Superior Court of New Jersey

Appellate Division

Docket No. A-000763-24T2

SL 10 PARK PLACE, LLC and SL MANAGEMENT GROUP, LLC, *Plaintiffs-Respondents,* vs. UTICA NATIONAL INSURANCE GROUP and UTICA MUTUAL INSURANCE COMPANY, *Defendants-Appellants,* and JEFFREY FOGARTY AND ELIZABETH FOGARTY, *Defendants,* CLIFTON ELEVATOR SERVICE COMPANY, INC., and FOGARTY BROTHERS, INC. d/b/a Safeway Van Lines, *Defendants-Respondents.*	:	CIVIL ACTION ON APPEAL FROM THE FINAL ORDERS OF THE SUPERIOR COURT OF NEW JERSEY, LAW DIVISION, MORRIS COUNTY DOCKET NO. MRS-L-1293-22 Sat Below: HON. STEPHAN C. HANSBURY, J.S.C.

BRIEF ON BEHALF OF DEFENDANT-APPELLANT UTICA MUTUAL INSURANCE COMPANY

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Appellant Utica Mutual Insurance Company (and incorrectly sued as Utica National Insurance Group) ("Utica") respectfully submits this brief in support of its appeal from the trial court's September 30, 2024 Trial Decision and May 26, 2023 Duty to Defend Order.

PRELIMINARY STATEMENT

This insurance coverage action arises from a personal injury lawsuit filed by Mr. Fogarty and his wife (the "Fogarty Lawsuit") against (1) SL Parties, the owner and property manager of the commercial building complex (the "Complex") where Mr. Fogarty fell down an open elevator shaft and sustained serious injuries, and (2) Clifton Elevator ("Clifton"), the company responsible for servicing the elevator in which Mr. Fogarty was injured at the Complex. SL Parties and Clifton, through their own insurers, settled the Fogarty Lawsuit by paying $8 million to Mr. Fogarty.

The appeal stems from the trial court's decision to improperly impose upon Utica both an indemnification obligation and a defense obligation for the benefit of SL Parties – one of the two parties to injure Mr. Fogarty – after Clifton (through its own insurer) had already (and correctly) assumed SL Parties' defense under its service contract with SL Parties and Clifton's insurance policy. In so doing, the trial court ignored and/or eviscerated key provisions in SL Parties' lease and Clifton's service contract and refused to

enforce the plain and unambiguous terms and exclusions in the commercial package policy issued by Utica to Fogarty Brothers (the "Utica Policy"). In its decisions, the trial court rewrote the contracts and Utica Policy to benefit the parties who caused Mr. Fogarty's injuries – SL Parties and Clifton, and their own insurers. The Duty to Defend Order and Trial Decision are unsupported by the factual record and contrary to New Jersey law and, as a result, should be reversed in their entirety by this Court.

In the Fogarty Lawsuit, SL Parties and Clifton did not obtain any determination that Fogarty Brothers or Mr. Fogarty was in any way liable for Mr. Fogarty's injuries and damages, and SL Parties explicitly admitted that Fogarty Brothers had no responsibility for the elevator at the Complex. Indeed, the Fogarty Lawsuit was dismissed with prejudice as to all parties without any payment by Fogarty Brothers. Moreover, Mr. Fogarty did not (because he could not under New Jersey's Workers Compensation laws) sue Fogarty Brothers or Utica (as Fogarty Brothers' commercial liability insurer) because he received Workers Compensation benefits under a separate policy.

In imposing all of SL Parties' defense costs upon Utica, the trial court completely ignored the Service Contract between Clifton and SL Parties, which contains an extremely broad indemnification provision that required Clifton to indemnify, defend and hold harmless SL Parties and to procure

commercial general liability insurance under which SL Parties are to be named as additional insureds and "which shall be the primary coverage for all claims of whatever type and nature." As required by the Service Contract, Clifton's primary insurer (GAIC) fully defended both Clifton (as the named insured under the GAIC Policy) and SL Parties (as additional insureds under the GAIC Policy) in the Fogarty Lawsuit. Thus, SL Parties paid no defense costs in the underlying Fogarty Lawsuit.

Contrary to the trial court's holding, no additional insured coverage is available to SL Parties under the Utica Policy. The Utica Policy expressly states that it provides additional insured coverage only if Fogarty Brothers has entered into a contract with a third party requiring Fogarty Brothers to procure such insurance for that third party. No such contract exists here. The Lease did not require Fogarty Brothers to procure additional insured coverage on behalf of SL Parties for Mr. Fogarty's bodily injury claim against SL Parties. Also, the Utica Policy contains exclusions and provisions that preclude coverage for the Fogarty Lawsuit, including but not limited to an exclusion for SL Parties' independent acts or omissions. Therefore, Utica had no duty to defend or indemnify SL Parties and, for the reasons set forth below, Utica respectfully requests that this Court reverse the trial court's decisions in their entirety.

PROCEDURAL HISTORY

On July 25, 2022 (while the Fogarty Lawsuit was pending), plaintiffs SL 10 Park Place, LLC and SL Management Group, LLC (together, "SL Parties") filed this action seeking a determination that Utica has both a duty to defend (First Count) and indemnify (Second Count) SL Parties in the Fogarty Lawsuit under the Utica Policy. Da64.

On September 6, 2022, Utica filed its Answer and Separate Defenses to Complaint with Counterclaim and Crossclaim, seeking the dismissal of SL Parties' Declaratory Judgment Complaint with prejudice. Utica's Counterclaim and Crossclaim (which was also asserted against Clifton) sought a declaration of the parties' respective rights and obligations, as well as contribution and, if necessary, an appropriate allocation of past and future defense and indemnity costs in the Fogarty Lawsuit. Da79.

On December 23, 2022, SL Parties filed a motion for partial summary judgment as to the First Count regarding the duty to defend, and to dismiss Utica's Counterclaim and Crossclaim. Da113. On May 26, 2023, the trial court granted, in part, SL Parties' motion and entered an order (the "Duty to Defend Order") declaring that SL Parties are additional insureds under the Utica Policy and that Utica is obligated to provide a defense to SL Parties for

the Fogarty Lawsuit. Da1. The trial court denied SL Parties' motion to the extent it sought to dismiss Utica's Counterclaim and Crossclaim. Da2.

On August 10, 2023, SL Parties filed a motion to enforce litigants' rights under the Duty to Defend Order, seeking to recover the defense costs already paid for in full by Clifton's insurer ("GAIC") for the Fogarty Lawsuit and attorneys' fees in this action. Da355. Utica opposed this motion and, on September 29, 2023, the trial court denied SL Parties' request for reimbursement of costs for both the Fogarty Lawsuit and this coverage action as premature. Da882, Da15-16.

The coverage action proceeded to a bench trial by written submissions and oral argument, with each party submitting proposed findings of fact and conclusions of law, response papers and joint exhibits. Da927. The findings of fact submitted by both Utica and SL Parties were not disputed. The trial court conducted a hearing on July 23, 2024. Da25.[1] On September 30, 2024, the trial court entered an Order of Judgment and Statement of Reasons (the "Trial Decision") in favor of SL Parties ordering Utica to indemnify SL Parties for the full limit of liability under the Utica Policy ($1 million of the $8 million paid to Mr. Fogarty in settlement by SL Parties and

[1] 1T refers to the Transcript of the Summary Judgment Hearing, dated May 26, 2023; 2T refers to the Trial Hearing Transcript, dated July 23, 2024.

Clifton) and to reimburse GAIC (Clifton's insurer) for all of SL Parties' costs in the Fogarty Lawsuit and this coverage action. Da25-42. On November 12, 2024, the trial court granted SL Parties' motion to amend and/or clarify the Trial Decision so that all references in the Trial Decision to the "other defendant carriers" are amended to state "other interested non-party carriers" instead. Da43. Utica filed its Notice of Appeal on November 13, 2024. Da45.

STATEMENT OF FACTS

I. The Underlying Fogarty Lawsuit

On or about March 7, 2020, Jeffrey Fogarty (an owner and employee of Fogarty Brothers) sustained serious injuries when he attempted to enter the elevator on the first floor of 10 Park Place and fell fifteen to twenty feet into the open elevator shaft. Da71 at ⁋7. Thereafter, on March 31, 2020, Mr. Fogarty and his wife filed the Fogarty Lawsuit. Da70. Mr. Fogarty alleged that the SL Parties were "responsible for managing, maintaining, inspecting, operating, repairing and/or otherwise controlling the Property including the elevators located within the property." Da70-71 at ⁋⁋ 1-2. Mr. Fogarty further alleged that, as a direct and proximate result of SL Parties' negligence, carelessness and recklessness, he fell and sustained significant and permanent physical injuries and endured "pain, suffering, loss of enjoyment of life, disability and impairment." Da72 at ⁋⁋ 11-12.

SL Parties asserted crossclaims against Clifton, seeking defense and indemnification for the Fogarty Lawsuit pursuant to the Service Contract between SL Parties and Clifton, alleging that Mr. Fogarty's injuries were the proximate result of Clifton's negligence and that Clifton is required to provide "additional insured coverage on a primary, non-contributory basis," to SL Parties for the Fogarty Lawsuit. Da186. SL Parties were fully defended in the Fogarty Lawsuit under the GAIC Policy issued to Clifton. Da365.

SL Parties also filed a Third-Party Complaint against Fogarty Brothers, which as amended, alleged that Fogarty Brothers' negligence caused Mr. Fogarty's injuries, that SL Parties are entitled to contribution from Fogarty Brothers, that the Lease requires Fogarty Brothers to defend, indemnify and hold harmless SL Parties for the Fogarty Lawsuit. Da210-211.[2]

On October 2, 2023, the parties in the Fogarty Lawsuit reached a settlement pursuant to which SL Parties and Clifton, through their insurers, agreed to pay a specified $8 million settlement amount (the "Settlement Amount") to Mr. Fogarty. Da1546-1559. The Settlement Amount was funded by: (1) GAIC, which tendered its policy limits on behalf of (a) Clifton (as the Named Insured under the GAIC Policy) and (b) SL Parties (as additional

[2] Utica provided a defense to its policyholder, Fogarty Brothers, against SL Parties' Third-Party Complaint, appointing Michael Mikulski, Esq. as counsel. Da1567.

insureds under the GAIC Policy); (2) Liberty Insurance Underwriters Inc. ("Liberty"), which also paid on behalf of (a) Clifton (as the Named Insured under the Liberty Policy) and (b) SL Parties (as additional insureds under the Liberty Policy); and (3) by SL Parties' own liability insurers, Travelers and Federal neither of which insured Clifton (or Fogarty Brothers). Da1550-1559.

As a result of Jeffrey Fogarty's extensive injuries, he tendered a Workers' Compensation claim to his carrier (Continental Indemnity Company, which was not a party to either the Fogarty Lawsuit or this action), which carrier paid almost $1 million in medical benefits; and, as part of the settlement of the Fogarty Lawsuit, the Workers' Compensation carrier compromised its lien to $688,573.28. Da2265.

The parties also dismissed with prejudice all claims and defenses, including both SL Parties' Third-Party Complaint against Fogarty Brothers and SL Parties' comparative negligence claim against Jeffrey Fogarty. Da1546. Thus, at no point in the Fogarty Lawsuit did either SL Parties or Clifton obtain a determination that Fogarty Brothers was in any way liable for Jeffrey Fogarty's injuries and damages. Moreover, SL Parties admitted in Requests for Admission that Fogarty Brothers had no responsibility for the elevator at the premises. Da1568. Under the settlement, and because there was no determination in the Fogarty Lawsuit that Fogarty Brothers was negligent or

otherwise caused Jeffrey Fogarty's injuries, Fogarty Brothers had no obligation to contribute to or pay any portion of the Settlement Amount owed to Mr. Fogarty. Da1547-1559.

II. The SL Parties' Lease with Fogarty Brothers

On March 9, 2016, Fogarty Brothers entered into a commercial lease agreement (the "Lease") with Butler Center Associates, the predecessor to SL 10 Park Place, for approximately 1,643 square feet of space (the "Premises") located on the second floor of Building #4-A at 10 Park Place in Butler, New Jersey (the "Complex"). Da1462. The Lease, which was effective from April 1, 2016 to March 31, 2021, defined the "Use of Premises" as "[s]torage of household items as well as pianos." Id.

The Lease expressly states that Fogarty Brothers has no obligation to defend, indemnify or hold harmless "the Landlord, its employees, and its agents" from any claim or cause of action "for any injury, death, damage, loss liability or expense, including without limitation any claim for personal injury or property damage" if such claim or cause of action is asserted by "the Tenant or any person or entity holding the Tenant's interest under this lease" or "due to the acts or negligence of Landlord, or its employees or its agents." Da1479 at Article 23. "Release and Indemnification."

Moreover, Article 7 of the Lease sets forth Fogarty Brothers' and SL Parties' respective obligations to maintain certain liability insurance:

> A. Insurance to be maintained by Landlord. Landlord shall maintain . . . **(b) commercial general public liability insurance covering Landlord for claims arising out of liability for bodily injury, death, personal injury, advertising injury and property damage occurring in and about the Complex and otherwise relating from any acts and operations of the Landlord, its agents and employees** . . . .
>
> B. Liability Insurance. Tenant shall purchase at its own expense and keep in force during this Lease a policy or policies of (i) commercial general liability insurance, including personal injury and property damage, in the amount of not less than One Million Dollars ($1,000,000.00) per occurrence and Two Million Dollars ($2,000,000.00) annual aggregate per location . . . . Said policies shall (a) name Landlord, Agent, and any party holding an interest to which this Lease may be Subordinated as additional insured's . . . . **(e) provide coverage for the indemnity obligations of Tenant under this Lease**; (f) contain a severability of insured parties provision and a cross liability endorsement; (g) be primary, not contributing with, and not in excess of coverage which Landlord may carry . . . .

Da1466-1467. Thus, under the Lease, the Landlord had its own obligation to maintain its own commercial general public liability insurance "relating from **any acts and operations** of the Landlord, its agents and employees." Id. (emphasis added). More importantly, the trial court disregarded subpart (e) in Article 7(B) of the Lease in both the Duty to Defend Order and the Trial Decision. Da1, Da25.

III. The Clifton Service Contract

SL Parties entered into a service contract with Clifton for the period of January 15, 2019 through December 31, 2019 (the "Service Contract"). Da1485. The scope of work to be performed by Clifton under the Service Contract included work on the freight and passenger elevators located at the Property. Da1496-1497. The Service Contract contains an extremely broad indemnification provision, which requires Clifton to indemnify, defend and hold harmless SL Parties against:

> any and all liabilities, claims, demands, causes of action, administrative or regulatory proceedings, lien, settlements, judgments and expenses, including, but not limited to, attorney's fees and investigative costs, directly or indirectly resulting from bodily injury, personal injury, or death, property damage or intangible pecuniary loss, sustained or alleged to have been sustained by any business, organization or person . . . arising out of or in connection with the performance of the Work or this Contract by Contractor, its agents, servants, employees, or independent contractors retained or hired by Contractor.

Da1489 at ¶14. The Service Contract further provides that:

> This indemnification is not limited to attorney's fees and investigative costs, and shall include costs, losses or damages resulting from or **alleged to result from either active or passive negligence of any Owner Indemnified Party concurrent with that of Contractor or others but shall not apply to instances of the actual sole negligence or in-fact willful misconduct on the part of any Owner Indemnified Party**.

Id. (emphasis added).

The Service Contract also requires Clifton to procure commercial general liability insurance under which SL Parties are to be named as additional insureds and which "**shall be the primary coverage for all claims of whatever type and nature**":

> Contractor agrees to maintain in full force and effect, in form and content and with insurers approved by Owner, and at Contractor's sole cost and expense, the following policies of insurance:
>
> * * *
>
> Commercial General Liability Insurance written on an occurrence form, with defense costs in addition to limits, **insuring Bodily Injury** and Property Damage, **including Product and Completed Operations coverage**, Blanket Contractual Coverage, Independent Contractors coverage, Personal Injury and Advertising Injury coverage and XCU (Explosion-Collapse-and Underground Hazard Insurance), in an amount not less than the following:
>
> * * *
>
> x 2,000,000 per occurrence
>
> * * *
>
> or higher limits at the sole discretion of Owner or SL Management Group on which the Owner . . . and SL Management Group, Inc. shall be named as additional insureds for loss arising from Contractor's operations and completed operations. **Such policy shall be the primary coverage for all claims of whatever type and nature.**
>
> The clause contained in Paragraph 14 of this Contract wherein Contractor agrees to indemnify, defend and hold Owner . . . and SL Management Group harmless shall be insured under such comprehensive General Liability Insurance.

Da1491-1492.

IV. The Insurance Policies

A. The Utica Policy – Issued to Fogarty Brothers

Utica issued the Utica Policy to Fogarty Brothers, with a policy period of February 27, 2020 to February 27, 2021. Da931. The Utica Policy contains a Commercial General Liability Coverage Form that provides, in part, as follows:

> We will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury" or "property damage" to which this insurance applies. We will have the right and duty to defend the insured against any "suit" seeking those damages. However, we will have no duty to defend the insured against any "suit" seeking damages for "bodily injury" or "property damage" to which this insurance does not apply. We may, at our discretion, investigate any "occurrence" and settle any claim or "suit" that may result.

Da998.

The Utica Policy also contains a General Liability Extension Endorsement, which amends Section II as follows:

> The following is added to **SECTION II – WHO IS AN INSURED**:
>
> a. **Additional Insureds – By Contract, Agreement or Permit**
>
> (1) Any person or organization with whom you have entered into a written contract, agreement or permit requiring you to provide insurance such as is afforded by this Commercial General Liability Coverage Form will be an additional insured, but only:

> (a) To the extent that such additional insured is held liable for acts or omissions committed by you or your subcontractors during the performance of your ongoing operations for the additional insured.
>
> (b) With respect to property owned or used by, or rented or leased to, you.
>
> The insurance afforded any additional insured under this paragraph 11.a.(1) will be subject to all applicable exclusions or limitations described in paragraphs 11.b.(1), (2), (3) and (4) and in 11.c.(1), (2), (3), (4), (5) and (6) below.

Da987 at Paragraph 11.a(1) (emphasis added).

The Utica Policy expressly states that it precludes coverage for an additional insured's "independent acts or omissions": "This insurance does not apply to: (1) The independent acts or omissions of such additional insured." Da989 at Paragraph 11.c.(1).

The Utica Policy also contains the following exclusions for "employer's liability" and "workers' compensation and similar laws":

> **2. Exclusions**
>
> This insurance does not apply to:
>
> * * *
>
> **d. Workers' Compensation And Similar Laws**
>
> Any obligation of the insured under a workers' compensation, disability benefits or unemployment compensation law or any similar law.

> **e. Employer's Liability**
>
> "Bodily injury" to:
>
> (1) An "employee" of the insured arising out of and in the course of:
>
> (a) Employment by the insured; or
> (b) Performing duties related to the conduct of the insured's business;
>
> * * *
>
> This exclusion applies whether the insured may be liable as an employer or in any other capacity and to any obligation to share damages with or repay someone else who must pay damages because of the injury.
>
> This exclusion does not apply to liability assumed by the insured under an "insured contract".

Da999 at Paragraph 2.d-e (emphasis added).

In addition, under Coverage C – Medical Payments, the Utica Policy plainly states that Utica will not pay expenses for "bodily injury" to any insured (Exclusion 2.a.) or "[t]o a person injured on that part of premises you own or rent that the person normally occupies" (Exclusion 2.c.). Da1005.

The Utica Policy also contains "Other Insurance" provisions which limit Utica's obligations to an insured for a covered loss as follows:

> **4. Other Insurance**
>
> If other valid and collectible insurance is available to the insured for a loss we cover under Coverages A or B of this Coverage Part, our obligations are limited as follows:

a. Primary Insurance

This insurance is primary except when Paragraph b. below applies. If this insurance is primary, our obligations are not affected unless any of the other insurance is also primary. Then, we will share with all that other insurance by the method described in Paragraph c. below.

b. Excess Insurance

(1) This insurance is excess over:

* * *

(b) Any other primary insurance available to you covering liability for damages arising out of the premises or operations, or the products and completed operations, <u>for which you have been added as an additional insured</u>.

(2) When this insurance is excess, we will have no duty under Coverages A or B to defend the insured against any "suit" if any other insurer has a duty to defend the insured against that "suit". If no other insurer defends, we will undertake to do so, but we will be entitled to the insured's rights against all those other insurers.

(3) When this insurance is excess over other insurance, we will pay only our share of the amount of the loss, if any, that exceeds the sum of:

(a) The total amount that all such other insurance would pay for the loss in the absence of this insurance; and

(b) The total of all deductible and self-insured amounts under all that other insurance.

> (4) We will share the remaining loss, if any, with any other insurance that is not described in this Excess Insurance provision and was not bought specifically to apply in excess of the Limits of Insurance shown in the Declarations of this Coverage Part.
>
> **c. Method of Sharing**
>
> If all of the other insurance permits contribution by equal shares, we will follow this method also. Under this approach, each insurer contributes equal amounts until it has paid its applicable limit of insurance or none of the loss remains, whichever comes first.
>
> If any of the other insurance does not permit contribution by equal shares, we will contribute by limits. Under this method, each insurer's share is based on the ratio of its applicable limit of insurance to the total applicable limits of insurance of all insurers.

Da1009 (emphasis added).

B. The GAIC Policy – Issued to Clifton

Great American Insurance Company ("GAIC") issued a general liability policy to Clifton Elevator Service Co., Inc. ("Clifton") for the policy period of August 1, 2019 to August 1, 2020 with a limit of $1,000,000 each occurrence, a general aggregate limit of $4,000,000 and a products-completed operations aggregate limit of $4,000,000. Da1037, Da1053. The GAIC Policy provides that GAIC "will pay those sums that the Insured becomes legally obligated to pay as damages because of 'bodily injury' or 'property damage' to which this insurance applies." Da1075. The GAIC Policy further states that

GAIC "will have the right and duty to defend the Insured against any 'suit' seeking those damages." Id.

