SUPREME COURT OF NEW JERSEY

DIONICIO RODRIGUEZ, Plaintiff, v. SHELBOURNE SPRING, LLC, GREEN POWER DEVELOPERS, LLC, UNITY CONSTRUCTION, SIRE ELECTRIC, LLC, ROCCO A. DIMICHINO. SUNDANCE ELECTRICAL CO., LLC, SF JOHNSON ELECTRIC, INC., FACILITY SOLUTIONS GROUP, JOHNSON CONTROLS SECURITY SOLUTIONS, LLC, MANAGED BUSINESS COMMUNICATIONS, INC., Defendants, -and- SIR ELECTRIC, LLC, Defendant/Third-Party Plaintiff,-Appellant v. HARTFORD UNDERWRITERS INSURANCE COMPANY, Third-Party Defendant-Appellee.	DOCKET No.: _____ On Motion for Leave to Appeal From an Interlocutory Order of the Superior Court of New Jersey, Appellate Division (Final Order as to Third-Party Complaint) Appellate Division Docket No.: A-2079-22 Sat below: Sumners, Rose and Smith, JJ.A.D.

BRIEF ON BEHALF OF RESPONDENT HARTFORD UNDERWRITERS INSURANCE COMPANY IN OPPOSITION TO APPELLANT SIR ELECTRIC, LLC'S MOTION FOR LEAVE TO APPEAL

WILSON, ELSER, MOSKOWITZ, EDELMAN & DICKER LLP
Katherine E. Tammaro, Esq. (Atty. ID # 0010102005)
7 Giralda Farms, Suites 100/110
Madison, New Jersey 07940
Tel: (973) 624-0800 / Fax: (973) 624-0808
Katherine.Tammaro@wilsonelser.com
Attorneys for Respondent, Hartford Underwriters Insurance Company

TABLE OF CONTENTS

Page

PRELIMINARY STATEMENT 1

COUNTER-STATEMENT OF FACTS AND PROCEDURAL HISTORY 4

LEGAL ARGUMENT 8

I. THERE WAS NO ERROR BECAUSE THE ORIGINAL COMPLAINT DOES NOT SEEK WORKERS COMPENSATION BENEFITS TO TRIGGER COVERAGE UNDER PART ONE WORKERS COMPENSATION OF THE HARTFORD POLICY 8

II. THERE WAS NO ERROR BECAUSE THE EMPLOYERS LIABILITY EII EXCLUSION CLEARLY AND UNAMBIGUOUSLY APPLIES TO BAR COVERAGE UNDER PART TWO EMPLOYERS LIABILITY OF THE HARTFORD POLICY 14

III. THERE IS NO ERROR BECAUSE THE TRIAL COURT CORRECTLY DENIED SIR'S MOTION TO AMEND 17

CONCLUSION 24

TABLE OF AUTHORITIES

Page(s)

Cases

Allstate Ins. Co. v. Malec,
104 N.J. 1, 514 A.2d 832 (1986) 22

Banco Popular N. Am. v. Gandi,
184 N.J. 161 (2005) 17

Charles Beseler Co. v. O'Gorman & Young, Inc.,
380 N.J.Super. 193 (App.Div. 2005),
aff'd 188 N.J. 542 (2006)..... 3, 12, 14, 15, 16, 18, 19, 22

Danek v. Hommer,
28 N.J. Super. 68 (App. Div. 1953).....14

In re Estate of Folcher,
224 N.J. 496 (2016) 13

F.S. v. L.D,
362 N.J. Super. 161, 827 A.2d 335 (App. Div. 2003).....22

Gov't Emps.' Ins. Co. v. Daniels,
180 N.J. Super. 227 (App. Div. 1981).....18

Harleysville Ins. Co. v. Garitta,
170 N.J. 223, 785 A.2d 913 (2001) 22

Merchs. Indem. Corp. of N.Y. v. Eggleston,
68 N.J. Super. 235, 172 A.2d 206 (App.Div.1961),
aff'd, 37 N.J. 114, 179 A.2d 505 (1962).....20

Miller v. Miller,
97 N.J. 154, 478 A.2d 351 (1984) 20

New Jersey Manufacturers Ins. Co. v. Delta Plastics Corp.,
380 N.J. Super. 532 (App. Div. 2005),
aff'd 188 N.J. 582 (2006)..... 3, 12, 14, 15, 16, 18, 19, 22

Nostrame v. Santiago,
213 N.J. 109 (2013) 17

Printing Mart-Morristown v. Sharp Electronics Corp.,
116 N.J. 739 (1989) 17

Rodriguez-Ortiz v. Interstate Racking & Shelving, II, Inc.,
A-1614-19, 2021 N.J. Super Unpub. LEXIS 2072
(N.J. Super. Ct. App. Div. Sept. 3, 2021) .. 2, 3, 10, 11, 12, 13, 14, 15, 16, 18, 22

