SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
A-3014-22

	:	ON APPEAL FROM:
NORTH RIVER INSURANCE COMPANY,	:	
	:	MERCER COUNTY
	:	LAW DIVISION
Plaintiffs,	:	
	:	DOCKET NO.: L - 1947-14
vs.	:	
	:	c/w
CARDUNER FRONT, LLC,	:	
	:	MERCER COUNTY
Defendant	:	LAW DIVISION
	:	
c/w	:	DOCKET NO.: L - 2753-14
	:	
CARDUNER FRONT, LLC, ROBERT CARDUNER, INDIVIDUALLY AND AS THE EXECUTOR OF THE ESTATE OF JEAN AND LUCY CARDUNER,	:	SAT BELOW:
	:	
	:	HON. DOUGLAS H. HURD, P.J. CIV.
Plaintiffs,	:	
	:	
vs.	:	
	:	
THE CONTINENTAL INSURANCE COMPANY, THE GLEN FALLS INSURANCE CO., THE NORTH RIVER INSURANCE COMPANY, THE GREAT AMERICAN INSURANCE COMPANY, THE SENTRY INSURANCE COMPANY, EAGLE STAR INSURANCE COMPANY, THE NEW JERSEY PROPERTY LIABILITY INSURANCE GUARANTEE ASSOCIATION, RAMP DRY	:	
:		

CLEANING INC., PAUL GANGI, and JOHN DOES, 1-10. :
:
:
Defendants. :

PLAINTIFFS/APPELLANTS' BRIEF AND APPENDIX VOL I of VI (Pa1-Pa322)

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ATTORNEY FOR DEFENDANT, CARDUNER FRONT, LLC IN MATTER L-1947-14 AND PLAINTIFFS ROBERT CARDUNER INDIVIDUALLY AND AS EXECUTOR OF THE ESTATE OF JEAN AND LUCY CARDUNER AS WELL AS CARDUNER FRONT, LLC, IN MATTER L-2753-14

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[1] *R.* 2:6-1(a)(1) provides that, "if the appeal is from a disposition of a motion for summary judgment, the appendix shall also include a statement of all items submitted to the court on the summary judgment motion ***and all such items shall be included in the appendix***." (Emphasis supplied). Two of the orders being appealed by the plaintiffs/appellants are the result of summary judgment motions below. The submissions by the parties in those motions included transcripts from prior, related hearings. Thus, the transcripts that were submitted to the Court as exhibits in the summary judgment motions below have been included in the Appendix.

R. 2:6(a)(1) also provides that, "briefs submitted to the trial court shall not be included in the appendix, unless the brief is referred to in the decision of the court or agency, ***or the question of whether an issue was raised in the trial court is germane to the appeal*** ... ." (Emphasis supplied). Certain filings by Continental were untimely and filed in contravention of the Court Rules. Pa1067-1113. One or more of these documents were letter-briefs. The plaintiff-appellants believe that these documents should be included in the appendix as well, as they are "germane to the appeal."

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I. PRELIMINARY STATEMENT

This appeal follows the trial court's dismissal of the plaintiffs' claims against their primary insurance carriers after settling a portion of their damage claims with the polluter of their property and its insurance carriers. Pa36-Pa37; Pa81-104 (Settlement Agreement and Mutual Release). That settlement, left the plaintiffs millions of dollars short of the funds needed to completely clean-up their property and to reimburse them for the response costs expended over the thirty-three years that the plaintiff's property has remain contaminated while their insurance carriers failed to provide the defense and indemnity that their policies promised. Pa740-Pa741.

The Trial Court's decision eliminated a significant source of insurance coverage available to the plaintiffs who were virtually forced to settle with the polluter of their property and its insurance carriers due to the polluter's insolvency and the alarming erosion of the polluter's coverage limits, largely the fault of the Carduners' insurance carriers' refusal to participate in the funding of the investigation or development of a remedy for the site. 3T26-3T27; Pa741. The decision of the Court below was based upon its reading of the "Judgment Reduction" provision of the Settlement Agreement. 3T26-3T27; Pa92 (¶ III(A)). In so doing, the Court ignored the provision of the Settlement Agreement indicating that none of the provisions of the agreement were intended to limit the pending claims between the Carduners

and their carriers. Pa95, ¶ VI(F)(the "Carve Out" provision). That provision held specifically, that:

> This Agreement does not create any rights in any person or entity other than the Parties. Nothing in this Agreement affects any rights that the Carduner Parties may have against their insurers.

*Ibid (*emphasis supplied).

The provision, apparently overlooked by the Court at first blush was specifically and substantively addressed on reconsideration. 3T1-3T12. Still, the Court, addressing the Carduners' arguments, ruled that the language should not be given its unambiguous, plain meaning, because, in the Court's opinion, it undermined the intent of the Judgment Reduction provision of the Agreement. 3T5-3T12.

The Court is, simply, incorrect on this issue, as the Carduner Carrier's "Carve-Out" provision did nothing of the sort. Paragraph VI(F) of the Settlement Agreement merely made any effect of the Judgment Reduction provision of the Settlement Agreement unavailable to the claims being asserted by the Carduners against their own carriers, North River Ins. Co., and Continental Ins. Co. *See* Pa962-Pa989 & Pa1567-Pa1598. The Judgment Reduction provision applies with full and equal force to each and every third party claim, "arising from" the claims asserted by the Carduners against Ramp and its carriers, except for the claims asserted against North River and Continental. *Ibid*. The exception for North River and Continental in the Settlement Agreement does not, as the Court below suggested, render the Judgment Reduction

provision meaningless. 3T12, l. 8-9. Thus, in large part, the rationale for dismissing the plaintiffs' claims against North River and Continental is logically unsupportable. It simply does not follow that the inclusion of the "carve out" provision in the settlement agreement, eviscerates the Judgment Reduction provision of the Settlement Agreement, rendering it meaningless. The two provisions are not inconsistent. The former merely further defines the reach of the later, excluding North River and Continental from its reach.

The Court's ruling re-writes the Settlement Agreement. This Court reviews that ruling *de novo*. *See Sashihara v. Nobel Learning Communities, Inc.*, 461 *N.J. Super.* 195, 200-201 (App. Div. 2019). Since there is neither legal nor logical justification for the Court's ruling, it should be reversed and the Carduner claims should be reinstated.

Once reinstated, this Court should grant summary judgment against the Carduner carriers on the breach of contract and unjust enrichment claims pursuant to the rationale of the *Morton International* and *Metex* decisions. *See Morton Int'l v. General Accident Ins. Co.*, 134 *N.J.* 1 (1992); *see also Metex Corp. v. Federal Ins. Co.*, 290 *N.J. Super.* 95 (1996); *see also*, 1T53, l. 19-20 (The Court: I'm going to have you issue an order saying that there's coverage under the policy). As such, the plaintiff/appellant seeks judgment in its favor and remand solely for the assessment of damages by the Jury and an award of fees and cost by the Court pursuant to *R*. 4:42-9.

II. FACTS

In 1990, contamination was discovered in the drainage sumps of property owned by the plaintiffs. Pa735. The Carduners' insurance agent, Allen & Stults Co., Inc., was immediately notified and promptly issued loss notices to the Carduners' insurance carriers, including the North River Insurance Company and the Continental insurance company.[3] Pa1622. The Loss Notice named Jean and Lucy Carduner as the Insureds. *Ibid*. A subsequent investigation indicated the presence of hazardous chemicals including chlorinated solvents,[4] largely associated with dry cleaning operations. Pa736-737; Pa1626.

On March 30, 1994, a Field Directive and Notice to Insurers was issued naming "Robert Carduner, Owner" as Respondent, identifying the location of the incident as the Carduner's Mall, Route 130 and Route 571, East Windsor, Mercer County (hereinafter referred to as the "Property"), and directing the respondents to remove or arrange for the removal of hazardous substances from the property, namely to, "initiate the treatment of contaminated ground water, dispose of all contaminated soils stockpiled at the site at an approved facility and remediate any hazardous vapors occurring within the basements of the buildings on the above mentioned

[3] The Continental Policies, written on Glens Falls Policy Forms, are appended at Pa1419-Pa1566. The North River policies are appended at Pa1145-Pa1253.

[4] The chlorinated solvent detected at highest levels was tetrachloroethylene, also known as PCE. PCE is the most common ingredient in dry cleaning fluid.

property." Pa1623. At that time, the property in question was owned by the Estate of Jean Carduner. Pa1623 (¶7)

Subsequent to receiving the Field Directive and Notice to Insurers, the NJDEP prepared an Administrative Consent Order ("ACO") identifying the Ramp Cleaners Site and identifying Robert Carduner as the owner of the site. Pa1623. Robert Carduner signed that ACO. *Ibid*.

Although the ACO named Robert Carduner as the property owner the property owner at the time was the Estate of Jean and Lucy Carduner, of whom Robert Carduner was the personal representative. *Ibid*. Jean Carduner, who survived Lucy, died testate on January 9, 1991. Pa1623 (¶8).

On October 24, 1990, Roland Stanzione, adjuster for Continental Insurance wrote to the Carduners, identifying Carduner's Liquor Store as its insured and acknowledging the claim filed by Allen & Stults on the Carduner's behalf (claim # 777 7H 8389). Pa1623.

On December 27, 1990, Barbara Gomez, a claims representative for North River, wrote to Jean and Lucy Carduner/Carduner's Liquor Store, acknowledging receipt of a claim for coverage issued by Allen & Stults Co., identified North River's insured as Carduner's Liquor Store and also acknowledged that the forms provided by Allen & Stults Co., indicated that North River had issued the following policies to Carduner's Liquor Store:

510-104909-7 (policy period 1/5/82 - 1/5/85)
510-419157-3 (policy period 1/5/85 - 1/5/86)
510-419169-9 (policy period 1/5/86 - 1/5/87)

Pa1624.

Pursuant to Jean Carduner's Last Will and Testament, Robert Carduner was appointed Executor of the Estate. Pa1624 (¶12).

On January 29, 1991, Jean Carduner's Estate was Probated and Robert Carduner was appointed as the Executor. Pa1624 (¶14). On February 28, 1992, Mr. Kelty, the estate's counsel at that time, wrote to Barbara Gomez, a claims representative representing North River, stating that, "while it is uncontroverted that the leakage was discovered on or about October 10, 1990, it is equally without question, as may be attested to by the environmental consultants engaged to remedy the situation, that the damages occurred over a period of time, including the time during which the policies were in effect." Pa1625 (¶15). This fact remains uncontroverted today, some 30 years later.

On February 28, 1992, Mr. Kelty, wrote to Roland Stanzione, a claims representative for Continental Ins. Co., stating that, "while it is uncontroverted that the leakage was discovered on or about October 10, 1990, it is equally without question, as may be attested to by the environmental consultants engaged to remedy the situation, that the damages occurred over a period of time, including the time during which the policies were in effect." Pa1625 (¶ 16).

In June of 1992, the Carduners were notified that Vincent Krisak, Region Chief for the NJDEP wrote to Ramp Cleaners confirming that there had been a release of hazardous

substances at the Property and that Ramp Cleaners was a potentially responsible party for the contamination. Pa1625 (¶17).

On August 12, 1992, Heidi Loesch wrote to counsel indicating that North River was in the process of investigating the Carduner's claim. Pa1625 (¶18). Ms. Loesch's subject line indicated that the policy holder was Carduner's Liquor Store and Jean and Lucy Carduner were copied on the correspondence although they were both deceased at the time. *Ibid*.

On August 26, 1993, Shakti Consultants issued a summary report on its efforts at the Carduner Mall site. Pa1626 (¶19); *see also*, Pa1647-1678. The report indicated Shakti's findings that tetrachloroethylene had been spilled into the sump under the Ramp Cleaner. *Ibid*. The spillage in the sump is the source of PCE contamination found in the basement sump of the Mall building # 2. Pa1677. The report also concluded that third-party impact to the groundwater and soil off site was probable. *Ibid*.

In August, 1994, the Bureau of Field Operations for the NJDEP, wrote to the Carduners and Ramp Cleaners transmitting a proposed Memorandum of Agreement (hereinafter "MOA") that the DEP prepared for the Property. Pa1677. The Memorandum of Agreement correctly identified the Estate of Jean Carduner as the owner of the Property. Pa1677 (¶22) Robert Carduner signed the MOA. *Ibid*.

On December 21, 1994, William Keephart forwarded correspondence to Rick Santella of Corestates Capital Markets on behalf of the Estate of Jean Carduner, transmitting the

original short certificate appointing Robert Carduner as Executor and an updated certificate issued by the Mercer County Surrogate's Court dated May 13, 1994, indicating that Robert was still the executor of the estate and the estate had not been completely administered at that time. Pa1627 (¶23).

On February 22, 1995, Heidi Loesch of Envision claims management wrote to our counsel supplementing North River's October 3, 1991 coverage letter. Pa1627 (¶25). The letter identified only Carduner's Liquor Store in its subject line. *Ibid*. Ms. Loesch acknowledged receipt of an information packet from Shakti indicating that off-site contamination existed at the Shop Rite shopping center adjacent to the Carduner's property. *Ibid*. She indicated in her letter that North River had issued the following policies to Counsel's client: policy no. 510-104909-7, 510-419157-3 and 510-419169-9. Pa1697-Pa1704. Heidi Loesch subsequently indicated that North River agreed to participate in the Carduner's defense. Pa1627 (¶26).

On June 9, 1995 Shakti Consultants reported to counsel that his investigation confirmed the presence of PCE in Monitoring Well 109, located on an adjacent property, at concentrations above NJDEP groundwater quality standards. Pa1628 (¶27). He also indicated that his company's opinion was that the discharges of PCE and TCE occurred at least as far back as the mid-1970s but in any event during the periods when both Continental and North River coverage was in effect. *Ibid*.

On February 22, 1995 North River agreed to provide Carduner's Liquor Store with a defense. Pa1628 (¶28). Contemporaneously, Continental had agreed to participate with North River in the Carduner's defense, which was to fund an appropriate investigation and remediation of the Carduner Property. Pa1628 (¶29).

On October 28, 1998, Robert Carduner, as Executor of the Last Will of Jean Carduner, Deceased, issued an executor's deed for the Carduner Property to Carduner Front, L.L.C. Pa1628 (¶30); Pa1709-Pa1716. In conjunction with the transfer of the Property from the Estate of Jean Carduner to Carduner Front LLC, Robert Carduner, as Executor of the Estate of Jean Carduner, executed an Environmental Indemnity Agreement. Pa1628 (¶31); Pa1717-Pa1720.

On March 31, 2008, General Land Abstract Company issued an abstract of a title search that was conducted on the Carduner property confirming the title history of the property and confirming that the property had been the property of Jean Carduner's Estate, from the date of Jean Carduner's death. Pa1628-Pa1629 (¶39); Pa1721-Pa1775.

All of the cooperation from the Carduner carriers ended in 2015. Pa739 (¶24). From that point forward, neither Continental nor North River contributed anything to the ongoing cost of the investigation and remediation of the Property. *Ibid*.

In 2015, North River terminated a settlement agreement wherein it had agreed to contribute to a portion of the costs being paid jointly by Ramp and the Carduners' carriers.

Pa739 (¶25). Although Continental did not formally terminate their participation in the joint defense of the Carduners, it simply ceased performing. From that point forward, without any justification offered to the Carduners, their carriers abandoned them, breaching their agreements to provide a defense and indemnity. Pa739 (¶24). This law suit followed.

During the pendency of this lawsuit, the Carduners have been forced to pay the share of the overall costs that their carriers would no longer shoulder. Pa739 (¶27). When a number of proposed remedies turned out to be ineffective or impractical, the Carduners' consultant, a New Jersey Licensed Site Remediation Professional (hereinafter "LSRP"), concluded that the only feasible remedy for the site was to demolish the existing building on the Property, excavate to a depth of 35', remove all contaminated soil, disposing of it off-site at an appropriate facility, and backfilling the excavation with clean fill. Pa742 (¶31); Pa890-891. The LSRP's remedy was estimated to cost in excess of $12,000,000.00 dollars. Pa742 (¶32); Pa890-891. When discovery conducted during the mediation suggested that Ramp's Insurance Carriers had approximately $8,662,500.00 in remaining coverage and, considering the fact that Ramp was a defunct corporation, the Carduners were forced to settle with Ramp and its carriers to preserve the remaining limits of Ramp's insurance and focus its litigation efforts on the breach of contract claims that had been pending against the Carduner Carriers. Pa741 (¶¶ 34-35).

The Mediator negotiated a settlement that was intended to preserve the Carduner's existing claims already pending against their carriers since 2015-2017. In spite of a specific provision of the Settlement Carving-Out the existing claims from any impact of the Settlement Agreement language, the Court, nevertheless, granted summary judgment to the Carduner Carriers and denied summary judgment to the Carduners, effectively ending the trial level portion of this litigation. Summary Judgment was granted to the defendants on March 31, 2023. Pa36-Pa37. Although the Court reconsidered its decision on May 11, 2023, it ruled substantively that ¶ VI(F) of the Settlement Agreement, which specifically excluded the Carduner Carriers from any release arising under the Settlement Agreement, rendered ¶ III(A) of the Settlement Agreement meaningless and should be ignored. 3T12, l. 9-10. In so doing, the Court rewrote the Settlement Agreement between the parties. This appeal followed in a timely fashion.

III. PROCEDURAL HISTORY

On March 31, 2023, this Court dismissed the plaintiffs' case against the defendants North River and Continental. Pa34-Pa35. The basis of the Court's dismissal of the plaintiffs claims was its reading of ¶ III the December 8, 2021 Settlement Agreement between Ramp Dry Cleaners and its insurance carriers on the one hand and the Estates of Jean and Lucy Carduner and other Carduner entities on the other. *See* Pa80-Pa104.

On December 8, 2021, after a lengthy mediation process overseen by Judge Mathesius, the Court appointed mediator and discovery master, a settlement was reached by and between Ramp Dry Cleaners and its insurance carriers on the one hand and the Estates of Jean and Lucy Carduner and other Carduner entities on the other. *Ibid*. In its oral opinion from the bench on March 31, 2023, the Court ruled that the last sentence in ¶ III on page 12 of the Agreement was dispositive, eliminating or waiving any claim that the Carduner Estates or any other Carduner entity had asserted in this litigation against the Carduner Carrier Defendants. 2T27. The passage in the Settlement Agreement focused upon by the Court read as follows:

> ... the Carduner Parties agree they will not seek to obtain payment from any other person or entity of any amount of portion of any amount that a court or tribunal finds attributable or allocable to a Releasing Party.

Pa904. This, ruled the court, coupled with the inclusion of the Carduner entities in the definition of Released Parties effected a complete release in favor of the Carduner Carrier Defendants.

In direct contrast to the Court's ruling, ¶VI(F) of the Agreement provided the following:

> ***Nothing in this Agreement affects any rights that the Carduner Parties may have against their insurers.***

Pa907(¶ VI(F) (emphasis supplied).

Since the filing of the Carduners Amended Complaint, the Carduners have asserted claims against their own insurance carriers for the damages suffered as the result of their breach and the carriers' unjust enrichment. Pa1567-Pa1598. Those claims have sustained

through motions for summary judgment filed by both of the Carduner carriers in 2018. 1T1-1T55.

