KENNEDYS CMK LLP
David M. Kupfer, Esq. – Attorney ID No.: 031561981
120 Mountain View Boulevard, P.O. Box 650
Basking Ridge, New Jersey 07920 – T: (908) 848-6300
David.Kupfer@Kennedyslaw.com
Attorneys for Third-Party Defendant/Appellant,
Prime Property & Casualty Insurance, Inc.

AURORA TERMINALS CORPORATION Plaintiff/Respondent, v. G2G TRANSPORT, LLC and BEACON LOGISTICS, LLC Defendants, and G2G TRANSPORT, LLC Defendant, Third-Party Plaintiff, v. PRIME PROPERTY & CASUALTY INSURANCE, INC., Third-Party Defendant/Appellant.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO. A-003283-23 On appeal from: TRIAL COURT DOCKET NO. ESX-L-7723-21 Hon. Jeffrey B. Beacham, JSC Civil Action Attorney of Record: David M. Kupfer, Esq. (031561981) On the Brief: James T. Byrnes, Esq. (016742008) Daniel Algieri, Esq. (176312015) Dylan Greenspan, Esq. (467292024) Submitted: August 29, 2024

BRIEF OF APPELLANT PRIME PROPERTY & CASUALTY INSURANCE, INC.

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PRELIMINARY STATEMENT

This lawsuit arises from a discharge of waste oil on June 1, 2021, onto property at 2-34 Lister Avenue, Newark, N.J., which property had been leased to Plaintiff-Respondent Aurora Terminals Corporation ("Aurora"). Aurora had allowed defendant G2G Transport, LLC ("G2G"), to park trailer-mounted "intermodals" (metal containers) containing waste oil on the property until the intermodals/trailers were driven by G2G to area ports for shipment overseas.

On June 1, 2021, an intermodal containing waste oil was punctured as a G2G driver was pulling the intermodal/trailer out of a "parking space." Clean-up began immediately. On October 21, 2021, Aurora filed suit against G2G under the Spill Act for compensatory damages (cleanup/remediation costs), fines, treble damages, attorneys fees and other damages. On May 17, 2022, G2G sued appellant Prime Property & Casualty Insurance, Inc. ("Prime"), its motor vehicle liability insurer, as a third party defendant for coverage for Aurora's claims. Prime answered and sued for judgment against all parties and new third parties declaring rights under its policy.

On April 6, 2023, Aurora's motion for summary judgment against G2G on all claims was granted by default; G2G was unrepresented, its counsel having been granted leave to withdraw and the order allowing counsel to withdraw having failed to set a date by which G2G would have to retain new counsel or

have its pleadings stricken. On February 23, 2024, Aurora's motion for summary judgment ordering Prime to pay up to $750,000 of the judgment against G2G was granted.

Prime now appeals from an order dated May 24, 2024 that denied reconsideration of the trial court's February 23, 2024 order against Prime; but this appeal, of necessity, seeks review of the April 6, 2023 "final judgment" for Aurora against G2G for cleanup/remediation costs, treble damages, fines and attorney's fees under the Spill Act; and a February 23, 2024 "final judgment" in favor of Aurora against Prime for $750,000 pursuant to an MCS-90 endorsement to the Prime Policy.

The trial court entered "final judgment" against G2G and Prime despite issues of material fact about which there had been no meaningful discovery, due to the incorrect discovery track designation of this environmental contamination case as "Track I," which designation the trial court refused to change despite motions by G2G and Prime (by the time Prime was impleaded, the discovery period had already ended). Prime's motions for reconsideration informed the trial court of: (1) issues of material fact that precluded summary judgment; (2) Aurora's own liability under the Spill Act as a "responsible party," by having allowed G2G to park/store trailer-mounted intermodals containing waste oil on property without a mandatory spill containment system; (3) pre-existing

contamination at the property, which made Aurora's cleanup and remediation more expensive; and (4) issues regarding the chemical composition of the spilled oil.

The February 23, 2024 "final judgment" against Prime was premature and incorrect: Aurora had never made a claim against Prime, such that there was no cause of action as to which a judgment against Prime could have been entered. A MCS-90 endorsement may obligate a carrier to pay a judgment due to an insured's "negligence," but the trial court never ruled that G2G had been negligent; it held G2G strictly liable under the Spill Act. Further, an MCS-90 endorsement is not triggered until the policy is first found not to afford coverage. Both G2G and Prime pled claims for declaratory judgment deciding coverage issues; but the trial court never decided those claims, leap-frogging to order Prime to pay under the MCS-90 endorsement, which is a back-stop, not a primary source of recovery.

Finally, the trial court erred in entering the April 6, 2023 order (against G2G) and February 23, 2024 order (against Prime) as "final judgments": neither order disposed of all claims as to all parties, and Aurora never moved to have either order certified as a "final judgment" (R. 4:42-2(a)), nor did the trial court ever consider whether "there [was any] just reason for delay."

CONCISE PROCEDURAL HISTORY

This appeal derives from a complex and unusual procedural history that is germane to the issues on appeal. As noted, the underlying action involves alleged clean-up and remediation costs as a result of a waste oil discharge in Newark, NJ.

A. The First "Final Judgment" Against G2G and Vacating of Same

1. On October 15, 2021, Plaintiff Aurora Terminals Corporation ("Aurora") filed a Verified Complaint and proposed "Order to Show Cause Summary Action" against Defendant G2G Transport, LLC ("G2G"). (PPCIa001-042).

2. Despite the fact that Aurora's complaint sought damages under the New Jersey Spill Act and had alleged environmental contamination caused by the accidental discharge of waste fuel oil, the case was incorrectly assigned to discovery Track I. (PPCIa043).

3. On October 27, 2021, the trial court granted Aurora's application for and signed an Order to Show Cause, which order was to be returnable on November 30, 2021. (PPCIa044-052).

4. On November 22, 2021, Aurora filed an Amended Verified Complaint that added Beacon Logistics, LLC, as a defendant and alleged that Beacon was liable as the "alter ego" of G2G. (PPCIa53-75).

5. G2G did not file papers in reply to the Order to Show Cause and, on November 30, 2021, the trial court entered a "Final Judgment Order [sic] by Default" in favor of Aurora and against G2G. (PPCIa076-079).

6. On May 9, 2022, despite a "final judgment" having been entered and without leave of court, Aurora attempted to file a Second Amended Complaint that added, Devarshi Upadhyaya and Rushikesh Upadhyaya, the principals of G2G, as party defendants. (PPCIa080-083).

7. By notification dated May 11, 2022, the court informed counsel for Aurora that "since this case is disposed by an order entering judgment, a motion needs to be filed to reopen and amend the complaint." (PPCIa084).

8. On May 17, 2022, counsel for G2G appeared and filed a motion to vacate the November 30, 2021 "Final Judgment Order by Default (PPCIa085-121), which motion was granted on July 15, 2022 by order "restor[ing the case] to the trial list." (PPCIa122).

B. <u>Prime is Impleaded as a Third-Party Defendant</u>

9. On July 20, 2022, G2G filed its answer, affirmative defenses and crossclaims, and a third-party complaint against Prime for judgment declaring that Aurora's claims would be covered under a policy of motor vehicle liability insurance. (PPCIa123-128).

10. On November 4, 2022, Prime filed its answer and affirmative defenses (PPCIa129-226), which defenses incorporated defenses asserted by G2G in its answer to Aurora's Complaint. (PPCIa132).

11. Prime's answer included a counterclaim and third-party complaint against G2G, Aurora, Beacon, and Devarshi Upadhyaya, the principal of G2G, for judgment declaring that the Prime policy would not afford coverage, declaring the rights of the parties under the policy, rescinding the policy due to G2G's material misrepresentations in its application for coverage, for contractual indemnification by Upadhyaya, and for damages. (PPCIa132-149)

12. G2G and Upadhyaya filed their answer to Prime's counterclaim on November 8, 2022. (PPCIa227-235).

13. Beacon was served with process on January 18, 2022 (PPCIa241), but did not answer. On December 7, 2023, Prime asked the court to enter default. (PPCIa236-250).

14. Aurora has never filed an answer or other pleading responsive to Prime's counterclaim, nor has it ever filed any pleading in which it seeks judgment against Prime (e.g., for a declaration of coverage under the Prime policy, for an order compelling Prime to pay any judgment that Aurora might obtain against G2G pursuant to the MCS-90 endorsement to the Prime policy, for judgment against Prime for damages, or otherwise).

C. Aurora's Motion for Summary Judgment against G2G, Motion by G2G to Change Track Assignment, and Motion by G2G's Counsel to Withdraw

15. On January 6, 2023, Aurora moved for partial summary judgment against G2G. (PPCIa251-349).

16. On January 13, 2023, G2G filed a motion to reopen discovery and to change the case track assignment from Track I to Track IV (environmental contamination litigation), and to extend discovery. (PPCIa350-356).

17. Counsel for G2G noted in such motion that, at the point in time at which the Final Judgment Order by Default had been vacated, the Track I discovery end date (June 26, 2022) had already expired (PPCIa355), and that in any event, the case should be "classified as Track IV since it is an environmental action." (PPCIa354).

18. However, on January 20, 2023, while Aurora's motion for summary judgment and the motion to change track assignments both were pending, counsel for G2G moved to be relieved, based primarily on the non-cooperation of G2G and its principals (PPCIa357-361).

19. In his motion to be relieved, counsel for G2G requested that, "[i]n the interest of fairness, it is respectfully requested that the return date of [Aurora's] Motion for Partial Summary Judgment be adjourned until [G2G and

its principals] have an adequate opportunity to retain succeeding counsel and respond." (PPCIa361).

20. On January 25, 2023, Aurora filed a letter brief opposition to G2G's motion to change track assignments as well as G2G's counsel's motion to be relieved, and accused both motions as being "delay tactics."

21. Unbeknownst to counsel for Prime (who was not consulted), counsel for Aurora and G2G conferred regarding the "track change motion" and the motion to be relieved as G2G's counsel. On January 30, 2023, counsel for Aurora filed a proposed order in which Aurora consented to the withdrawal of counsel for G2G, and G2G withdrew its motion to change the case track assignment. (PPCIa362-63).

22. On February 6, 2023 (7 days after the proposed consent order had been filed), the trial court signed the Consent Order permitting G2G's counsel's withdrawal. (PPCIa364-65). The Consent Order marked G2G's motion to change track assignment as "withdrawn." Id. The Consent Order did not set a date by which "new counsel" for G2G would have to appear or that, if it did not retain new counsel, it would be held in default. Id. Thus, G2G's answer and affirmative defenses were never stricken or suppressed, and remained as defenses to Aurora's claims when Aurora moved for summary judgment.

23. On March 13, 2023, counsel for Prime asked Aurora's counsel about the status of Aurora's motion against G2G for summary judgment and advised via voicemail that Prime intended to file opposition to such motion. (PPCIa378-79).

24. On the following day, March 14, 2023, counsel for Aurora, though having been made aware that Prime opposed Aurora's motion against G2G for summary judgment, contacted the court regarding the status of its motion.

25. During a subsequent telephone conference that same day, counsel for Aurora alerted counsel for Prime of his communication with the trial court. (PPCIa378-79).

26. That same afternoon, by letter dated March 14, 2023 to the trial court, counsel for Prime inquired whether the court had set a new return date for Aurora's summary judgment motion and informed the Court that Prime intended to file opposition to such motion. (PPCIa366-67).

27. The Court did not reply.

D. "Final Judgment" for Aurora and Against G2G and Prime's Motions to Reconsider, Change Track Assignment and Re-Open Discovery

28. By letter dated April 5, 2023, notwithstanding Prime's announced intention to oppose Aurora's motion for summary judgment against G2G, counsel for Aurora misinformed the Court that its motion for summary judgment "went unopposed." (PPCIa368).

29. The next day (April 6, 2023), before Prime had an opportunity to correct Aurora's counsel's misstatement that Aurora's motion for summary judgment against G2G had been "unopposed," the Court entered an order granting Aurora summary judgment against G2G and entered "final judgment" against G2G in the amount of $1,426,871.61 (PPCIa369-371). Although Aurora claimed to have incurred $475,623.87 in environmental response/cleanup costs, the Court trebled those damages under the Spill Act, resulting in the entry of a $1,426,871.61 "Final Judgment" against G2G. Id.

30. The Court was not asked to, nor did it certify that pursuant to R. 4:42-2, there was "no just reason for delay," such that a "final judgment" should be entered upon fewer than all claims as to all parties.

31. On April 26, 2023, Prime moved for reconsideration of the April 6, 2023 order granting "Final Judgment" against G2G, both because Prime had not been afforded the opportunity to oppose Aurora's motion and on the merits. (PPCIa372-87).

32. On June 22, 2023, and before the Court had decided Prime's motion for reconsideration, Aurora moved for partial summary judgment against Prime. Aurora sought judgment that Prime, pursuant to an MCS-90 endorsement in the Prime policy, was liable to pay $750,000 of the "final judgment" it had obtained against G2G. (PPCIa388-418).

33. On July 31, 2023, the Court declined to vacate its April 6, 2023 Order granting "Final Judgment" against G2G (PPCIa419-420).[1]

34. On August 21, 2023, Prime again moved for reconsideration of the denial of its motion for reconsideration of the April 6, 2023 Order granting "final judgment" against G2G because the trial court relied upon facts not established by the record in its July 31, 2023 decision hearing, and to re-open discovery and change the track assignment from Track I to Track IV. Prime's motion also identified a number of material facts that remained in dispute and that should have precluded summary judgment at the time the Court granted same. (PPCIa421-32).

35. On September 12, 2023, Prime filed opposition to Aurora's motion for partial summary judgment against it. (PPCIa433-46).

D. Summary Judgment Entered Against Prime & Reconsideration Thereof

36. On February 23, 2024, the Court denied Prime's motion for reconsideration (PPCIa449-50) and granted Aurora's motion for partial summary judgment against Prime; entering "final judgment" in the amount of

[1] The transcript of the hearing of July 31, 2023 has been filed and is referred to as "1T". The transcripts of the hearings of February 23, 2024 and May 24, 2024 have also been filed and are referred to as "2T" and "3T," respectively.

$750,000 against Prime. (PPCIa447-48). The "Final Judgment" against Prime was entered on February 28, 2024. Id.

37. On March 12, 2024, Prime filed a motion for reconsideration of the February 28, 2024 "final judgment" that had been entered against it. (PPCIa451-58).

38. On May 24, 2024, the trial court denied Prime's reconsideration motion, leaving the "final judgment" intact. (PPCIa459-60). Again, the Court was not asked to nor did it certify that pursuant to R. 4:42-2, there was "no just reason for delay," such that a "final judgment" should be entered upon fewer than all claims as to all parties. (PPCIa459-60).

39. On June 25, 2024, Prime filed a Notice of Appeal to the New Jersey Superior Court, Appellate Division. (PPCIa474-79). Prime also obtained a stay of execution from the trial court of the judgment against Prime pending appeal, secured through a supersedeas bond. (PPCIa461-73).

