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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2773-20

ESTATE OF MIKE ALEXANDER, deceased, by LORRAINE ALEXANDER as Executrix of the Estate, and LORRAINE ALEXANDER, individually,

Plaintiffs-Appellants,

and

CRISDEL GROUP, INC., and NEW JERSEY TURNPIKE AUTHORITY,

Plaintiffs/Intervenors-Respondents,

v.

GEMINI INSURANCE CO. and TOKIO MARINE SPECIALTY INSURANCE CO.,[1]

Defendants-Respondents,

and

NORTHEAST SWEEPERS LLC,

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[1] Incorrectly pled as "Tokyo Marine Specialty Insurance Co."

and CHRISTOPHER M. HACKETT,

Defendants.

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Argued February 14, 2023 – Decided July 11, 2023

Before Judges Messano, Gilson and Rose.

On appeal from the Superior Court of New Jersey, Law Division, Essex County, Docket No. L-7133-17.

John Michael Vlasac argued the cause for appellants (Hegge & Confusione, LLC, and Vlasac & Shmaruk, LLC, attorneys; Michael Confusione, John Michael Vlasac, Jr., and Yelena Kofman-Delgado, on the briefs).

Stacey H. Snyder argued the cause for respondent Tokio Marine Specialty Insurance Company (Marshall, Conway, Bradley, Gollub & Weissman, PC, attorneys; Stacey H. Snyder, on the brief).

Justin N. Kinney argued the cause for respondent Gemini Insurance Company (Kinney Lisovicz Reilly & Wolff, PC, attorneys; Justin N. Kinney, of counsel and on the briefs).

PER CURIAM

On July 11, 2014, while working for Crisdel Group, Inc. (Crisdel) in an active construction zone on the New Jersey Turnpike, Mike Alexander was killed when Christopher M. Hackett, an employee of Northeast Sweepers (Northeast), struck Alexander with a "sweeper truck" owned by Northeast.

Northeast had been subcontracted to provide sweeping services at the job site and used the "sweeper truck" to remove debris from the roadway after it was "milled" for resurfacing. Individually and as executrix of her husband's estate, plaintiff Lorraine Alexander filed a complaint in the Law Division in October 2014 against Hackett, Northeast, and several other parties, alleging negligence and seeking damages (the wrongful death action).

On the date of the accident, Northeast was insured under three policies: (1) a commercial automobile insurance policy issued by the Progressive Group (Progressive, and the Progressive policy); (2) a "commercial general liability" policy issued by Gemini Insurance Co. (Gemini, and the Gemini policy); and (3) a "commercial lines excess policy" issued by Tokio Marine Specialty Insurance Co. (Tokio, and the Tokio policy). Progressive tendered its $1 million policy in the wrongful death action, which is still pending in the Law Division.

Plaintiff also demanded coverage from the $1 million Gemini policy and the $4 million Tokio policy. Both insurers declined, citing provisions in their policies, which they asserted excluded coverage. In October 2017, plaintiff filed a declaratory judgment action naming Gemini, Tokio, Northeast and Hackett as defendants and seeking a declaration that: Gemini and Tokio were "required to defend and/or indemnify" Northeast and Hackett; and Northeast and Hackett

were "entitled to a defense or coverage for a judgment or claim for punitive damages" related to decedent's death.[2] The Law Division judge — the third assigned to the declaratory judgment action — granted Gemini's and Tokio's motions for reconsideration and entered orders dismissing plaintiff's complaint. This appeal followed.

I.

Because plaintiff's arguments implicate some of the tortured procedural history that followed the filing of her declaratory judgment complaint, we set out those events in some detail.