The Carduners made it clear to all parties participating in the mediation ordered by this Court, that they would not settle with the Ramp defendants and their insurance carriers if that settlement affected or compromised in any fashion their existing claims against their own insurance carriers for abandoning them and impermissibly ceasing to provide the defense and indemnity to which they were entitled. Pa73 (¶ 9). So entrenched was this concern that the language quoted in ¶ 4 above, to the effect that, "nothing in this Agreement affects any rights that the Carduner Parties may have against their insurers," was included in the first draft of the Agreement and every subsequent draft, up to and including the final version that was executed by the Carduners and the Ramp parties. *Ibid*. Thus, every draft, from beginning to end contained the operative language above which was clearly intended to prevent precisely the determination made by this Court on March 31, 2023. Pa73-Pa74 (¶9).

When the Court ruled that the language of ¶ III of the Settlement Agreement constituted a waiver of the claims asserted by the Carduners against North River and Continental, it did so in spite of the direct and clear language of ¶ VI(F) of the Agreement indicating that nothing in the Agreement was intended to affect, in any manner, the existing claims that had been asserted by the Carduners against their carriers.

Any of the issues not specifically addressed in the initial motion argument were addressed substantively on reconsideration pursuant to *R*. 4:50-1. The Court's decision to address the Carduners' substantive issues on reconsideration is reviewed under the abuse of discretion standard. However, the substantive interpretation of the settlement agreement is reviewed *de novo*. The reconsideration motion of May 11, 2023 followed cross-motions for summary judgment filed by North River and the Carduners. Continental filed a brief and certification in support of North River's Motion but did not file a proper notice of motion for summary judgment on its own behalf. Pa74; *see also*, *R*. 4:46-1. Instead, on March 3, 2023, Continental filed correspondence with the Court, joining in the motion and attaching a Brief, Certification and Exhibits in support of North River's position. Pa74; *see also*, Pa168-170.

Even though it had late-filed a Brief and Certification on March 3rd and was not the movant, Continental filed a reply brief after office hours on March 28, 2023. Pa1067-Pa1068. The brief was not filed until 7:00 p.m., well after close of business. *Ibid*. Even if Continental had a right to file a reply brief (which it did not), it was late under *R*. 1:6-3.[5] There is no rule that permits a party who had not initiated a motion for summary judgment to file a supporting

[5] Even setting aside the lack of notice of cross-motion and the sequencing of Continental's belated March 3, 2023 letter joining in North River's motion coupled with the filing of a Reply Brief unauthorized by the rules, Continental's reply brief was late, in violation of *R*. 1:6-3. *R*. 1:6-3 provides that a brief is only considered filed when it is received by the other party. Suffice it to say that a brief filed after close of business on the deadline is not received until the next business day.

brief and then a reply. Moreover, Continental's reply raised issues and cases that had not been previously presented to the Court. This forced the plaintiffs to file a sur reply on those issues as late as March 30, 2023, literally on the eve of oral argument. Pa1111-Pa1113.

In spite of the above, the Court heard oral argument on the summary judgment motion. The Court granted judgment to the defendants, holding that the settlement agreement between the Carduners and Ramp extinguished the pending claims that the Carduners had asserted against their own carriers.

Although the court had not specifically addressed the impact of ¶ VI(F) of the Ramp/Carduner settlement agreement on the Judgment Reduction Provision during the March 31, 2023 hearing, it did so on reconsideration under *R.* 4:50-1. 3T9. Even still, when it did reconsider its March 31, 2023 decision, the Court held that the Judgment Reduction provision of the settlement agreement must be given precedence over the Carve-Out provision in ¶ VI(F), specifically excluding any and all claims asserted by the Carduners against its own carriers. 3T12. Otherwise, the Court indicated, the exclusion of the Carduners' claims against their own carriers would, "render the judgment provision completely meaningless." *Ibid*.

As will be discussed at greater length below, the Court is simply incorrect on that issue. A holding giving effect to ¶ VI(F) of the Ramp/Carduner settlement agreement does not render the Judgment Reduction Provision meaningless, it merely makes it inapplicable to the Carduners' insurance carriers, against whom, claims had been asserted since being refiled in

2017. Those claims date back to the date that the releases were discovered on their properties in the 1990s are were sounding in breach of contract and unjust enrichment theories that would not have otherwise triggered the Judgment Reduction provision by its own terms.

On June 6, 2023 the Carduners filed a timely appeal of the Court's May 11, 2023 decision on the Reconsideration Motion, the March 31, 2023 Order granting summary judgment to the Carduner Carriers, and interlocutory decisions from November 9, 2018 finding coverage under the North River and Continental policies but failing to enter summary judgment on Carduners' the breach of contract and unjust enrichment claims.

III. LEGAL ARGUMENT

A. INTRODUCTION.

This Appeal is directed at three key events in the underlying coverage and damages case between the Carduners and their insurance carriers. The Carduners own property that was polluted in the 1970s and 1980s by a tenant, Ramp Cleaners Inc. Ramp has since become defunct and the principals deceased.

The PCE contamination was discovered in 1990 and the Carduners put their insurance carriers on notice at that time. The agent and the carriers agreed that the trigger date for coverage would be 1978, due to the opinion of the environmental consultant retained jointly by the insurance carriers for Ramp, the polluter, and the Carduners, who owned the property at the time of the releases. No one has contested that trigger date in 30 years.

In 1995 and 1996 respectively, the Carduners' insurance carriers agreed to defend the Carduners under a reservation of rights. From the mid 1990s until 2005, the insurance carriers for the Carduners and Ramp Cleaners participated 50%/50% in the Carduner/Ramp defense, meaning that they each paid collectively paid for one-half of the investigation and interim remedial steps needed on the property.

In 2005 Continental ceased participating in the defense claiming that they were overpaying for the Carduner's defense given the greater responsibility for the contamination born by Ramp, who was, afterall, the polluter. Under threat of litigation by the Carduners, the insurance carriers renegotiated the percentage that they would contribute to the Carduner/Ramp defense, the Ramp Carriers agreeing to undertake 75% of the defense costs. This collation continued until 2010, when the Carduner carriers again refused to participate in the Carduner defense.

The Carduner carriers' refusal to participate in the Carduner's defense prompted litigation that was mediated by Eric Max of the New Jersey Office of Dispute Resolution. The mediation resulted in a Settlement Agreement that defined the parties' participation until it was terminated by North River in 2015. From that point onward, both North River and Continental refused to participate with Ramp and its carriers and refused to provide a defense separately to the Carduners. The case underlying this appeal was then filed. The underlying case sought

reimbursement for the costs incurred by the Carduners, funding their own defense,[6] attorneys fees for the coverage action pursuant to *R*. 4:42-9, and equitable relief to address the carrier's unjust enrichment. All of these claims were sustained through summary judgment motions below in 2018.

The case was referred to mediation with Judge Mathesius being appointed by the Court as mediator and discovery master. Ramp participated in good faith in the mediation efforts, while North River and Continental did not. Ultimately, the trial Judge set aside three final months that was to be dedicated exclusively to mediation, recognizing that additional discovery was still needed to make the case trial-ready, so the Order directed the parties to notify the Court at the end of the Mediation Period, if unsuccessful, of any discovery needed prior to trial. Pa42-Pa46.

While the Carduner insurers said nothing when the Mediator was circulating the order, soon after it was entered, they wrote to the Court below, indicating that they would no longer participate in mediation and that they were exercising their right to dismiss the Mediator. Pa47-70. The dismissal was allegedly based on a conflict of interest which arose when a client of the Kennedy's firm falsely accused the Judge of fraudulent behavior related to a completely separate case involving an unrelated client. Pa1831-Pa1832. Suffice it to say that neither the

[6] Investigation and remediation of the Carduner property and all off-site contamination. The Carduners paid at one time, 25% of the defense costs and at another, 12.5% of the defense costs.

mediator nor the Carduners believed that the assertion of a conflict was made in good faith and was, instead, made tactically. Without awaiting either the Court's or the Mediator's recognition of the suspension of the mediation period, North River filed a motion for summary judgment.

Faced with a defunct Ramp Cleaners and dwindling limits of the Ramp Coverage, combined with the abject refusal of the Carduner carriers to defend them or the Court's failure to compel a defense when that issue was before it in 2018, the Carduners entered into a settlement with Ramp and its Carriers for what they calculated were the remaining limits of the Ramp policies. This calculation was aided by a discovery order and disclosures as to the remaining limits of coverage compelled by the mediator.[7] Thus, at the time of the settlement with Ramp, with the aid of the mediator, the Carduners had calculated the remaining limits of Ramp's coverage.

The remaining coverage available to Ramp, due, in part, by the erosion of its limits from the Carduner Carriers' failure to participate in the Carduner's defense, was estimated to be more than Four Million ($4,000,000.00) dollars less than the projected remedial costs alone remaining at the site and nearly Ten Million ($10,000,000.00) dollars less from the combined remedial costs and damages suffered over the years, including unnecessary contributions,

[7] Who had also been appointed as a discovery master by the Court.

attorneys fees, and other response costs, such as rents and the like that had to be foregone to keep the areas in need of remediation available over the years.

In direct contravention of the existing case management order North River summarily dismissed the Mediator and filed a motion for summary judgment. Ultimtaely, the Court below found, as a matter of law, that the settlement agreement between Ramp, its carriers and the Carduners also resolved the existing claims that had been pending between the Carduners and their own carriers since 2015. That is true despite the fact that ¶ VI(F) of the Ramp Settlement Agreement stated that, "[n]othing in this Agreement affects any rights that the Carduner Parties may have against their insurers."

The Carduners focused their reconsideration motion on the fact that the Court did not address the impact of ¶ VI(F) on the Ramp/Carduner settlement. The Court, likely recognizing the procedural defects in the original motion for summary judgment, recognizing that it did not address the impact of ¶ VI(F) of the settlement agreement granted oral argument on the reconsideration motion. On May 11, 2023, the Court reconsidered its March 31st Decision but again ruled, this time substantively, that ¶ VI(F) did not preserve the Plaintiffs' claims against its own carriers. This appeal followed.

B. THE COURT CORRECTLY RECONSIDERED ITS MARCH 30, 2023 RULING EVEN THOUGH IT ULTIMATELY REACHED THE WRONG RESULT.[8]

Once raised, a motion for reconsideration is a matter to be exercised in the trial court's sound discretion. *Capital Fin. Co. of Delaware Valley, Inc. v. Asterbadi*, 398 *N.J. Super.* 299, 310 (App. Div. 2008). The touchstone of the Court's exercise of that discretion is the interest of justice. *Lawson v. Dewar*, 468 *N.J. Super.* 128, 134 (App. Div. 2021). It is the interest of justice that prevails in such a motion and the trial judges are urged to consider that, "a motion for reconsideration does not require a showing that the challenged order was 'palpably incorrect,'[9] irrational or based upon a misapprehension or overlooking of significant material presented on the earlier application as long as the interest of justice compels reconsideration. *Lawson*, 468 *N.J. Super.* at 136.

The court's March 31, 2023 decision obviously failed to address ¶ VI(F) of the Settlement Agreement. Paragraph VI(F) of the Agreement indicated that, "nothing in this Agreement affects any rights that the Carduner Parties may have against their insurers."

The very act of reconsideration by the Court was a recognition that the phrase, which it had not considered in its initial, March 31, 2023 ruling, was significant enough to change the outcome of the motions. Pa906 (¶ VI(F). On reconsideration, the Carduners argued that

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[8] The reconsideration issues have been argued below. Related portions of the Record are at 3T1-3T13 & Pa7-Pa350.

[9] Although it was.

the provision in ¶ VI(F) can only be read as the plaintiffs' intent to preserve the claims that were pending in this suit since 2015 and which had been sustained through North River's prior motion for summary judgment in 2018. The Court below disagreed.

C. THIS COURT REVIEWS THE LOWER COURT'S DECISION DE NOVO.[10]

The Court below determined that the Settlement Agreement between the Carduners, Ramp and its insurance carriers, was unambiguous and barred the claims that had been pending against its own carriers since 2015.[11] When the issues before this Court involve contract interpretation and the application of case law to the facts of the case by the trial court, appellate review is de novo. *Hutnick v. ARI Mut. Ins. Co.*, 391 *N.J. Super.* 524, 528 (App. Div. 2007); *see also*, *Fastenberg v. Prudential Ins. Co. of Am*, 309 *N.J. Super.* 415, 420 (App. Div. 1998).

The *de novo* review must take into consideration that the defendant insurance carriers were granted summary judgment pursuant to *R.* 4:46-1 et seq. The carrier defendants were required to demonstrate to the Court below that there was no genuine dispute as to any material fact and that they were entitled to judgment as a matter of law, accepting as true all evidence

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[10] This argument is related to appellate review only. It was not argued below

[11] Those claims sought a declaration of coverage and damage claims for breach of contract, breach of the duty of good faith and fair dealing, and unjust enrichment.

that supports the non-moving party's position and all legitimate inferences drawn therefrom. *Doison v. Anastasia*, 55 N.J. 2, 5-6 (1969).

D. THE CARDUNERS INTENDED TO PRESERVE THEIR EXISTING CLAIMS AGAINST NORTH RIVER AND CONTINENTAL IN THE RAMP/CARDUNER SETTLEMENT.[12]

The Court below has found that the language in ¶ III of the Agreement constituted a waiver of all of the claims contained within the Carduners' Second Amended Complaint against North River and Continental. New Jersey jurisprudence provides that, while a party to a contract may waive its rights, such waiver must be based upon a contractual provision that clearly and unambiguously reflects a knowing and voluntary waiver of such rights. *Atalese v. U.S. Legal Services Group*, L.P. 219 *N.J.* 430, 443 (2003). That clearly did not occur here.

In order for a party to agree to a waiver of its rights in a contract, the operative provision of the agreement must reflect the executing party's knowledge of its legal rights and an expressed intent to waive them. *Atalese*, 219 *N.J.* at 442. In light of that, when a court interprets contract language alleged to constitute a waiver of rights, the court may not rightfully read that language expansively, as it did in this case. *Garfinkel v. Morristown Obstetrics & Gynecology Assoc., P.A.*, 168 *N.J.* 124, 132 (2001).

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[12] Argued Below. Related portions of the Record are at 3T1-3T13; 2T1-2T28; Pa351-Pa1134.

Here, the Agreement reflects a clear intent to preserve the claims that had been asserted by the Carduners against their own carriers, pending in this Court since Complaint was filed in 2015. The drafting history of the document establishes that the preservation of the Carduners' claims against North River and Continental were paramount to the plaintiffs/appellants during the mediation process. *See* Pa127-167 (drafts 1-5 and final version of the Settlement Agreement).

The Court's March 31, 2023 Order is in error. In the interest of justice, it should be reversed. Paragraph VI(F) of the Settlement Agreement, indicating that, "nothing in this Agreement affects any rights that the Carduner Parties may have against their insurers," can only be read as the plaintiffs' intent to preserve the claims that were pending in this suit since 2015 and which had been sustained through North River's prior motion for summary judgment in 2018 with the Court finding coverage under the North River and Continental policies. So contrary is that language to the Court's ruling on March 31st, that the Court could not reconcile its March 31st decision without effectively striking the provision from the Settlement Agreement ostensibly because of the impact on the Judgment Reduction provision.

Nothing contained in the releases embedded within the settlement agreement were intended to impact the pending claims against North River and Continental. Paragraph VI(F) could not be more clear or direct. It says precisely that: "[n]othing in this Agreement affects

any rights that the Carduner Parties may have against their insurers." Pa907 (¶ VI(F)). In fact, it is not possible to express that intent any clearer.

Faced with a clear expression in the Agreement of the Carduners' intent to preserve their existing claims against their insurance carriers, the Court was faced with only two options: ignore ¶ VI(F) or reverse its March 31, 2023 decision. The Court chose to ignore ¶ VI(F) by asserting that to give the Carduners' expressed intent the force to which it is entitled, would render ¶ III(A) of the Settlement Agreement meaningless. The Court elected the wrong option.

There is no reason to conclude that to give ¶ VI(F) effect would render ¶ III meaningless. It simply makes the provision in ¶ III(A) inapplicable to the two defendants and no one else. Even giving full force and effect to the plain language of ¶ VI(F), ¶ III(A) makes perfect sense, considering the number of potential third parties who could be impacted by claims. "arising out of" a released claim and is attributable to a Releasing Party.[13] Pa904 (¶ III(A)).

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[13]Such a claim would normally be expressed as a cross-claim. The Carduners have asserted, both in mediation and in this case, that the Carduner Carriers have no cross-claims against Ramp and its Carriers for two reasons: One, they haven't spent anything since 2015 and waived all recovery for the amounts they previously spent or, two, their breach of contract have extinguished any cross-claims they may have had. The latter issue was argued at length during the March 31, 2023 session. If the carriers have no cross claims to assert in this case and ¶ III(A) is aimed clearly at limiting the impact of cross-claims on Ramp and its carriers, it can't be that the provision was meant to extinguish the claims that were pending between the Carduners and North River or Continental, only the Carriers' theoretical cross-claims between them, Ramp and Ramp's carriers. In that sense, the Court's reading of ¶ III(A) defies logic.

There is no question that the Court's reading of ¶ III(A) contradicts a material term of the Agreement in ¶ VI(F). Such terms must be read *in pari materia* if possible. *Ceva v. River Vale*, 119 *N.J. Super.* 593, 603-604 (App. Div. 1972). Thus, the Court's adoption of the defendants' argument, ignores our rules of contract construction.

Finally, the drafting history of the Carduner/Ramp settlement documents bears out the material nature of the provision preserving the plaintiffs' claims against their own carriers, which was a precondition to the Carduner's agreement to mediate this issue with Judge Mathesius. Pa72-Pa73 (¶ 9). The language from the initial draft of the Agreement in June, 2021, is identical to that of the final draft of the agreement. Compare ¶ VI(F) in the first draft at Pa105-108 with ¶ VI(F) from each succeeding draft: Pa109-Pa112, Pa113-Pa116, Pa117-Pa120, Pa121-Pa124 and the final version at Pa80-Pa104.

That language precluding any waiver of the existing claims between Continental and North River in ¶ VI(F) predates the operative language of ¶ III. This is true in spite of the fact that the Judgment Reduction Provision was only intended to address liability "attributable or allocable to Ramp and the Insurance Companies." Pa92 (¶ III). The substitution of the term "Releasing Parties," which this Court found material to its analysis was first proposed on August 25, 2021. That language was accepted along with all the negotiated terms in the November 10, 2021 draft of the Agreement. The language preserving the plaintiffs' claims against their own carriers was not only contained in the original draft of the Ramp/Carriers

Settlement Agreement but remained in its original form in every subsequent draft. That language was constant and did not change at all throughout the 5 months of negotiation.[14]

In construing a contract, the polestar of the analysis is the intent of the parties. *Karl's Sales & Serv. Inc. v. Gimbel Bros., Inc.*, 249 *N.J. Super.* 33, 44 (App. Div.), *certif. denied,* 127 *N.J.* 548 (1991). A parties' intention is revealed in the language used by them. *Karl's Sales & Serv. Inc.,* 249 *N.J. Super.* at 44. Thus, the focus of the Court must be on the language of the document, "taken in its entirety, the situation of the parties, the attendant circumstances and the objectives they were striving to attain." *Lederman v. Prudential Life Ins. Co. of Am.*, 385 *N.J. Super.* 324, 339 (App. Div.), *certif. denied*, 188 *N.J.* 353 (2006).