CONCISE STATEMENT OF FACTS

A. The Prime Policy

On September 29, 2020, Prime issued a policy of commercial automobile liability insurance that names "G2G Transport, LLC" as Insured (PPCIa152-53). The Prime Policy includes Endorsement Form MCS-90, pursuant to Sections 29 and 30 of the Motor Carrier Act of 1980. (PPCIa182-84).

Pursuant to this endorsement, and under certain conditions, Prime, as a surety, may be obligated to pay a "final judgment" against G2G resulting from negligence in the operation, maintenance or use of a motor vehicle if the policy does not afford coverage. Id. By its statutorily mandated terms, the MCS-90 endorsement does not obligate Prime to pay any part of a judgment that the Policy would not have covered. Id.

B. The Underlying Oil Spill

On June 1, 2021, Prime was informed that earlier that day, a tractor operated by G2G had been pulling a trailer-mounted "intermodal" (a metal container) that it had "parked" at a lot located at 10 Lister Avenue, Newark, NJ. (PPCIa435). As the tractor was pulling the trailer from its "parking space," the intermodal was pierced by an adjacent trailer, spilling its contents (waste oil) onto the ground. Id.

To Prime's information, the subject lot is leased by the property owner, 99 Chapel Street, LLC, to Aurora, which in turn, let G2G "park" trailers there.[2] (PPCIa436). The intermodal comprised a metal exterior shell and a flexible interior bladder that contained a petroleum liquid – the exact substance of which remains in dispute. (PPCIa436; PPCIa438). The trailer had been parked at the

[2] While Prime has been provided the lease agreement as between 99 Chapel Street, LLC and Aurora, Prime understands that there was no written agreement as between Aurora and G2G.

premises pending transportation of the container to Maher Terminals, a shipping terminal located just over six miles away. (PPCIa435).

C. Initial Emergency Response to the Oil Spill Incident

Prime was informed that certain government agencies responded and took action to contain the discharge. (PPCIa055-56). On June 1, 2021, the New Jersey Department of Environmental Protection – Bureau of Emergency Response issued a Field Directive to G2G which generally required G2G to recover and remediate the discharged waste oil on the subject property. (PPCIa446). Although the Field Directive was issued to G2G, it did not conclude that G2G was solely responsible or liable for the discharge; rather it simply noted that "the Department may direct any person/entity in any way responsible for the discharge to clean up and remove or arrange for the removal of such discharge." Id.

Upon completion of the emergency response cleanup on or before June 7, 2021, the NJDEP advised that it would release control of the remaining remediation to the retained Licensed Site Remediation Professional. (PPCIa058-59). Aurora then assumed charge of all remediation efforts. Id.

D. Aurora's Suit Against G2G

In October 2021, Aurora filed suit against G2G pursuant to the New Jersey Environmental Rights Act and the New Jersey Spill Act for damages

resulting from the spill and remediation, and for statutory fines and treble damages. (PPCIa1-42). Aurora alleged to have incurred over $400,000 in remediation costs. Id. At the time of its motion against G2G for partial summary judgment, Aurora claimed damages of $475,623.87. (PPCIa259).

LEGAL ARGUMENT

POINT I

THE TRIAL COURT ERRED IN ENTERING SUMMARY JUDGMENT ON APRIL 6, 2023 AGAINST G2G IN FAVOR OF AURORA, AS WELL IN REFUSING TO REVERSE THAT ORDER

(PPCIa369-71; PPCIa419-20; 1T; and PPCIa449-50)

A. Standard of Review

A trial court's ruling as to summary judgment is reviewed *de novo* on appeal. Town of Kearny v. Brandt, 214 N.J. 76, 91 (2013). A trial court may enter summary judgment only if "the pleadings, depositions, answers to interrogatories and admissions on file, together with any affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to judgment as a matter of law." R. 4:46-2(c).

"The Court determines 'whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged dispute in favor of the non-moving party.'" Manahawkin Convalescent v. O'Neill, 217 N.J. 99,

115 (2014). "[G]enuine issues of material fact preclude the granting of summary judgment." Brill v. Guardian Life Ins. Co. of America, 142 N.J. 520, 530 (1995).

"As does the motion judge, [this Court must] first decide if there is a genuine issue of material fact, and if none, whether the moving party is entitled to judgment as a matter of law." Simonetti v. Selective Ins. Co., 372 N.J. Super. 421, 427 (App. Div. 2004).

B. The Procedural Context of the Case at the Time the Trial Court Granted Summary Judgment against G2G Regarding Liability for the Spill and Resulting Remediation Costs.

As a threshold matter, this Court should consider the procedural context of the case against G2G as of the date on which the trial court entered summary judgment in favor of Aurora. By the time that Prime became a party to the litigation, Aurora had obtained an Order for Final Judgment against G2G (based on an unopposed summary action Order to Show Cause (PPCIa076-79) – vacated in July 2022 (PPCIa122)) and the discovery end date had already passed (PPCIa355). The initial discovery end date was a consequence of the fact that, when suit was filed, the case was mis-designated as a Track I case – despite the fact that the matter clearly arose out of environmental contamination and should have been assigned to Track IV. (PPCIa043).

Counsel for G2G recognized this error and, on January 13, 2023, filed a motion to change the track assignment and extend discovery. (PPCIa350-56).

However, apparently in consideration of Aurora's agreement to permit his withdrawal as counsel for G2G, and without notice to, much less consent of, counsel for Prime, G2G's counsel agreed to withdraw his motion to change the track assignment. (PPCIa362-65).

By that time, Aurora's motion for summary judgment against G2G had already been filed (PPCIa251-52) and, based on the erroneous discovery track designation, neither G2G nor Prime had any opportunity to engage in meaningful discovery.

Thus, at the time the trial court granted Aurora's motion for summary judgment against G2G, the record in the case (particularly regarding the genuine issues of material fact, identified to the trial court by Prime in its later attempts for reconsideration of the trial court's order against G2G), was effectively and unfairly barren.

C. Genuine Issues of Material Fact Precluded Summary Judgment Against G2G.

On April 6, 2023, the trial court entered summary judgment, essentially by default, in favor of Aurora against G2G, and marked the motion as "unopposed." (PPCIa369-71). The trial court did so in spite of: (1) Prime's advice to both Aurora and the trial court that it intended to oppose Aurora's motion (PPCIa366; PPCIa378-79); (2) G2G's request that the trial court adjourn Aurora's motion until such time that G2G had retained new counsel (PPCIa361);

and (3) that G2G was not represented by counsel at the time Aurora's motion was granted against G2G (PPCIa364-65).

The trial court also provided no factual or legal basis for its decision (it accepted the facts stated in Aurora's pleadings at face value). (PPCIa369-71). The "final judgment" entered against G2G (a proposed form of order filed with Aurora's motion) summarily found that "G2G is liable under the Spill Act for the Incident" and that G2G was required to: (1) reimburse Aurora the sum of $475,623.87; (2) pay a penalty to the "Superior Court of New Jersey" of $75,000; (3) pay Aurora's counsel "its reasonable attorneys and expert fees and costs";[3] and (4) pay Aurora treble the damages of $475,623.87 "(less the initial contribution payment)". Id.

Prime sought reconsideration of the "final judgment" against G2G on several occasions (PPCIa372-87; PPCIa421-32), identifying issues of fact and law that compelled the denial of Aurora's motion for summary judgment that G2G was 100% liable for remediation costs arising out the underlying spill incident:

(1) There was and is a disputed issue regarding Aurora's liability for the spill in its capacity as a "Responsible Party," and in turn allocation of some

[3] Aurora was required to make an application to the trial court for its fees and costs within 15 days of the Order, but ultimately never did so.

or all liability among Aurora and G2G for remediation costs. (PPCIa435-37). Aurora is a "potentially responsible party" under the Spill Act. N.J.A.C. 7:1J-1.4. It was undisputed below that Aurora had leased the subject property to truck, trailer, and container companies, like G2G, to stage/store shipping containers containing waste oil. (PPCIa391; PPCIa436). G2G and Prime asserted certain claims and pled facts to prove Aurora's errors, omissions and liability for the spill, including (a) allowing companies such as G2G to park and stage trailers containing waste/bunker oil on the property; and (b) having failed to install a waste containment system to remediate spills, as it was required to do under certain environmental statutes and regulations. *See* 40 CFR §279.45 ("Used oil transfer facilities are transportation related facilities including loading docks, parking areas, storage areas, and other areas where shipments of used oil are held for more than 24 hours during the normal course of transportation and not longer than 35 days."); 40 CFR §264.175(a) ("Container storage areas must have a containment system that is designed and operated in accordance with paragraph (b) of this section, except as otherwise provided by paragraph (c) of this section."); 40 CFR §264.175(b)(1) ("A containment system must be designed and operated as follows: . . . (1) [a] base must underlie the containers which is free of cracks or gaps and is sufficiently impervious to contain leaks,

spills, and accumulated precipitation until the collected material is detected and removed"). (*See generally,* PPCIa137-38; PPCIa436-38).

Notwithstanding Aurora's liability under the Spill Act as a "responsible party," the trial court entered "final judgment" against G2G for 100% of all of Aurora's alleged cleanup costs, without any allocation (or even giving consideration to an allocation) between Aurora and G2G – as required by the Spill Act. Magic Petroleum Corp. v. Exxon Mobil Corp., 218 N.J. 390, 403 (2014) ("dischargers ordered by the DEP to pay for the entirety of cleanup costs were entitled to *seek contribution from other responsible parties*, based in part, on the 'normal course of tort law'") (emphasis added); N.J.A.C. 58:10-23.11f.a.(2).

"[T]he general right of contribution invokes several liability by intending that the defendant-in-contribution shall pay no more than the party's percentage of liability." Magic Petroleum, 218 N.J. at 403. The failure to address such an allocation prior to entering summary judgment was both a factual and legal error by the Court.

(2) There was also a factual issue as to whether one or more historical spill events at the site may have been at issue – which would not have been the responsibility of G2G (or Prime as G2G's insurer). (PPCIa439-40). Specifically, Aurora's own environmental consultant, Eikon Planning and Design, LLC

("Eikon") identified a previous spill event. (PPCIa427-29). Eikon also noted that an unrelated gasoline discharge was located horizontally below the petroleum impact resulting from the Incident – again further indicating at least one prior unremediated spill event. (PPCIa429; PPCIa439).

To this day, it remains unclear whether and to what extent Aurora's alleged environmental costs include remediation work for prior incidents at the site – which, as matter of common sense and fairness, would not be the responsibility of G2G or Prime. This material issue of fact remained open at the time of the trial court's Order for "Final Judgment" against G2G.

(3) Finally, there continues to be a dispute as to whether the content of the intermodal was "bunker oil" (a hazardous substance) or "waste oil" (non-hazardous). (PPCIa442). Aurora alleged that the G2G trailer contained "bunker oil," a hazardous substance, but G2G has disputed that allegation and instead contends that the intermodal contained "waste oil." (*Compare*, PPCIa054 and PPCIa137-38). Indeed, Eikon questioned the make-up of the petroleum constituent that the G2G trailer was carrying. (*See generally*, PPCIa426-32). This issue is significant as to potential coverage under the Prime Policy.

D. The Court Erred in Failing to Later Reconsider its "Final Judgment" Against G2G.

Notwithstanding Prime's explanation regarding how these issues of both fact and law precluded entry of summary judgment on Aurora's claims against

G2G, the trial court, on Prime's motion for reconsideration, refused to vacate its prior order entering "final judgment" against G2G. (*See* 1T). The trial court explained its reasoning for finding G2G 100% liable: "DEP and [Field Directive] did not identify Plaintiff [Aurora] as a responsible party but named G2G as the responsible party," such that "[i]t is clear in this case that G2G is the responsible party . . . and is the cause of the spill and any further discovery would not change the fact that G2G is the responsible party and is responsible." (1T13 - 11 to 17).

The trial court reasoning is flawed: (1) it assumes that a Field Directive by the NJDEP on the day of the incident, identifying G2G as a "responsible party," established G2G's liability as a matter of law **to the exclusion of all others**; and (2) it assumes that G2G, and only G2G, is a "responsible party" liable for the spill.

With respect to the Field Directive, N.J.S.A. 58:10-23.11f(a)(1) provides that the NJDEP "may, in its discretion, . . . direct the discharger to clean up and remove or arrange for the cleanup and removal of, the discharge." N.J.S.A. 58:10-23.11f.a.(2)(a) then provides that "[w]henever one or more dischargers or persons clean up and removes a discharge of a hazardous substance, those dischargers and persons shall have a right of contribution against *all other dischargers and persons in any way responsible* for a discharged hazardous substance or other persons who are liable for the cost of the cleanup and removal

of a hazardous substance. . . . In resolving contribution claims, a court may allocate the costs of cleanup and removal among the liable parties using such equitable factors as the court determines are appropriate."

Thus, the NJDEP's issuance of a Field Directive to an identified "discharger" does not mean that that "discharger" is solely responsible for all cleanup/remediation costs, to the exclusion of all other persons who or entities that may also be liable. Otherwise, the right of contribution section under N.J.S.A. 58:10-23.11f.a.(2)(a) would be meaningless.

As noted above, Aurora falls within the definitions of a "potentially responsible party" under the Spill Act as the lessee/occupier of the property at which the discharge occurred. N.J.A.C. §7:1J-1.4. Aurora also failed to have, install or employ an oil discharge and containment system, as it was required by certain regulations. 40 CFR §279.45; 40 CFR §264.175(a); 40 CFR §264.175(b)(1). Such failure caused or contributed to the scope of the discharge (permitting it to flow well beyond the immediate area of impact) and extent of the clean-up and remediation efforts. N.J.A.C. §7:1J-1.4.

E. The Trial Court Erred in Entering Summary Judgment against G2G at a Time When It Was Without Counsel.

On February 6, 2023, the trial court signed a "Consent Order" (to which Prime had not consented and had not been asked to consent) permitting counsel for G2G to withdraw. (PPCIa364-65). The Consent Order did not set a date by

which new counsel for G2G would have to appear or that, if it did not retain new counsel, it would be in default. Id. G2G's answer and affirmative defenses were not suppressed and remained defenses to Aurora's claims when Aurora moved for summary judgment. The April 6, 2023 "Final Judgment" against G2G misstates that the matter was before the court "with Glen J. Vida, Esq., appearing for G2G; and the Court having considered… the evidence presented by the Defendant, the arguments of counsel, and the papers submitted…". (PPCIa369-71). Mr. Vida had been granted leave to withdraw as counsel for G2G two months earlier, such that G2G was (and remains) unrepresented. (PPCIa364-65). G2G did not file opposition to Aurora's motion, nor did counsel make arguments on G2G's behalf.

