contends were damaged. Pa25.

Barone conceded in her deposition testimony that there was no contractual agreement between her and A Plus. Pa62, page 142; Pa94. Barone acknowledged that A Plus was not engaged to restore, repair or clean her property. Pa65, page 155. Barone testified that she understood that the role of A Plus was simply to inventory her personal property and assess the damage. Pa62, page 142. An entity doing business as 911 Restoration came to Barone's home to perform restoration and cleaning services following the water leak. Pa34, page 33.

B. There is no credible evidence establishing that any act or omission on the part of A Plus resulted in a loss to Barone.

As set forth above, Barone has not and under the fact of this case cannot produce any credible evidence establishing that A Plus is responsible for any alleged damage to her personal property, as her own testimony establishes that those items were damaged by the water leak and the activities of 911 Restoration, and she is unable to differentiate between any damage allegedly caused by A Plus and that damage that was already done by the water leak and the activities of 911 Restoration. Finally, Barone has not produced any expert testimony concerning her alleged damages.

Based on the foregoing, the Trial Court correctly granted summary judgment in favor of A Plus with respect to Barone's breach of contract claims.

III. THE TRIAL JUDGE PROPERLY DENIED APPELLANT'S MOTION FOR RECONSIDERATION.

The motion for reconsideration filed by Barone sought to overturn the Trial Court's order of September 26, 2022, granting summary judgment in favor of A Plus. Inasmuch as Barone failed to make the showing necessary to even begin the reconsideration process, the Trial Court correctly denied Barone's motion for reconsideration.

Barone did not and under the facts of this case could not present any facts that were not previously presented to and considered by the Trial Court. Further, Barone is unable to demonstrate that the basis for the Trial Court's decision was palpably incorrect or irrational. "Reconsideration is a matter within the sound discretion of the Court, to be exercised in the interest of justice. *D'Atria v. D'Atria*, 576 A.2d 957, 242 N.J. Super. 392, 401 (Law Div. 1990). Moving for reconsideration of a prior order "is not appropriate merely because a litigant is dissatisfied with a decision of the court or wishes to reargue a motion. *Palombi v. Palombi*, 414 N.J. Super. 274, 997 A.2d 1139, 1147 (App. Div. 2010). Rather, reconsideration is only appropriate

> for those cases which fall into that narrow corridor in which either 1) the Court has expressed its decision based upon a palpably incorrect or irrational basis, or 2) it is obvious that the Court either did not consider, or failed to appreciate the significance of probative, competent evidence. Said another way, a litigant must initially demonstrate that the Court acted in an arbitrary, capricious, or unreasonable manner, before the Court should engage in the actual reconsideration process.
>
> ****************
>
> Although it is an overstatement to say that a decision is not arbitrary, capricious, or unreasonable whenever a Court can review the reasons stated for the decision without a loud guffaw or involuntary gasp, it is not much of an overstatement.

D'Atria v. D'Atria, 576 A.2d 957, 242 N.J. Super. 392, 401; See also, *Palombi v. Palombi*, 414 N.J. Super. 274, 997 A.2d 1139, 1147.

A trial judge's denial of a motion for reconsideration will not be overturned on appeal absent "a clear abuse of discretion[, which] arises when a decision is made without a rational explanation, inexplicably departed from established policies, or rested on an impermissible basis." *Kornbleuth v. Westover*, 241 N.J. 289, 302 (2020)(citations omitted).

In granting summary judgment in favor of A Plus, the Trial Court did not act in an arbitrary, capricious or unreasonable manner. Rather, the Trial Court articulated very thoroughly its reasoning on the record. It is clear that Barone was simply dissatisfied with the outcome and wanted to reargue A Plus's motion for summary judgment. As set forth above, Barone did not offer any credible evidence that the damages and losses she alleges to have sustained were the natural and probable consequences of any thing A Plus did or failed to do. Barone is unable to prove A Plus is responsible for any alleged missing items, as both 911 Restoration and Got Trash were in her home and removed items following the incident long before A Plus's arrival on the scene. Barone has not and under the fact of this case cannot produce any credible evidence establishing that A Plus is responsible for any alleged damage to her personal property, as her own testimony establishes that those items were already damaged by the water leak and the activities of 911 Restoration.

In her motion for reconsideration before the Trial Court, Barone claimed that she provided an expert report in support of her alleged damages against A Plus. Pa416-419. That is not correct. At no time did Barone produce any expert opinion, or other evidence for that matter, proving that A Plus is responsible for the damages she allegedly sustained. On this significant point, Barone cannot demonstrate that the Trial Court either did not consider, or failed to appreciate the significance of probative, competent evidence, because such evidence does not exist.