In lieu of answers, both Gemini and Tokio filed motions to dismiss, or alternatively for summary judgment, in November and December 2017, respectively. Both argued the policies provided no coverage to Northeast because of an "auto exclusion." Plaintiff argued the auto exclusion did not apply to the "sweeper truck" because it was not an "auto," and other provisions of the policies provided coverage. The first judge denied both motions, reasoning that even though Alexander was not a covered person under the policies, plaintiff was "entitled to discovery to establish" Northeast's reasonable expectations of

[2] Northeast was dissolved at some point in 2017, and neither Northeast nor Hackett ever appeared in the declaratory judgment action.

coverage under the policies. Soon thereafter, Gemini and Tokio filed answers and discovery ensued.[3]

In July 2019, Gemini and Tokio moved for summary judgment; plaintiff filed opposition and cross-moved for summary judgment to compel coverage. A second judge heard argument on the motions in January 2020, but did not place an oral decision on the record until June 2020. Because of difficulty in the transcription of his decision, on August 20, 2020, the judge issued a written statement of reasons that supported orders (the August 2020 orders) denying

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[3] At some point thereafter, Crisdel and the New Jersey Turnpike Authority (NJTA) successfully moved to intervene. Crisdel and NJTA had been granted summary judgment in the wrongful death action based on a finding that Northeast was contractually obligated to defend and indemnify Crisdel and NJTA. In this suit, after intervening, NJTA and Crisdel moved for partial summary judgment seeking a declaration that Gemini and Tokio were required to indemnify Northeast under their respective policies. The second judge entered orders providing that if the fact finder in the wrongful death action found "actions or omissions on behalf of NJTA [or Crisdel] proximately caused the decedent's injuries, and those actions or omissions d[id] not solely involve the use or maintenance of an auto, then Gemini and Tokio [were] required to cover [Northeast] for [its] contractual indemnity obligation to NJTA." He later reversed himself when Gemini and Tokio moved for reconsideration.

Gemini's and Tokio's summary judgment motions and granting plaintiff summary judgment.[4]

In determining that Gemini and Tokio were required to provide coverage, the judge found the "auto exclusion" in the Gemini policy "unambiguous and . . . the sweeper truck constitute[d] an 'auto.'" However, the judge also concluded that Northeast had an objectively reasonable expectation of coverage for the underlying accident, and while the auto exclusion was unambiguous, there was a conflict between that exclusion and an exception in a separate "contractual liability exclusion" that created an ambiguity in the policy. The judge concluded that because of this ambiguity in the policy, Northeast's reasonable expectation of coverage precluded application of the auto exclusion to deny coverage.

Gemini and Tokio quickly moved for reconsideration. By this time, the second judge had retired, and so the motions were now before a third judge. Gemini and Tokio argued the second judge had misapplied the law, plaintiff lacked standing to bring a declaratory judgment action on behalf of Northeast

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[4] The orders did not expressly resolve NJTA's and Crisdel's claims as plaintiffs-intervenors nor the issue of attorneys' fees and costs, which plaintiff sought in her complaint.

and Hackett, the auto exclusion clearly and unambiguously excluded coverage, and any reasonable expectations of coverage Northeast may have had were inconsequential given the unambiguous auto exclusion.

In an oral decision, the third judge rejected plaintiff's argument that Gemini and Tokio had never raised standing as an issue, noting they had specifically argued that issue when they moved for summary judgment before the second judge, but he never addressed it. Because the second judge "did not specifically enter a ruling on th[e] issue," however, the third judge decided not to reconsider whether plaintiff had standing to bring a declaratory judgment suit against Northeast's insurers.

The third judge noted her predecessor had concluded the sweeper truck was an "auto" under the Gemini policy and suggested she could not revisit the issue because "[t]hat determination ha[d] not been challenged by any party" and "it would [not] be proper for [her] to . . . overrule that factual determination . . . without someone having asked me to." But the judge determined her predecessor had misapplied the law by concluding that a perceived ambiguity between the auto and contractual liability exclusions meant the auto exclusion did not apply. She quoted the following from <u>Weedo v. Stone-E-Brick</u>:

> [E]ach exclusion is meant to be read . . . independently of every other exclusion. . . . If any one

> exclusion applies[,] there should be no coverage, regardless of inferences that might be argued on the basis of exceptions or qualifications contained in other exclusions. There is no instance in which an exclusion can properly be regarded as inconsistent with another exclusion, since they bear no relationship with one another.
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> [81 N.J. 233, 248 (1979) (quoting Tinker, "Comprehensive General Liability Insurance — Perspective and Overview" 25 <u>Fed'n Ins. Couns. Q.</u> 217, 233 (1975)).]