Business entities cannot represent themselves: they must appear in litigation through "an attorney authorized to practice in this State." R. 1:21-1(c). "A judgment entered in favor of a business entity when the entity was not represented by an attorney authorized to practice law in this State as required by *Rule* 1:21–1(c) is voidable at the election of the adverse party without a showing of a material irregularity in the trial proceeding or that the judgment was otherwise erroneously entered." Gobe Media Group, LLC v. Cisnero, 403 N.J. Super. 574, 577 (App. Div. 2008),

The February 6, 2023 "Consent Order" allowing counsel for G2G to withdraw did not set a date by which G2G would have to retain new counsel or have its pleadings stricken; G2G's answer and defenses to Aurora's complaint were viable when Aurora moved for summary judgment. (PPCIa364-65). The court then erred by entering the April 6, 2023 "final judgment" against G2G as "unopposed," despite 1) the request of former counsel for G2G in his motion to withdraw to, "[i]n the interest of fairness, it is respectfully requested that the return date of [Aurora's] Motion for Partial Summary Judgment be adjourned until [G2G and its principals] have an adequate opportunity to retain succeeding counsel and respond" (PPCIa361); and 2) not having set a new return date, on notice to G2G and Prime, for Aurora's summary judgment motion: rather, it accepted the misrepresentation of Aurora that its motion for summary judgment "went unopposed" (PPCIa368) and, the next day (April 6, 2023), before Prime had an opportunity to correct Aurora's counsel's misstatement, entered an order granting Aurora summary judgment against G2G and entered "final judgment" against G2G in the amount of $1,426,871.61 (PPCIa369-71).

POINT II

THE TRIAL JUDGE ERRED IN ENTERING SUMMARY JUDGMENT AGAINST PRIME UNDER THE MCS-90 ENDORSEMENT IN THE PRIME POLICY IN ITS ORDER OF FEBRUARY 23, 2024 AS WELL AS IN REFUSING TO LATER VACATE SUCH ORDER

(PPCIa447-48; 2T; PPCIa459-60; and 3T)

A. The MCS-90 Endorsement Only Applies to Liability for "Negligence".

The MCS-90 endorsement would compel an insurer to pay "any final judgment recovered against the insured for public liability resulting from **negligence in the operation, maintenance or use of motor vehicles**" (emphasis added) (PPCIa183). G2G has not been adjudged negligent (PPCIa369-71), nor did Aurora assert a negligence cause of action against G2G (PPCIa053-75). The April 6, 2023 "Final Judgment" against G2G states only that "THE COURT FINDS that G2G is liable under the Spill Act for the Incident" (emphasis in original) (PPCIa370).

Negligence is not an element of liability under the Spill Act. "Not only does the Spill Act not incorporate a common-law negligence standard of care, but it provides for strict liability without regard to fault." McCay Dev. Co. v. Jenny Oil Corp., A-6335-94-T1 (App. Div. Aug. 8, 1996) (slip op. at 6) (*See* PPCIa495-501 for a copy of the McCay opinion); *see also*, Russell-Stanley Corp. v. Plant Indus., Inc., 250 N.J. Super. 478, 497-498 (Ch. Div. 1991) (Spill Act strict liability claims and common-law causes of action are to be pled separately). Liability under the Spill Act arises against "any person who has discharged a hazardous substance, or is in any way responsible for any hazardous substance" and that person "shall be strictly liable, jointly and severally, **without regard to**

fault, for all cleanup and removal costs no matter by whom incurred." N.J.S.A. 58:10-23.11g; emphasis added. "The Spill Act is supposed to be construed liberally to effectuate its purposes. The Supreme Court of New Jersey has determined that a party 'even remotely responsible for causing contamination will be deemed a responsible party under the Act'." N.J. Tpk. Auth. v. PPG Indus., 197 F.3d 96, 106 (3d Cir. 1999) quoting In re Kimber Petroleum Corp., 110 N.J. 69, 85 (1988).

The April 6, 2023 "Final Judgment" against G2G is not a "final judgment recovered against the insured for public liability resulting from negligence in the operation, maintenance or use of motor vehicles" that Prime, as G2G's insurer, might be obligated to pay if the Prime policy did not afford coverage. (*Compare* PPCIa183 to PPCIa369-71). Since liability under the Spill Act does not "incorporate a common law negligence standard of care," and since the trial court has never held that G2G was negligent—indeed, Aurora never even pled a negligence cause of action against G2G—the February 23, 2024 "final judgment" entered against Prime, holding it liable by reason of the MCS-90 endorsement to its policy to pay $750,000 of the judgment against G2G, was entered in error and must be vacated.

B. The MCS-90 Endorsement Only Applies When a Determination Has First Been Made That There Is No Coverage Available Under the Policy.

The trial court's April 6, 2023 and February 23, 2024 Orders were limited to findings based upon G2G's alleged liability under the Spill Act and Prime's alleged liability under the Policy's MCS-90 endorsement. (*See*, PPCIa369-71; PPCIa447-48). The trial court did not consider and has never adjudicated whether the Prime Policy, to which the MCS-90 endorsement is attached, would afford coverage.

In so ruling as to the applicability of the MCS-90 endorsement, however, the Court, respectfully, put the "cart before the horse." The MCS-90 endorsement is intended as a back-stop; not as a basis for primary recovery (as occurred here). An MCS-90 endorsement only applies after there is first a finding that the policy does not actually afford coverage for the claim. *See,* QBE Ins. Co. v. P&F Container Services, Inc., 362 N.J. Super. 445, 450 (App. Div. 2003) ("The insurer's obligations under the MCS-90 are triggered when the policy to which it is attached otherwise would provide no coverage to the insured. [citation omitted] In other words, under the endorsement, the insurer becomes a surety for the interstate carrier in any case where there is no other coverage provided[.]"); see also Chapter 3, Michael Jay Leizerman, Litigating Truck Accident Cases, §3:10. *Coverage defenses and Exclusions* (April 2024 Update)

("The MCS-90 endorsement is triggered only when the rest of the insurance policy would not otherwise provide coverage for the insured carrier[.]") (*See* PPCIa480-88 for a copy of this authority).

Here, despite the fact that both Prime and G2G each sought a declaration by the trial court regarding whether the Prime policy actually covered Aurora's claims, the trial court never made any such determination (*See generally,* PPCIa126-27; PPCIa132-49). This missed step is significant.

Although G2G pled a claim that it was indeed entitled to coverage under the Prime policy (an issue that was never decided), the present ruling as to the applicability of the MCS-90 endorsement means that G2G is responsible, as a matter of law, to reimburse Prime for any amounts paid under the MCS-90 endorsement. *See*, QBE Ins. Co., 362 N.J. Super. at 450 (quoting from the MCS-90 endorsement that "[t]he insured agrees to reimburse the company for . . . any payment that the company would not have been obligated to make under the provisions of the policy except for the agreement contained in this endorsement"); see also Prime policy MCS-90 Endorsement at PPCIa183 (identical provision); Chapter 3, Michael Jay Leizerman, Litigating Truck Accident Cases, §3:12. *Allocation and reimbursement issues* (April 2024 Update) ("The MCS-90 permits the insurer to collect back from the insured after paying a judgment under the endorsement"). (*See* PPCIa489-94 for a copy of this

authority). Thus, notwithstanding that a finding of no coverage under the policy for the loss is a prerequisite to triggering the MCS-90 endorsement, G2G has also arguably been prejudiced by this premature ruling as to the MCS-90 endorsement.

The Court's "Final Judgment" against Prime under the MCS-90 endorsement was improper due to the well settled principle that the endorsement applies only after there has first been a finding that no coverage exists under the policy – an issue that remains in the dispute.

C. Aurora Never Pled Any Claim Against Prime, Yet the Trial Court Entered Final Judgment in Favor of Aurora and Against Prime.

Despite Aurora's not having pled any claim or cause of action against Prime (PPCIa053-75) and not having filed an answer or other pleading responsive to Prime's counter-complaint for declaratory judgment, to which Aurora was named as a party (PPCIa132), the trial court erroneously granted Aurora's motion for "final judgment" against Prime for $750,000 by reason of the MCS-90 endorsement to its policy. Prime is a party only by reason of G2G's third party complaint and its counterclaim and third party complaint for declaratory judgment.

Obviously, a party cannot move for summary judgment with respect to a cause of action it never has pled in a complaint, counterclaim, cross-claim or third party complaint; these are the only affirmative pleadings allowed (*see* R.

4:5-1(a)). "A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim, or third-party claim, ***shall*** contain a statement of the facts on which the claim is based showing that the pleader is entitled to relief" (R. 4:5-2; emphasis added). The object of affirmatively pleading a claim for relief is to give notice consistent with due process: "[i]t is fundamental that the pleading must fairly apprise the adverse party of the claims and issues raised." Pressler & Verniero, *Current N.J. Court Rules*, cmt. 2 on R. 4:5-2 (2024).

Since Aurora could not have obtained summary judgment that Prime is obligated to pay the judgment Aurora has recovered against G2G, having never pled such claim, or any affirmative claim, against Prime, the February 23, 2024 "final judgment" entered against Prime, holding it liable by reason of the MCS-90 endorsement to its policy to pay $750,000 of the judgment against G2G, was entered in error and must be vacated. (PPCIa447-48).

D. Financial Responsibility Under the MCS-90 Is Limited to Actual Remediation Costs and Does Not Include Punitive or Other Damages Designed to Punish or Deter.

While it is Prime's primary position that the Court erred in granting summary judgment against Prime under the MCS-90 endorsement, the Court also erred in ordering Prime to pay $750,000 to Aurora instead of Aurora's actual

alleged remediation costs of $475,623.87.[4] By the terms of the MCS-90 endorsement as well as New Jersey law prohibiting the insurability of punitive/exemplary damages, any award against Prime under the MCS-90 endorsement should have been limited to the amount of Aurora's actual alleged remediation costs; not treble damages or fines/penalties.

The MCS-90 endorsement provides that Prime will pay "any final judgment recovered . . . for public liability resulting from negligence in the operation, maintenance or use of motor vehicles[.]" (PPCIa183) "Public liability" is defined as "liability for bodily injury, property damage, and environmental restoration."[5] Id. "Property damage" means "damages to or loss of use of tangible property." Id. "Environmental restoration" means "restitution for the loss, damage, or destruction of natural resources arising out of the accidental discharge, dispersal, release or escape into or upon land . . . of any commodity transported by a motor carrier. This shall include the cost of removal and the cost of necessary measures taken to minimize or mitigate damage to . . . the natural environment[.]" Id.

[4] Prime does not concede that the alleged $475,000 in remediation costs incurred by Aurora were reasonable or appropriate – an issue which Prime also raised with the Court below.

[5] No party has claimed any alleged liability for "bodily injury."

While the provisions of the MCS-90 endorsement recognize a right of recovery for damage to property and the actual cost of environmental remediation under the MCS-90 endorsement, none of the MCS-90 provisions recognize a right to recover for treble, punitive or exemplary damages and such damages are not covered under the Prime policy.

Moreover, New Jersey law expressly prohibits the insurability of punitive or exemplary damages. Loigman v. Massachusetts Bay Ins. Co., 235 N.J. Super. 67, 73 (App. Div. 1989) (internal citations omitted); Johnson & Johnson v. Aetna Casualty and Surety Co., 285 N.J. Super 575, 584 (App. Div. 1995). To that end, the treble damages feature of the Spill Act effectively functions as a punitive measure against a "contribution defendant." *See*, N.J.A.C. 58:10-23.11f.a.(3).

Thus, the trial committed further error when it ordered Prime to pay $274,376.13 in excess of Aurora's actual remediation costs ($475,623.87) under the MCS-90 endorsement (up to the $750,000 limit under the MCS-90 endorsement), as that additional amount was on account of the trial court's award for treble damages against G2G. That additional amount is not recoverable under the terms of the MCS-90 endorsement as well as clear New Jersey public policy.

POINT III

THE TRIAL COURT ERRED IN ENTERING BOTH ORDERS FOR SUMMARY JUDGMENT (APRIL 6, 2023 AND FEBRUARY 23, 2024) AS "FINAL JUDGMENTS"

(PPCIa369-71; PPCIa447-48; 2T; PPCIa459-60; and 3T)

A. The Orders Did Not Resolve All Claims as to All Parties.

It is well settled that an order is interlocutory unless it resolves all claims as to all parties. *See* R. 4:42-2; *see* Silviera-Francisco v. Bd. of Educ. of City of Elizabeth, 224 N.J. 126, 136 (2016) ("in a multi-party, multi-issue case, an order granting summary judgment, dismissing all claims against one of several defendants, is not a final order subject to appeal as of right until all claims against the remaining defendants have been resolved"); Yuhas v. Mudge, 129 N.J. Super. 207, 209 (App. Div. 1974)("...plaintiffs' claims against some of the defendants still remain open; thus, the summary judgment appealed from is interlocutory rather than final"); West Side Trust Co. v. Gascoigne, 39 N.J. Super. 467, 469 (App. Div. 1956) ("Here only two of the three causes of action were adjudicated; the judgment is interlocutory in character").

Here, however, the trial court entered two orders, granting partial summary judgment in favor of Plaintiff Aurora, as "final judgments." The trial court's April 6, 2023 Order for summary judgment against G2G decided only *one* issue in the case ("that G2G is liable under the Spill Act for the Incident").

(*See generally*, PPCIa369-71). The trial court's February 23, 2024 Order then found only that "(1) the MSC-90 [sic] surety endorsement is triggered as a result of the April 6, Final Judgment entered in this matter against G2G requiring G2G to pay Aurora treble the amount of $475,623.87…, and (2) the maximum amount of the MSC-90 [sic] surety endorsement is $750,000." (*See generally*, PPCIa447-48).

However, numerous claims against Aurora and among G2G, Prime, Beacon and Upadhyaya were unresolved. (*Compare*, PPCIa123-28; PPCIa129-49; PPCIa227-35). G2G's Answer asserted a cross-claim against Beacon for indemnity and a third-party complaint for coverage. (PPCIa125-28). G2G's answer asserted affirmative defenses that Aurora's own actions and negligence contributed to any damages and that Aurora itself was a "responsible party" under the Spill Act. (PPCIa125).

Prime's counterclaim sought judgment to rescind the policy based on material misrepresentations; for a declaration of "no coverage" based on certain issues; and for breach of contract against G2G and its principal, Devarshi Upadhyaya, based upon a separate Personal Guarantee and Indemnity Agreement; and against Beacon (G2G's parent company) for liability as G2G's "alter ego." (PPCIa132-49). Prime's affirmative defenses also relied on any

defense to liability or damages that G2G had asserted in relation to Aurora's affirmative claims. (PPCIa132).

Neither the trial Court's April 6, 2023 Order, nor the trial court's February 23, 2024 Order addressed these claims. (PPCIa369-71; PPCIa447-48). However, for an Order to be considered "final" it must "dispose of all claims against all parties." Family First Fed. Sav. Bank v. DeVincentis, 284 N.J. Super. 503, 511 (App. Div. 1995). Therefore, the Court's entries of the April 6, 2023 Order and the February 23, 2024 Order as "final judgments" were in error.

B. The Trial Court Failed to Analyze Whether Either Order Should Be Certified as a "Final Judgment."

R. 4:42-2(a) provides:

> If an order would be subject to process to enforce a judgment pursuant to *R.* 4:59 if it were final and if the trial court certifies that there is no just reason for delay of such enforcement, the trial court may direct the entry of final judgment upon fewer than all the claims as to all parties, but only in the following circumstances: (1) upon a complete adjudication of a separate claim; or (2) upon complete adjudication of all the rights and liabilities asserted in the litigation as to any party; or (3) where a partial summary judgment or other order for payment of part of a claim is awarded.