In granting summary judgment in favor of A Plus, the Trial Court correctly recognized that Barone did not proffer any credible evidence that the damages and losses she alleged to have sustained were the natural and probable consequences of any thing A Plus did or failed to do. During the motion hearing, the Trial Court recognized that Barone failed to demonstrate that A Plus was responsible for any of the items Barone claimed were missing. In fact, Barone does not dispute that other individuals and entities, including 911 Restoration and Got Trash, were in her home and removed items following the incident well before the arrival of A Plus. Barone's own testimony establishes that the items of her property that are at issue in this case were already damaged by the water event and the activities of 911 Restoration at her home. That fact coupled with the lack of any evidence proving that A Plus caused additional damage to those items above and beyond what was already done precludes Barone from meeting her burden of proof, such that a trial against A Plus in this case would be an unnecessary and fruitless exercise. Accordingly, the Trial Court's decision granting summary judgment in favor of Barone was not at all arbitrary, capricious, or unreasonable. The Trial Court's reasoning, if read aloud, would not evoke a loud guffaw or involuntary gasp. See *D'Atria v. D'Atria*, supra.

For all of the foregoing reasons, the Trial Court properly denied Barone's Motion for reconsideration.

Conclusion.

For all of the foregoing reasons, the Trial Court's September 26, 2022 Order granting summary judgment in favor of A Plus, and the November 18, 2022 Order denying Barone's motion for reconsideration of the summary judgment, should be affirmed.

Respectfully submitted,

THE WHELIHAN LAW FIRM LLC

Thomas A. Whelihan

Dated: 11/09/2023 By:______________________

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TANIA BARONE

Plaintiff/Appellant

vs.

CSAA GENERAL INSURANCE COMPANY and A PLUS CONTENTS, INC.

Defendants/Appellees.

SUPERIOR COURT OF NEW JERSEY
APPELATE DIVISION

DOCKET NO. HUD-L-528-20

COURT BELOW:
Hudson County
Law Division

Judge Below:
Hon. Anthony V. D'Elia, J.S.C.

LEGAL BRIEF OF RESPONDENT,
CSAA GENERAL INSURANCE COMPANY,
IN OPPOSITION TO APPELIANT'S LEGAL BRIEF
IN SUPPORT OF HER APPEAL OF
THE TRIAL COURT' S ORDERS DATED SEPTEMBER 26, 2022,
NOVEMBER 18, 2022, AND APRIL 14, 2023

Of Counsel and On the brief:
C. SCOTT RYBNY, ESQUIRE

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PRELIMINARY STATEMENT

This matter started as a simple insurance claim. Appellant, a professed model and actress, owns a multi-unit property located in Jersey City, New Jersey in which she occupied the basement level apartment. Almost four years ago, a water line connected to Appellant's hot water heater broke, causing some minor water damage to the downstairs apartment that she occupied. What started as a relatively straightforward insurance claim, took various twists and turns as Appellant embellished her claim.

This is an appeal where an oral argument is necessary and CSAA is again reiterating its request for oral argument. The reason for this is simply: Appellant should be put to the task of explaining how she can support her request that the trial judge's rulings be overturned when it was her actions and admissions that formed the basis of each ruling – which admissions she either accedes to or conveniently ignores. In this Appeal, Appellant once again attempts to repackage the same arguments made before the Trial Court but continues to miss the target as she still fails to address the factual underpinnings that supported the entry of summary judgment in favor of CSAA - that under New Jersey law Appellant admittedly made false, incomplete, or misleading representations to CSAA that violated the Policy's Concealment or Fraud Provision. Appellant's insurance fraud consisted of the following:

(1) Falsely claiming that she suffered personal injuries as a result of mold exposure that rendered her unable to work as a model in an effort to secure alternative living expenses from CSAA;

(2) Falsely claiming that she owned a limited edition U2 iPod that she claimed was worth over $8,000;

(3) Submitting false and misleading information about her background in an effort to deceive CSAA into believing that Appellant was an expert on oriental rugs to justify her claim regarding the alleged damage to three rugs in her apartment; and

(4) Falsely claiming that all three rugs were in her apartment at the time of the loss even though one was located in an upstairs hallway as established by one of Appellant's tenants.

To avoid summary judgment, Appellant sought to re-invent her case through a self-serving sham affidavit that contradicted some of her prior discovery responses, document production, and deposition testimony in a last-ditch effort to claim that disputed issues of fact exist. In doing so, as she continues with her current filing, Appellant overlooks the key facts and her admissions upon which the Trial Court granted summary judgment. What Appellant fails to apprehend but the Trial Court recognized is that a single act of fraud is sufficient under New Jersey law to justify summary judgment.

PROCEDURAL HISTORY

CSAA adopts the procedural history set forth by A Plus in its Brief, but with some minor modifications. Specifically, on August 1, 2022, CSAA filed a motion for summary judgment. (Pa127). Following a hearing on the motion, the Trial Court entered an Order on September 26, 2022, granting summary judgment in favor of CSAA and dismissing Barone's claims against CSAA, with prejudice. (Pa411). Barone also filed a motion on October 17, 2022, seeking reconsideration of the Trial Court's Order granting summary judgment as it related to CSAA. (Pa415). CSAA opposed Appellant's motion by way of a Letter Brief filed with the Trial Court. (Pa 449) Following oral argument on November 18, 2022, the Trial Court issued an Order, dated November 18, 2022, denying Barone's motion for reconsideration. Pa452.