The judge held "the auto exclusion was unambiguous" and "[r]ead independently of every other exclusion, it excludes coverage for the damages sought by plaintiff[] against the defendants." The judge also concluded that no circumstances justified applying "the reasonable expectations doctrine."

The third judge's May 4, 2021 orders: vacated the August 2020 orders granting summary judgment to plaintiff and denying summary judgment to Gemini and Tokio; declared that Gemini and Tokio had no obligation to defend or indemnify Northeast or Hackett under their respective policies; declared there likewise was "no coverage" for NJTA's and Crisdel's claims against Gemini and Tokio; granted summary judgment to Gemini and Tokio; and dismissed plaintiffs' first amended complaint and NJTA's and Crisdel's complaints in intervention with prejudice.

II.

Before us, plaintiff argues the third judge "distorted the reconsideration standard" and failed to appreciate the "narrow circumstances" justifying reconsideration. She also argues the judge misapplied the "governing law" in construing the policies and erred by reversing the second judge's proper interpretation of Gemini's and Tokio's policies. Plaintiff also contends the judge "failed to apply the law of the case doctrine" by deciding "the reasonable expectations of the insured doctrine [did] not apply" in these circumstances. Lastly, plaintiff argues that Gemini and Tokio are estopped from asserting that she lacks standing to bring this declaratory judgment action.

We have considered these arguments in light of the record and applicable legal standards and affirm.

A.

Motions for reconsideration are governed by two court rules, Rule 4:49-2 and Rule 4:42-2. "Rule 4:49-2 applies only to motions to alter or amend final judgments and final orders[] and doesn't apply when an interlocutory order is challenged." Lawson v. Dewar, 468 N.J. Super. 128, 134 (App. Div. 2021). The standard applicable to Rule 4:49-2 motions "requires a showing that the challenged order was the result of a 'palpably incorrect or irrational' analysis or

of the judge's failure to 'consider' or 'appreciate' competent and probative evidence." Ibid. (quoting Cummings v. Bahr, 295 N.J. Super. 374, 384 (App. Div. 1996)). In other words, such motions should be "granted only under very narrow circumstances." Fusco v. Bd. of Educ., 349 N.J. Super. 455, 462 (App. Div. 2002).

"Rule 4:42-2 declares that interlocutory orders 'shall be subject to revision at any time before the entry of final judgment in the sound discretion of the court in the interest of justice.'" Lawson, 468 N.J. Super. at 134. Thus, a party moving for reconsideration of an interlocutory order need not show that the order was "'palpably incorrect,' 'irrational,' or based on a misapprehension or overlooking of significant material presented on the earlier application. Until entry of final judgment, only 'sound discretion' and the 'interest of justice' guides the trial court, as Rule 4:42-2 expressly states." Ibid. (quoting R. 4:42-2); see also Lombardi v. Masso, 207 N.J. 517, 534 (2011) ("It is well established that 'the trial court has the inherent power to be exercised in its sound discretion, to review, revise, reconsider and modify its interlocutory orders at any time prior to the entry of final judgment.'" (quoting Johnson v. Cyklop Strapping Corp., 220 N.J. Super. 250, 257 (App. Div. 1987))).

Plaintiff contends the more rigorous standard of Rule 4:49-2 applied to defendants' motions for reconsideration, but she is incorrect. The August 2022 orders entered by the second judge that granted plaintiff summary judgment did not dispose of the intervenors' claims for coverage in the wrongful death action or plaintiff's claim for counsel fees, and, therefore, were clearly interlocutory.[5] See e.g., Janicky v. Point Bay Fuel, Inc., 396 N.J. Super. 545, 549–50 (App. Div. 2007) ("To be a final judgment, an order generally must 'dispose of all claims against all parties.'" (quoting S.N. Golden Ests., Inc. v. Cont'l Cas. Co., 317 N.J. Super. 82, 87 (App. Div. 1998))); N.J. Mfrs. Ins. Co. v. Prestige Health Grp., LLC, 406 N.J. Super. 354, 358 (App. Div. 2009) ("An order is interlocutory, and not final, if it does not dispose of counsel fees issues." (citing Marx v. Friendly Ice Cream Corp., 380 N.J. Super. 302, 305 (App. Div. 2005))). Although the August 2020 orders granted plaintiff summary judgment, they were not final orders. See Lombardi, 207 N.J. at 535–36 ("[A] party's sense of finality upon summary judgment is just that—a feeling unsupported by the notion of what is, in fact, interlocutory.").

