
**H.L., H.S. and H.D., NAMES BEING
FICTITIOUS**

Plaintiffs,

v.

**GIANFRANCO MAUCIONE; SELECTIVE
INSURANCE COMPANY OF AMERICA;
SELECTIVE WAY INSURANCE
COMPANY; JOHN/JANE DOE SECURITY
OFFICERS (1-5) (FICTITIOUS
DEFENDANTS), JOHN/JANE DOES (1-10)
(FICTITIOUS DEFENDANTS), ABC
ENTITIES (1-10) (FICTITIOUS
DEFENDANTS),**

Defendants.

**SUPERIOR COURT OF NEW
JERSEY APPELLATE DIVISION
DOCKET NO.: A-3977-23**

On Appeal From:

**LAW DIVISION: ESSEX COUNTY
DOCKET NO.: ESX-L-4567-15**

Sat Below: Hon. Keith Lynott, J.S.C.

Civil Action

PLAINTIFFS/APPELLANTS' H.L, H.S. AND H.D. BRIEF

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PRELIMINARY STATEMENT

This is an insurance coverage declaratory judgment action. In 2010 Plaintiff H.L. was a 16-year-old student at the Henry P. Becton Regional High School in Carlstadt, New Jersey. One of the teachers, Gianfranco Maucione, had for many months been engaging in a gradually increasing inappropriate relationship with her that involved communications and interactions, but no sexual contact.

The school defendants had a policy with Selective Insurance which provided both a general liability policy as well as an additional policy to cover acts of abuse and/or molestation committed by its insureds. All employees, including Defendant Maucione, are insureds under this agreement. Selective refused to provide coverage for Maucione's action even though he committed the same wrongful acts as other insureds who were defended by Selective.

There are essentially two questions before the Court on this appeal: (1) should Maucione's actions be analyzed under the objective intent to harm standard of *At. Employers Ins. Co. v. Tots & Toddlers Pre-Sch. Day Care Ctr., Inc.*, 239 N.J. Super. 276 (App. Div. 199) or under the subjective intent to harm standard of *Voorhees v. Preferred Mut Ins. Co.*, 128 N.J. 165 (1992); and (2) if *Voorhees* applies, does the general liability, additional abuse and molestation, or both portions of Selective's insurance policy provide coverage for Maucione's actions as they have for all other

insureds who committed a wrongful act under said policy.

In granting summary judgment in favor of the Defendants, the trial court erred in (1) finding that Defendant Maucione's actions objectively intended to harm Plaintiff; (2) finding that the policy exclusions in the Selective Policy are not ambiguous nor illusory; (3) finding that Maucione's actions are not covered by the abuse and molestation coverage section of the Selective Policy and (4) finding that Maucione's actions were not covered by the general liability section of the Selective Policy.

Defendant Maucione's action are not comparable to the actions of the assailant in *Tots & Toddlers* who sexually assaulted preschool aged children. While there is indeed a bright line for objective intent to harm under *Tots and Toddlers*, here the trial court erred in redrawing that line under factual distinct circumstances. In *Tots & Toddlers* the assailant gave one-year old children venereal warts, among other heinous acts, with clear objective intent to physically harm children. Here, there is simply no evidence to suggest that Maucione sexually assaulted Plaintiff nor in what ways that Maucione sought to objectively harm Plaintiff. The trial court does not state how the actions of Maucione sought to cause Plaintiff objective harm to her mental state, showing why the comparison with *Tots & Toddlers* is mistaken. Rather, Maucione's actions should be viewed under the subjective intent standard set as

stated in *Voorhees*.

Additionally the Court erred in finding that the policy would not cover Maucione who is an insured by definition and committed a covered wrongful act. Applying coverage to both Maucione and his actions is no different than applying the coverage to the other individual Defendants, which Selective did offer coverage for. Each one of those Defendants committed what would be considered a wrongful act under the policy and/or the abuse and molestation policy. To find one participant is covered and one is not, although both committed a wrongful act, highlights the illusory and ambiguous nature of the policy. Put simply, either all or none of the bad actors who are insured should be covered. The other individual named Defendants are no less liable for their wrongful acts and negligence to Plaintiff.

Maucione's actions should be analyzed through the subjective intent of *Voorhees*. As there is no evidence to show Maucione subjectively intended to harm Plaintiff, Selective must cover Maucione's actions either under the general liability or abuse and molestation portions of the insurance policy at issue, just as every other insured who committed a wrongful act in this matter was.

For the reasons stated herein, it is respectfully requested the Court's July 12, 2024 Order granting summary judgement for Defendants be vacated and this Court should find that summary judgment in favor of Plaintiff is proper.

PROCEDURAL HISTORY AND STANDARD OF REVIEW

On July 12, 2024, the trial court granted Defendants motion for summary judgment. (*Pal-23*). The Court found that the actions committed by Maucione were comparable to those committed by the assailant in *Tots & Toddlers* and therefore Maucione had an objective intent to harm H.L. (*Id.*)

The trial court further found that the Selective policy exclusions, by their plain terms, do not afford conduct to Maucione. (*Id.*) Specifically the Court found that the policy affords coverage for the acts of Maucione to the school defendants, but not to Maucione himself. (*Id.*) The court further found that Maucione was not covered as there was no “accident” because the court applied the objective intent to harm standard and therefore the abuse and molestation additional coverage did not apply either. (*Id.*)

The standard of review of the order granting summary judgement to Selective is *de novo*, applying the same standard as the motion judge. *Woytas v. Greenwood Tree Experts, Inc.*, 237 N.J. 501, 511 (2019).

STATEMENT OF FACTS

I. Case Background Facts

The declaratory judgment action in this matter arises out of an underlying

complaint which was filed on January 26, 2012. (*Pa24-34*) (*Pa35-59*). At the time of the incidents giving rise to the Federal Complaint, Plaintiff, H.L., was a 16 year old student at Henry P. Becton Regional High School. (*Pa62* at 6:28-29) (*Pa35-59*). Defendant, Gianfranco Maucione, was employed by Henry P. Becton Regional High School as a teacher and coach and acting within the course and scope of that employment at all relevant times. (*Pa35-59*). David Mango was a defendant in the underlying action, employed as Principal of Henry P. Becton High School at the relevant time. (*Id.*). Paul Saxton was a defendant in the underlying action, employed as Superintendent of Carlstadt-East Rutherford Regional Board of Education and acting within the scope of that employment at all relevant times. (*Id.*). Bruce Young was a defendant in the underlying action, employed as President of Carlstadt-East Rutherford Regional Board of Education and acting within the scope of that employment at all relevant times. of that employment at all relevant times. (*Id.*).

Carlstadt-East Rutherford Board of Education and Henry P. Becton Regional High School had a valid policy of insurance with Selective under Policy No.: S 1325176 and/or other policies, effective during the relevant times. (*Pa122-150*). All of these defendants, including Maucione, Mango, Saxton, and Young, were insureds under the Selective policy. (*Id.*).

Selective defended and indemnified all Defendants except Maucione. (*Pa1510-*

176). The underlying federal matter settled in 2015 against all Defendants except Maucione. Plaintiff thereafter entered into a *Griggs* settlement² with Maucione (*Pa177-178*) (*Pa179*). Selective paid Plaintiff H.L. in that settlement for the conduct of the other school defendants. (*Pa177-178*).

The underlying federal complaint contains several negligence allegations against Maucione and the other Defendants. Judge Furnari previously found there were negligence allegations in the complaint. (*Pa387-388*).

II. Underlying Case Discovery Facts

Plaintiff H.L. testified that she had been in Maucione's car for about 15 minutes, during which time there was no physical contact (*Pa70* at 39). Plaintiff H.L. testified further that Maucione did not behave inappropriately during other (*Id.* at 41). As far as any physical contact between H.L. and Maucione, H.L. testified the extent was a hug and possible kiss on the cheek which happened on a single occasion. (*Pa76* at 62-63). Plaintiff further testified that Maucione never physically touched her while in a classroom. (*Pa78* at 70).

Maucione's version of what happened on the single hug occasion is as innocuous, but slightly different, with him testifying that Plaintiff went to hug Maucione as a way to say thank you and did so even though Maucione did not want

²As allowed by the mechanism in *Griggs v Bertram*, 88 N.J. 347 (1982)

her to. (*Pa201* at 115-116).

Plaintiff testified that she did receive photos from Maucione but they were not of a sexual nature and were waist up only. (*Pa79* at 74-75). The 2010 Becton Regional High School Yearbook features at least one photo of a male from the waist up, having won the “best physique” award, showing such photos are not sexual in nature. (*Pa691-692*).

Defendant Maucione testified that Plaintiff initiated sending texts to him and that he never gave her his cell phone number. (*Pa190-191*). Maucione testified that as things escalated with Plaintiff “I didn't know what to do. I was never told when something like that occurs what to do.” (*Pa198, Pa205*) Maucione said that he received no directives from the school about the use of cell phones or texting. (*Pa233. at 206*). Maucione testified that he mentioned the conduct to Mr. Mango when it was occurring. (*Pa996* at 110). Maucione further testified: “I told him that I reported what was going on to Mr. Mango and that for my safety, to protect me and continue teaching at Becton, that [Plaintiff] needs to tell the truth.” (*Pa230* at 194).

Defendant Maucione admitted that he exchanged more than 10,000 texts with Plaintiff. (*Pa243* at 248-249). Maucione stated that a majority of the texts were general matters, and day to day conversations. (*Pa200* at 108). Maucione admitted he received a text from Plaintiff in which she congratulated him on the birth of his

daughter. (*Pa190-191* at 33-36). Maucione admitted that he texted Plaintiff, advising her that he would be at a field helping with his soccer players. (*Pa949*). Maucione admitted that he texted Plaintiff, asking if she or others would be coming up to his classroom so he could determine whether or not to leave the computers on. (*Pa972*). Maucione admitted he received a text from Plaintiff, asking him to pick her up from a party. (*Pa201*). Maucione admitted he received a text from Plaintiff which included a head shot of her. (*Pa956-958*). Maucione admitted Plaintiff and Defendant were alone together less than five times in a classroom during the school day, during the time she was taking a virtual class on the computer. (*Pa968-969, Pa228* at 186).

Maucione acknowledged picking up Plaintiff and driving her home in his car. (*Pa201*). Maucione pled guilty only to the charge of third-degree official misconduct, and was sentenced to five years probation. The remaining charges were dismissed. (*Pa248* at 268-269).

III. Criminal Plea and No Intent to Harm H.L.

During his sentencing, Maucione's attorney re-affirmed Maucione's position: "He is mortified that his actions caused anyone any harm. And he would only ask that the Court be aware that he—he did not have any intention whatsoever to cause anyone any harm whatsoever." (*Pa273* at 6-7). Maucione himself certified:

Also with regard to the insurance coverage matter, at no point during

any of my communications and interactions with Plaintiff, H.L., did I ever intend to injure H.L. At my sentencing on June 3, 2011, at pages 6-7, my attorney correctly stated on my behalf, “It was not his intention to cause harm. ...he did not have any intention whatsoever to cause anyone any harm whatsoever.”

(*Pa631*) (emphasis added). Even during the insurance investigation of the underlying accusations, it was made known to Selective that Maucione denied any involvement with the Plaintiff, and that there was no physical conduct known. (*Pa298*).

There exists no proof that any other physical contact aside from what is stated *supra* ever took place between Maucione and Plaintiff H.L.

IV. Selective Insurance Corporate Representatives Deposition Testimony

On October 1, 2018, Plaintiff conducted the deposition of Allison Paulson, an assistant vice president of Selective. She was produced as the person most knowledgeable as to the insurance policy at issue. (*Pa713-718*) (*Pa438* at 9, *Pa440* at 15-16, *Pa451* at 58). Ms. Paulson testified that the Abuse and Molestation coverage in the policy was intended to provide additional coverage above and beyond the General Liability coverage. (*Pa444* at 30). Ms. Paulson stated the policy would exclude a principal who knew or should have known of an abuse or molestation situation. (*Pa456* at 78-80). Nonetheless, Selective did defend and indemnify the principal in this matter, even though it was alleged he knew or should have known about the situation involving Maucione and H.L.

Ms. Paulson confirmed that the terms “abuse or molestation” are not defined anywhere in the Selective policy. (*Pa449-Pa450* at 52-54). Ms. Paulson could not define the terms “sexual misconduct” nor “sexual molestation,” and admitted the terms could have different meanings. (*Pa467* at 123-125). Ms. Paulson testified the phrases “abuse or molestation,” “sexual misconduct,” and “sexual molestation” are ambiguous. (*Ibid*). She specifically testified these terms “could have several different meanings.” (*Ibid*). Indeed, Ms. Paulson testified the very purpose of the abuse and molestation coverage was to cover incidents of abuse, molestation, sexual misconduct and sexual molestation. (*Pa454* at 72-73). But Allison Paulson could not envision any scenario where it would actually cover anyone. (*Pa457* at 82-84).

Allison Paulson admitted the coverage is illusory:

Q. So if the coverage only covers someone that has nothing to do with it, didn't participate, knew nothing about it, what risk is Selective insuring there?...I am talking about vis-à-vis the people in the organization, the principals, the administrators, the teacher, what risk is it insuring vis-à-vis that?...

A. I don't know.

(*Ibid*). She further testified that she did not know why these terms were not included under the definition section of the policy. (*Pa457* at 85).