Schmidt v. Smith,
294 N.J. Super. 569, 684 A.2d 66 (App.Div. 1996),
aff'd 155 N.J. 44 (1998).....14, 20, 21, 22

Variety Farms, Inc. v .New Jersey Mfrs. Ins. Co., 172 N.J.Super. 10
(App.Div. 1980).....14, 21

W. Jersey Title & Guar. Co. v. Indus. Trust Co.,
27 N.J. 144, 141 A.2d 782 (1958) 20

Statutes

N.J.S.A. § 34:6A 4

N.J.S.A. § 34:15-7.....21

N.J.S.A. § 34:15-8.....2, 7, 15, 16

N.J.S.A. § 34:15-9.....7

N.J.S.A. § 34:15-49(a) 9, 11

N.J.S.A. § 34:15-90.1.....19

N.J.S.A. § 34:15-90.2.....19

Rules

N.J. Ct. R. 2:11-3(e)(1)(E).....13

N.J. Ct. R. 4:6-2(e).....17

PRELIMINARY STATEMENT

SIR Electric, LLC's ("SIR") motion for leave to appeal the per curiam decision of the three-judge panel of the Appellate Division should be denied, as the Appellate Division decision is clear, consistent with all prior case law and statutory and regulatory guidance, and entirely correct.

This is an insurance coverage dispute by which SIR contends that it is entitled to coverage under the Workers Compensation and Employers Liability Policy issued by Respondent, Hartford Underwriters Insurance Company ("Hartford") to SIR as the insured (the "Hartford Policy"), for the tort allegations and explicit Laidlow claim made against it by its own employee, Dionicio Rodriguez, in the complaint filed against SIR and others in the Superior Court ("Original Complaint").

The Hartford Policy provides two types of coverage, neither of which applies to the claims alleged against SIR in the Original Complaint. The Hartford Policy's Part One Workers Compensation Insurance provides a defense of claims or suits expressly seeking benefits required by the workers compensation law of the state of New Jersey. The burden is on SIR to establish that the tort allegations in the Original Complaint set forth an actual claim for workers' compensation benefits to qualify for coverage under Part One. The Original Complaint simply does not seek workers compensation benefits – and SIR admits that Mr. Rodriguez submitted a separate workers compensation claim through the Workers Compensation Board, and

Hartford has paid and is paying Mr. Rodriguez's workers compensation benefits under Part One of the Hartford Policy. SIR's inability to meet its burden to demonstrate coverage under Part One of the Hartford Policy does not constitute an error by the Appellate Division.

Coverage under the Hartford Policy's Part Two Employers Liability Insurance coverage is excluded by the "NEW JERSEY PART TWO EMPLOYERS LIABILITY ENDORSEMENT WC 20 03 06 (B)" (the "Employers Liability EII Exclusion"), which explicitly bars coverage for "any and all intentional wrongs within the exception allowed by N.J.S.A. 34:15-8 including but not limited to, bodily injury caused or aggravated by an intentional wrong committed by you or your employees, or bodily injury resulting from an act or omission by you or your employees, which is substantially certain to result in injury." Since these are the very allegations made by Mr. Rodriguez against SIR in the Original Complaint, the Employers Liability EII Exclusion wholly applies to preclude coverage to SIR for the Original Complaint under Part Two of the Hartford Policy.

Both the Appellate Division decision and the unpublished opinion of Rodriguez-Ortiz v. Interstate Racking & Shelving, II, Inc., A-1614-19, 2021 N.J. Super Unpub. LEXIS 2072 (N.J. Super. Ct. App. Div. Sept. 3, 2021), found the Employers Liability EII Exclusion to be clear and unambiguous, and applicable to

bar coverage for Laidlow claims under the Part Two Employers Liability Insurance coverage, and are in complete accord in that regard.

Further, the Appellate Division in both the decision in this case and in Rodriguez-Ortiz, followed the guidance set forth in the companion cases of New Jersey Manufacturers Ins. Co. v. Delta Plastics Corp., 380 N.J. Super. 532 (App. Div. 2005), aff'd 188 N.J. 582 (2006), and Charles Beseler Co. v. O'Gorman & Young, Inc., 188 N.J. 542, 548 (2006), which anticipated the very language of the Employers Liability EII Exclusion. The Appellate Division also acknowledged that the exact language of the Employers Liability EII Exclusion, the language suggested by Delta Plastics and Beseler, was submitted to, considered and approved by the Commissioner of Banking and Insurance, just as the legislature instructed in the Workers Compensation Statute.

As such, the legality of the Employers Liability EII Exclusion is not a novel legal question as SIR contends. In fact, although the Appellate Division acknowledged that SIR failed to properly raise the public policy and legality issue with the trial court, and the record reflects that SIR waived this argument, the Appellate Division nevertheless considered the argument, and found it meritless.

SIR simply disagrees with the Appellate Division's decision, but there is no conflict between the Appellate Division's decision and existing case law. The Court should therefore deny SIR's Motion For Leave To Appeal.