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[5] The second judge had originally granted the intervenors summary judgment but then reversed himself in an oral opinion that was never formalized by entry of an order. The third judge's May 2021 orders were the first orders that finally resolved the intervenors' claims for coverage from Gemini and Tokio in the wrongful death action.

An appellate court reviews a trial court's decision on a reconsideration motion for abuse of discretion. Branch v. Cream-O-Land Dairy, 244 N.J. 567, 582 (2021) (citing Kornbleuth v. Westover, 241 N.J. 289, 301 (2020)). For the reasons that follow, the third judge did not mistakenly exercise her discretion by granting the reconsideration motions and correcting the second judge's legal errors in granting plaintiff summary judgment.

We also reject plaintiff's argument that the "law of the case doctrine" required the third judge to defer to the second judge's conclusion that Northeast's reasonable expectation of coverage trumped application of the auto exclusion.[6] "The law of the case doctrine teaches us that a legal decision made in a particular matter 'should be respected by all other lower or equal courts during the pendency of that case.'" Lombardi, 207 N.J. at 538 (quoting Lanzet v. Greenberg, 126 N.J. 168, 192 (1991)).

"A hallmark of the law of the case doctrine is its discretionary nature, calling upon the deciding judge to balance the value of judicial deference for the rulings of a coordinate judge against those 'factors that bear on the pursuit of justice and, particularly, the search for truth.'" Id. at 538–39 (quoting Hart v.

[6] Plaintiff also inaccurately contends the first judge made a similar ruling. However, the first judge only denied the insurer's motions to dismiss based on his conclusion that more discovery was necessary to resolve the issue.

City of Jersey City, 308 N.J. Super. 487, 498 (App. Div. 1998)). "It 'should not be used to justify an incorrect substantive result.'" Toto v. Princeton Twp., 404 N.J. Super. 604, 618 (App. Div. 2009) (quoting Hart, 308 N.J. Super. at 498).

In this case, for the reasons explained below, the second judge's reasoning in support of the August 2020 orders was clearly erroneous and contrary to binding Supreme Court precedent. The law of the case doctrine did not foreclose the third judge from reconsidering those orders.

B.

We turn next to plaintiff's arguments regarding the Law Division judges' interpretation of the policies. The Gemini policy issued to Northeast included coverage for bodily injury and property damage "that the insured be[came] legally obligated to pay." The insurance did not apply to:

> "Bodily injury" or "property damage" arising out of the ownership, maintenance, [or] use . . . of any . . . "auto" . . . owned or operated by . . . any insured. . . .
>
> This exclusion applies even if the claims against any insured allege negligence or other wrongdoing in the supervision, hiring, employment, training or monitoring of others by that insured, if the "occurrence" which caused the "bodily injury" or "property damage" involved the ownership, maintenance, [or] use . . . of any . . . "auto" . . . that is owned or operated by . . . any insured.
>
> This exclusion does not apply to:

. . . .

(5) "Bodily injury" or "property damage" arising out of:

(a) *The operation of machinery or equipment that is attached to, or part of, a land vehicle that would qualify under the definition of "mobile equipment" if it were not subject to a compulsory or financial responsibility law or other motor vehicle insurance law in the state where it is licensed or principally garaged[.]*

[(Emphasis added).]

Section V of the Gemini policy defined "autos" and "mobile equipment":

2. "Auto" means:

a. A land motor vehicle, trailer or semitrailer *designed for travel on public roads*, including any attached machinery or equipment; or

b. *Any other land vehicle that is subject to a compulsory or financial responsibility law or other motor vehicle insurance law in the state where it is licensed or principally garaged*.

However, "auto" does not include "mobile equipment."

. . . .