On or about March 31, 2023, CSAA filed a Motion for Summary Judgment as to its counterclaims against Appellant. (Pa 453). Appellant filed an Opposition to CSAA's Motion, in which she repeated the exact same arguments raised in her opposition to CSAA's first Motion (Pa127) and her Motion for Reconsideration. The Trial Court entered summary judgment in favor of CSAA. (Pa 538).

COUNTERSTATEMENT OF MATERIAL FACTS

Appellant owns and rents a property in Jersey City, located at 102 Hancock Avenue (Pa129, 1). At all times material hereto, Appellant maintained a homeowner's insurance policy issued by CSAA General Insurance Company and bearing policy number NJH3-204341680 (the "Policy") (Pa131, 12). Appellant's Policy contains the following condition, which is contained in **SECTIONS I AND II – CONDITIONS:**

> **B. Concealment Or Fraud**
>
> This entire policy is void if it was obtained by fraud or concealment of any material facts or circumstances.
>
> We do not provide coverage to any "insured" who, whether before or after a loss, has:
>
> **1.** Knowingly and willfully concealed or misrepresented any material fact or
> circumstance;
>
> **2.** Engaged in fraudulent conduct; or
>
> **3.** Made false statements; relating to this insurance.

(Pa131, 13)

On January 9, 2019, a pipe connected to Appellant's hot water heater reportedly leaked and she thereafter presented an insurance claim to CSAA on or about January 14, 2019 (Pa131, 14).

In connection with that claim, Appellant sought compensation from CSAA for alleged damage to her dwelling, personal property and for alternative living expenses (Pa132, 15). CSAA amicably resolved Appellant's claim for the damage to her dwelling (Pa132, 18). The litigation she filed revolved around her remaining claims for personal property damage and alternative living expenses with the latter forming the basis of her alleged personal injury claim that she was also pursuing.

After receiving notice of the claim, CSAA commenced an investigation into the scope and extent of Barone's alleged loss. CSAA assigned Plaintiff's insurance claim to Mary von Schmidt. (Pa. 132, 16-17).

Appellant is a model and testified that she was involved in commercial and print (Pa 132, 22). After the loss she started pressuring CSAA to pay for her to live in a hotel in January 2019, the basis of which claim stemmed from her allegation that the loss rendered her ill and unable to work as a model. She specifically claimed: "I am not taking time off of work, I am forced to take time off of work because of this disaster, I have a respiratory infection due to this situation and I am forced to be here for clean up to take inventory of my damaged items along with contacting and get estimates from several contractors and hire one of them to do the work." (Pa132, 23).

To further support her request that CSAA pay for Plaintiff to live in a hotel, Plaintiff further represented to New Jersey's Department of Banking and Insurance pursuant to N.J.S.A. 17:33A-6 that she was experiencing adverse health effects from alleged mold exposure. (Pa133, 24). She has doubled down on that position, claiming that she has not worked since the date of loss because of the alleged illness that she sustained as a result of the insurance claim. (Pa133, 25).

In this litigation, CSAA learned that these representation was false. Medical documentation provided by Plaintiff showed that Plaintiff lied about her exposure to mold as testing performed by Lab Corp on or about February 7, 2019, was negative for mold exposure. (Pa 133, 26) The same test results did show that Plaintiff was highly allergic to dogs, cats, and dust mites. (Pa133, 27). That Plaintiff was suffering from an allergic reaction to dogs is not surprising considering she owned one at the time of the loss (Pa133, 28). Moreover, Plaintiff's modeling records that she produced demonstrate that Plaintiff did in fact secure various modeling jobs for which she received compensation from January 19, 2019, through December 27, 2022. (Pa133, 29).

In connection with Appellant's claim for alleged damage to her personal property, Ms. Von Schmidt asked Plaintiff to prepare a contents inventory listing all of the items that sustained damage. (Pa134, 34). CSAA ultimately paid Plaintiff a total of $14,664.00 for the damage that she claimed to her personal property (Pa132, 20; Pa461). Plaintiff continued to work with A Plus to prepare the contents inventory. (Pa134 35).

Dissatisfied with the funds that she received from CSAA, Appellant testified that she went “back and forth” with A Plus over the contents list “several times and there were several changes.” (Pa134, 36).

During discovery, CSAA asked Appellant to identify the personal property items that challenged its payment of. (Pa134, 37). Appellant responded to that Interrogatory by not only answering the same, but by preparing a list with her own contrary valuations. (Pa134, 38). Among the items that Appellant claimed CSAA undervalued included an iPod, which she valued at $8,000 based on her allegation that the specific iPod listed in line 145 was a U2 Special Edition iPod. (Pa134, 39-40).