When viewed in their entirety, the Agreement evidences a clear intent to preserve the plaintiffs' claims against their carriers while settling their claims with Ramp and its carriers. That is supported by the language of the agreement, the drafting history, and the clear expressed intent of the Carduners. The preservation of the plaintiffs' claims against North River and Continental was a material objective in the mediation and settlement. If there is any doubt about that, the case should be remanded for discovery on that issue. At the very least,

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[14] The issue of the preservation of the plaintiffs' existing claims against their carriers was raised as a precondition to any negotiation with Ramp and the Ramp carriers. Moreover, it was raised constantly with the mediator in discussions. The Carduners have no doubt but that our Mediator is well aware of the reservation and preservation of those claims, which were not to be affected by the settlement.

the Mediator could illuminate that issue. Discovery had been stayed throughout the mediation and by the case management order in effect at the time of the Carriers' motion.

Finally, the Court's interpretation of the Agreement violates a number of the primary tenants of contract construction. First, it renders the entire provision in ¶ VI(F) meaningless. A contract should never be interpreted to render one of its terms meaningless. *Porreca v. City of Millville*, 419 *N.J. Super.* 212, 233 (App. Div. 2011). Second, it ignores a principal rule of construction providing that where there is both general and specific language addressing the same issue, the specific language controls. *Homesite Ins. Co. v. Hinderman,* 413 *N.J. Super.* 41, 48 (App. Div. 2010).

Under that rule of construction, the clear language of ¶ VI(F), specifically preserving the plaintiffs claims against North River and Continental, would clearly control over the broad general release of all "Releasing Parties" in ¶ III of the Agreement. Paragraph VI(F) specifically "carves out" for preservation, from the class of all released parties, those claims that had been previously asserted by the plaintiffs against their own carriers.

The Court below, however, held just the opposite, basically writing ¶ VI(F) out of the agreement. New Jersey's rules of construction prohibit such an interpretation.

In so doing, the Court held that ¶ III of the Settlement Agreement, the so called Judgment Reduction provision had, "to take precedence over the miscellaneous ¶ 6(f) provision." 3T12, l. 1-3. To hold otherwise, explained the Court would, "render the judgment

reduction provision completely meaningless ... ." *Id.*, l. 9-10. That is, simply, not the case and this is why.

The Judgment Reduction Provision of the Agreement, ¶ III(A) of the Settlement Agreement, provided as follows:

> In the event any Claim arising from or arising out of a Released Claim is brought by a Carduner Party ... and such Claim results in an adjudication on the merits ... and the recovery the Carduner Party obtains against such other entity includes amounts allocable to a Releasing Party ... the Court ... shall reduce any judgment ... by the amount, if any, that a court or tribunal determines that the Releasing Party would have been liable to pay such other entity.

Pa92. On the other hand, the Carduner Carriers' Exclusion provision, ¶ VI(F), clearly preserves its existing claims against its carriers, pending in the Court below. The language could not be more clear: "nothing in this Agreement affects any rights that the Carduner Parties may have against their insurers." It excludes from the impact of ¶ III(A) the existing claims asserted against its carriers. In that sense, the exclusion is quite specific and limited.

The Judgment Reduction Provision, on the other hand, is extremely broad, "applying to each and every case arising out of a released claim." Those claims may be claims brought by an environmental agency, or any 3rd party to the agreement. The interpretation of ¶ VI(f) advanced by the Carduners in this matter does not impact the efficacy of that provision in any way, unless the claims reduced to judgment are those that had been pending in the Court between the Carduners and their own insurance carriers prior to the execution of the

Settlement Agreement. The broad grant of immunity under ¶ III(A) does not apply to the claims brought against North River and Continental. Thus, the Court's conclusion, that the interpretation argued by the Carduners would "render the Judgment Reduction provision meaningless," is incorrect. It would do nothing of the sort. An effective Carve Out provision, ¶ VI(F), would merely render the judgment reduction provision ineffective as to North River and Continental, as intended. In fact, it is the only interpretation of the Settlement Agreement that makes any sense given the difficult history between the Carduners and their carriers, who ignored their obligations to their insureds for decades.

It is, instead, the carriers' interpretation of the Judgment Reduction Provision that renders ¶ VI(F) meaningless. If ¶ VI(F) was not intended to preserve the Carduners' existing claims against its carriers, then what?

That is why, when, at oral argument, the Court repeatedly asked if the Judgment Reduction and ¶ VI(F) were ambiguous, the Carduners' response is that neither was. The Judgment Reduction provision of ¶ III(A) is a broad grant of immunity for Ramp, protecting it from cross-claims for indemnification or contribution by third parties, known or unknown. But, by operation of ¶ VI(F), that broad grant of immunity does not extend to the existing claims that had been pending between the Carduners and their carriers since 2015 and which had been sustained by the Court in 2018 in the face of a motion for summary judgment by the Carduner Carriers and coverage being declared under the policies. The Court's interpretation

of the Settlement Agreement is precisely backwards and should be reversed. Should this Court find that the two provisions can not be reconciled with each other, then the meaning and intent of each provision must be resolved as a matter of fact. In so doing, the Court was required to consider the Carduners' assertion that, "[t]he issue of the preservation of the plaintiffs' existing claims against their carriers was raised as a precondition to any negotiation with Ramp and the Ramp carriers." Added to that is the fact that each and every draft of the Settlement Agreement contained the Carduner Carriers' exclusion in ¶ VI(F) while the Judgment Reduction provision was negotiated much later in the drafting process. Finally, there is the mediator, who can confirm the purpose of the two provisions and the negotiations leading up to their inclusion in the final draft of the agreement. The issue was raised constantly with the mediator in discussions. As noted in their brief, the Carduners have no doubt but that the Mediator is well aware of the reservation and preservation of those claims, which were not to be affected by the settlement." Reconsideration Brief at page 8, note 4. At the very least, considering that § "E" of the Carduners' summary judgment brief indicated that factual questions remained requiring the completion of discovery and a plenary hearing, the Court should have permitted the parties to address these issues fully in discovery before contemplating summary judgment on that issue.

E. THE DEFENDANT/RESPONDENTS' MOTION FOR SUMMARY JUDGMENT WAS PROCEDURALLY DEFECTIVE AND THAT DEFECT CAUSED A CHAOTIC BRIEFING AND DISCUSSION OF THE ISSUES.[15]

One of the points raised by the Court on Reconsideration was that ¶ VI(F) was not specifically addressed by the Carduners during the original summary judgment motion. With all due respect to the Court below, the motions that were filed by the carriers completely ignored the appropriate procedures and were made in such a way that there was a cacophony of arguments for the plaintiffs to address.

First, the motion was filed without the Court's permission at a time when its management orders mandated exclusive efforts to mediate. North River, however, attempted to unilaterally fire the mediator for what it claimed were conflicts created in another matter, having nothing to do with the Carduner case. The conflicts were imaginary.

The Mediator disagreed with defense counsel's position and the Carduners disagreed as well. In a law review article in the New Jersey Law Journal, Judge Mathesius has indicated that the Kennedy's firm dismissed him in that matter for improper reasons, made knowingly false statements to the Court, defamed him and was guilty of misuse of process. Pa1831-Pa1832. It gives one pause about the procedural excesses in this matter as well.

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[15] This was argued below. Related portions of the Record are at 2T1-2T28 & Pa351-Pa1134.

Prior to filing any motion with the Court, the carrier defendants should have made an application to the Court to vacate the existing case management order that mandated an exclusive effort to resolve the case before additional discovery could be undertaken. Specific to that Order was the Ramp/Carduner settlement, as it occurred just prior to the Order from Mathesius mandating a push to mediate the case. Pa42-Pa46. The timing of his dismissal and the filing of the motion appears to be an effort to end-run the Court's case management order and prohibit the discovery that the plaintiffs were entitled to prior to addressing the summary judgment claims.

When the motion was filed, it was a motion filed solely by North River. The original return date of the motion was March 3, 2023.

On that date[16] Continental sent a letter to the Court seeking to assert its own motion for summary judgment but relying solely on the North River documents. That letter was not accompanied by a Notice of Cross-Motion, a statement of undisputed material facts, nor any other document required by *R*. 4:46-1 or *R*. 4:46-2. The plaintiffs' objected to Continental's efforts to join in North River's summary judgment motion. The Carduners objected to any effort by Continental to file a reply brief. Nevertheless, ignoring the Court Rules, Continental filed a Certification "joining in North River's Motion for Summary Judgment," a Statement of Undisputed Material Facts and a Reply brief.

[16]The original motion had been adjourned to March 17, 2023.

The, so called, reply brief raised new arguments, not raised by either North River or Continental elsewhere in the motion. The question addressed by Continental's late filed brief, was whether or not North River and Continental had any subrogation claims at all, that would prevent the dismissal of their cross-claims against Ramp and its carriers. The argument being made by Continental in reply appeared to move past the arguments that had previously been made by North River, in essence waiving the arguments based upon ¶ III(A) of the Agreement. Moreover, since Continental was making the argument in tandem with North River, it appeared that the defendants had retreated from the position that the Judgment Reduction provision mandated dismissal of the plaintiffs' remaining claims against its carriers, shifting to an argument, apparently one of first impression in New Jersey, that its cross claims were not extinguished by operation of law by the Carduner/Ramp settlement and by the breach of its agreements with the Carduners.

The brief late-filed by Continental cited to a District Court decision that, itself was based upon an unpublished decision from the Appellate Division. Pa1078-Pa1099. The cases cited did not even support the arguments they were making at the 11th hour. Thus, literally on the eve of oral argument, the undersigned was required to reply to these newly minted arguments. Pa1111-Pa1134.

To say that record on the motion is confused would be kind. The plaintiffs ultimately objected to the late filed arguments of Continental and objected to them being heard on the return date in any fashion.

In the plaintiffs' brief and again at oral argument on the 31st, the Court was told that the claims by the Carduners against their carriers were preserved under the settlement agreement. In fact, the plaintiffs' original brief contained a ¶ labeled, "The Settlement Agreement Does Not Foreclose this Action," referencing the claims asserted against the Carduner carriers.

The oral argument transcript from March 31, 2023 is less than helpful. In the 27 page oral argument transcript, 78 passages were marked as "indiscernible." 2T1-2T27. What was contained within those passages, or for that matter, the amount of argument represented by the demarkation "indiscernible" is unknown.

One thing is certain, however, and that is that the Court had before it, a complete copy of the Carduner/Ramp Settlement agreement and should have compelled it to reverse its March 31, 2023 Order granting summary judgment to the defendants. To the extent that the record is confused, the blame rests solely at the feet of the defendants' and their failure to comply with the simple rules under which we all litigate.

F. THE COURT ERRED BY DENYING THE PLAINTIFFS' CROSS-MOTION FOR SUMMARY JUDGMENT IN 2018.[17]

On November 9, 2018, the Court denied cross motions for summary judgment filed by the Carduner Carriers and the Carduners. The Court sustained the Carduners' claims against their carriers on the strength of the *Metex* decision from this Court, finding coverage under the Continental and North River Policies. *See e.g., Metex Corp.* , 290 *N.J. Super.* at 107 (App. Div. 1996). The Court, however, failed to compel the Carduner Carriers to provide the defense that the Carduners were entitled to under *Metex*, which the Court should have granted as a matter of law and failed to enter summary judgment on the breach of contract claims and the unjust enrichment claims.

Metex stands for the proposition that a Comprehensive General Liability Carrier, like North River and Continental, are required to provide a defense, that is, the costs associated with the investigation and remediation of environmental harm for which their insureds may be legally responsible. 290 *N.J. Super.* at 104-105. Like the carriers in the *Metex* case, the Carduner carriers issued general comprehensive insurance policies to Jean and Lucy Carduner providing that the "company will pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of bodily injury or property damage.

[17] Argued below. Related portions of the Record are at 1T1-1T55 & Pa1135-Pa1832.

The evidence was undisputed in the case below that the chlorinated solvent contamination (hereinafter "PCE") affecting the groundwater at the Carduner site originated from the dry cleaning operations of Ramp Cleaners. Ramp Cleaners was a tenant of Jean and Lucy Carduner, who were the owners of the property. Moreover, pursuant to the unrebutted opinion of John Bee of Shakti Consultants, Inc., licensed environmental engineers and subsurface evaluators, PCE was released into the environment during the mid-1970s and continued throughout the entire period of Continental and North River's coverage. Since that time, a period spanning more than thirty years, neither Continental nor North River has developed any technical evidence that the Shakti evidence was incorrect.

Based on the Shakti data, both Continental and North River agreed to provide the Carduners a defense, i.e., pay a portion of the investigative and remedial costs, in 1995 and 1996. Years later, and most certainly by 2017, both carriers had abandoned their obligations without any real basis for doing so. This abandonment caused the Carduners to incur costs and expenses that they should not have incurred. Equally important, the abandonment of North River and Continental's obligations to pay their insureds' investigative and remedial costs put that financial burden on the Carduners, Ramp and its Carriers.

In large part, it is that failure to pay the reasonable investigative and remedial costs that alarmed the Carduners, who could not help but observe that Ramp's coverage limits were eroding placing them at risk of depleting the resources needed to address the contamination of

their property. It is that decision that ultimately led to the settlement between Ramp, its carriers and the Carduners. The entire idea of the settlement was to secure the remaining policy limits of Ramp's carriers and look to the Carduner carriers to make up the difference needed to bring the site into compliance with NJDEP clean-up standards.

Prior to the November 9, 2018 cross motion hearing, Continental and North River justified their refusal to act on their insured's behalf arguing that there was no claim pending against the Estate of Jean and Lucy Carduner that would require them to act. However, virtually the same argument was made by the Federal Insurance Company in the *Metex* case. The Federal policies in that case were identical to the policies issued by Continental and North River.

The insured in the *Metex* case had not undertaken any clean up at the time suit was filed. *Metex*, 290 *N.J. Super.* At 100. No third party had threatened any suit over the contamination. *Ibid*. No agency or governmental entity had issued an order or directive ordering the insured to investigate or remediate the contamination at the site. *Ibid*. Nevertheless, in the *Metex* case, the appellate panel concluded that the insurance carriers were required to fund the investigation and remediation for which the insured was legally responsible. *Ibid*. Thus, the companies were ordered to pay those costs going forward.

The Court in *Metex* reasoned that the trigger of coverage under the insurance policies was not the assertion of a claim by a third party but the strict liability imposed on the insured

as a matter of law. Nothing that investigative and remedial environmental costs constituted damages under the *Morton International*[18] decision, the Court indicated that, the only real question for a court addressing coverage is "whether the policyholder was legally obligated to pay by virtue of the Spill Compensation and Control Act (the "Spill Act")"[19] That question could only be answered in the positive with regard to Jean and Lucy Carduner's estates. Here's why.

Jean and Lucy Carduner were the owners and landlords of the property leased to Ramp. According to the Shakti report, Ramp's operations released PCE into the soil and groundwater beneath the property and that PCE has migrated onto the property of other third parties. Pa1647-Pa1648. Shakti concluded that the releases on the site occurred between 1978 and 1986. Pa1705-Pa1706. Thus, Jean and Lucy Carduner were the owners of the property at the time that hazardous materials were discharged there. Much like the insured in the *Metex* case, the Carduner's status as property owners of a site where hazardous discharges occurred during their period of ownership, the Carduners were strictly liable to investigate and remediate the contamination under the Spill Act.

The Spill Act imposes liability on polluters and owners of property at the time a release has occurred. *Magic Petroleum Corp. v. Exxon Mobile Corp.*, 218 *N.J.* 390 (2014). Thus, like

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[18] *Morton Int'l. Inc.,* 134 *N.J.* at 1.

[19] *N.J.S.A.* 58:10-23.11, *et seq.*

the insured in *Metex*, the Carduner Estate was strictly liable under the Spill Act and legally responsible to investigate and remediate their property.

The Court noted at oral argument that there was no issue of fact about the timing of the releases or triggering of an occurrence during the insurer's policy period. 1T32, l.10-11. Further, the Court rejected the insurance carrier's assertion that a claim was required before their obligation to defend was triggered. 1T36, l. 19-24. The Court also noted that the fact that the release occurred while the Carduners were owners of the property was likewise undisputed. 1T37, l. 6-9. The Court again confirmed the lack of a genuine issue of material fact when it noted that, "there aren't facts in dispute that justify the denial of both motions." 1T41, l. 14-15. Ultimately the Court concluded that, "there was coverage under the policy but inexplicitly failed to order North River or Continental to defend the Carduners or award damages at that time. 1T53, l. 17-21.

The Court in *Metex* held that, "it is the statutory mandate that makes a polluter legally obligated to pay damages of property damage. This liability arises upon the discharge of a hazardous substance onto the property." *Metex*, 290 *N.J. Super.* 104-105. Under the Spill Act, a polluter or a property owner's liability is triggered by the pollution, not whether or not there is a claim or enforcement by environmental agencies. *Ibid*. It is this liability that triggers the CGL carriers' duty to defend their insureds, as a matter of law. *Ibid*. There being no genuine question as to any material fact regarding the Estate's liability, the Carduners' cross-motion for

summary judgment should have been granted in 2018 and the case should have advanced to trial on the merits on damages only.

G. THE COURT HAVING RULED THAT THERE WAS COVERAGE UNDER THE CARDUNER POLICIES AND THE DEFENDANTS, HAVING FAILED TO COMPLY WITH THE COURT'S ORDER, FACED ONLY BREACH OF CONTRACT CLAIMS OR EQUITABLE CLAIMS NOT PROHIBITED BY THE JUDGMENT REDUCTION PROVISION OF THE SETTLEMENT AGREEMENT.[20]

Given the Court's rulings on November 9, 2018 and the Carduner Carriers' failure to pay the costs associated with the investigation and remediation of their property, the coverage issues presented to the Court in 2018 survived as breach of contract claims that would not have been prohibited by the Judgment Reduction Provision under any circumstances. That is true even if the Appellate Court accepts the lower Court's interpretation of ¶¶ III(A) and VI(F) of the settlement agreement.

In essence, by resolving the coverage aspect of the case,[21] more than 4 years prior to the settlement agreement with Ramp, and the Carduner carriers, steadfastly ignoring the Court's mandate to "work it out" (meaning the cost sharing with Ramp and its carriers), the carriers having failed to so for nearly another 5 years, were in clear breach of their insuring agreements and in violation of the Court's orders.

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[20] Argued Below. Related portions of the Record are at 2T1-2T28 & Pa3510-Pa1134.

[21] The Court: "I'm going to submit an order saying there's coverage under the policy subject to a reservation." 1T53, l. 17-20.

The Judgement Reduction provision provided as follows:

> In the event any Claim arising from or arising out of a Released Claim is brought by a Carduner Party ... and such Claim results in an adjudication on the merits ... and the recovery the Carduner Party obtains against such other entity includes amounts allocable to a Releasing Party ... the Court ... shall reduce any judgment ... by the amount, if any, that a court or tribunal determines that the Releasing Party would have been liable to pay such other entity.

Pa92. Having already prevailed on the declaratory judgment aspect of their claims, remaining before the Court on cross motions for summary judgment on November 9, 2023 were issuers of damages arising from the breach of the insuring contracts and equitable claims.

It is the Carriers' failure to act in the face of the Court's order, that placed the Carduners in the situation where they were watching the limits of the Ramp coverage evaporate while their carriers sat back and did nothing. Thus, were the carriers responsible for the damages suffered by the Carduners but also for any additional harm caused by the need to mitigate their damages by settling with Ramp and its carriers before the well ran dry.

This argument was also made to the Court on March 31, 2023. Due to their breach, our Carriers have no cross claims against Ramp and its carriers. There's simply no cross claim. Thus, there's no triggering of the Judgment Reduction Provision. It really doesn't apply under those circumstances. 2T8, l. 21-25; 2T9, l. 1-2.