The GAIC Policy contains "Additional Insured" endorsements which provide coverage for any person or organization that Clifton is required by agreement to name as an additional insured under the GAIC Policy where the written contract or agreement is in effect during the term of the GAIC Policy and is entered into prior to the "occurrence" of any "bodily injury" or "property damage." Da1063 (Additional Insured – Owners, Lessees or Contractors – Scheduled Person or Organization); Da1065 (Additional Insured – Owners, Lessees or Contractors – Completed Operations).

The GAIC Policy provides coverage to an additional insured for liability for "bodily injury" caused, in whole or in part, by Clifton's acts or omissions or the acts or omissions of those acting on Clifton's behalf. Da1063; see also Da1065 (providing additional insured coverage for liability for "bodily injury" caused, in whole or in part, by "your work" at the designated location performed for that additional insured and included in the "products-completed operations hazard"). Here, Clifton entered into the Service Contract with SL Parties which required Clifton to include SL Parties as additional insureds on a primary basis and noncontributory basis. Da1492. The GAIC Policy contains "other insurance" provisions which permit

contribution by equal shares where all other applicable insurance policies permit contribution by equal shares. Da1089 ("Method of Sharing"). The GAIC Policy states that "[u]nder this approach each insurer contributes equal amounts until it has paid its applicable Limit of Insurance or none of the loss remains, whichever comes first." Id.

GAIC fully defended SL Parties as additional insureds under the GAIC Policy in the Fogarty Lawsuit and paid $1 million of the Settlement Amount on behalf of Clifton and SL Parties (as additional insureds) in the Fogarty Lawsuit. Da1555-1559.

C. The Liberty Excess Policy – Issued to Clifton

Liberty Insurance Underwriters Inc. ("Liberty") issued an excess liability policy to Clifton for the policy period of August 1, 2019 to August 1, 2020 with a limit of $5,000,000 each occurrence and an aggregate limit of $5,000,000 where applicable (the "Liberty Policy"). Da1122. The Liberty Policy sits directly above the GAIC Policy and, except for any definitions, terms, conditions and exclusions in the Liberty Policy, the coverage provided by the Liberty Policy is subject to the terms and conditions in the GAIC Policy. Da1128, Da1151. Liberty paid no defense costs on behalf of its insureds, Clifton and the SL Parties, in connection with the Fogarty Lawsuit; but Liberty paid $4.75 million in indemnity on behalf of Clifton and the SL

Parties (as additional insureds) to Mr. Fogarty as part of the Settlement Amount for the Fogarty Lawsuit. Da1555-1557.

D. The Travelers Policy – Issued to SL Parties

Travelers Property Casualty Company of America ("Travelers") issued a general liability policy to SL Parties for the policy period of July 1, 2019 to July 1, 2020, with a limit of $1,000,000 each occurrence, a general aggregate limit of $2,000,000 and a products-completed operations aggregate limit of $2,000,000 (the "Travelers Policy"). Da1156, Da1187. Travelers paid no defense costs on behalf of its insureds, the SL Parties, in connection with the Fogarty Lawsuit; but Travelers paid $1 million in indemnity on behalf of the SL Parties to Mr. Fogarty as part of the Settlement Amount. Da1553-1554.

E. The Federal Policy – Issued to SL Parties

Federal Insurance Company ("Federal") issued an umbrella liability policy to SL Parties for the policy period of July 1, 2019 to July 1, 2020, with limits of $10,000,000 each occurrence and in the aggregate (where applicable) (the "Federal Policy"). Da1375-1376. The Federal Policy sits directly above the Travelers Policy. Da1393. Federal paid no defense costs on behalf of its insureds, the SL Parties, in connection with the Fogarty Lawsuit; but Federal paid $1.25 million in indemnity on behalf of the SL Parties to Mr. Fogarty as part of the Settlement Amount. Da1550-1551.

V. The Trial Court's Orders

A. The Duty to Defend Order

On December 23, 2022, SL Parties filed a motion for partial summary judgment as to the First Count, seeking a declaration on the duty to defend, and to dismiss Utica's Counterclaim and Crossclaims. Da113. On May 26, 2023, the trial court granted, in part, SL Parties' motion and entered an order declaring that SL Parties are additional insureds under "Section I, Coverage A 1.a and Section 11.a(1)(b) of the General Liability Extension Endorsement" of the Utica Policy and that Utica is obligated to provide a defense to SL Parties for the Fogarty Lawsuit. Da2. The trial court specifically denied SL Parties' motion to dismiss Utica's Counterclaim and Crossclaim and held that "the SL Parties have not articulated any reason why Utica would not be entitled to seek an allocation of defense and indemnity costs among the parties or contribution and/or equitable subrogation in the event that Fogarty Brothers and/or Utica is found to be in any way liable in the underlying personal injury action and/or this action." Da13-14.

B. The Order Denying SL Parties' Motion to Enforce Litigants' Rights

On August 10, 2023, SL Parties filed a motion to enforce litigants' rights under the May 26, 2023 Duty to Defend Order, seeking to recover the defense costs already paid for in full by GAIC for the Fogarty Lawsuit and SL

Parties' defense costs incurred in this coverage action. Da355. On September 29, 2023, the trial court denied SL Parties' request for reimbursement of defense costs for both the Fogarty Lawsuit and this action as premature. Da15-16. The trial court explained that, to the extent that it is determined that Utica has a duty to defend SL Parties under the Utica Policy, the duty to defend may be converted to a duty to reimburse, Da23 (citing *Grand Cove II Condominium Ass'n, Inc. v. Ginsberg*, 291 N.J. Super. 58, 73 (App. Div. 1996), and that "the duty of reimbursement is limited to allegations covered under the policy if there can be an apportionment." Id. (citing *L.C.S., Inc. v. Lexington Ins. Co.*, 371 N.J. Super. 482, 498 (App. Div. 2004). The trial court further found that because no determination has been made as to priority of coverage or apportionment of defense costs, the duty to reimburse cannot currently be enforced. Id. Similarly, the trial court denied SL Parties' request for an award of attorneys' fees incurred in this coverage action as premature. Da16.

C. The Trial Decision

On September 30, 2024, the trial court entered an Order of Judgment and Statement of Reasons (the "Trial Decision") in favor of SL Parties, ordering Fogarty Brothers' own insurer, Utica, to reimburse and pay the full $1 million limit of liability under the Utica Policy, and to reimburse all

of SL Parties' defense costs in the Fogarty Lawsuit and attorneys' fees and costs in this action in the amount of $647,939.78, without apportioning any of the defense costs incurred in the Fogarty Lawsuit to Clifton (under the Service Contract) or Clifton's insurer, GAIC – the insurer that was required to insure SL Parties on a primary, non-contributory basis for the Fogarty Lawsuit. Da25-42.

LEGAL ARGUMENT

I. THE TRIAL DECISION AND DUTY TO DEFEND ORDER ARE SUBJECT TO DE NOVO REVIEW

Under New Jersey law, the interpretation of a contract, including an insurance policy, is a legal question subject to de novo review by this Court. *See Serico v. Rothberg*, 234 N.J. 168, 178 (2018) ("In the absence of a factual dispute, we review the interpretation of a contract de novo."); *Pickett on behalf of Est. of Pickett v. Moore's Lounge*, 464 N.J. Super. 549, 554-55 (App. Div. 2020) ("This appeal turns on a purely legal question: our interpretation of the [insurance] policy."); *Abboud v. Nat'l Union Fire Ins. Co. of Pittsburgh*, Pa., 450 N.J. Super. 400, 406 (App. Div. 2017) ("Interpretation of an insurance policy also presents a legal question, which we review de novo."). There are no disputed issues of fact in this appeal.

The New Jersey Supreme Court has consistently held that "[a] trial court's interpretation of the law and the legal consequences that flow from

established facts are not entitled to any special deference [,]' and, hence, an 'issue of law [is] subject to de novo plenary appellate review[,]', regardless of the context." *Estate of Hanges v. Metro. Prop. & Cas. Ins. Co.*, 202 N.J. 369, 382-83 (2010) (internal citation omitted); *see also Baker v. Nat'l State Bank*, 353 N.J. Super. 145, 153 (App. Div. 2002) ("De novo review means that a reviewing court may disagree with the lower court's findings and conclusions.") (citing *Goodman v. London Metals Exch., Inc.*, 86 N.J. 19, 28-29 (1981)).

Here, the trial court inexplicably ignored, rewrote and/or misconstrued: (1) critical provisions in the Lease, including Article 23(C) which states that Fogarty Brothers has no obligation to defend or indemnify SL Parties for bodily injury claims asserted by Mr. Fogarty due to SL Parties' own acts or negligence, and Article 7, which confirms that Fogarty Brothers' obligation to procure additional insured coverage on behalf of SL Parties is coextensive with its indemnification obligations under Article 23(c); (2) the Utica Policy, which by its plain and unambiguous terms, conditions and exclusions does not provide additional insured coverage to SL Parties for the Fogarty Lawsuit, and (3) the Service Contract, which contains a broad indemnification provision requiring Clifton to defend, indemnify and hold harmless SL Parties and to procure additional insured coverage on behalf of

SL Parties for such liabilities on a primary, non-contributory basis. The trial court also disregarded New Jersey law regarding the purpose and scope of additional insured coverage, among other issues.

Accordingly, because this Court's interpretation of the parties' respective rights and obligations under the Lease, the Utica Policy and the Service Contact are questions of law for this Court to determine, the Trial Decision and Duty to Defend Order are subject to de novo review and should be reversed by this Court for the reasons set forth below.

II. UTICA HAS NO DUTY TO INDEMNIFY SL PARTIES UNDER THE LEASE OR UTICA POLICY (Da34)

A. SL Parties Had The Burden To Prove, By A Preponderance Of The Evidence, That The Fogarty Lawsuit Falls Within The Scope Of Coverage Of The Utica Policy But Failed To Do So (Da34)

It is well-settled law in New Jersey that "[t]he burden is on the insured to bring the claim within the basic terms of the policy." *Reliance Ins. Co. v. Armstrong World Indus., Inc.*, 292 N.J. Super. 365, 277 (App. Div. 1996) (emphasis added) (citing *Diamond Shamrock Chemicals Co. v. Aetna Cas. & Sur. Co.*, 258 N.J. Super. 167, 216 (App. Div. 1992), *certif. denied*, 134 N.J. 481 (1993)); *see also Wear v. Selective Ins. Co.*, 455 N.J. Super. 440, 455 (App. Div. 2018) ("Neither the duty to defend nor the duty to indemnify 'exists except with respect to occurrences for which the policy provides

coverage.'") (quoting *Hartford Acc. & Indem. Co. v. Aetna Life & Cas. Ins. Co.*, 98 N.J. 18, 22 (1984)).

The duty to indemnify is distinct from the duty to defend and requires SL Parties (as plaintiffs, and supposed additional insureds) to demonstrate by a preponderance of the evidence that the claims for which SL Parties seek coverage under the Utica Policy are, in fact, covered. *Mem'l Properties, LLC v. Zurich Am. Ins. Co.*, 210 N.J. 512, 529 (2012) ("The duty to defend and the duty to indemnify are distinct; an insurance company's duty to defend "is neither identical nor coextensive" with its duty to indemnify.") (citation omitted); *Brindley v. Firemen's Ins. Co. of Newark*, 35 N.J. Super. 1, 7 (App. Div. 1955) ("It was the burden of plaintiffs [the insureds] to show by a fair preponderance of the evidence that the damages to their building were within the coverage . . . .") (citations omitted); *see also Mahon v. Am. Cas. Co. of Reading, Pa.*, 65 N.J. Super. 148, 178 (App. Div. 1961) (concluding that the insured "will have the burden of proof, since it goes to establishment of coverage under the insuring clause of the policy") (citations omitted).

The Joint Exhibits submitted at the trial hearing prove that Utica has no indemnity obligations for the Fogarty Lawsuit because, as confirmed by the October 2, 2023 settlement and dismissal of the Fogarty Lawsuit: (a) SL Parties do not qualify as additional insureds under the Utica Policy because the

Lease does not require Fogarty Brothers to indemnify SL Parties for injuries to Jeffrey Fogarty caused by SL Parties or to procure additional insured coverage for SL Parties for such claims; (b) Utica has no obligation to pay indemnity (including medical expenses) to any of its own policyholders (*i.e.*, Mr. Fogarty); and (c) the "independent acts or omissions" exclusion in the Utica Policy bars coverage for the Fogarty Lawsuit because Mr. Fogarty did not assert any claims against his own company, the Fogarty Lawsuit did not seek to hold SL Parties vicariously liable for the acts or omissions of Fogarty Brothers and all claims (including SL Parties' third party claims) were dismissed with prejudice as to Fogarty Brothers, with no obligation for Fogarty Brothers to contribute to the settlement amount. 1T24:12-16. Thus, based on SL Parties' failure to bring their claim within the scope of coverage of the Utica Policy, this Court should reverse the Trial Decision.

B. The Lease Does Not Require Fogarty Brothers To Indemnify Or Procure Additional Insured Coverage For SL Parties For Jeffrey Fogarty's Bodily Injury Claims (Da38)

The trial court erred by ignoring critical provisions in the Lease and, in doing so, impermissibly rewrote the terms of the Lease and mistakenly concluded that SL Parties qualify as additional insureds under the Utica Policy. As an initial matter, under Article 23 of the Lease, Fogarty Brothers had no obligation to indemnify or defend SL Parties for any claim or cause of

action for injuries asserted by Mr. Fogarty where such injuries were due to the acts or negligence of SL Parties (or their employees or agents, including Clifton). Da1479 at Article 23. "Release and Indemnification." The settlement and dismissal of the Fogarty Lawsuit confirms that Mr. Fogarty did not seek to hold SL Parties vicariously liable for the negligence, acts or omissions of Fogarty Brothers. Mr. Fogarty did not assert any claims against Fogarty Brothers (his own company) and, SL Parties' third-party claims were dismissed with prejudice as to Fogarty Brothers, with no obligation for Fogarty Brothers to make any settlement payments (and no determination of comparative negligence against Mr. Fogarty).

The trial court also disregarded Article 7 of the Lease, which states that Fogarty Brothers is only obligated to procure additional insured coverage for SL Parties for those claims for which Fogarty Brothers has an obligation to indemnify SL Parties under the Lease. Da1467 ("Tenant shall purchase at its own expense and keep in force during this Lease a policy or policies of (i) commercial general liability insurance . . . . Said policies shall . . . (e) provide coverage for the indemnity obligations of Tenant under this Lease") (emphasis added). Indeed, the trial court ignored subparagraph (e) in the Duty to Defend Order and the Trial Decision.

Thus, under the Lease, because Fogarty Brothers had no obligation to indemnify SL Parties for SL Parties' own negligence, Fogarty Brothers also had no obligation to obtain additional insured coverage for SL Parties' own negligence involving Mr. Fogarty's injuries. Instead, the Lease plainly states that SL Parties are responsible for maintaining their own liability insurance for injuries caused by their own negligence, acts or omissions. Da1466-1467 ("Landlord shall maintain . . . (b) commercial general public liability insurance covering Landlord for claims arising out of liability for bodily injury, death, personal injury, advertising injury and property damage occurring in and about the Complex and otherwise relating from any acts and operations of the Landlord, its agents and employees . . . .") (emphasis added).

The New Jersey Supreme Court has made clear that this Court should not re-write the Lease in order for the SL Parties to find coverage where none exists under the Utica Policy. *Kampf v. Franklin Life Ins. Co.*, 33 N.J. 36, 43 (1960) ("Courts cannot make contracts for parties. They can only enforce the contracts which the parties themselves have made."); *McMahon v. City of Newark*, 195 N.J. 526, 545-46 (2008) (stating that "[w]hen the terms of [a] contract are clear, it is the function of a court to enforce it as written and not to make a better contract for either of the parties [because t]he parties are entitled to make their own contracts"). The New Jersey Supreme Court also

has held that in order "to bring a negligent indemnitee within an indemnification agreement," such agreement "must specifically reference the negligence or fault of the indemnitee." *Azurak v. Corp. Prop. Invs.*, 175 N.J. 110, 112-13 (2003).[3] Here, the indemnification provision in the Lease specifically excludes SL Parties' negligence from any indemnity obligation.

The express terms of SL Parties' own Lease confirm that Fogarty Brothers had no obligation to indemnify or procure additional insured coverage on behalf of SL Parties for the Fogarty Lawsuit. Therefore, the Trial Decision should be reversed because, consistent the terms of the Lease, SL Parties do not qualify as additional insureds under the Utica Policy.

C. The Plain Terms Of The Utica Policy Only Provide Coverage For An Additional Insured Under A Contract That Requires Fogarty Brothers To Provide Such Insurance (Da38)

The trial court's decisions should be reversed because SL Parties failed to demonstrate that they are additional insureds under the Utica Policy. The Utica Policy specifically states that "[a]ny person or organization with whom you [*i.e.*, Fogarty Brothers] have entered into a written contract, agreement or permit requiring you to provide insurance such as is afforded by

[3] The Court in *Azurak* concluded that a janitorial services company had no obligation to indemnify a shopping mall for its own negligence in a personal injury action filed by a customer where the indemnification provision in the contract at issue did not specifically require that company to indemnify the mall for its own negligence.

this Commercial General Liability Coverage Form" is an additional insured subject to the limitations set forth in paragraph a.(1)(a)-(b) and subject "to all applicable exclusions or limitations described in paragraphs 11.b.(1), (2), (3) and (4) and in 11.c.(1), (2), (3), (4), (5) and (6). Da987. The Lease explicitly does not require Fogarty Brothers to procure additional insured coverage for SL Parties' own negligence, acts or omissions in connection with the Fogarty Lawsuit. Thus, given the terms of the Lease, Fogarty Brothers was not required to provide insurance for Mr. Fogarty's bodily injury claim, and SL Parties do not qualify as additional insureds under the Utica Policy.

D. The Utica Policy Does Not Pay Indemnity to Its Own Policyholder (Da39)

Utica has no obligation to reimburse SL Parties, GAIC or any of SL Parties' other insurers for any indemnity payments made in connection with the Fogarty Lawsuit, including the Settlement Amount paid to Mr. Fogarty, because the Utica Policy has no obligation to pay indemnity for losses sustained by its own policyholders. Specifically, Utica cannot have a duty to indemnify SL Parties because New Jersey's Workers' Compensation Act precludes Mr. Fogarty from asserting any direct claims against his employer, Fogarty Brothers, let alone claims for which SL Parties are alleged to be vicariously liable. *See Basil v. Wolf*, 193 N.J. 38, 55 (2007) ("It is well settled in this State that there is no direct action available to an injured employee

against the employer, or against the employer's insurer when the insurer takes no action beyond that which is required under the Act and the carrier's insurance policy."); *Gore v. Hepworth*, 316 N.J. Super. 234, 240 (App. Div. 1998) ("[A]n employee's exclusive remedy against the employer for ordinary work injuries is a statutory remedy without regard to fault. In return, the employee forgoes a common law tort remedy.") (citing *N.J.S.A.* 34:15-8). Mr. Fogarty unquestionably received the workers' compensation benefits to which he was entitled under a separate workers compensation policy.

In addition, even if the Fogarty Lawsuit had sought to hold SL Parties vicariously liable for any alleged negligence of Fogarty Brothers, which again it did not, such claims against SL Parties still would be excluded by the employer's liability exclusion and also the workers' compensation exclusion in the Utica Policy. *See Am. Motorists Ins. Co. v. L-C-A Sales Co.*, 155 N.J. 29, 42 (1998) ("Aside from the plain language of the employee exclusion, the presence of the workers' compensation exclusion immediately preceding the employee exclusion demonstrates that the objective of the CGL policy was to exclude from coverage all claims — whether falling within or beyond the workers' compensation system — 'arising out of and in the course of' [plaintiff's] employment.").

Moreover, the Utica Policy is a third-party liability insurance policy issued to Fogarty Brothers, in which Jeffrey Fogarty is an owner. As an owner, "executive officer" and/or director of Fogarty Brothers, Mr. Fogarty is an "insured" under the Utica Policy. Da1006 (Section II – Who Is An Insured, Form CG 00 01 04 13). As a third-party liability policy, the Utica Policy does not have any obligation to pay indemnity to its own policyholder (*i.e.*, Mr. Fogarty) for damages because of "bodily injury" sustained by its insured or to pay medical expenses to any insured. *See Universal Underwriters Grp. v. Heibel*, 386 N.J. Super. 307, 317 (App. Div. 2006) (explaining that liability insurance is "known as third-party insurance since liability insurance 'does not directly recompense the insured for the insured's own loss'") (quoting 15 Holmes' Appleman on Insurance § 111.1 (2d ed. 1996)); *State, Dep't of Env't Prot. v. Signo Trading Int'l, Inc.*, 235 N.J. Super. 321, 336 (App. Div. 1989) (observing that "liability insurance policies cover only tort liability for damage to others, not first party losses of the insured itself"), *aff'd sub nom.*, *State v. Signo Trading Int'l, Inc.*, 130 N.J. 51 (1992); *see also Kentopp v. Franklin Mut. Ins. Co.*, 293 N.J. Super. 66, 76 (App. Div. 1996) ("CGL policies cover losses or liabilities on account of property damage sustained by parties other than the insured itself, as they are not insurance policies providing an insured first-party coverage for losses sustained to the insured's property."). This

Court has long recognized that "[i]n sorting out whether a policy is first-party insurance or third-party insurance it is necessary to look to whom the insurer owes the duty to pay, i.e., whether the insurer must pay '1) directly to the insured or 2) directly to a third-party claimant.'" *Universal Underwriters*, 386 N.J. Super. at 317-18 (citation omitted).