The U2 Special Edition iPods are red with signatures of the band members on the back. (Pa134,42). The serial numbers for iPods belonging to the Plaintiff confirm that neither is a special edition version. (Pa135, 43). Appellant also included as part of her insurance claim, a request that CSAA pay for two oriental rugs that she claimed were in her unit and sustained damage. (Pa135, 46). When CSAA questioned her about whether the rugs sustained any damage, Appellant sent an email dated June 18, 2019, to Ms. Von Schmidt in which she made the following claims regarding her personal background and experience:

> This is false, my grandfather owned a textiles factory in the Middle East, I have family in Paris that owns a textiles factory and I grew up around these rugs & fabrics. I 100% testify that my rugs were damaged during this process. Mary, I will not accept you trying to do this to me as you tried to do telling me I don't qualify for mortgage insurance (per my policy) & how you told me I got ripped off by the plumber, or how you refused to send out a company to record my damaged personal inventory because you claimed "even grandmas can do that". I need to be reimbursed for my damaged rugs. I prefer to settle this but if I need to take this to court, I will.

(Pa135, 47).

The problem with Appellant's representations, as CSAA later discovered, is that none of them were true. (Pa135, 48). In fact, one of the rugs that Appellant claimed as damaged was not even in her unit at the time of the loss. CSAA learned this in the underlying litigation when it deposed one of Appellant's tenants, Dustin Jaycox. Mr. Jaycox testified that one of the rugs was in an upstairs hallway from the date he moved into the unit in 2018 until around 2020. (Pa136, 50).

LEGAL ARGUMENT

I. THE TRIAL COURT'S DECISION GRANTING SUMMARY JUDGMENT TO CSAA DISMISSING PLAINTIFF'S CLAIMS SHOULD BE AFFIRMED.

A. *Standard of Review*

The Appellate Division's review of a trial court's grant of summary judgment is de novo, using the same standard employed by the trial court under Rule 4:46 as enunciated in *Brill v. Guardian Life Ins. Co. of America*, 142 N.J. 520, 540 (1995). *See also Liberty Surplus Ins. Corp. v. Nowell Amoroso, P.A.*, 189 N.J. 436, 445-46 (2007); see also *Prudential Prop. & Cas. Ins. Co. v. Boylan*, 307 N.J. Super. 162, 167 (App. Div.), certif. denied, 154 N.J. 608 (1998). That is, the Court must consider whether there are any material factual disputes and, if not, whether the facts viewed in the light most favorable to the non-moving party, and in consideration of the applicable evidentiary standard, would permit a decision in that party's favor on the underlying issue as a matter of law. *Brill*, 142 N.J. at 540.

While the Appellate Division's review is de novo, its review is limited to the record before the trial court when it decided the original motion for summary judgment. *Ji v. Palmer*, 333 N.J. Super. 451, 464 (App. Div. 2000). Therefore, when reviewing a grant of summary judgment, the Court can "consider the case only as it had been unfolded to that point," and the evidential material submitted on that motion. *Bilotti v. Accurate Forming Corp.*, 39 N.J. 184, 188 (1953); *Scott v. Salerno*, 297 N.J. Super. 437, 447 (App. Div.), certif. denied, 149 N.J. 409 (1997). The Court's review is also limited by the actual issues and arguments raised before the trial court, and therefore such review ordinarily should not include new arguments raised for the first time on appeal. *Nieder v. Royal Indem. Ins. Co.*, 62 N.J. 229 (1973) (holding that issues not presented to the trial court will not be considered on appeal unless the matter concerns the jurisdiction of the trial court or a substantial public interest).

Under this lens, we must determine "whether the competent evidential materials presented . . . are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving part[ies]." *Townsend v. Pierre*, 429 N.J. Super. 522, 525, 60 A.3d 800 (App. Div. 2013) (quoting Brill, supra, 142 N.J. at 540). The "'essence of the inquiry'" is "'whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Mayo, Lynch & Assocs., Inc. v. Pollack*, 351 N.J. Super. 486, 494-95, 799 A.2d 12 (App. Div. 2002)(quoting *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 251-52, 106 S. Ct. 2505, 2512, 91 L. Ed. 2d 202, 214 (1986)). That said, the Trial Court's interpretation of the law and the legal consequences that flow from established facts are not entitled to any special deference, meaning this Court can uphold the Trial Court's findings but on different grounds. *Farmers Mut. Fire Ins. Co. of Salem v. N.J. Prop.-Liability Ins. Guar. Ass'n*, 215 N.J. 522, 535-36 (2013).

B. ***The Trial Court Did Not Err in Granting CSAA's Motion for Summary Judgments as Appellant Did Not Properly Oppose Material Facts***

Appellant was granted numerous opportunities by the Trial Court to present her case as to why summary judgment should not have been entered against her– the first was in response to CSAA's Motion for Summary Judgment, the second arose in her request for reconsideration, and the third took place in connection with CSAA's Motion for Summary Judgment on its counterclaims. There are two simple reasons why the Appellant failed each time. First, she admitted either through sworn testimony, or discovery responses to providing false or misleading information to

CSAA. Second, Appellant's argument that material facts existed suffered from a fatal flaw – the factual dispute (to the extent one even existed) was created by Appellant herself. As such the Trial Court did not commit reversible error by rejecting Appellant's self-serving characterizations in her certification.