Aurora did not move to certify either order as a final judgment, and the trial court did not certify that there was "no just reason for delay," after having heard from the parties and considered the issues; rather, it merely signed the proposed form of order filed with Aurora's moving papers, which was captioned as a "final judgment." See Leonardis v. Bunnell, 164 N.J. Super. 338, 340 (App.

Div. 1978) ("At the outset we deem it essential to point out that when a judgment does not dispose of all the issues between all the parties, the trial judge should not designate it as a final judgment under R. 4:42-2 unless he determines there is no just cause for delay. His conclusory statement that it is a final judgment, when in fact it is interlocutory, will not turn an otherwise partial summary judgment into a final judgment").

Failing such analysis, on notice to the parties, such "final judgment" is just an interlocutory order. See id. (it is "essential for purposes of review by this court that the trial judge spell out his reasons for utilizing R. 4:42-2"). This was also reversible error.

C. The MCS-90 Endorsement Obligates an Insurer Only to Pay a "Final Judgment," which the April 6, 2023 Order Granting Summary Judgment against G2G Was Not.

Finally, the interlocutory nature of the April 6, 2023 "Final Judgment" against G2G serves as a further basis to preclude summary judgment against Prime under the MCS-90 endorsement.

The MCS-90 endorsement to the Prime Policy states:

> In consideration of the premium stated in the policy to which this endorsement is attached, the insurer (the company) agrees to pay, within the limits of liability described herein, any ***final judgment*** recovered against the insured for public liability resulting from negligence in the operation maintenance or use of motor vehicles…

(PPCIa183) (emphasis added); see also Canal Ins. Co. v. Underwriters at Lloyd's London, 435 F.3d 431, 442 n. 4 (3d Cir. 2006) ("The MCS–90 endorsement is a federally required form endorsement which states that commercial liability insurers… must pay any 'final judgment' recovered against the insured for public liability resulting from negligence in the operation, maintenance, or use of motor vehicles…").

New Jersey courts have held that, "[w]hen interpreting an insurance policy, courts should give the policy's words "their plain, ordinary meaning." President v. Jenkins, 180 N.J. 550, 562 (2004); Zacarias v. Allstate Ins. Co., 168 N.J. 590, 595 (2001). Under the plain, ordinary meaning of the language in the MCS-90 endorsement, the insurer agrees to pay for any "final judgment" recovered against the insured for "public liability resulting from negligence."

As set forth above, the trial court's April 6, 2023 Order against G2G is "final" in name only. It did not resolve "all issues as to all parties" (*see* Silviera-Francisco, 224 N.J. at 136), and it was never certified as "final" by the trial judge. *See* R. 4:42-2; Leonardis 164 N.J. Super. at 340. Accordingly, the February 23, 2024 "final judgment," which orders Prime to pay $750,000 of the "final judgment" purportedly entered against G2G pursuant to the April 6, 2023 Order, must be vacated: the April 6, 2023 Order was not a "final judgment," and

an insurer is obligated by the MCS-90 endorsement only to pay a "final judgment."

CONCLUSION

For all the foregoing reasons, Prime respectfully requests that this Court: (1) reverse and vacate the trial court's Orders for summary judgment of April 6, 2023 against G2G and February 23, 2024 against Prime; and (2) remand this matter to the trial court for further proceedings.

Respectfully submitted,

KENNEDYS CMK LLP
Attorney for Third-Party Defendant-Appellant
Prime Property & Casualty Inc.

/s/ David M. Kupfer
DAVID M. KUPFER, ESQ.

Dated: August 29, 2024

AURORA TERMINALS CORPORATION, Plaintiff/Respondent, v. G2G TRANSPORT, LLC and BEACON LOGISTICS, LLC, Defendants, And G2G TRANSPORT, LLC, Defendant/Third-Party Plaintiff, v. PRIME PROPERTY & CASUALTY INSURANCE, INC., Third-Party Defendant/Appellant.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION CIVIL ACTION DOCKET NO. A-003283-23 On Appeal From: Trial Court Docket No. ESX -L – 7723-21 Hon. Jefferey B. Beacham, J.S.C. Civil Action

BRIEF OF RESPONDENTS

MEYNER AND LANDIS LLP
Albert Telsey, Esq.
New Jersey Attorney ID #16961982
One Gateway Center Suite 2500
Newark, New Jersey 07102
P: 973-602-3423
F: 973-624-0356
atelsey@meyner.com
Attorneys for Defendants/ Respondent

On the brief:
Albert I. Telsey, Esq.

October 14, 2024

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PRELIMINARY STATEMENT

This case concerns an oil spill that occurred at plaintiff, Aurora Terminals Corporation's ("Aurora") truck/trailer storage facility located in Newark near the Port of Newark. The spill happened when a driver for defendant, G2G Transportation LLC ("G2G"), negligently scraped his trailer on the neighboring parked trailer as he was pulling out of his parking spot. This ripped open the container causing its wase oil content to gush out (the "Incident"). The Incident was uniquely caught on a surveillance camera. A screen shot of the ripped-open trailer gushing oil onto the ground was included in Aurora's Verified Complaint in this matter as Exhibit 1. (PPCIa002).

The New Jesey Department of Environmental Protection ("NJDEP") immediately responded and issued G2G a Field Directive naming them responsible for the spill and ordering them to clean it up. G2G admitted the accident and put its carrier on notice of the Incident, Appellant, Prime Property & Casualty Insurance, Inc. ("Prime"). Prime investigated the Incident after it happened and then declined to provide insurance coverage based on a variety of exclusions in the insurance policy. Neither G2G nor Prime did anything to clean up the spill leaving Aurora to clean it up with its own money. The cleanup is still ongoing to this day.

Prime's insurance policy had an MCS-90 surety endorsement, which is required for all trucking companies, like G2G, pursuant to the Motor Carrier Act of

1980. It provides that the insurance company must automatically pay any final judgment rendered against the trucking company for an oil spill as a surety to the general public for such incidences, regardless of the exclusions in the underlying insurance policy. However, the insurance company can seek reimbursement from the trucking company if such a surety payment must be made. This is part of the social contract created by the Motor Carrier Act to allow trucks to haul cargo from one place to another.

Aurora sued G2G by way of Verified Complaint and Order to Show Cause with Certifications and supporting documents (collectively, the "Verified Complaint"), and won judgment by default because G2G failed to answer the complaint. G2G then hired a lawyer, filed an Answer and third-party complaint against Prime, and got the default judgment lifted.

Aurora then filed summary judgment against G2G, and G2G's lawyer withdrew given non-cooperation by G2G. The trial court gave G2G three months to get a new lawyer, but G2G never hired a new lawyer, nor has G2G otherwise participated in this matter to this day. On February 6, 2023, the court issued Final Judgment against G2G for $1.4 Million.

Prime answered G2G's third-party complaint, and counterclaimed G2G to have the court confirm no coverage on the G2G insurance policy, and to compel G2G's principals to reimburse Prime for any payment it may have to make on the

MCS-90 surety endorsement pursuant to a personal guarantee and indemnity they signed in the event Prime must pay a surety claim under the MCS-90 surety clause. Prime also named Aurora as an "interested party" in the event Aurora filed an MCS-90 surety claim but Prime did not allege any claims or seek any relief against Aurora.

Prime then sought to have the court reconsider its February 6, 2023 Final Judgment against G2G so it could be decided on the merits, which the court granted. The court reexamined its February 6, 2023 Final Judgment against G2G on the merits and concluded the judgment must stand.

Prime then filed for reconsideration of that decision. Aurora then filed summary judgment against Prime on the MCS-90 surety endorsement given that Final Judgment was rendered against G2G. The court heard both motions together. On February 23, 2024, the trial court denied Aurora's motion for reconsideration on the G2G judgment and granted Aurora's motion against Prime on the MCS-90 surety for the amount of $750,000, the limit of the surety. Prime filed a motion for reconsideration of the MCS-90 judgment, and the motion was denied. Prime then filed this appeal.

Aurora submits that all of Prime's arguments presented on appeal were properly addressed below by the trial court for the reasons discussed herein and that this appeal should be denied.

PROCEDURAL HISTORY

On October 15, 2021, Aurora filed the Verified Complaint and Order to Show Cause against G2G. On October 27, 2021, the Order to Show Cause was granted with a return date of November 30, 2021. (PPCIa044-49).

On November 30, 2021, Final Judgment by default was granted because G2G failed to respond. (PPCIa076-79).

On November 16, 2022, Prime filed a Complaint in the Federal District Court for New Jersey (Case 2:22-cv-00834-ES-JBC) seeking declaratory relief against G2G, Beacon Logistics, LLC, (a G2G alter ego company), and Devarshi Upadhyaya and Rushikesh Upadhyaya, the principals of G2G and Beacon Logistics, declaring the insurance policy to G2G does not provide coverage for the Incident and seeking reimbursement from the principals of G2G pursuant to personal indemnification agreements they signed in the event Prime must pay on the MCS-90 surety. Prime did not assert any claims against Aurora or seek any relief from Aurora, but merely included Aurora "as an 'interested party' given the MCS-90 surety. (1Da-21Da)

Defendants hired Glen Vida, Esq., to represent them. On May 17, 2022, G2G and Beacon Logistics answered Aurora's Second Amended Complaint. Their Answer also included a third-party complaint against Prime seeking insurance coverage. Defendants also filed a motion to vacate the Default Judgment entered on

November 30, 2021. On July 15, 2022, the court vacated the Default Judgment against G2G. (PPCIa122)

On August 17, 2022, Prime dismissed its Federal Court Complaint without prejudice (22Da), and on November 4, 2022, Prime filed an Answer to the Defendants' Third-Party Complaint, which included Counterclaims and a Third-Party Complaint against the Defendants seeking the same declaratory relief and personal indemnification relief Prime sought in its Federal Court Complaint. Again, Prime Insurance did not assert any claims against Aurora or seek any relief from Aurora, but merely included Aurora "as an 'interested party' pursuant to N.J.S.A. 2A:16-56" given Aurora's expected MCS-90 surety claim. (PPCIa132).

On January 6, 2023, Aurora filed a Motion for Partial Summary Judgment against G2G. (PPCIa251-349).

The trial court picks up the procedural history from here:

"On January 13, 2023, G2G moved to have the matter reassigned to Track 4 discovery and, accordingly, to extend the discovery and date." (PPCla350-56).

"On January 20, 2023, Counsel for G2G moved to withdraw and asked that Aurora's summary judgment motion be adjourned to let G2G retain new counsel." (PPCla357-56).

"On January 30, 2023, Aurora and G2G entered into a consent order to which Prime was not a party, allowing Counsel for G2G to withdrawal. Such order did not

set the new date on which Aurora's summary judgment motion would be heard or set a date by which G2G would have to retain new counsel or be in default." (PPCla357-63).

"On February 6, 2023, the Court signed the Aurora-G2G consent order. Despite the order neither having been settled on a motion on notice to all parties nor with the written approval of Counsel for Prime, an affected party, and Prime argues that that is required by Rule 4:42-1. Prime for its part, argues that it asked the Court and Counsel to advise of a new return date for Aurora's summary judgment motion to which Prime intended to file opposition and received no reply." (PPCla364-65).

"On April 6, 2023, the Court granted Aurora's motion [for summary judgment against G2G] as unopposed." (PPCla369-71). On the Final Judgment against G2G, the Court added the following language, "This motion was filed on January 6, 2023. On January 30, 2023, Glen Vida, Esq. [counsel for G2G], confirm that the defendant G2G Transport, LLC received a copy of this motion for partial summary judgment. On 2/6/2023, Glen Vida Esq. was relieved as counsel. G2G Transport, LLC has not opposed this motion in the 3 months that this motion has been pending." (PPCla369-71).

"On July 31, 2023, the Court granted Prime's motion for reconsideration of the [April 6, 2023] order granting Aurora's summary judgment motion and having reconsidered such order, declined to vacate it." (PPCla419-20).

During the July 31, 2023 hearing for reconsideration of the G2G judgment, the court continued with the procedural history stating as follows:

"On March 13, [2023], Counsel for Prime contacted Aurora regarding Aurora's motion for partial summary judgment against G2G and Prime communicated its intent to oppose Aurora's motion. Prime also sought agreement from Aurora regarding a briefing schedule for Prime's opposition to Aurora's motion. Consistent, by letter dated March 14, 2023, Counsel for Prime informed the court that Prime intended to oppose Aurora's motion. (PPCIa366-69). Then, on April 5, 2023, Aurora wrote to the court indicated that Aurora's motion for summary judgment went unopposed because Prime did not oppose the motion for summary judgment in February, March and beginning of April [2023]." (PPCIa368). "Despite the fact that [Aurora's motion for summary judgment was filed January 6, 2023] and there was no opposition in February, March or April, the court is going to grant [Prime's] motion for reconsideration and then decide [Aurora's] motion for summary judgment on its merits." (PPCIa369-71).

The trial court then summarized Prime's arguments to set aside the Final Judgment against G2G. The trial court stated that Prime claimed issues of fact have been left unaddressed and require further discovery from Aurora, such as whether the trailer was carrying a hazardous substance; whether Aurora had to prepare its facility to accommodate the storage of oil and failed to do so; whether G2G told

Aurora it was transporting oil; and whether Aurora should be considered a potential responsible party for the oil spill. (PPCIa419-25).

In response, the trial court stated that Prime never filed any claims against Aurora and there is "nothing about Prime's insurance policy or G2G's lack of responsiveness to Prime's investigation to the spill here that is within the possession of the Plaintiff because the Plaintiff is not Prime's policyholder. That is why the court finds that Prime does not articulate in its opposition to the motion for summary judgment and its motion for reconsideration what information Prime needs to defend against the summary judgment motion brought against G2G." (PPCIa419-25). Also, "the New Jersey Department of Environmental Protection confirmed the discharge was waste oil, a hazardous substance, in the Field Directive and Notice to Insurers attached to the Plaintiff's Verified Complaint, [and] Prime has had this information for years." (PPCIa419-25). Regarding Aurora's procedures for handling oil trailers, "the Plaintiff states in his Verified Complaint that Plaintiff is not in the business of providing space for trailers carrying bunker oil or hazardous substances and plaintiff is not a used oil transfer facility." (PPCIa419-25). Regarding whether Aurora is a responsible party, "DEP and the [field] directive did not identify plaintiff as a responsible party but named G2G as the responsible party." (PPCIa419-25).

The trial court then concluded, "it is clear in this case that G2G is the responsible party in this matter and is the cause of the spill and any further discovery

would not change the fact that G2G is a responsible party and is responsible. So, accordingly, the motion for [summary judgment] on reconsideration is granted on the merits against G2G because G2G is the responsible party." (PPCIa419-25)

On June 22, 2023, Aurora filed a Motion for Summary Judgment against Prime pursuant to the MCS-90 surety endorsement in the G2G policy given that the court had approved the Finaly Judgment against G2G on its merits and that G2G judgment was a prerequisite to filing a summary judgment motion against Prime. (PPCIa380-PPCIa502).

On August 21, 2023, Prime filed a Motion for Reconsideration for the Court to reconsider its decision regarding the G2G Final Judgment. (PPCIa421-PPCIa432).