> We have an entity that has a certain amount of coverage, and that coverage is being eroded because of the breach of our carrier. Our claim is that our carriers are the reason for that debt.

> Our carriers said today that they had the right to seek indemnity against Ramp. The whole purpose of this provision is to eliminate that argument, to protect out carriers to mitigate our damages with Ramp and [cease][22] the eroding of the Ramp (indiscernible).
>
> ... This whole tradition,[23] the judgment reduction provision doesn't – just simply doesn't apply to our carriers.

The Carduners explained that the entire concept of the judgment reduction provision was to deal with any valid subrogation claims that the Carduner Carrier may have. The Carduners argued, however, that their carriers had no subrogation claims. 2T9, l. 21.

As noted in Oral Argument on March 31, 2023:

> We mitigated our damages.[24] Now, we're looking for the damage claims and the difference on that is, we think the difference between the settlement number and the remedial number because we think all of those costs and extra costs were unnecessary over the years.

2T18, l. 16-20.

This argument led to a discussion of the "Absolute Waiver" Rule and the cases in which it arises. The Absolute Waiver rule arises:

> When an insurer erroneously or wrongfully denies coverage, the policyholder should not be punished for mitigating its damages - and perhaps the insurer's as well by settling the underlying matter. That is because the denial is

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[22]Incorrectly transcribed as "decease." 2T11, l. 11.

[23]Most likely "provision" mis-transcribed.

[24]Meaning that, by settling, the Carduners mitigated their damages against their own carriers by assuring that Ramp did not further erode any of its limits.

> a breach of contract on the part of the insurer and its breach should relieve the policyholder of the punitive effects of its failure to comply with the consent provisions of the insurance policy.

The Absolute Waiver rule is the majority rule in the United States but its application in New Jersey is an issue of first impression. Applying the Absolute Waiver rule, there are no viable cross claims for the Carrier defendants to assert in this case. The Court should have dismissed them out of hand. Moreover, since the breach of contract claims (as well as the equitable claims arising under the doctrine of unjust enrichment) are not claims "arising out of a released claim," that was "attributable to a Releasing Party," the Judgment Reduction provision has no application. *See* Pa92 (the Judgment Reduction Provision).

The Court rejected this argument without really explaining why. It never even addressed the Absolute Waiver rule and its applicability in this case. That is true in spite of the parties spending the last two days prior to oral argument briefing the issues before the Court. Continental thought the issue important enough to ignore the Court Rules in order to have its view of the Absolute Waiver Rule before the Court.

In the end, the Court simply ruled that, "this issue about a contract claim, I mean, to me that's just another name for seeking coverage ... ." 2T27, l. 7-8. This, of course, ignores the fact that the Court had already ruled that there was coverage under the Continental and North River policies back in 2018 and the only remaining claims to be adjudicated were the breach of contract claims and the unjust enrichment claims. Neither of those claims, under any

interpretation of the Judgment Reduction provision would apply or be barred by that provision, even if the Appellate Court was to sustain the interpretation of that provision decided by the Court on March 31, 2023.

H. THE COURT SHOULD NOT HAVE DISMISSED THE POLICIES ISSUED TO CARDUNER LIQUOR STORE INC.[25]

The insurance policies at issue in this case since 2018 are those issued by North River and Continental to Jean and Lucy Carduner as property owners. However, each carrier also issued policies with similar limits to a corporation owned by Jean and Lucy Carduner, the Carduner Liquor Store Inc. Pa1673.

These policies were identified first by representatives of Continental and North River in response to notifications by the Carduners' agent of a release at the site. *Ibid*. For the next thirteen years, the carriers continued to assert that the coverage being provided to the Carduners were under these policies. The policies effectively double the amount of coverage available to the Carduners.

The Court allowed the policies to be dismissed in 2018. However, at least one of the sumps in the property leased by the Liquor Store was known to be contaminated and was a possible source of the spread of the contamination to third-party property. The policies in question were dismissed well before the close of discovery. The dismissal was premature and

[25] Argued below. Related portions of the Record are at 1T1-1T55 & Pa1135-Pa1832.

the policies should remain in the case until a more definitive conclusion can be drawn about the involvement of the company's property in the overall contamination problem. The doubling of coverage will help to insure that there are available funds to complete the investigation and remediation of the Carduner property and all impacted their party properties.

V. CONCLUSION

The Court below far too broadly read the Judgment Reduction Provision of ¶ III(A) and too narrowly read the Carve-Out provision of the Settlement Agreement, denying the Carduners the benefit of their bargain in the settlement. There is a strong public policy in New Jersey favoring settlements. *Gere v. Louis*, 209 *N.J.* 486, 500 (2012). Because of this strong public policy, Courts will "strain" to give the terms of a settlement agreement effect. Gere, 209 *N.J.* at 500. Here, just the opposite has occurred. The Court has prohibited claims that had been pending in the this litigation since the Carduner Carriers ceased performing their duty to participate in the investigation and remediation of the Carduner property. Moreover, the Court ruled so in spite of ¶ VI(F) of the Agreement making it clear that the settlement was not to affect the claims that had been asserted against the Carduner Carriers in the underlying litigation. Moreover, it ruled so in spite of the fact that the Carduners' damages arose from North River and Continental's breach of contract or unjust enrichment.

As such, they were not the type of claims "arising out of a released claim" that would have given rise to a right of subrogation that correspondingly would have triggered the need

to reduce the ultimate judgment in this matter to zero. The Judgment Reduction provision, simply, did not apply to these claims. Thus, the Carduner Carriers' motion, as procedurally defective as it was, should have been denied on the strength of ¶ VI(F) of the Settlement Agreement alone. Barring that, the Court should have adopted the majority rule under these circumstances, the Absolute Waiver Rule, and recognized that the Carduner Carriers' breach of contract eviscerated any right it might otherwise have to subrogation and absent that, the breach claims were not claims, "arising out of a released claim." and, thus, not governed by the Judgment Reduction provision.

Given the past rulings of the Court finding coverage, the failure of the Carduner Carriers to comply with the Court's Orders, given the pending breach of contract claims, given the unequivocal waiver of any subrogation rights the carriers have otherwise have had, the effect of ¶ VI(F) of the Settlement Agreement and the exclusion of Causes of Action sounding in Breach of Contract or Unjust Enrichment from the Judgement Reduction provision, the Carduners were entitled to judgment on their cross-motion for summary judgment and the Carrier defendants were not entitled to judgment on their claims. *Brill v. Guardian Life Ins. Co. of America,* 142 *N.J.* 520 (1995).

Thus, for the reasons stated above, the March 31, 2023 and May 11, 2023 Orders of the Court below should be reversed and the plaintiffs' cross motion for summary judgment should

be granted with the case being remanded for a trial on damages, attorneys fees and costs pursuant to *R*. 4:42-9.

Respectfully submitted,

GIANSANTE & ASSOC., LLC

By: /s/ Louis Giansante
Louis Giansante

Dated: October 2, 2023

Superior Court of New Jersey

Appellate Division

Docket No. A-003014-22

NORTH RIVER INSURANCE COMPANY, *Plaintiffs,* vs. CARDUNER FRONT, LLC, *Defendant,* c/w CARDUNER FRONT, LLC, ROBERT CARDUNER, Individually and as the Executor of the Estate of JEAN and LUCY CARDUNER, *Plaintiffs,* *(For Continuation of Caption See Inside Cover)*	CIVIL ACTION ON APPEAL FROM THE FINAL ORDERS OF THE SUPERIOR COURT OF NEW JERSEY, LAW DIVISION, MERCER COUNTY DOCKET NO.: L-1947-14 c/w LAW DIVISION MERCER COUNTY DOCKET NO.: L-2753-14 Sat Below: HON. HON. DOUGLAS H. HURD, P.J. CIV.

JOINT BRIEF AND APPENDIX ON BEHALF OF DEFENDANTS-RESPONDENTS THE CONTINENTAL INSURANCE COMPANY, AS SUCCESSOR BY MERGER TO THE GLENS FALLS INSURANCE COMPANY AND THE NORTH RIVER INSURANCE COMPANY

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(For Continuation of Appearances See Inside Cover)

Date Submitted: January 26, 2024

CP COUNSEL PRESS (800) 4-APPEAL • (321957)

vs.

THE CONTINENTAL INSURANCE COMPANY, THE GLEN FALLS INSURANCE CO., THE NORTH RIVER INSURANCE COMPANY, THE GREAT AMERICAN INSURANCE COMPANY, THE SENTRY INSURANCE COMPANY, EAGLESTAR INSURANCE COMPANY, THE NEW JERSEY PROPERTY LIABILITY INSURANCE GUARANTEE ASSOCIATION, RAMP DRY CLEANING INC., PAUL GANGI, and JOHN DOES, 1-10,

Defendants.

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[1] Briefs are being included in the appendix pursuant to R.2:6-1(a)(2) because it addresses whether an issue was raised to the trial court, which is germane to this appeal.

PRELIMINARY STATEMENT

This appeal stems from the trial court's grant of summary judgment in favor of The North River Insurance Company ("North River") and The Continental Insurance Company as successor by merger to The Glens Falls Insurance Company ("Continental") (collectively, the "Insurers") in an environmental contamination suit brought by Carduner Front, LLC ("Carduner Front"), Robert Carduner, individually, and as the executor of the estates of Jean and Lucy Carduner (the "Estates") (collectively, the "Carduner Parties" or the "Appellants") against the Insurers, Ramp Dry Cleaning, Inc. ("Ramp") and Ramp's insurers (the "Ramp Carriers"). The property, a shopping center, or mall, located at Routes 130 and 571 in East Windsor, New Jersey (the "Site"), was contaminated by Ramp's dry cleaning operations over a number of years, and was owned at various times, by each of the Carduner Parties. Since at least 1998, the Site has been owned by Carduner Front, an entity that was not insured by the Insurers at any time, and was not created until a decade or more after the Insurers' policies expired. In fact, with the exception of a single Continental policy the Insurers' policies name only Jean and Lucy Carduner as insureds.

On or about November 18, 2021, the Carduner Parties, Ramp, and the Ramp Carriers entered into a settlement agreement (the "2021 Agreement"), pursuant to which the Carduner Parties received $8,662,500 from the Ramp

Carriers to remedy the contamination at the Site. As a condition for receiving this sum, which was significantly more than the $6,441,006 the Carduner Parties sought to recover in this suit, they were required to relinquish all claims against Ramp, the Ramp Carriers, and the Insurers, which had valid cross-claims against Ramp and the Ramp Carriers. The 2021 Agreement ensured this would occur pursuant to its "Judgment Reduction Provisions." Nevertheless, after receiving the settlement funds, in spite of their express representations that they would not do so, the Carduner Parties continued to pursue their claims against the Insurers, ultimately requiring the Insurers to move for summary judgment.

After the trial court granted summary judgment in the Insurers' favor, the Carduner Parties moved for reconsideration of the summary judgment decision, raising new facts and arguments that, although they could certainly have been raised then, were not presented to the trial court at the time the motions for summary judgment was made and decided. The trial court denied the motion for reconsideration on that basis, and because as the trail court explained at oral argument, in any event, the new arguments and information would not have changed its ruling. Nevertheless, the Carduner Parties continue to press those arguments (and information) on this appeal, as if they had been before the trial court at the summary judgment stage. This is seemingly done with the goal of misleading this Court into believing that the trial court had ignored the

Appellants' arguments, when in fact, it did not. (Similarly, the Appellants improperly raise new arguments here, often without record support.)

Clearly, the Appellants' criticism of the trial court is misplaced; at the summary judgment stage (and on reconsideration), the trial court considered all arguments and documentary evidence before it, and issued its decision. That decision was correct then, was correct on reconsideration, and is correct now, regardless of whether the Appellants' new arguments and information raised are considered or not. The other appeals of rulings from 2018 and 2015 are likewise meritless. For these reasons, and those set forth in greater detail herein, the rulings of the trial court should be affirmed in their entirety.

PROCEDURAL HISTORY

I. The North River Action

Effective May 27, 2010, Carduner Front, Ramp, and various insurers (including Continental and North River) entered into a Settlement Agreement and Release regarding environmental cleanup at the Site (the "2010 Agreement"). (Pa1810-26). The 2010 Agreement resolved prior litigation concerning Site remediation, and released all claims against the Insurers, including any for bad faith. (Pa1816-17). The 2010 Agreement was for a three year term, after which it could be terminated by any insurer party. (Pa1817).

On October 24, 2014, pursuant to paragraph 6(a) of the 2010 Agreement, North River exercised its contractual right to opt out, thereby terminating the agreement. (Pa981 ¶70). In September 2014, North River filed a declaratory judgment action against Carduner Front styled *The North River Insurance Company v. Carduner Front LLC*, Docket No. L-1947-14 in the Superior Court of New Jersey Law Division: Mercer County (the "North River Action"), seeking a declaration of no coverage for liabilities related to the Site contamination. (Da133-41). After Carduner Front unsuccessfully moved to dismiss the North River Action, it answered, asserted counterclaims, and filed a third-party complaint. (Da143-76).

II. The Carduner Action

In December 2014, the Carduner Parties[2] brought their own declaratory judgment action styled *Carduner Front, LLC, et al. v. The Continental Ins. Co., et al.* in the Superior Court of New Jersey, Mercer County, Docket No. L-2753-14 (the "Carduner Action"), naming Ramp, the Ramp Carriers,[3] and the Insurers

[2] In their appellate briefing (and before the trial court), the Appellants rarely distinguish between and among the Carduner Parties, almost always referring to themselves solely as the "Carduners." However, they are separate individuals/entities, with varying rights and liabilities, and often, the distinction among them is an important one.

[3] The Ramp Carriers include The Great American Insurance Company, The Sentry Insurance Company, Eagle Star Insurance Company, and the New Jersey Property Liability Guarantee Association.

as defendants, and then amended their complaint in February 2015. (Pa963-89). The Amended Complaint included six claims against the Insurers: (1) declaratory judgment (Count 2); (2) failing to perform under the 2010 Agreement fairly and in good faith (Count 4); (3) failing to fulfill their policy obligations fairly and in good faith (Count 5); (4) for material misrepresentations during the negotiation and performance of the 2010 Agreement (Count 7); (5) Recovery under the Spill Act (Count 8); and (6) a Declaration of Rights (Count 9). (*Id*.) The Carduner Action was consolidated with the North River Action on January 23, 2015. (Da142)

III. Motions Successfully Filed by the Insurers

On June 5, 2015, North River filed three motions. (Pa40, ¶1) First, it moved to dismiss all claims brought by Carduner Front and Robert Carduner, individually, and all extra-contractual counts (Counts 4, 5, 7, 8, and 9 of the Amended Complaint). (*Id*.) It also sought dismissal of Carduner Front's Counterclaims in the North River Action. (*Id*.) Finally, it sought summary judgment declaring that the North River Policies did not provide coverage to Carduner Front or Robert Carduner. (*Id*.) In a trial court Order dated October 21, 2015, virtually all of North River's requested relief was granted (Pa40-41),[4]

[4] To the extent they could do so, the Appellants were permitted to plead post-2010 unjust enrichment or bad faith claims in an amended complaint. (Pa40-41).

including the dismissal of all pre-2010 extra contractual claims against North River (in accordance with the 2010 Agreement). (*Id.*)

Similarly, on June 10, 2015, Continental joined the motion to dismiss filed by North River, and filed its own motion to dismiss. (Da4-6). Specifically, it sought to narrow the issues by moving to dismiss all of Carduner Front's claims under the Glens Falls policies and Robert Carduner's claims for post-6/1/79 coverage under the same policies. (*Id.*) Continental also sought dismissal of Counts 4, 5, 7, 8, and 9 of the Amended Complaint, which included claims for bad faith, unjust enrichment, misrepresentation, contribution under the Spill Act, and statutory access. (*Id.*; Pa489-98). On October 21, 2015, the court granted Continental's motion, dismissing all Carduner Front's claims and Robert Carduner's claims for post-6/1/79 coverage. (Da4-6). The court also dismissed Counts 4, 5, 7, 8, and 9 of the Amended Complaint in their entirety. (*Id.*).

An appeal of these October 21, 2015 Orders is not before the Court. (*See infra* at pp. 46-47).

IV. The Carduner Parties' Second Amended Complaint

On January 30, 2017, the Carduner Parties filed a Second Amended Complaint (Pa471-99), the operative pleading when the Insurers won summary judgment dismissing this suit in 2023. In its third count, the Estates sought declaratory judgment against the Insurers, seeking defense and indemnity for

the directives and obligations assumed not by the Estates, but by Robert Carduner as owner under of the Site (as confirmed by an April 24, 1994 Administrative Consent Order issued by the NJDEP (the "ACO")). (Pa491-93, ¶¶80-89). In the fourth count, the Estates asserted a breach of contract claim against the Insurers. (Pa494, ¶¶90-91). Finally, the eighth count asserted an improper "Unjust Enrichment" claim that was duplicative of previously dismissed claims. (Pa498, ¶¶112-117).

After successfully moving for summary judgment dismissing the coverage claims by the other Carduner Parties in 2015, in 2018 the Insurers moved for summary judgment against the Estates. (P38-39). They did so pursuant to a case management order ("CMO") which expressly provided for the filing of such a motion, "solely related to the issue" of whether the Estates should be dismissed as plaintiffs because they lacked any underlying liability. (Da7-9). The Insurers asserted that the Estates had incurred no losses, faced no claims, and thus had no basis for seeking coverage. (Da84-94). The Estates opposed and filed a cross-motion, which was granted insofar as the trial court determined that "they may assert [their] insurance coverage claims." (Pa39, ¶3). The trial court also referred the matter "back [to] mediation" for attempted resolution of all remaining coverage issues and defenses. (Pa39, ¶4).

Previously, in 2015, the trial court had referred the parties to mediation before Judge William Mathesius (ret.) (the "Mediator"). (Da1-3). Pursuant to the terms of his engagement, the parties were permitted to withdraw from mediation at any time after the expiration of an initial one hour mediation session. (*Id*.). For several years, all parties to the litigation continued to proceed before Judge Mathesius, and on or about November 18, 2021, the Carduner Parties entered into the 2021 Agreement with Ramp and the Ramp Carriers which settled all liabilities between and among them. (Pa209-32). The 2021 Agreement included certain "Judgment Reduction Provisions," which operated to resolve this litigation entirely among all parties, including the Insurers, but the Appellants continued to pursue claims against the Insurers anyway. (Pa220).

Believing that the 2021 Agreement was dispositive, and that an apparent conflict of interest had developed on the part of the Mediator, North River withdrew its consent to mediation. (Pa47-48). Regardless of whether a conflict existed (Pb18-19), North River could do so pursuant to terms of the Mediator's retention (Da1-3), which he acknowledged. (*See* Pa42) ("As I have often declared, if any party or client no longer desires my mediation/discovery master efforts, that is all that needs be said and I'll 'see you later.'")

On February 3, 2023, North River filed a motion for summary judgment seeking to enforce the terms of the 2021 Agreement (Pa302-22), which

Continental joined. (Pa563-64). The Carduner Parties then cross-moved for summary judgment dismissal of the Insurers' cross-claims against Ramp. (Pa233-64) (the "2023 Summary Judgment Motions"). After briefing was completed, oral argument was held on March 31, 2023. (Pa179-207). At the conclusion of oral argument, the trial court granted summary judgment in favor of the Insurers, dismissing all claims against them, and denied the Carduner Parties' cross-motion. (Pa205-07). Later that day, the Court issued a March 31, 2023 Order (Pa36-37) memorializing its rulings. The Carduner Parties appeal that Order here. (Pa 18).