1. Violation of An Insurance Policy's Fraud and Concealment Provision Barred Appellant's Claims

For over twenty years, New Jersey's courts and legislature recognized that "insurance fraud is a problem of massive proportions that currently results in substantial and unnecessary costs to the general public in the form of increased rates." *Merin v. Maglaki*, 126 N.J. 430, 436 (1992). That is one reason why New Jersey law is cemented in its requirement that individuals, such as Appellant, are under an obligation to provide honest and truthful information to CSAA. *See Ferrante v. N.J. Mfrs. Ins. Grp*., 232 N.J. 460, 468 (2018) ("Our case law has routinely emphasized the importance of candor by insureds and the obligation to act in a forthright, open, and honest manner with their carriers throughout the entire process of their claim"). New Jersey's Supreme Court has remained steadfast in that "[t]he right rule of law . . . is one that provides insureds with an incentive to tell the truth. It would dilute that incentive to allow an insured to gamble that a lie will turn out to be unimportant." *Citizens United Reciprocal Exch. v. Perez*, 223 N.J. 143, 151 (2015) (citing *Palisades Safety & Ins. Ass'n v. Bastien*, 175 N.J. 144, 148, 814 A.2d 619 (2003)).

In the seminal case of *Longobardi v. Chubb, Inc*., 121 N.J. 530 (1990), the New Jersey Supreme Court considered a "Concealment or Fraud" provision in defendant Chubb's policy that is essentially identical to Clarendon's provision. For comparison, the Chubb policy provides as follows:

> Concealment or Fraud: We do not provide coverage for any insured who has intentionally concealed or misrepresented any material fact or circumstances relating to this insurance.

In *Longobardi*, plaintiff asserted a claim for stolen items in his home under his policy with Chubb, and later made false statements during his Examination Under Oath. Chubb denied coverage under its "Concealment or Fraud" provision, and plaintiff sued. At trial, the jury found plaintiff did not make any false statements when he applied for insurance but did make a material post-loss misstatement. The complaint was dismissed, and the plaintiff appealed.

New Jersey's Supreme Court found this provision unambiguously provides that if materially false statements were made at any time during the insurance relationship, it allows the insurer to void coverage under the policy: "We are convinced that a reasonable person reading that provision would understand that it includes misrepresentations made to the insurer, whether made during the application or claims processes." *Longobardi*, 121 N.Y. at 542-543.

Stated differently, Appellant's post-loss lies were sufficient to nullify the policy, so long as the misrepresentations were knowing and material. *Id*. at 536-543.

As discussed *supra*, CSAA's policy expressly bars coverage when a material misrepresentation is made by the claimant "in connection with any claim" under the policy. The use of the "any " in the CSAA Policy is explicit enough to encompass Appellant's lies made not only during the claim process but also in the ensuing litigation. Simply put by the *Longabardi* Court: "any means any." *Id*. at 540 (citing *American Employers' Ins. Co. v. Taylor*, 476 So.2d 281, 283 (Fla.Dist.Ct.App. 1985)); see also *Thomas v. N.J. Ins. Underwriting Ass'n (NJIUA)*, 277 N.J. Super. 630, 638 (Super. Ct. 1994) ("When the misrepresentation was made should not make a difference.")

What this means for the current litigation and appeal is that any misrepresentation by Appellant provides a justifiable basis for not only judgment against her on her direct claims against CSAA in the Litigation, but also for the Trial Court to enter judgment as to CSAA's Counterclaims.

Nowhere in Appellant's brief does she argue that a contrary interpretation of the law exists. To the contrary her entire argument is premised on her belief that material facts were disputed that barred summary judgment and that it was for the jury to decide her intent. Yet, just as Appellant failed to present such evidence supporting her claim as to CSAA to the Trial Court, she still failed to identify those facts in the record before this Court.

2. Appellant's Admitted Misrepresentations

Instead of coming forward with evidence supported by the record to support her appeal, Appellant merely cut and pasted the same arguments from her earlier filings to claim that: (1) a factual dispute existed, and (2) it is for the jury to determine her "state of mind." (Appellant's brief, p. 12). In reality, what Appellant is really arguing is that it is for a jury to determine whether she lied in her claim, in her deposition testimony, or in her discovery responses.

The problem with Appellant's argument is that it ignores established New Jersey law.[1] It has long been established in this state that a representation by an insured will support the forfeiture of the insured's rights under the policy if it is untruthful, material to the particular risk assumed by the insurer, and actually and reasonably relied upon by the insurer. *First Am. Title Ins. Co. v. Lawson*, 177 N.J. 125, 137, 827 A.2d 230 (2003) (quoting *Allstate Ins. Co. v. Meloni*, 98 N.J. Super. 154, 158-59, 236 A.2d 402 (App. Div. 1967)); *see also Palisades Safety & Ins. Ass'n v. Bastien*, 175 N.J. 144, 151, 814 A.2d 619 (2003) (recognizing that a "policy may be rescinded and denied to the innocent intended beneficiary based on material misrepresentations, even when the misrepresentations are innocent").