Additionally, the Utica Policy expressly states that it has no obligation to pay medical expenses for "bodily injury" to "***any*** insured" or to "a person injured on that part of premises you own or rent that the person normally occupies." Da1005 (Exclusion 2.a & c. Form CG 00 01 04 13) (emphasis added). There is no dispute that Fogarty Brothers was renting warehouse space at the Complex owned by SL Parties at the time of Mr. Fogarty's accident, that Mr. Fogarty routinely used the freight elevator to access the warehouse space and that Mr. Fogarty sustained serious injuries when he fell into the freight elevator shaft at the Complex. Thus, under both Exclusions 2.a. and 2.c., Utica has no obligation to pay for any medical expenses for "bodily injury" to Mr. Fogarty.

E. The Independent Acts Or Omissions Of SL Parties Are Excluded From Coverage Under The Utica Policy (Da39-41)

Utica also has no obligation to indemnify SL Parties for the Fogarty Lawsuit because, among other reasons, the Utica Policy excludes coverage for SL Parties' own independent acts or omissions. Contrary to the

trial court's holding, the independent acts or omissions exclusion is clear and unambiguous and should be enforced as written.

The Utica Policy provides that Utica "will pay those sums that the insured becomes legally obligated to pay as damages because of 'bodily injury' . . . to which this insurance applies." The Utica Policy expressly states that "[t]he insurance afforded any additional insured under this paragraph is subject to applicable exclusions or limitations," including paragraph 11.c.(1). That provision plainly excludes coverage for SL Parties' independent acts or omissions: "This insurance does not apply to: (1) The independent acts or omissions of such additional insured." Da989 at Paragraph 11.c.(1). This provision is entirely consistent with the Lease between Fogarty Brothers and SL Parties, which as discussed expressly states that Fogarty Brothers has no obligation to defend, indemnify or hold harmless "the Landlord, its employees, and its agents" from any claim or cause of action "for any injury, death, damage, loss liability or expense, including without limitation any claim for personal injury or property damage" if such claim or cause of action is asserted by "the Tenant or any person or entity holding the Tenant's interest under this lease" or "due to the acts or negligence of Landlord, or its employees or its agents." Da1479 at Article 23. "Release and Indemnification" (emphasis added). Thus, Fogarty Brothers has no obligation under the Lease to

indemnify SL Parties for Mr. Fogarty's injuries, and the trial court completely ignored that portion of the Lease in both the Duty to Defend Order and the Trial Decision, instead finding that the independent acts or omissions exclusion was ambiguous.

Courts construing exclusions for an additional insured's "independent acts or omissions" have held that this exclusion unambiguously limits coverage to claims for which the additional insured is alleged to be vicariously liable for the named insured's acts. *See, e.g., Shannon v. B.L. England Generating Station*, No. 10-cv-04524 (RBK), 2013 WL 6199173, at *10 (D.N.J. Nov. 27, 2013) (New Jersey law) (concluding that the "policy unequivocally excludes coverage to an additional insured such as [defendant] for its own negligent acts and omissions" where (1) the policy plainly states that "[t]he person or organization does not qualify as an additional insured with respect to the independent acts or omissions of such person or organization," and (2) "the theory of liability in [the underlying] complaint relates to negligent acts or omissions by [defendant]," including defendant's maintenance of the premises where the injury allegedly occurred) (emphasis added); *see also Pennsville Shopping Ctr. Corp. v. American Motorists Ins. Co.*, 315 N.J. Super. 519, 523 (App. Div. 1998) ("Under the terms of the lease in this case, tenant bore responsibility only for damages incurred on the

demised premises. Its undertaking to name landlord as an additional insured must be taken to be coextensive with the scope of tenant's own liability.");[4] *see also Northeast Utilities Serv. Co. v. St. Paul Fire & Marine Ins. Co.*, No. 3:08-CV-01673 (CSH), 2012 WL 2872810, at *9 (D. Conn. July 12, 2012) (Connecticut law) (construing Utica policy and concluding that "the 'independent acts' exclusion limits coverage to instances in which the additional insured's alleged liability is based on vicarious liability for the insured's acts, excluding instances in which the additional insured's alleged liability is based solely on its own conduct."); *see also St. Paul Fire & Marine Ins. Co. v. Hanover Ins. Co.*, 187 F. Supp. 2d 584, 589-90 (E.D.N.C. 2000) (North Carolina law) (determining that exclusion for "independent acts or omissions of such person or organization" limits coverage to cases in which the alleged additional insured is vicariously liable for the named insured's acts and precludes coverage for the sole negligence of the alleged additional insured); *Edwards v. Brambles Equip. Servs., Inc.*, No. 01-cv-0892, 2002 WL 31001835, at *7 (E.D. La. Sept. 4, 2002) (Louisiana law) (holding that

[4] The Duty to Defend Order and Trial Decision both ignore *Pennsville* and solely rely upon *Erdo v. Torcon Const. Co., Inc.*, 275 N.J. Super. 117 (App. Div. 1994), which involved a contractor-subcontractor relationship instead of the landlord-tenant relationship at issue here.

exclusionary language in additional insured endorsement precludes coverage), *aff'd*, 75 F. App'x 929 (5th Cir. 2003).

Thus, the trial court erred when it summarily concluded, without any legal or factual support, that the "independent acts" exclusion is "ill-defined" and "ambiguous." This Court has recognized that "[a] 'genuine ambiguity' arises only 'where the phrasing of the policy is so confusing that the average policyholder cannot make out the boundaries of coverage'" and has also cautioned that "courts must guard against rewriting policies in favor of the insured under the guise of interpreting a contract's reasonable terms." *Arthur Andersen LLP v. Fed. Ins. Co.*, 416 N.J. Super. 334, 346 (App. Div. 2010) (citations omitted). In this case, the trial court failed to adhere to these principles and, instead, rewrote the Utica Policy to create additional insured coverage for SL Parties. Moreover, in the Duty to Defend Order, the trial court interpreted this exclusion solely in the context of the duty to defend analysis and refused to revisit its analysis of this exclusion in the Trial Decision in determining whether a duty to indemnify exists, despite the fact that the duty to defend and duty to indemnify are distinct. *See Mem'l Properties*, 210 N.J. at 529.

Thus, for the reasons discussed above, the Utica Policy does not extend coverage to an additional insured for the additional insured's own

negligence. Instead, an additional insured seeking coverage for its own negligence must submit such a claim to its own liability insurer. *See Schafer v. Paragano Custom Bldg., Inc.*, No. A-2512-08T3, 2010 WL 624108, at *3 (N.J. App. Div. Feb. 24, 2010) ("The additional insured endorsement . . . clearly states that [the general contractor] is covered only as to liability caused by the acts or omissions of [the subcontractor]. It provides coverage for a claim asserted against [the general contractor] for vicarious liability; it does not provide coverage for a claim against [the general contractor] for its own direct negligence. Coverage for such claims rests with [the general contractor's] own liability insurer, not [the subcontractor's].").[5]

Article 7(A) of the Lease provides that SL Parties are required to procure and maintain their own liability insurance for such bodily injuries. Also, SL Parties are covered as additional insureds under the GAIC Policy issued to Clifton for loss arising from Clifton's operations for the elevator. In addition, SL Parties are covered as named insureds under the Travelers Policy and Federal Policy issued to SL Parties. As a result, SL Parties' share of the

[5] *See also Harbor Ins. Co. v. Lewis*, 562 F. Supp. 800, 803 (E.D. Pa. 1983) (observing that additional insured provisions "are intended to protect parties who are not named insureds from exposure to vicarious liability for acts of the named insured. These provisions are employed in countless situations [including] landlord and tenant relations, where the landlord asks or requires the tenant to procure insurance for the landlord for liability resulting from the tenant's activities"); *see also Pennsville*, 315 N.J. Super. at 523.

Settlement Amount paid to Mr. Fogarty in the Fogarty Lawsuit was funded by: (1) GAIC, which tendered its policy limits on behalf of SL Parties, as additional insureds under the GAIC Policy, and on behalf of Clifton (as the Named Insured under the GAIC Policy); and (2) SL Parties' own liability insurers, Travelers and Federal, under the Travelers Policy and Federal Policy. Since there is no dispute that the Travelers Policy and the Federal Policy issued to SL Parties do not insure either Fogarty Brothers or Clifton as additional insureds, SL Parties cannot credibly deny that Travelers and Federal's payment of indemnity was for SL Parties' own "independent acts or omissions" for the Fogarty Lawsuit. Importantly, the parties also dismissed with prejudice all claims and defenses, including SL Parties' third-party complaint against Fogarty Brothers and, under the settlement, Fogarty Brothers has no obligation to contribute to or pay any portion of the Settlement Amount owed to Mr. Fogarty. *See White v. Ellison Realty Corp.*, 5 N.J. 228, 237 (1950) ("The landlord having assumed the duty of maintaining an elevator for the common use of two of the tenants in its building, was under a duty to exercise reasonable care to maintain the elevator in proper working order."). As a result, the Utica Policy has no obligation to indemnify SL Parties for the Fogarty Lawsuit. Accordingly, this Court should reverse the Trial Decision and enter judgment declaring that Utica has no duty to indemnify SL Parties

for the Fogarty Lawsuit and that, as a result, Utica has no obligation to reimburse SL Parties, GAIC or any of SL Parties' other insurers for any portion of the Settlement Amount paid to Mr. Fogarty.

III. UTICA HAS NO DUTY TO REIMBURSE SL PARTIES' DEFENSE COSTS (Da2, Da26, Da35, Da41)

A. Because Utica Has No Duty To Indemnify SL Parties, Utica Also Has No Duty To Reimburse Defense Costs (Da40-41)

The trial court erred because, in the absence of a duty to indemnify SL Parties for the Fogarty Lawsuit, then Utica has no obligation to reimburse SL Parties for their defense costs in the Fogarty Lawsuit. Under New Jersey law, where an insurer has no duty to indemnify an insured, the insurer cannot have a duty to defend that insured. *See Merrimack Mut. Fire Ins. Co. v. Coppola*, 299 N.J. Super. 219, 228 (App. Div. 1997) ("If there is no duty to indemnify defendant under any version of [plaintiff's] allegations, [the insurer] had no duty to defend him or bear the cost of his defense.") (citing *Voorhees v. Preferred Mut. Ins. Co.*, 128 N.J. 165, 180 (1992)). The trial court disregarded the factual record, which confirms that there was no determination of comparative or contributory negligence on the part of either Fogarty Brothers or Mr. Fogarty in the Fogarty Lawsuit, and the SL Parties' admission that Fogarty Brothers had no responsibility under the Lease for the maintenance of the elevator. Da1568. Therefore, it defies logic that the trial court required

only the insurer for Fogarty Brothers to pay defense costs and expert fees on behalf of SL Parties, which caused the injuries and damages to Mr. Fogarty.

The New Jersey Supreme Court has held that an insurer does not have an immediate duty to defend or pay defense costs upfront (1) "when coverage, i.e., the duty to pay, depends upon a factual issue which will not be resolved by the trial of the third party's suit against the insured" or (2) where a conflict of interest exists between the insurer and policyholder because the complaint alleges both covered and non-covered theories of liability. *Burd v. Sussex Mut. Ins. Co.*, 56 N.J. 383, 388-90 (1970).[6] Thus, "[w]here there is a dispute regarding coverage, '[t]he practical effect of *Burd* is that an insured must initially assume the costs of defense . . . subject to reimbursement by the insurer if [the insured] prevails on the coverage question.'" *Passaic Valley Sewerage Comm'rs v. St. Paul Fire & Marine Ins. Co.*, 206 N.J. 596, 616

[6] In both the Duty to Defend Order and the Trial Decision, Judge Hansbury misconstrued the distinction between the duty to reimburse defense costs and the duty to provide a concurrent defense. As Judge Minkowitz correctly held in the September 29, 2023 Order and Statement of Reasons, Utica had no obligation to provide a concurrent defense to SL Parties in the Fogarty Lawsuit because: (i) GAIC was already providing a full defense to SL Parties, (ii) critical issues concerning the scope of SL Parties' liability had to first be resolved before the trial court could determine Utica's obligations, if any, and (iii) as a result, the duty to defend should "be converted into a duty to reimburse." Da23. Thus, contrary to Judge Hansbury's suggestion in the Trial Decision, Judge Minkowitz did not hold that Utica had a concurrent duty to defend SL Parties for the Fogarty Lawsuit and Utica was not required to file a motion for reconsideration or interlocutory appeal.

(2011) (quoting *N.J. Mfrs. Ins. Co. v. Vizcaino*, 392 N.J. Super. 366, 370-71 (App. Div. 2007)); *see also Norman Int'l, Inc. v. Admiral Ins. Co.*, 251 N.J. 538, 550 (2022) ("There are times, however, when comparing the causes of action in the complaint to the exclusionary clause will not provide an answer as to whether there is a potentially covered claim. That situation occurs "when coverage, i.e., the duty to pay, depends upon a factual issue which will not be resolved by the trial.'") (quoting *Burd*, 56 N.J. at 388); *see also Wear*, 455 N.J. Super. at 457 (holding that "the duty to defend should be converted to a duty to reimburse pending resolution of the coverage action"); *see also Grand Cove II Condo. Ass'n, Inc. v. Ginsberg*, 291 N.J. Super. 58, 73 (App. Div. 1996) (concluding that "where an insurer did not undertake defense of the case at the inception of the litigation, the duty to defend may be converted into a duty to reimburse") (citing *SL Industries, Inc. v. American Motorists Ins. Co.*, 128 N.J. 188, 200 (1992)). There is no question that there was a conflict between Mr. Fogarty (and Fogarty Brothers), on the one hand, and SL Parties on the other hand during the pendency of the Fogarty Lawsuit.

As explained above, the Utica Policy does not provide additional insured coverage to SL Parties for SL Parties' own negligence, and prior to the settlement of the Fogarty Lawsuit, no determination had been made as to whether Mr. Fogarty's injuries were caused by SL Parties' own independent

acts or omissions or whether SL Parties, as landlord and property manager, are liable for any alleged negligence by its tenant, Fogarty Brothers. *See, e.g.*, *White*, 5 N.J. at 237 (concluding that "there is an abundance of evidence bearing upon the question of whether control of the elevator was retained by the defendant or was given over to the tenant" and that these facts should be considered by the jury in determining liability for injuries sustained by plaintiff, a commercial tenant's employee, when an elevator fell at defendant-landlord's building). The Fogarty Lawsuit sought to hold SL Parties liable for SL Parties' own independent acts or omissions and/or for the acts or omissions of Clifton (which, again, is not an insured under the Utica Policy) and there was no determination of liability against Fogarty Brothers or Mr. Fogarty himself. And, with no duty to defend or indemnify, SL Parties should not have been entitled to their attorneys' fees in this action under *R.* 4:42-9(a)(6), which were paid in full by GAIC, not SL Parties.

B. Clifton Has The Sole Duty To Defend And Indemnify SL Parties Under The Service Contract (Da35)

Utica has no obligation to SL Parties/GAIC for defense costs incurred on behalf of SL Parties for the Fogarty Lawsuit because, based upon Clifton's broad indemnification obligation under the Service Contract, Clifton is solely responsible for defending and indemnifying SL Parties here. Under New Jersey law, "[c]ourts cannot make contracts for parties. They can only

enforce the contracts which the parties themselves have made." *Kampf*, 33 N.J. at 43. Thus, New Jersey courts have long held that "[w]hen the terms of [a] contract are clear, it is the function of a court to enforce it as written and not to make a better contract for either of the parties [because t]he parties are entitled to make their own contracts." *McMahon*, 195 N.J. at 545-46.

The Service Contract between Clifton and SL Parties unquestionably contains an extremely broad indemnification provision, which requires Clifton to indemnify, defend and hold harmless SL Parties against the Fogarty Lawsuit. The Service Contract further provides that:

> This indemnification is not limited to attorney's fees and investigative costs, and shall include costs, losses or damages resulting from or alleged to result from either active or passive negligence of any Owner Indemnified Party concurrent with that of Contractor or others . . . .

The Service Contract also requires Clifton to procure the liability insurance under which SL Parties were fully defended here.

There is no dispute that SL Parties are additional insureds under the GAIC Policy. GAIC, as the insurer for Clifton, provided a full defense to both Clifton and SL Parties (as additional insureds) as required under the Service Contract and under the express terms of the GAIC Policy for the Fogarty Lawsuit. And, for the reasons already addressed in Point II.D. above, Utica also should not be required to defend or reimburse defense costs for the

benefit of SL Parties at the expense of Utica's own policyholder. *See Heibel*, 386 N.J. Super. at 317; *Signo Trading*, 235 N.J. Super. at 336.

IV. ANY AWARD OF REIMBURSEMENT OF DEFENSE COSTS SHOULD HAVE BEEN ALLOCATED AND REDUCED (Da35)

The trial court erred in concluding that Fogarty Brothers' own insurer – Utica – must pay all of the defense costs for SL Parties' conduct that caused Jeffrey Fogarty's injuries rather than SL Parties or Clifton. At a minimum both defense costs and expert expenses should have been allocated between and among SL Parties and Clifton and their respective insurers (and, if necessary, then Utica). *IMO Indus. Inc. v. Transamerica Corp.*, 437 N.J. Super. 577, 604 (App. Div. 2014) ("defense costs are also allocable, subject to policy terms, in the same manner as indemnity expenditures"); *Potomac Ins. Co. of Illinois ex rel. OneBeacon Ins. Co. v. Pennsylvania Mfrs.' Ass'n Ins. Co.*, 215 N.J. 409, 425 (2013) (affirming decision to allocate defense costs among several insurers using same apportionment applied to indemnity).

A. The Utica Policy is Excess Over the GAIC Policy (Da35)

The trial court failed to properly determine the priority of coverage among the policies insuring SL Parties. The Utica Policy is excess over any other primary insurance available to SL Parties "covering liability for damages arising out of the premises or operations, or the products and completed operations" for which SL Parties have been added as additional

insureds. Da1009. Here, under the Service Contract, Clifton agreed to procure and maintain commercial general liability insurance, "with defense costs in addition to limits, insuring Bodily Injury and Property Damage, including Product and Completed Operations coverage," and to name SL Parties as additional insureds for loss arising from Clifton's operations and completed operations under such insurance. Da1491-1492. The Service Contract further provides that "[s]uch policy shall be the primary coverage for all claims of whatever type and nature." Da1492. Indeed, the trial court's decision to impose all of SL Parties' defense costs upon Utica as Fogarty Brothers' insurer rather GAIC as Clifton's insurer defies the contracts and case law.

At a minimum, the "other insurance" provisions in the Utica Policy clearly state that when the Utica Policy is excess over other primary insurance, Utica "will have no duty under Coverages A or B to defend the insured against any 'suit' if any other insurer has a duty to defend the insured against that 'suit'." Da1009. This Court has explained that "[a]n excess other-insurance clause seeks to make an otherwise primary policy excess insurance should another primary policy cover the loss in issue." *W9/PHC Real Estate LP v. Farm Family Cas. Ins. Co.*, 407 N.J. Super. 177, 197 (App. Div. 2009) (citing 15 Couch on Insurance 3d § 219:33 (2005)). In those circumstances, "where one policy has an excess other-insurance clause and another policy on

the same risk does not, the former policy will not come into effect until the limits of the latter policy are exhausted." *Id.* Moreover, SL Parties have not suffered any damages because their defense costs were fully paid by GAIC under the GAIC Policy. *See Carter-Wallace, Inc. v. Admiral Ins. Co.*, 154 N.J. 312, 322 (1998) (determining that "other insurance" clauses are "typically designed to preclude a double recovery when multiple, concurrent policies provide coverage for a loss").[7]

B. The Trial Court Failed to Deduct Unreasonable and Unnecessary Defense Costs (Da42, 2T66-72)

Lastly, Utica identified four categories of defense costs in the Fogarty Lawsuit and litigation costs in this action that should have reduced the award of costs because they were not reasonable and necessary. *SL Indus.*, 128 N.J. at 216 (holding that "the lack of scientific certainty does not justify imposing all of the costs on the insurer by default" and concluding that "our courts will be able to analyze the allegations in the complaint in light of the coverage of the policy to arrive at a fair division of costs"). The four categories of reductions included: (1) the "smear campaign" waged by SL

[7] As argued before the trial court, Utica's liability for defense and indemnity costs should have been no more than its share of the total insurance of all parties (SL Parties, Clifton and Fogarty Brothers) at issue – meaning $1 million of $18 million in total limits. Thus, Utica's share, if any to be imposed, should have been no more than 1/18th of the total.

Parties against Mr. Fogarty to try to pin the blame for the accident against him; (2) the filing of summary judgment motions against third parties (including Clifton); (3) the unsuccessful motion to enforce in this action; and (4) the unsuccessful motions to intervene in this action made on behalf of the other insurers.[8] The trial court failed to consider any of these deductions and, if Utica is found in any way liable for SL Parties' defense costs, then the action should be remanded to address whether the defense and insurance coverage costs were reasonable and/or necessary.

[8] The total amount that Utica sought to have reduced from the defense costs was over $200,000 and was detailed in an Addendum to Utica's Proposed Findings of Fact and Conclusions of Law.

CONCLUSION

Accordingly, for the reasons discussed above, Utica respectfully requests that this Court reverse the Trial Decision and the Duty to Defend Order and enter judgment in favor of Utica, declaring that Utica (1) has no duty to indemnify SL Parties for the Fogarty Lawsuit, (2) no duty to reimburse any portion of SL Parties/GAIC's defense costs for the Fogarty Lawsuit, and (3) no obligation reimburse SL Parties' attorneys' fees incurred in the coverage action. In the alternative, if Utica is found to be in any way liable, then Utica is entitled to an appropriate allocation for any "reasonable and necessary" defense costs incurred and indemnity paid in the Fogarty Lawsuit under New Jersey law.