12. "Mobile equipment" means any of the following types of land vehicles, including any attached machinery or equipment:

a. Bulldozers, farm machinery, forklifts and *other vehicles designed for use principally off public roads*;

. . . .

d. Vehicles . . . maintained primarily to provide mobility to permanently mounted:

(1) Power cranes, shovels, loaders, diggers or drills; or

(2) Road construction or resurfacing equipment such as graders, scrapers or rollers;

. . . .

f. Vehicles not described in Paragraph **a., b., c.** or **d.** above <u>maintained primarily for purposes other than the transportation of persons or cargo</u>.

<u>However, self-propelled vehicles with the following types of permanently attached equipment are not "mobile equipment" but will be considered "autos"</u>:

(1) <u>Equipment designed primarily for</u>:

(a) Snow removal;

(b) <u>Road maintenance, but not construction or resurfacing</u>; or

(c) <u>Street cleaning</u>;

. . . .

<u>However, "mobile equipment" does not include any land vehicles that are subject to a compulsory or financial responsibility law or other motor vehicle insurance law in the state where it is licensed or</u>

> principally garaged. Land vehicles subject to a compulsory or financial responsibility law or other motor vehicle insurance law are considered "autos."
>
> [(Emphasis added).]

An endorsement to the Gemini policy expressly excluded coverage for "[a]ll street sweeping operations performed by the insured or on behalf of the insured by independent contractors[] in the state of New York," but the policy did not contain any similar exclusion with respect to street sweeping operations in New Jersey.

Separately, the Gemini policy also contained a "Contractual Liability" exclusion which provided that the insurance did not apply to "'[b]odily injury' or 'property damage' for which the insured is obligated to pay . . . by reason of the assumption of liability in a contract or agreement." However,

> This exclusion does not apply to liability for damages:
>
> (1) That the insured would have in the absence of the contract or agreement; or
>
> (2) Assumed in a contract or agreement that is an "insured contract[,]" provided the "bodily injury" or "property damage" occurs subsequent to the execution of the contract or agreement.

"Insured contract" was defined to include:

> f. That part of any other contract or agreement pertaining to your business . . . under which you assume the tort liability of another party to pay for "bodily injury" or "property damage" to a third person or organization. Tort liability means a liability that would be imposed by law in the absence of any contract or agreement.

The Tokio policy identified the Gemini policy as the "controlling underlying insurance" and provided:

> The insurance provided under this policy will follow the same provisions, exclusions and limitations that are contained in the applicable "controlling underlying insurance[,]" unless otherwise directed by this insurance. To the extent such provisions differ or conflict, the provisions of this policy will apply. However, the coverage provided under this policy will not be broader than that provided by the applicable "controlling underlying insurance" and if coverage does not exist under any applicable "controlling underlying insurance," coverage shall not exist under this policy.

We begin by recognizing "[t]he interpretation of an insurance policy, like any contract, is a question of law, which we review de novo." Sosa v. Mass. Bay Ins. Co., 458 N.J. Super. 639, 646 (App. Div. 2019) (citing Selective Ins. Co. of Am. v. Hudson E. Pain Mgmt. Osteopathic Med. & Physical Therapy, 210 N.J. 597, 605 (2012)). "In attempting to discern the meaning of a provision in an insurance contract, the plain language is ordinarily the most direct route." Chubb Custom Ins. Co. v. Prudential Ins. Co. of Am., 195 N.J. 231, 238 (2008)

(citing Zacarias v. Allstate Ins. Co., 168 N.J. 590, 594–95 (2001)). "We are guided by general principles: 'coverage provisions are to be read broadly, exclusions are to be read narrowly, potential ambiguities must be resolved in favor of the insured, and the policy is to be read in a manner that fulfills the insured's reasonable expectations.'" Sosa, 458 N.J. Super. at 646 (quoting Selective Ins. Co., 210 N.J. at 605).