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[1] Even if the Appellate Division considered Appellant's argument regarding the need for a jury to determine her state of mind, that still does not entitle her to the relief she seeks under these facts. *Liebling v. Garden State Indem.*, 337 N.J. Super. 447, 465, 767 A.2d 515 (App. Div. 2001), certif. den., 169 N.J. 606 (2001) (however, even where credibility is in issue, if single, unavoidable resolution of alleged disputed issue of fact exists, that issue should be considered insufficient to constitute genuine issue of material fact for purposes of N.J. Ct. R. 4:46-2)

The material facts, however, remain uncontroverted and Appellant's misrepresentations are straightforward and uncontroverted.

In the first instance, the undisputed record demonstrates that Appellant lied about her physical condition and claimed that her ailments prevented her from working in order to secure alternative living expenses from CSAA, which claim CSAA ultimately honored, paying a total of $17,112.39 in connection with that claim (Pa 132, Pa462-464). Of that amount, CSAA paid almost $15,000 for Appellant to stay in a hotel. (Pa 463). She further pressured CSAA into housing her in a hotel until her apartment was mitigated by filing as well as the Complaint that Appellant filed with the Department of Banking and Insurance pursuant to the penalties of perjury (Pa133).

CSAA's claim payments in this regard are not in dispute nor is Appellant's own email to CSAA (Pa132) in which she lied about her physical condition. establishes these facts, the lies being revealed through medical testing that Appellant underwent. (Pa133, Pa265). According to the report, on February 7, 2019, Appellant underwent testing for exposure to Alternaria alternata, Aspergillus fumigatus, Cladosporium herbarum and Penicillium chrysogenum (Pa.265). Appellant tested negative. That same report showed Appellant to be highly allergic to dogs and cats. (Pa 265). Appellant owned a dog at all times relevant hereto.

While Appellant claims that it is for the jury to determine her state of mind, as it relates to the applicability of the Policy's concealment and fraud provision, her motive for lying is irrelevant. *Longobardi*, 121 N.J. at 538 (1990) As such, forfeiture does not depend on proof that Appellant harbored an intent to recover proceeds to which she was not entitled. *Id.* The Trial Court's decision should be upheld because there is because Appellant – through her own writings and spoken words - willfully misrepresented material facts to secure insurance proceeds (i.e., having CSAA pay for her to stay in a hotel) that she was not eligible for.

There are other documented instances of insurance fraud that supported CSAA's Motions. Turning to Appellant's iPod, it is important to note that during discovery, CSAA asked Appellant to identify the personal property items that she challenged its payment of. (Pa134) Plaintiff responded to that Interrogatory by not only answering the same, but by preparing a list with her own contrary valuations. (Pa287, Pa305 and Pa311, no. 145) Among the items that Plaintiff is claiming CSAA undervalued included an iPod, which Plaintiff has valued at $8,000. (Pa311, no. 145) Plaintiff has claimed that the iPod that sustained damage was a U2 Special Edition iPod. *Id*.

Unfortunately, for Appellant, the U2 Special Edition iPods are red with signatures of the band members on the back. (Pa324-330) The serial numbers for iPods belonging to the Plaintiff confirm that neither is a special edition version. (Pa324-330).

She also previously admitted that she lied about her oriental rug experience to persuade CSAA to afford coverage for the same. This was established in Appellant's June 18, 2019, to Ms. Von Schmidt in which she made the following representation:

> This is false, my grandfather owned a textiles factory in the Middle East, I have family in Paris that owns a textiles factory and I grew up around these rugs & fabrics. I 100% testify that my rugs were damaged during this process. Mary, I will not accept you trying to do this to me as you tried to do telling me I don't qualify for mortgage insurance (per my policy) & how you told me I got ripped off by the plumber, or how you refused to send out a company to record my damaged personal inventory because you claimed "even grandmas can do that". I need to be reimbursed for my damaged rugs. I prefer to settle this but if I need to take this to court, I will.

(Pa332-333).

By the language of her email Appellant clearly intended to convey a single message – that she was an expert on oriental rugs having grown up around them with her family in the Middle East and Paris so as to pressure CSAA to pay money for that portion of her claim outside of litigation. None of this was true, as Appellant later conceded in her deposition. Specifically, Appellant admitted that, (1) she was not even alive when her family allegedly owned a textile factory (Pa54 110:2-5); (2) she also never worked in a textile factory (Pa55 115:19-20), (3) never worked for a company that cleaned rugs (Pa55 115:21-24), and (4) never personally cleaned rugs professionally like the ones she claims were damaged in her apartment (Pa55 115:25; 116:1-8).