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Attorneys for Defendant
Utica Mutual Insurance Company
(and as incorrectly sued as Utica National Insurance Group)

By: *s/ Robert W. Mauriello, Jr.*
Robert W. Mauriello, Jr. (018331993)

Dated: February 18, 2025

Superior Court of New Jersey

Appellate Division

Docket No. A-000763-24T2

SL 10 PARK PLACE, LLC and SL MANAGEMENT GROUP, LLC, *Plaintiffs-Respondents,* vs. UTICA NATIONAL INSURANCE GROUP and UTICA MUTUAL INSURANCE COMPANY, *Defendants-Appellants,* and JEFFREY FOGARTY AND ELIZABETH FOGARTY, *Defendants,* and CLIFTON ELEVATOR SERVICE COMPANY, INC., and FOGARTY BROTHERS, INC. d/b/a Safeway Van Lines, *Defendants-Respondents.*	CIVIL ACTION ON APPEAL FROM THE FINAL ORDERS OF THE SUPERIOR COURT OF NEW JERSEY, LAW DIVISION, MORRIS COUNTY DOCKET NO. MRS-L-1293-22 Sat Below: HON. STEPHAN C. HANSBURY, J.S.C.

BRIEF ON BEHALF OF DEFENDANT-RESPONDENT CLIFTON ELEVATOR SERVICE COMPANY, INC.

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Date Submitted: March 25, 2025

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TABLE OF AUTHORITIES[1]

No case law was attached by Appellant Utica pertaining to the arguments against Respondent CESCO.

[1] There were no cases in Appellant's Brief which apply to the cross-claims of allocation against Clifton Elevator Service Company. Appellant had no case law which applies to us, so I have no cases.

PRELIMINARY STATEMENT

Defendant/Appellant Utica Mutual Insurance Company (hereinafter "Appellant Utica") has filed this appeal following the judgement at trial, which included the dismissal of Utica's cross-claims with prejudice against Defendant/Respondent Clifton Elevator Service Company (hereinafter "Respondent CESCO").

This matter arises out of a declaratory judgment action involving a coverage dispute. In response to the declaratory judgment action filed by Plaintiff/Respondent SL 10 Park Place and SL Management (herein after "SL Parties"), Appellant Utica asserted cross-claims for contribution and allocation against Respondent CESCO. The matter proceeded to trial and the trial court issued a decision of the indemnification and defense obligation against Utica (this portion of the decision does not involve the cross-claims against CESCO). The trial court also dismissed the cross-claims of Appellant Utica against Respondent CESCO for contribution and allocation.

Appellant Utica contends that the Trial Court issued an improper decision and ignored discovery. Appellant Utica now requests that the Appellate Court reverse the trial court's decisions.

Appellant Utica initially, in its' preliminary statement, does not address Utica's claim for allocation against CESCO.

There is no evidence of judicial indiscretion or error in this matter, as Appellant Utica was provided multiple opportunities to present their case to the trial court, and therefore Respondent CESCO respectfully submits that Appellant Utica's Appeal should be denied.

PROCEDURAL HISTORY

Defendant/Appellant Utica's appeal, as it pertains to Defendant/Respondent CESCO, stems from an Order of Judgement (trial decision) in a declaratory judgment lawsuit in favor of Plaintiff/Respondent SL Parties, against Utica requiring Utica to indemnify the SL Parties. This decision also dismissed all cross-claims asserted by Utica against Respondent CESCO. Da 25-42.

A trial court hearing was conducted on July 23, 2024, in the Declaratory Judgement matter. Da25. At the hearing on July 23, 2024, The Honorable Stephan C. Hansbury, several times stated that it was unclear what Utica was claiming against CESCO. Da25. 2T87 3-25, and 2T91 4-25. On November 12, 2024, the trial court issued its' decision, finding among other holdings, that Utica had not proven its' cross-claims against CESCO. Da25-42. The notice of appeal was filed by Utica on November 13, 2024. Da45.

STATEMENT OF FACTS

In the underlying personal injury lawsuit, Plaintiffs Jeffery and Elizabeth Fogarty filed a Complaint on March 31, 2020, alleging bodily injuries arising from an elevator accident. Da70. In their pleadings, the SL parties asserted cross-claims against CESCO, seeking insurance coverage and a defense pursuant to a service contract. Da186. CESCO had a contract for service of the elevators with the SL Parties. Da1485. The service contact with CESCO had an additional insurance requirement in favor of the SL Parties. Da1492. The CESCO policy issued by Great American Insurance Company ultimately provided coverage for CESCO and the SL Parties. Da1037, Da1053, Da1065. CESCO's insurance carrier accepted the SL Parties Tender of Defense and, the SL Parties were defended under the Great American Insurance policy issued to CESCO. Da365.

The underlying bodily injury lawsuit was settled on October 2, 2023, at which time CESCO and all other parties were dismissed. Da1546-1559. As part of the settlement, Great American split its' policy limits equally on behalf of CESCO and the SL Parties. Da1555-1559. The decision on how to allocate the settlement was not made by CESCO.

While the underlying personal injury action of the Fogartys was proceeding, Respondent/Plaintiff, SL Parties filed a declaratory coverage action.

Da64. In that action CESO was named as an "interested party." Defendant/Appellant Utica cross-claimed against CESCO for contribution and allocation.

On September 30, 2024, the trial court entered an order of Judgement, after a trial proceeding on July 23,2024, in favor of CESCO, dismissing all claims against CESCO for contribution and allocation. Da25-42. In the trial court's decision, it was determined that all claims and cross-claims be dismissed with prejudice against CESCO. Da25-42. The trial court determined Utica Mutual presented that no evidence against CESCO. Da25-42.

Appellant Utica now seeks to appeal that final judgment.

LEGAL ARGUMENT

POINT I

THE TRIAL COURT DECISION SHOULD NOT BE SUBJECT TO DE NOVO REVIEW

CESCO is only involved in this appeal as it pertains to the cross-claims for contribution and allocation asserted by Utica Mutual. As to that point alone, the argument is simple. There can be no claim against CESCO in a declaratory judgment action as the underlying claim was settled and CESCO was dismissed. Appellant presents no reason, argument, or supporting case law to justify the cross-claims against CESCO. CESCO is not an insurance company and has no duty of contribution beyond the original settlement.

With respect to the cross-claims for allocation, the underlying matter was settled. CESCO purchased insurance from both Great American and Liberty Mutual, whose insurance policies provided a defense and insurance coverage to CESCO and the SL Parties in this case. The decision of the trial court was correct when the claims against CESCO were dismissed with prejudice. Da25-42.

At the hearing on July 23, 2024, The Honorable Stephan C. Hansbury, several times stated that it was unclear what Utica was claiming against CESCO. Da25. 2T87 3-25, and 2T91 4-25. There is no basis for a review of the trial decision and the claims against CESCO should remain dismissed.

In the underlying bodily injury lawsuit, there were no cross-claims or third-party claims between CESCO and Fogarty Brothers Inc., who was Utica Mutual's insured.

POINT II

CESCO IS NOT INVOLVED IN UTICA'S APPEAL REGARDING UTICA'S DUTY TO INDEMNIFY THE SL PARTIES

Respondent CESCO is not an involved party to the arguments in Point II.

POINT III

CESCO IS NOT INVOLVED IN UTICA'S APPEAL REGARDING UTICA'S DUTY TO REIMBURSE SL PARTIES DEFENSE COSTS

Respondent CESCO is not an involved party to the arguments in Point III.

POINT IV

CESCO SHOULD NOT BE A PARTY TO UTICA'S APPEAL SEEKING ALLOCATION OF DEFENSE COSTS

Respondent CESCO is not an insurance company. CESCO should not be involved in a dispute between insurance carriers regarding priority of coverage and allocation of defense costs. Appellant Utica is arguing priority of coverage in the appeal of the lower court's decision. This argument does not involve CESCO. Appellant Utica does not even state a reason in its' Appellant brief as to why they are keeping CESCO in the case. Appellant Utica does not cite any cases or law to support its' position why they believe that they have valid cross-claims against CESCO.

In the instant matter, neither Utica nor the SL Parties are seeking reimbursement of defense costs from CESCO. In addition, neither party is seeking reimbursement of indemnity payments made to settle the underlying personal injury case from CESCO. CESCO is not seeking reimbursement of any legal fees or indemnity payments from any other party. Based upon the above,

there is no basis for any continuing claims against CESCO in this declaratory action.

I have attached a certification of Tracy Brown, the Vice President at CESCO (which is no longer an active business). CDa1. According to this certification, which has been supplied in the declaratory judgment matter, there was a contract between CESCO and the SL Parties. Da1485. Under the terms of the contract, CESCO was required to obtain liability coverage. CESCO obtained liability coverage through Great American Insurance. Da 1037. The SL parties tendered their defense and were defended under the CESCO policy, in the underlying bodily injury lawsuit filed by Jeffrey and Elizabeth Fogarty. Da365. The underlying matter was settled, and Great American paid its' full policy limits, split equally between CESCO and the SL Parties. Da1555-Da1559.

Once the underlying matter was settled, CESCO can no longer be deemed an interested party, as there is no basis for Great American or Utica Mutual to recover monetary damages from CESCO, and CESCO is not seeking monetary damages from Great American or Utica Mutual. CESCO did not issue any payments to the plaintiffs in the settlement of the underlying matter and CESCO did not pay any legal bills submitted by counsel for the SL parties. Simply, there is no basis for the cross-claims against CESCO by Utica.

Last, CESCO did not assert any claims against Utica's insured Fogarty Brothers and Fogarty Brothers did not assert any claims against CESCO.

In the instant matter there is no dispute of the facts. It is universally acknowledged that CESCO had a contract with the SL Parties and, that SL's defense was tendered to both CESCO and Fogarty Brothers Inc. and, that a defense was provided to the SL parties by CESCO's insurance carrier. The issue of priority of coverage between the insurance carriers for CESCO, the SL Parties and Utica Mutual does not involved CESCO and CESCO should be dismissed from any declaratory judgment action, and no claims for allocation should be allowed against CESCO.

CONCLUSION

Defendant/Respondent CESCO respectfully requests this Court affirm the Trial Court's ruling, dismissing Defendant/Appellant's cross-claims against CESCO with prejudice.

Dated: March 18, 2025

Respectfully Submitted,
GOETZ SCHENKER BLEE & WIEDERHORN

/s/ David Blee
DAVID BLEE
Attorneys for Defendant/Respondent CESCO

Superior Court of New Jersey

Appellate Division

Docket No. A-000763-24T2

SL 10 PARK PLACE, LLC and SL MANAGEMENT GROUP, LLC, *Plaintiffs-Respondents,* vs. UTICA NATIONAL INSURANCE GROUP and UTICA MUTUAL INSURANCE COMPANY, *Defendants-Appellants,* and JEFFREY FOGARTY AND ELIZABETH FOGARTY, *Defendants,* CLIFTON ELEVATOR SERVICE COMPANY, INC., and FOGARTY BROTHERS, INC. d/b/a Safeway Van Lines, *Defendants-Respondents.*	:	CIVIL ACTION ON APPEAL FROM THE FINAL ORDERS OF THE SUPERIOR COURT OF NEW JERSEY, LAW DIVISION, MORRIS COUNTY DOCKET NO. MRS-L-1293-22 Sat Below: HON. STEPHAN C. HANSBURY, J.S.C.

BRIEF ON BEHALF OF PLAINTIFFS-RESPONDENTS

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Plaintiffs-Respondents, SL 10 Park Place, LLC and SL Management Group, LLC (hereinafter collectively "SL") by and through their undersigned counsel, Calistri McLaughlin LLC, respectfully submit the within Plaintiff-Respondents' Brief, as follows:

PRELIMINARY STATMENT

Jeffrey Fogarty fell into an elevator shaft he had access to, and use of, by virtue of the commercial lease his employer (Fogarty Brothers, Inc. ("FB")) held with the owner and landlord of the premises (SL). Mr. Fogarty's employer, a piano-moving company, required use of the subject elevator to access its warehouse space on the building's second floor. Consistent with the requirements of that Lease, FB secured liability insurance with Utica covering claims "arising out of liability for… injuries…occurring in or about the Premises and Complex" and naming SL as additional insureds on a primary and non-contributory basis. Significantly, Utica's additional insured endorsement specifically extended full coverage to "Owners" and "Lessors of Premises" who required this coverage in writing "with respect to property used by, or rented or leased to" Utica's named insured.

Utica denied a defense to SL, including after SL filed the present declaratory action and the trial court (the "Court") ruled that Utica had a duty to defend SL for all claims from the inception of the underlying tort suit (the "Tort

Suit") through its conclusion. After stipulated evidence and a bench trial, the Court ordered, again, that Utica reimburse SL for its defense costs as well as attorney's fees incurred pursuing insurance coverage. The Court also required Utica to indemnify SL up to the Utica Policy's limits for the subsequent settlement of the underlying Tort Suit.

Utica's appeal disregards the Court's determination of coverage *pursuant to Section 11.a.(1)(b)* of its Endorsement and argues at length as if that determination were never made. Indeed, Utica pretends additional insured coverage was instead found pursuant to a different subparagraph (Section 11.a.(1)(a)) and then contends that this irrelevant provision was not satisfied. However, policy coverage having been established, the burden shifted to Utica to demonstrate an exclusion defeating this coverage. Utica's "Employer's Liability" exclusion and related arguments are without merit as nothing in Utica's Policy or in the law of New Jersey prohibits a liability carrier from extending coverage to an additional insured who, as here, is being sued by an employee of that liability carrier's named insured. Utica's "Independent Acts and Omissions" exclusion is without impact because SL faced multiple claims of liability in this case unrelated to its "independent" acts. Indeed, SL faced liability for vicarious liability (in New Jersey the owner of an elevator is vicariously liable for the negligence of its elevator service contractor); joint and

several liability (alleged in the tort plaintiffs' Complaint); and contractual liability (alleged by the co-defendants). Further, Utica's argument concerning separate contractual indemnity relationships among the parties disregards the long-established legal principle that the analysis of a carrier's duty to its additional insured is entirely separate from possible indemnifications that may flow between litigants in contracts to which the carrier is not a party.

As Utica failed to prove any exclusion, its denial of coverage is deemed wrongful and the duty to indemnify is triggered under the precedent of Griggs. The "reasonableness" of the underlying settlement was self-evident in that the matter resolved for $8 Million and Utica's $1 Million Policy was primary among all other policies. Despite Utica bearing the burden on its Counterclaim, its Appeal fails even to cite to its own Endorsement's 'Other Insurance' provision as well as the "Other Insurance" provisions of the involved carrier policies Utica claims are somehow primary to its own Policy. Finally, Utica cannot meet the abuse of discretion standard required to overthrow the Court's award of defense costs in the tort suit and attorney's fees in securing insurance coverage.

PROCEDURAL HISTORY

In the present appeal, Utica challenges the Court's May 26, 2023 Order granting SL's partial motion for summary judgment (the "SJ Order") which held:

- the SL Parties ***are additional insureds and entitled to a defense and coverages*** under the Commercial General Liability Coverage From Section I, Coverage A1.a. and Section 11.a.(1)(b) of the General Liability Extension Endorsement of the Utica Policy;

- Utica is obligated to provide the SL Parties with a defense, **from initiation through conclusion, for *all claims asserted against the SL Parties*** in the *Jeffrey Fogarty* litigation… ; and

- the SL Parties are entitled to reimbursement of reasonable attorneys' fees and costs in the prosecution of this Declaratory Judgment Action from Utica pursuant to Rule 4:42-9(a)(6).

(**Da1-2, Da3, 1T:48:20-50:8)**[1] (emphasis added).

Contrary to characterizations contained in Utica's Procedural History (**Db5)**, the Court reaffirmed the foregoing ruling on summary judgment in its September 29, 2023 Order partially granting SL's Motion to Enforce Litigants Rights (the "MELR Order") (which SL filed after Utica advised in a defiant email of July 24, 2023 that it would not be complying with the Court's May 26, 2023 Order. (**Da20-24, Da363**). The MELR Order and Reasons stated:

> **[A]s already determined by the Court, plaintiffs [SL] are additional insureds and are entitled to a defense and coverage by Utica**… **Therefore, plaintiffs' motion to enforce the Order is granted**… For the reasons outlined above, [SL] should recover reimbursement for its pursuit of coverage in the instant Declaratory Judgment action at the appropriate time following trial.

(**Da22-Da24**) (emphasis added).

[1] 1T refers to the Transcript of the Summary Judgment Hearing, dated May 26, 2023; 2T refers to the Trial Hearing Transcript, dated July 23, 2024.

However, the Court partially denied the SL Motion to Enforce (without prejudice) at that time because the Tort Suit had not yet been resolved and the ultimate amount of defense costs and attorney's fees in the coverage action remained undetermined, and to further allow Utica the opportunity to establish any potential entitlement to allocation or contribution from other carriers from whom SL was also entitled to coverage, per Utica's remaining Counterclaim preserved by the SJ Order. (**Da15, Da23-24, Da13-14**). After the Tort Suit settled on October 2, 2023, the Court recognized the interests of several non-party carriers who had acted in good faith by undertaking SL's defense (Great American Insurance Company ("GAIC")) and settled the Tort Suit on SL's behalf (GAIC, Travelers Property Casualty Company of American ("Travelers"), Federal Insurance Company ("FIC") and Liberty Insurance Underwriters ("Liberty"); specifically, the Court ruled that GAIC, Travelers, and Liberty's interventions were not necessary because their interests were already protected by SL. (**Pa49-50, Pa58-59, Pa67-68)**.

The parties in this declaratory matter agreed to adjudicate the remaining issues not already resolved by the SJ Order in a modified bench trial, with the parties agreeing to joint evidence and proposed findings of fact to be the foundation for the Court's decision. (**Da920, 922, 925, 927**). On September 30, 2024, the Court issued its decision (the "Trial Order") ordering: Utica to pay the

full amount of defense costs in the Tort Suit and legal fees incurred pursuing insurance coverage totaling $647,939.78, as well as Utica's full $1 Million policy limits in indemnity for the settlement amount paid on behalf of SL. (**Da25, Da27**). The Trial Order was clarified on November 12, 2024 to reflect that the award was subject to the rights of the "other interested non-party carriers" who had paid for both SL's defense (GAIC) and the settlement made on behalf of SL (GAIC, Travelers, Liberty, and FIC). (**Da43, 2T 45:4-49:11**).

COUNTERSTATEMENT OF RELEVANT MATERIAL FACTS

Utica omits or mischaracterizes several critical parts of the record in its Statement of Facts which are herein addressed in corresponding sequence.

SL faced multiple claims beyond direct negligence in the Tort Suit that are left unmentioned by Utica (**Db6-7**) including: claims of joint and several liability and vicarious liability brought by the plaintiffs in the Tort Suit (**Da70, Pa34 at No. 22**); and claims of joint and several liability, vicarious liability through common law indemnity, and contractual liability brought by Clifton and FB. (**Da244-45, Da255, Da273**).

Utica also mischaracterizes SL's responses to Requests for Admissions in the Tort Suit. (**Db8**). Therein, SL merely admitted that the Lease between SL and FB did not place responsibility on FB "for maintenance or repairs to the elevator," (and not that FB had "no responsibility" *at all* with respect to its

employees' use of the elevator or Premises). **(Db8, Da1568-69 at No. 4-5, 8, Da1468 at 11a)**). Indeed, the Lease provides that FB will have access to and use of the elevator, which Utica readily acknowledges in its Brief where it states, correctly, that FB is a piano-moving business with its leased warehouse space on an upper floor. (**Db6, Da167 at 21:21-22:15, Da1462-63**). In fact, the only reason that Jeffrey Fogarty had access to and use of the subject elevator at the time of his incident, was by virtue of the Lease. (**Db6, Da1462-63, Da71 ¶¶1-2, 6-7, Da165, Da178, Pa12 at No. 6-9, Pa3 at ¶¶6-12**).

Furthermore, Utica omits that it was asked, but refused, to contribute to the settlement of the Tort Suit, but made no objection to the settlement itself or the amount thereof ($8 Million globally funded by GAIC, Liberty, Travelers and FIC). (**Db8-9**, **Da2250, Da2253**, **Da1550-1560, 2T 67:24-68:1**). Also, the written Agreement memorializing the settlement in the Tort Suit expressly set forth that the resolution was not an admission of liability by any party (whether it be SL, Clifton, or FB). (**Da1547 at ¶5**, and **Da1546, Da1561 (dismissal of all claims against all parties**)).

Utica also omits critical language contained in paragraph 7.B. of the Lease (**Db10**) setting forth the requirements of the additional insured coverage (which FB appropriately procured for SL) as follows:

> Tenant shall purchase at its own expense . . . commercial general liability insurance, including personal injury. . . **against any losses**

> **arising out of liability for personal injuries . . . occurring in or about the Premises and Complex . . .** Said policies shall name [SL] . . . as additional insureds . . . (f) **contain a severability of insured parties provision and a cross liability endorsement**; [and] (g) **be primary, not contributing with, and not in excess of coverage which [the SL Parties] may carry**…

(**Da1467 at ¶7.B**.) (emphasis added).

Utica also conspicuously excludes the critical title of its Additional Insured Endorsement ("Endorsement") on which coverage was found in this case (**Db13-14**), and fails to acknowledge or address the crucial policy construction issue that arose with the Court with respect to the application of that Endorsement, which provides:

> **11. ADDITIONAL INSUREDS – BY CONTRACT, AGREEMENT OR PERMIT – INCLUDING . . . OWNER OF LEASED LAND, MANAGERS OR LESSORS OF PREMISES . . . .**
>
> The following is added to **SECTION II – WHO IS AN INSURED:**
>
> **a. Additional Insureds- By Contract, Agreement or Permit**
>
> (1) Any person or organization with whom you have entered into a written contract, agreement or permit requiring you to provide insurance such as afforded by this Commercial General Liability Coverage Form will be an additional insured, but only:
>
> (a) To the extent that such additional insured is held liable for acts or omissions committed by you or your subcontractors during the performance of your ongoing operations for the additional insured.
>
> (b) **With respect to property owned or used by, or rented or leased to, you**.
>
> The insurance afforded any additional insured under this paragraph 11.a.(1) will be subject to all applicable

> exclusions or limitations described in paragraphs 11.b.(1), (2), (3), and (4) and in 11.c.(1), (2), (3), (4), (5), and (6) below.