The Carduner Parties then moved for reconsideration of the trial court's March 31, 2023 Order. (Pa 72). At oral argument on May 11, 2023 (3T1-3T13), the trial court denied the Appellants' motion for reconsideration,[5] and entered an order to that effect, also dated May 11, 2023. (Pa34-35). The Carduner Parties appeal that Order here, as well. (Pa18)

STATEMENT OF FACTS

I. The Relevant Insurance Policies

Respondent North River issued the following policies: liability policy no. 5101049097, effective from January 5, 1982 until January 5, 1985. (Pa362-93);

[5] Appellants suggest the trial court "reconsider[ed]" (or granted) its summary judgment order (Pb15, 21), however, that motion was denied. (Pa34-35).

liability policy no. 5104191573, effective from January 5, 1985 until January 5, 1986 (Pa395-431); and liability policy no. 5104191699, effective from January 5, 1986 until January 5, 1987 (Pa433-469) (collectively, the "North River Policies.") Each policy was issued to Jean Carduner and Lucy Carduner in their capacity as individuals and landlords of property at Route 130 & Northwest Corner Stockton Street, located in East Windsor, New Jersey. (*Id.*) None of the other Carduner Parties was named or otherwise qualified as insureds under the North River Policies.

Respondent Continental issued policy CBP68982, which was effective January 5, 1978 to January 5, 1981. (Pa563, 565) At inception, the named insureds on policy CBP68982 were Jean I. Carduner, Robert Carduner and Jean I. Carduner & Lucy Carduner T/A Carduner's Liquor Store A/T/I/M/A (Pa563, 565). Effective June 1, 1979, the identity of the named insureds on policy CBP68982 was amended to be "Carduners Liquor Store Inc. and/or Jean I. Carduner and Lucy Carduner A/T/I/M/A." (Pa576). Continental also issued policy CBP316215, which was effective on January 5, 1981 and cancelled effective January 5, 1982. (Pa644). The named insureds on policy CBP316215 were "Carduners Liquor Store, Inc. and Jean I. Carduner and Lucy Carduner A/T/I/M/A." (Pa644). The claims brought by the Plaintiffs in the Second

Amended Complaint against Continental were under policies CBP68982 and CBP316215. (Pa473-74).

II. The 1990 Claim, 1994 Field Directive, Administrative Consent Order, and 2010 Agreement

On October 5, 1990, North River received a General Liability Loss Notice under the North River Policies for an oil leak discovered on adjacent property, which allegedly emanated from an underground storage tank present on the Site (the "1990 Environmental Claim"). (Pa501-03). Continental also received notice, and acknowledged receipt of the claim on October 24, 1990. (Pa744). Subsequently, on March 30, 1994, the NJDEP issued to "Respondent, Robert Carduner, Owner," a Field Directive finding that "the Respondent is responsible for the discharge of hazardous substances, and for the hazardous substances which are improperly stored, including but not limited to #2 heating oil and perchloroethylene (tetrachloroethylene)." (Pa505).

The Field Directive expressly required "Robert Carduner, Owner" to "[i]initiate treatment of contaminated ground water, dispose of all contaminated soils stockpiled at the site at an approved facility and remediate any hazardous vapors occurring within the basements on the above mentioned property." (*Id.*). On April 24, 1994, the NJDEP issued the ACO to Robert Carduner (and none of the other Carduner Parties), individually and as owner of the "Site" (defined in

the ACO as the Ramp Cleaners site, located within Carduner's Mall at Routes 130 and 571.[6]) (Pa507-23, at 507). The ACO was also issued to respondents Paul Gangi and Michael Vernoia, co-owners/operators of Ramp. (*Id.*). It required respondents to remediate all contaminants at the Site and all contaminants emanating therefrom. (Pa507-23, at 508).

The Appellants and Respondents agree that the clean-up of heating oil was quickly resolved, and that the remediation activities then focused solely on the clean-up of tetrachloroethylene (PCE) and chlorinated solvent contamination that had emanated from the Ramp business. (Compare Pa354 ¶11 with Pa241 ¶11).[7] They further agree that the Carduner Parties retained a Licensed Site Remediation Professional ("LSRP"), and that it issued an August 8, 2022 Environmental MHPT Summary developing volume estimates for PCE in the Site's subsurface. (Compare Pa354 ¶12 with Pa241 ¶12). The parties also agree that the MHPT Summary detailed the LSRP's soil sampling efforts at the "Former Ramp Cleaners" and indicated that it contains the required data to

[6] Despite the NJDEP's clear identification of Robert Carduner as the Site's owner when the ACO was issued, the Carduner Parties incredibly contend that at that time, the Site was actually owned by the Estate of Jean Carduner, although Robert Carduner never challenged, or sought to correct, the ACO.

[7] The Appellants' trial court briefing is sometimes referenced in this brief for purposes of establishing certain admissions, and to demonstrate that certain arguments were never raised by the Appellants at the summary judgment stage.

design and implement a remedial action for soil and groundwater, which is solely attributable to Ramp. (Compare Pa354 ¶13 with Pa241 ¶13).

III. The Second Amended Complaint

As the Carduner Parties conceded before the trial court, the Second Amended Complaint alleges that: "[a] former tenant, Ramp Dry Cleaning, Inc. . . . contaminated the soil and groundwater of the property with Tetrachloroethylene (hereinafter "PCE") and other chlorinated solvents." (Compare Pa354 ¶14 with Pa241 ¶14). They further conceded, the Second Amended Complaint also provides that "[t]he recent technical work at the site definitively establishes Ramp as the sole responsible party for the chlorinated solvent contamination." (Compare Pa354 ¶15 with Pa241 ¶15). The Carduner Parties also conceded that the Second Amended Complaint states that the "Ramp defendants are. . . responsible to indemnify and hold the plaintiffs harmless from the cost of remediating and investigating the property" (*id.* at ¶75), and that "Ramp and [its owners] are 100% liable for all of the chlorinated solvent contamination present or beneath the Carduner's property." (Compare Pa354 ¶16 with Pa241 ¶16).

IV. The 2021 Agreement

On November 18, 2021, Ramp, the Ramp Carriers, and the Carduner Parties entered into the 2021 Agreement. Pa536-60. Although the Second

Amended Complaint indicates that the Site cleanup was expected to cost $6,441,006 (Pa481-82, at ¶43), under the 2021 Agreement, the Carduner Parties received $8,662,500 from Ramp, as paid by the Ramp Carriers. (Pa544).

The 2021 Agreement includes these Judgment Reduction Provisions:

> In the event any Claim related to or arising out of a Released Claim is brought by a Carduner Party against an entity that is not a party to this Agreement, and such Claim results in an adjudication on the merits, whether in court or another tribunal with jurisdiction, and the recovery the Carduner Party obtains against such other entity includes amounts allocable to a Releasing Party, then the Carduner Party agrees that it will not seek to obtain payments from such other entity or to enforce any related judgment to the extent of any sum that represents the applicable Releasing Party's share of the obligation owed, but rather, the Carduner Party shall voluntarily reduce any judgment, or claim against, or settlement with, such other entity by the amount, if any, that a court or tribunal determines that the applicable Releasing Party would have been liable to pay such other entity. To ensure that such a reduction is accomplished, the Releasing Parties shall be entitled to assert this paragraph as a defense to any action against it for any such portion of the judgment or claim and shall be entitled to have the court or appropriate tribunal issue such orders as are necessary to effectuate the reduction to protect the Releasing Parties from any liability for the judgment or Claim. ***In addition, the Carduner Parties agree they will not seek to obtain payment from any other person or entity of any amount or portion of any amount that a court or tribunal finds attributable or allocable to a Releasing Party.***

(Pa548) (emphasis added).[8] The "Releasing Parties" are defined in the "Definitions" section of the 2021 Agreement as follows:

[8] The Insurers' summary judgment motion relied on the emphasized language, but it was never addressed in the Carduner Parties' opposition (Pa234-64).

> 20. "Releasing Parties" means (a) the Ramp Entities; (b) the Carduner Parties, (c) Great American on behalf of itself and the Great American Companies, (d) Eagle Star on behalf of itself and the Eagle Star Companies, (e) Sentry on behalf of itself and the Sentry Companies, and (f) PLIGA on behalf of itself and the PLIGA Parties.

(Pa543, at ¶20.) The "Carduner Parties" are defined as follows:

> 1. "Carduner Parties" means (a) Carduner Front LLC, Carduner Back, LLC and Brix & Mortar, LLC, and each of their past, present, and future, direct and indirect, parents, subsidiaries, and affiliates, and each of their respective directors, officers, members, managers, employees, agents, attorneys, representatives, predecessors, successors, and assigns; and (b) Robert Carduner, the Estate of Jean Carduner and the Estate of Lucy Carduner, and each of their respective past, present, and future, managers, employees, agents, attorneys, representatives, predecessors, successors, heirs, and assigns.

(Pa540). The 2021 Agreement defines "Claims" as follows:

> "Claims" means any and all past, present, or future, known or unknown, fixed or contingent, matured or unmatured, liquidated or unliquidated, anticipated or unanticipated, foreseen or unforeseen, direct or indirect, accrued or unaccrued, claims, causes of actions, cross-claims, liabilities, rights, demands (including letter-demands, notices, or inquiries from any Person), penalties, assessments, damages, requests, suits, lawsuits, costs (including attorneys' fees and expenses), interest of any kind, actions, administrative proceedings, criminal proceedings, or orders, of whatever nature, character, type, or description, whenever and however occurring, whether at law or in equity, and whether sounding in tort or contract, or any statutory, regulatory or common law claim or remedy of any type. (Pa540-41).

The 2021 Agreement defines "Released Claims" as the claims released in Section II (Pa543) and identifies the following released claims:

1. Claims that were or could have been asserted in the Litigations, including any claims for costs, expenses or fees;

2. Claims resulting from groundwater contamination on or emanating from the Site;

3. Claims alleging any violation (whether or not in bad faith) of any statute, regulation, or common law doctrine or rule of bad faith or extra-contractual liability, including, without limitation, Unfair Claim Practices Acts or similar statutes of each of the fifty states (where applicable) under, arising out of or relating to the Policies;

4. Claims alleging any negligent undertaking by the Releasing Parties under, arising out of or relating to the Policies but expressly reserving any and all claims against Roux for negligence or intentional acts; or

5. Claims alleging any breach of contract, failure to abide by any duty or obligation, nondisclosure, misconduct or alleged bad-faith committed by the Releasing Parties arising out of or relating to the Policies or the Past Agreements;

6. Claims by any of the Carduner Parties for (a) rent allegedly lost or forfeited, (b) payment for the Ramp Parties' use of the premises at the Site, (c) money allegedly owed by the Ramp Parties to any of the Carduner Parties under the Past Agreements, (d) any other sum of money or non-monetary relief that the Ramp Parties owe, owed, or ever will owe to any of the Carduner Parties arising out of the subject matter of the Litigation; and

7. Claims alleging any mischaracterization of any payment made by a Ramp Carrier in connection with the Remediation as defense costs, indemnity costs or otherwise. (Pa545-46).

All claims against the Insurers in the Second Amended Complaint relate to the contamination caused by Ramp at the Site. (*See supra* pp. 6-9).

ARGUMENT

I. Standard of Review

The Carduner Parties appeal the trial court's March 31, 2023 Order granting summary judgment in favor of the Insurers, the trial court's May 11, 2023 denial of the Carduner Parties' request for reconsideration, and the trial court's November 27, 2018 Order granting the Carduner Parties' cross-motion for summary judgment. The summary judgment appeals are reviewed de novo, however, the May 11, 2023 denial of the motion for reconsideration is reviewed pursuant to an abuse of discretion standard. (*See* Pb14).

Appellate courts will not disturb a reconsideration decision "unless it represents a clear abuse of discretion." *Kornbleuth v. Westover*, 241 N.J. 289, 301-302; *accord Pitney Bowes Bank, Inc. v. ABC Caging Fulfillment*, 440 N.J. Super. 378, 382, 113 A.3d 1217 (App. Div. 2014). "An abuse of discretion 'arises when a decision is made without a rational explanation, inexplicably departed from established policies, or rested on an impermissible basis.'" *Pitney Bowes*, 440 N.J. Super. at 382, 113 A.3d 1217 (quoting *Flagg v. Essex Cty. Prosecutor*, 171 N.J. 561, 571, 796 A.2d 182 (2002)).

The Carduner Parties present their principal appellate argument, regarding paragraph VI. (F) of the 2021 Agreement ("Miscellaneous Provision F") as if it were raised as part of its motion for summary judgment. It was not. Although

this provision clearly could have been raised at the summary judgment stage, instead it was argued for the first time in the Appellants' motion for reconsideration. Consequently, contrary to the Appellants' apparent assertions, an abuse of the discretion standard, and not a de novo standard, applies to that motion. *See Da Silva v. Da Silva*, 2022 N.J. Super Unpub. LEXIS 1791 *17 (rejecting Appellant's attempt to intertwine evidence presented on a motion for reconsideration with the trial court's decision on summary judgment, and affirming denial of motion for reconsideration because newly offered information could have been adduced at time of summary judgment motion.) *See also Nieder v. Royal Indem. Ins. Co*., 62 N.J. 229, 234, 300 A.2d 142 (1973) ("our appellate courts will decline to consider questions or issues not properly presented to the trial court when an opportunity for such a presentation is available. . ." (quotation omitted)).

II. The Trial Court Correctly Held that the Judgment Reduction Provisions Bar the Carduner Parties Claims Against the Insurers

The trial court's March 31, 2023 Order correctly granted the Insurers' motions for summary judgment dismissing the case against them in their entirety. In the 2021 Agreement (Pa537-60), the Carduner Parties relinquished their potential claims against non-parties to the 2021 Agreement (including the Insurers) stemming from the environmental contamination caused by Ramp. Specifically, the

Carduner Parties agreed that ***"they will not seek to obtain payment from any other person or entity of any amount or portion of any amount that a court or tribunal finds attributable or allocable to a Releasing Party."***[9] (Pa548). Nevertheless, even after receiving an $8,662,500 recovery, the Carduner Parties continue to improperly pursue recovery against the Insurers.

A. The Carduner Parties' Binding Judicial Admissions Establish that Ramp is the Sole Cause of the Contamination at Issue

As discussed above, the Carduner Parties have admitted to material facts proffered by the Insurers establishing Ramp as the party solely responsible for the contamination of the Site (*see supra* p. 11-13). However, even if this were not the case, the allegations regarding Ramp's contamination of the Site in the Second Amended Complaint nevertheless makes them binding admissions.

In their Second Amended Complaint, the Carduner Parties concede that Ramp, a "Releasing Party" under the 2021 Agreement, is 100% responsible for the contamination at the Site (making it the only party the contamination is attributable to). (Pa490 at ¶76). Additionally, in that pleading, the Carduner Parties state, among other things, that "Ramp Dry Cleaning, Inc. . . contaminated the soil and groundwater of the property with Tetrachloroethylene (hereinafter

[9] This provision was undoubtedly included to protect Ramp (the polluter) and its Carriers from further litigation, in particular subrogation claims by the Insurers should they be required to indemnify the Carduner Parties at all.

"PCE") and other chlorinated solvents" (Pa472-73 at ¶6), that "technical work at the site definitively establishes Ramp as the sole responsible party for the chlorinated solvent contamination" (Pa486 at ¶57), that the "Ramp defendants are. . . responsible to indemnify and hold the plaintiffs harmless from the cost of remediating and investigating the property" (Pa490 at ¶75), and that "Ramp and [its owners] are 100% liable for all of the chlorinated solvent contamination present or beneath the Carduner's property." (*Id*. at ¶76).[10] These statements, as binding admissions, are determinative as to the cause of the contamination.[11]

Here, such a waiver exists in the form of the Carduner Parties' unequivocal admission in a sworn pleading that the site contamination at issue was "100%" caused by Ramp. Such "factual assertions in prior or suspended pleadings of parties stand on the same footing on this score as their admissions." *Stoelting v. Hauck*, 32 N.J. 87, 107 (1960) (citations omitted). Additionally,

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[10] The Carduner Parties produced full Site remediation proposals discussing only chemical contamination caused by Ramp. (Pa532-35). This, along with the Carduner Parties' own admissions, gave the trial court all it needed to find that the contamination of the Site and the damages stemming therefrom, were attributable or allocable solely to "Releasing Parties."

[11] A judicial admission is: "An express waiver made in court or preparatory to trial by the party or his attorney conceding for the purposes of the trial that the truth of some alleged fact, has the effect of a confessor pleading, in that the fact is thereafter to be taken for granted; so that one party need offer no evidence to prove it and the other is not allowed to disprove it." 9 *Wigmore on Evidence* §2588 (Chadbourn rev. 1981).

"admissions in pleadings are, by the weight of authority, admissible in evidence against the pleader." *Winn v. Wiggins*, 47 N.J. Super, 215, 222 (App. Div. 1957) (citations omitted); *see also Bauman v. Royal Indem. Co*., 36 N.J. 12, 18 (1961) (Factual assertions in party pleadings "stand on the same footing on this score as their admissions") (citations omitted); *New Amsterdam Cas. Co. v. Popovich*, 18 N.J. 218, 224 (1955) (Assertions in pleadings inconsistent with or contradictory to present claims treated as admissions). Accordingly, the trial court correctly concluded that the site contamination could only have been caused by a "Releasing Party." (Pa205).[12]

B. The 2021 Agreement Precludes the Carduner Parties' Claims as a Matter of Law

Where "the terms [of the contract] are not in dispute, the construction of the contract is a question of law to be resolved by the court, and not by the fact finder." *Seal Tite Corp. v Ehret, Inc*., 589 F.Supp 701, 703 (D.N.J. 1984). Here, there is no dispute as to the terms of the 2021 Agreement, which resulted from the arm's length negotiations between and among the Carduner Parties, Ramp and the Ramp Carriers.

The Judgment Reduction Provisions in the 2021 Agreement ensure that,

[12] A copy of the transcript of the March 31, 2023 oral argument is available at Pa179-207. Unlike the transcript that is available at 2T-2T28, this version does not omit numerous passages from the transcript as "indiscernible."

in exchange for the $8,662,500 received by the Carduner Parties, they can seek no further recovery for damages or liabilities relating to the environmental contamination of the Site. As quoted above, the first part of the Judgment Reduction Provisions includes a clause requiring any future judgment obtained by the Carduner Parties to be reduced to the extent of any sum representing Ramps' share of the obligation owed.

While this in itself is significant, as it is undisputed that Ramp is solely responsible for the contamination at the Site, the final sentence of the Judgment Reduction Provisions proves fatal to any remaining claims the Carduner Parties may have had against North River and Continental. (See Pa548; supra pp. 14, 19). Again, the Carduner Parties have conceded that Ramp is 100% responsible for the remaining Site contamination. (*See supra* pp. 13, 19-21).

However, even if this were not the case, and some of the contamination had been caused by the Carduner Parties, because all of the Carduner Parties are included within the definition of "Releasing Parties" contained in the 2021 Agreement (Pa543, at ¶20), no portion of the contamination would ever be allocated to an entity that is not a "Releasing Party." Thus, because the 2021 Agreement's Judgment Reduction Provisions precludes the Carduner Parties from seeking recovery against anyone, including the Insurers, for any amount attributable or allocable to "Releasing Parties" there is no scenario where the

Judgment Reduction Provisions would not bar their claims against the Insurers.