COUNTER-STATEMENT OF FACTS AND PROCEDURAL HISTORY

Plaintiff Dionicio Rodriguez filed the Original Complaint in this matter on February 28, 2022. (Pa23)[1] The Original Complaint names SIR as a defendant, as well as several other defendants who are not party to this appeal. (Pa23)

Mr. Rodriguez's Original Complaint alleges that SIR provided electrical services for a worksite located at 41 Spring Street, New Providence, New Jersey, and that SIR was his employer at the time of the alleged accident that is the subject of this lawsuit. (Pa24-Pa25) The Original Complaint alleges that on or around May 24, 2020, Mr. Rodriguez, during the course of his employment with SIR, was electrocuted, burned and sustained severe and permanent injuries from an electrical spark and explosion. (Pa27) The Original Complaint makes a distinction between allegations against "Defendant SIR Electric" and allegations against the other non-employer defendants, and alleged against SIR specifically and separately:

> 53. Plaintiff's resulting injuries and the context surrounding them are more than a fact of life of electrical employment and are plainly beyond anything the legislature could have contemplated as entitling the employees to recover only under the Compensation Act.
>
> 54. Defendant Sir Electric's acts violated the New Jersey Worker Health and Safety Act, N.J.S.A. 34:6A, et. seq.

[1] "Pa__" refers to SIR's Appellate Division appendix. "Da__" refers to Hartford's Appellate Division appendix. "MLAa__" refers to the appendix to SIR's motion for leave.

> 55. Sir Electric's reckless indifference for Plaintiff's safety and well-being rise to the level of a Laidlow claim piercing the Workers Compensation Act bar.

(Pa27-Pa30) There are no allegations of negligence specifically alleged against SIR. (Pa28-Pa29)

SIR filed the third-party complaint in this matter on July 15, 2021. (Pa44) The third-party complaint alleges that Hartford improperly denied coverage to SIR and that Hartford improperly refused to defend and indemnify SIR in connection with the Original Complaint. (Pa45)

Tellingly, SIR failed to cite any policy language at issue in its Motion For Leave To Appeal. The Hartford Policy is a Workers Compensation and Employers Liability Policy that contains Part One Workers Compensation Insurance (Pa88) and Part Two Employers Liability Insurance (Pa89).

Part One Workers Compensation Insurance states in part:

A. How This Insurance Applies

> This workers compensation insurance applies to bodily injury by accident or bodily injury by disease. Bodily injury includes resulting death.
>
> 1. Bodily injury by accident must occur during the policy period.
>
> 2. Bodily injury by disease must be caused or aggravated by the conditions of your employment. The employee's last day of last exposure to the conditions causing or aggravating such bodily injury by disease must occur during the policy period.

B. When We Pay

We will pay promptly when due the benefits required of you by the workers compensation law.

C. We Will Defend

We have the right and duty to defend at our expense any claim, proceeding or suit against you for benefits payable by this insurance. We have the right to investigate and settle these claims, proceedings or suits.

We have no duty to defend a claim, proceeding or suit that is not covered by this insurance.

(Pa88)

Part Two Employers Liability Insurance states in part:

A. How This Insurance Applies

This employers liability insurance applies to bodily injury by accident or bodily injury by disease. Bodily injury includes resulting death.

* * *

B. We Will Pay

We will pay all sums that you legally must pay as damages because of bodily injury is covered by this Employers Liability Insurance.

* * *

C. Exclusions

…

5. Bodily injury intentionally caused or aggravated by you;

(Pa89 – Pa90)

Notably, the Hartford Policy also contains the NEW JERSEY PART TWO EMPLOYERS LIABILITY ENDORSEMENT, form WC 29 03 06 (B), which states in part:

> With respect to Exclusion C5, this insurance does not cover any and all intentional wrongs within the exception allowed by N.J.S.A. 34:15-8 including but not limited to, bodily injury caused or aggravated by an intentional wrong committed by you or your employees, or bodily injury resulting from an act or omission by you or your employees, which is substantially certain to result in injury.
>
> * * *
>
> This insurance does not provide for the payment of any common law negligence damages or other damages when the provisions of Article 2 of the New Jersey Workers Compensation Law have been rejected by you and your employee(s) as provided in N.J.S.A. 34:15-9.

(Pa101)

Hartford filed a motion to dismiss SIR's third-party complaint. (Pa71) SIR filed an opposition to Hartford's motion to dismiss and cross-motion for summary judgment. (Pa114) In its cross-motion, SIR conceded that there were no further facts to plead and affirmatively stated, "SIR respectfully submits that no material questions of fact exist with respect to SIR's claim." (Da13) In fact, SIR urged the trial court to hold an "immediate, expedited trial" of SIR's claim for coverage if its cross-motion for summary judgment were denied.