Allison Paulson admitted the exclusion is ambiguous:

Q. So "sexual misconduct" and "sexual molestation" as referenced in the policy could have several different meanings; do you agree?...

A. Yes.

Q. And same with abuse and molestation. The "abuse" and "molestation" references in the policy that we have been speaking about can have several different meanings?...

A. Yes.

(*Pa467-Pa468* at 125-126). Paulson was not sure if unreported texts between teacher and student would constitute abuse and molestation. (*Pa459* at 91). Paulson stated she believed that if a teacher gave a student a ride home, even without any sexual contact or discussion, the simple fact of the ride would constitute "abuse or molestation" under the policy. (*Pa460* at 96).

Paulson stated she believed that if a teacher got too friendly with a student, that too would constitute "abuse or molestation" under the policy. (*Id.* at 95). Paulson believed the term "abuse or molestation" included any inappropriate behavior or misconduct, including such as, for example, a teacher flicking a rubber band at a student. (*Pa463* at 106). Paulson testified that a text message from a teacher to a student involving sports would be considered "abuse or molestation" under the policy. (*Pa466* at 119).

On October 1, 2018 and October 24, 2018, Plaintiff conducted the deposition

of Heather Korsgaard, a complex claims coverage specialist with Selective³. She was produced as the person most knowledgeable of the reasons why Maucione was denied defense and indemnification under the policy. (*Pa713-718*) (*Pa495* at 9). Ms. Korsgaard also confirmed that the term “abuse or molestation” was not defined in the policy. (*Pa559* at 170-171). Korsgaard testified that texting between a student and a teacher in and of itself could be an inherently harmful act. (*Pa569* at 210-211). Korsgaard also testified a teacher sending a photograph of himself with his shirt off could be inherently harmful under the policy language, as would a teacher sending a photo of a person in a bikini on a beach. (*Pa571* at 219; *Pa577* at 241-243).

Korsgaard testified that Selective denied Maucione coverage based on the allegations and unspecified guilty plea. (*Pa555* at 155). When asked why the other individuals were afforded coverage and Maucione was not, Korsgaard answered, “I don’t know.” (*Pa581-Pa583* at 260-268).

V. The Trial Court’s Prior Coverage Decision

On June 28, 2017, the Judge Furnari heard motions for summary judgment on the issues of coverage and defense. (*Pa367-435*). Judge Furnari held that the

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Both Heather Korsgaard and Allison Paulson are corporate designees representatives of Selective produced under *Rule* 4:14-2(c). This means they are not just ordinary employees. Instead, they speak the official position of, and bind, the corporation. *Rule* 4:14-2(c) and *Official Comment*

Complaint contained legitimate claims of negligence which, if proven, would fall under the policy coverage. (*Pa410* at 84). The Court stated that he could think of a thousand inappropriate texts and photos that would not meet the exclusions of the policy. (*Ibid*). The Court was mindful that Selective had previously provided defense and indemnity to the other defendants. (*Pa426* at 116).

In reaching his decision, Judge Furnari, distinguishing *Tots & Toddlers*, holding that Selective was not entitled to an automatic finding that Maucione's behavior was inherently harmful merely due to the fact that Maucione was a teacher and Plaintiff a student. (*Pa423*). The Court recognized that because Plaintiff was 16 years old and had reached the age of consent in New Jersey for sexual activity, and also because there was no sexual contact between Maucione and Plaintiff, the *Tots & Toddlers* case was not applicable. (*Ibid*). Rather, Judge Furnari stated that the *Voorhees* approach applies under the language of the policy, holding:

The accidental nature of an occurrence is determined by analyzing whether the alleged wrongdoer intended or expected to cause an injury. If not, then the resultant injury is accidental, even if the act that caused the injury is intentional.

(*Pa423*); *see also Voorhees*, 128 N.J. at 165.

Further, the Court held that Selective cannot merely rely on Maucione pleading guilty to support a finding of intent to harm, but rather directed that an investigation

must be conducted to determine if he acted with the requisite intention to harm, adding that insurers bear the burden that exclusion applies. (*Pa426-Pa432* at 117-128). There is also no provision in the policy which permits denying coverage based on a “guilty plea.” (*Pa466-467* at 121-122) (*Pa551-Pa552* at 137-144). However, in April 2011, Selective ultimately decided, “no coverage for teacher based on guilty plea.” (*Pa144*).

Judge Furnari proposed that under Selective’s reading of the ambiguous policy provision in the additional Abuse and Molestation policy coverage would actually provide less coverage than the basic coverage under the General Commercial Liability policy. (*Pa393-Pa395* at 50-55, *Pa398* at 61-62). The trial court held:

THE COURT: See ... what’s a little bit troubling about that is there’s a separate premium, there’s a separate money - - amount paid, as if in addition to my normal coverage, I’m getting additional coverage. And yet, there’s a paragraph in it that says - - paragraph 5, that says except for the insurance provided by this coverage part, the policy to which this coverage part is attached does not apply to any claim or suit seeking damages arising out of the actual or alleged act or abuse or molestation, including sexual misconduct and sexual molestation.

So it’s another - - I normally would have coverage, except now I have additional coverage that I’m paying for which says it’s not only greater, but it’s lesser.

THE COURT: He’s arguing that it’s an occurrence under the other section, or under the general policy that there was an injury and the like, and - - and you’re arguing no, no, no, no, no. The only coverage that there could be is limited by this section. So while there - - this is part of a policy that’s sold as additional coverage, right?

THE COURT: So if I didn't buy this - - if I didn't buy this, right, and I just bought your general liability policy which doesn't have this exclusion, I would be covered?

(Pa393 at 50) (emphasis added). The trial court further held:

THE COURT: Okay. Then it says at the bottom, for the purpose of this endorsement, abuse means an intentional, inherently harmful act. Right?

MR. SIEGEL: Correct.

MR. CLARK: That ... just gets circular. It goes back to what *Voorhees* talks about, which is if it's sexual abuse of a minor under certain circumstances, the intent to injure can be deemed ... it's just circular back ...

THE COURT: And ... it's the same language. It's the identical language that appears after paragraph 5 ...

MR. SIEGEL: Well, Your Honor, it's - - it's not identical with respect to that the abuse and molestation coverage part also excludes coverage for sexual misconduct. That is, actual or threatened. But, again, this - - this endorsement, being - -

THE COURT: Well, no. What the paragraph says for the purpose of this coverage, identical language, abuse means - -

MR. SIEGEL: We're talking about the definition of abuse. Yes.

THE COURT: - - an intentional, inherently harmful act. So the previous exclusion would only apply if there was threatened - - from the general policy, the actual or threatened abuse or molestation by anyone, etc., etc. Okay? That's what the exclusion is. And for the - - and for the purpose of the endorsement it means the in - - intentional, inherently harmful act. Right? Which seems to be just be describing, as counsel points out, the *Voorhees* standard.

Now, my - - my - - so some of my problem with your argument that this - - it gets back to my first question. So if I didn't buy this extra insurance and I only bought the comprehensive general liability insurance, I would under your analysis have potentially more coverage because if the act of sexual something, and ... was not intentional or inherently harmful act, meaning that I thought it was a permissible act. It was not my intended consequence to abuse ... the person, but they

were nonetheless abused, there would be coverage.

But according to your statement about the abuse or molestation liability coverage part, under that section there would be no coverage and this by its language restricts the CL - - the CGL policy, as well, because it says any act of actual or threatened abuse or molestation, including sexual misconduct or sexual molestation. Right? Isn't that what you're saying? You're saying all.

And ... as I understand your position, this says whenever there is sexual misconduct or sexual molestation, regardless of whether there was an intention or whether it was an inherently harmful act in and of itself, it's irrelevant. It - - it is excluded. Is that your position?

MR. SIEGEL: That's my position in part ...

(*Pa393-Pa395* at 52-55)(emphasis added). Judge Furnari also noted that the terms of the policy were ambiguous, observing that Selective's position as to the term sexual misconduct was that the term could mean anything. (*Pa401* at 66; *Pa422* at 108-109).

On March 1, 2019, Judge Furnari affirmed his June 28, 2017 ruling on similar arguments:

I don't have any facts here for me to establish that the offense in it of itself rises to the level of only being an objective case under *Tots & Toddler* Preschool, as I've indicated several times here today. That case is one for the extreme or exceptional circumstances.

(*Pa765-Pa766* at 93-94).

LEGAL DISCUSSION

I. The Court Erred in Granting Defendants' Motion for Summary Judgment because Maucione did not Intend to Harm H.L., and the Exclusions are Ambiguous and do not Bar Coverage (*Pa1-23; Pa1086-1174*)

A. Boilerplate Law About the Court’s Role in Construing Insurance Coverage Broadly, Exclusions Narrowly, and Resolving any Ambiguities in Favor of Coverage (Pa3-20)

A basic tenant of insurance law is that insurance policies, as contracts of adhesion, are subject to special rules of interpretation. *Longobardi v. Chubb Insurance Co.*, 121 N.J. 530, 537 (1990) (citing *Meir v. New Jersey Life Insurance*, 101 N.J. 597, 611-612 (1986)). It is well settled that insurance policies should be liberally construed in favor of the insured and coverage afforded to the full extent that a fair interpretation of the policy will allow. *Meir, supra*, 101 N.J. at 611. Observing that “the primary object of all insurance is to insure,” the Appellate Division has stated that when reviewing insurance policies, “[a] construction should be taken which will render the contract operative, rather than inoperative, and which will sustain the claim for indemnity, if reasonably possible, rather than exclude it.” *Erdo v. Torcon Construction Company*, 275 N.J. Super. 117, 120 (App. Div. 1994). Accordingly, when reviewing an insurance policy, as with any contract, the Court’s function is to “search broadly for the probable intent of the parties in an effort to find a reasonable meaning in keeping with the express general purposes of the policy.” *Id.*

Any judicial examination of a policy exclusion must proceed in accordance with these guiding principles. Thus, where “the policy provision under examination relates to the inclusion of persons other than the named insured within the protection

afforded, a broad and liberal view is taken of the coverage extended. But, if the clause in question is one of exclusion or exception, designed to limit the protection, a strict interpretation is applied.” *Id.* at 120 (quoting *Mazzilli v. Accident and Casualty Insurance Company of Switzerland*, 35 N.J. 1, 8 (1961)). Accordingly, insurance policies should be liberally construed in favor of the insured and coverage afforded to the full extent that a fair interpretation of the policy will allow. *Meir, supra*, 101 N.J. at 611.

Moreover, the insurer is charged with the responsibility of phrasing its contracts with such clarity as to avoid ambiguity as to their meaning; otherwise "they must be construed most strongly against the insurer." *Id.* at 607. When an insurance carrier puts in issue its coverage of a loss under a contract of insurance, it bears a substantial burden of demonstrating that the loss falls outside the scope of coverage. *United Rental Equip. Co. v. Aetna Life & Cas. Ins. Co.*, 74 N.J. 92, 99 (1977); *Ruvolo v. American Cas. Co.*, 39 N.J. 490, 498 (1963); *Weedo v. Stone-E-Brick, Inc.*, 81 N.J. 233 (1979). Insurance policies “should [also] be construed liberally in [the insured’s] favor to the end that coverage is afforded ‘to the full extent that any fair interpretation will allow.’” *Kievit v. Loyal Protective Life Ins. Co.*, 34 N.J. 475, 482 (1961) (quoting *Danek v. Hommer*, 28 N.J. Super. 68, 76 (App. Div. 1953), *aff’d*, 15 N.J. 573 (1954)); *Cruz-Mendez v. ISU/Ins. Services*, 156 N.J. 556, 571 (1999); *Doto v. Russo*, 140 N.J.

544 (1995); *see also* *Hunt v. Hospital Serv. Plan of New Jersey*, 33 N.J. 98, 102 (1960).

In determining whether a particular claim is covered under the policy:

[T]he complaint should be laid alongside the policy and a determination made as to whether, if the allegations are sustained, the insurer will be required to pay the resulting judgement, and in reaching a conclusion, doubts should be resolved in favor of the insured.

Danek, *supra*, 28 N.J.Super. at 77. Moreover, insurance companies employ varied, highly technical and complex instruments with language which is often obscure to the layman and extremely difficult to understand. *Voorhees v. Preferred Mut. Ins. Co.*, 128 N.J. 165, 175 (1992); *Sparks v. St. Paul Ins. Co.*, 100 N.J. 325, 335 (1985); *Allen v. Metropolitan Life Ins. Co.*, 44 N.J. 294, 302 (1965). Thus, courts interpreting insurance policies must "assume a particularly vigilant role in ensuring their conformity to public policy and principles of fairness." *Gibson v. Callaghan*, 158 N.J. 662 (1999) (quoting *Voorhees* 128 N.J. at 175). These circumstances long ago fathered the principle that any doubt as to the existence or extent of coverage must generally be resolved in favor of the insured. *Mazzilli* 35 N.J. at 8.

While a court should not ignore an exclusion's clear meaning, if there is another fair interpretation, the court must construe the insurance policy in favor of coverage and against the insurer. *Boddy v. Cigna Property & Cas. Companies*, 344

N.J. Super 649, 658 (App. Div. 2000); *see also Stafford v. T.H.E. Ins. Co.*, 309 N.J. Super 97, 105 (App. Div. 1998). The insurer has the burden of establishing application of an exclusion. *Hartford Acc. & Indem. Co. v. Aetna Life & Cas. Ins. Co.*, 98 N.J. 18, 26 (1984). When considering an exclusion from coverage, any ambiguity in a policy must be strictly construed against the insurer so that reasonably anticipated coverage is provided. *Argent v. Brady*, 386 N.J. Super. 343, 351 (App. Div. 2006); *Sears Mortgage Corp. v. Rose*, 134 N.J. 326, 347 (1993); *Walker Rogge, Inc. v. Chelsea Title & Guar. Co.*, 116 N.J. 517, 529 (1989); *see also Mazzilli*, 35 N.J. at 7 (explaining that a court should find the broadest coverage possible under an insurance policy when controlling language is susceptible to multiple interpretations).