On February 23, 2024, the trial court heard both motions – Prime's Motion for Reconsideration regarding the G2G Final Judgment, and Aurora's Motion for Summary Judgment against Prime on the MCS-90 surety. Regarding Prime's Motion for Reconsideration, the court summarized Prime's arguments in support of reconsideration, which included the following: whether the Verified Complaint was competent evident for the court to rely; whether Prime should be entitled to discovery to explore Aurora's own negligence in the Incident; and whether the Court vacating the November 30, 2021 Default Judgment against G2G and then hearing

the summary judgment motion against G2G on its merits with Prime's participation was sufficient procedural due process for Prime. (PPCIa380-PPCIa502).

The trial court then recited the factual and procedural history of the matter and stated, "After Prime filed their answer in this matter, Prime did nothing. Aurora then filed it summary judgment motion on January 6, 2023, and Prime did nothing. Prime did say that they intended to do things, however, Prime never served any discovery requests and never made any motions to extend discovery." (1T26:7-11). "What's very interesting in Prime's motion to reconsider, they never filed a motion to extend discovery." Id. And in the proposed form of order that Prime submitted with its Motion for Reconsideration, Prime just asked that the Motion be granted but did not request that discovery be extended. Id.

The trial court recognized that a Motion for Reconsideration is guided by *Cummings v Bahr*, 295 N.J. Super. 374 (Ap. Div. 1996), and noted that, in Prime's motion for reconsideration, "no new facts have been uncovered which would warrant either this motion for reconsideration or the prior motion for [summary judgment]. In the original motion for summary judgment, the Court considered all evidence. There is no evidence submitted by Prime because Prime conducted no discovery. The court considered the Verified Complaint, and the Verified Complaint was competent evidence for the court to consider. And therefore, Prime's motion for reconsideration is denied." (1T26:25- 27:15).

Regarding Aurora's Motion for Summary Judgment on the Prime MCS-90 surety, the trial court noted that "Prime admits the G2G insurance policy included the MCS-90 surety endorsement as required by the Motor Carrier Act of 1980, to protect the public from damages caused by motor carriers," that the MCS-90 surety endorsement "will pay up to $750,000 as surety for the final judgment against G2G for public liability related to environmental restoration costs, whether the underlying Prime insurance policy to G2G provides coverage for the accident are not;" that the insurance policy requires G2G "to reimburse Prime in the event Prime must pay on the surety endorsement;" that "to backstop the MCS-90 reimbursement obligation, Prime made G2G and its principals sign an indemnity and personal guarantee agreement to Prime;" and that "Prime's counterclaim and third-party complaint names Aurora as a necessary party to the relief that Prime seeks." (1T27:16-33-24).

The trial court then acknowledged that Final Judgment had been entered against G2G and that Aurora claimed that Prime's obligation to pay on the MCS-90 surety endorsement has been triggered, which is the basis of Aurora's motion for summary judgment. Id.

The trial court then noted that Prime opposed the motion for summary judgment on the MCS-90 surety because the Final Judgment against G2G is not a "final judgment;" Aurora must bear some responsibility for the Incident; G2G was engaged wholly in intrastate commerce at the time of the Incident and therefore the

MCS-90 is not triggered; and the MCS-90 endorsement does not cover punitive damages. (1T 30:2-33:9).

The court went on to state that the MCS-90 surety endorsement "is distinct and separate from the insurance policy and its conditions and limitations;" and that it applies to a final judgment, which is arrived at after vigorous or non-vigorous litigation efforts are undertaken. (1T 34:17-21).

Here, the court noted that, "no one conducted any discovery, and the defendants gave up pretty quickly. G2G had no ability to mount a defense and Prime took a no coverage, no defense position regarding G2G's insurance claim related to the oil spill incident. In fact, in this case, G2G did not answer the complaint, they suffered a default judgment, they came into the case late, they got the default judgment lifted, they filed an answer and third-party complaint against Prime for coverage, then gave up again when it filed no opposition again to Aurora's motion for summary judgment against G2G, and that resulted in the final judgment being rendered against G2G for the oil spill." (1T 34:17-21).

The court then went on to state that, "Prime also did nothing in this case. They said they intended to do things. First, they refuse to defend G2G in the Aurora action, even though Prime was facing a back end MCS-90 surety obligation if Prime let G2G face a complaint without mounting a defense. This no coverage; no defense strategy may be effective when Prime provides only insurance to a policyholder

without a surety backend endorsement. However, here, that strategy did not work. Prime knew that if it let G2G suffer final judgment without a defense, Prime's surety endorsement would be triggered and none of the conditions and limitations in the insurance policy would apply to blunt the unconditional surety obligation." (1T 35:6--13).

The court further stated, "here, Prime did not defend G2G and, in addition, Prime did not counter sue Aurora to try to raise the arguments it is trying to raise now, such as the allegation that Aurora is somehow jointly liable for the spill, Aurora is a used oil transfer facility operating without protective berms, the amount spent by Aurora to respond to the spill are questionable, and that there should be some kind of allocation of responsibility between Aurora and G2G for the oil spill. Of course, Aurora denies these allegations because these allegations are unsupported and unproven." (1T 35:20-36:6).

"Prime also did not challenge Aurora's summary judgment motion against G2G, which resulted in the final judgment. That is the basis of this current motion to enforce the MCS-90 surety. Prime told the court it would file opposition papers to that motion, but for some unknown reason, it never did file opposition to the [motion] papers." (1T 36:7-13).

"Prime then sought reconsideration of the summary judgment motion against G2G, seeking to overturn the final judgment, making the same arguments it is

making here to oppose the motion for summary judgment [on the MCS-90 surety], and the court addressed the motion for summary judgment [on the G2G liability] on the merits, and the motion for summary judgment [for G2G's liability] was granted." (1T 36:14--21).

"Prime's argument that the final judgment against G2G is not final has no merit. The judgment against G2G was a final judgment because all the issues among all the defendants have been resolved. Aurora sued G2G for Spill Act violations, as permitted by the Environmental Rights Act. The court awarded Aurora summary judgment against G2G for these claims. The only other defendant was Beacon Logistics. They never answered the complaint and suffered default, pursuant to Rule 4:43-1. Aurora's complaint is fully resolved. Prime did not raise this non-finality argument when it sought to have this court reconsider the G2G final judgment because it was a nonissue then and it is a non-issue now because the final judgment is a final judgment." (1T 37:7-11).

The court then went on to state, "this is a straightforward case. Final judgment was entered against G2G in the amount of $1.4 million. Prime insured G2G and provided G2G with an MCS-90 surety endorsement with a $750,000 policy limit. Prime is denying insurance coverage to G2G. That triggers the MCS-90 surety up to the limit of $750,000, and Prime retains its right to seek reimbursement from G2G and its principals." (1T 37:7-39:9-16).

The court further stated that, "by abandoning its defense to G2G, Prime has made the business decision to recover its costs directly from G2G and its principal. Aurora in this case was left to clean up the oil spill that G2G caused and has been doing so since the oil spill occurred in this matter. And so, for the foregoing reasons, Aurora is granted summary judgment against Prime, pursuant to the MCS-90 surety endorsement for $750,000." (1T39:9-16).

On March 12, 2024, 2023, G2G filed a Motion for Reconsideration for the court to reconsider its February 23, 2024 order granting Aurora's Motion for Summary Judgment on the MCS-90 surety endorsement. (PPCIa452). Prime again argued that the February 23, 2024 final judgment was not a final judgment because it did not address Prime's counterclaims and crossclaims against G2G seeking declaratory judgment that the policy does not provide insurance coverage to G2G, and it did not address the guarantee agreements of G2G's principals obligation to reimburse Prime on any MCS-90 payment Prime makes. The court stated, "the court's decision is, the court did not make an error entering the final judgment. It was the final judgment *against Prime* and there is no basis to reconsider this decision." [Emphasis added]. (2T:12:24-13:2).

STATEMENT OF MATERIAL FACTS

The oil spill. The oil spill was captured on a surveillance camera the moment it happened. Paragraph 2 of Aurora's Verified Complaint stated, "On June 1, 2021,

a driver for Defendant G2G was driving a truck pulling a trailer carrying waste oil as its commodity. As the driver drove the rig out of a parking spot, *he negligently scraped against a sharp object* that cut through the bladder in the container, which released the entire contents of oil onto the ground. Hereinafter referred to as the 'Incident.'" [Emphasis added] (PPCIa001-2). Aurora included a still photo from the camera footage showing oil gushing out of the side of the ripped open truck trailer as Figure 1. See, *infra*.

The Verified Complaint also stated that Aurora was the primary tenant at the property and sublet parking spaces to various motor carriers who needed space to store rigs as shipping containers are being shipped from one location to another." (PPCIa002). G2G was one of Aurora's subtenants. (PPCIa003).

The Verified Complaint also stated that "G2G stored the above trailer at the Property without informing Aurora of its oil content. If Aurora was notified of its content, it would have been prohibited." (PPCIa003).

Government response to the spill. The Verified Complaint also stated that local, state and Coast Guard emergency response teams were immediately notified and took charge of the Incident. (PPCIa003).

The NJDEP issued G2G (referred to as the "Respondent") a Field Directive and Notice to Insurers on the date of the Incident, June 1, 2021." (PPCIa003, PPCIa022). The Directive (a) found G2G liable as a responsible party pursuant to

the Spill Compensation and Control Act, ("Spill Act") N.J.S.A. 58:10-23.11 et seq.; (b) "determined the Respondent to be responsible for discharge(s) at the above location;" (c) identified the discharge as oil and that G2G is "responsible for the discharge of these hazardous substances;" (d) directed G2G "to conduct a remedial investigation and remedial action(s) in accordance with the Technical Requirements for Site Remediation, N.J.A.C. 7:26E and all other applicable State, Federal and local regulations" beginning on the date of the Directive, June 1, 2021; (e) directed G2G "to engage a Licensed Site Remedial Professional (LSRP)," and (f) directed G2G to notify its insurer since transport companies are require by The Motor Carrier Act of 1980, 49 U.S.C.A. § 10927 to have surety coverage. (PPCIa003, PPCIa022).

Prime response to the spill. Prime admitted it was informed about the Incident and its details on the day it occurred, June 1, 2021. (PPCIa137-38). Prime admitted that it investigated the Incident. Prime then took no further action after that initial investigation. (PPCIa137-38).

G2G's admission of responsibility. As set forth in the Verified Complaint, G2G sent an email to Aurora a few days after the Incident where G2G admits its liability, which is pictured in the Verified Complaint (PPCIa004). In that email, G2G stated, "one of our drivers was trying to move the container to the Newark terminal and *had an accident* with our chassis parked next to the container." [Emphasis added] (PPCIa004).

G2G failed to respond to the Incident. As set forth in the Verified Complaint, despite G2G's initial reaction to the Incident on the day it happened, G2G failed to (a) hire an LSRP; (b) undertake remediation activities; (c) calculate Environmental Restoration costs; and (d) post a remediation funding source ("RFS") as required by the NJDEP Directive. (PPCIa005)

Aurora responded to the Incident. As set forth in the Verified Complaint, Aurora's environmental consulting firm, Engineering & Land Planning Associates, Inc. ("E&LP"), took action to address the oil discharged to the Property by initiating investigation and remediation activities regarding soil, groundwater, drainage piping, and bulkhead integrity, among other things. (PPCIa006). Eikon Planning and Design, LLC ("Eikon") replaced E&LP as Aurora's environmental consulting firm and is undertaking the work necessary to complete the Environmental Restoration required because of the Incident. (PPCIa006-07). When the Environmental Restoration work is completed, David L. Pry, LSRP will issue a Response Action Outcome ("RAO"). (PPCIa008). The issuance of an RAO means the remediation of the oil spill Incident will be completed. N.J.A.C. 7:26C-6.2. (PPCIa008).

"Environmental Restoration" means restitution for the loss, damage, or destruction of natural resources arising out of the accidental discharge, dispersal, release or escape into or upon the land, atmosphere, watercourse, or body of water,

of any commodity transported by a motor carrier. This shall include the cost of removal and the cost of necessary measures taken to minimize or mitigate damage to human health, the natural environment, fish, shellfish, and wildlife. (PPCIa024).

According to the Verified Complaint, costs incurred by Aurora through January 2023 to address Environmental Restoration work because of the Incident are $475,623.87. (PPCIa012-17, PPCIa369-71).

These costs include the work necessary to investigate and remediate the Incident and the costs necessary to minimize and mitigate damage to the property, human health, and the environment. (PPCIa012-17). Remediation work continues to this day.

G2G is responsible for the remediation. The Spill Act provides that any person who discharges a hazardous substance or is in any way responsible for any hazardous substance, shall be liable, jointly, and severally, without regard to fault, for all cleanup and removal costs no matter by whom incurred. N.J.S.A. 58:10-23.11g.c.(1). NJDEP regulations define discharger or a responsible party as, among other things, "1. Any person whose act or omission results or has resulted in a discharge; 2. Each owner or operator of any land, facility, vehicle or vessel from which a discharge has occurred; 3. Any person who owns or controls any hazardous substance, which is discharged; 4. Any person who has directly or indirectly caused a discharge; 5. Any person who has allowed a discharge to occur; or 6. Any person

who brokers, generates or transports the hazardous substance discharged." N.J.A.C. 7:1J-1.4. (PPCIa015-16).

G2G fits the definition of a responsible party pursuant to categories 1, 3, 4, 5 and 6 above. G2G drove the truck in such a way that it was slashed open to discharge its contents of oil; G2G owned and/or operated the truck/trailer; G2G owned and/or controlled the oil in the trailer; G2G's negligent driving slashed open the container discharging its contents; G2G allowed the discharge to continue until the trailer was emptied of its contents; and G2G transported the oil. (PPCIa015-16).

NJDEP concluded G2G was liable under the Spill Act and issued G2G a Directive. G2G admitted it was liable for the Incident.

By negligently causing the discharge of oil and failing to comply with the NJDEP Directive, G2G is liable for the cleanup and removal costs that Aurora has incurred and will continue to incur in the future to remediate the hazardous substances discharged at the Property. N.J.S.A. 58:10-23.11f.a.(1).

On June 25, 2021, Plaintiff Aurora sent Defendant G2G as well as the New Jersey Attorney General's Office, the NJDEP Commissioner, and the City of Newark a notice pursuant to the Environmental Rights Act, N.J.S.A. 2A:35A-1 et seq. ("ERA") demanding that Defendant G2G conduct the remediation required by the June 2021 Directive. (PPCIa010, PPCIa026). The ERA Notice provided that if, within 30-days, Defendant G2G did not undertake remediation of the discharge then

Plaintiff Aurora would file an action in Court pursuant to the ERA seeking an order compelling compliance, assessing penalties, attorneys' fees, expert fees, and other relief against Defendant G2G as permitted by the ERA. (PPCIa010). On June 25, 2021, Aurora also sent G2G a letter telling them to undertake remediation or suffer treble damages as permitted by the Spill Act. (PPCIa042).

On July 20, 2021, Aurora sent G2G a letter telling them to comply with the Directive and to address the Incident. (PPCIa269). G2G did not respond.