(**Da987 at Section 11.a(1))** (emphasis added to highlight sub-section (b)).

As the Court below recognized, sub-paragraph (a)'s application is limited to situations where the named insured is engaged in ongoing operations ***"for"*** the additional insured, which was clearly inapplicable to the present landlord-tenant situation. (**Da9, Da11, 1T 11:11-12:1, 24:7-25, 2T 13:14:3**). On the other hand, the Court held that sub-paragraph (b) clearly applied to claims, like the present one, arising with respect to property leased to and used by the named insured. (**Da9, Da11, Da31, Da38-39, 1T 11:11-12:1, 24:7-25, 2T 13:14:3, 41:21-42:13 95:12-96:21**).

Utica also inexplicably omits from its Statement of Facts (and throughout its Brief) any reference to, or citation of, the multiple 'Other Insurance' provisions set forth in its own Policy, the GAIC Policy, and the Travelers Policy. (**Db15-17**). These critical 'Other Insurance' provisions are set forth and discussed in full in Argument II.G. (**Pb32)**. Finally, Utica omits that it had multiple opportunities to control SL's defense in the Tort Suit from its inception, yet refused to do so. (**Db7-8, Da1502-1506, Da1521-1538, Pa20 at No. 22-27).**

LEGAL ARGUMENT

I. WHILE A DE NOVO REVIEW IS APPROPRIATE FOR QUESTIONS OF CONTRACTUAL AND INSURANCE POLICY CONSTRUCTION, AN ABUSE OF DISCRETION STANDARD IS UTILIZED FOR REVIEWING THE COURT'S AWARDS OF DEFENSE COSTS AND ATTORNEY'S FEES

When applying a *de novo* standard of review for questions of law in interpreting an insurance contract, the appellate court, while not bound by the trial court's reasoning, may nonetheless consider it as persuasive. Jennings v. Pinto, 5 N.J. 562 (1950). Challenges to a trial court's award of counsel fees, on the other hand (discussed in Point IV below), should be disturbed only on the ***rarest*** of occasions, and then only because of a clear abuse of discretion. See Rendine v. Pantzer, 141 N.J. 292, 317 (1995). Under an abuse of discretion standard, reversal is appropriate only where the lower court's discretion was "manifestly unjust", rendered without rational explanation, an inexplicable departure from established policies, or resting on an impermissible basis. See State v. Chavies, 247 N.J. 245, 257 (2021); Newark Morning Ledger Co. v. N.J. Sports & Exposition Auth., 423 N.J. Super. 140, 174 (2011).

II. UTICA MUST INDEMNIFY (AND DEFEND) SL UNDER THE PLAIN TERMS OF ITS ADDITIONAL INSURED ENDORSEMENT WHERE ITS NAMED INSURED WAS REQUIRED UNDER WRITTEN CONTRACT TO OBTAIN THAT ADDITIONAL INSURANCE COVERAGE

Contrary to Utica's claim that the FB Lease did not require it to name SL as additional insureds **(Db24-30 at I.-II.A.-C.)**, the plain language of the Lease

(which Utica fails to cite) states the exact opposite. Indeed, the Lease requires FB to purchase commercial general liability insurance "**against any losses arising out of liability for personal injuries . . . occurring in or about the Premises and Complex . . .**" and name SL as additional insureds thereon on a primary and non-contributory basis. (**Da1467 at ¶7.B, Pa4-5 at No. 15-16, 2T 39:15-40:6**). Significantly, that Policy's Additional Insured Endorsement modified the definition of "Who is an insured" to include "Owners" and "Lessors of Premises" "[w]ith respect to property… used by, rented or leased to" Utica's named insured (Fogarty Brothers, Inc. ("FB")). (**Da987 at 11.a(1)(b), Da984**). Far from "ignoring" or "rewriting" the Lease and Endorsement as Utica claims, the Court appropriately found that "all the claims pled against SL in the Tort Suit "specifically ar[o]se '[w]ith respect to property . . . used by, or rented or leased to' FB as required by Section 11.a.(1)(b)" of the Endorsement. (**Da11).** No "re-writing" took place. The Lease plainly required FB to name SL as additional insureds (which FB did) and the Endorsement of that insurance plainly extended coverage to any owner or lessor who rented or leased property to FB. (**Da1467 at ¶7.B. and Da987 at 11.a.(1)(b)**). Thus, there can be no meaningful dispute that SL was additional insureds on the Utica Policy. See Simonetti v. Selective Ins. Co., 327 N.J. Super. 421 (App. Div. 1994) (basic rule for coverage is to determine intent of parties from language of the

policy giving effect to all parts so as to give reasonable meaning to the terms, applying the plain and ordinary meaning of the words therein); Gateway Park v. Travelers Ins. Co., 2020 N.J. Super. Unpub. LEXIS 785, ***16-18* (Apr. 29, 2020) (summary judgment declaring entity entitled to additional insured coverage appropriate where undisputed facts establish that the policy conditions are satisfied). **(Da291)**.

A. Once SL Established Additional Insured Status on the Policy, the Burden Shifted to Utica to Prove the Application of any Exclusion

After SL showed entitlement to additional insured status on the Utica Policy, the burden shifted to Utica to prove some exclusion limited or defeated SL's coverage. See; Kopp v. Newark Ins. Co., 204 N.J. Super. 415, 521 (App. Div. 1985) (once insured meets initial burden of establishing coverage within the policy terms, the burden shifts to the ***insurer*** to prove that an exclusion operates to bar coverage). Although Utica never acknowledges its burden in this regard, it nonetheless asserts that coverage to SL is defeated because: (1) of the alleged impact of contractual indemnity language in the Lease; (2) the Policy does not extend coverage to the present claims; (3) Utica "does not pay its own policyholders"; and (4) of the application of the Policy's independent acts exclusion. (**Db27**). Each of these arguments are addressed in Sections II. B., C.,

D., and E., below.[2] Since Arguments B.-E. unequivocally demonstrate Utica's failure to meet its burden of proving any exclusion, Argument II.F. (**Pb30)** addresses the impact of Utica's wrongful denial and Argument II.G. (**Pb32**) addresses the priority among the competing policies in light of that wrongful denial.

B. Any Contractual Indemnification Language Contained in the Lease is Irrelevant to, and Separate and Distinct from, The Additional Insured Coverage Owed to SL

Utica mistakenly conflates separate contractual indemnity provisions of the Lease which have no bearing whatsoever on Utica's additional insured obligation. (**Db27-30 at II.B, 2T38:19-39:14).** Indeed, the case law of New Jersey redounds with statements by our courts that proper insurance coverage analysis should never confuse the crucial distinction between additional insured coverage provided by an insurance policy and any entirely separate indemnification obligation that may exist elsewhere in a relevant contract or lease. See W9/PHC Real Estate LP v. Farm Fam. Cas. Ins. Co., 407 N.J. Super. 177, 193 (App. Div. 2009) (whether the entity seeking additional insured

[2] Contrary to Utica's erroneous assertion that SL bears the burden of proving some Policy exclusion does *not* defeat coverage (**Db25-26**), New Jersey law unequivocally places the burden of proving the applicability of any exclusion on the carrier. See Wear v. Selective Ins. Co., 455 N.J. Super. 440, 454. (App. Div. 2018)

coverage had a right to be indemnified for their own negligence in a separate indemnification provision in a contract with the named insured, had no bearing on whether they were entitled to a defense and indemnification as an additional insured under the named insured's policy, because entirely different principles of law apply to the interpretation of an indemnification agreement as opposed to an insurance policy and, thus, the carrier's "discussion of the law relating to indemnification agreements is of no import on this appeal"); Jeffrey M. Brown Assoc., Inc. v. Interstate Fire & Cas. Co., 414 N.J. Super. 160 (App. Div. 2010) (language of the insurance policy, and not the indemnity obligations created by a separate agreement, determines the scope of insurance coverage).

Notably, an insurer's obligation is based on the policy terms, not the insured's promise in a separate agreement. QBE Ins. Co. v. Mt. Hawley Ins. Co., 2011 N.J. Super. Unpub. LEXIS 781, at ***4-6* (App. Div. Mar. 30, 2011) (insurer's duty is defined by what *it* contracted to do, not what its *insured* contracted to do) (**Pa336)**; Killeen v. Jenson & Mitchell, Inc., 2017 N.J. Super. Unpub. LEXIS 1060, *cert. denied* 231 N.J. 113, at ***13-15* (App. Div. May 2, 2017) (not inconsistent that an insurer is obligated to provide indemnity coverage to an additional insured, but the named insured was not contractually obligated to indemnify the additional insured for the same accident, since entirely different legal principles apply) (**Pa312)**; Friedland v. First Specialty,

2016 N.J. Super. Unpub. LEXIS 1841, at **18* (App. Div. Jun. 10, 2016) (principles of contractual indemnity and indemnity obligations under insurance policy as they apply to a claim for additional insured coverage should not be confused; the former requires a clear and unequivocal statement of intent to indemnify indemnitee for its own negligence; no such statement is required for the latter) (**Da284**); Harrah's Atlantic City, Inc. v. Harleysville Ins. Co., 288 N.J. Super. 152, 157 (App. Div. 1996).[3] Indeed, an insurance policy is a contract between the insurer and the insured; the extent of coverage is controlled by the relevant policy terms, not by the terms of the underlying trade contract that required the named insured to purchase coverage. Allan D. Windt, *Insurance Claims & Disputes: Interpretation of Important Policy Provisions* §11.30 at 11-469 (5th ed. 2007).

Based on the foregoing – and decisive – precedent, Utica's effort to complicate the additional insured analysis by invoking irrelevant contractual indemnity considerations, is unavailing. SL's status as additional insureds exists by virtue of Section 11.a.(1)(b) of the Utica Endorsement alone (**Da2, Da9,**

[3] Factually similar matter where Court held landlord was entitled to additional insured coverage under tenant's policy even though tenant had *no obligation* to contractually indemnify the landlord and the tenant's employee was injured in an area for which the landlord, not the tenant, was responsible, because the carrier was bound by the terms of its policy, not what its named insured agreed to in separate contract and there was a clear nexus between tort claim and tenant's use of leased premises triggering coverage.

Da38-39), and the separate indemnity language in Section 23 of the Lease does not impact Utica's obligation to SL in any way.

C. The Claims in the Tort Suit Clearly Fall Within the Scope of the Utica Policy

Utica next claims that "the Lease explicitly does not require FB to procure additional insured coverage for SL's own negligence, acts or omissions." (**Db30-31**). This is a bald mischaracterization of the Lease. What the Lease actually does state, in its unrelated and irrelevant Contractual Indemnity Clause (Section 23) (see **Pb13-15 at II.B.**), is that the Tenant will defend and indemnify the Landlord except for the latter's own negligence. (**Da1479 at ¶23.C.)**. This indemnity obligation is solely between the parties to the Lease and does not implicate in any way the coverage extended to an additional insured. As established above, a contractual indemnification provision of this nature has nothing to do with the entirely separate contractual requirement (contained in Section 7.B. of the Lease) that the Tenant must obtain liability insurance naming the Landlord as an additional insured and covering it on a primary and non-contributory basis for injury claims "occurring in or about the Premises and Complex." (**Da1467 at ¶7.B.)**. As before, Utica has conflated and confused the profound legal difference between one party's contractual indemnification of another party and the entirely separate issue of insurance coverage owed to a

party when another party has agreed to name that party as an additional insured on its own insurance.

D. Utica's Claim that it "Does Not Pay Indemnity to its Own Policyholder Has No Relevance or Bearing on the Coverage Owed to SL

Utica's claim that it "Does not pay indemnity to its own policyholder" (**Db31)** is premised on Jeffrey Fogarty's status as an employee of FB who received workers' compensation for his injuries. It is worth re-stating, however, that Mr. Fogarty was an employee of FB, not SL. (**Da166 at 21:4-6, Db6**). Citing to the Utica Policy's "Separation of Insureds"[4] provision as well as clear-cut New Jersey law holding that 'Employers' Liability' and 'Worker's Compensation' exclusions (**Db14-15**) are inapplicable ***where the tort plaintiff was not the employee of the party claiming additional insured status***, the Court rejected Utica's effort to apply the exclusion. (**Da9-11, Da39, 1T 35:7-41:4, 48:20-12, 2T 18:5-21, 40:7-22**). The law in New Jersey could hardly be more decisive and settled in this regard. See Erdo v. Torcon Constr. Co., Inc., 275 N.J.

[4] The Utica Separation of Insured's Provision states: coverage thereunder applies "**As if each Named insured were the only Named Insured**; and . . . **Separately to each insured against whom a claim is made or 'suit' is brought.**" (**Da1010 at Section 7.**) (emphasis added). In this context, the phrasing of "the" insured rather than "an" or "any" insured in a particular exclusion is critical; the application of an exclusion is exclusive to a *particular* insured, rather than a general, inclusive reference to *all* insureds. See Arcelormittal Plate, LLC v. Joule Tech Servs., 558 Fed. Appx. 205 (3d Cir. Ct. App. 2014) (**Pa301**); Argent v. Brady, 386 N.J. Super. 343, 352-53 (App. Div. 2006).

Super. 117, 122 (App. Div. 1994) ("the reference to 'the insured' in the quoted exclusionary clauses applies only to the particular insured, whose employee is suing him on account of the injury in question, notwithstanding that the injury was compensable through workmen's compensation" rejecting the employer's liability exclusion where tort plaintiff (employee of named insured) was not employee of "the" insured making the claim for coverage). (**1T 7:9-9:6**).

Indeed, absent an employee-employer relationship between the insured seeking coverage (here, SL) and the injured plaintiff (here, Mr. Fogarty), neither of the Exclusions cited by Utica apply to the additional insured, who thereby remains under the protective coverage of the policy. Erdo. 275 N.J. Super., at 122; Maryland Cas. Co. v. New Jersey Mfrs. (Casualty) Ins. Co., 48 N.J. Super. 314, 327 (App. Div. 1958) (reference to 'the insured' in exclusionary clauses applies only to insured whose employee is suing him on account of injury and worker's compensation liability exclusion inapplicable to other insureds); Farmland Dairies v. New Jersey Prop.-Liab. Ins. Guar. Ass'n, 237 N.J. Super. 578 (App. Div. 1990); Finnegan v. Inductotherm Corp., 2017 N.J. Super. Unpub. LEXIS 2105 (Aug. 22, 2017) (**Pa37**); Arcelormittal Plate, 558 Fed. Appx. 205 (**Pa301**).

Utica also attempts a slightly different (but equally rejected) argument that because Fogarty was injured and had a workers' compensation claim against his

employer, FB, that the liability carrier for FB can ***never*** be called upon to defend an additional insured. (**Db31-32**). This claim by Utica ignores the simple fact that, ***in most of the cases cited above,*** that is exactly what happened. Indeed, in Erdo, Maryland Casualty, and Arcelormittal Plate the liability carrier for the employer of the plaintiff was required to defend the party the employer had agreed to name as an additional insured. Thus, Utica's baseless reference to the Workers' Compensation statute (as if the immunity extended therein to an employer somehow also immunizes a liability carrier from its duty under the policy to defend a third-party) is another example of Utica being confused or in denial about what are, in truth, routine and long-resolved legal principles.[5]

Utica's argument is further flawed in its characterization of Jeffrey Fogarty as the 'Named Insured' under the Utica Policy. (**Db33**). In fact, the 'Named Insured' is "Fogarty Brothers, Inc.", defined as an "organization other than partnership or joint venture," *not* Jeffrey Fogarty the individual. (**Da981**).

[5] The Court in Mass Bay Ins. Co. v. Hall Bldg. Corp., 2018 N.J. Super. Unpub. LEXIS 7858, at **24* (Law Div. Jul. 9, 2018) held that the fact that tort claims by the named insured's employee against the named insured were barred by immunity under the Worker's Compensation Act was irrelevant to whether the named insured/employer's carrier was obligated to provide additional insured coverage where the named insured agreed to do so. (**Pa318)**. Also, in Am. Fire & Cas. Co. v. Am. Family Home Ins. Co., 2023 U.S. Dist. LEXIS 88771, *at **21-22* (D.N.J. Dec. 13, 2023) the fact that the employer was immune from tort liability in the underlying suit under the Worker's Compensation Act, did not affect an additional insured's right to coverage since allegations in the pleadings stated a claim within the purview of coverage provided by the policy. (**Pa280).**

Although he was an employee of Fogarty Brothers, this fact does not render Jeffrey Fogarty *the* named insured under Utica's policy. (**Da998 (defining "you" and "your"), Da1006 at Section II – Who is an Insured)**.

Nor does the case law cited by Utica support its position that a liability carrier cannot provide additional insured coverage to an entity with whom its named insured has contracted to additionally insure for a claim of bodily injury brought against that additional insured by the named insured's employee; rather, the cases cited concern named insureds making claims for injuries or damages to *themselves* and involve entirely different factual circumstances.[6] (**Db33-34).**

In sum, where an employee of a named insured is suing an additional insured who is not her employer, the obvious purpose of the immunity of the Workers' Compensation statute is not implicated. Maryland Casualty, 48 N.J. Super. at, 323-24. Indeed, if Utica's position were enforced, the additional insured coverage it purports to provide would be illusory in any circumstance where the party suing happened to be an employee of the named insured.

[6] The matter of Universal Underwriters Group v. Heibel (**Db33**) addressed the requirement of a dealership to provide collision insurance to a permissive user who brought suit against it under New Jersey's compulsory motor vehicle liability insurance statute. The matters of State Dep't of Env't Prot. v. Signo Trading Int'l Inc., (**Db33**) and Kentopp v. Franklin Mut. Ins. Co., (**Db33**) involved the applicability of "owned property" exclusions for claims of damage to a named insured's property, and both courts found the exclusion did not bar coverage so long as there was a threat of imminent danger to another property, even if no actual harm resulted.

Notably, Utica has not cited to a single case where, simply because an additional insured sought a defense from the liability carrier of the injured plaintiff's employer, such coverage was somehow voided by the immunity provision of the Workers' Compensation statute. That is because no such case exists.

Finally, Utica's random references to exclusions contained in unrelated provisions of Coverage C – Medpay (**Db34)**, have no relevance as to whether SL are entitled to coverage pursuant to Coverage *A1.a* of the CGL Form. (**Da2)**.

E. Utica Has Failed to Meet its Burden of Showing that its Purported Policy Exclusion Concerning the Additional Insured's Independent Acts Applies to the Present Case

Utica, despite trying to evade coverage by citing to the "Independent Acts and Omissions" exclusion of Section 11.c.(1) of the Endorsement (the "11.c.(1) Exclusion"), never attempted to meet its burden in this regard. (**Db34-40, Da11-12, 1T 26:11-27:10, 33:11-34:13, 41:7-43:18, Da39-40, 2T 59:1-62:15, 76:2-77:6**). Instead, Utica claimed at trial, as now, that the burden was, somehow, on its insured (SL) to prove that the exclusion did not apply. (**2T 59:1-62:15, 76:2-77:6**). Regardless, the Court also twice considered, but rejected, the applicability the 11.c.(1) Exclusion, which Utica argued barred coverage because the underlying Complaint in the Tort Suit contained direct allegations of negligence against SL. (**Da11-12, 1T 26:11-27:10, 33:11-34:13, 41:7-43:18, 49:13-50:8,**

Da39-40, 2T 59:1-62:15, 76:2-77:6).[7] However, the Court correctly recognized that SL faced potential liability in the Tort Suit beyond their own alleged negligence,[8] including: claims for joint and several liability; claims for vicarious

[7] The matters of Shannon v. B.L. Eng. Generating Station (**Db36, Da325**); Northeast Utils. Serv. Co. v. St. Paul Fire & Marine Ins. Co. (**Db37, Da340**); St. Paul Fire & Marine Ins. Co. v. Hanover Ins. Co. (**Db37**); Edwards v. Brambles Equip. Servs. (**Db37-38, Da350**) cited by Utica (**Db36-38**) are readily distinguishable and do not support the application of the 11.c.(1) Exclusion instantly, because, in those cases, the additional insured coverage: arose under provisions similar to the inapplicable 11.a.(1)(*a*) of the Endorsement (not sub-paragraph (b)); in the context of a contract for services by the named insured "for" the additional insured (not a lease for real property); and/or for claims where the additional insured was not facing liability beyond its own independent acts (such as claims of vicarious liability, joint and several liability, and/or liability for contractual indemnity SL faced in the Tort Suit). (**1T 17:15-19:6, 2T 19:2-21:18**). Utica's reliance on Schafer v. Paragano Custom Bldg., Inc. (**Db39, Da322**) is further misplaced as it has been rejected in subsequent cases. See Friedland, N.J. Super. Unpub. LEXIS 1841, *at **8, 17-18* (criticizing Schafer for improperly confounding legal standards applying to contractual indemnity with those for coverage, the later to be determined from the allegations of complaint for whether coverage conditions were triggered) (**Da286-289**).