Insurance contracts are "unipartite in character," having been drafted by the company's experts, "[people] learned in the law of insurance." *Mazzill*, 35 N.J. at 7. Thus, it is not unfair that the insurer "bear the burden of any resulting confusion." *Gaunt v. John Hancock Mut. Life Ins. Co.*, 160 F.2d 599, 602 (2nd Cir.), *cert. denied*, 331 U.S. 849 (1947). Thus, if the controlling language of the insurance contract will support two meanings, one favorable to the insurer, and the other favorable to the insured, the interpretation sustaining coverage must be applied. That is, any ambiguities must be resolved in favor of the insured. *Sparks*, 100 N.J. at 334-39. Courts are bound to protect the insured to the full extent that any fair interpretation

will allow. *Kievit, supra.* 34 N.J. at 475.

When ambiguous or contradictory terms arise in an insurance contract, they are to be interrupted in favor of coverage. “The insurer, as the drafter of an insurance policy, is responsible for its language. Where that language is ambiguous its object is determined not by what the insurer intended it to mean, but by what a reasonable person in the position of the insured would have understood it to mean at the time the contract was entered into.” *Cumberland Mut. Fire Ins. Co. v. Murphy*, 183 N.J. 344, 350-1 (2005) (citing *Couch on Insurance* 3d §21.14) (emphasis added). Where a policy contains words unclear or ambiguous language supporting two meanings, one in favor of the insured and the other in favor of the insurance, “the interpretation favoring coverage should be applied.” *Progressive Cas. Ins. Co. v. Hurley*, 166 N.J. 260, 273-4 (2001). When terms are undefined by the policy, “the policy must be interpreted in favor of coverage.” *Lundy v. Aetna Cas. and Sur. Co.*, 92 N.J. 550, 559 (1983).

B. Coverage Applies Under the General Liability Policy for “Bodily Injury...Caused by an Occurrence.”(Pa3-20)

Under the insurance policy at issue, Selective provided commercial general liability coverage for the Carlstadt-East Rutherford Regional Board of Education. All named defendants in the underlying action, as employees of the school, were insured

under the policy. On July 12, 2024, the trial court found that the policy affords coverage from acts of abuse and molestation as to the insureds' negligence who gives rise to such conduct. The trial court further found that the policy did not provide coverage directly to Maucione himself, but rather to the school for negligent hiring or other similar causes of action. The trial court erred in making this finding as Maucione is an insured who committed a wrongful act for which the policy provides coverage under either the general liability or abuse and molestation sections.

Under the applicable Selective policy, Selective will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury...caused by an occurrence." Selective also had the duty to defend the insured against any "suit" seeking those damages. (*Pa128*). In 2017 and again in 2019, Selective moved for summary judgment making essentially the same arguments: Selective would not indemnify or defend Maucione. The trial court rejected those arguments and ordered them to provide a defense to Maucione. (*Pa367-435*). The Appellate Division later rejected Selective's attempt to appeal that ruling. Judge Furnari and Appellate Division rejected Selective's arguments again in 2019. (*Pa719-772; Pa885-886*).

The policy states that it insures employees and their actions done during employment. (*Pa137*). The only exceptions for such are when bodily injury is caused

to another employee, to a family member, to share damages, or failing to provide for healthcare services. (*Id.*) Maucione acted within the capacity as a teacher for all relevant times with this conduct taking place during the school day at various points. The plain language of the insurance agreement makes Maucione an insured under the policy and the Court erred in finding that the policy did not cover Maucione as an individual for his actions as an employee.

i. “Bodily Injury”

Under the General Liability Policy Definitions in the Selective policy, bodily injury means “bodily injury...sustained by a person, ...resulting from any of these at any time.”(*Pal40*). As set forth by the New Jersey Supreme Court:

We conclude that the term "bodily injury" is ambiguous as it relates to emotional distress accompanied by physical manifestations. That ambiguity should be resolved in favor of the insured. *Sparks, supra*, 100 N.J. at 336. Moreover, we find such an interpretation to be in accord with the insured's objectively-reasonable expectations. That "emotional distress can and often does have a direct effect on other bodily functions" is well recognized. *NPS Corp., supra*, 213 N.J.Super. 547, 553. An insured who is sued on account of an injury involving physical symptoms could reasonably expect an insurance policy for liability for bodily injuries to provide coverage.

Voorhees, supra, 128 N.J. at 177-8. The Court in *Voorhees* held that “bodily injury encompasses emotional injuries accompanied by physical manifestations” in its interpretation of the insurance coverage in that case. *Id.* at 179. Similarly, as a result

of Defendant Maucione’s conduct in the present underlying case, Plaintiff H.L. suffered emotional anguish and stress, which manifested itself as, among other things, trichotillomania (i.e. physically pulling out her own hair) (*Pa89-90* at 116-118). This would certainly constitute physical manifestations of emotional injury, and thus constitute bodily injury under the Selective policy.

Established New Jersey case law promotes a finding of coverage when an ambiguous term such as “bodily harm” is used in Selective’s policy, there must be a finding promoting coverage. *See e.g. Voorhees*, 128 N.J. 179; *Lundy*, 92 N.J. at 559; *see also Hurley*, 166 N.J. at 272-4. Furthermore, the evidence establishes Plaintiff has suffered “bodily harm.” Selective had the opportunity to further define “bodily injure” to exclude certain conditions at the time of drafting. Selective chose not to.

ii. There is No Evidence Maucione Subjectively Intended to Harm Plaintiff and the Policy Must Cover the Victim’s Claims.

Selective had denied coverage based on the argument that nothing that occurred which is the subject of the complaint or amended complaint constitutes an “occurrence,” which is defined as “an accident.” (*Pa142*). “Accident” is not defined in the policy. The New Jersey Supreme Court has established the meaning of the phrases “occurrence” and “accident” in general liability policies like this. *Voorhees*, 128 N.J. 165. It all boils down to one simple question—did the insured subjectively

intend to cause the harm at issue? *Id.* at 181-183; *see also Murphy*, 183 N.J. at 350.

In interpreting what constitutes an “occurrence”, the Court in *Voorhees, supra*, held that the policy at issue defined “occurrence” as an “accident:”

In essence, the insurance company limits its coverage to accidental occurrences to preclude coverage for insureds whose conduct is intentionally-wrongful.

Voorhees, 128 N.J. at 180. The Court in *Voorhees*, in dealing with the similar issue, held that the Court must interpret the terms “occurrence” and “accident” in a manner that is both consistent with the reasonable meaning of the insurance contract and responsive to policy concerns. *Id.* at 181. In its analysis, the Court held:

In contrast, New Jersey's lower courts generally focus on the accidental nature of the resulting injury. In *Lyons v. Hartford Insurance Group*, 125 N.J.Super. 239, 310 A.2d 485 (App. Div.1973), *certif. denied*, 64 N.J. 322, 315 A.2d 411 (1974), Lyons had fired a shot, killing a man, and sought coverage for the liability resulting from his act. His insurance policy defined an occurrence as "an accident." In reversing the lower court's conclusory dismissal based on the absence of an occurrence, the court stated: "The general rule is that coverage exists...for the unintended results of an intentional act, but not for damages assessed because of an injury which was intended to be inflicted." *Id.* 125 N.J.Super. at 245.

Id. at 181-2. The Court went on to conclude:

We adhere to the prevalent New Jersey rule and hold that the accidental nature of an occurrence is determined by analyzing whether the alleged wrongdoer intended or expected to cause an injury. If not, then the resulting injury is "accidental," even if the act that caused the injury was intentional. That interpretation prevents those who intentionally cause

harm from unjustly benefitting from insurance coverage while providing injured victims with the greatest chance of compensation consistent with the need to deter wrong-doing. It also accords with an insured's objectively-reasonable expectation of coverage for unintentionally-caused harm.

Id. at 183 (emphasis added). The Selective representatives testified they do not follow this law.

Instead, Selective simply decides if the act was intentional, then there is no coverage, even if the insured did not intend to cause harm. Allison Paulson, the Selective representative who knows the most about the subject coverage language, testified that if the principal of a school (i.e. Mr. Mango) picked up a brick and threw it into a bush, not knowing a student was hiding in the bush, then the principal's actions would have been an intentional act and the exclusion would apply because he intentionally threw the brick regardless of the intent to harm the student. (*Pa451* at 59-60).

When Plaintiff asked the corporate representative at Selective most knowledgeable on the topic whether Selective follows this law, Plaintiff was met with resistance and no straight answer. (*Pa530* at 54-55). The *Voorhees* Court further held that:

Absent exceptional circumstances that objectively establish the insured's intent to injure, we will look to the insured's subjective intent to determine intent to injure. *Voorhees'* actions were a far cry from the type

of egregious behavior that justified an objective approach in *Atlantic Toddlers* and thus do not justify a departure from the general rule requiring an inquiry into the insured's subjective intent to injure.

Although Voorhees' statements were unquestionably intentional, there is little evidence that she intended or expected to injure the schoolteacher. Our impression is that she was motivated by concern for her child rather than by a desire to injure the teacher. Regardless of our impressions, the complaint itself included an allegation of negligent infliction of emotional distress. An allegation of negligence presumes the absence of an intent to injure. Preferred Mutual thus had the duty to defend until the negligence claim had been dismissed.

Voorhees, supra, at 185. This is the situation in the instant matter. The plaintiff here should not be denied a recovery because, from the subjective standpoint of the insured, Maucione did not intend to harm H.L. (*Pa631; Pa635*).

Sometimes, when the conduct is so egregious, like the sexual assault of toddlers in a day care center (*Tots & Toddlers, supra* 239 N.J. Super. 276) intent to harm will be imputed. In all other circumstances, an inquiry must be made into the actor's subjective intent to cause the injury. *Murphy*, 183 N.J. at 535-7 (holding intentionally committing "wrong" or "illegal" acts does not exclude coverage); *Voorhees, supra*, at 184-5 (holding foolhardy or reckless acts do not exclude coverage); *S.L. Industries Inc. v. American Motorists Insurance Co.*, 128 N.J. 188, 209 (1992) (coverage may be excluded where the insured "subjectively intends" harm); *see also Harleysville Insurance Co. v. Garitta*, 170 N.J. 223 (2001) (affirming

Voorhees and *SL*).

In addition, this Appellate Division has held that the sexual assault of a minor does not constitute a per se objective intent to harm. In *Shelby Cas. Ins. Co. v. H.T.*, 391 N.J. Super. 406, 418 (App. Div. 2007) the court concluded that the subjective intent test must be used to determine if a sexual offender under the age of fourteen intended to harm a victim. This highlights the level of wrong which needs to be committed before an objective determination under *Tots & Toddlers* will be applied. In their holding, the *Shelby* court noted the “important public policy of providing a source of recovery through insurance proceeds to an innocent victim.” *Id.*

iii. Based on our Supreme Court’s Ruling in *Murphy*, there is no Argument that Maucione had either Subjective or Objective Intent to Harm Plaintiff.

Our Supreme Court in *Murphy* affirmed *Voorhees, S.L.*, and *Garitta*. In *Murphy*, the case involved an insured “who foolishly shot some BB’s to ‘ding’ passing vehicles” on a “dark and moonless” night with poor visibility and “sleeting weather.” *Id.* at 534-5. The insured admitted to “shooting intentionally at the cars, but he denied that he intended to hurt anyone.” *Id.* at 535 (emphasis added). The insured knew what “he was doing was ‘wrong,’ ‘illegal,’ and might subject him to ‘juvenile court.’” *Id.* The insured’s actions of shooting passing cars on a dark winter night resulted in a BB piercing a plastic window of a vehicle passing by and entering a

driver's/victim's right eye, causing permanent blindness and other complications. *Id.* The State filed a delinquency petition "alleging facts that, if committed by an adult, would have constituted possession of a firearm for an unlawful purpose and aggravated assault." *Id.* (emphasis added). The insured "admitted to aggravated assault." *Id.* (emphasis added). The insurer denied the claim based on an intentional act. *Id.* at 536.

A declaratory judgment action, near identical to the one here, was filed with the "fundamental issue [being] whether the policy provisions clearly excluded [the] acts from coverage." *Id.* Based on the evidence, the Court found "the circumstances surrounding the shooting would not support a presumption that [the insured] harbored a subjective intent to injure anyone." *Id.* While the insured "did 'something utterly stupid,' this stupid prank was not one in which [the insured] envisioned the horrible injury [he] caused." *Id.* In doing so the Court found that the insurer must provide coverage.

In the instant matter, on either an objective or subjective analysis, there is no intent to cause harm. Subjectively, at the criminal sentencing hearing, Maucione's attorney stated:

He is mortified that his actions caused anyone any harm. And he would only ask that the Court be aware that he—he did not have any intention whatsoever to cause anyone any harm whatsoever.

(Pa635)(emphasis added). As stated *supra*, Maucione himself certified to this as well. (Pa631).