"When the provision at issue is subject to more than one reasonable interpretation, it is ambiguous, and the 'court may look to extrinsic evidence as an aid to interpretation.'" Templo Fuente De Vida Corp. v. Nat'l Union Fire Ins. Co. of Pittsburgh, 224 N.J. 189, 200 (2016) (quoting Chubb Custom Ins. Co., 195 N.J. at 238). But "[i]f the plain language of the policy is unambiguous, we will 'not engage in a strained construction to support the imposition of liability or write a better policy for the insured than the one purchased.'" Ibid. (quoting Chubb Custom Ins. Co., 195 N.J. at 238). "[C]ourts will enforce exclusionary clauses if [they are] 'specific, plain, clear, prominent, and not contrary to public policy,' notwithstanding that exclusions generally 'must be narrowly construed,' and the insurer bears the burden to demonstrate they apply." Abboud v. Nat'l Union Fire Ins. Co. of Pittsburgh, 450 N.J. Super. 400, 407 (App. Div. 2017) (quoting Flomerfelt v. Cardiello, 202 N.J. 432, 441–42 (2010)).

Pursuant to the auto exclusion, the Gemini policy did not provide coverage for damages due to "'[b]odily injury' . . . arising out of the ownership, maintenance, [or] use . . . of any . . . 'auto' . . . owned or operated by . . . any insured." In the wrongful death action, plaintiff alleged bodily injury arising out of Northeast's ownership and Hackett's use of the sweeper truck. The auto exclusion also states that it "applies even if the claims against any insured allege negligence or other wrongdoing in the supervision, hiring, employment, training or monitoring of others by that insured" so long as "the 'occurrence' which caused the 'bodily injury'" involved the use of an "auto" owned by any insured. In count eight of the amended complaint in the wrongful death action, plaintiff alleged Northeast was liable for the negligent hiring, employment, training, and supervision of Hackett. The language of the exclusion is clear and unambiguous. If the sweeper truck was an "auto" within the meaning of the Gemini policy, plaintiff's negligence claims against Northeast and Hackett were excluded from coverage.

The Gemini policy defines "auto" to include "[a] land motor vehicle . . . designed for travel on public roads, including any attached machinery or equipment," as well as "[a]ny other land vehicle that is subject to a compulsory or financial responsibility law or other motor vehicle insurance law in the state

where it is licensed or principally garaged." A vehicle that qualifies as "mobile equipment" is an exception to the definition.

It cannot be disputed that the sweeper truck was a land motor vehicle designed for travel on public roads; the photo in the appellate record makes this clear. Plaintiff, however, contends the sweeper truck "was a piece of 'mobile equipment' under the policy." This argument fails for two reasons.

First, the Gemini policy repeatedly states that land vehicles subject to compulsory motor vehicle insurance are "autos" and not "mobile equipment." The policy's definition of "auto" specifically includes motor vehicles that are subject to a compulsory "motor vehicle insurance law." The definition of "mobile equipment" specifically "does not include any land vehicles that are subject to" such a law "in the state where it is licensed or principally garaged" and reiterates that such vehicles "are considered 'autos.'"

Under N.J.S.A. 39:6B-1(a): "Every owner . . . of a motor vehicle registered or principally garaged in this State shall maintain motor vehicle liability insurance coverage . . . ." "'Motor vehicle' means a motor vehicle as defined in [N.J.S.A.] 39:1-1, exclusive of an automobile as defined in [N.J.S.A. 39:6A-2(a)] . . . ." N.J.S.A. 39:6A-2(j). N.J.S.A. 39:1-1, in turn, defines "motor vehicle" to include "all vehicles propelled otherwise than by muscular power,

excepting such vehicles as run only upon rails or tracks, low-speed electric bicycles, low-speed electric scooters, and motorized bicycles." The sweeper truck was, in fact, insured as required by the Progressive policy.

Plaintiff does not address the fact that Northeast obtained vehicle insurance for the sweeper truck through Progressive but instead implies that because the sweeper truck was registered with the Motor Vehicle Commission (MVC) as equipment "in-transit," see N.J.S.A. 39:4-30, it was not an auto as defined by Gemini's policy, but rather "mobile equipment." If the sweeper truck were "mobile equipment," it was not subject to the auto exclusion.