In fact, when it decided the 2023 Summary Judgment Motions, the trial court stated "[a]nd the fact that releasing parties includes—as you acknowledge—the only responsible—potentially responsible parties here, which are the Carduners and Ramp… I can't ignore that last provision….I simply can't ignore the plain language. I've looked at this provision more times than I want to admit. And I don't see any way around it."[13] (Pa205, ln. 11-21). In doing so, the trial court correctly granted the Insurers' motions for summary judgment, dismissing all remaining claims against them. (Pa78-79).[14]

C. North River and Continental are Intended Third Party Beneficiaries of the 2021 Agreement

Although not necessary to bar recovery against the Insurers, they are intended third-party beneficiaries of the Judgment Reduction Provisions. This was confirmed by Ramp's counsel (s*ee* Pa562) and the Appellants have never disputed this. More importantly, the Insurers' status as third-party beneficiaries

[13] The trial court also correctly noted, as the Carduner Parties acknowledged, "this isn't a *Rova Farms* case or a bad faith case. . . this is essentially -- coverage case." (Pa206, ln.6-7).

[14] The cases relied on by the Carduner Parties in presenting their argument that the trial court improperly read the language in the 2021 Agreement expansively resulting in a waiver of the Carduner Parties' rights is inapplicable. (*See* Pb23). Those cases focus on the waiver of Constitutional and statutory rights in the context of parties submitting their claims to arbitration. (*Id.*)

is clearly established under New Jersey law. *See* New Jersey Statute §2A: 15-2. "[T]hird-party beneficiaries may sue upon a contract made for their benefit without privity of contract." *Rieder Communities, Inc. v. Township of North Brunswick*, 227 N.J. Super. 214, 221-22 (App. Div. 1988) (citation omitted). "The standard applied by courts in determining third-party beneficiary status is 'whether the contracting parties intended that a third party should receive a benefit which might be enforced in the courts[.]'" *Rieder Communities*, 227 N.J. Super, at 222.; *see also Ross v. Lowitz*, 222 N.J. 494, 513 (2015) (third-party beneficiary status "'focuses on whether the parties to the contract intended others to benefit from the existence of the contract, or whether the benefit so derived arises merely as an unintended incident of the agreement'"). Finally, the Insurers' status as third-party beneficiaries is self-evident from the terms of the "Judgment Reduction Provisions," which state that they are intended to protect against claims "brought by a Carduner Party against an entity [like the Insurers] that is not a party to this Agreement."

III. The Appellants' Motion for Reconsideration was Correctly Denied

A. Appellants' Failed to Present Their Main Argument to the Trial Court in Opposition to the Insurers' Summary Judgment Motions

The Appellants' main appellate point is that the trial court "overlooked" Miscellaneous Provision F, a generic carveout provision in the "miscellaneous" provisions of the 2021 Agreement, and therefore erroneously granted the

Insurers' motion for summary judgment. This misleading argument incorrectly blames the trial court for purportedly ignoring the Appellants' arguments. However, these arguments were never made at the summary judgment stage. (*See* Pa241-64, Pa179-207).

This argument was improperly raised for the first time in the Appellants' motion for reconsideration. *See Medina v. Pitta*, 442 N.J. Super. 1, 18 (App. Div. 2015) ("a motion for reconsideration does not provide the litigant with an opportunity to raise new legal issues that were not presented to the court in the underlying motion."). Motions seeking reconsideration of final orders pursuant to Rule 4:49-2, like the one at issue here, are subject to a stringent standard of review, and are granted only under very narrow circumstances. To wit:

> A litigant should not seek reconsideration merely because of dissatisfaction with a decision of the Court. Rather, the preferred course to be followed when one is disappointed with a judicial determination is to seek relief by means of either a motion for leave to appeal or, if the Order is final, by a notice of appeal. Reconsideration should be utilized only 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.

D'Atria v. D'Atria, 242 N.J. Super. 392, 401, 576 A.2d 957 (Ch.Div.1990).

The Appellants cannot credibly contend that the trial court acted arbitrarily or capriciously, so instead, they do not distinguish between what was raised at the summary on summary judgment stage, and what was argued on reconsideration. This is of course extremely troubling, especially because at the reconsideration stage, the Appellants sought to introduce new arguments and documents (that they were long aware of, but failed to raise previously) in the hope that they could convince the trial court that it had somehow incorrectly decided the summary judgment motions. (Compare Pa234-64 with Da11-24)

The trial court clearly recognized that under New Jersey law, an argument or information for reconsideration that was not offered at the time of the initial motion (or even raising an argument or information on reconsideration that was simply overlooked) cannot serve as the basis for a motion for reconsideration. For example, in *Fusco v. Bd. of Educ. of City of Newark*, 793 A.2d 856, 860-61 (Super. Ct. App. Div. 2002), this court stated as follows:

> [C]ounsel either made a tactical decision not to present the document the first time around or overlooked it in his initial argument. He cannot now seek to bring this document in under the guise of reconsideration after defendant prevailed on summary judgment. (citations omitted). To validate such a practice would encourage attorneys to hold back evidence and move for reconsideration on a regular basis in order to get "a second bite of the apple" if their adversary prevailed on the initial motion.

Specifically, for the very first time on reconsideration, the Carduner

Parties argued that Miscellaneous Provision F, which provides that "Nothing in this Agreement affects any rights the Carduner Parties may have against their insurers," somehow invalidates the specifically negotiated Judgment Reduction Provisions included in section III. of the 2021 Agreement. Despite being able to do so, in opposing the Insurers' 2023 Summary Judgment Motions, the Appellants did not raise, or even discuss, Miscellaneous Provision F as a counter to the very specifically worded, yet broad in effect, language in the Judgment Reduction Provisions. (*See* Pa179-207 and Pa234-64).

As discussed by the *Fusco* court (*supra* at p. 26), whether intentional, or an oversight, it is well settled that filing a motion for reconsideration "does not provide the litigant with an opportunity to raise new legal issues that were not presented to the court in the underlying motion." *Medina v. Pitta*, 442 N.J. Super. 1, 18 (App. Div. 2015); *see also Cummings v. Barr*, 295 N.J. Super. 374, 384 (App. Div. 2021) ("Clearly, plaintiff had the ability and the obligation to review defendant's deposition thoroughly before filing their brief in opposition to summary judgment. Plaintiff should not be permitted to pick and choose alternative theories of liability and assert them *ad seriatim* in separate proceedings in the same litigation.")

Under New Jersey law, the basis for seeking reconsideration is determined by "what was before the court in the first instance." *Lahue v. Pio Costa*, 263

N.J. Super. 575, 598 (App. Div. 1993). Accordingly, a motion for reconsideration "cannot be used to expand the record and reargue a motion." *Capital Fin.Co. of Del. Valley, Inc. v. Asterbadi*, 398 N.J. Super. 299, 310 (App. Div. 2008). It "is designed to seek review of an order based on the evidence before the court on the initial motion ... not to serve as a vehicle to introduce new evidence in order to cure an inadequacy in the motion record." *Id.; accord Barros v. Barros*, 2022 WL 17543183 *5 (N.J. Super. Ct. App. Div. 2022) ("Reconsideration is not an opportunity for a litigant to present new facts or arguments that could have been raised before the order being challenged was filed"); *Flanagan v. Flanagan*, 2022 WL 1466095 *3 (N.J. Super. Ct. App. Div. 2022) (Same.), *cert. denied*, 253 N.J. 284, 290 A.3d 623 (2023); *Testa v. State*, No. A-0693-20, 2022 WL 1161753 *7 (N.J. Super. Ct. App. Div. 2022) (Same.)

The Appellants fully admitted in their reconsideration briefing (Da11-24) that they were well aware of the "new" arguments and documents they offered at the reconsideration stage long before the motions for summary judgment were briefed and argued, and that they long possessed (since 2021) the "new" exhibits (Pa105-46) they also sought to rely upon in support of their motion for reconsideration. Nevertheless, the Appellants unpersuasively argued (and continue to argue here), that the trial court's decision granting the Insurers' 2023 Summary Judgment Motions was incorrect, and somehow ignored language in

the 2021 Agreement provisions they never raised. Indeed, as the trial court stated when it denied the Appellants' motion for reconsideration, if the carveout provision of the [2021 Agreement] was such a "smoking gun," then "it would have been part of the initial motion." (3T11).

The Appellants' attempts to mislead and obscure what they actually argued at the summary judgment stage is significant, not only because they seek to shift blame to the trial court, by asserting that it "overlooked" the generic carveout provision contained in Miscellaneous Provision F, but also because they surreptitiously attempt to have this Court review the issue under a standard that is clearly inapplicable. (As previously discussed, summary judgment decisions are reviewed de novo, on the record before the trial court, but reconsideration decisions are reviewed for abuse of discretion.) Tellingly, other than generically asserting that the "interest of justice" required otherwise (Pb21), Appellants fail to explain how the trial court erred in denying their motion for reconsideration.[15]

B. The Trial Court Correctly Construed the 2021 Agreement

The trial court correctly denied the Carduner Parties' motion for

[15] Having taken this approach in its initial appellate briefing, the Appellants are precluded from raising additional or new arguments on this issue in their reply brief. *Bouie v. N.J. Dep't of Cmty. Affs.*, 407 N.J. Super. 518, 525 n.1 (App. Div. 2009) ("a party may not advance a new argument in a reply brief.″)

reconsideration, and even if Miscellaneous Provision F is considered (it should not be), also correctly construed the 2021 Agreement in accordance with applicable principles of contractual interpretation. In fact, it is the Appellants and not the trial court who have "violate[d] a number of the primary tenants [sic] of contract construction." (Pb28).

First and foremost, as the Appellants recognize in their appellate briefing, when there is specific and general language in a contract addressing an issue, the specific provision governs. (Pb28); s*ee also Homesite Ins. Co. v. Hindman*, 413 N.J. Super. 41, 49 (Super. Ct. App. Div. 2010) ("When two provisions dealing with the same subject matter are present, the more specific provision controls over the more general."); *Gil v. Clara Maass Medical Center*, 162 A.3d 1093, 1098-99 (Super. Ct. App. Div. 2017) ("Specific language in a contract controls over general language, and where specific and general provisions conflict, the specific provision ordinarily qualifies the meaning of the general."); *Standard Fire Ins. Co. v. Cesario*, 2012 WL 4194506, at *2 (D.N.J. 2012) ("Whatever inconsistency exists between these two provisions is easily resolved by a well-settled rule of contract interpretation: where there is an inconsistency between a general provision and a more specific provision, the more specific provision will qualify and control the more general clause."); *Homesite Ins. Co. v. Hindman*, 413 N.J. Super. 41, 48, 992 A.2d 804 (App. Div. 2010) (referencing

"the well-recognized rule of construction that when two provisions dealing with the same subject matter are present, the more specific provision controls over the more general").

Here, the Carduner Parties argue that Miscellaneous Provision F is the "specific" provision, and that the Judgment Reduction Provisions are the "general" provisions. This is clearly not the case. As the documentation presented by the Appellants for the first time in connection with their motion for reconsideration establishes (Pa105-146), Miscellaneous Provision F (like similar general provisions) is a boilerplate term, that was inserted into the 2021 Agreement during its initial drafting, and was not further discussed. The Judgment Reduction Provisions, however, were extensively negotiated over multiple drafts with the goal of concluding the litigation, and were expanded in scope as the negotiations proceeded. (*See id.*)

In addition to enforcing specific provisions over general ones, "in construing a contract a court must not focus on an isolated phrase but should read the contract as a whole as well as considering the surrounding circumstances." *Wheatley v. Sook Suh*, 217 N.J. Super. 233, 239 (App. Div. 1987). Thus, when a court construes the meaning of contractual provisions, "[t]he general purpose of the agreement must guide [the] interpretation of its particular terms." *Simonson v. Z Cranbury Assocs., Ltd. Pshp.*, 149 N.J. 536,

539 (1997). To that end, "a subsidiary provision should not be interpreted in such a manner as to conflict with the obvious or dominant purpose of the contract." *Wheatley*, 217 N.J. Super. at 240.

This principle was explained by the Supreme Court in *Newark Publishers' Assoc. v. Newark Typographical Union*, 22 N.J. 419, 426 (1956):

> A subsidiary provision is not to be interpreted as to conflict with the obvious 'dominant' or 'principal' purpose of the contract. We seek for the intention of the parties; and to this end the writing is to have a reasonable interpretation. Disproportionate emphasis upon a word or clause or a single provision does not serve the purpose of interpretation. Words and phrases are not to be isolated but related to the context and the contractual scheme as a whole, and given the meaning that comports with the probable intent and purpose; and thus the literal sense of terms may be qualified by the context. *Id.*

Applying this concept, in *Healy v. Fairleigh Dickinson Univ.*, the Court rejected the plaintiff's interpretation of the contract at issue, reasoning that it gave excessive weight to a "single provision," which conflicted with the primary purpose of the agreement. *Healy v. Fairleigh Dickinson Univ.*, 287 N.J. Super. 407, 415 (Super. Ct. App. Div. 1996). Here, the purpose of the 2021 Agreement was to resolve Ramp's liabilities in their entirety by ensuring that, in exchange for the sum of $8,662,500 (an amount significantly greater than the $6,441,006 the Carduner Parties initially sought), no further claims would be brought against Ramp and the Ramp Carriers relating to the Site contamination. To ensure that this, it was necessary for the Carduner Parties to relinquish their

claims against the Insurers, which they did, in the Judgment Reduction Provisions. If the Judgment Reduction Provisions were not included in the 2021 Agreement, and any of the Carduner Parties were to successfully recover from the Insurers, the Insurers would have then sued Ramp in subrogation. The Judgment Reduction Provisions prevent this situation from occurring and allow Ramp and the Ramp Carriers to "buy their peace."

The overall intent of the 2021 Agreement and the applicability of the Judgment Reduction Provisions is already inherently clear. However, if there was any doubt at all, the Appellants have already conceded to the trial court that the Judgment Reduction Provisions were specifically included in order to reduce the Insurers' potential liability, thereby affecting the Carduner Parties' rights against them. Contrary to what they argue here, before the trial court, the Appellants stated that the first part of the Judgment Reduction Provisions operates in situations where a plaintiff reaches a settlement with less than all defendants to the case, to protect potentially liable non-settling defendants (*i.e.,* the Insurers) by way of their "entitle[ment] to a credit reflecting the settler's fair-share of the amount of the verdict," (*see* Pa 259-60).

Having confirmed that the first part of the Judgment Reduction Provisions affects their recovery rights against the Insurers, and is not at all impacted by Miscellaneous Provision F, the Appellants cannot simultaneously assert that

Miscellaneous Provision F nullifies the final part of the very same Judgment Reduction Provisions, which also affects the Carduner Parties' recovery rights against the Insurers.

Additionally, giving the Judgment Reduction Provisions priority over Miscellaneous Provision F is the only way to ensure that a provision to the contract is not "interpreted to render one of its terms meaningless." (Pb28). As this Court recently held in *C.L. Division of Med. Ass'n. And Health Services*, 473 N.J. Super. 591, 599 (App. Div. 2022):

> "A basic principle of contract interpretation is to read the document as a whole in a fair and common sense manner." (citation omitted). . . Importantly, "[a] contract 'should not be interpreted to render one of its terms meaningless.' " (citations omitted) Further, when interpreting a contract, "[s]o long as it leads to a result in harmony with the contracting parties' overall objective a specific, defined term controls a general, undefined term." (citation omitted). Therefore, when both general language of a contract and specific language address the same issue, the specific language controls. (citation omitted).

If Miscellaneous Provision F supersedes the Judgment Reduction Provisions, the Judgment Reduction Provisions would be rendered meaningless because they would have no application in any context (even though the Carduner Parties have already conceded that they do). (S*ee supra* at p. 33; Pa 259-60). On the other hand, if the Court were to affirm the trial court's decision, and enforce the Judgment Reduction Provisions, Miscellaneous Provision F

would not be rendered meaningless. Rather, Miscellaneous Provision F would apply generally, and the Carduner Parties' rights against the Insurers would be affected only in instances in which they were seeking to recover amounts stemming from the contamination of the property at issue that are attributable to "Releasing Parties" as defined under the 2021 Agreement. (Pa548). In other words, the Carduner Parties' right to pursue other claims against the Insurers that fall outside the scope of the 2021 Agreement would not be impacted.

Finally, the Insurers correctly asserted before the trial court that the 2021 Agreement was clear and unambiguous (Pa301-322) and the Carduner Parties agree and make that point on appeal. (Pb29-30). But, if this Court somehow perceives an ambiguity in the 2021 Agreement, it would be construed against the drafter (the Appellants) and in favor of the non-drafting Insurers.[16] Thus, even if the "new" arguments and information raised for the first time on reconsideration had been presented at the time of the summary judgment motions, the result would be the same, and the trial court did not abuse its discretion in denying the Carduner Parties' motion for reconsideration.

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[16] See *Michele Matthews, Inc. v. Kroll & Tract*, 275 N.J. Super. 101, 109 (App. Div. 1994) ("A vague or ambiguous clause in a contract should be construed against the drafter of the contract"). The Insurers were not involved in drafting the contract, but the Carduner Parties and their attorneys clearly were (Pa105-46), requiring any alleged ambiguities to be construed against them.

IV. Appellants' Procedural Arguments have no Merit

Appellants present a hodgepodge of arguments that the Insurers' motions were procedurally improper. Initially, they seem to suggest that the 2023 Summary Judgment Motions should not have been permitted during a time when the Mediator was involved in the case. (Pb32). However, beyond the fact that the parties were engaged in voluntary mediation, the Carduner Parties fail to point to any orders of the trial court, or for that matter, anything else that would preclude the Insurers from moving for summary judgment when they did, and tellingly, at the trial level, never asserted that the mediation process precluded the 2023 Summary Judgment Motions. Moreover, prior to those motions being made, North River had opted out of the mediation process, which was proceeding for only so long as the parties consented. (Da1-3).

Ultimately, regardless of whether the Mediator had a conflict or not (*see* Pb18), the Insurers could withdraw their consent to the process at any time, a fact that the Mediator himself acknowledged. (Pa42, 48). Most significantly, however, the trial court allowed the summary judgment briefing to go forward, which it clearly had the discretion to do. *See North Jersey Media Group, Inc. v. Bergen County Econ. Dev. Corp.*, 2010 N.J. Super. Unpub. LEXIS 2893 (Sup. Ct. Bergen Cty. Sept, 10, 2010) ("Although, a strict reading of the New Jersey Court Rules does not permit such a cross-motion**,** the court has discretion to

relax the rules in the interests of justice."); *see also* NJ R. 1:1-2 ("any rule may be relaxed or dispensed with by the court in which the action is pending").

Specific to Continental, the Carduner Parties assert that it improperly joined North River's motion for summary judgment by way of a letter brief. (Pb33). This, however, is incorrect, as New Jersey Courts routinely permit parties to join motions (including summary judgment motions) via letter. *See Burke-Schaf v. Devine*, 2007 N.J. Super. Unpub. LEXIS 2052 (Super. Ct. App. Div. Aug. 7, 2007) (allowing defendant to join in motion for summary judgment via letter, as to disallow it "would be placing form over substance"); *Chauhan v. Rios,* 2020 N.J. Super. Unpub. LEXIS 2980 (Sup. Ct. Bergen Cty. Mar. 9, 2020) (considering defendant's letter joining in co-defendant's motion for summary judgment); *Ace Am. Ins. Co. v. Old Republic Gen. Ins. Corp.*, 2018 N.J. Super. Unpub. LEXIS 2714 (Sup. Ct. Bergen Cty. Nov. 29, 2018) (same). Moreover, NJ Court Rule 4:105-8 permits a party to join another parties' motion or opposition "by timely submitting a letter stating that the party is joining in the relief sought and relying upon the papers submitted by the movant or opponent of the motion." There is no requirement that Continental file its own notice of motion or cross-motion, in lieu of joinder.[17]

[17] Appellants also incorrectly argue that Continental's joinder violates R. 4:46-1 (Pb33) and ignore that the filing included a Certification containing a statement of material facts. (Pa563-64)

Second, the Appellants falsely assert that "plaintiffs' objected to Continental's efforts to join in North River's summary judgment motion." (Pb33). The Appellants actually advised the trial court that they "do not object to the Court addressing issues that are common to Continental and North River," and that one "issue that is common to North River and Continental is the degree to which the settlement between the Carduners and Ramp's Carriers precludes this suit. That issue is squarely before the Court." (Pa1105).