Selective made no inquiry whatsoever into the subjective intent of Maucione. In fact Selective did not even attempt to speak to Maucione to understand what, if anything, occurred between him and Plaintiff. Beyond that, Selective simply ignored the “exculpatory” material in their scant claim denial file, including his denial of any inappropriate contact, the supporting statements of witnesses, and their knowledge that there was no sexual contact. Selective relied on scant hearsay, innuendo, a couple news articles, and never re-evaluated their position.

This matter is better compared *Murphy* regarding the actions taken by the insured–Maucione. Maucione, unlike the insured in *Murphy*, did not understand that his actions of shooting BB guns at passing cars could be considered “wrong” or “illegal,” as the insured in *Murphy* did. Additionally, the insured admitted to “aggravated assault.” As codified by *N.J.S.A.* 2C:12-1(b)(1) and (2), aggravated assault requires a person to “purposely or knowingly” cause injury, or cause injury “recklessly.” *Id.* Unlike the crime Maucione plead guilty to, official misconduct in the third-degree, the crime of the insured in *Murphy* had a clear intent aspect connected and the Court still found the insured did not subjectively intend to harm the victim. Maucione’s actions do not raise to the same level of the insured of *Murphy*, who was

found to not have subjectively intended to harm a driver while illegally shooting BB's at cars on a dark winter night during dangerous weather conditions. Maucione's conduct is indeed more akin to "something utterly stupid" rather than malicious, perverse, deviant, or objectively intending to harm.

Defendant argued they should not have to compensate the victim because Maucione was "grooming her" for future sexual activity. This is mere assumption as no such evidence supports this finding and at that point, H.L. was already 16 years old, the age of consent in New Jersey. And furthermore, this "future time" was when she was to turn 18. H.L. testified that she discussed plans to go to Italy with Maucione once she turned 18 years old. (*Pa74* at 57). It is the supervisory capacity found within the teacher-student relationship that made these communications "inappropriate." Regardless, there is no subjective showing that the insured intended to harm the Plaintiff. To the contrary, Maucione continually maintained that he did not have any intention whatsoever to cause any harm to H.L.

During the discovery period of the underlying case, Maucione testified that as things escalated with H.L. he did not know what to do and never received guidance on same. (*Pa198* at 92, *Pa205* at 149, *Pa226* at 181). Maucione said that he received no directives from the school about the use of cell phones or texting (*Pa239* at 206). It was his failure to properly notify his superiors of the inappropriate communications

with Plaintiff, or otherwise properly address it, that led Maucione to plead guilty to third-degree official misconduct. The other charges, that were sexual in nature, were dismissed for a lack of evidence. Again, as pointed out earlier, both testified there was no sex or sexual contact. These actions, as argued *supra*, may be found to be profoundly stupid, but they are a far cry from malicious acts intending harm.

The trial court's July 12, 2024 ruling that this case is comparative to *Tots & Toddlers* is misplaced. In *Tots & Toddlers*, various preschool aged children were sexually abused by their teacher. *Tots & Toddlers, supra*, 239 N.J. Super at 278-279. The five young boys between the ages of "one and four years old" showed behaviors and physical symptoms associated with sexual assault including "severe constipation, compulsive masturbation, bruises, sleeping difficulties, and...the outbreak of venereal warts." *R.S. v. Knighton*, 125 N.J. 79, 82 (1991). The conduct at issue here is a far cry from the sexual assault of a child or the other horrors Mr. Knighton committed. There was no sexual conduct between Plaintiff and Maucione. The debate whether a single kiss and hug took place cannot be placed on the same level as giving a one-year old child venereal warts.

The trial court pointed to factors such as communications between Maucione and H.L. in which H.L. submitted photos and videos of herself in various states of undress and engaging in sexual activity. (*Pal9-20*). The trial court further notes that

a sexual predator can cause significant harm with a camera and email. (*Id.*) In doing so, the trial court did not state what type of injury Maucione intended to inflict upon H.L. through such actions. The trial court appears to reason the injury inflicted is sexual in nature while Plaintiff has claimed the injury in the matter arises out of emotional damage in association with physical symptoms such as H.L. pulling out her hair. As such, the trial court erred in painting with too broad of a brush the narrow application of the objective test used in *Tots & Toddlers*—which had an objective harm of sexually assaulting children under the age of five.

Furthermore, the mere ability to cause significant harm does not automatically turn into an objective finding of harm. In *Murphy* and *H.T.*, cited *supra*, the actions of the insured were capable, and did, cause significant harm to the victims. Despite this, the actions of the insured were analyzed under the subjective test. As such the magnitude of harm is immaterial to whether the insured subjectively intended such harm to a victim.

In addition, the trial court's denial that the general liability policy would cover Maucione's action necessarily turned on the finding that Maucione's actions were objectively reprehensible and Maucione was not an insured. For the reasons stated *supra*, the subjective test should have been the test to use and as there is no evidence that Maucione intended to harm Plaintiff the general liability policy must cover his

actions as an insured. The language of the abuse and molestation policy, as discussed *infra*, is illusory, and would cover Maucione even if such did apply.

C. The Court Erred in Finding that the “Abuse or Molestation” Additional Coverage Does Not Apply to Maucione as an Insured Who Committed a Wrongful Act under the Policy (Pa3-20)

i. Selective’s Reading of the Abuse or Molestation “Additional” Coverage Renders it Illusory

Selective sold its insured additional policy coverage called “Abuse or Molestation Liability Coverage.” (*Pa144-Pa150*). Selective Representative Allison Paulson testified that his policy covered abuse, molestation, sexual misconduct and sexual molestation. (*Pa454* at 72-73). Yet the policy seeks to exclude coverage for these very wrongful acts. As such, Selective would be able to collect a premium on a policy to which they would never pay a claim. Under the Selective Policy “Abuse or Molestation Coverage Form” Selective agreed to cover a “loss” resulting from a “wrongful act.” (*Pa146*). A “Wrongful act” is defined as:

- a. Any Act of actual or threatened abuse or molestation (including sexual misconduct or sexual molestation) which results in injury to another, or
- b. The negligent: Employment; Investigation; Supervision; Reporting to the proper authorities, or failure to so report; or Retention; of a person for whom any insured is or ever was legally responsible...

(*Pa150*) (numbering omitted). But then the coverage goes on to exclude any “person”

who had anything to do with any such “wrongful act.” (Pa146).

Further, the plain language of the policy insurers Maucione. As per Section II, “[e]ach of the following is an insured under this coverage...(2) [y]our employees, ... teachers...” (Pa147)(emphasis added). Maucione is undisputed to be a teacher and/or employee of the named insured.

Since the “Abuse or Molestation Coverage” excludes the very thing it purports to cover, it is illusory coverage and the exclusion has to be deemed null and void. Indeed, it is long settled that insurance policy exclusions that contravene public policy or that essentially result in a policy that provides no coverage, or illusory coverage, are unenforceable. *Sparks, supra*, 100 N.J. at 337-38 (“Where particular provisions, if read literally, would largely nullify the insurance, they will be severely restricted so as to enable fair fulfillment of the stated policy objective.”)

When the provisions of an insurance policy, “read literally, would largely nullify the protections afforded by the policy” their meaning is restricted “so as to enable fair fulfillment of the stated policy objective.” *Auto Lenders Acceptance Corporation v. Gentilini Ford, Inc.*, 181 N.J. 245, 276 (2004) (quoting *Kievit, supra*, 34 N.J. at 483). Indeed, where a given clause is “so unreasonable and repugnant to the main purpose of the policy ... courts construe it very strictly and sometimes really seem to disregard it all together.” *Kievit*, 34 N.J. at 483 (quotation omitted).

By way of example, in *Gentilini*, a car dealership sought coverage under the “Employee Dishonesty” provisions of its commercial liability policy for twenty-seven (27) separate instances of credit application fraud perpetrated by one of its employees. *Gentilini*, 181 N.J. at 250. The operable policy provision stated that “[a]ll loss or damage: (1) [c]aused by one or more person; or (2) [i]nvolving a single act or series of related acts; is considered one occurrence.” *Id.* at 275. At issue was whether the twenty-seven (27) instances of fraud constituted one (1) or multiple “occurrences.” *Ibid.*

The dealership’s insurer, focusing on its policy’s definitions *supra*, asserted that the plain language limited “occurrences” to one per employee, thereby limiting the maximum recovery for the errant employee’s actions to the policy maximum for a single occurrence. *Id.* at 275. The Supreme Court disagreed, observing that, “read literally, the occurrence provision would limit all losses for employee dishonesty to a single ... maximum because losses of that type must, by their very nature, be ‘caused by one or more persons.’” *Id.* at 276 (citing *Auto Lenders Acceptance Corp. v. Gentilini Ford, Inc.*, 358 N.J. Super. 28, 40 (App. Div. 2003) (Wecker, J.A.D. dissenting)). Therefore, the Court declined to adhere to the literal limitations of the policy “because to do so ... would nearly vitiate the coverage that the parties clearly contemplated.” *Id.* at 276. “Instead [the Court] conclude[d] that a fair reading of

that provision simply means that for each loss of property covered by the policy there can be only one recovery, regardless of the number of employees that may have caused the loss.” *Ibid.* Similarly here, reading the policy exclusions on the “abuse and molestation” coverage would vitiate that very coverage. They should not operate to deny the victim a recovery as such is against public policy.

- ii. The “Abuse or Molestation” Coverage References in Both the General Liability and Additional Coverage Forms Are Undefined and Ambiguous; According to Selective, Flicking a Rubber Band at a Student, or a Teacher Receiving a Photo of a Man with His Shirt off Would Constitute “Abuse or Molestation” and Therefore Not Be Covered

Beyond that, the terms “abuse or molestation” referenced in both the general liability and additional coverage exclusions are undefined and ambiguous. The general liability policy excludes bodily injury arising out of the “actual or threatened abuse or molestation by anyone of any person while in the care, custody or control of any insured ...” (*Pa144*). However, “abuse or molestation” is never defined anywhere. (*Pa559* at 170-171).

Therefore, “abuse or molestation” means whatever Selective wants it to mean, as the Court previously recognized. (*Pa401* at 66; *Pa463* at 108-109). This is highlighted by the following questioning of its representatives where they believe it could mean something as benign as a teacher flicking a rubber band at a student.

(Pa463 at 106). In fact, Selective’s representative Ms. Korsgaard confirmed that the term “abuse or molestation” is not defined anywhere in the Selective policy.(Pa559 at 169-170). Ms. Paulson further testified:

Q. What is Selective’s intended understanding or meaning of the term abuse or molestation...?

A. I can’t answer that. ...I don’t know.

(Pa450 at 54-55) (emphasis added). Again, this is the corporate representative most knowledgeable in what this policy means. If she does not know what it means, how can the insured fairly be charged with knowing, such that the victim should be barred a recovery?

Paulson testified she does not know the meaning of the terms “abuse or molestation,” “sexual misconduct” and “sexual molestation.” She admitted the terms falls squarely within the definition of ambiguous. She testified:

Q. So "sexual misconduct" and "sexual molestation" as referenced in the policy could have several different meanings; do you agree?...

A. Yes.

Q. And same with abuse and molestation. The "abuse" and "molestation" references in the policy that we have been speaking about can have several different meanings?...

A. Yes.

(Pa467-Pa468 at 125-126). In fact, Selective’s official position is that a “sexual predator” is anyone who engages in abuse and molestation. And Selective also

maintains that a teacher who has a habit of flicking rubber bands at students constitutes “abuse and molestation.” (*Pa463* at 106-107). Ergo, according to Selective’s bizarre logic, that makes the rubber band flicking teacher a sexual predator. (*Pa547-549* at 124-129). It is this very kind of ridiculous logic that underpins Selective’s coverage denial here. *Voorhees*, 128 N.J. at 183 (Supreme Court permits coverage in cases like this for the purpose of “providing injured victims with the greatest chance of compensation consistent with the need to deter wrong-doing. It also accords with an insured's objectively-reasonable expectation of coverage for unintentionally-caused harm.”)

Paulson was not sure if unreported texts between teacher and student would constitute abuse and molestation. (*Pa459* at 91). She believed that if a teacher gave a student a ride home, even without any sexual contact or discussion, the simple fact of the ride would constitute abuse or molestation. (*Pa460* at 96). Similarly, she believed that if a teacher got too chummy with a student, it would constitute abuse or molestation. (*Id.* at 95). Paulson believed the term abuse or molestation included inappropriate behavior and misconduct, so if a teacher flicked a rubber band at a student, that too could be considered abuse or molestation. (*Pa463* at 106).

Korsgaard as well suggested the simple fact of texting between a student and a teacher in and of itself would be an inherently harmful act. (*Pa569* at 210-211).

She also suggested a photo of a male with his shirt off, or a photo of a person in a bikini on a beach, could also be inherently harmful. (*Pa571* at 219; *Pa577* at 241-243). Yet this very kind of thing appears in the 2010 Becton High School Yearbook. (*Pa691-692*).

By this very nature the exclusion itself is rendered ambiguous as nearly any interaction between a student and teacher could be deemed to be abuse or molestation if Selective so decides. The absurdity that the action that a teacher texting a student regarding school work or potentially a last second change to a sport's schedule can be called abuse or molestation by Selective shows how amorphous and ambiguous the term is. As such, it is impossible to determine when the abuse and molestation policy would trigger as opposed to the general liability policy.