One may register "road building machinery, [or] vehicle[s]" with "in-transit" plates, however, only if one files "satisfactory evidence" of one's "financial responsibility . . . to meet any claim for damages arising out of an accident." Ibid. The appendix contains information from the MVC regarding the registration of "Contractor Equipment in Transit," and specifically lists "Insurance requirements."

Second, the Gemini policy defined "mobile equipment," in part, by excluding vehicles with "equipment designed primarily for . . . [r]oad maintenance, but not construction or resurfacing," or "[s]treet cleaning," from the definition, because they were considered "autos." By contrast, vehicles

"maintained primarily to provide mobility to permanently mounted . . . [r]oad construction or resurfacing equipment such as graders, scrapers or rollers" were classified as "mobile equipment."

Plaintiffs suggest that Northeast's specific use of the sweeper truck made it "mobile equipment," arguing that "sweeping for milling and paving jobs in a construction zone is completely different than sweeping parking lots, private developments, or streets." Plaintiff notes that Northeast's principal, John Tyler Slaman, believed the Progressive policy would cover the sweeper truck while traveling to a job site, and the Gemini and Tokio policies would cover its use at the job site. She also notes that Gemini's claims examiner initially thought the claim was covered for the same reason.

However, in classifying "road maintenance" and "street cleaning" vehicles as "autos," the Gemini policy refers to the "primar[y]" "design[]" of the vehicle's equipment, not the vehicle's actual use by its owner. Nothing in the record suggests that the sweeper truck's equipment was designed primarily for anything other than "street cleaning" and/or "road maintenance," and nothing in the Gemini policy suggests that such an "auto" stops being an "auto" when operated in a particular setting. That the sweeper truck's street cleaning/road maintenance functions were used at a road resurfacing project site — cleaning the road of

debris — did not transform the vehicle's equipment into "[r]oad construction or resurfacing equipment such as [a] grader[], scraper[] or roller[]." We conclude the auto exclusion in the Gemini policy applied to deny coverage.

Despite finding the auto exclusion was unambiguous, the second judge denied Gemini and Tokio summary judgment and granted plaintiff summary judgment because the contractual liability exclusion created an "ambiguity . . . as to which clause applies." He reasoned, "Northeast signed a vendor contract with Crisdel and agreed to defend, indemnify and hold harmless Crisdel against any and all claims" arising out of the resurfacing project. Therefore, "Northeast needed th[e Gemini] policy to indemnify and defend Crisdel." In other words, the "insured contract" exception to the contractual liability exclusion applied. In essence, the judge reasoned that because the contractual liability exclusion might not apply to bar coverage, the entire policy was ambiguous and thwarted Northeast's reasonable expectation of coverage. On reconsideration, the third judge corrected this obvious legal error.

In Weedo, the Court rejected an interpretation of a commercial general liability policy that would have resulted in coverage for the repair and replacement of the insured's own faulty workmanship. 81 N.J. at 247–48. The insured's interpretation of the policy "relie[d] on the supposition that the

exception" to one exclusion — providing that the exclusion did "not apply to a warranty that work performed by or on behalf of the named insured will be done in a workmanlike manner" — "grant[ed] coverage for claims based on the warranty described." Id. at 247. "As a variant of [this] argument," that the exclusion did not foreclose coverage, the insured claimed "that this exception, when read in conjunction with the 'business risk' [exclusions], is confusing in that coverage 'granted' by the former clause is taken away by the latter two." Id. at 248 (quoting Weedo v. Stone-E-Brick, Inc., 155 N.J. Super. 474, 486 (App. Div. 1977)).

The Court rejected both arguments, explaining that they ran "directly counter to the basic principle[s] that exclusion clauses subtract from coverage rather than grant it," id. at 247, and that each exclusion must be read and applied "independently of every other exclusion," id. at 248. Thus, the Court found no ambiguity that would prevent application of "the 'business risk' exclusions" to deny coverage. Id. at 246.

Here, the second judge found the auto exclusion was unambiguous. We agree. Nonetheless, he found that because a second exclusion, the contractual liability exclusion, arguably provided coverage, the policy was ambiguous. But even if coverage were available because the contractual liability exclusion did

not apply, the judge failed to independently consider the clear and unambiguous auto exclusion. Plaintiff's attempts to distinguish Weedo's holding in this regard lack any merit.