The trial court held extensive oral argument on these cross-motions. (Pa227) On November 18, 2022, two separate orders were entered by the Court: (1) an Order

for Dismissal, granting Hartford's motion and dismissing SIR's third-party complaint with prejudice (Pa1); and (2) an Order For Summary Judgment, denying SIR's cross-motion for summary judgment (Da01). The same Statement Of Reasons were attached to both Orders. (Pa3-Pa11, Da01-Da11)

SIR subsequently filed a motion for reconsideration and leave to amend. (Pa244) The trial court held oral argument (Da39) and on January 27, 2023, the trial court entered an Order denying SIR's motion, with an attached Statement of Reasons. (Pa12, Pa14)

Leave to appeal was granted by the Appellate Division (Pa337), and this appeal followed. The Appellate Division held oral argument on December 12, 2023 (MLAa2), and issued its decision on December 22, 2023. (MLAa2) The Appellate Division stated:

> After carefully reviewing the record and considering the governing legal principles and the arguments of the parties, we affirm substantially for the reasons explained in Judge Lindemann's cogent written decisions.

(MLAa3)

LEGAL ARGUMENT

I. THERE WAS NO ERROR BECAUSE THE ORIGINAL COMPLAINT DOES NOT SEEK WORKERS COMPENSATION BENEFITS TO TRIGGER COVERAGE UNDER PART ONE WORKERS COMPENSATION OF THE HARTFORD POLICY

SIR's principal argument is that Hartford has a duty to defend SIR for the

"negligence-based claims" of the Original Complaint under Part One Workers Compensation of the Hartford Policy. SIR goes so far as to claim that there has been "an abiding duty to defend negligence-based claims under the workers' compensation part of the two-part policy" under New Jersey law. SIR makes these claims without ever acknowledging the actual language of the Hartford Policy, presumably because the language itself does not support its arguments.

The Insuring Agreement of Part One provides, "[w]e will pay promptly when due the benefits required of you by the workers compensation law." (Pa 88) Part One further provides, "[w]e have the right and duty to defend at our expense any claim, proceeding or suit against you for benefits payable by this insurance" and conversely, "[w]e have no duty to defend a claim, proceeding or suit that is not covered by this insurance." (Pa88)

By its express terms, Part One provides coverage only to claims brought pursuant to the workers compensation law of the State of New Jersey, which by statute, can only be brought within the exclusive jurisdiction of the Division of Workers Compensation. See N.J.S.A. 34:15-49(a) ("The Division of Workers' Compensation shall have the exclusive original jurisdiction of all claims for workers' compensation benefits . . . ."). Here, the Original Complaint specifically alleges that Mr. Rodriguez does not seek benefits under the Workers Compensation

Act – therefore, coverage under Part One of the Hartford Policy clearly does not apply.

With no support from the language of Hartford Policy, SIR relies entirely upon Rodriguez-Ortiz for its claim that Part One covers the Original Complaint. However, SIR completely overstates Rodriguez-Ortiz's limited finding of coverage under Part One.

The court in Rodriguez-Ortiz, like the trial court in this matter, undertook a two-part analysis and separated its review of Part One Workers Compensation from Part Two Employers Liability. See 2021 N.J. Super Unpub. LEXIS 2072 at *9. While the court found that there was no coverage under Part Two, due to the application of Employers Liability EII Exclusion (discussed infra), the court only found a very limited duty to defend under Part One, based upon the specific allegations of the underlying complaint and the facts at issue. None of those allegations or facts compelling that result in Rodriguez-Ortiz are present here.

First, the underlying complaint considered in Rodriguez-Ortiz contained allegations of negligence against the insured-employer, which the court deemed to be seeking workers compensation benefits. The Rodriguez-Ortiz court then made a narrow ruling that, under Part One, the insurer, AmGuard, owed a duty to defend those negligence allegations until the allegations were dismissed and transferred to the Workers' Compensation Division where they belonged. Thereafter, the insurer

would have no further obligation to defend the underlying complaint, as the court explained:

> That is so because Rodriguez-Ortiz's negligence-based claims were for "bodily injury by accident," to which the workers' compensation insurance applied; and the policy imposed upon AmGuard a "duty to defend . . . any claim, proceeding or suit against [Interstate] for benefits payable by this [workers' compensation] insurance"; and its duty to defend only excluded "a claim, proceeding or suit that is not covered by this [workers' compensation] insurance." **In other words, AmGuard does not dispute that if an employee brings a negligence-based claim in Superior Court - whether it is instead of, or in addition to, filing a petition in the Workers' Compensation Division — the workers' compensation policy covers the cost of defending and, presumably, securing the lawsuit's dismissal and transfer to the Workers' Compensation Division. See N.J.S.A. 34:15-49(a) ("The Division of Workers' Compensation shall have the exclusive original jurisdiction of all claims for workers' compensation benefits . . . .").**

Rodriguez-Ortiz, 2021 N.J. Super Unpub. LEXIS 2072, at *13-14 (emphasis added).

Second, AmGuard, for unstated reasons, conceded that the negligence allegations of the underlying complaint sought workers compensation benefits. Id. at *13. The Rodriguez-Ortiz court acknowledged AmGuard's concession in its decision. Id.