Furthermore, given that the "abuse or molestation" exclusions include the very conduct alleged as to the other individual defendants—Mango, Saxton and Young, that exclusion would have equally applied to them. The fact that they were not excluded, something Selective could not explain (*Pa583* at 266-268), further shows the exclusions are ambiguous.

There was never any "sexual molestation or abuse"—whatever that means—proven against Maucione. The coverage under this part of the policy does not appear to cover anything at all, and the ambiguities of the policy should be construed

in favor of coverage. Indeed, it is long settled that insurance policy exclusions that contravene public policy or that essentially result in a policy that provides no coverage, or illusory coverage, are unenforceable. *Sparks, supra*, 100 N.J. at 337-38 (“Where particular provisions, if read literally, would largely nullify the insurance, they will be severely restricted so as to enable fair fulfillment of the stated policy objective.”); *Mazzilli, supra*, 35 N.J. at 7 (explaining that a court should find the broadest coverage possible under an insurance policy when controlling language is susceptible to multiple interpretations).

Judge Furnari previously rejected Selective’s arguments by way of its decision and order of June 28, 2017. (*See generally Pa367-435*). This Appellate Division also rejected Selective’s attempt to have this ruling overturned. Regarding this separate coverage, Judge Furnari essentially already ruled this coverage is illusory. (*Pa 393* at 50). Additionally, Judge Furnari previously found that this paragraph 5 clause to be highly ambiguous. When considering an exclusion from coverage, any ambiguity in a policy must be strictly construed against the insurer so that reasonably anticipated coverage is provided. In referencing the abuse and molestation coverage, Judge Furnari correctly pointed out further ambiguities. (*Pa394* at 52).

Accordingly, Judge Furnari found Selective’s arguments unpersuasive, and that the Abuse and Molestation coverage part was not the only applicable insurance

coverage here. The trial court further correctly found that the Commercial General Liability coverage applies and that there was a duty to defend the insured for the allegations found in the Complaint.

On July 12, 2024, the trial court erred and essentially reserved Judge decisions and finding that the abuse and molestation exclusions does not cover the actions of the person whose negligence gives rise to the liability. Within the policy language, the abuse and molestation excludes coverage to any person who participated in the wrongful act or knowingly allowed the wrongful act to continue. This exclusion applies to more than just Maucione, it would include, for example, Mango who knowingly failed to report the situation after Maucione told him as well as the school entities. Such is drawing an arbitrary line as to whose actions give rise to liability when both have committed a wrongful act. By its very defining terms, a “wrongful act” covered under the abuse and molestation clause includes the negligent employment, investigating, supervision, and failure to report on behalf of the defendants that Selective did extend coverage to. (*Pa150*). As such other defendants would also be excluded under this policy as they “participated in” these wrongful acts. Yet, these other insured were covered, despite holding the same status as Maucione.

It is clear under the policy that negligent employment, investigating,

supervision, and failure to report are all “wrongful acts” under the policy. (*Pa8-9*). Selective is arbitrarily covering other bad actors under this policy while not covering Maucione. Each defendant had their own duty to act and failed to do so. Maucione’s actions are not the only actions which give rise to the liability of the other defendants, each had their own duty to Plaintiff.

The trial court’s finding that other defendants such as the school district and principal would be granted coverage but Maucione would not contradicts the very terms of the policy. The school district committed “abuse or molestation” by committing the wrongful acts of negligent hiring, investigation, supervision, and failure to report Maucione. All Defendants in this matter committed a wrongful act under the abuse and molestation policy, if such a policy does apply to any of them, and therefore either all must be covered or none covered. The very ambiguity of trying to parse who is more at fault when all have committed a “wrongful act” proves the amorphous nature of the policy and thus its illusory status.

For such reasons, it is respectfully submitted the trial court erred in ruling the abuse and molestation exclusion is not illusory.

II. The Court Erred in Finding Selective’s Policy Interpretation Passed the Reasonable Expectations Test (*Pa1-23; Pa1086-1174*)

Selective's policy interpretations do not pass the reasonableness test. A

fundamental tenet of insurance law is to fulfill the objectively reasonable expectations of the customer. *See Zuckerman v. National Union Fire Ins. Co.*, 100 N.J. 304 (1985). However, “[a]t times, even an unambiguous contract has been interpreted contrary to its plain meaning so as to fulfill the reasonable expectations of the insured.” *Werner Industries, Inc. v. First State Ins. Co.*, 112 N.J. 30, 36 (1988); *see also, Voorhees, supra*, 128 N.J. at 175 (“[I]f an insured’s ‘reasonable expectations’ contravene the plain meaning of a policy, even its plain meaning can be overcome.”) Thus, “[w]hen members of the public purchase policies of insurance they are entitled to the broad measure of protection necessary to fulfill their reasonable expectations.” *Kievit, supra*, 34 N.J. at 482. “They should not be subjected to technical encumbrances or to hidden pitfalls and their policies should be construed liberally in their favor to the end that coverage is afforded to the full extent a fair interpretation will allow.” *Ibid.* (quotation omitted).

The rationale underpinning this rule has been explained by our Supreme Court as follows:

Since the form of the agreement and the language used are prepared by the insurer in advance and the coverage generally must be purchased by the insured in that form without change, it is unrealistic to talk about the mutual intention of the parties. ... So, beyond the universal rule that ambiguities and uncertainties are to be resolved against the company, many courts, including our own, have looked at policies from what we conceive to be the reasonable expectations of the average purchaser in

the light of the contract language.

Linden Motor Freight Co., Inc. v. Travelers Ins. Co., 40 N.J. 511, 524 (1963). This principle has been repeatedly affirmed by the Court. *See, e.g., American Motorists Ins. Co. v. L-C-A Sales Co.*, 155 N.J. 29 (1998) (under certain circumstances, even the plain meaning of insurance policy language may be overcome if it conflicts with the reasonable expectations of the insured); *Aubrey v. Hayersville Ins. Companies*, 140 N.J. 397 (1995) (courts generally construe insurance policies consistent with objectively reasonable expectations of insured).

Here, Selective admits the key exclusionary terms are undefined and ambiguous. This, in Selective's view, enables them to just make it up as they go along. Therefore, they can say, as in this case, a single kiss on the cheek constitutes "abuse or molestation," such that the "abuse or molestation" coverage the insured paid a premium for does not apply to such "abuse or molestation."

Allison Paulson conceded that given the ambiguities, Selective could call virtually anything "abuse or molestation." (*Pa460-463* at 95-96, 98-109). In essence, the insured purchased additional "abuse and molestation" coverage, which happens to exclude "abuse and molestation." That would be like selling a malpractice policy, that excludes malpractice claims.

Put simply, the abuse and molestation policy is either ambiguous and should be read to provide coverage or the actions of Maucione do not fall within the undefined terms and the general liability policy would apply. As such, either under the general liability policy or the abuse and molestation policy, Defendant Maucione would be covered like all other similarly situated Defendants who committed wrongful acts.

As such the trial court erred in finding that neither the abuse and molestation nor the general liability policy covers Maucione in this matter.

CONCLUSION

On July 12, 2024, the trial court erred in finding that the actions of Maucione meet the objective standard of *Tots & Toddlers*, the abuse and molestation policy is not illusory, and that Maucione is not covered under either the general liability or abuse and molestation policies. First, whether there is coverage for Maucione's actions under either the General Liability or additional Abuse or Molestation coverage in Selective's policy. As discussed *supra*, the terms "abuse" and "molestation" are undefined, ambiguous, and their parameters are unknown to the Selective's corporate representative most knowledgeable about such terms. Such ambiguity alone renders the exclusion of the General Liability policy void and coverage should be found. Further, the additional Abuse or Molestation coverage,

which the insured paid a premium for, should also apply here. It is reasonable for an insured to believe the insured purchased insurance coverage for certain actions involving abuse or molestation. The insured school clearly believed Maucione's actions were within the insurance policy when they contacted Selective to defend and indemnify them in this matter. Either Selective must state these actions are considered abuse or molestation, triggering the Abuse or Molestation additional coverage or these actions are not abuse or molestation triggering the General Liability policy. Selective had the ability to better define the situations in which they would provide coverage and failed to do so. New Jersey law clearly supports a ruling as a matter of law that such ambiguous and contradictory language should be read to find coverage for the insured who reasonably believes they purchased insurance for this situation.

Second, Maucione's actions do not rise to the bright line level of *Tots & Toddles* and should be viewed through subjective intent to harm under *Voorhees*, *H.T.* and *Murphy*. Testimony from both H.L. and Maucione on this issue have confirmed Maucione did not intend to harm H.L. New Jersey law on subjective intent is clear: when an insured intends to act but does not intended to harm, coverage applies. This ideology comes from our Supreme Court's ruling in cases such as *Voorhees* and *Murphy*. Specifically, Maucione is akin to the insured of *Murphy* as neither intended to harm their victim. The Supreme Court found coverage to compensate the victim

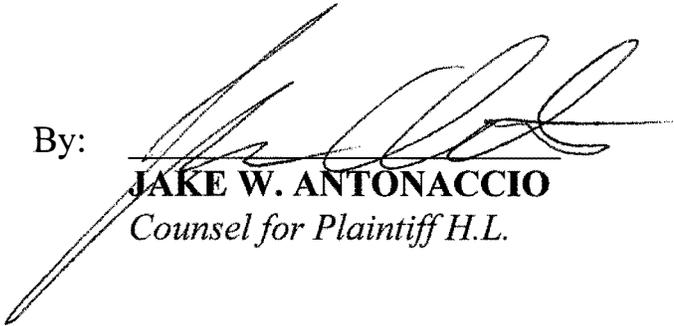
despite the insured of *Murphy* knowing he was committing an illegal act and plead guilty to an intent required crime. No testimony of Maucione has revealed his action were as intentional as the insured in *Murphy* where coverage was found. Additionally, there is no evidence Maucione intended to harm H.L.

The actions of Maucione, along with the actions of the Defendants in this matter are wrongful acts under the policy and are negligent. As Selective's policy has provided coverage for simlailry situated Defendants, then the policy must also apply to Muacione.

For all the reasons discussed herein, it is respectfully the Court vacate the July 12, 2024 Orders and deny Defendants' motion for summary judgment and grant Plaintiff's request for summary judgment.

Respectfully submitted,

By:


JAKE W. ANTONACCIO
Counsel for Plaintiff H.L.

Dated: May 20, 2025

H.L., H.S. and H.D., NAMES BEING
FICTITIOUS,

Plaintiffs/Appellants,

v.

GIANFRANCO MAUCIONE;
SELECTIVE INSURANCE
COMPANY OF AMERICA;
SELECTIVE WAY INSURANCE
COMPANY; JOHN/JANE DOE
SECURITY OFFICERS (1-5)
(FICTITIOUS DEFENDANTS),
JOHN/JANE DOES (1-10)
(FICTITIOUS DEFENDANTS),
ABC ENTITIES (1-10)
(FICTITIOUS DEFENDANTS),

Defendants/Respondents.

Civil Action

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO.: A-003977-23

On Appeal From:

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: ESSEX COUNTY
DOCKET NO.: ESX-L-4567-15

Sat Below:

Hon. Keith E. Lynott, J.S.C.

**BRIEF OF DEFENDANTS/RESPONDENTS,
SELECTIVE INSURANCE COMPANY OF AMERICA AND
SELECTIVE WAY INSURANCE COMPANY**

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Pa Plaintiff’s/Appellant’s Appendix.¹

Da Defendants’/Respondents’ Appendix.

1T Transcript of the June 22, 2023, Oral Argument before the Honorable Keith E. Lynott, J.S.C.

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The Honorable Keith E. Lynott, J.S.C.’s July 12, 2024, Order granting Selective Insurance Company of America and Selective Way Insurance Company’s Cross-Motion for Summary Judgment Da1

¹ Plaintiff’s Appendix does not include the Honorable Keith E. Lynott, J.S.C.’s July 12, 2024, Order granting Selective Insurance Company of America and Selective Way Insurance Company’s Cross-Motion for Summary Judgment. See Da1–2.

PRELIMINARY STATEMENT

The issue on appeal is whether an alleged sexual predator, Defendant, Gianfranco Maucione, is entitled to insurance coverage under certain Policies issued to his employer by Selective Insurance Company of America and Selective Way Insurance Company (collectively, “Selective”) for sexually abusing a sixteen-year-old female student, Plaintiff/Appellant, H.L. (“Plaintiff” or “H.L.”), while Maucione was a twenty-nine-year-old teacher. Throughout this lawsuit—and again on appeal—Plaintiff’s briefs have gone to great lengths to minimize Maucione’s atrocious and utterly intolerable alleged sexual abuse of H.L. in an attempt to obtain insurance coverage that simply does not exist. For example, the second sentence of Plaintiff’s Brief mischaracterizes and trivializes Maucione’s conduct as “a gradually increasing inappropriate relationship with [H.L.] that involved communications and interactions, but no sexual contact.” Page 32 of the Brief describes appalling alleged acts of sexual abuse as nothing more than “profoundly stupid” behavior. Those descriptions are grossly inaccurate, and stand in stark contrast to Plaintiff’s own pleadings, briefs, admissions, sworn testimony, and expert reports in the underlying federal lawsuit she filed against Maucione and others.