[8] See Thunder Basin Coal Co. L.L.C. v. Zurich Am. Ins. Co., 2013 U.S. Dist. LEXIS 173779 (E.D. Mo. 2013) (carrier required to defend additional insured despite endorsement restricting from coverage "independent acts" because complaint also alleged negligence of parties other than additional insured) (**Da303**); Orchard Hillz & McCliment, Inc. v. Phoenix Ins. Co., 146 F. Supp. 3d 879 (Michigan. E.D. 2015) ("independent acts" restriction in endorsement does not relieve the carrier from its duty to defend additional insured where underlying suit claims that both additional insured and other parties were negligent).

liability through common law indemnity;[9] and claims for contractual indemnity. (**Da11-12**, **Da32 (incorporating SJ Order therein)**).[10]

It is also worth noting that where the Lease in question required FB to name SL as an additional insured, it specifically stated this insurance must provide coverage "against any losses arising out of liability for…personal

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[9] In light of New Jersey's well-established law that the owner of an elevator is vicariously liable for the negligence of its elevator service contract, SL faced potential liability for Clifton's conduct (and thus, a need for a defense and coverage), even where SL was entirely free of any negligence. See De Los Santos v. Saddlehill, Inc., 211 N.J. Super. 253 (App. Div. 1986) (owner of a building who contracts elevator maintenance to a third-party has a non-delegable duty to exercise reasonable care for safety of invitees); Rosenberg v. Otis Elevator, 366 N.J. Super. 292 (App. Div. 2004) (in light of non-delegable duty to maintain property in reasonably safe manner, property owner faces vicarious liability for its elevator maintenance contractor's conduct). (**1T 16:3-15, 2T 19:17-20:19, 37:15-7).**

[10] The Court also noted the "lack of definition" as to what Utica intended in its purported exclusion of independent acts of the additional insured" in finding that the 11.c.(1) Exclusion did not bar coverage for SL in the Tort Suit. See Essex Ins. Co. v. Newark Builders, Inc., 2015 N.J. Super Unpub. LEXIS 1165, *at *12-13* (May 19, 2015) (because ambiguities in insurance policies must be construed narrowly, against drafter and to allow for coverage where possible, carrier obligated to defend and pay for indemnity of additional insured after it and other parties were found liable at trial because policy expressly extended coverage for vicarious liability for named insured, but failed (despite opportunity) to limit said coverage *solely* to vicarious liability for the named insured. (**Da284, 1T 14:8-17:9**); See Valentin-Rivera v. NJ Prop.-Liab. Ins. Guar. Ass'n, 2011 N.J. Super. Unpub. LEXIS 745, at ***6-7* (App. Div. Mar. 25, 2011) (ambiguous exclusionary clauses must be construed narrowly, against the drafter and in a way to afford coverage, unlike provisions affording coverage which must be construed more broadly, but also against the drafter and in favor of finding coverage) (**Da314)**; Weedo v. Stone E-Brick, Inc., 81 N.J. 233, 247-50 (1979) (basic principle is that exclusionary clauses subtract from coverage, rather than grant it).

injuries occurring about the Premises and Complex". (**Da1467 at ¶7.B.**). New Jersey Courts have repeatedly held that such language is to be broadly and comprehensively interpreted in the context of coverage for bodily injuries in a landlord-tenant context. See Harrah's, 288 N.J. Super., at 157; Franklin Mut. Ins. Co. v. Security Indem. Ins. Co., 275 N.J. Super. 335, 340-41 1994); Liberty Vil. Assoc. v. W. Am. Ins. Co., 308 N.J. Super. 393, 399-402 (1998); See also Gateway Park, N.J. Super. Unpub. LEXIS 785, at ***16-18*. (**Da291**). Contrary to Utica's mischaracterizing claims, the subject Lease placed no other restrictions on the insurance to be secured by FB. (**Da1467 at ¶7.B.**).

The factually dissimilar matter of Pennsville Shopping Center Corp. v. American Motorists Ins. Co., 719 A.2d 182 (N.J. Super. 1998), repeatedly referenced by Utica, does not suggest, as Utica claims, that the 11.c.(1) Exclusion somehow drastically transforms the broad scope of coverage provided by 11.a.(1)(b) into the limited scope of FB's separate contractual undertaking to indemnify SL in certain circumstances under Section 23 of the Lease; nor does Pennsville somehow restrict Utica's coverage obligation only to FB's vicarious liability. (**Db36-39**). Indeed, Pennsville considered whether an additional insured provision (which is never actually quoted by the court in the decision) extended coverage *at all*, and did not consider the interpretation or application of any policy exclusion (let alone one similar to the Utica Policy's 11.c.(1)

Exclusion). Moreover, Utica ignores the many factually similar subsequent New Jersey cases[11] cautioning carriers against over-relying on Pennsville as to the relevance of contractual indemnification clauses in extrinsic agreements between the named insured and additional insured for defining additional insured coverage, given Pennsville's highly unique facts (none of which are present instantly).[12]

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[11] See *e.g.* W9/PHC, 407 N.J. Super. at 193-94 (rejecting carrier's reliance on Pennsville for claim that exclusion for additional insured's "independent acts and omissions" limited scope of additional insured coverage to that of named insured's contractual indemnification obligations in separate agreement to which carrier not a party); Gateway Park, N.J. Super. Unpub. LEXIS 785, at ***17-18* ("[T]he Pennsville decision is inapposite here" because insurer's duty arises from policy terms, not insured's promise in separate indemnification agreement and additional insured provision provided broad coverage for claims arising from tenant's "use of" leased premises) (**Da291)**; Finnegan, N.J. Super. Unpub. LEXIS 2105, at ***4-8* (trial court erred in dismissing additional insured claim and misconstrued Pennsville as limiting scope of additional insured coverage to named insured's contractual indemnity obligations, noting the Court had "since cautioned against over reading Pennsville's holding" to inappropriately considering extrinsic evidence (separate contractual indemnity agreements) rather than language of the insurance policy to define bounds of coverage). (**Pa37)**.

[12] Unlike Pennsville: the Lease between FB and SL contains no reciprocal indemnification provision requiring the landlord to indemnify the tenant, for claims resulting from the landlord's failure to maintain the area in question (**Da1479-80)**; SL did *not* retain sole responsibility for the maintenance of the area in question (rather, elevator maintenance was contracted to Clifton) (**Da1485)**; Section 7.B. of the Lease obligated FB to obtain broader additional insurance for SL (covering against "any losses arising out of liability… for personal injuries… occurring in or about the Premises and Complex" (**Da1467))** than the Pennsville lease (merely requiring the tenant to, vaguely, name the landlord "as an additional insured" on its liability policy). See Pennsville, 315

Contrary to Utica's claim, there exists ***no case*** in New Jersey *de facto* prohibiting agreements to provide additional insured coverage in an insurance policy broader than the separate contractual indemnity obligations undertaken by the named insured, or suggesting that the language of the 11.c.(1) Exclusion somehow militates such an interpretation. (**Db37 at FN4 and Db3 at FN5)**. In fact, the Court in Harrah's Atlantic City v. Harleysville Ins. Co., reached the ***opposite*** conclusion, stating that there is ***no prohibition in law or public policy*** against a landlord negotiating for an insurance endorsement insuring against the risk of liability generated by the business to be conducted by the tenant and placing the cost of insuring that risk on the tenant. See Harrah's, 288 N.J. Super. at 158-159 (landlord may reasonably expect additional insurance coverage where the risk grew out of the tenant's use of the leased premises).[13]

Utica claims throughout its Brief that because the Tort Suit settled without FB (or any party) being adjudicated liable, that Utica is somehow exonerated

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N.J. Super. at 522; *cf* Am. Fire & Cas. Co. v. State Nat'l Ins. Co., 2016 N.J. Super. Unpub. LEXIS 1896, at ***7-9* (App. Div. Aug. 15, 2016) (Pennsville not applicable where landlord not solely responsible for area of incident, lease did not require landlord to indemnify tenant, and additional insurance coverage for landlord against losses arising from tenant's "use" of leased premises and, thus, not contingent on finding of tenant's liability) (**Pa293)**.

[13] Here, but for FB's tenancy at the Premises, Mr. Fogarty and the other FB employees would have had no right or opportunity to access the elevator or Premises in question. Thus, there is a clear nexus between the risk insured against and FB's tenancy at the Premises.

from its coverage obligations. (**Db27-28 at II.A.-B., Db31 at II.D., Db 39-41, Db43 at III.A.**) This argument is founded on two glaringly erroneous presumptions. First, it presumes that a party must first be proven liable before coverage can be afforded. Such a policy would force countless cases to trial as liability carriers game the avoidance of defense costs against any risk presented by going to trial. See L.C.S., Inc. v. Lexington Ins. Co., 371 N.J. Super. 482, 492 (2004) (to uphold a denial of insurance coverage on an assumption that a particular cause of action is doomed contradicts established law as well as public policy in favor of finding coverage absent the clear applicability of a policy exclusion); Szelc v. Stanger, 2009 U.S. Dist. LEXIS 112911, at ***9-10* (N.J.D.C. 2009) (purpose of an insurance contract is promoted by requiring an insurer to provide a defense as to claims where coverage is disputed; otherwise burden would be improperly placed upon the insured of demonstrating in advance of the underlying litigation which of the competing theories of recovery against it was applicable for purposes of insurance, thereby frustrating one of the basic purposes of an insurance contract) (**2T 36:15-38:7, 67:24-69:7, Pa340)**.[14]

[14] See also, Voorhees v. Preferred Mut. Ins. Co., 128 N.J. 165 (1992) (parties to an insurance contract would not have agreed to an arrangement whereby in the event of a dispute of coverage, the insured would bear the cost of defense to which he may well be entitled); Flomerfelt v. Cardiello, 202 N.J. 432 (2010)

Furthermore, Utica's insistence that a finding of liability against FB was a condition precedent to coverage for SL (**Db 27-28, 31, 39-41, 43)** presumes that SL's coverage flowed from sub-paragraph (a) of the Endorsement (limiting additional insured coverage to the extent the additional insured is held liable for the acts and omissions of the named insured). (**Da987 at 11.a.(1)(a)),)**. However, the Court specifically ruled that ***only Section 11.a.(1)(b)*** of the Endorsement applied in this matter and that 11.a.(1)(a) and (b) were, accordingly, *disjunctive*. (**Da9, Da11, Da31, Da38-39**, **1T 11:11-12, 24:7-25).** Significantly, sub-paragraph (b) does ***not*** limit SL's coverage to that of vicarious liability for the named insured and rather, much more broadly provides coverage "[w]ith respect to property . . . used by, or rented or leased to, you." (**Da987 at 11.a.(1)(b), 2T 42:15-43:3, 94:17-96:21).**[15] Similar additional insured

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(even where the underlying coverage question cannot be decided from the face of the pleadings, the insurer is obligated to provide a defense until all potentially covered claims are resolved).

[15] Although Utica peculiarly never addresses or argues the issue, the Court held that sub-paragraphs (a) and (b) are disjunctive. (**Da9, Da11, Da31, Da38-39**). Utica ignores the issue and presumes, without discussion or analysis, that sub-section (a) applies. (**Db26, Db28, Db31-32, Db36-37, Db39, Db41, Db44)**. However, a conjunctive approach, as the Court held, would be fundamentally flawed as the Endorsement nowhere suggests in any way that it is conjunctive. (**Da9, Da11**); moreover, a cursory review throughout the Utica Policy reveals that whenever the conjunctive is intended in any of its provisions, the Policy deploys an "and" between the various items or conditions. (see **examples of conjunctively drafted provisions at Da984 at 3.(1)(a)-b) and 3.(3)(a)-(b), Da987 at 9.3.a.-b., Da990 at 15.a.(1)-(3) and 15.c.(1)-(4), 1T 11:11-12:1,**

provisions have been repeatedly interpreted by New Jersey Courts to provide broad coverage for claims growing out of the tenant's use of leased premises so long as there is a substantial nexus between the occurrence and the use of the leased premises. Harrah's, 288 N.J. Super., at 157; Franklin Mut., 275 N.J. Super., 340-41; Liberty Vil., 308 N.J. Super., at 399-402; See also Gateway Park, N.J. Super. Unpub. LEXIS 785, at ***16-18* (**Da291)**; Am. States Ins. Co. v. Phila. Ins. Co., 2014 N.J. Super. Unpub. LEXIS 2067, at ***6-9* (App. Div. Aug. 21, 2014) (**Pa297**).

Utica's claim that only a trial on the merits of the underlying action could establish its liability for coverage is a convenient (and obvious) effort to avoid the fact that it has the burden, which it has made no effort to meet, to show why its coverage here is subject to an exclusion or why its own counterclaim might somehow support an allocation or apportionment of its defense and indemnity owed to SL. (*See* **Pb32-50 at II.G.-IV.**). For this reason, Utica's ongoing

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24:7-25). Sub-paragraph (a) applies to contracts under which the named insured has undertaken the performance of some service or task "for" and on behalf of the additional insured. (**Da987 at Section 11.a.(1)(a)**). There is no scenario where the tenant of a real property's operations are "for" the benefit of the Lessor or Manager of the leased premises. (**1T 18:7-16)**. FB's Lease with SL was not to perform operations "for" SL; it was to "use" the leased space and Premises for FB's business. (**Da1462-63**). This is why sub-paragraph (b) exists: to provide additional insured coverage to Lessors of Property from whom the named insured has leased or rented space. (**1T 10:7-13:2, 18:7-16, 2T 12:10-14:3, 41:21-42:13).**

argument that for SL to prevail in this action it must somehow have shown at trial that the named insured (FB) was negligent or responsible for the accident in question, is the ***exact opposite*** of what Section 11.a.(1)(b) requires. (**Da8-9, Da11-12, 1T 32:3-11, 43:19-44:24, 45:11-21, 49:15-25**).

F. Utica Wrongfully Denied Coverage to SL Triggering its Indemnity Obligations for the Settlement Reached in the Tort Suit on the SL's Behalf

Under New Jersey Law, where an insurer has wrongfully refused coverage and a defense to its insured, such that the insured is obligated to defend itself in an action held to be covered under the policy, the insurer is obligated for the amount of the settlement made by the insured. See Griggs v. Bertram, 88 N.J. 347 (N.J. 1982); Fireman's Fund Ins. Co. v. Sec. Ins. Co., 72 N.J. 63, at 71 (1976); Jefferson Ins. Co. v. Health Care Ins. Exchange, 247 N.J. Super. 241, 247 (App. Div. 1991) (where two insurers owe concurrent coverage to a mutual insured, and one insurer assumes the defense and the other carrier refuses to participate, the latter cannot avoid contribution to settlement based on the solemn obligation, independent to each carrier, to act in the best interest of the insured in negotiating and settling all claims made against the insured); Traders & Gen. Ins. Co. v. Rudco Oil & Gas Co., 129 F. 2d 621, 626 (10th Cir. 1942) ("[an insured should not] be required to wait until after the storm before seeking refuge [when faced with] a potential judgment far in excess of the limits of the

policy."). Moreover, once an insured has successfully put forth proof that the settlement was reasonable and entered into good faith, the ultimate ***burden of persuasion as to these elements is the responsibility of the non-participating insurer***. Griggs, 88 N.J. at 368; (**2T 35:24-38:7**).

Since the well-settled ruling in Griggs applies here, the sole remaining question to be addressed by the Court is whether the settlement at issue was reasonable and entered into in good faith. See N.J. Mfrs. Ind. Ins. Co. v. U.S. Cas. Co., 91 N.J. Super. 404, 407-408 (1966) (**Da216-230)**. Instantly, Utica has made ***no effort*** to challenge whether the settlement reached on SL's behalf was reasonable and in good faith and, thus, has conceded the issue. (**Db48-50 (challenging reasonableness of defense costs and legal fees in coverage suit *only*)**). As shown in Argument II.G. below (**Pb32)**, since the Utica policy is primary to all other policies, its $1 Million would and should have been *the **first policy to go*** with respect to this settlement. Thus, in light of Utica's wrongful refusal to provide coverage and a defense for the claims in the Tort Suit which are unequivocally covered under the Utica Policy, Utica is obliged for the reasonable settlement paid on behalf of SL up to Utica's full $1 Million policy limits. Where a carrier's failure to defend is wrongful, its right to challenge the nature and extent of the underlying settlement (aside from reasonableness) is forfeited because it indisputably violated its contractual obligation to its

additional insured. Passaic Valley Sewerage Com'rs v. St. Paul Fire and Marine Ins. Co., 206 N.J. 596, at 615 (2011); Fireman's Fund, 72 N.J., at 71-77; see also L.C.S., Inc. 371 N.J. Super. 482 (where an insurer has the opportunity to participate in the defense of an action where coverage is disputed under a reservation of rights and declines to do so, it cannot be heard to dispute the reasonable settlement entered into by the insured forced to fend for itself).

G. Utica's Policy is Primary to All Other Coverages Available to SL and, Thus, Utica Has No Right of Contribution or Equitable Subrogation from Any Other Carrier

In an oversight that is either accidental or an attempt to conceal a fatal defect in its priority analysis, Utica completely ignores the controlling 'Other Insurance' provision of its own additional insured Endorsement. (**Db13-17, Db46-48 at IV.A.).** Indeed, Section 11.a.(2) of Utica's Endorsement[16] plainly states that Utica's coverage is primary; yet Utica acts as if this provision does not exist. (**Da988 at 11.a.(2), 2T 10:23-13:2, 14:12-15:17)**. It is worth noting that the very provision providing SL with additional insured coverage (Section 11.a.(1)(b)) appears ***directly above*** the 'Other Insurance' provision (Section

[16] Section 11.a.(2) states: "Such insurance as is provided by paragraph 11.a.(1) for any additional insured will be primary if so required by the written contract, agreement or permit. Any other insurance available to such person or organization shall be excess over this insurance." (**Da988)**.

11.a.(2)) setting forth Utica's additional insured coverage as primary. (**Da987-988 at 11a.(1)-(2), 2T 14:12-15:10**).

Here, all conditions of Section 11.a.(2) are met. (**2T 15:4-10**). First, SL's right to additional insured coverage under the Utica Policy arises specifically under paragraph 11.a.(1)(b) of the Endorsement. (**Da2, Da11-12, Da31, Da38-39**). Additionally, Section 7.B.(g) of the Lease Agreement between FB and SL specifically requires that FB provide SL with primary, non-contributory, additional insured coverage which is not in excess of other coverage available to SL. (**Da1467 at ¶7.B.(g), Da38**). Rather than acknowledging this dispositive 'Other Insurance' provision (which indisputably renders the Utica policy as primary), Utica bizarrely resorts to the main CGL Coverage Form in the Utica policy (**Db15-17**) and ignores the simple fact that its additional insured Endorsement specifically states that it modifies the Main policy. (**Da984 ("This endorsement modifies the insurance provided under" the Commercial General Liability Coverage Form)**; see Gabriele v. Lyndhurst Residential Cmty., L.L.C., 426 N.J. Super. 96, 104-05 (App. Div. 2012) (when an endorsement modifies, qualifies, or restricts the terms of the original policy, the endorsement controls). Thus, the Utica Policy explicitly provides that its additional insured coverage is primary where, as here, it is so required by contract and, further, it provides that this coverage is excess to all other coverage

available to the additional insured. (**Da988 at 11.a.(2), Da1467 at 7.B.(g)**). For this reason, Utica's allocation argument defies the clear dictates of its own Policy.

The primary nature of Utica's coverage and the excess nature of any other coverage available to SL is further demonstrated when comparing the 'other insurance' language of Section 11.a.(2) of the Utica Policy with the applicable 'other insurance' language of the GAIC Policy.[17] (**2T 10:23-12:1, 15:18-17:14)** See Cosmopolitan Mut. Ins. Co. v. Continental Cas. Co., 28 N.J. 554, 559 (1959). Here, again, Utica cites to the wrong provision. (**Db17-19**). As it did with its own additional insured Endorsement, Utica fails to consider or even acknowledge the GAIC additional Endorsement (pursuant to which SL received additional insured defense and coverage from GAIC). (**Db17-19, Db46-48**). Either this evasion is accidental or it seeks to conceal the simple fact that GAIC's 'Other Insurance' provision renders GAIC's coverage excess over Utica's coverage, which is primary. Indeed, GAIC's additional insured endorsement

[17] Section K.a. of the GAIC Endorsement at the 'Primary and Non-Contributory Additional Insured Extension' specifically states that coverage to an additional insured under the GAIC policy is ***only*** primary***:***

> **provided that:** (1) the Additional Insured is a Named Insured under such other insurance; **and** (2) you [the named insured, Clifton] have agreed in writing in a contract or agreement that this insurance would be primary and you would not seek contribution from any other insurance available to the Additional Insured.

(**Da1114 at ¶K.a.)** (emphasis added)**.**

expressly states that its coverage is ***only*** primary to other insurance available to the additional insured ***if*** the additional insured is a ***named insured*** on that other insurance. (**Da1114 at ¶K.a.**).

While part (2) of the GAIC provision is satisfied (because Clifton Elevator indeed agreed in writing to name SL as an additional insured as required), part (1) is clearly ***not*** satisfied because the additional insured (SL) is not the named insured on the other insurance (the Utica Policy) available to it. (**Da1027 at Declarations specifying Clifton Elevator as named insured on GAIC Policy)**. Because FB is the named insured on the Utica Policy (**Da981)**, not SL (which is merely the additional insured), the conditions precedent for the GAIC policy to be primary are not met. Thus, the Utica Policy is primary to the GAIC Policy.

For the foregoing reasons, Utica's own policy language does not entitle it to allocation or contribution from the other polices (Travelers, FIC, Liberty) providing coverage to SL. Indeed, since the applicable 'Other Insurance' provision in the Travelers Policy rendered its coverage excess where the insured (SL) was an additional insured on the other insurance (the Utica Policy), coverage under the Traveler's Policy is excess to coverage under the Utica Policy, which is primary.[18] (**Da1206, 2T 32:18-34:25)**. Further, the Utica policy

[18] The Travelers Policy states: (1) This insurance is excess over…

is a true primary policy which cannot be rendered excess to true excess policies (like the FIC and Liberty policies) by virtue of an 'other insurance' clause. **(Da1120, Da1151 at I. COVERAGE, Pa90, 2T 35:1-23)**; CNA Ins. Co. v. Selective Ins. Co., 354 N.J. Super. 369, 379-381 (App. Div. 2002) (an excess 'other insurance' clause in primary policy does not transform that other insurance into an excess policy). Utica thereby owes first-dollar defense for all defense costs incurred and first-dollar indemnity to SL up to the $1 Million limit of the Utica Policy.