Through June-July 2021, Aurora's counsel sent memos to Prime counsel seeking confirmation of coverage. Prime did not confirm coverage. (PPCIa414-18).

Prime's MCS-90 endorsement. Prime admits in paragraphs 15 through 17 of its Counterclaim and Third-Party Complaint that the G2G insurance policy includes an MSC-90 surety endorsement as required by the Motor Carrier Act of 1980 to protect the public from damages caused by motor carriers. Prime also attached its G2G policy, including the MCS-90 endorsement, to its pleading as Exhibit A. (PPCIa136-37, PPCIa182-83).

The MCS-90 surety endorsement provided that Prime will pay up to $750,000 as surety for any final judgment against G2G for "Public Liability" related to "Environmental Restoration" costs whether the underlying Prime insurance policy to G2G provided coverage for the accident or not.

The Prime MCS-90 endorsement to G2G specifically stated:

> In consideration of the premium stated in the policy to which this endorsement is attached, the insurer (the company) agrees to pay, within the limits of liability described herein, any final judgment recovered against the insured for public liability resulting from negligence in the operation, maintenance or use of motor vehicles subject to the financial responsibility requirements of Sections 29 and 30 of the Motor Carrier Act of 1980 regardless of whether or not each motor vehicle is specifically described in the policy and whether or not such negligence occurs on any route or in any territory authorized to be served by the insured or elsewhere … It is understood and agreed that that no condition, provision, stipulation, or limitation contained in the policy, this endorsement, or any other endorsement thereon, or violation thereof, shall relieve the company from liability or from the payment of any final judgment, within the limits of liability herein described, irrespective of the financial condition, insolvency, or bankruptcy of the insured.

(PPCIa182-83).

G2G as the insured remains liable to reimburse Prime in the event Prime must pay on the surety endorsement. The MCS-90 form states, "the insured agrees to reimburse the company for any payment made by the company on account of any accident, claim, or suit involving a breach of the terms of the policy, and for any payment that the company would not have been obligated to make under the provisions of the policy except for the agreement contained in this endorsement." (PPCIa182-83).

To backstop the MSC-90 reimbursement obligation, Prime made G2G and its principal sign an indemnity and personal guaranty agreement to Prime. Prime stated in its pleading:

> 73. On September 29, 2020, in connection with and in consideration of Prime's issuance of the Prime Policy, Devarshi Upadhyaya, on behalf of G2G and on his own behalf, signed a Personal Guarantee and Indemnity Agreement (Exhibit D) which agreement states in relevant part:
>
> > 1. Despite the limitations and exclusions contained within the Policy issued by Prime to G2G, Prime may nonetheless be obligated to pay certain claims pursuant to federal

> or state financial responsibility laws, such as the MCS-90 Endorsement, state filings, or other similar regulations (collectively, "Financial Responsibility Law(s)").

(PPCIa220-26).

LEGAL ARGUMENTS

POINT I

THE TRIAL COURT DID NOT DENY PRIME DISCOVERY

Prime claims it was unfairly denied discovery because the Track Assignment for this matter was Track I and should have been Track IV, and "by the time Prime became a party to the litigation [G2G's Third-party complaint filed May 17, 2022], Aurora had obtained an Order for Final Judgment against G2G [November 30, 2021] based on an unopposed summary action Order to Show Cause vacated in July 2022 [after] the [Track I] discovery end date had already passed [March 14, 2022]." (Br. 16-17).

Prime was well aware of this lawsuit the moment it was filed on October 15, 2021. On November 16, 2021, a month after Aurora filed this suit, Prime sued G2G in Federal District Court. Prime's Federal Court Complaint stated, "This complaint seeks judgment declaring all parties' rights and obligations under a policy of commercial motor vehicle liability insurance with reference to the June 1, 2021 discharge of the contents" of a G2G trailer at Aurora's terminal, which "was made the subject of a lawsuit captioned, *Aurora Terminals Corporation v G2G Transport*

LLC and Beacon Logistics, LLC, Docket No. ESX-L-7723-21 filed on October 15, 2021." (PPCIa001-42).

Prime could have defended G2G in this matter and addressed the Track Assignment/discovery issue, but did not do so. Prime could have intervened in this matter to assert its no coverage position, but did not do so. Prime could have joined its federal suit with this matter, but did not do so.

When Prime did dismiss its federal lawsuit on August 17, 2022, and filed its Answer to G2G's Third-party complaint on November 4, 2022, Prime could have filed a motion to change the Track Assignment, but did not do so. Prime could have filed a motion to extend the discovery, but did not do so.

The trial court frequently noted Prime's indifference to discovery issues and noted that Prime's no defense/no coverage position was a business decision it chose to make on the presumption that, if Prime had to pay on the MCS-90 surety, Prime would seek reimbursement from the personal guarantees and indemnity from the G2G principals. In other words, whatever discovery discomfort Prime is now alleging was a product of its own case management decisions and not the fault of the trial court.

POINT II

PRIME PRESENTED NO EVIDENCE TO COUNTER AURORA'S VERIFIED COMPLAINT

Prime claims the trial court accepted the facts in the Verified Complaint as competent evidence and failed to consider Prime's allegations that Aurora was liable for the oil spill, there may have been historic spills at the property, and the waste oil may not have been hazardous. (Br-p17-21). Prime further claims that the NJDEP Field Directive naming G2G as the responsible party for the oil spill does not preclude finding Aurora was also liable for the oil spill. (Br- 21-23).

The trial court stated that Prime never asserted any claims against Aurora as a responsible party (1T35:20-24); the Verified Complaint was competent evidence and that Prime's bare allegations were not competent because they were not supported by evidence. (1T27:9-14). Prime had no evidence to present to the court because Prime chose not to pursue discovery or ask for an extension of discovery. (1T34:17-18). Prime made no argument supported by law for its claim that the trial court's reliance on the Verified Complaint, given no opposing evidence, was error. That is because the court can rely on evidence presented in a Verified Complaint. The Verified Complaint is competent evidence pursuant to R. 1:4-7 [verification of pleadings] because the owner of Aurora and the Aurora LSRP certified to each numbered fact and statement in the Verified Complaint by way of Affidavits

attached to the Verified Complaint as required by R. 1:6-6 [which requires personal knowledge of verified statements]. As such, there are no "genuine issues of material fact" as claimed by Prime because Prime presented no opposing facts to the Verified Complaint.

POINT III

G2G'S FAILURE TO HIRE SUBSTITUTION COUNSEL DID NOT DENY THE TRIAL COURT AUTHORITY TO RENDER FINAL JUDGMENT AGAINST G2G

On January 20, 2023, Glen Vida, Esq., counsel for G2G, filed a motion to be relieved of counsel claiming his clients' "cooperation is non-existent," "multiple telephone calls and approximately 23 emails requesting cooperation have been fruitless," and "I have requested vital documents which remain unprovided." Mr. Vida then requested that Aurora's Motion for Summary Judgment against G2G be postponed. (PPCIa357-63).

On February 6, 2023, the trial court entered an order relieving Mr. Vida as counsel (PPCIa364-65), and then waited to see if G2G would hire substitution counsel.

On the April 6, 2023 Final Judgment against G2G, the Court added the following language, "This motion was filed on January 6, 2023. On January 30, 2023, Glen Vida, Esq. [counsel for G2G], confirm that the defendant G2G Transport, LLC received a copy of this motion for partial summary judgment. On 2/6/2023,

Glen Vida Esq. was relieved as counsel. G2G Transport, LLC has not opposed this motion in the 3 months that this motion has been pending." (PPCIa369-71).

Prime claims that the trial court erred in signing the April 6, 2023 Final Judgment against G2G and that it must be voided. Prime cites Rule 1:21-1(c), which provides that a business entity cannot appear in court to represent itself or file papers in court, except through an attorney authorized to practice law in New Jersey. Prime also cited to *Gobe Media Group, LLC v Cisnero*, 403 N.J. Super. 574, 577 (App. Div. 2008), which holds that judgment against a business entity not represented by counsel is voidable at the option of the adverse party without proving plain error.

Here, G2G nor its principals appeared in court to represent themselves, nor did they file papers on their own behalf. Glen Vida, Esq., represented them and filed papers on their behalf before withdrawing as counsel. Therefore, there has been no violation of R. 1:21-1(c). Also, here, Prime was not the adverse party to the G2G Final Judgment – G2G was the adverse party, and G2G has not sought to void the Final Judgment.

Here, the trial judge did not appoint substitute counsel for G2G, nor did he have to do so. A court can appoint an attorney for criminal matters, custody, abuse and neglect cases and guardianship matters, but not business defendants in civil suits. The trial judge instead waited 3 months for G2G to hire substitute counsel and G2G did not do so.

In the interest of judicial economy and finality of matters, the trial court had authority to enter the April 6, 2023 Final Judgment as "unopposed" because at the time the Motion for Summary Judgment against G2G was filed on January 6, 2023, G2G was represented by counsel, Glen Vida, Esq. and G2G thereafter chose not to oppose the motion and to abandon the case. To this day, G2G has not hired a lawyer or appeared in this matter.

Prime cannot step into the shoes of G2G and assert a right to void the Final Judgment on G2G's behalf, even if it was voidable, which it was not in this instance, because Prime is not the adverse party to the G2G judgment – G2G is the adverse party. The trial judge did, nevertheless, grant Prime's Motion for Reconsideration of the April 6, 2023 Final Judgment against G2G, as a Third-Party defendant, where Prime tried to assert a variety of defenses on behalf of G2G even though Prime presented no evidence in support of those defenses, and even though Prime did not represent G2G. The court found no reason to vacate the G2G judgment.

Prime could have hired counsel for G2G, as provided in the G2G insurance policy, but Prime chose not to do so. Instead, Prime insisted on trying to defend G2G itself, without hiring independent counsel to do so, while, at the same time, representing its own interests as the insurer to deny G2G coverage. That is a clear conflict of interest. Aurora pointed this out to the trial court in a sur-reply brief to Prime's Motion for Reconsideration of the April 6, 2023 Final Judgment against

G2G. (1T21:16-21) Aurora cited to Advisory Committee on Professional Ethics Opinion 502, 110 N.J.L.J. 349 (September 23, 1982), which held that an insurer that is seeking declaratory judgment against the insured to deny coverage, as is the case here, cannot also represent the interests of the insured in the same action, as is also the case here. (1T21:16-21). In other words, the reason the court in *Gobe* held that only the unrepresented adverse party can void a judgment against it is because, to allow others to do so, can create a conflict of interest and other mischief.

POINT IV

THE MCS-90 SURETY IS NOT TRIGGERED BY AN ADJUDICATION OF THE UNDERLYING INSURANCE COVERAGE

Prime claims that the trial court could not order Prime to pay under the MCS-90 surety because there exists a "well settled principle that the endorsement applies only after there has been a finding that no coverage exists under the policy," and the trial court here has not made that adjudication. (Br. p. 30). Prime cites a passage from only one case, *QBE Ins. Co. v. P&F Container Services, Inc.*, 362 N.J. Super. 445, 450 (App. Div. 2003), for this alleged well settled principle. That passage is, "The insurer's obligations under the MCS-90 are triggered when the policy to which it is attached *otherwise would provide no coverage* to the insured. [citations omitted]. In other words, under the endorsement, the insurer becomes a surety for the interstate carrier in any case where there is no other coverage provided." (Br. 28-30).

The court in *QBE* never held that "a trial court must make a determination" of the underlying coverage before the MCS-90 surety is triggered. That was Prime's misstatement of the case. The court in *QBE* stated that it must be shown that the underlying insurance "would provide no coverage to the insured" for a host of reasons, including the insurer denying coverage, which is the case here.

Prime already determined that the policy would provide G2G no insurance coverage. Prime's defenses to the G2G Third-party complaint seeking coverage stated, "G2G's claims for coverage are barren by reason of" its breach of warranties, failure to comply with the terms of the policy, misrepresentations and concealments, failure to cooperate, and failure to give notice. (PPCIa131). In its Counterclaim against G2G, Prime sought to cement its own determination of no coverage by seeking judgement "declaring the Prime Policy void." (PPCIa140-41).

The trial court directly addressed the MCS-90 coverage issue by reading the actual language of the MCS-90 endorsement. The trial court stated, "The MCS-90 surety endorsement provides that it is distinct and separate from the insurance policy and its conditions and limitations. The MCS-90 surety endorsement states, 'It is understood and agreed that no condition, provision, stipulation, or limitation contained in the policy, this endorsement, or any other endorsement thereon, or violation thereof, shall relieve the company from liability or from the payment of any final judgment within the limits of liability herein described, irrespective of the

financial condition, insolvency, or bankruptcy of the insured.'" (1T33:25-34:8). The trial court acknowledged that the MCS-90 surety was triggered because "Prime took a no coverage, no defense position regarding G2G's insurance claim related to the oil spill Incident," (1T38:25-39:2), and that that position was the sufficient prerequisite for the trial court to confirm the policy "would otherwise provide no coverage," as set forth in *QBE*, thereby triggering the MCS-90 endorsement. The trial court did not err in ruling the MCS-90 surety was triggered here.

POINT V

G2G ACTED NEGLIGENTLY IN SLICING OPEN THE TRUCK TRAILER FILLED WITH OIL

Prime argues that the court failed to find that G2G acted negligently and that the MCS-90 surety is only triggered upon a finding of negligence. Paragraph 2 of Aurora's Verified Complaint stated, "On June 1, 2021, a driver for Defendant G2G was driving a truck pulling a trailer carrying waste oil as its commodity. As the driver drove the rig out of a parking spot, *he negligently scraped against a sharp object* that cut through the bladder in the container, which released the entire contents of oil onto the ground." [Emphasis added]. Aurora also included a still photo from the camera footage showing oil gushing out of the side of the ripped open truck trailer as Figure 1.

G2G admitted its responsibility in the email it wrote to G2G, wherein G2G stated, "one of our drivers was trying to move the container to the Newark terminal

and *had an accident* with our chassis parked next to the container." [Emphasis added] (PPCIa004-05). The trial court accepted the allegations in the Verificied Complaint as competent evidence. Prime did not claim, as an affirmative defense, that G2G did not act negligently.

Prime now argues that the trial court erred in not finding G2G negligent but only finding G2G liable under the Spill Act. The Spill Act is a strict liability statute which means that, whether a person (property owner, tenant, transporter, consignment owner of hazardous material, etc.) is negligent or not negligent in causing a discharge, the party will be deemed strictly liable for the remediation of the discharge. In other words, strict liability does not exclude negligence, as Prime argues. Strict liability includes negligence. By accepting the Verified Complaint as competent evidence as the basis for its decision to issue final judgment against G2G, the trial court accepted Aurora's allegation of negligence and G2G's admission of negligence. No other formality to the issue was required.

POINT VI

AURORA HAD STANDING AS A NAMED "INTERESTED PARTY" TO SUE PRIME ON THE MSC-90 SURETY

Prime argues that Aurora did not file a claim against Prime and therefore the court erred in entertaining Aurora's Motion for Summary Judgment against Prime on the MCS-90 surety. (Br. p.30-31.)