The Honorable Keith E. Lynott, J.S.C., rejected Plaintiff’s transparent effort to camouflage Maucione’s objectively reprehensible alleged sexual abuse of H.L., which included: (1) stalking and grooming her for sexual abuse; (2) telling her that

she does not “look like [she is] 16”, has an “amazing body,” a “hot banging body,” and a “great set of boobs”; (3) informing her of sexually explicit dreams about H.L.; (4) advising H.L. that he wants to give her “so many orgasms,” “pin [her] down,” “take advantage of [her,] and dominate [her],” and wants her to “give him head”; (5) hugging and kissing H.L.; (6) coercing H.L. to send text, picture, and video messages depicting her in various stages of undress and engaging in sexual contact, including pictures in lingerie, a bra and thong, with her shirt and bra off and one hand covering her nipples, a picture that “was like full boobs . . . everything included, no shirt, no bra, no hands covering, everything, ‘cause that’s what [Maucione] asked,” and a video of H.L. sexually “pleasur[ing] [her]self”; (7) causing H.L. to feel “ashamed, embarrassed and powerless in the situation; much like an alt[a]r boy being molested by a priest or an at risk child being molested by a football coach”; and (8) sexually abusing H.L. in a manner that was so severe that she “began pulling [her] hair out.”

See Pa1161–1274, Pa1291–1321.

Plaintiff’s persistent attempts to downplay and obscure overwhelming evidence of sexual abuse (much of which comes directly from H.L.) are misplaced, and at best, predicated on a clear misread of the governing law. New Jersey courts adhere to the general rule—inapplicable here—that there may be insurance coverage for the unintended results of an intentional act, but not for an intentionally inflicted injury. Plaintiff relies on that inapplicable general rule to erroneously maintain that

Maucione did not subjectively expect or intend to harm H.L., and, as such, the Selective Policies should afford coverage for his alleged sexual abuse of a sixteen-year-old girl. However, this Court and the Supreme Court unequivocally and consistently reject that general rule in the sexual abuse context, find that there is no need to consider the abuser's subjective intent, and hold that the intent to injure can be objectively inferred because it is not possible to sexually abuse a minor without causing some kind of injury. Thus, the trial court properly concluded that Selective has no duty to indemnify Maucione under the Selective Policies and New Jersey law. This Court should affirm Judge Lynott's sound decision.

PROCEDURAL HISTORY

In 2012, H.L. filed a lawsuit against Maucione and others in the United States District Court for the District of New Jersey (the "Underlying Federal Action" or "UFA"). Pa35–59. H.L. alleged that Maucione sexually abused her for years while teaching at the Henry P. Becton Regional High School and that the Board of Education, Superintendent, and Principal failed to properly supervise Maucione. Pa35–59. Selective defended and resolved H.L.'s UFA claims against the Board of Education, Superintendent, and Principal defendants. Pa17. Selective declined to indemnify Maucione for H.L.'s claims against him personally.

H.L. and Maucione ultimately executed a "Settlement Agreement." Pa636–639. Under the Settlement Agreement, Maucione entered into a consent judgment

with H.L. in the amount of \$500,000. Pa636. Instead of paying that amount to H.L., Maucione assigned H.L. his purported rights under Selective insurance policies issued to the Northeast Bergen County School Board Insurance Group (the “Selective Policies”). Pa636–637. H.L. agreed to: (1) attempt to enforce the consent judgment against Selective, rather than her alleged abuser; and (2) pursue a court ruling that Selective is required to indemnify Maucione for the \$500,000 settlement. Pa637–638.

H.L. subsequently filed this action seeking a declaratory judgment that Selective is obliged to indemnify Maucione for reprehensible alleged acts of sexual abuse that are now strongly corroborated by the evidence. Pa24–30. H.L. moved for summary judgment on January 27, 2023, and Selective cross-moved for summary judgment on April 4, 2023. Pa3. Judge Lynott held oral argument on June 22, 2023, and entered Orders and a Statement of Reasons denying H.L.’s motion and granting Selective’s cross-motion for summary judgment on July 12, 2024. Pa1–23; Da1–2.

STATEMENT OF FACTS

Plaintiff’s own pleadings in the UFA detail the various ways in which H.L. was allegedly sexually abused by Maucione: “on multiple dates during and between June 1, 2009 and January 26, 2010,” throughout Maucione’s repeated in-person and electronic encounters with H.L., he “used his supervisory/disciplinary authority over [H.L.] to solicit [H.L.] and engage in the following:”

- B. Communication with [H.L.] via text message and/or pictorial and/or video and/or electronic mail and/or social network messaging that was sexual and explicit in nature;
- C. Coercing [H.L.] to engage in communication, via text message and/or pictorial and/or video and/or email and/or social network messaging that was sexual and explicit in nature;
- D. Sexual conduct with and/or directed towards [H.L.], including but not limited to: hug(s) and/or kiss(es); making comments and/or engaging in conversations, including those of a sexual nature; text messaging, including those of a sexual nature[;] . . . electronic mailing/messaging, including those of a sexual nature[;] . . . sending and receiving pictures or video which involved various stages of undress and/or sexual contact;
- E. A course of conduct designed to impair and/or debauch the morals of [H.L.];
- F. Sexual contact with [H.L.] by coercing H.L. to perform sexual acts upon herself with the purpose of either degrading or humiliating Plaintiff or in the pursuit of sexual arousal and/or gratification, including, but not limited to, having Plaintiff touch her own breasts [;]
- G. Attempting to initiate sexual and/or romantic relationship with [H.L.];
- H. Intimidating and/or instilling fear of retribution in [H.L.] should [she] reveal the aforementioned inappropriate conduct[; and]
- I. Falsely imprisoning [H.L.] by confining, restraining, coercing and/or forcing [her] to remain within set boundaries without legal justification.

[Pa38–39, ¶ 4 (emphasis added).]

The UFA Complaint alleges that Maucione “used his supervisory and/or disciplinary powers to pursue an improper course of conduct, thereby subjecting [H.L.] to highly offensive sexual advances, inappropriate sexual contact and sexual harassment . . .

.” Pa39, ¶ 5 (emphasis added). The pleading adds that Maucione:

- A. Made impermissible, inappropriate, uninvited, unsolicited sexual contact and/or advances towards [H.L.] for his own sexual gratification and/or to embarrass, humiliate, degrade, intimidate and debauch [H.L.];
- B. Behaved in a flagrant, lewd and lascivious manner in the presence of [H.L.] and directed said behavior towards [H.L.];
- C. Degraded, humiliated and intimidated [H.L.] by subjecting her to overtly and sexually offensive acts and/or communications; [and]
- D. Attempted to debauch the morals of [H.L.] by subjecting her to overt and sexually offensive acts and/or communications.

[Pa39, ¶ 5 (emphasis added).]

H.L. reiterates those UFA allegations in this lawsuit. See Pa24–27, ¶¶ 1–10.

During a 2017 oral argument, H.L.’s counsel conceded that the “sexual assault” allegations of the Complaints are not covered by the Selective Policies:

I would definitely agree that some of -- many of the language [sic] in the Complaint could reasonably be interpreted to fall outside the scope of coverage. We really

never disputed that. There's clearly very strong, you know, sexual assault type allegations in the Complaint and we really don't dispute that that would generally, probably, fall outside of the coverage, depending on certain factual situation [sic].

[Pa412, 89:3–11 (emphasis added).]

The evidence of Maucione's sexual misconduct is not limited to the pleadings. Plaintiff's Answers to Interrogatories in the UFA include additional details of Maucione's alleged sexual abuse of H.L. See Pa1326–1331. For example:

Maucione's standing as a teacher and therefore, an authority figure was otherwise intimidating to [H.L.]. . . . Maucione's inappropriate and aggressive conduct towards [H.L.] coupled with the fact that he was her teacher and she a young student resulted in [H.L.] feeling ashamed, embarrassed and powerless in the situation; much like an alt[a]r boy being molested by a priest or an at risk child being molested by a football coach.

[Pa1328 (emphasis added).]

While Plaintiff repeatedly contends that there was “no sexual contact,” H.L.'s Certified Answer to Interrogatory 17 states: “Maucione did engage in sexual contact with [H.L.]. The sexual contact consisted of holding and kissing [H.L.] as well as sending and requesting explicit communications” Pa1330 (emphasis added).

Plaintiff served the expert report of Richard L. Farber, Ed.D. (“Dr. Farber”) dated February 11, 2016 (the “Report”) in the UFA. See Pa773–803. His Report states, in relevant part, as follows:

[t]he record reflects that at various times between August 2009 and January 26, 2010, Gianfranco Maucione a mathematics teacher, department chairperson and soccer coach at the Henry Becton Regional High School . . . engaged in inappropriate sexually oriented communication (text messages, cell phone conversations, face to face conversations, pictures, videos) and inappropriate physical contact . . . with one of his students and mentees, [H.L.] . . .
[Pa777 (emphasis added).]

His Report adds that “[H.L.] was systematically victimized sexually and psychologically over the period of two years in a high school classroom via cell phone, computer and text messages.” Pa794 (emphasis added). Maucione was suspended and resigned “[b]ased upon his admittance of guilt in sending inappropriate texts, having a student in his vehicle (no less than three times), sending and receiving nude and semi-nude pictures, using school electronic devices to send and receive inappropriate messages and pictures, [and] inappropriate contact with a child among other grievous behaviors” Pa794 (emphasis added). Dr. Farber concludes that H.L. was subjected to: (1) “an environment that became a catalyst for sexual assaults on a child who was impressionable and who unknowingly put her trust, confidence, faith and welfare in a veteran public school teacher that should not have been permitted to be around children”; and (2) “physical, psychological and sexual abuse . . . over at least a 2 year period from 2008–2010” Pa802.

H.L.’s treating social worker, Melissa Adessa, MSW, LCSW (“Ms. Adessa”), testified candidly regarding H.L.’s alleged injuries and Maucione’s conduct. See

Pa804–884. Consistent with Plaintiff’s own Complaints and Dr. Farber’s conclusions, Ms. Adessa found that Maucione sexually abused H.L. See Pa814, 11:14–18. She concluded that: (1) Maucione “was stalking [H.L.], grooming her to abuse her, sending her text messages”; (2) “[e]very movement in school she made, he was always there”; (3) “[e]very [piece of] information about her life, he . . . knew, and he would pull her in . . .”; and (4) “he was around every corner of the school, texting her inappropriate times, asking her inappropriate questions, asking her to meet him and come to see his baby, things that teacher[s] do not do with their students.” Pa823–824, 20:21 to 21:7 (emphasis added). In Ms. Adessa’s professional opinion, Maucione was “grooming” H.L. to have sex with a minor child. Pa825, 22:17–23; Pa834, 31:2–8. When asked whether he is a sexual predator, Ms. Adessa replied: “[i]f a sexual predator exists, no doubt this is sexual predator behavior.” Pa843, 40:13–17. She believes that Maucione’s misconduct was part of an intentional plan to groom H.L. into having sexual intercourse and that H.L.’s alleged injuries were caused by Maucione’s sexual abuse. Pa844, 41:2–5; Pa865, 62:3–7.

In 2019, H.L. provided a sworn audio statement to Detective Melissa Para of the Bergen County Prosecutor’s Office’s “Sex Crimes and Child Abuse Squad” and Sergeant Bill Hopkins of the East Rutherford Police Department. See Pa1179–1209. H.L.’s statement included detailed descriptions of the ways in which she was sexually abused by Maucione when she was just 16 years old:

Q. And what happened at Riggins Field [in August 2009]?

A. Um, this— I was there with my friends. We were running track. I walked ‘cause I was tired. Um, I guess [Maucione] caught up to me and then we started chatting. It was more or less “How’s your summer going? Are you okay? You know, you’re getting ready for your junior year.” I was like yes and then he made a lude [sic] comment about me not looking 16 and I just looked at him funny and didn’t think anything of it.

Q. Do you recall the comment that he made?

A. Uh, yes, I do. I just—

Q. What was it?

A. You don’t look like you’re 16.

....

Q. After you left the field, . . . did he try to contact you?

A. Uh, yeah, he actually immediately text[ed] me and said that I had an amazing body and just commented like just my figure.

Q. How’d that make you feel?

A. Really uncomfortable. That was one of the first times that like he really used some vulgar words, more or less and just like amazing, banging body, so I knew like it was just getting very awkward and uncomfortable.

....

Q. What was the content of the text messages?

A. Uh, the text messages— at first if, if he knew that I wasn’t really responding much right away, he would act normal again. He wouldn’t, um, he wouldn’t be so vulgar right away. He would like wait ‘til I guess, he got my trust back and then he would talk to me again and then at— but once he got further into my trust, then I responded back, he would use really explicit and lude [sic] um, text messages to me and sexual stuff about dreams he had of me, about things he’d want me to do to him and stuff. He’d like, he wanted me to like, he wants to do me.

Q. Do you recall any of them specifically?

A. Yea he was saying like he would give me like so many orgasms.

Q. Did he, did he ever ask you on text messages to do anything to him?

A. Yeah, he just really wanted me to give him head . .

..

Q. What did he say he wanted to do to you?

A. He just said that he wanted to pin me down and he just wanted to take advantage of me and dominate me, he was saying and that um, I'd never had sex like that before and like and stuff like that.

....

Q. [W]hat did you do [when Maucione asked for pictures depicting more than your shoulders and head]?

A. Um, I told him as for now, that's all he's gonna get, but then after he told me that he asked for it again, again, a couple days later, I finally gave in and gave him one of my shirt off, bra was off, but I had my hands, one hand covering both, I guess nipples, if you want to call them.

Q. Okay. Across your boobs?

A. Yes. I don't know.

Q. After you sent him that. Um, did he have any response back?

A. Yes, he said that once again, uh, I don't know if I could use that language, but he was just saying that it was like bullshit, that like I should just send him the whole thing and that's being lame and that c'mon, I don't trust him and stuff like that. So then—.