III. UTICA'S DUTY TO DEFEND ITS ADDITIONAL INSURED RENDERS IT LIABLE FOR ALL OF SL'S DEFENSE COSTS IN THE TORT SUIT

A. Utica Has Failed to Meet its Burden of Showing that Any Claims in the Tort Suit are Non-Covered

It is ironic that Utica spends its first argument on appeal asserting (correctly) that the duty to defend is broader and distinct from the duty to indemnify (**Db26-27 at II.A.)**; but in the present Argument Utica claims that the two are actually synonymous and the only way SL could have secured a defense from Utica was by forcing the Tort Suit to trial and proving its entitlement to

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> (b) any other insurance whether primary, excess, continent, or on any other basis, that is available to the insured when the insured is an additional insured, or is any other insured that does not qualify as a named insured, under such other insurance.

(Da1206 at 4.b.(1)(b)).

indemnity. (**Db41-44 at III.A.)** Here, Utica is, yet again, repeating its specious claim that SL' entitlement to coverage was somehow contingent on proving the liability of its named insured, FB. (**Db41-44).** As discussed in Section II.E. above (**Pb26-29)** (and incorporated herein), SL is entitled to coverage under Section 11.a.(1)(b) of Utica's Endorsement which in no way requires a finding of liability against the named insured as a condition precedent to coverage or defense. (**2T 94:17-96:21**). Thus, Utica's assertion that a trial was necessary (because it would presumably determine the named insured's liability) is irrelevant. See Voorhees, 128 N.J. at 174 (duty to defend arises when underlying claim states claim constituting a risk insured against, regardless of the claim's actual merit, or whether the carrier may ultimately be required to pay indemnity on the insured's behalf); S.T. Hudson Eng'rs, Inc. v. Pa. Nat'l Mut. Cas. Co., 388 N.J. Super. 592, 606 (2006) (the duty to defend is broader than the duty to indemnify and is "itself a meaningful benefit"); Occhifinto v. Olivo Constr. Co LLC, 221 N.J. 443, 452-53 (2015) (duty to defend determined by the nature of the claims alleged in pleadings, not the merit of those claims); United Rentals (N. Am.), Inc. v. Liberty Mut. Fire Ins. Co., 2022 U.S. Dist. LEXIS 77243, at ***12-24* (N.J.D.C. 2022) (**Pa356**).[19]

[19] Contrary to Utica's claim (**Db42 at FN 6)**, the Court's interim September 29, 2023 Order ***reaffirmed*** SL's entitlement to a defense from Utica in partially

Nor does Burd v. Sussex Mut. Ins. Co., 46 N.J. 383 (1970) or any other New Jersey case support Utica's assertion that wherever there is a question as to coverage on the face of the pleading, the carrier's duty to defend is not triggered until after the carrier's indemnity obligations are determined by trial in the underlying matter. See Flomferfelt, 2020 N.J. at 444-45 (where a pleading involves multiple or alternative causes of action, the duty to defend attaches so long as any of them would be covered and continues until all potentially covered claims have been resolved); Gitao v. DirecTV, Inc., 2010 N.J. Super. Unpub. LEXIS 2524 (App. Div. Oct. 18, 2010) (carrier's duty to defend additional insured ***not*** contingent on preliminary jury determination that named insured was liable or triggering of duty to indemnify and, rather, triggered upon face of pleading's allegations of both potentially covered and non-covered causes of

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granting SL's Motion to Enforce the May 26, 2023 summary judgment order. (**Da20-Da24, 2T 61:25-62:8, 98:2-7**). Indeed, in partially denying the Motion pending the resolution of the Tort Suit, it was not a question of *whether* Utica owed SL a defense (as Utica asserts) but rather, determining *the amount* of total costs Utica ultimately owed. (**Da20-21** ("The Court has clearly determined that SL Parties are additional insureds and are entitled to defense and coverage under the Utica policy. The parties do not dispute the fact that SL Parties are additional insured under the Utica policy"); **Da22** ("…as already determined by the Court, [SL] are additional insureds and are entitled to a defense and coverage by Utica…[SL's] motion to enforce the Order is granted…"); **Da23** ("The Court has not yet resolved the underlying personal injury action, which will be followed by a determination of apportionment of defense costs and priority of coverage…Therefore, the request for reimbursement for legal fees related to [the Tort Suit] is denied, without prejudice, as premature.")

loss) (**Pa371**); Mt. Hope Inn v. Travelers Indem. Co., 157 N.J. Super. 431 (1978) (ultimate dismissal of covered claims in complaint alleging both covered and non-covered claims, had no effect on carrier's duty to defend before that time). Indeed, the Court in Burd acknowledged New Jersey's long-standing "general approach" that the carrier's obligation to defend is immediately triggered "whenever the complaint alleges a basis of liability within the covenant to pay." Burd, 56 N.J., at 388. Moreover, Utica fails to satisfy the Burd elements which might have prevented its duty to defend from being triggered at the initiation of the Tort Suit. Indeed, even assuming *arguendo* Utica could somehow establish that any of the claims in the Tort Suit were not covered under the Policy, the issues Utica claims are dispositive of coverage (the respective liabilities of SL, FB, and others) ***would*** be resolved by the underlying trial (unlike in Burd where whether the firearm shooting at issue fell within the policy's definition of an intentional act versus the impact of potential intoxication for determining criminal "intent" involved different burdens of persuasion and *would not* have been resolved by trial in the underlying matter). (**1T 32:1-6 (Utica admission that trial in Tort Suit would resolve coverage issues)**.

Similarly, Utica's claim that having to defend SL creates some sort of "conflict of interest" because Mr. Fogarty was an employee of Utica's named insured, grossly misapprehends both the nature of the "conflict of interest"

required for Burd to apply and the essence of the insurer-insured relationship. (**Db42-43, 2T 96:22-98:1)**; See Am. Fire v. Am. Family, 2023 U.S. Dist. LEXIS 88771, at ***24-27* (no conflict of interest per Burd in carrier having to defend both its named and additional insured for claim brought by employee of a named insured because the interests of the carrier and both insureds are presumably aligned, with neither insured wishing to be found liable and, the mutual carrier, similarly, not wishing to pay out any claims) (**Pa280**).

Furthermore, the remaining cases cited by Utica (**Db42-43)** do not support Utica's claim that a trial was necessary to establish SL's entitlement to a defense. Passaic Valley Sewerage Comm'rs v. St. Paul Fire & Marine Ins. Co., 206 N.J. 596 (involved carrier's duty to reimburse indemnity payments made in numerous claims related to a regulatory agency and in which the carrier proffered a defense while appropriately preserving its rights to dispute coverage on certain claims via numerous reservation of rights letters); N.J. Mfrs. Ins. Co. v. Vizcaino, 392 N.J. Super. 366, 370-71 (App. Div. 2007) (involved negligence (covered) and intentional conduct (uncovered) claims arising from an assault); Norman Int'l, Inc. v. Admiral Ins. Co., 251 N.J. 538 (2022) (no duty to defend where the injury in question occurred in Nassau County and the insurance policy contained an exclusion expressly barring coverage for claims in any way arising out of Nassau County). Further, even assuming *arguendo* Utica could establish

some claims in the Tort Suit were not covered, it has conspicuously failed to even argue let alone satisfy its burden of establishing which of the defense costs were related to non-covered claims (**Db41-43)** and, thus, would *still* be responsible for *all* of the costs in the Tort Suit.[20] (**2T 17:25-18:9**).

Finally, because Utica has failed to establish that any exclusion precludes Utica's duty to defend SL in the Tort Suit, SL is a "successful claimant" for purposes of Rule 4:42-9(a) entitled to counsel fees. See Occhifinto, 114 A.3d, at 338 (securing defense from carrier only, without indemnity, satisfied "successful claimant" under Rule 4:42-9(a)(6)); R.M. v. Supreme Court of New Jersey, 918 A.2d 7 (2007) ("success" under R. 4:42-9(a)(6) broadly defined and requires only that claimant achieve some benefit sought in bringing suit).

[20] See SL Indus. v. Am. Motorists Ins. Co., 128 N.J. 188, at 214-15 (192) (where defense costs cannot be apportioned between those incurred for covered claims versus those incurred for non-covered claims, insurer bears the cost of ***all*** claims); Hebela v. Healthcare Ins. Co., 370 N.J. Super. 260, 279-80 (2004) (whether and how defense costs can be allocated falls upon the insurer "**who allowed the difficulties of allocation to accrue through its refusal to defend.**") (emphasis added); First Trenton Indem. Co. v. River Imaging, P.A., 2009 N.J. Super. Unpub. LEXIS 2190, at ***24-25* (App. Div. Aug. 11, 2009) (by its failure to submit proposed allocation of defense costs specifying covered versus non-covered claims, carrier could not satisfy its burden of showing that defense costs could be allocated thus, responsible for reimbursement of *all* reasonable defense costs) (**Pa369)**. Thus, if the Court finds that Utica had the duty to defend SL for *any* claim in the Tort Suit, Utica is liable for ***all*** of SL's defense costs.

B. Clifton's Contractual Indemnity Obligations Do Not Alter Utica's Duty To Its Additional Insured, SL

In an effort to avoid the dictates of its own its additional insured Endorsement, Utica next claims (**Db44-46 at III.B.)** that the separate contractual indemnification obligations between SL and Clifton Elevator somehow pre-empt Utica's duty to defend its additional insured. As argued above, however **(Pb13-16 at II.B.-C., Pb24-26 at II.E.),** whether Utica's additional insured, SL, had separate contractual indemnification relationships with other parties (whether it be Fogarty Brothers or Clifton Elevator) in extrinsic agreements to which Utica was not a party, has no bearing on, and is of no import to, whether SL was entitled to a defense and indemnification under Utica's policy. (**2T 92:17-95:10**); See *e.g.* W9/PHC, 407 N.J. Super. at 193; Jeffrey M. Brown Assoc., 414 N.J. Super., at 171; QBE, N.J. Super. Unpub. LEXIS 781, at ***4-6* (**Pa336**).

Moreover, the mere fact that Clifton Elevator's GL carrier acted in good faith and provided SL with a defense as additional insureds does not somehow relieve Utica of its independent coverage obligation to SL. See Jefferson Ins., 247 N.J. Super. at 246-48; Potomac Ins. Co. of Illinois *ex rel* One Beacon Ins. Co. v. Pennsylvania Mfrs. Ass'n Ins. Co., 425 N.J. Super. 305 (2012), *aff'd* 215 N.J. 409 (2012) (where two insurers independently provide insurance on the same risk for which they are both liable, the defending carrier is entitled to

equitable contribution from the other insurer, without regard to principles of equitable subrogation). Utica's self-interested argument, which at its core contends that because another carrier provided for SL's defense that Utica should not have to (**Db44-46)**, is both unsupported by any case precedent and would undermine the recognized policy that insurance exists to benefit the insured, not the insurer. (**Da21-22);** See Marshall v. Raritan Valley Disposal, 398 N.J. Super. 168, 176, *cert. denied* 196 N.J. 592 (App. Div. 2008); Sisolak v. Briarwood Sportsman's Club, 2010 N.J. Super. Unpub. LEXIS 2727 (App. Div. Nov. 10, 2010) (**Da878**).

IV. UTICA HAS FAILED TO SATISFY ITS BURDEN OF PROVING THAT ANY DEFENSE COSTS SHOULD BE ALLOCATED, APPORTIONED OR WERE IN ANY RESPECT UNREASONABLE.

The issues of allocation and apportionment are part of Utica's Counterclaim on which it self-evidently bears the burden. (**Da86-87 at ¶(4), 2T 65:4-8 (acknowledging Utica was permitted the "right" to establish its Counterclaim by the SJ Order)**; Smargiassi v. Jersey Shore Wildcats, 2016 N.J. Super. Unpub. LEXIS 994, at **5-6* (App. Div. May 2, 2016) (dismissal appropriate for defendant's failure to meet burden of proof on counterclaim) (**Pa376)**; Alsentzer v. Bulboff, 2006 N.J. Super. Unpub. LEXIS 816, at **20* (App. Div. Jan. 26, 2006) (affirming dismissal of defendant's counterclaim for

failure to meet burden of proof) (**Pa273)**. As shown below, Utica has failed to meet this burden.

A. Utica Has Failed to Establish it is Entitled to Contribution or Allocation of its Obligations from Any Other Carrier

Utica's contention that its Policy is somehow excess over other coverages to SL (**Db46-48 at IV.A.**) has already been addressed (and readily disproven) above. (**Pb32 at II.G.)**. As noted, while Utica's additional insured endorsement states it is always primary to other coverages (**Da988 at 11.a.(2)),** GAIC's additional insured endorsement states it is ***only*** primary if the additional insured (here, SL) is also the named insured on the competing policy. (**Da1114 at ¶K.a.)**. However, since SL is not the named insured on the competing Utica policy (FB has that distinction), the Utica policy is primary and the GAIC policy is excess.

Additionally, Utica's argument that SL will receive a double recovery since another insurance carrier paid for SL's defense (and settlement contributions) was rejected by the Court in both its MELR Order (**Da21-22)** and Orders denying GAIC, Liberty, and Travelers' Motions to Intervene (**Pa43-63, 2T 30:4-32:6)** (from which, Utica did not seek an appeal) (**Da45)**. In the latter Orders, the Court noted that SL's right to pursue coverage from Utica was co-existent with the properly paying carriers' right to reimbursement from any

amount SL secured from Utica.[21] (**Pa49-50, Pa58-59, Pa67-68**); see Marshall, 398 N.J. Super., at 176-177 (whether insured has other insurance coverage available to it is irrelevant for purposes of its right to seek coverage from non-paying carrier); Sisolak, N.J. Super. Unpub. LEXIS 2727 (**Da878**). Indeed, the Court's amended Trial Order specifically addresses this issue, and notes that SL's award was subject to the rights of these interested non-party carriers and eliminated the risk of any such double recovery by SL. (**Da43, 2T 45:4-48:12**).

B. Utica Has Failed to Show the Court Abused Its Discretion in its Calculation and Award of Both Defense Costs in the Tort Suit and Attorneys' Fees in the Instant Coverage Action

Utica's final remaining claim, which attempts to reduce its liability for SL's defense costs in the Tort Suit and attorneys' fees in pursuit of insurance coverage (**Db48-49**), requires that Utica establish that these costs and fees were not reasonable and necessary. Hebela, 370 N.J. Super. 278 (where carrier wrongfully refused to defend insured, the tasks undertaken by the insured's counsel cannot be second guessed by a non-paying carrier, if they represent an

[21] The distinguishable cases of IMO Indus. Inc. v. Transamerica Corp. (**Db46**), Potomac Ins. Co. of Illinois (**Db46)**, and Carter-Wallace, Inc. v. Admiral Ins. Co., (**Db48**) cited by Utica (**Db46-48 at III.A.**) consider allocation in the context of 'continuous triggers' in toxic and environmental torts implicating multiple insurance policies over a long period of time are irrelevant to Utica's purported right to allocation from GAIC or the appropriate method thereof, which, rather, is properly determined by a comparison of the policies' respective 'other insurance' provisions. See W9/PHC, 407 N.J. Super., at 199.

objectively reasonable response to the claims asserted against the insured). Unlike questions of law or interpretation of an insurance contract where *de novo* review on appeal may be appropriate, Utica must establish the Court abused its discretion to warrant any disturbance of its award of counsel fees. See Rendine, 141 N.J. at, 317 (trial court's award of counsel fees should be "disturbed only on the *rarest* of occasions" due to an abuse of discretion). Here, there is nothing to suggest that the Court's award of counsel fees to SL was made without a rational explanation, inexplicably departed from established policies, rested on any impermissible basis, or was otherwise 'manifestly unjust' under the circumstances. See State v. Chavies, 247 N.J. at, 257; Newark Morning Ledger, 423 N.J. Super. at, 174.

Notably, Utica's modest challenge to the award of fees and costs is contained in less than a page of text of Utica's Brief. [22] (**Db48-49)**. Contrary to

[22] Utica provides no basis on which this Court could conclude that SL's costs and fees (**Db48-49)** were in any respect unreasonable. Utica fails to cite to any part of the record, or reference any specific entries contained in the hundreds of pages of legal bills, third-party invoices, and other proofs provided by SL, that Utica apparently believes are unreasonable or excessive. See R.P.C. §1.5(a) (reasonableness factors for attorney's fees assessment); see also Rendine, 141 N.J. 292. Utica even fails to provide this Court with the Addendum (only attached to its trial brief below) wherein it sought to itemize the expenses it was challenging. See R. 2:6-2(a)(5) (requiring brief to include references to appendix and transcript to support issues raised); see Soc. Hill Condo. Ass'n, Inc. v. Soc. Hill Assoc., 347 N.J. Super. 163, 178 (2002) (without necessary documents to evaluate claims raised on appeal, appropriate to affirm lower court ruling); First Trenton, N.J. Super. Unpub. LEIXS 2190, at **29* (**Pa369)**.

Utica's argument that the Court did not consider the merits of its challenge (**Db49)**, the Trial Decision carefully set forth the facts of record and legal precedent supporting its rejection of Utica's challenges. (**Da41-42 at (C)-(E))**. Indeed, the Court referenced New Jersey's well-settled law that where, as here, an insurance carrier wrongfully denies its obligation to defend an insured, it loses its right to challenge the legal *strategy* employed by the insured in undertaking its defense. ((**Da41-42 at (C)-(E), 2T 21:23-22:5)**); See Hebela 370 N.J. Super., at 278-280 (where carrier had, but rejected, multiple opportunities to control and direct the defense of an insured, it has forfeited its right to later second-guess in hindsight the strategic steps taken by counsel in defending the insured, such as a different or more expeditious strategy); see also Fireman's Fund, 72 N.J. at 71-77. The Court noted that Utica had every opportunity to control SL's defense costs and strategy from the inception of the Tort Suit as early as March 2020 (when SL first tendered its defense), through SL's numerous subsequent re-tenders, and the entry of the SJ Order and MELR Order -- or anytime in between. Yet, Utica declined to do so. The Court observed, "[h]ere not only did Utica deny coverage initially, it continued to do so even after being ordered to do so. Utica has clearly placed itself in this position by denying coverage unlike any of the other carriers." (**Da30-31, 41-42, Da216-230**).

The Court's reasoning is consistent with New Jersey case law holding that the proper course of action in the instant circumstances is for the carrier to take control of the defense under a reservation of rights, which obviates the need for any after the fact assertions that defense costs or strategies were inappropriate. See L.C.S. Inc., 371 N.J. Super. 482 (where carrier has opportunity to control defense of insured while preserving coverage challenges via a reservation of rights but declines, its right to challenge aspects of the defense obtained by the insured are waived); Willey v. DD Transp., 2013 N.J. Super. Unpub. LEXIS 2125, at ***32-34* (App. Div. Aug. 27, 2013) (carrier waived right to challenge counsel fees as excessive where it could have hired defense firm of its choosing had it honored its obligation to defend) (**Pa355)**; Passaic Valley, 206 N.J. 596 (where coverage is in dispute, appropriate conduct for insurer is to defend insured for covered claims under reservation of rights); Fireman's Fund, 72 N.J. 63 (insurance carrier who fails to uphold its good faith obligations to its insured cannot later be heard to challenge the strategy employed by the insured in undertaking its own defense).

The Court ultimately found unpersuasive Utica's complaints as to defense strategies (paid for by another carrier) employed by SL's defense counsel:

> As noted in Fireman's Fund, supra, the unwise decision of Utica to deny coverage has placed it in a very difficult position. It has no control over the litigation process and therefore its costs… Utica argues that some efforts were not appropriate but that argument is rejected. It had

> its chance to monitor but did not. . . By taking the position it did, [Utica] voluntarily lost control of the expenses in this litigation. (See Fireman's Fund, supra). It really can't quibble about efforts undertaken by counsel to discredit Fogarty or anything else.

(**Da41-42 at (D)-(E))**.

Utica also ignores the additional basis the Court provided for rejecting Utica's reasonableness arguments; namely, that the proofs provided by SL independently supported a finding of reasonableness. (**Da41-42 at (D)-(E)).** Indeed, the Trial Decision points to the fact that SL's defense costs were monitored by the other carriers, namely GAIC and that SL's legal bills were regularly screened and in some cases certain legal work was reduced pursuant to third-party bill review. (**Da41-42 at (D)-(E), 2T 26:6-28:2, 65:22-66:6, 71:3-20).** These facts were cited by the Court as evidence of the appropriateness of the defense costs incurred and led the Court to conclude that "the expenses were monitored and generally paid by the other carriers. They are deemed reasonable and necessary." (**Da41-42 at (D)-(E)**, **Da1543, Da1580-2248, Da2260 and Pa244-261 (reflecting over 1000 pages of documents produced by SL for the Court's consideration in support of the reasonableness of the at issue costs), 2T 23:14-21, 32:11-17)**; see also 212 Marin Blvd., LLC. V. Chi. Title Ins. Co., 2015 N.J. Super. Unpub. LEXIS 1184 (App. Div. May 20, 2025) (affidavits as to reasonableness and necessity of legal costs, hundreds of legal billing invoices specifying details regarding attorney's precise actions, summarizing fees, hours,

and rates for work, sufficient evidence to satisfy reasonableness burden) (**Pa263)**; Willey, N.J. Super. Unpub. LEXIS 2125, at ***41-45* (affirming reasonableness of defense costs supported by 69 pages of billing statements describing in detail each billing activity, showing that work was done for defendant in direct relation to claims at issue) (**Pa355**). As the Court's decision in this regard is clearly supported by rational explanation, is consistent with the established policies as to the effect of a carrier's wrongful denial on its subsequent challenges to attorney's fees, and rested on a permissible basis as shown by the cases cited above, Utica cannot show that the Court abused its discretion to warrant any disturbance of the Court's award.