To be clear, Harford makes no such concessions. In stark contrast to the underlying complaint considered in Rodriguez-Ortiz, the Original Complaint here makes no negligence-based claims specifically against SIR and expressly alleges that Plaintiff is not seeking benefits under the Workers Compensation Act. (Compare Pa175, Pa181, Pa184, Pa195-Pa213, Pa214 and Pa29, ¶53) Thus, the narrow ruling

of Rodriguez-Ortiz cannot be applied here since there are no claims or allegations to get dismissed and transferred to the Workers Compensation Division.

Here, the trial court acknowledged that the Original Complaint simply was not making a claim for workers' compensation benefits that would be covered under Part One:

> [H]ere, there is no claim where if the complaint's allegations were sustained, an insurer would be required to pay the judgment. The Complaint explicitly references Laidlow, and in seven different paragraphs unequivocally pleads a cause of action for intentional tort barred by coverage. Accordingly, the complaint states no basis for relief and, likewise, completion of discovery would not provide a basis for relief. Thus, dismissal of SIR's Third-Party Complaint is appropriate. . . .
>
> In support of its cross-motion for summary judgment, SIR cites to case law to support its position that coverage should be provided and has been improperly disclaimed by Hartford. For controlling case law, SIR relies on Charles Beseler Co. v. O'Gorman & Young, Inc., 380 N.J.Super. 193 (App.Div. 2005, aff'd 188 N.J. 542 (2006) and New Jersey Manufacturers Ins. Co. v. Delta Plastics Corp., 380 N.J.Super. 532 (App.Div. 2005). SIR also relies on the previously discussed unpublished Rodriguez-Ortiz case. In doing so, SIR is essentially contending that the underlying complaint here falls within its insurance coverage because Hartford issued a workers compensation/employers liability policy and, as such, has a duty to defend the insured against a common law tort suit brought by the underlying plaintiff.
>
> Here, however, it is undisputed that the underlying plaintiff has received workers compensation benefits separate from this action. In fact, the record demonstrates that the parties do not dispute the underlying facts and record. Whereas Plaintiff has already received workers compensation benefits separate from the present action and whereas Hartford has no duty to defend SIR against a common law tort suit brought by Plaintiff, SIR's cross-motion for summary judgment must be denied.

(Pa10 – Pa11) The Appellate Division "affirmed substantially for the reasons explained in Judge Lindemann's cogent written decisions" (MLAa3), and further explained: "The judge's characterization of Rodriguez's claims as Laidlow claims correctly determined that there are 'no alternative causes of action' entitling SIR to defense or indemnification of the Laidlow claims under Hartford's worker's compensation policy." (MLAa20)

Moreover, the Appellate Division expressly stated "[t]o the extent that we have not addressed any of SIR's remaining arguments, we conclude that they lack sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E)" acknowledging that there was no need to further address SIR's meritless argument that there could be coverage under Part One for the Original Complaint. (MLAa26) See e.g., In re Estate of Folcher, 224 N.J. 496, 515 (2016) ("[T]he Appellate Division's use of the Rule affirmance format should in no way be fairly perceived to consider arguments advanced. See R. 2:11-3(e)(1)(E)."). The Appellate Division clearly considered and rejected SIR's argument that there could be coverage under Part One, even if it did not address Part One in the exact manner that would satisfy SIR.

SIR's sweeping claim that there has been an "abiding" rule under New Jersey law that insurers have a duty to defend Superior Court tort suits is similarly misguided. Prior to Rodriguez-Ortiz, no case had ever found a duty to defend an

employer in a civil lawsuit under Part One Workers Compensation. Every single case finding a duty to defend an employer in a civil lawsuit found coverage under policies with Part Two Employers Liability coverage with no Employers Liability EII Exclusions. See e.g., Danek v. Hommer, 28 N.J. Super. 68, 77 (App. Div. 1953); Variety Farms, Inc. v .New Jersey Mfrs. Ins. Co., 172 N.J.Super. 10, 17 (App.Div. 1980); Schmidt v. Smith, 155 N.J. 44 (1998); Delta Plastics, supra, 532 N.J. Super. at 542; Beseler, supra, 380 N.J. Super. at 548. Thus, the decisions of the trial court and Appellate Division are not radical changes in the law, as SIR suggests, because no court prior to Rodriguez-Ortiz has found a duty to defend under Part One.

II. THERE WAS NO ERROR BECAUSE THE EMPLOYERS LIABILITY EII EXCLUSION CLEARLY AND UNAMBIGUOUSLY APPLIES TO BAR COVERAGE UNDER PART TWO EMPLOYERS LIABILITY OF THE HARTFORD POLICY

As SIR points out, the only New Jersey case to date to consider the same language as the Hartford Policy's Employers Liability EII Exclusion is Rodriguez-Ortiz. The Rodriguez-Ortiz court found that the Employers Liability EII Exclusion was broad and unambiguous and applied to bar Part Two coverage for the underlying complaint's allegations of intentional wrongs, including alleged acts "substantially certain to result in injury." Rodriguez-Ortiz, 2021 N.J. Super. Unpub. LEXIS 2072 at *15-16. The exclusion included no duty to defend. Id. at *17. The court found the Employers Liability EII Exclusion applied to bar coverage even though the underlying complaint at issue contained allegations that the employer acted

"intentionally as well as negligently, recklessly and carelessly" in causing the employee's injuries. Id. at *1.