Q. How'd that made [sic] you feel?

A. It just made me feel stuck, like I don't know how else to describe stuck, I just knew that I wish I could say something. I just, I just couldn't get outta there. I just felt like I had to do it and I knew I'd see him in person in school, so I felt like if I didn't do it, it'd be a lot worse for me, so I just feel like if I just did it, it'd be better, get it over with and since I've already this far [sic] and this deep into it, so I just felt stuck.

....

Q. Okay. After you sent the one of you covering your boobs, um, what was the next picture that you sent?

A. That might have been a few weeks later, um, I sent him a full, it was like full boobs, um picture, everything

included, no shirt, no bra, no hands covering, everything, 'cause that's what he asked.

....

Q. And you sent him that. Did he ask for another picture at that time?

A. Uh, yeah, he did. He wanted it with nothing on, he said, "Don't be gay."

Q. And after you sent that, what was his ending response response [sic]?

A. Um, yeah, just he thought it was really hot. He said I had a hot body and I had [a] great set of boobs and that [sic] he said, "I'm more of an ass guy though. Do you want to send me a picture of your ass now?"

Q. And what did you do?

A. I was, I was, once again, I just thought that—I gave him what he wanted. I just thought he would stop already but he wanted more. Well, figuring there's only like one more body part left really, I don't know, . . . so I was just like okay, fine, and I just gave him the other one, so I felt stuck again.

....

Q. Okay. After the picture of your ass that you sent him, did you send anything else?

A. I sent him a video.

....

Q. Okay. And in the video, um, what are you wearing?

A. Nothing.

Q. Okay. So, you're naked from head to toe?

A. Yeah.

Q. And did he ask you to do anything?

A. Um, he used the words "pleasure yourself," more or less touch yourself kind of words?

....

Q. Okay. Is that what you did in the video?

A. Yeah.

Q. Did you touch, um, your butt at all in the video?

A. Yeah, I turned around.

Q. You just turned around?

A. I turned around, I kind of slid my hands down my back.

. . . .

Q. Was there [a picture] in January that you sent?

A. Yes.

Q. And what picture was that?

A. Um, that was a picture of me in lingerie.

Q. How did that come about that you sent him that picture?

A. Uh, my boyfriend has a birthday, his birthday's January 20th. He would have been 17, and uh, I kinda got him a gift for his birthday, a special occasion and I took a picture of it, front and back. It was a one piece lingerie set, um, the front was just lace and it came down and showed cleavage, but the back was a thong.

Q. Was there a time that Mr. M approached you in a hallway and questioned you about that outfit?

A. Yeah, I was actually in his classroom and when I was alone, he said, "You better send me that picture." I was like "What picture?" He goes, "You know, you better send me that picture of the surprise, that present you're giving him. I know you're giving him a present. I heard about it, so I better get a picture."

[Pa1179–1209 (emphasis added).]

Additionally, H.L. testified that she was in Maucione's car on three occasions, one of which concluded with sexual contact. Pa1200–1202. Specifically, Maucione picked H.L. up and took her to the Lincoln School in Carlstadt. When H.L. said "Okay, I gotta go[,]" Maucione responded with "Why? I don't get a hug or kiss goodbye?" H.L. said "no," but when she ultimately gave in and hugged Maucione goodbye, Maucione "turned his head in and he kissed [H.L.], no tongue, just kiss."

Pa1200–1202 (emphasis added).

H.L. described the various means and methods employed by Maucione to conceal and destroy evidence of his sexual abuse of H.L.:

Q. Did Mr. M, what did he tell you to change his name in your phone to?

A. He told me to change his name to a girl's name because uh, he said it would make it less obvious and then we could just talk and I wouldn't have to like not [sic] delete his number.

. . . .

Q. What else did [Maucione] tell you to do with the text messages after you received them?

A. Um, he told me to immediately delete them, make sure I had no traces of them, not to tell anybody, no friends, no sisters, nothing. He'd remind me of that every now and then to delete everything immediately

[Pa1198–1199 (emphasis added).]

Once Maucione's alleged sexual abuse was discovered, he instructed a third-party to contact H.L. and tell her that "[H.L.] has to protect [Maucione]. Say it was all about [Maucione's] baby and don't tell them anything." Pa1204–1205.

In response to Selective's First Request for Admissions ("FRFA"), H.L. admits that Maucione subjected her to the following sexual abuse:

- a. FRFA 4: "In August 2009 at Riggins Field, Maucione told H.L. 'you don't look like you're 16.'"
- b. FRFA 6: "In August 2009, Maucione texted H.L. that she 'had an amazing body.'"
- c. FRFA 8: "Maucione texted H.L. that he 'would give [H.L.] like so many orgasms.'"

- d. FRFA 10: “Maucione texted H.L. that he ‘wanted [H.L.] to give him head.’”
- e. FRFA 12: “Maucione texted H.L. that he ‘wanted to pin [H.L.] down and he just wanted to take advantage of [H.L.] and dominate [H.L.]’”
- f. FRFA 14: “Maucione asked H.L. to send him a picture of her breasts.”
- g. FRFA 15: “H.L. ‘gave in and gave [Maucione] [a picture] of [her] shirt was off, bra was off, but [H.L.] had her hands, one hand covering both’ nipples.”
- h. FRFA 17: “Maucione asked H.L. to send him a picture of her fully nude.”
- i. FRFA 18: “H.L. ‘sent [Maucione] a full, it was like full boobs, um picture, everything included, no shirt, no bra, no hands covering, everything, ‘cause that’s what he asked.’”
- j. FRFA 20: “Maucione asked H.L. to send him a picture of her ‘ass.’”
- k. FRFA 21: “H.L. ‘gave’ Maucione the requested picture of her ‘ass.’”
- l. FRFA 26: “Maucione asked H.L. to send him a picture of her in lingerie that H.L. purchased for her boyfriend’s birthday.”
- m. FRFA 27: “H.L. sent Maucione a ‘picture of [herself] in lingerie’ because Maucione demanded that he ‘better get a picture.’”
- n. FRFA 29: “Maucione sent H.L. a text and email with a picture of himself from the waist up without a shirt.”
- o. FRFA 37: “Maucione ‘turned his head in and he kissed [H.L.], no tongue, just kiss.’”
- p. FRFA 88: “Maucione texted H.L. that ‘[she has] a hot banging body’ or something similar.”
- q. FRFA 92: “Maucione did text H.L. that he was having dreams about her and wanted to make H.L. orgasm.”

- r. FRFA 99: “During her junior year of high school, H.L. sent Maucione a picture of her in a bra and a thong.”
- s. FRFA 101: “H.L. did not want to send Maucione any pictures of herself and H.L. did not send any of the pictures of herself to Maucione willingly.”
- t. FRFA 104: “Maucione hugged and kissed H.L.”

[See Pa1161–1274.²]

H.L.’s responses to Selective’s Second Request for Admissions (“SRFA”) provide additional evidence of Maucione’s sexual misconduct. See Pa1291–1321. The SRFA is premised on a five-page Statement authored by H.L. and attached as “Exhibit A.” See Pa1306–1311. Plaintiff admits that “the entire statement was authored by HL and is true and accurate to the best of her knowledge and recollection.” Pa1313. Consequently, H.L. admits all of the following facts:

- a. SRFA 3: “Maucione ‘told [H.L.] to get his number through [a third-party] and text [Maucione] once [H.L.] had it.’”
- b. SRFA 13: “Maucione said to H.L. ‘You don’t look like you’re 16.’”
- c. SRFA 15: “Maucione’s comment to H.L. that ‘You don’t look like you’re 16’ made H.L. feel uneasy.”
- d. SRFA 16: “H.L. did not question Maucione’s comment to H.L. that ‘You don’t look like you’re 16’ because Maucione was an authority.”

² H.L.’s responses: (1) admit facts necessary to conclude that Maucione sexually abused H.L., and yet; (2) deny those same facts on behalf of Maucione. Selective’s FRFA was served on H.L. (not Maucione) and designed to confirm H.L.’s version of events (not Maucione’s). Plaintiff’s attempted denials on behalf of H.L.’s alleged abuser—denials that contradict H.L.’s admissions—are improper and inadmissible.

- e. SRFA 18: “Maucione texted H.L. that she ‘had a hot banging body.’”
- f. SRFA 20: “Towards the end of the summer, Maucione asked H.L. for a picture of H.L.”
- g. SRFA 22: “Maucione ‘said he couldn’t see [H.L.’s] picture because [her Facebook] page was private and that [they] couldn’t be friends on Facebook until [she] graduated. So [Maucione] persisted and insisted that [H.L.] show him [her] hair cut. Finally, [H.L.] sent the same picture as shown on Facebook to him and his response was ‘Gay.’”
- h. SRFA 24: “H.L. learned that Maucione ‘expected [H.L.] to show more than just [her] face.’”
- i. SRFA 28: “Maucione ‘was much more verbally aggressive towards [H.L.] in person.’”
- j. SRFA 45: “If [H.L.] didn’t answer [Maucione’s] text he would usually send them again or send a new one, or call [her].”
- k. SRFA 46: “H.L. wrote . . . that ‘It was becoming too much so the end of September is when [she] first gave in to a picture of [herself] in a bra and thong.’”
- l. SRFA 48: “H.L. sent Maucione a picture of herself in a bra and thong because Maucione coerced her into taking and sending him the picture.”
- m. SRFA 50: “When H.L. sent Maucione the picture of herself in a bra and thong, she was humiliated, and felt disgusting and ashamed.”
- n. SRFA 51: “H.L. wrote . . . that ‘as the weeks progressed the persistence began and to avoid his comments in person, texts and calls [H.L.] sent [Maucione] what he ask [sic]. [H.L.] sent [Maucione] naked shots of [her] breast, genitals, even a video of [her] touching [her] self.’”
- o. SRFA 52: “Maucione asked H.L. to send him pictures of her breasts and genitals.”

- p. SRFA 53: “To avoid comments in person, texts, and calls, H.L. sent Maucione photos of herself naked, including her breasts and genitals.”
- q. SRFA 55: “Maucione asked H.L. to send him a video of her touching herself.”
- r. SRFA 56: “H.L. sent Maucione a video of her touching herself.”
- s. SRFA 58: “H.L. sent Maucione photos of her breasts and genitals and a video of her touching herself because she had lost all control.”
- t. SRFA 62: “H.L. ‘began pulling [her] hair out’ because Maucione coerced her into sending photos of her breasts and genitals and a video of her touching herself.”
- u. SRFA 68: “Maucione sent H.L. a degrading text about what he would do to her sexually.”
- v. SRFA 70: “Maucione sent H.L. a text message saying that he would give her so many orgasms.”
- w. SRFA 71: “Maucione sent H.L. a text message saying that he dreamed about her often.”
- x. SRFA 76: “Maucione instructed H.L. to put his name as ‘Carolyn’ in her cell phone, and he put her name as ‘Rob’ in his cell phone.”
- y. SRFA 83: “On Halloween Mr. Maucione texted [H.L.] saying to meet up with him because he was wearing a toga with nothing underneath.”
- z. SRFA 85: “[Maucione] would constantly say extremely vulgar comments [to H.L.] in person.”

[See Pa1291–1321.]

Maucione was convicted of Official Misconduct under N.J.S.A. 2C:30-2, Pa1332–1334, which requires that the misconduct be committed intentionally. See N.J.S.A. 2C:30-2 (misconduct must be committed “with purpose to obtain a benefit

. . . or to injure”) (emphasis added). He was sentenced to five years of probation, required to forfeit his teacher’s certification, barred from school fields, and forced to attend “sex offender counselling.” See Pa1332–1334.

LEGAL ARGUMENT

I. Standard of Review.

Trial court orders granting motions for summary judgment are subject to de novo review. See Branch v. Cream-O-Land Dairy, 244 N.J. 567, 582 (2021). The Appellate Division applies “the same standard” as the trial court. Christian Mission John 3:16 v. Passaic City, 243 N.J. 175, 184 (2020). Thus, the Appellate Division will “determine whether ‘the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law.’” Branch, 244 N.J. at 582 (quoting R. 4:46-2(c) and citing Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995)).

When evaluating whether summary judgment was properly granted, “[t]he Court must consider whether the competent evidential materials presented, viewed in the light most favorable to the non-moving party in consideration of the applicable evidentiary standard, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party.” Davis v. Devereux Foundation, 209 N.J. 269, 286 (2012) (citing Brill, 142 N.J. at 540). A non-moving

party may only defeat a motion for summary judgment by submitting “competent evidential material beyond mere speculation and fanciful arguments.” Hoffman v. Asseenontv.Com, Inc., 404 N.J. Super. 415, 426 (App. Div. 2009) (citation and internal quotations omitted) (emphasis added). As the Supreme Court made clear in Maressa v. New Jersey Monthly, 89 N.J. 176, 196, cert. denied, 459 U.S. 907 (1982), “courts should not hesitate to use summary judgment procedures where appropriate to bring [non-meritorious] actions to a speedy end.” The thrust of Brill and its progeny is to “encourage trial courts not to refrain from granting summary judgment when the proper circumstances present themselves.” Brill, 142 N.J. at 541.