Additionally, the Appellants repeatedly mischaracterize the timing of the parties' filings in the lower court. Continental filed its letter joining North River's motion for summary judgment on March 3, 2023, which was well in advance of the March 9, 2023 due date for responses to North River's motion, which had a March 17, 2023 return date at the time. It was also prior to the March 7, 2023 filing of Plaintiffs' cross-motion for summary judgment, which made no mention of Continental's filing. Similarly, Appellants' argument that Continental's Reply and Opposition Brief of March 27, 2023 was not timely filed is also false. Appellants complain that this filing, made at 6:50PM (Pa1067-1068, Pa1109) was "after office hours." (Pb14). Of course, the rules expressly permit filings at any time of day.[18] For purposes of judicial efficiency,

[18] *See* https://www.njcourts.gov/attorneys/ecourts-appellate ("Documents are filed on the same day they are received, unless they are filed after 11:59 p.m.).

Continental joined and supplemented the points raised in North River's brief, which had been filed an hour earlier. (Pa957-58).

Appellants further argue that Continental's Reply Brief improperly "raised new arguments" that were not before the lower court on the insurers' motion for summary judgment. (Pb34). This assertion ignores that Continental's Brief was responding to arguments raised in Appellants' Cross-Motion before the lower court, in which the Carduner Parties had argued that they "are entitled to have the cross-claims of the non-settling defendants dismissed with prejudice." (Pa1108). Moreover, to the extent Continental's filings were deficient, the trial court had wide discretion to consider them anyway. *See North Jersey Media Group* supra at p. 37; *see also* NJ R. 1:1-2.

V. The Appellants have no Basis for Appealing the 2018 Summary Judgment Orders

The Carduner Parties also purport to appeal the trial court's November 27, 2018 Order (Pa38-39) claiming that its own motion for summary judgment had been denied, however, that was not the case. In fact, in that Order, the trial court granted the Carduner Parties' the relief they sought by way of cross-motion (Pa 39). They are not aggrieved by an Order which granted their own cross-motion, and thus, may not appeal such an Order. *See, e.g., New Jersey Schools Constr. Corp. v. Lopez*, 412 N.J. Super. 298, 308-09 (App. Div. Feb. 21, 2010) ("the rule allowing an appeal as of right from a final judgment contemplates a judgment

entered involuntarily against the losing party"). Moreover, any other alleged appeal from that Order is both procedurally and substantively invalid.

As context, in 2015, the Insurers had successfully moved for summary judgment on several points intended to narrow the scope of the case. One such ruling was the dismissal of the coverage claims being made by Carduner Front. This was based on the argument that Carduner Front was not an insured under the policies, and indeed had not even existed until more than a decade after such policies had expired. (See, e.g., §VI, below, regarding the 2015 orders.)

Then in 2018, having already narrowed the case, the parties and the Mediator considered a similar, threshold issue that might further narrow the case. That was: Whether the coverage claims of the two long-closed Estates should likewise be dismissed.[19] If so, it would be because the Estates had suffered no loss, had no claims against them, and the time to assert such claims against these closed Estates had long ago expired. (These points all remain true.)

Thus, the argument was, the Estates had no coverage claims for such non-existent underlying claims. With the Mediator's assistance, a CMO was developed and executed by the trial court on July 20, 2018, to resolve this specific issue. (Da7-10). Under that CMO, the trial court and all parties,

[19] This was a significant issue because, after the 2015 rulings, virtually all remaining coverage belonged to the Estates, and not the other Carduner Parties.

including the Appellants, agreed to address the sole issue of whether the Estates could sue for coverage in the first place. (*Id.*). All other coverage issues and defenses were reserved. (*Id.,* Da85n.3, Da96n.2). The CMO provided in pertinent part as follows:

> WHEREAS the Court has previously held … that the relevant policies … do not provide coverage for plaintiff Robert Carduner, in is individual capacity (as opposed to his capacity as representative of the Estate of Jean and Lucy Carduner), and that plaintiff Carduner Front LLC is not entitled to coverage as an insured under the North River and CIC policies;
>
> WHEREAS … it would be in the interest of judicial economy and would advance the progress of this case and its possible resolution for the Court to address and resolve the additional issue as to whether there is legal liability on the part of the Estates … such that the insurance coverage … would, or would not be implicated for such parties;
>
> WHEREAS, … no further discovery is presently necessary to resolve this [particular] issue, …
>
> NOW THEREFORE it is hereby ordered:
>
> 1) Defendants North River Insurance Company and Continental Insurance Company ***shall file their motions for summary judgment solely with respect to the above issue*** by August 3, 2018;
>
> 2) Plaintiffs Estate of Jean Carduner and Estate of Lucy Carduner shall ***file their opposition to the motion, and any cross-motion solely related to the issue addressed by the motion***, by August 24, 2018;
>
> ****
>
> 5) Upon resolution of the motions, the matter shall be referred back to Judge Mathesius for further mediation with all remaining parties and a determination of any additional discovery or proceedings

> needed prior to trial of the matters that will still need to be addressed.

(Da7-10.)(emphasis added).[20]

In accord with the CMO, North River and Continental each moved for summary judgment seeking dismissal of the Estates coverage claims. (Pa1135-1614). The Carduner Parties opposed, and cross-moved for summary judgment on that issue. (Pa1615-1775).[21] Their argument was that the Estates can seek coverage, even without incurring losses or having claims made against them, on the basis of this Court's decision in *Metex Corp. v. Federal Ins. Co.*, 290 N.J Super. 95 (App. Div. 1996). In that action, although the NJDEP had not yet made a formal claim against *Metex* to fund a remediation, *Metex* was unquestionably liable for the remediation so it voluntarily performed the

[20] The other coverage issues, reserved under the CMO, included, among other things: (i) whether the insurance provided by Continental is limited to the Estates' respective interests in Carduner Liquor Store and does not include the ownership of the mall Property; (ii) whether coverage is barred by the application of the pollution exclusion; (iii) whether coverage is barred by the owned property exclusion; (iv) if there is coverage, the proper allocation to Insurers given that they only insured certain Carduner Parties, and only for certain years; and (v) whether Insurers could then recover from Ramp and its insurers. (*See, e.g.*,Pa722-32).

[21] After the trial court decided the motions, the Carduner Parties sought an order that would have resolved the case more broadly. However, it would have ignored the CMO, the express limitation of the motions to the issue of the Estates' standing to sue for coverage, and all the other reserved defenses of the Insurers. The trial court rejected that effort by the Carduner Parties.

remediation and then sued for coverage. This Court held that Metex was entitled to seek coverage for its voluntarily incurred losses, without the need for a disputed underlying claim.

In the present case, the Insurers argued among other things that *Metex* did not validate coverage claims by the Estates which had incurred no losses, were not expected to incur losses, and faced no claims. Moreover, unlike in *Metex*, here the NJDEP had issued an ACO ordering remediation, identifying the responsible parties (i.e., Ramp as the actual polluter, and Robert Carduner as the property owner), and in doing so had imposed no obligation on the two long-closed Estates. Moreover, the responsible parties then undertook a Site clean-up, which is now being fully funded by Ramp, as the party responsible for the contamination. None of the facts and concerns in *Metex* existed here. Beyond that, even in *Metex*, the Court had not held any insurer to "owe coverage," but simply reversed the dismissal of Metex's Complaint to allow the case to proceed "subject to any other defenses" the insurer had. *Id*. at 117.

Nevertheless, on the basis of *Metex*, the trial court declined to dismiss the coverage claims of the two closed Estates, allowing them to proceed, and for the Insures to litigate, among other things, all of their expressly reserved coverage defenses. In so doing, the Court denied the Insurers' motions for summary judgment dismissing the Estates' claims, and further ruled as follows:

> 3. IT IS FURTHER ORDERED that Plaintiffs' Cross-Motion is hereby GRANTED insofar as the Court has determined that there is potential legal liability on the part of the Estates of Jean and Lucy Carduner under the Spill Act for the contamination that is the subject matter of this lawsuit such that they may assert insurance coverage claims against the North River and Continental insurance policies at issue;
>
> 4. IT IS FURTHER ORDERED that pursuant to this Court's July 20, 2018 Case Management Order, this matter shall be referred back to Judge Mathesius for further mediation with all remaining parties and a determination of any additional discovery or proceedings needed prior to trial or other resolution of the remaining issues;

After oral argument but before entry of the above Order, the Carduner Parties submitted a proposed order which, in pertinent part, would have ordered "that the defendants, Continental . . . and North River . . . defend and indemnify the Plaintiffs, subject to a reservation of rights. . ." (Da109-11). Unsurprisingly, the trial court rejected that order and instead executed the order quoted above. (Pa38-39). Any such ultimate, substantive relief would have been beyond the scope of the court's CMO which defined the specific issue to be addressed. It would have also violated the court's and parties' multiple, express reservations of the Insurers' other defenses, would have resolved all such defenses without the merits even being litigated, and would have gone beyond the scope of the motions, and the holding of *Metex*.

Highlighting the baselessness of what the Carduner Parties had sought, such an order would have compelled the "defense" of the Estates even without there being any claims against the Estates to "defend." The *Metex* case makes no mention of defense costs, nor does it stand for the proposition that the cost of investigation and remediation of property should be awarded as defense costs on summary judgment. In any event, the Court rejected the proposed order, and instead entered the order quoted above, referring the matter back to the mediator for "resolution of the remaining issues."

In sum, the motions and cross-motion, resolved by the November 27, 2018 Order were limited ahead of time to the specific issues of whether the closed Estates could sue for coverage in the absence of any losses or claims against them. The trial court allowed such claims to proceed, and in so doing granted the only relief that the Carduner Parties actually sought or were entitled to seek on those motions. Thus, they are not aggrieved by that ruling and have no right of appeal. To the extent they contend that there was any other procedural or substantive error in the Court's Order of November 27, 2018, they are clearly mistaken.[22]

[22] In Section G of their brief, Appellants seemingly raise a confused argument, claiming that because the trial court purportedly sustained their claims for coverage in 2018, the judgment reduction provision of the 2021 Agreement is rendered inapplicable to the Insurers. (Pb41-45) However, this argument fails

VI. Appeals of the 2015 Orders are Not Before This Court

The Appellants' Notice of Appeal and Amended Notice of Appeal state that they are also appealing the lower court's "3 Orders dated October 21, 2015 dismissing claims by the Estates against North River and Continental's policies issued to Jean and Lucy Carduner t/a the Carduner Liquor Store and Carduner Liquor Store Inc., dismissing claims asserted by Carduner Front, LLC against North River and Continental and denying the Carduners' coverage claims against Continental and North River." (Pa 9, Pa26). However, Appellants' Brief does not contain any argument with respect to these 2015 Orders. Further, Appellants' record does not contain any of the items submitted to the lower court on the 2015 summary judgment motions as required by Rule 2:6-1(a)(1)(I) ("If the appeal is from a disposition of a motion for summary judgment, the appendix shall also include a statement of all items submitted to the court on the summary judgment motion and all such items shall be included in the appendix. . ."). Thus, appeal of these orders has been abandoned. *See State v. D.F.W.*, 468 N.J. Super. 422, 447 (Super. Ct. App. Div. 2021) (refusing to consider issues that "defendant did not formally brief"); *Cmty. Hosp. Grp., Inc. v. Blume Goldfaden Berkowitz Donnelly Fried & Forte, P.C.*, 381 N.J. Super. 119, 127 (Super. Ct.

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on a threshold point, as the trial court did not rule in 2018 that the Estates were entitled to coverage, instead simply ruling they could further pursue relief.

App. Div. 2005) (the Court is not "obliged to attempt review of an issue when the relevant portions of the record are not included").

VII. The Carduner Parties' Other Arguments are Without Merit

In their Appellate Brief, the Carduner Parties' make assertions unsupported by citations or facts in the record. For example, there were the previously discussed assertions that the trial court ignored Miscellaneous Provision F, when it was never raised at the summary judgment stage (Pa223-64), their unsupported assertions regarding the erosion of the Ramp Carriers' limits (Pb10,19, 37, 42), and the assertion that the preservation of their claims against the Insurers was a precondition to negotiations with Ramp and the Ramp Carriers. (Pb27, n. 14). To the extent they are even relevant, these unsupported assertions should be disregarded.[23]

Additionally, Section H of the Appellants' brief seemingly purports to appeal 2015 court rulings with respect to the dismissal of policies allegedly

[23] Rule 2:6-2(a)(5) requires a "concise statement of the facts material to the issues on appeal supported by references to the appendix and transcript." *See also Spinks v. Township of Clinton*, 402 N.J. Super. 465, 474 (Super. Ct. App. Div. 2008) ("it is [the party's] responsibility to refer [the court] to specific parts of the record to support their argument"); *Ijaz v. Ahmad*, 2023 N.J. Super. Unpub. LEXIS 1073, at *9 (Super. Ct. App. Div. June 28, 2023) ("we do not consider facts which are not tied to the record").

issued to Carduner Liquor Store, Inc. Were this Court to excuse the Carduner Parties' appellate procedural deficiencies (*see* supra p. 46), and allow an appeal of the purportedly improper dismissal of policies allegedly issued to Carduner Liquor Store, Inc., that entity is not a party to this suit. Accordingly, the Appellants have not demonstrated how they would be entitled to assert any claims on behalf of that entity under the alleged policies. In fact, the only reference to this purported insured, other than in the Carduner Parties' pleadings, is contained in the notice letters sent to the Insurers (and their responses) when the contamination at the Site was discovered. (*See, e.g.*, Pa746-47).[24] There is nothing in the appellate record, or before the trial court, establishing that such policies were issued, and if so, their terms and conditions. Thus, all claims regarding the policies were properly dismissed.

The Carduner Parties also, in their Brief at §G, refer to an argument they first raised improperly in a letter filed the afternoon before oral argument. (Pa 1111-13). That is, that the Insurers supposedly waived their Cross-Claims against Ramp and the Ramp Carriers for subrogation. (Pb 47). First, assuming the Carduner Parties even have standing to bring such a claim on behalf of these

[24] This letter references "Carduner's Liquor Store" in the "Re" of the letter, but the letter itself references policy numbers corresponding to the North River Policies at issue here.

parties, and that the trial court's dismissal of the Carduner Parties' claims was erroneous–it was not—there has been no breach by the Insurers. Moreover, because the Carduner Parties have released all claims including those against the Insurers (see §II, above), the subrogation rights of the Insurers no longer arise. Further, the rule of "absolute waiver" of subrogation rights, even in states which have adopted such rule (which do not include New Jersey) would not apply here. Among other things, the rule could only apply where an insurer knew the insured was settling with the liable third party and consented to the settlement, which is not the case here. *See generally* 5 New Appleman, Insurance Law Library Edition § 49.01[3]; *See also* (Pa1069-70).

The Carduner Parties may also be suggesting that, by settling with Ramp, they cut off the Insurers' subrogation rights against Ramp. That unexplained assertion is simply not true, but even if it were, they would have thereby defeated their own coverage claims by interfering with their Insurers' subrogation rights. *See, e.g., Rogers v. Am. Fid. & Cas. Co.*, 52 N.J. Super. 254 (App. Div. 1958); *31-01 Broadway Assocs. v. Co. v.*, 2020 N.J. Super. Unpub. LEXIS 4445, at *47 (Super. Ct. Bergen Cty. Aug. 17, 2020).[25]

[25] *See* Pa624 ("The insured shall do nothing after loss to prejudice such rights."); *see also* Pa383, 424, 462, 689.

CONCLUSION

For the foregoing reasons, Defendants respectfully request that this Court affirm the Trial Court's Order granting Defendants summary judgment.

Dated: January 26, 2024

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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
A-3014-22

NORTH RIVER INSURANCE COMPANY, Plaintiffs, vs. CARDUNER FRONT, LLC, Defendant c/w CARDUNER FRONT, LLC, ROBERT CARDUNER, INDIVIDUALLY AND AS THE EXECUTOR OF THE ESTATE OF JEAN AND LUCY CARDUNER, Plaintiffs, vs. THE CONTINENTAL INSURANCE COMPANY, THE GLEN FALLS INSURANCE CO., THE NORTH RIVER INSURANCE COMPANY, THE GREAT AMERICAN INSURANCE COMPANY, THE SENTRY INSURANCE COMPANY, EAGLE STAR INSURANCE COMPANY, THE NEW JERSEY PROPERTY LIABILITY INSURANCE GUARANTEE ASSOCIATION, RAMP DRY CLEANING INC., PAUL GANGI, and JOHN DOES, 1-10. Defendants.	ON APPEAL FROM: MERCER COUNTY LAW DIVISION DOCKET NO.: L - 1947-14 c/w MERCER COUNTY LAW DIVISION DOCKET NO.: L - 2753-14 SAT BELOW: HON. DOUGLAS H. HURD, P.J. CIV. (more over)

PLAINTIFFS/APPELLANTS' REPLY BRIEF AND APPENDIX PRA1-PRA24

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I. PRELIMINARY STATEMENT

The Court's decision below was initially focused on a single paragraph of the Settlement Agreement[1] between Ramp and its carriers and the plaintiffs. It failed to take into account the impact of § VI(F) of the Settlement Agreement, the history of the parties and purpose of the Ramp/Carduner Agreement.

The defendants' joint opposition continues to ignore the central issue in this appeal. It focuses instead upon mis-characterizing the record below or mis-stating the Court's decision being challenged and the standard of review in this appeal. The summary judgment decisions below are, simply, inconsistent with the purpose and plain language of the Settlement Agreement and should be reversed for the reasons stated in the plaintiffs' moving brief and this reply.

II. LEGAL ARGUMENT

A. THE TRIAL COURT'S DECISIONS BELOW GRANTING SUMMARY JUDGMENT TO NORTH RIVER AND CONTINENTAL ARE REVIEWED *DE NOVO*

An appellate court reviews an order granting summary judgment in accordance with the same standard as the motion judge. *J.P. v. Smith*, 444 *N.J. Super.* 507, 519-520 (App. Div. 2016). The appellate panel first identifies whether there were genuine issues of material fact and then decides whether the motion judge's application of the law was

[1] The Judgment Reduction Provision of the Settlement Agreement, § III. Pa904.

correct. *J.P.*, 444 *N.J. Super.* at 520. In this regard, the appellate panel, "owes no deference to the trial court." *Sabilowicz v. Kelsey*, 200 *N.J.* 507, 512 (2009).

In this case, the court below initially granted summary judgment in a procedurally defective motion, based upon an interpretation of the Ramp/Carduner Settlement Agreement that was focused only upon Section III of the Agreement without reference to § VI(F) (which contradicted the court's decision). Upon a timely *R.* 4:49-2 motion, the court reconsidered the Settlement Agreement in light of § VI(F). Upon reconsideration, the Court still ruled in the defendants' favor.