Prime knew Aurora was going to file a claim on the MCS-90 surety, which is why Prime named Aurora as "a party that is believed to have an interest in the declaratory relief sought by Prime's counterclaim against G2G and is therefore joined as an 'interested party' pursuant to N.J.S.A. 2A:16-56." Prime did not make any claims against Aurora or seek any relief from Aurora. (1T35:20-24).

N.J.S.A. 2A:16-56 provides that, "when declaratory relief is sought, all persons having or claiming any interest which would be affected by the declaration shall be made parties to the proceeding." In other words, Prime recognized Aurora's standing to make claims against Prime if the MCS-90 surety was triggered by a final judgment, which occurred here, because a surety is a three-party agreement, whereas an insurance policy is a two-party agreement. *Cruz–Mendez v. ISU/Insurance Servs.,* 156 *N.J.* 556, 568 (1999).

Aurora's standing to sue Prime is actually provided in the MCS-90 endorsement itself which states, "it is further understood and agreed that, upon failure of the company to pay any final judgment recovered against the insured as provided herein, the judgment creditor may maintain an action in any court of competent jurisdiction against the company to compel such payment." (PPCIa182-83). A direct right of action by a judgment creditor is actually the hallmark of a surety agreement. *New Jersey Div. of Taxation v. Selective Ins. Co. of America,* 399 N.J. Super. 315, 325 (App. Div. 2008).

Aurora, as a judgment creditor, has standing as a third-party beneficiary to assert a claim against Prime on the MCS-90 surety because the MCS-90 surety confirms that Prime "intended others to benefit from the existence of the contract" and that Aurora is not merely an unintended beneficiary. *Broadway Maint. Corp. v. Rutgers*, 90 N.J. 253, 259 (1982).

As such, Aurora had standing to assert its claim for summary judgment against Prime on the MCS-90 surety endorsement because Prime specifically invited Aurora as a judgment creditor to do so in the MCS-90 endorsement itself, and because Prime directly invited Aurora to do so by naming Aurora as an "interested party" in its Counterclaims addressing the MCS-90 surety.

POINT VII

THE MCS-90 SURETY DOES NOT EXCLUDE TREBLE DAMAGES IF PART OF A FINAL JUDGMENT

Prime claims Aurora can only be awarded its past costs incurred, $475,623.87, and not its future costs, because they are punitive, and an insurance contract does not cover punitive costs.

The Verified Complaint stated that, although considerable environmental investigation and remediation work had been undertaken by Aurora at the property, "more work is required to address soil and groundwater contamination before an LSRP can issue an unrestricted use Response Action Outcome ("RAO") to confirm that the Incident has been remediated and is protective of human health, safety and

the environment." (PPCIa011). The Verified Complaint further states that, Aurora's environmental consultant, "states that presently the oil spill is continuous and likely to recur in the future by way of migration further and wider than its current location unless it is completely remediated by way of an RAO issued by an LSRP." (PPCIa011).

Aurora has so far spent $475,623.87 on investigating and remediating the Incident. More work is required in the LSRP has not yet issued an RAO for the Incident. The trial judge trebled that award because Aurora gave notice to G2G to respond to the Incident (PPCIa369-71); otherwise, Aurora would do the work and seek treble damages as permitted by the Spill Act. N.J.S.A. 58:10-23.11f.a(3). G2G did not respond, and Aurora proceeded with the work.

Prime argues that an insurance policy does not cover punitive damages and cites cases to that effect. (Br. p. 33). However, a surety agreement is not an insurance contract. A surety agreement is a three-way guarantee agreement based on the personal evaluation of the oblige to perform. A surety (Prime) guarantees to a third party (Aurora) that a named oblige (G2G) will perform its obligations. If the oblige (G2G) does not perform, the surety (Prime) will pay the third-party beneficiary (Aurora) on the final judgment and then seek reimbursement from the oblige (G2G). *Eagle Fire Protection Corp. v. First Indemn. of Am. Ins. Co.,* 145 *N.J.* 345, 353-54

(1996). There is nothing about the MCS-90 surety that is tied into the underlying insurance contract, and insurance contract law does not govern the surety agreement.

There is nothing in the MCS-90 surety endorsement that precludes the payment of a treble damage award, other than the limit of the surety, which here is $750,000. The trial court did not err in awarding Aurora $750,000 because the surety obligation required payment of the G2G Final Judgment regardless of insurance issues.

POINT VIII

THE COURT'S FINAL JUDGMENTS WERE "FINAL JUDGMENTS"

Prime claims that the April 6, 2023 Final Judgment against G2G, and the February 23, 2024 Final Judgment against Prime, are not "final" because all claims as to all parties were not resolved, and because Rule 4:42-2(a), permitting the trial court to finalize all claims as to one party, does not apply here. (Br. 36-39).

Rule 4:42-2(a) provides that, "If an order would be subject to process to enforce a judgment pursuant to *R.* 4:59 if it were final and if the trial court certifies that there is no just reason for delay of such enforcement, the trial court may direct the entry of final judgment upon fewer than all the claims as to all parties, but only in the following circumstances: (1) upon a complete adjudication of a separate claim; or (2) upon complete adjudication of all the rights and liabilities asserted in the

litigation as to any party; or (3) where a partial summary judgment or other order for payment of part of a claim is awarded."

The court in *Janicky v Point Bay Fuel, Inc*., 396 N.J. Super. 545, 550 (App. Div. 2007) stated, "An order may be certified as final under Rule 4:42-2 only if it satisfies two preconditions: first, it must fall within one of the three numbered subparts of the rule, and second, it must be "subject to process to enforce a judgment pursuant to *R.* 4:59 if it were final[.]" Here, the trial court's orders satisfy all of the prerequisites of finality.

The April 6, 2023 Final Judgment against G2G required G2G to pay treble the amount of $475,623.87 for environmental restoration costs incurred and to be incurred, $75,000 as a penalty, and to reimburse Aurora its attorney's fees and costs within 180-days of the order. (PPCIa369-71).

This order complied with Rule 4:42-2(a) because (1) the trial court completely adjudicated the claims against G2G regarding its ERA liability under the Spill Act, Counts 1 and 2 of the Second Amended Complaint, which were all the counts alleged against G2G; (2) the trial court completely adjudicated all the rights and liabilities asserted in the litigation as to G2G (Counts 1 and 2); and (3) the trial court awarded payment to Aurora as part of a summary judgment motion. The order is also enforceable under Rule 4:59 because it is final and for a sum certain subject to a

Writ of Execution. *Newstead Bldrs., Inc. v. First Merch. Nat'l Bank*, 146 N.J. Super. 295 (App. Div. 1977).

Regarding the court's "certification" of finality of this order against G2G, the court addressed and dismissed each of Prime's challenges to the April 6, 2023 Final Judgment; that is, the allegation that issues of fact needed to be addressed (i.e., whether Aurora had berms, whether the bunker oil was hazardous, whether Aurora should be jointly liable); and that Prime needed more discovery, and the trial court found all unpersuasive. (1T36:22-25). The court then concluded, "it is clear in this case that G2G is the responsible party in this matter and is the cause of the spill and any further discovery would not change the fact that G2G is a responsible party and is responsible. So, accordingly, the motion for [summary judgment] on reconsideration is granted on the merits against G2G because G2G is the responsible party." (1T39:11-16). The trial court made a clear certification of finality.

On reconsideration of this motion, the trial court stated, "no new facts have been uncovered which would warrant either this motion for reconsideration or the prior motion for [summary judgment]. In the original motion for summary judgment, the Court considered all evidence. There is no evidence submitted by Prime because Prime conducted no discovery. The court considered the verified complaint, and the verified complaint was competent evidence for the court to

consider. And therefore, Prime's motion for reconsideration is denied." (1T27:10-15). This too is a clear certification of finality.

The February 23, 2024 Final Judgment against Prime required Prime to pay $750,000 to Aurora within 30 days of the date of the order. (PPCIa447-48). This order complied with Rule 4:42-2(a) because (1) the trial court completely adjudicated the MCS-90 surety claim that Prime invited Aurora to adjudicate as a named "interested party;" (2) the trial court completely adjudicated all the rights and liabilities asserted in the litigation as to the MSC-90 surety claim; and (3) the trial court awarded payment to Aurora as part of a summary judgment motion. The order is also enforceable under Rule 4:59 because it is final and for a sum certain subject to a Writ of Execution. *Newstead Bldrs., Inc. (supra.).*

Regarding the court's "certification" of finality of this order against Prime, the court addressed Prime's issues and found that the Final Judgment against G2G is a "final judgment;" Aurora does not bear responsibility for the Incident; the interstate/intrastate travel issue is a non-issue in the MCS-90 analysis; and the MCS-90 endorsement covers punitive damages. (1T30:2-37:11).

The court noted that Prime's no coverage/no defense strategy backfired, and that Prime did not sue Aurora to raise any of the defenses it was trying to raise late in the game after discovery ended. Id. "Prime's argument that the final judgment against G2G is not final has no merit. The judgment against G2G was a final

judgment because all the issues among all the defendants have been resolved. Aurora sued G2G for Spill Act violations, as permitted by the Environmental Rights Act. The court awarded Aurora summary judgment against G2G for these claims. The only other defendant was Beacon Logistics. They never answered the complaint and suffered default, pursuant to Rule 4:43-1. Aurora's complaint is fully resolved. Prime did not raise this non-finality argument when it sought to have this court reconsider the G2G final judgment because it was a nonissue then and it is a non-issue now because the final judgment is a final judgment." (1T36:7-37:11).

The court further stated that, "by abandoning its defense to G2G, Prime has made the business decision to recover its costs directly from G2G and its principal. Aurora in this case was left to clean up the oil spill that G2G caused and has been doing so since the oil spill occurred in this matter. And so, for the foregoing reasons, Aurora is granted summary judgment against Prime, pursuant to the MCS-90 surety endorsement for $750,000."

Prime then sought reconsideration of this order. The court stated, "the court's decision is, the court did not make an error entering the final judgment. It was the final judgment *against Prime* and there is no basis to reconsider this decision." [Emphasis added]. (PPCIa459-60). The trial court made a clear certification of finality of this order.

CONCLUSION

For all of the reasons set forth herein, the Trial Court did not commit error. Respondent respectfully requests that the Court deny Appellant's Appeal in its entirety.

Respectfully submitted,

MEYNER AND LANDIS LLP
Attorneys for Plaintiff-Respondent

By: Albert I. Telsey
Albert I. Telsey, Esq.

Dated: October 14, 2024

KENNEDYS CMK LLP
David M. Kupfer, Esq. – Attorney ID No.: 031561981
120 Mountain View Boulevard, P.O. Box 650
Basking Ridge, New Jersey 07920 – T: (908) 848-6300
David.Kupfer@Kennedyslaw.com
Attorneys for Third-Party Defendant/Appellant,
Prime Property & Casualty Insurance, Inc.

AURORA TERMINALS CORPORATION Plaintiff/Respondent, v. G2G TRANSPORT, LLC and BEACON LOGISTICS, LLC Defendants, and G2G TRANSPORT, LLC Defendant, Third-Party Plaintiff, v. PRIME PROPERTY & CASUALTY INSURANCE, INC., Third-Party Defendant/Appellant.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO. A-003283-23 On appeal from: TRIAL COURT DOCKET NO. ESX-L-7723-21 Hon. Jeffrey B. Beacham, JSC Civil Action Attorney of Record: David M. Kupfer, Esq. (031561981) On the Brief: James T. Byrnes, Esq. (016742008) Daniel Algieri, Esq. (176312015) Dylan Greenspan, Esq. (467292024) Submitted: November 8, 2024

REPLY BRIEF OF APPELLANT PRIME PROPERTY & CASUALTY INSURANCE, INC.

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TABLE OF JUDGMENTS, ORDERS AND RULINGS APPEALED

(See Table of Judgments, Orders and Rulings Appealed in Prime's Brief of August 29, 2024, incorporated here by reference.)

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PROCEDURAL HISTORY

Appellant/Third-Party Defendant, Prime Property & Casualty Insurance, Inc. ("Prime"), incorporates the Procedural History in its brief of August 29, 2024. Prime briefly responds to correct certain statements within the Procedural History section of Respondent/Plaintiff Aurora Terminal Corporation's ("Aurora") appeal brief:

1. Aurora misstates that Prime filed a declaratory judgment action in federal court on November 16, 2021 (Pb23) and separately on November 16, 2022 (Pb4). Both dates are incorrect. Prime filed a declaratory judgment action in federal court on February 16, 2022 (021Da).

2. Aurora states that it assumes that Prime included Aurora as an "interested party" because of "Aurora's expected MCS-90 surety claim." Aurora was named as an "interested party" in Prime's declaratory judgment action as an "interested party" because of Aurora's claims against Prime's insured, G2G, which might or might not be covered under the Prime policy.

STATEMENT OF FACTS

Prime incorporates the Statement of Facts that appear in its August 29, 2024 brief. As discussed in Prime's appeal brief and below, several "facts" averred by Aurora are incorrect or disputed.

LEGAL ARGUMENT

POINT I

GENUINE ISSUES OF MATERIAL FACT PRECLUDED SUMMARY JUDGMENT

A. Lack of Any Meaningful Opportunity for Discovery.

Point I of Aurora's appeal brief seeks to cast much blame upon Prime for what occurred in the trial court below – particularly as it relates to Prime's lack of opportunity to engage in meaningful discovery. Aurora ignores the procedural status of the case by the time that Prime was made a party and also misrepresents critical facts.

By the date on which Prime was made a party to the Aurora v. G2G litigation, the discovery end date had already passed (PPCIa355), as a consequence of the mis-designation of the case as a Track I case (150 days discovery), rather than as a Track IV environmental case (PPCIa043).

G2G attempted to remedy that error by filing a motion to change the track designation (PPCIa350-56), but withdrew such motion (without notice to Prime) on account of what appears to have been a "side deal" between G2G and Aurora – whereby Aurora would consent to an order allowing counsel for G2G to withdraw and, in consideration, G2G would withdraw its motion to change the track assignment (PPCIa362-65).

Contrary to Aurora's representation that Prime never sought to extend discovery (Pb24), Prime later moved to change the track designation to Track IV ("environmental/environmental coverage litigation") (*see* PPCIa421-25). Prime's motion was denied, such that it was unfairly denied discovery to prepare its defenses and to prosecute its declaratory judgment counterclaim. That was not surprising, given that the trial court, without the benefit of a developed factual record, had already made up its mind that "G2G is the responsible party" and even stated that "any further discovery would not change [that] fact" (1T at 13:11-15). Any motion by Prime to extend discovery or change the track assignment would have been denied, regardless of when such motion had been filed. Aurora's attempt to cast Prime as the villain here is both false and disingenuous.

Aurora also argues that because Prime had filed a declaratory judgment action in federal court it must have been "well aware of [the Aurora lawsuit] the moment it was filed" (Pb23). Aurora's argument misstates the facts: Prime did not, as Aurora claims, file a declaratory judgment action in federal court in November 2021, "a month after Aurora filed this suit[.]" Prime filed suit in federal court on February 16, 2022 (020Da) – nearly three months after Aurora had obtained its first "Final Judgment [sic] by Default" against G2G (PPCIa076-079). In fact, Prime argued in the federal court action that it had been prejudiced,

both by G2G's failure to have notified Prime about the filing of the Aurora lawsuit and by having allowed a final judgment by default to have been entered against it (012Da-013Da).