The Rodriguez-Ortiz court additionally acknowledged that the Employers Liability EII Exclusion "is an apparent response to our decisions in" Delta Plastics and Beseler. Id., at *15, n. 6.

As the Appellate Division correctly found in this case, consistent with the Rodriguez-Ortiz ruling, any claim or allegation of gross negligence or recklessness would be encompassed by the Employers Liability EII Exclusion and excluded from coverage under Part Two. (MLAa19 – MLAa20) After noting that Judge Lindemann's analysis was correct, the Appellate Division explained:

> In addressing SIR's cross-motion for summary judgment, Judge Lindemann rejected its reliance on Charles Beseler Co. v. O'Gorman & Young, Inc. (Beseler I), 380 N.J. Super. 193 (App. Div. 2005), aff'd, Charles Beseler Co. v. O'Gorman & Young, Inc. (Beseler II), 188 N.J. 542 (2006), and Delta Plastics. The judge found these cases determined that insurance policy provisions excluding coverage for intentional tort claims were unenforceable; thus, the insureds were covered under the policies.
>
> In Delta Plastics, Judge Lindemann noted, this court concluded the policy's exclusion provision was ambiguous and unenforceable because it failed to "exclude[] coverage for 'all intentional wrongs allowed by N.J.S.A. [34:15-8].'" 380 N.J. Super. at 542. In contrast, the judge determined that Hartford's exclusion provision was unambiguous, stating "this insurance does not cover any and all intentional wrongs within the exception allowed by N.J.S.A. 34:15-8" (emphasis omitted) (citation omitted); thus, Hartford's policy excluded coverage for Rodriguez's claims.

> As for Beseler II, Judge Lindemann noted unlike the present policy "the policy [there], which excluded insurance coverage for bodily injuries 'intentionally caused or aggravated by the employer' was ambiguous." The Court, affirming our decision in Beseler I, held "due to its lack of express language excluding conduct substantially certain to result in injury, we find [the policy's] exclusion to be ambiguous and construe it, as we must, in favor of the insured." 188 N.J. at 547-48.
>
> * * *
>
> In sum, the judge properly found Hartford's Employer's Liability EII exclusion was distinguishable from the exclusionary language in Delta Plastics and Beseler II because the present policy expressly provided "no insurance coverage for any and all intentional wrongs within the exception allowed under the [Compensation Act]" and, as such, was unambiguous. (Emphasis omitted).

(MLAa20 –MLAa22)

The Appellate Division, like the court in Rodriguez-Ortiz, rejected SIR's claim that the clear and unambiguous Employer's Liability II Exclusion was against SIR's reasonable expectations: "SIR's assertion that the average policyholder or layman could not possibly keep up with the intended meaning of the phrase 'allowed by N.J.S.A. 34:15-8' is misguided. Not only is the language clear, considering the Department of Banking and Insurance approved the language, we can only surmise the exclusion conforms with public policy." (MLAa23). See also, Rodriguez-Ortiz court. supra. at *22-24.

The Appellate Division correctly found here, as it did in Rodriguez-Ortiz, that the Employers Liability EII Exclusion applies to bar coverage for Laidlow claims under Part Two of the Hartford Policy.

III. THERE IS NO ERROR BECAUSE THE TRIAL COURT CORRECTLY DENIED SIR'S MOTION TO AMEND

As the Appellate Division acknowledged, "Hartford's duty to defend SIR against Rodriguez's claims is purely a legal question governed by the terms of its policy and subject to de novo review." (MLAa15) Because a motion to dismiss is limited to the pleadings in this case SIR's third-party complaint, which incorporated the Original Complaint and Hartford Policy – the duty to defend can be conclusively determined upon a motion to dismiss. See Banco Popular N. Am. v. Gandi, 184 N.J. 161 (2005) ([T]he "complaint" includes the "exhibits attached to the complaint, matters of public record, and documents that form the basis of the claim.").

SIR relies on Printing Mart-Morristown v. Sharp Electronics Corp., 116 N.J. 739 (1989), for the proposition that dismissals granted under R. 4:6-2(e) "should be without prejudice to a plaintiff's filing of an amended complaint." However, more recently, the Court held in Nostrame v. Santiago, 213 N.J. 109, 128 (2013), that dismissals with prejudice are proper where "plaintiff conceded that he had no further facts to plead [and] instead fil[ed] the complaint in the hope that he could use the tools of discovery [to support his claims]." Id. at 128. Here, SIR affirmatively stated in support of its cross-motion, "SIR respectfully submits that no material questions of fact exist with respect to SIR's claim." (Da16) In fact, SIR urged the trial court to hold an "immediate, expedited trial" of SIR's claim for coverage if its cross-motion for summary judgment were denied. (Da16-Da17) Additionally, the amendment was

to add a legal theory cause of action, which would have been supported by the original facts alleged. Thus, SIR's motion to amend was properly denied.