CONCLUSION

For the foregoing reasons, it is respectfully requested that this Honorable Court affirm the May 26, 2023 Summary Judgment Order, September 30, 2024 Trial Order, and its November 12, 2024 correction, in all respects.

CALISTRI McLAUGHLIN LLC

/s/ Brian Calistri

By:_____

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Date: March 31, 2025

Superior Court of New Jersey

Appellate Division

Docket No. A-000763-24T2

SL 10 PARK PLACE, LLC and SL MANAGEMENT GROUP, LLC, *Plaintiffs-Respondents,* vs. UTICA NATIONAL INSURANCE GROUP and UTICA MUTUAL INSURANCE COMPANY, *Defendants-Appellants,* and JEFFREY FOGARTY AND ELIZABETH FOGARTY, *Defendants*, CLIFTON ELEVATOR SERVICE COMPANY, INC., and FOGARTY BROTHERS, INC. d/b/a Safeway Van Lines, *Defendants-Respondents.*	:	CIVIL ACTION ON APPEAL FROM THE FINAL ORDERS OF THE SUPERIOR COURT OF NEW JERSEY, LAW DIVISION, MORRIS COUNTY DOCKET NO. MRS-L-1293-22 Sat Below: HON. STEPHAN C. HANSBURY, J.S.C.

REPLY BRIEF ON BEHALF OF DEFENDANT-APPELLANT UTICA MUTUAL INSURANCE COMPANY

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Utica respectfully submits this reply brief in further support of its appeal from the Trial Decision and Duty to Defend Order.[1]

PRELIMINARY STATEMENT

SL Parties' and Clifton's opposition briefs do not, because they cannot, dispute the following critical facts:

- The Lease (under Articles 7 and 23) does not require Fogarty Brothers to defend, indemnify or obtain additional insured coverage for SL Parties for the injuries suffered by Mr. Fogarty;
- The Utica Policy does not provide additional insured coverage to SL Parties: (1) where the Lease is not "requiring" Fogarty Brothers to do so; and (2) for the independent acts or omissions of SL Parties;
- SL Parties admitted in Requests for Admission that Fogarty Brothers had no responsibility under the Lease for the elevator that caused Mr. Fogarty's injuries;
- In the Fogarty Lawsuit, SL Parties and Clifton did not obtain any determination that Fogarty Brothers (or even Mr. Fogarty) was responsible for Mr. Fogarty's injuries – Clifton and SL Parties (not Fogarty Brothers) paid all of the indemnity to Mr. Fogarty;

[1] The abbreviations used in Utica's principal brief are also used in this reply and Db refers to Utica's principal brief, Pb refers to SL Parties' brief, and CDb refers to Clifton's brief.

- Clifton's Service Contract for the elevator at issue required Clifton to fully defend and indemnify SL Parties here; and
- Clifton's insurer, GAIC, paid all of SL Parties' defense costs for the Fogarty Lawsuit because SL Parties qualified as additional insureds under the GAIC Policy and SL Parties and its own insurers did not pay even one cent of those defense costs.

Given these critical undisputed facts, most (if not all) of which the trial court either ignored or improperly re-wrote, New Jersey case law confirms that neither the Utica Policy nor the Lease requires Utica to provide additional insured coverage to SL Parties for Mr. Fogarty's bodily injury claims in the Fogarty Lawsuit. Clifton and its insurer, GAIC, were the proper parties to defend and indemnify SL Parties for the Fogarty Lawsuit. Indeed, throughout their brief, SL Parties candidly admit that, consistent with New Jersey law, the Fogarty Lawsuit sought to hold SL Parties liable for their own conduct and/or vicariously liable for Clifton's conduct – not for any act or negligence of Fogarty Brothers under the Lease.

Despite these undisputed facts, SL Parties insist (and the trial court improperly found) that Utica must reimburse SL Parties/GAIC for (a) the $1 million in indemnity paid on behalf of SL Parties to Mr. Fogarty (Utica's own insured under the Utica Policy), and (b) all defense costs in the Fogarty

Lawsuit and coverage action attorneys' fees paid by GAIC on behalf of SL Parties, including costs for SL Parties to wage a smear campaign against Mr. Fogarty and to pursue third party claims other than against Utica. Thus, for the reasons set forth below and in Utica's principal brief, the Duty to Defend Order and Trial Decision should be reversed.

PROCEDURAL HISTORY

Utica relies upon the Procedural History in its principal brief.

STATEMENT OF FACTS

Utica relies upon the Statement of Facts in its principal brief.

LEGAL ARGUMENT

I. SL PARTIES APPLY THE INCORRECT STANDARD OF REVIEW IN THEIR OPPOSITION BRIEF

The trial court's incorrect determination that, under the Utica Policy, Utica must pay indemnity and reimburse all defense costs incurred by SL Parties in the Fogarty Lawsuit is subject to de novo review and should be reversed by this Court. Db23-25. For the reasons set forth in Utica's principal brief, SL Parties' attempt to apply an abuse of discretion standard to even the trial court's erroneous award of attorneys' fees under *R.* 4:42-9(a)(6)[2] should be rejected because the Court incorrectly foisted all defense costs upon Utica.

[2] *Passaic Valley Sewerage Comm'rs v. St. Paul Fire & Marine Ins. Co.*, 206 N.J. 596, 618 (2011) (applying abuse of discretion standard solely to deny application for attorney's fees under *R.* 4:42-9).

II. UTICA HAS NO DUTY TO INDEMNIFY SL PARTIES FOR THE FOGARTY LAWSUIT (Da34)

A. SL Parties Failed To Establish That They Are Additional Insureds Under the Utica Policy (Da34)

In their opposition brief, SL Parties continue to disavow their threshold obligation to bring their claim for coverage for the Fogarty Lawsuit within the basic terms of the Utica Policy. As an initial step, SL Parties – who are strangers to the Utica Policy – have the burden to show that they qualify as additional insureds under the Utica Policy. Db25. There is no dispute that the Utica Policy governs which persons or organizations qualify as additional insureds under the Utica Policy. Da987. SL Parties misconstrue the scope of additional insured coverage under the Endorsement and simply ignore (as the trial court did) any provision that SL Parties are unable to satisfy.

First, to qualify as additional insureds under Section II.a.(1), SL Parties must show that Fogarty Brothers entered into a "contract, agreement or permit requiring" Fogarty Brothers to procure such insurance for SL Parties. Da987. SL Parties cannot identify any such contract or agreement, instead arguing that the terms of the Lease are "irrelevant" because an insurer's coverage obligations arise solely under the policy's terms. Pb13-16. Yet, the Utica Policy itself requires Fogarty Brothers to have entered into a contract that conforms to the requirements under Section II.a.(1) of the Utica Policy.

Under precedent from this Court, the terms of the Lease are unquestionably critical to determining whether SL Parties are additional insureds under the Utica Policy. *See Pennsville Shopping Ctr. Corp. v. Am. Motorists Ins. Co.*, 315 N.J. Super. 519, 523 (App. Div. 1998) ("[T]he question whether a party is insured at all may be a separate matter susceptible of resolution by reference to any relevant matter such as an underlying contract, here the lease agreement, which clarifies the intendments of the parties in apportioning responsibility and providing for insurance coverage."). SL Parties' reliance on *Brown* and *W9/PHC Real Estate* is misplaced. Pb13-14. Unlike here, the issue in *Brown* was whether a construction subcontract can modify an additional insured endorsement that was a "self-contained provision that specifically described the scope of the coverage provided without reference to any other document." *Jeffrey M. Brown Assocs., Inc. v. Interstate Fire & Cas. Co.*, 414 N.J. Super. 160, 168 (App. Div. 2010) (emphasis added); *see also W9/PHC Real Est. LP v. Farm Fam. Cas. Ins. Co.*, 407 N.J. Super. 177, 192 (App. Div. 2009) (insurer did not dispute at trial that plaintiffs are additional insureds).

The Lease between SL Parties and Fogarty Brothers does not require Fogarty Brothers to indemnify, defend or procure additional insured coverage for bodily injury claims asserted by Mr. Fogarty due to any acts or negligence of SL Parties (or their employees or agents, including Clifton). SL

Parties misconstrue Article 7 of the Lease, which plainly states that Fogarty Brothers is obligated to procure commercial general liability insurance on behalf of SL Parties "for the indemnity obligations of Tenant [*i.e.*, Fogarty Brothers] under this Lease." Da1467. Under Article 23 of the Lease, Fogarty Brothers had no obligation to indemnify (or defend) SL Parties for any claim or cause of action for injuries asserted by Mr. Fogarty where such injuries were due to the acts or negligence of SL Parties (or their employees or agents, including Clifton). Da1479; *see Azurak v. Corp. Prop. Invs.*, 175 N.J. 110, 112-13 (2003). Thus, and as argued below and in Utica's principal brief, the Lease does not meet the express requirements of Section II.a.(1) of the Utica Policy or extend additional insured coverage to SL Parties here.

Second, even if SL Parties could identify an applicable contract, which they cannot, the Endorsement then plainly states that additional insured coverage is subject to the provisions set forth in Section II.a.(1)(a)-(b) and "to all applicable exclusions or limitations described in paragraphs 11.b.(1), (2), (3) and (4) and in 11.c.(1), (2), (3), (4), (5) and (6)." Da987.

In an attempt to distract this Court from the fact that the Lease does not require additional insured status for this particular claim under Section II.a.(1), SL Parties have conjured up a dispute by conflating the insuring provision under Section II.a.(1) with the exclusion under Paragraph

11.c.(1) for independent acts or omissions. To be clear, SL Parties cannot meet their initial burden because the Lease does not require Fogarty Brothers to procure additional insured coverage for the Fogarty Lawsuit. Thus, SL Parties' supposed issue of whether subparagraphs (a)-(b) are disjunctive or conjunctive is irrelevant here.

B. The Independent Acts or Omission Exclusion Precludes Coverage for the Fogarty Lawsuit (Da39-41)

Contrary to the trial court's determinations, Utica has satisfied its burden of proving that the "independent acts or omissions" exclusion under Paragraph 11.c.(1) of the Endorsement bars coverage for the Fogarty Lawsuit even if SL Parties could satisfy their burden of proving that the Lease requires additional insured status for the SL Parties for this particular claim. Db34-38. This exclusion states that: "This insurance does not apply to: (1) The independent acts or omissions of such additional insured." Da989. This exclusion is unquestionably consistent with the Lease which provides that Fogarty Brothers has no obligation to indemnify or procure additional insured coverage for the acts or negligence of SL Parties in connection with Mr. Fogarty's claim. As explained at length in Utica's principal brief, courts have repeatedly held that this exclusion limits coverage to claims for which the additional insured is alleged to be vicariously liable for the named insured's acts, not a stranger to the Lease or the Utica Policy such as Clifton. Db36-38.

SL Parties repeatedly admit that the Fogarty Lawsuit sought to only hold SL Parties vicariously liable for the acts of *Clifton*, not for any acts of Fogarty Brothers. Pb2 ("SL faced liability for vicarious liability (in New Jersey the owner of an elevator is vicariously liable for the negligence of its elevator service contractor) . . . ."); Pb23 ("In light of New Jersey's well-established law that the owner of an elevator is vicariously liable for the negligence of its elevator service contract [sic], SL faced potential liability for Clifton's conduct (and thus, a need for a defense and coverage), even where SL was entirely free of any negligence.") (emphasis added); Da2172. SL Parties also admit that, under the Lease, Fogarty Brothers has no responsibility "for maintenance or repairs to the elevator that is the subject of this lawsuit." Da1569. Thus, it defies logic for SL Parties to seek (and the trial court to find) additional insured coverage under the Utica Policy (issued to Fogarty Brothers) for Mr. Fogarty's lawsuit seeking to hold SL Parties vicariously liable for Clifton's and SL Parties' own negligence.

There is no dispute that Clifton is not a named insured and does not qualify as an additional insured under the Utica Policy. Clifton is the named insured under the GAIC Policy and, pursuant to the Service Contract, obtained additional insured coverage for SL Parties. Db17-18. Indeed, GAIC defended and indemnified SL Parties under the GAIC Policy – SL Parties (and

its own insurers) did not pay any of the defense costs for the Fogarty Lawsuit. SL Parties' portion of the settlement in the Fogarty Lawsuit was funded by Clifton's insurers (GAIC and Liberty) and SL Parties' own insurers (Travelers and Federal). Da1550-59. SL Parties' insurers' indemnity payments are entirely consistent with Article 7(A) of the Lease, which requires SL Parties to maintain their own liability insurance for bodily injuries caused by SL Parties.

C. Utica Has No Duty To Pay Indemnity Or Medical Expenses To Its Own Insured (Da39)

By ordering Utica to pay $1 million (Utica's full policy limit) in reimbursement of the settlement payments made by SL Parties' other insurers to Mr. Fogarty, the trial court is requiring Utica to make an indemnity payment to its own insured, Mr. Fogarty. As set forth in Utica's principal brief, the Utica Policy is a third-party liability policy and, thus, does not indemnify its own insured for its own first-party liability losses. Db33. Such a payment is also prohibited under Coverage A, Exclusion 2.d (employer's liability) and 2.e (workers' compensation) and Coverage C, Exclusion 2.a and c. (medical expenses) and also violates New Jersey's Workers' Compensation laws. The employers' liability exclusion in the Utica Policy plainly states that it applies "whether the insured may be liable as an employer or in any other capacity and to any obligation to share damages with or repay someone else who must pay damages because of the injury." Da999 (emphasis added). Thus, and contrary

to the trial court's determinations and SL Parties' argument, the fact that Mr. Fogarty is employed by Fogarty Brothers instead of by SL Parties does not preclude application of this exclusion. The cases relied on by SL Parties (*e.g.*, *Maryland Casualty* and *Erdo*) do not construe this specific employer's liability exclusion or even involve a landlord-tenant relationship.[3]

The Duty to Defend Order and Trial Decision also misconstrue Exclusion 2.e (workers' compensation) and violate New Jersey's Workers' Compensation laws by requiring Utica to reimburse Mr. Fogarty (an insured under the Utica Policy) for his workplace injuries.[4] Db31-32.

SL Parties also ignore Exclusions 2.a and 2.c., which plainly state that Utica has no obligation to pay medical expenses for "bodily injury" to

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[3] This specific exclusion was "first introduced by insurers in the 1970s" (*i.e.*, after *Maryland Casualty*). *Am. Motorists Ins. Co. v. L-C-A Sales Co.*, 155 N.J. 29, 34 (1998). In *Maryland Casualty*, the exclusion stated that the policy does not apply "to bodily injury to or sickness, disease or death of any employee of the insured while engaged in the employment, other than domestic, of the insured or in domestic employment if benefits therefor are either payable or required to be provided under any workmen's compensation law." *Maryland Cas. Co. v. New Jersey Mfrs. (Cas.) Ins. Co.*, 48 N.J. Super. 314, 322 (App. Div. 1958); *see also Erdo v. Torcon Const. Co.*, 275 N.J. Super. 117, 121 (App. Div. 1994) ("The language of Exclusion j. is substantially similar to the employee exclusion in *Maryland Casualty*.").

[4] SL Parties have confused the definitions of "Named Insured" and "Insured" under the Utica Policy. Pb19. Fogarty Brothers is the "Named Insured." Da931. Utica has never suggested that Mr. Fogarty is also a "Named Insured." Db33. Instead, Mr. Fogarty is an "Insured" under Section II.1.(d) because he is an owner, "executive officer" and/or director of Fogarty Brothers. Da1006.

"***any*** insured" (Mr. Fogarty) or to "a person injured on that part of premises you [Fogarty Brothers] own or rent that the person normally occupies." Da1005 (emphasis added). Thus, Exclusions 2.a. and 2.c. both preclude payments for any medical expenses for "bodily injury" to Mr. Fogarty.

III. UTICA HAS NO DUTY TO REIMBURSE SL PARTIES' DEFENSE COSTS (Da2, Da26, Da35, Da41)

A. Because Utica Has No Duty To Indemnify SL Parties, Utica Also Has No Duty To Reimburse Defense Costs (Da40-41)

SL Parties' opposition brief obfuscates the duty to defend and duty to indemnify. As explained in Utica's principal brief, once it is determined that there is no duty to indemnify, an insurer cannot have a duty to defend in cases such as this one. Thus, because Utica has no duty to indemnify SL Parties, Utica has no duty to defend (or reimburse defense costs). Db41. SL Parties misinterpret *Burd* and the circumstances in which a duty to defend is actually converted to a duty to reimburse. The New Jersey Supreme Court has made clear that "[w]here there is a dispute regarding coverage, '[t]he practical effect of *Burd* is that an insured must initially assume the costs of defense . . . subject to reimbursement by the insurer if [the insured] prevails on the coverage question.'" *Passaic Valley Sewerage Comm'rs v. St. Paul Fire & Marine Ins. Co.*, 206 N.J. 596, 616 (2011) (quoting *N.J. Mfrs. Ins. Co. v. Vizcaino*, 392 N.J. Super. 366, 370-71 (App. Div. 2007)); *see also Norman*

Int'l, Inc. v. Admiral Ins. Co., 251 N.J. 538, 550 (2022). Here, a conflict unquestionably existed between Mr. Fogarty (and Fogarty Brothers, who was defended by Utica against third party claims asserted by SL Parties), on the one hand, and SL Parties on the other hand in the Fogarty Lawsuit. Thus, as recognized by *Burd* and its progeny and in the trial court's September 29, 2023 Order, the Fogarty Lawsuit did not trigger an "immediate" duty to defend SL Parties under the Utica Policy. SL Parties' brief and the October 2, 2023 settlement confirm that, ultimately, the Fogarty Lawsuit sought to hold SL Parties liable for Clifton's negligence and SL Parties' own negligence, neither of which is covered by the Utica Policy. Therefore, absent any finding that SL Parties were held vicariously liable for Fogarty Brothers' negligence, Utica has no duty to reimburse defense costs.

B. The Service Contract And GAIC Policy Required Clifton And GAIC To Fully Defend SL Parties (Da35)

Neither Clifton nor SL Parties deny that: (1) under the Service Contract, Clifton had a broad duty to defend (and indemnify) SL Parties and to procure additional insured coverage for SL Parties on a primary basis "for all claims of whatever type and nature" (Da1492), and (2) the GAIC Policy provided additional insured coverage to SL Parties here. SL Parties also admit that the Fogarty Lawsuit sought to hold SL Parties vicariously liable for Clifton's negligence. Pb23. Thus, there is no merit to Clifton's argument that

Clifton "should not be involved" in a dispute regarding priority of coverage and allocation of defense costs. CDb6. Clifton is the primary indemnitor of SL Parties for this claim and GAIC was obligated to and did defend SL Parties.

IV. ANY AWARD OF REIMBURSEMENT OF DEFENSE COSTS SHOULD HAVE BEEN REDUCED AND/OR ALLOCATED (Da35)

For the reasons set forth in Utica's principal brief, the Utica Policy is excess over the GAIC Policy (which provides additional insured coverage to SL Parties on a primary basis pursuant to the Service Contract) and, thus, the Utica Policy does not reimburse defense costs. Db46-47.

Despite arguing that the Lease is "irrelevant" in determining Utica's obligations under the Utica Policy, SL Parties then argue that the Lease somehow determines priority of coverage and requires Utica to provide additional insured coverage on a primary, non-contributory basis to SL Parties. Pb15; Pb33. SL Parties fail to identify any provision in the Utica Policy or Lease that requires Utica to provide "first-dollar defense for all defense costs incurred" by SL Parties for bodily injury claims arising out of Clifton's conduct and/or claims alleging that SL Parties are vicariously liable for Clifton's negligence – the claims SL Parties concede were asserted against them. Pb36. Instead, the responsibility for the defense of such claims lies with Clifton and its insurer, GAIC.

Even if the Court were to find that both the GAIC Policy and Utica Policy provide additional insured coverage on a co-primary basis, which Utica strenuously denies, Utica still would not be required (under the Utica Policy or New Jersey law) to pay for 100% of SL Parties' defense costs (actually paid by GAIC). Instead, GAIC and Utica would share in the defense costs. *See Cosmopolitan Mutual Ins. Co. v. Continental Cas. Co.*, 28 N.J. 554, 562 (1959) (holding that multiple concurrent policies require that "each company is obligated to share in the cost of the settlement and expenses"). The trial court completely ignored New Jersey precedent that, under a "contribution by limits" approach, "each insurer's share is based on the ratio of its applicable limit of insurance to the total applicable limits of insurance of all insurers." *Id.*; *see also Am. Home Assur. Co. v. Hartford Ins. Co.*, 190 N.J. Super. 477, 489 (App. Div. 1983) (concluding that "each [policy] provides essentially for the proration of any loss based on the ratio that the coverage afforded by each policy bears to the total coverage afforded by all valid and collectible insurance"). The trial court improperly foisted all defense costs upon Utica rather than allocate between or among the insurers.

Moreover, the trial court completely ignored Utica's argument that, under New Jersey case law, Utica has no obligation to pay for defense costs for covered claims that are not reasonable or necessary. *See Hebela v.*

Healthcare Ins. Co., 370 N.J. Super. 260, 281 (App. Div. 2004) (holding that an insurer's decision to deny a defense obligation "should not be viewed as an opportunity for plaintiff to have generated excessive fees in the anticipation of a windfall should [the insurer's] disclaimer ultimately be viewed as wrongful"). The trial court failed to consider any of the deductions identified by Utica for the reasonableness of such costs. Therefore, if this Court finds that Utica must reimburse defense costs, remand is required to determine Utica's share and the reasonableness of the defense and coverage action costs.

CONCLUSION

For the reasons discussed above and in Utica's principal brief, Utica respectfully requests that this Court reverse the Trial Decision and the Duty to Defend Order and enter judgment in favor of Utica. If Utica is found to be in any way liable, Utica requests that the case be remanded to determine an appropriate allocation and the reasonableness of the defense costs at issue.

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