B. The Trial Court Erred in Relying Solely on Allegations Contained in Aurora's Verified Complaint as its Basis for Summary Judgment.

While Aurora filed the underlying action upon a Verified Complaint, the facts alleged therein were never tested in discovery. Nevertheless, the trial court seemed to believe that every fact alleged in Aurora's Verified Complaint were *ipso facto* true and could not be challenged or controverted.

This court has stated that "issues of credibility must be left to the finder of fact" and that this applies "even where a witness's testimony is uncontradicted [citation omitted], as long as, when considering the testimony in the context of the record, persons 'of reason and fairness may entertain differing views as to [its] truth.'" Akhtar v. JDN Properties at Florham Park, LLC, 439 N.J. Super. 391, 399 (App. Div. 2015). "Thus, a trier of fact 'is free to weigh the evidence and to reject the testimony of a witness, even though not directly contradicted, when it . . . contains inherent probabilities or contradictions which alone or in connection with other circumstances in evidence excite suspicion as to its truth.'" D'Amato by McPherson v. D'Amato, 305 N.J. Super. 109, 115 (App. Div. 1997) (alterations in original); see also Panko v. Grimes, 40 N.J. Super. 588, 594 (App. Div. 1956) ("Where the particular circumstances reasonably give rise to

conflicting inferences as to testimonial trustworthiness, the evidence is not conclusive merely because it is uncontradicted by direct testimony").

Among the genuine issues of material fact which should have precluded entry of summary judgment against G2G (*see* Db17-21), Aurora averred in its Verified Complaint that: (1) it was unaware as to the oil content of G2G's trailer; (2) had it been aware, it would have prohibited the trailer on the property; and (3) even though oil was in fact being stored on Aurora's property (and despite evidence of prior spills and contamination), "Aurora is not in the business of providing space for trailers carrying bunker oil or hazardous substances and is not a used oil transfer facility" (PPCIa055).

It is respectfully submitted that such statements are entirely self-serving and were put forth solely to deflect Aurora's own liability for the spill by having allowed trailers containing waste oil to be parked/staged on its property without having installed the oil discharge containment system required by the Spill Act and federal regulation. See Marsh v. New Jersey Spill Compensation Fund and Environmental Claims Admin., 286 N.J.Super. 620, 630 (App. Div. 1996) ("'A party even *remotely responsible* for causing contamination will be deemed a responsible party under the [Spill]Act.' (emphasis added)"); State, Dept. of Environmental Protection v. Ventron Corp., 94 N.J. 473, 502 (1983) ("The subsequent acquisition of land on which hazardous substances have been

dumped may be insufficient to hold the owner responsible. *Ownership or control over the property at the time of the discharge, however, will suffice*") (emphasis added). Of course, Aurora, as might any property owner when a discharge occurs on its property, denied knowledge of the presence of contaminants and went so far as to claim that, had it known that G2G was parking trailers containing waste oil on its property, it would have stopped G2G from doing so.

Those self-serving statements were disputed issues of fact, because: (1) G2G had pled in its answer that "Aurora specifically permitted defendant G2G to store bunker oil on the property" (PPCIa124); (2) G2G did in fact store trailers containing oil on the property; and (3) there was evidence of at least one historical spill event at the property (there was evidence an unrelated gasoline discharge occurred before the oil spill) (PPCIa429).

Thus, despite Aurora's attempts to deny any such knowledge in order to avoid potential liability under the Spill Act, the evidence suggests otherwise and Prime has never been afforded the opportunity to depose an Aurora witness, so as to challenge these convenient statements through the crucible of cross-examination. Furthermore, Aurora's claimed lack of knowledge that waste oil was being stored on its property is irrelevant: "Used oil transfer facilities are transportation related facilities including . . . parking areas . . . where shipments of used oil are

held for more than 24 hours during the normal course of operation[.]" 40 CFR §279.45. G2G was in fact storing used oil at Aurora's property (with Aurora's knowledge and permission, according to G2G) such that the Aurora property was, as a matter of law, a "used oil transfer facility". As set forth in Prime's appeal brief (Db18-19), among other requirements, Aurora was required to have a containment system to prevent widespread spills (as occurred in this matter). This property did not have any such containment system, such that the oil spill from G2G's trailer discharged onto the ground and the adjoining river. Aurora is therefore liable for the costs of remediating the discharge.

Here, Aurora not only failed to install a system that would have contained the spill, but claims that G2G is solely responsible for clean-up costs, despite Aurora's having failed to comply with a federal regulation that would have avoided the very damages it seeks to impose upon G2G. All of these factual issues should have precluded summary judgment for Aurora against G2G, for all of its claimed remediation expenses and damages; at a minimum, there should have been discovery to allow an equitable allocation of fault (Db22-23).

C. <u>G2G Was Never Found to Have Been "Negligent".</u>

Aurora claims in its brief that "[s]trict liability includes negligence" and that because the trial court accepted Aurora's Verified Complaint as competent evidence, the trial court similarly accepted Aurora's allegations of negligence

against G2G. As support for this contention, Aurora relies on paragraph 2 of its Verified Complaint, in which it alleged that "[the G2G driver] negligently scraped against a sharp object" as well as an alleged admission of liability by G2G where it stated that "one of our drivers . . . had an accident with our chassis parked next to the container."

First, Aurora is incorrect that "[s]trict liability includes negligence": strict liability is liability by operation of law, without regard to whether a party breached a duty of care. A party can be liable under the Spill Act simply based upon its status (as purchaser of contaminated property, as a discharger, etc.). Housing Authority of City of New Brunswick v. Suydam Investors, LLC, 177 N.J. 2, 18 (N.J. 2003) ("The Spill Act imposes strict liability, 'jointly and severally, without regard to fault,' on 'any person who has discharged, . . . or is in any way responsible' for the discharge of any hazardous substance"); McCay Development Co., Inc. v. Jenny Oil Corp., 1996 WL 592654, *7 (N.J. App. Div., August 8, 1996) ("[N]ot only does the Spill Act not incorporate a common-law negligence standard of care, but it provides for strict liability without regard to fault. . . . Thus, a finding that [Defendant] violated the Spill Act would not require a conclusion that it was negligent") (PPCIra5-6). A conclusory statement in a pleading that a party acted "negligently," verified or not, is not "competent evidence" that party was negligent as a matter of law.

Secondly, G2G expressly denied the allegations of paragraph 2 of Aurora's Verified Complaint (that it had been negligent) in its Answer. PPCIa124. Thirdly, the statement by G2G in an email shortly after the accident that "one of our drivers . . . *had an accident* with our chassis parked next to the container[,]" (emphasis by Aurora) does not, in any reasonable view, amount to an admission of "negligence" by G2G. It was simply a statement that G2G's driver had been involved in "an accident" and did not constitute an admission of tortious fault.

Quite simply, Aurora's argument does not respond to (because it cannot rebut) Prime's point that Aurora's complaint against G2G did not state a cause of action for negligence, such that the trial court did not find and could not have found that as a matter of undisputed fact and as a matter of law, G2G was liable for negligence; that cause of action was never pled by Aurora (PPCIa062-71). As set out in Prime's brief (Db26-27), Prime would only be liable under the MCS-90 endorsement to pay "a final judgment recovered against the insured for public liability resulting from negligence in the operation, maintenance or use of motor vehicles subject to the financial responsibility requirements of Section 29 and 30 of the Motor Carrier Act of 1980" (PPCIa183). Aurora does not and cannot dispute that no "final judgment [was] recovered against [G2G] for public liability resulting from negligence in the operation, maintenance or use of motor vehicles," such that Aurora should not have been granted summary judgment against Prime under the MCS-90 endorsement.

The April 6, 2023 "Final Judgment" against G2G found G2G liable only under the Spill Act (PPCIa369-71), under which negligence is not an element of liability. Aurora's allegation in its Verified Complaint that G2G was negligent (which allegation G2G denied) cannot "paper over" that glaring omission.

POINT II

PRIME WAS NEITHER CONFLICTED NOR PROHIBITED FROM CHALLENGING THE CLAIMS BROUGHT BY AURORA AGAINST G2G

Although the trial court did not base its ruling on February 23, 2024 on this issue (and, therefore, we question its relevance here), Aurora contends in its brief that, once G2G's hired counsel withdrew from G2G's defense (with Aurora's sole consent), a purported conflict of interest prevented Prime from contesting G2G's liability with respect to Aurora's claims against G2G and in support of that contention refers this Court to Opinion 502, 110 N.J.L.J. 349 (September 23, 1982).

To be absolutely clear, Opinion 502 concludes that "where there is a question of coverage at inception of the liability case, the attorney hired by the carrier to file defensive pleadings on behalf of the insured ought to promptly advise the insured to retain his own personal attorney for all purposes, but in no case ought to appear for the carrier against the insured in a Declaratory Judgment case brought to resolve the question of coverage." Restated – the lawyer

assigned by the insurance company to defend the insured in the liability action should advise the insured to retain its own personal counsel and the lawyer should not appear as counsel for the insurance company in the declaratory judgment action against the insured. None of these circumstances are at issue here, nor does the ethics opinion seek to prohibit the insurance company, where the insurer may also be a party to the underlying lawsuit (as occurred here), from asserting and arguing defenses which seek to avoid any underlying liability against the insured. As a matter of common sense, Prime and G2G are united in their defense against Aurora's claims and nothing in the subject ethics opinion addresses such an issue.

No conflict is at issue in the present situation (the insured and insurer's interests are in fact aligned) and, aside from its mis-reliance on Opinion 502, Aurora has not cited any authority prohibiting Prime from defending the insured's interests.

POINT III

AURORA IS NOT ENTITLED TO RECOVER THE PORTION OF THE JUDGMENT AGAINST G2G ATTRIBUTABLE TO TREBLE DAMAGES UNDER THE MCS-90 ENDORSEMENT

Aurora's argument that the MCS-90 endorsement is a surety obligation devoid of any restrictions or limitations (there is "nothing in the MCS-90 surety endorsement that precludes payment of a treble damage award," (Pb34-36)) ignores

the unambiguous provisions of the endorsement, which is a form that federal law requires an insurer to use. The MCS-90 endorsement requires Prime to pay only for final judgments for "public liability," defined as liability for "bodily injury," "property damage" or "environmental restoration." Each phrase is defined in the endorsement (PPCIa183), and none obligate a carrier to pay a judgment for treble, punitive or exemplary damages.

Further, in an attempt to avoid the application of New Jersey's public policy prohibition against punitive damages, Aurora makes the novel argument that the MCS-90 endorsement is a stand-alone surety obligation that is somehow wholly divorced from any such insurance-related public policy prohibitions. While no New Jersey court has yet addressed this issue, a treatise discussing this issue, as well as underlying case law from around the United States discussed therein, recognizes that the "majority rule is that the surety is not liable to pay punitive damages." *See* 1 Punitive Damages: Law and Prac. 2d § 7:20 (2024 ed.), John J. Kirchner & Christine M. Wiseman (PPCIra10). This treatise also recognized that "public policy issues similar to those dealt with in insurance cases arise when punitive damages are sought." Thus, whether an insurance policy or a surety agreement, it is a distinction without a difference in the context of the public policy prohibiting coverage for punitive damages.

POINT IV

IT WAS ERROR FOR THE TRIAL COURT TO APPLY THE MCS-90 ENDORSEMENT WITHOUT FIRST ADJUDICATING COVERAGE

While Aurora appears to concede that an MCS-90 endorsement is inapplicable if the insurance policy affords coverage for the loss, Aurora argues that the requirement that the policy "otherwise would provide no coverage" may be satisfied where the insurer simply takes a "no coverage, no defense position" – even where the issue of potential coverage under the policy still remains in dispute (as was the case here). We are unaware of any decision in relation to an MCS-90 endorsement where a court has found that an open dispute as to coverage is sufficient to satisfy the requirement that the policy does not actually afford coverage for the loss.

In support of the requirement that the disputed coverage issue must be resolved first, Prime cited not only to the QBE decision, but also to two treatises on this topic. (PPCIa480-94). This requirement makes logical sense because by "leap frogging" directly to the MCS-90 endorsement – to the ignorance of the disputed coverage issue(s) – there will be potential prejudice to the policyholder.

POINT V

AURORA DID NOT ASSERT ANY CLAIM AGAINST PRIME

Aurora never pled **any** cause of action against Prime, let alone for judgment pursuant to the MCS-90 endorsement. Aurora attempts to "explain-away" this fatal omission by arguing that it had standing to sue Prime for a money judgment pursuant

to the MCS-90 endorsement. Standing to sue Prime is not the issue: the issue is that Aurora does not (cannot) dispute that it never sued Prime for a money judgment; in fact, Aurora never so much as answered Prime's counterclaim for declaratory judgment! Aurora appears to claim that Prime, by having sued Aurora as an "interested party" (as it was required to do by N.J.S. 2A:16-56, Parties Interested as Parties to Proceeding), "invited" Aurora to seek a money judgment against it; that Prime, by having named Aurora as an "interested party," should have intuited that Aurora would seek a money judgment against it. Such argument turns the rules of pleading practice and law of due process on their heads. Aurora's having been a party "interested in" Prime's counterclaim for declaratory judgment did not excuse Aurora from having had to plead an affirmative claim against Prime for a money judgment. See R. 4:5-2, Claim for Relief ("...a pleading which sets forth a claim for relief...shall contain a statement of the facts on which the claim is based, showing that the pleader is entitled to relief, and a demand for judgment for the relief to which the pleader claims entitlement"). It is axiomatic that an "interested party" cannot recover a judgment on a claim it has never asserted in a pleading.

POINT VI

THE TRIAL COURT NEVER CERTIFIED ANY JUDGMENT AS "FINAL"

Aurora recognizes that R. 4:42-2 requires the trial court to certify "that there is no just reason for delay" in order for an interlocutory order to be treated

as "final," (Pb36) but argues over the course of 4 pages that the trial court implicitly did so. (Pb36-40).

Whether the Order, in hindsight, could have been certified as final is of no moment; the trial court was required to analyze, hear argument, find as a matter of law and certify "that there is no just reason for delay." See D'Oliviera v. Micol, 321 N.J. Super. 637, 641 (App. Div. 1999)("[An interlocutory Order] is consequently ordinarily appealable only by leave to appeal granted pursuant to R. 2:5-6, unless eligible for certification as final pursuant to R. 4:42-2 ***and so certified***")(emphasis added). The trial court never certified its April 6, 2023 or February 23, 2024 orders as "final judgments," nor did it consider whether and find that there was "no just cause for delay."

CONCLUSION

Prime respectfully requests that this Court: (1) reverse and vacate the trial court's Orders for summary judgment of April 6, 2023 against G2G and February 23, 2024 against Prime; and (2) remand this matter to the trial court for further proceedings.

Respectfully submitted,

KENNEDYS CMK LLP
Attorney for Third-Party Defendant-Appellant
Prime Property & Casualty Inc.

/s/ David M. Kupfer
DAVID M. KUPFER, ESQ.