This appeal is not from the Court's decision to reconsider or not reconsider its prior ruling but from the substantive ruling it made after reconsidering the agreement in light of § VI(F), which it had not considered previously. In either motion, the Court should not have granted summary judgment because of the clear language of § VI(F) of the settlement agreement. That decision is reviewed de novo. *Lee v. Brown*, 232 *N.J.* 114, 126-127 (2018).

The defendants incorrectly assert in their opposition brief that the trial court's decision below is reviewed under the abuse of discretion standard. It is not in this case because the Court reconsider its decision and made a substantive ruling on the issues raised in the reconsideration motion. When it did, it nevertheless ruled that summary judgment in favor of North River and Continental was appropriate.

In ruling that the Judgment Reduction Provision in § III of the Settlement Agreement released the plaintiffs' claims against North River and Continental the Court ignored the

provision in § VI(F) stating that, "nothing in this Agreement affects any rights that the Carduner Parties may have against their insurers." Pa551. That opinion is not reconcilable with the plain language of the document itself and is inconsistent with the purpose of the settlement with Ramp and its carriers.

While a court's decision to reconsider or not reconsider a prior ruling is entitled to deference by an appellate court,[2] once the Court decides to reconsider its decision, particularly a summary judgment decision, any interpretative ruling is subject to *de novo* review. *Branch*, 244 *N.J.* at 582. The defendants mis-cite the appropriate standard of review on this appeal.[3]

A *de novo* review of the Settlement Agreement focused on the plain language of the Agreement and the intent of the parties in entering into the Agreement can only conclude that the Agreement was intended to exclude the Carduners' carriers from its reach. *See* Pa81-Pa107. Thus, this Court's *de novo* review should result in the reversal of summary judgment below.

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[2] *Branch v. Cream-O-Land Dairy*, 244 *N.J.* 567, 582 (2021); *see also, Pitney Bowes Bank, Inc. v. ABC Caging Fulfillment*, 440 *N.J. Super.* 378, 382 (App. Div. 2015)(a decision to grant or deny a motion for reconsideration under *R.* 4:49-2 rests within the sound discretion of the trial court).

[3] The defendants wish this Court to adopt an "abuse of discretion" standard but this ignores the fact that the Court did reconsider its original summary judgment decision taking into account the impact of § VI(F) on the Settlement Agreement. Unfortunately, it still made the wrong decision and granted the defendants' motion for summary judgment. That substantive decision is reviewed by this Court *de novo*. *Ibid*.

B. THE JUDGMENT REDUCTION PROVISION DOES NOT APPLY TO THE CARDUNERS' BREACH OF CONTRACT CLAIMS AGAINST NORTH RIVER AND CONTINENTAL, THE DAMAGES FROM WHICH ARE NEITHER "ATTRIBUTABLE" TO RAMP AND ITS INSURANCE CARRIERS NOR "ALLOCABLE" TO THEM.

The Court below found that § III of the Settlement Agreement between the Carduners and Ramp extinguished all of the Carduners' claims against their own insurance carriers, who had failed to defend or indemnify them for the harm they had suffered due to the Ramp operations on their property. These claims included breach of contract, unjust enrichment and bad faith claims. *See* Pa963-Pa989.

There is no question that the contamination discovered on the Carduner property originated from the operations of Ramp Cleaners at a time when they were the tenants of Jean and Lucy Carduner. Those facts remain un-controverted.

The Carduners' claims against North River and Continental sounded in Contract, Breach of Contract, Bad Faith and Unjust Enrichment. Pa491-Pa499. The claims alleged that the failure of North River and Continental to defend and indemnify them has caused them damages. *Ibid*. The damages are the increased costs of the remediation caused by the delays and the reduced limits of the Ramp coverage, leaving the Carduners at risk of having to pay a portion of the remedial costs themselves. *Ibid*.

The breach of contract claims were based solely on the behavior of the defendants. That liability is not allocable to Ramp, its carriers, nor the plaintiffs. Had the Estate's carriers done what they were required to do, the Carduners would not have been exposed to Ramp's eroding policy limits that forced them to settle with Ramp and its carriers or risk

exhausting the Ramp coverage altogether. Thus, the breach of contract claims asserted in the Second Amended Complaint are not the type of claims that are attributable to anyone other than North River or Continental and are not the type of claims that allocatable to Ramp, its carriers or the plaintiffs themselves. They are thus, claims that are not extinguished by § III of the Settlement Agreement. Pa904. If the court had any doubt about the above, it should have been resolved by its review of § VI(F) of the Agreement which makes it clear that the settlement agreement is not intended to affect the claims asserted by the Carduners against their carriers, which were pending at the time of the settlement with Ramp. Pa907.

The same provision applies to claims that would cause allocation of liability to Ramp, its carriers or the plaintiffs. The Carduner claims against their own carriers don't fall into that category either. The Carduners put their carriers on notice of claims in 1990 and the carriers participated in the Carduners' defense from 1995 through 2015, when they opted to terminate a settlement agreement between Ramp, its carriers, the Carduners and their carriers in 2010 and ceased providing any coverage to the Carduners under the policies. Pa963-Pa982.

In 2018, the Court found for the plaintiffs under the declaratory counts of the complaint, leaving only the breach of contract, bad faith and unjust enrichment counts remaining to be litigated. Pa38-Pa39. In prior settlement agreements between North River, Continental and the Ramp Carriers, the Carduners' insurance carriers waived the recovery of any contribution they made toward the Carduners' defense and indemnification prior to

the unilateral termination of the settlement agreement in 2015. PRa1-Pra26. Thus, prior to 2015, the Carduner carriers had waived any subrogation rights they might have had against Ramp and its carriers.

Since 2015, the Carduners' carriers have acquired no subrogation rights because they have not defended nor indemnified the Carduners for anything. *See American Reliance Ins. Co. v. K. Hovnanian at Mahwah IV, Inc.*, 337 *N.J. Super.* 67, 72 (App. Div. 2001). The Settlement Agreement is premised upon the Carduners' belief that their carriers had no legitimate right to subrogation against Ramp, its carriers or themselves.

To counter the Carduners' arguments, their carriers argue that admissions of Ramps' sole responsibility for the contamination of their property exonerates them. As such, they argue neither North River nor Continental can be allocated any responsibility for that contamination and thus, owe the Carduners no defense nor indemnity.

What that argument ignores is the law of joint and several liability, the obligation of the Carduner carriers to defend and indemnify the Carduners under the *Metex*[4] case and the damages caused by their failure to do so. Since the passage of the New Jersey Spill Compensation and Control Act, (hereinafter the "Spill Act")[5] polluters and property owners who owned the property at the time of a release triggering liability under the Spill Act or there after, have been jointly and severally responsible for all investigative and clean up

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[4] *Metex Corp. v. Fed. Ins. Co.*, 290 *N.J. Super.* 95 (App. Div. 1995).

[5] *N.J.S.A.* 58:23.11 *et seq*.

costs. *Franklin Mutual Ins. Co. v. Metropolitan Property and Cas. Ins. Co.*, 406 *N.J. Super.* 586, 594 (App. Div. 2009). Thus, in spite of the fact that the operations of Ramp Cleaners are entirely responsible for the chlorinated solvent contamination present in the soil and groundwater on the property, by operation of the Spill Act, both Ramp and the Carduners are jointly and severally liable for the investigative and remedial costs associated with the site. Thus, in spite of the assertion that Ramp is primarily responsible for all of the chlorinated solvents in the soil and groundwater, the Carduners are not relieved of their liability by that fact. *Franklin Mutual*, 406 *N.J. Super.* at 594. Neither were North River nor Continental.

Ramp is a defunct corporation. All of the principals are deceased and their estates are insolvent. The only identifiable company asset was its insurance coverage. If Ramp's coverage could not completely cover the cost of the remediation of the Carduner site, the additional costs would fall to the Carduners or their carriers.

The Carduners have argued to this Court since the case was initially filed that their entire defense should have been taken up by their carriers, who issued millions of dollars of coverage to the Carduners between 1978, the date of a confirmed release at the site and 1987, the last year that the Carduner policies contained the "sudden and accidental" pollution exclusion. The Court confirmed that by ruling in favor of the Carduners finding coverage under those policies for the contamination discovered in the soil and groundwater beneath the Carduner property. Pa40-41.

Once claims were submitted by Jean and Lucy Carduner's estates to their carriers, North River and Continental were obligated to investigate and remediate the Carduner site, up to the limits of their coverage. They did not do that. Instead, they initially agreed to participate in Ramp's efforts to investigate the property by paying 50% of the investigative and remedial costs. PRa1-PRa4. In 2005, Continental and North River reduced their participation to 25% and ultimately ceased any efforts on the Carduners' behalf in 2015, when this suit was commenced.

Had the Carduners' carriers properly performed their obligation to defend and indemnify the Carduners, conducted the investigation and undertook any required remediation, there is little question but that the carriers would be entitled to have their expenses reimbursed by Ramp, up to the value of the company's existing assets[6] or Ramp's carriers up to the value of their policy limits. *Brodsky v. Grinnell Haulers, Inc.*, 181 *N.J.* 102, 111 (2004). Thus, if the investigative and remedial costs exceed the value of Ramp's assets or the limits of its coverage, it is the Carduners' carriers who bear the risk of loss of insolvent tortfeasors or exhausted policy limits.

By refusing to defend and indemnify the Carduners, North River and Continental shifted the risks associated with Ramp's insolvency and Ramp's carriers' dwindling policy limits from themselves to the Carduners. This was a clear breach of the insuring agreement. As the result, the total coverage that should have been available to the Carduners was

[6] Which are nonexistent.

compromised, with North River and Continental shifting the risk of loss from themselves to the Carduners.[7] That shift saved North River and Continental millions of dollars and improperly placed those losses upon the Carduners.

Thus, the argument that Ramp is 100% responsible for the contamination at the Carduner site and due to that, the Carduner carriers have no responsibilities with regard to the investigation or remdiation of the site is, simply, nonsense. The argument necessarily twists existing case law beyond recognition and ignores the impact of joint and several liability on North River and Continental's insureds.

C. NORTH RIVER AND CONTINENTAL'S WAIVER AND OTHER ARGUMENTS ARE LIKEWISE BASED ON A FALLACIOUS RECHARACTERIZATION OF THE RECORD BELOW.

In response to North River and Continental's summary judgment motions below, the Carduners submitted a counter-statement of undisputed material facts and supporting documentation reflecting their abandonment by their insurance carriers. Pa739-Pa741, ¶¶ 24- 39. The statement of undisputed material facts accurately recounted the Court's prior Order granting partial summary judgment on Count II of the Plaintiff's Amended Complaint establishing coverage[8] under the North River and Continental policies.

The plaintiffs submitted their consultants' opinions that, in part due to the delays caused by their own carrier's inaction and the calculation of the current price of the

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[7] The investigative and clean up costs are estimated at well in excess of $12,000,000.00 dollars and, with damages, approaching 18,000,000.00 dollars.

[8] Pa741, ¶ 38.

remediation of their property and reimbursement of the response costs incurred over the years. Pa740, ¶¶ 30-33. The total combined cost and damage calculation totaled $17,307,500.00 dollars,[9] demonstrating to the court that the settlement with Ramp, which was prompted by concerns over dwindling policy limits caused by its own carriers' recalcitrance, resolved only half the costs of the remediation and response costs needed to restore the Carduner property. *Ibid*. In the motions below, plaintiffs' opposition indicated that, "nothing in the settlement documents that warrants dismissal of the claims that this Court has previously held were properly asserted by the Estates of Jean and Lucy Carduner against North River." *See* Carduners' Opposition Brief at 1.[10] The opposition brief also stated that, "the settlement agreement between the Estates and the Ramp carriers does not bar the present claim being asserted by the Estates against their insurers." *Id.*, at 1.

Addressing the waiver argument discussed above,[11] the Carduner's opposition below provided the court with a complete version of the settlement agreement. *Id.*, at 8-13. The plaintiffs argued that the settlement agreement, when taken as a whole, did not foreclose the claims asserted by the Carduners against their carriers in this case. *Id.*, at 18-23. That

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[9] Pa740, ¶ 32.

[10] The assertion was directed at North River's filings only because Continental had not yet attempted to "join" the motion.

[11] The argument made by North River, that the Carduners' pleadings unequivocally admit that the Carduners bear no responsibility for the investigation and remediation of the contamination on their property, further argued that North River, could not be allocated any responsibility for that contamination and thus, owe the Carduners no defense nor indemnity.

argument not only remains the same today but is based upon the evidence that was before the Court during argument on the initial summary judgment motion. There was no waier.

At that time, the Carduners pointed out to the Court that the remaining claims asserted by the Carduners against their carriers sounded in breach of contract and were not purely coverage claims. *Id.*, at 23. The claims sounding in breach of contract between the Carduners and their carriers were not claims "attributable" to Ramp or its carriers, nor "allocable" to them and thus, not covered by the Judgment Reduction provision of the Settlement Agreement. Pa904.

To that argument, the Court simply responded that it viewed the coverage claims and the breach of contract claims to be the same. 2T27, l. 7-8.. They were not. The coverage claims were asserted in a separate count and were based upon a completely separate nucleus of operative facts. The coverage claims are focused on the language of the policies and the events related to the contamination of the Carduner property, all of which had occurred between 1978 and 1996, when the carriers agreed to defend and indemnify the plaintiffs. Pa491-493 (2nd Amended Complaint, Count III); Pa494-495(2nd Amended Complaint, Count V). The breach of contract, bad faith and unjust enrichment claims,[12] however, arise largely post-2015, when the Carduner carriers abandoned their insureds and ceased participating in their defense. Pa494; Pa496-Pa497 & Pa498 (2nd Amended Complaint, Counts IV, VI, VII & VIII). While the former are based primarily on the language of the

[12] All of which previously survived summary judgment motions filed by North River and Continental. Pa40-41.

policies and the circumstances of the underlying environmental claims, the breach of contract, bad faith and unjust enrichment claims are based solely upon the carriers' behavior in abandoning their insureds and attempting to shift the risk of Ramp's insolvency and exhaustion of coverage limits from themselves to their insureds. The Court was incorrect to equate the two.

While a coverage claim could theoretically give rise to a claim for indemnity or contribution, if coverage was provided by the carrier as called for under the policy, breach of contract claims would not. Where the carrier failed to execute its contractual duties under the agreement, the insured's remedy sounds in breach,[13] bad faith and unjust enrichment and even if it would otherwise have a claim for contribution and indemnity, the failure to provide coverage constitutes a waiver under the Absolute Waiver Rule.[14] As such, the court below should have concluded that the Carduner carriers would not be impacted by the Judgment Reduction provision of the Settlement Agreement.

If there was any doubt that the agreement was intended to function precisely in the fashion discussed above, § VI(F) puts that issue to rest. Section VI(F) provides that:

> This Agreement does not create any rights in any person or entity other than the Parties. *Nothing in this Agreement affects any rights that the Carduner Parties may have against their insurers.*

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[13] *I.e.*, the foreseeable damages arising from the breach. *Coyle v. Englanders*, 199 *N.J. Super.* 212 (App. Div. 1985)(citing the *Hadlex v. Baxendale* Rule).

[14] *See e.g.*, *Nat'l Mfg. Co. v. Citizens Mut. Co. of Am.*, unpublished decision from the District of New Jersey, a copy of which is included in the plaintiffs appendix at Pa1115-Pa1134.

Pa551(emphasis supplied). Given the foregoing, the Court's interpretation of the Judgment Reduction Provision can not stand without doing violence to the clear language of §VI(F).

It is axiomatic in New Jersey that a Court is not free to ignore terms of a contract. *Rosen v. Smith Barney Inc.*, 393 *N.J. Super.* 578, 592 (App. Div. 2007). Here, the Court's decision ignores the plain language of § VI(F).

Not only does the Court's decision ignore the plain language of the Settlement Agreement but it ignores the circumstances that were facing the Carduners when they agreed to settle with Ramp and its carriers. The Carduners had been abandoned by their carriers since 2015, and for nearly a decade, had been forced to deal with Ramp's obsruction of their efforts to address the problem. They had to shoulder a portion of that cost and navigate an adversarial relationship with the polluter of their property. All, while their carriers did nothing.

Nevertheless, the Court below found that the intent of the Settlement Agreement was to release the Carduner's own carriers and abandon their pending claims against more than $10,000,000.00 dollars in coverage that was known to exist and against which this Court had already rendered summary judgment. From that perspective, the ruling below makes no sense.

When interpreting a contract, the Court must take into consideration the surrounding circumstances and the relationship of the parties at the time of the formation to understand the intent of the parties and to give effect to the nature of the agreement as expressed on the written page. *Schenck v. HJI Associates*, 295 *N.J. Super.* 445, 450-451 (App. Div. 1996).

This is true even where a written contract is free from ambiguity on its face. *Great Atlantic & Pacific Tea Co., Inc. v. Checchio*, 335 *N.J. Super.* 495, 501 (App. Div. 2000). The situation of the parties and the objects they sought to attain are all necessary for the court to consider in interpreting the language of the agreement. With all due respect, that did not happen below.

Given that the impetus for the Carduner settlement with Ramp and its carriers was the abandonment by North River and Continental of their own coverage obligations, coverage obligations that were confirmed by the Court's partial summary judgment on coverage in 2018, the Court would have to accept that the Carduners nevertheless intended to release its carriers in spite of the fact that over nearly $10,000,000.00 dollars in uncompensated damages remained and the settlement funds from Ramp and its carriers fell at least four million dollars short of remediating their property. That makes no sense either. The more likely circumstance is this: having been abandoned by their own carriers and facing dwindling coverage limits and an insolvent polluter, the Carduners were forced to settle with Ramp and its carriers while preserving its claims against its own carriers.

The construction of a written instrument to be adopted by a Court is the one which appears to be in accord with common sense and the probable intent of the parties. *Krosnowski v. Krosnowski*, 22 *N.J.* 376, 386-387 (1956). The Court below ignored both of those rules of construction, selecting an interpretation of the Carduner/Ramp Settlement Agreement that failed to comport with common sense or the probable intent of the parties in entering the agreement. So too is the Court's adoption of North River and Continental's

argument that they were intended third-party beneficiaries of the Settlement Agreement when the plain language of agreement evidences a clear intent to exclude them from the impact of the settlement. *See* Pa907 at VI(F)("nothing in this Agreement affects any rights that the Carduner Parties may have against their insurers").

At the very least, the Court should have considered that the presence of § VI(F) rendered the Settlement Agreement ambiguous, requiring the court to look further into the facts and circumstances surrounding the formation of the document. *Great Atlantic & Pacific Tea Co., Inc.*, 335 *N.J. Super.* at 501.

V. CONCLUSION

For the reasons stated in the plaintiffs' moving brief and above, the summary judgment granted to the defendants is unsustainable and is inconsistent with the plain language of § VI(F) of the Agreement. The interpretation of § III of the Agreement is, thus, flawed considering the aims and negotiations underlying the settlement.

In spite of the defendants' abandonment of the plaintiffs, the Court below concluded that the plaintiffs' intended the settlement to benefit North River and Continental and intended to make the defendants third party beneficiaries of the Settlement Agreement. All of this, in spite of the clause stating that, "nothing in this Agreement affects any rights that the Carduner Parties may have against their insurers." The Court's decision below is incorrect and should be reversed.

Respectfully submitted,

GIANSANTE & ASSOC., LLC

By: /s/ Louis Giansante
Louis Giansante

Dated: February 26, 2024