On this documentary record, the Trial Judge made the following finding:

> I'm finding, based upon the deemed statement of material facts, that the misrepresentations were knowing and material. You know if you're working between December -- January and December as opposed to not working. You know if you were diagnosed not with mold but with something else as the medical records showed which is a big part of her claim and fight with the insurance company, and you would probably know the, the proper value of that iPod. So they were all knowing and material. According to, according to my findings today there's no genuine issue of material facts as to those, as to those.

(T 17:11-22)

C. Appellant's Certification was a Sham Affidavit

In her opposition to CSAA's Motion for Summary Judgments, Appellant relied exclusively on her own subjective, self-serving Certification as opposed to any admissible document of record. It is that Certification that supports her request that this Court reverse the Trial Court's rulings. Appellant does not address the fact that the Trial Court rejected Appellant's Certifications, finding the same did not comply with Rule 4:46-2(b) and *Lyons v. Twp. of Wayne,* 185 N.J. 426 (2005). Indeed, she does not reference the *Lyons* decision anywhere in her brief. As such, the propriety of the Trial Court's rejection of Appellants Certifications is deemed waived. *Graves v. Church & Dwight Co., Inc*., 267 N.J. Super. 445 (App. Div. 1993).

Even if this Court considers the Certifications that Appellant submitted in response to the Motions for Summary Judgment, it is clear that her Certifications triggered the Sham Affidavit Doctrine[2] as discussed in *Shelcusky v. Garjulio*, 172 N.J. 185 (2002). This doctrine "refers to the trial court practice of disregarding an offsetting affidavit that is submitted in opposition to a motion for summary judgment when the affidavit contradicts the affiant's prior deposition testimony." *Id*. "The doctrine calls for rejection of the affidavit where the contradiction is unexplained and unqualified by the affiant." *Id*. In such instances, the allegedly disputed factual issue can be considered a sham, rather than an impediment to a summary judgment in favor of the moving party. *Id*.

In this case, Appellant takes her Certification to the extremes and attempts to flatly contradict the entirety her earlier deposition testimony and written discovery long after the expiration of the discovery deadline. It is also important that this Court take notice of what is <u>not</u> in Appellant's Brief or in her Appendix – any effort undertaken by Appellant to amend her discovery responses prior to the Discovery End Date. The reason why such information is absent is because she made no such effort.

This is also significant because R. 4:17-7 provides that if a party who has furnished answers to interrogatories thereafter obtains information that renders such answers incomplete or inaccurate, amended answers shall be served not later than

[2] Appellant incorrectly claims that the Trial Court rejected the Appellees' Sham Affidavit argument. That is not true. To the contrary, the Trial Court did not address that argument as it rejected (correctly) Appellant's Certification.

20 days prior to the end of the discovery period. Thereafter, amendments may be allowed only if the party seeking to amend certifies therein that the information requiring the amendment was not reasonably available or discoverable by the exercise of due diligence prior to the discovery end date. *O'Donnell v. Ahmed*, 363 N.J. Super. 44 (Super. Ct. 2003). Appellant's Certification is still fatally flawed given failure to comply with this basic Rule.

D. The Trial Court Correctly Denied Appellant's Motion for Reconsideration

Pursuant to R. 4:49-2, a motion for reconsideration shall "state with specificity the basis on which it is made, including a statement of the matters or controlling decisions which counsel believes the court has overlooked or as to which it has erred." R. 4:49-2. Indeed, a motion for reconsideration is only appropriate where either "the Court has expressed its decision based upon a palpably incorrect or irrational basis, or it is obvious that the Court either did not consider, or failed to appreciate the significance of probative, competent evidence." Cummings v. Bahr, 295 N.J. Super. 374, 384 (App. Div. 1996) (citing D'Atria v. D'Atria, 242 N.J. Super. 392, 401 (Ch. Div. 1990)).

As reflected by the argument transcripts (T), Appellant's counsel was provided with every opportunity to answer the Trial Court's questions and to argue to the Court why summary judgment should not be granted but failed to address either the law or specific points that supported CSAA's Motion. When she filed her Motion for

Reconsideration, the Trial Court again afforded Appellant the opportunity to justify her position. When Appellant sought the same arguments, the Trial Court correctly rejected the same and denied her Motion.

II. THE TRIAL COURT'S DECISION GRANTING SUMMARY JUDGMENT TO CSAA AS TO ITS COUNTERCLAIMS SHOULD ALSO BE AFFIRMED

CSAA also filed a Motion for Summary Judgment as to the various counterclaims it asserted against Appellant. Specifically, CSAA asserted counterclaims against Appellant for: (1) Declaratory Judgment as it relates to her violation of the Policy's Fraud & Concealment Provision, (2) Unjust Enrichment, (3) Breach of Contract/Breach of the Duty of Good Faith & Fair Dealing (Pa159). CSAA premised its Motion on its Counterclaims on two primary arguments. First, given the Trial Court's ruling that led to its September 23, 2022, Order (Pa 411) as detailed at the oral argument (T 17:11-22), under the Law of the Case Doctrine the Trial Court's prior findings were dispositive. Out of an abundance of caution, CSAA also argued the same facts that it relied upon to support its Motion seeking dismissal of Plaintiff's claims.