The origin and acceptability of the Employers Liability EII Exclusion is not a novel issue. No discovery into the "genesis and history" of the Exclusion is necessary – it is no mystery. As even the Rodriguez-Ortiz court expressly acknowledged, the Employers Liability EII Exclusion "is an apparent response to our decisions in" Delta Plastics and Beseler. 2021 N.J. Super Unpub. LEXIS 2072, at *15, n. 6. As the Appellate Division found:

> Not only is the language clear, considering the Department of Banking and Insurance approved the language, we can only surmise that the exclusion conforms with public policy. See Gov't Emps.' Ins. Co. v. Daniels, 180 N.J. Super. 227, 232 (App. Div. 1981) ("We perceive that the public policy of this State is satisfied by the coverage provision of the insurance contract approved by the Commissioner [of Banking and Insurance] which is as broad as the registration requirements in Title 39 for automobiles and motorcycles."). SIR provides no indication to the contrary.
>
> * * *
>
> The legality of the Employer's Liability EII exclusion is not a novel legal question as SIR contends. As we mentioned, the exclusion language was in conformity with the Supreme Court's directives in Beseler II and Delta Plastics, where it struck down intentional tort claim exclusionary provisions it concluded were ambiguous. Hence, SIR's motion to amend its complaint was futile because it would have been dismissed for failure to state a claim.

(MLAa23 – MLAa25) The expansive and expensive discovery proposed by SIR is completely unnecessary to establish the origin, consideration and approval of the

Employers Liability EII Exclusion, and would be a burdensome and unnecessary waste of resources for the trial court and the parties.

The Compensation Rating and Inspection Bureau ("CRIB") was established by the New Jersey Legislature and continued pursuant to N.J.S.A. 34:15-90.1 of the Workers Compensation Act. N.J.S.A. 34:15-90.2 specifically sets forth the Authority of CRIB, and provides that CRIB shall have the authority to "[p]repare and file, for the approval of the commissioner, and for the use by all of its members, any amendments to its policy forms and its system of classification of risks and premiums thereto." The record reflects that after the Delta Plastics and Beseler decisions, the Employers Liability EII Exclusion, in exactly the same form as it appears in the Hartford Policy, was submitted to CRIB for consideration and approval. (Da43 – Da45) The Governing Committee of CRIB met on April 4, 2007, and the minutes of the meeting show that a motion was passed to adopt the proposed change to New Jersey Part Two Employers Liability Endorsement WC 29 03 06 B for July 1, 2007 effect. (Da69, Da75-Da76) The Manual Amendment Bulletin #436 noted that:

> The change to the C.5 language is necessary since recent rulings by the New Jersey Supreme Court have increased the scope of coverage for intentional injury under Part Two of the policy. The rulings represent a significant erosion of the exclusive remedy provision of the Law and may lead to increased costs in the price of workers compensation and employers liability insurance. The new language is meant to address the findings of the Court and to restore the intent of the policy exclusion for intentional injury.

(Da80) CRIB considered the potential expansion of the exclusive remedy and increased premiums associated with such expansion to be an important public policy consideration. Thereafter, the Department of Banking and Insurance ("DOBI") reviewed the amendment and approved it, and communicated its approval by letter dated May 23, 2007. (Da65) The CRIB and DOBI files are part of the record. Because the Employers Liability EII Exclusion has been approved by the Commissioner and DOBI, it comports with public policy. No fact discovery is required to confirm this.

Further, SIR affirmatively advised the trial court that it did not need to consider the public policy arguments within the context of the dispositive motions it was considering. (Da37, Da38, Pa234, Pa235, Pa236, Pa17-Pa18) By its own actions, SIR waived the argument and was estopped from raising it. See W. Jersey Title & Guar. Co. v. Indus. Trust Co., 27 N.J. 144, 152, 141 A.2d 782, 786 (1958); See Merchs. Indem. Corp. of N.Y. v. Eggleston, 68 N.J. Super. 235, 254, 172 A.2d 206, 216 (App.Div.1961), aff'd, 37 N.J. 114, 179 A.2d 505 (1962); Miller v. Miller, 97 N.J. 154, 163, 478 A.2d 351, 355 (1984).