The second judge reasoned this apparent conflict — where one unambiguous exclusion applied to defeat coverage, but another did not — undermined Northeast's reasonable expectations of the coverage provided by Gemini's policy. In Abboud, Judge Ostrer set forth those circumstances in which our courts have "vindicate[d] the insured's reasonable expectations over the policy's literal meaning," 450 N.J. Super. at 409–10. But the Court has noted that should occur only "in exceptional circumstances[] when the literal meaning of the policy is plain." Doto v. Russo, 140 N.J. 544, 556 (1995). We discern no exceptional circumstances exist in this case, particularly because Northeast specifically purchased an automobile liability policy for the sweeper truck, and a separate comprehensive general liability policy to cover other claims.

The third judge properly reconsidered the prior judge's erroneous interpretation of the Gemini policy's two exclusions and applied the appropriate analysis to plaintiff's claim. We affirm the May 4, 2021 orders under review.

C.

Defendants sought summary judgment by arguing plaintiff lacked standing to bring a declaratory judgment action against Northeast's insurers. Neither the second nor third judge addressed the argument. Plaintiff asserts that defendants are estopped from raising the argument, but this contention is simply wrong. See, e.g., Tymczyszyn v. Columbus Gardens, 422 N.J. Super. 253, 256 n.1 (App. Div. 2011) (considering respondent's alternative grounds for relief that were raised before, but not addressed by, the Law Division (citing Chimes v. Oritani Motor Hotel, Inc., 195 N.J. Super. 435, 443 (App. Div. 1984))). Because the parties' initial briefs addressed only whether defendants were estopped from reasserting the standing argument, we ordered them to address the merits of the issue in supplemental briefing.

Certainly, the general rule is that "plaintiffs in tort actions may not directly sue insurers." Cruz-Mendez v. ISU/Ins. Servs. of San Francisco, 156 N.J. 556, 566–67 (1999). As the Court recently explained:

> In general, "a stranger to an insurance policy has no right to recover the policy proceeds." There are exceptions to that general rule, including certain assignments of rights that authorize a third party to assert a bad-faith claim against an insurer, and third-party beneficiary status, which requires a showing that the contracting parties intended that a third party receive a benefit from the contract that may be enforced in court.

> [Crystal Point Condo. Assoc., Inc. v. Kinsale Ins. Co., 251 N.J. 437, 448 (2022) (citations omitted) (quoting Ross v. Lowitz, 222 N.J. 494, 512 (2015)).]

In this case, the record does not indicate that Northeast ever assigned its rights under the Gemini and Tokio policies to plaintiff, or that plaintiff's decedent was an intended third-party beneficiary of the policies.

Yet, in Manukas v. American Insurance. Co., while affirming the dismissal of the plaintiff's direct claim against the defendant-church's insurer, we noted in dicta that the "[p]laintiff could have included a declaratory judgment action against [the insurer] in the action against the church[] or instituted a separate declaratory judgment action joining the church as a party . . . ." 98 N.J. Super. 522, 525 (App. Div. 1968) (emphasis added). See also, Bomba v. State Farm Fire & Cas. Co., 379 N.J. Super. 589, 591–92 (App. Div. 2005) (considering issues raised in a declaratory judgment action brought by the plaintiffs against the defendants and their insurer seeking additional coverage after the insurer paid its policy into court on the underlying negligence claim); Griffin v. Pub. Serv. Mut. Ins. Co., 327 N.J. Super. 501, 504–05 (App. Div. 2000) (considering the plaintiff's declaratory judgment action filed directly against the defendants' insurers and consolidated with the negligence suit).

Given the particular and peculiar circumstances of the litigation, with plaintiff filing two separate lawsuits and Northeast having dissolved in the interim and not appearing in this action, and given our disposition of the appeal on the merits of plaintiff's arguments, we choose not to decide the issue of whether plaintiff had standing to file this declaratory judgment action.

Affirmed.

I hereby certify that the foregoing is a true copy of the original on file in my office.

CLERK OF THE APPELLATE DIVISION