A. Applicability of the Law of the Case Doctrine to CSAA's Motion for Summary Judgment on its Counterclaims.

Under the law of the case doctrine, "where there is an unreserved decision of a question of law or fact during the course of litigation, such decision settles that question for all subsequent stages of the suit." *Bahrle v. Exxon Corp.*, 279 N.J. Super.

5, 21 (App.Div. 1995) (quoting *Slowinski v. Valley Nat'l Bank*, 246 N.J. Super. 172, 179 (App.Div.1993); *Monaco v. Hartz Mountain Corp.*, 178 N.J. 401, 413 (2004) (finding the trial court "overstepped its bounds" when it ruled on an issue that was previously resolved upon summary judgment because "[a] court of equal jurisdiction had no right to 'reconsider' [the issue] in the absence of substantially different evidence at a subsequent trial, new controlling authority, or specific findings regarding why the judgment was clearly erroneous").

Under this doctrine, the Trial Court was bound to respect its earlier ruling. *Lanzet v. Greenburg*, 126 N.J. 168 (1991) (citing State v. Reldan, 100 N.J. 187, 203 (1985). In this case, the Trial Court already decided key facts relevant to CSAA's Motion on its Counterclaims when it issued its September 23, 2022, ruling. The most important part of that ruling was the Trial Court's finding that Barone knowingly and willingly submitted false information thereby committed insurance fraud as a matter of law. Since addresses none of these arguments in her Brief, she should be precluded from later arguing them. *Graves*, 267 N.J. Super. 445.

Should this Court consider the merits of the Trial Court's ruling, it is clear that the ruling is consistent with New Jersey law. Starting with the Declaratory Judgment count, consistent with *Longobardi*, the Trial Court correctly ordered Appellant to forfeit those insurance benefits that she received based on her individual misrepresentations but instead must forfeit all of the policy proceeds that she received. This outcome is consistent with the laws of many other states. *See i.e., Johnson v. Allstate Ins. Co*., 126 Wash App 510, 108 P3d 1273, 1276-77 (2005) (policy voided at time of insured's misrepresentations but insurer entitled to return of all claim payments, including those made before misrepresentations were made), *Perovich v. Glens Falls Ins. Co.,* 401 F2d 145, 146 (9th Cir 1968) (applying California law) (in light of insured's misrepresentations, insurer entitled to recover all payments made under the policy); *Allstate Ins. Co. v. Apted,* 18 Fed App'x 624, 626 (9th Cir 2001) (applying Alaska law) (because policy was voided by insured's misrepresentations, insurer entitled to reimbursement as a matter of law); *Tyler v. Fireman's Fund Ins. Co.,* 255 Mont 174, 841 P2d 538, 541 (1992) (insurer entitled to recover all payments where policy was voided by insured's fraud); *Schneer v. Allstate Ins. Co*., 767 So 2d 485, 490 (Fla Dist Ct App 2000) (insurer entitled to restitution of all claim payments after policy was voided by insured's misrepresentations); *Martin v. Farm Bureau Gen. Ins. Co. of Mich*., No. 275261, 2008 WL 1807940 *2-3 (Mich Ct App Apr 22, 2008) (reversing trial court's determination that policy was divisible between personal property, living expenses, and dwelling claims because anti-fraud provision clearly stated the "entire policy is void"); *Employers Mut. Cas. Co. v. Tavernaro*, 4 F Supp 2d 868, 871 (E.D. Mo 1998) (insurer entitled to restitution for monies paid to mortgagee bank after policy was found void for misrepresentation); *Quintin v. Miller,* 138 Vt 487, 417 A2d 941, 943

(1980) ("It is likewise well settled that an insurer who has paid a claim based on facts misrepresented to it, or withheld from its knowledge, is entitled to recover the amount paid.")

CSAA was also entitled to judgment in its favor as to its Unjust Enrichment claim since Appellant made misrepresentations that resulted in her receiving claim payments she was not otherwise entitled to. *See VRG Corp. v. GKN Realty Corp*., 135 N.J. 539, 554, 641 A.2d 519 (1994) (citations omitted). As such, CSAA was entitled to a return of those monies. By her actions and misrepresentations as detailed above, Appellant also breached the insurance contract's implied duty of good faith and fair dealing. *Association Group Life, Inc. v. Catholic War Veterans*, 61 N.J. 150, 293 A.2d 382 (1972). See 13 Williston on Contracts § 38:15 (4th ed.2000) (stating that an implied covenant of good faith and fair dealing means that "neither party will do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract").

III. CONCLUSION

For all the foregoing reasons, the Trial Court's September 23, 2022, granting Summary Judgment in favor of CSAA General Insurance Company, its November 18, 2022, Order denying Appellant's Motion for Reconsideration, and April 14, 2023, Orders granting Summary Judgment in favor of CSAA General Insurance Company as to its Counterclaims should be affirmed.

Respectfully submitted,

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