Moreover, allowing SIR to amend its third-party complaint to assert public policy arguments would be futile. SIR relies on Schmidt v. Smith, 294 N.J. Super. 569, 684 A.2d 66 (App.Div. 1996), aff'd 155 N.J. 44 (1998), to urge a public policy review. However, Schmidt is inapposite for two reasons. First, there is no indication

n Schmi t th t t e insur d employ e w s pa d worke s compensati n benefit , i.e , compensat d f r h r injuri s und r Pa t O e f t e polic ; where s her , M . Rodrigu z h s be n pa d worke s compensati n benefi s und r Pa t O e f t e Hartfo d Poli y a d th s h s be n compensat d f r h s occupation l injurie . M . Rodrigu z seeki g furth r damag s fr m S R und r Laidl w do s n t chan e th s fac . Secon , Schmi t consider d covera e f r n employer s vicario s liabili y f r sexu l harassmen , a d fou d t e exclusi n t iss e d d n t b r covera e f r su h exposur . I . t 50-5 . Schmi t d d n t promulga e a y statuto y manda e wi h respe t o a y intention l inju y exclusio , l t alo e t e Employe s Liabili y E I Exclusio . S e id ; 2 4 N. . Supe . t 58

Varie y Farm , In . v .N w Jers y Mfr . In . Co , 1 2 N.J.Supe . 1 , 7 (App.Di . 1980 , s likewi e distinguishab e s t e Worke s Compensati n Statu e giv s mino s t e opti n o s e f r damag s n a comm n l w acti n f r t e employer ' negligen e inste d f limiti g t e min r o worker ' compensati n benefi s und r N.J.S. . 34:15- , t seq , s s t e ca e f r adu t employee . I . t 17-1 . Furthe , t e min r h s o choo e betwe n t e statuto y a d comm n l w remedie . I . t 1 . T e cou t fou d th t t e min r employee s cla m mu t co e und r t e purvi w f Pa t O e r Pa t T o f t e polic , b t d d n t fi d th t t mu t e cover d y bot . I . t 1 . Her , worke s compensati n benefi s a e bei g pa d und r Pa t On .

The cases decided since Schmidt have also declined to promulgate a statutory mandate with respect to intentional injury exclusions, specifically Delta Plastics and Beseler. Contrary to SIR's claims, the court in Rodriguez-Ortiz clearly explained that, even to the extent there is any statutory mandate that would be applicable, an insured seeking indemnification for its own defense costs, as SIR does here, "lies outside the statutory mandate and the public policy that motivated it." 2021 N.J. Super Unpub. LEXIS 2072, at * 21. As SIR's cross motion for summary judgment was limited to a ruling on the duty to defend and SIR did not seek indemnity under the Hartford Policy (MLAa3, MLAa13), there is no public policy bar to the application of the Employers Liability EII Exclusion, even under Rodriguez-Ortiz.

Further, New Jersey courts have found that "policy provisions that exclude coverage for liability resulting from intentional wrongful acts are 'common' and are consistent with public policy," in other policies that are subject to statutory mandates, such as auto policies. See e.g., Allstate Ins. Co. v. Malec, 104 N.J. 1, 6, 514 A.2d 832 (1986). See also Harleysville Ins. Co. v. Garitta, 170 N.J. 223, 231, 785 A.2d 913 (2001) (auto policy); F.S. v. L.D., 362 N.J. Super. 161, 166, 827 A.2d 335 (App. Div. 2003).

There simply is no public policy reason to nullify the Employers Liability EII Exclusion and provide coverage to insureds for their alleged intentional acts which would require them to pay common law damages in addition to the workers

compensation benefits required under the statute. Hartford has paid and is currently paying workers compensation benefits under Part One of the Hartford Policy to Mr. Rodriguez. Any damages awarded against SIR for the allegations of the Original Complaint would be offset by the workers compensation benefit payments made by Hartford, which would represent the compensatory portion of any such award. Public policy would not require Hartford to make double payments for the injury.

SIR claims that it is the only employer in New Jersey to have ever been denied coverage under a Workers Compensation and Employers Liability Policy based on the Employers Liability EII Exclusion. However, SIR refers to no factual or legal support or citation to the record for its claim – because there are none. As explained by the Appellate Division, "The legality of the Employers Liability EII exclusion is not a novel legal question as SIR contends." (MLAa25) Try as SIR might to escape the clear and straightforward policy language and caselaw guidance, the Employers Liability EII Exclusion clearly and unambiguously applies to preclude coverage to SIR for the Original Complaint.[2]

[2] SIR has also submitted a Supplemental Certification attaching a January 12, 2024 letter from New Jersey Manufacturers Insurance Company ("NJM") (incorrectly identified by SIR as Liberty Mutual). This letter is not part of the record, NJM is not a party to this appeal, and the Supplemental Certification (and its unsupported commentary) should not be considered by the Court.

CONCLUSION

For the reasons set forth above, Hartford respectfully requests that the Court deny SIR's Motion For Leave To Appeal the Appellate Division's decision.

Dated: January 26, 2023

Respectfully submitted,

WILSON ELSER MOSKOWITZ EDELMAN & DICKER LLP
Attorneys for Defendant Hartford Underwriters Insurance Company

By: */s/ Katherine E. Tammaro*
Katherine E. Tammaro, Esq.