The parties agreed with Judge Lynott during oral argument that there was no triable issue and that the lawsuit was properly decided by the court as a matter of law. 1T12:22 to 13:15, 1T29:19–24. Judge Lynott correctly held that there is no coverage for Maucione’s acts under the Selective Policies and New Jersey decisional law. There simply is no support for the contention that an alleged sexual predator is entitled to insurance coverage for sexually abusing a minor. Since the parties agree that this action distills to a question of law, and because there is no basis to disturb Judge Lynott’s ruling, this Court should affirm the judgment dismissing Plaintiff’s Complaint.

II. Plaintiff’s Brief Distorts the Facts (Pa1–23; Da1–2).

A. The Issue is Whether Maucione is Entitled to Insurance Coverage, Not Whether H.L. is Entitled to Insurance Coverage

Selective defended and resolved H.L.’s claims against the Board of Education, Superintendent, and Principal defendants named in the UFA—a fact that undermines any argument that the coverage provided by the Selective Policies is “illusory.” Pa17. H.L. and Maucione entered into a Settlement Agreement and \$500,000 consent judgment whereby Maucione assigned H.L. his alleged rights under the Selective Policies issued to the School Board Insurance Group. Pa636–637. H.L. agreed to seek a judgment that Selective is required to indemnify Maucione for the \$500,000 settlement. Pa637–638.³

Hence, it is critically important to recognize that H.L.: (1) is an assignee of Maucione’s purported rights under the Selective Policies; and, as such, (2) stands in Maucione’s shoes for the purposes of this action. Despite Plaintiff’s allegations, the key issue is not whether a victim like H.L. should receive insurance benefits for heinous alleged acts of sexual abuse. Rather, the focus of this action is whether

³ Selective pled and maintains a number of defenses that were not addressed by the trial court and are not at issue in this appeal, including Selective’s positions that the Settlement Agreement and Consent Judgment are unreasonable, collusive, products of bad faith, and non-binding and unenforceable against Selective. See Griggs v. Bertram, 88 N.J. 347, 366–68 (1982). Furthermore, Selective maintains that it has no duty to indemnify Maucione because Plaintiff failed to allocate the \$500,000 settlement between covered and uncovered claims. See Bldg. Materials Corp. of Am. v. Allstate Ins. Co., 424 N.J. Super. 448, 458, 465–66 (App. Div. 2012).

Maucione is entitled to insurance coverage for allegedly sexually abusing a sixteen-year-old student while he was a twenty-nine-year-old teacher. A plain reading of the Selective Policies and governing laws conclusively establishes that there is no coverage—nor should there ever be—for Maucione’s purported conduct.

Moreover, despite Plaintiff’s position, Maucione’s subjective intent is entirely irrelevant, as it is settled law that a wrongdoer’s intent to injure a minor can be objectively inferred in the sexual abuse context. This Court so held in Atlantic Employers Insurance Company v. Tots & Toddlers Pre-School Day Care Center, Inc., 239 N.J. Super. 276 (App. Div. 1990), and its progeny. Consequently, the key coverage issue is whether H.L.’s allegations of sexual abuse—and the evidence that now overwhelmingly supports those allegations—amount to the kind of reprehensible sexual misconduct that warrants application of the objective approach adopted in Tots & Toddlers. Here, the trial court properly concluded that: (1) Maucione’s alleged conduct is objectively reprehensible under Tots & Toddlers; (2) the Selective Policies afford no coverage for his atrocious alleged acts of sexual abuse; and (3) Selective has no duty to indemnify an alleged sexual predator. Judge Lynott’s conclusions are well-supported by the Selective Policies and governing laws and should be affirmed.

B. Plaintiff Attempts to Paradoxically Downplay Maucione’s Misconduct in an Effort to Obtain Insurance Coverage for an Alleged Sexual Predator

Plaintiff endeavors to evade and conceal Maucione’s appalling alleged sexual abuse in direct contravention of H.L.’s own pleadings, admissions, discovery responses, and testimony, and the opinions of H.L.’s own expert and mental health provider. Stated differently, Plaintiff is attempting to distort the very evidence of sexual abuse relied upon in the UFA in a disingenuous attempt to obtain insurance coverage for Maucione’s misconduct in this action. For example, H.L.’s Brief: (1) mischaracterizes Maucione’s conduct as a “gradually increasing inappropriate relationship . . . that involved communications and interactions, but no sexual contact[;]” (2) falsely claims that “there is simply no evidence to suggest that Maucione sexually assaulted Plaintiff[;]” and (3) incorrectly alleges that there was “no physical contact.” See Pl’s Br., pp. 1, 2, 6. Those summaries of Maucione’s purported acts are blatantly inaccurate attempts at misdirection.

First, the allegations that there was “no sexual contact” and “no physical contact” are belied by Plaintiff’s own Brief. See Pl’s Br., p. 6 (right after alleging that “there was no physical contact,” Plaintiff admits “a hug and possible kiss on the cheek”). In fact, Plaintiff admitted the “kiss goodbye” during argument before Judge Lynott, and now tellingly denies that sexual contact on appeal. 1T7:11–13.

Second, Maucione’s sexual abuse is well substantiated by H.L.’s own pleadings, admissions, testimony, and expert report in the UFA. See, e.g., Pa38–39,

¶ 4 (the UFA Complaint describes Maucione’s “[s]exual conduct with and/or directed towards [H.L.], including but not limited to: hug(s) and/or kiss(es); . . . sending and receiving pictures or video which involved various stages of undress and/or sexual contact[;] [and] [s]exual contact with [H.L.] by coercing H.L. to perform sexual acts upon herself with the purpose of either degrading or humiliating [H.L.] or in the pursuit of sexual arousal and/or gratification”); Pa25–26, ¶ 9 (repeating the UFA Complaint’s allegations); Pa777 (H.L.’s expert found that Maucione engaged in “inappropriate physical contact . . . [H.L.]”); Pa1202 (H.L. reported during a sworn statement that Maucione “turned his head in and he kissed [her], no tongue, just kiss.”); Pa1168 and Pa1278, ¶ 37 (H.L. admits that Maucione “turned his head in and he kissed [her], no tongue, just kiss.”); Pa1176 and Pa1289, ¶ 104 (H.L. admits that “Maucione hugged and kissed H.L.”); Pa1329–1330 (H.L.’s certifies that “Maucione did engage in sexual contact with [H.L.]. The sexual contact consisted of holding and kissing plaintiff as well as sending a requesting explicit communications”). Even H.L.’s Statement of Facts quotes her testimony that Maucione hugged and kissed H.L. Pa1088–1089.

While the trial court properly rejected Plaintiff’s attempt to evade H.L.’s own sworn accounts of sexual abuse, Plaintiff again resorts to the same tactic on appeal. That strategy is not only insincere, but very telling, as it: (1) underscores Plaintiff’s attempt to elude the claims and evidence of sexual abuse that served as the

foundation of the UFA; and (2) highlights the inescapable reality that there is no insurance coverage for Maucione's alleged sexual misconduct. Indeed, if there were coverage for Maucione's alleged acts, then why would Plaintiff feel the need to mischaracterize those acts here? The only logical answer to that question is that there is no coverage for Maucione's misdeeds, and, as such, Plaintiff engineers a strategy to inaccurately recast heinous sexual assault allegations in a different light in an attempt to obtain coverage where none exists. While Maucione's alleged sexual abuse of H.L. is intolerable, inexcusable, and reprehensible, it is nevertheless against public policy to provide "insurance indemnification for the civil consequences of wrong-doing" or "condone and encourage intentionally-wrongful conduct." Voorhees v. Preferred Mut. Ins. Co., 128 N.J. 165, 181 (1992).

Third, in stark contrast to Plaintiff's puzzling stance that H.L. was sexually abused when she "was already 16 years old, the age of consent in New Jersey," Pl.'s Br., p. 31; Maucione was charged with criminal sexual contact with a minor because he was a teacher with supervisory and disciplinary power over H.L. Specifically, he was charged with: (1) violating N.J.S.A. 2C:14-3b., which criminalizes sexual contact with a victim between the ages of 16 and 18 when the actor has supervisory or disciplinary power over the victim; and (2) endangering the welfare of a child in violation of N.J.S.A. 2C:24-4a., which criminalizes sexual conduct by a caregiver that would "impair or debauch the morals of the child . . ."). Pa1332–1334; see also

Pa39, ¶ 4E. (H.L. expressly alleges that Maucione engaged in “[a] course of conduct designed to impair and/or debauch the morals of [H.L.]”); Pa25–26, ¶ 9E. (same).

Fourth, Plaintiff continues to rely on the fact that “Maucione pled guilty only to the charge of third-degree official misconduct, and was sentenced to five years probation.” See Pl.’s Br., p. 8. That is yet another misplaced argument because a conviction for Official Misconduct requires that the misconduct be committed intentionally, “with purpose to obtain a benefit for himself . . . or to injure . . . another” N.J.S.A. 2C:30-2 (emphasis added). Even if Maucione did not plead guilty to a crime that requires intent to benefit himself or injure another (he did), his unmistakable intent to injure H.L.: (1) is not determined by the crime to which he pled guilty; and (2) can be objectively inferred under Tots & Toddlers in light of the overwhelming evidence of sexual abuse. Maucione was also sentenced to five years of probation, required to forfeit his teacher’s certification, barred from school fields, and compelled to attend “sex offender counselling.” See Pa1332–1334. If Maucione was not a “sex offender,” then why would the Court require him to attend “sex offender counselling”?

Fifth, Plaintiff’s appeal offers an antiquated and impractical understanding of sexual abuse. The contention undergirding Plaintiff’s appeal is that no sexual abuse exists in the absence of in-person sexual contact. That absurd proposition is a moot point here insofar as Plaintiff repeatedly admits that Maucione did have sexual

contact with H.L. in the form of hugging and kissing—a concession that sexual abuse did occur.⁴ However, even without that admitted direct physical sexual contact, the additional evidence of Maucione’s sexual abuse of H.L. leaves no doubt that his alleged conduct is precisely the kind of reprehensible sexual abuse from which an intent to injure can be objectively inferred. See Pa19 (where Judge Lynott recognizes that there is “ample evidence of reprehensible grooming and other sexual misconduct by Maucione to buttress the use of the objective assessment employed in Tots & Toddlers. To conclude otherwise is to ignore the modern-day reality that a sexual predator can effect significant harm with a computer, an email platform, a cell phone and camera, as occurred here.”) (emphasis added).

In sum, the pleadings, admissions, evidence, and expert opinions confirm that Maucione: stalked and groomed H.L. for sexual abuse; made consistent and frequent comments of a sexual nature; informed of sexually explicit dreams and a desire to perform sexual acts on H.L.; coerced H.L. to send text, picture, and video messages depicting her in various stages of undress and engaging in sexual conduct; and sexually abused her so severely that she developed Trichotillomania (a medical condition colloquially known as “hair-pulling disorder”). Those sexual abuse allegations serve as the basis of Plaintiff’s claims in the UFA.

⁴ The position is further belied by Plaintiff’s Certified Answers to Interrogatories, which expressly declare that Maucione’s “sexual contact” with H.L. included “sending and requesting explicit communications . . .” Pa1330 (emphasis added).

However, in this declaratory judgment action, Plaintiff attempts to minimize Maucione’s reprehensible conduct as nothing more than “a gradually increasing inappropriate relationship . . . that involved communications and interactions, but no sexual contact.” Pl.’s Br., 1. That characterization is, at best, irreconcilable with the pleadings and evidence, and it was properly rejected by the trial court as a glaring attempt at misdirection designed to obtain insurance coverage for the benefit of an alleged sexual predator. This Court—like the trial court—should reject Plaintiff’s suggestions that: (1) Maucione’s alleged conduct was not objectively certain to injure H.L., who literally tore out her hair in response to alleged acts of pedophilia; (2) sexual abuse of a minor by someone with supervisory and disciplinary power is not objectively certain to injure the child; and (3) alleged sexual predators are entitled to insurance coverage for their misdeeds so long as they testify that they never expected or intended to harm their victims.

Finally, the coverage issues at the center of the dueling dispositive motions are questions of law that were properly decided based on a plain reading of the Selective Policies. Plaintiff continues to rely on irrelevant and inadmissible testimony of Selective representatives that has already been barred by the trial court.⁵ Selective submits that Judge Lynott correctly: (1) rejected Plaintiff’s attempt to alter

⁵ Plaintiff is barred from calling the Selective witnesses at trial, referencing the Selective Policies at trial, and/or referencing Selective’s claim file or claim administration at trial. See Pa1322–1323.

the actual claims and evidence of sexual abuse; (2) applied the true facts of this case to the Selective Policies and governing laws; and (3) concluded—just as this Court did in Tots & Toddlers—that Selective has no obligation to indemnify Maucione for his alleged sexual abuse of a 16-year-old child. Since the laws and public policies of this State do not—and should never—afford insurance coverage to sexual predators, Selective respectfully submits that this Court should affirm Judge Lynott’s decision.

III. The Trial Court Properly Concluded that Selective has no Duty to Indemnify Maucione under the Abuse or Molestation Liability Coverage Part of the Policy (Pa1–23; Da1–2).

A. Duty to Indemnify Standard

An insurer’s coverage obligation is governed by the terms, conditions, definitions, exclusions, and endorsements contained within the policy. See, e.g., Flomerfelt v. Cardiello, 202 N.J. 432, 441 (2010) (citing Kampf v. Franklin Life Ins. Co., 33 N.J. 36, 43 (1960)). “The terms of insurance contracts are given their plain and ordinary meaning” and the policy “will be enforced as written when its terms are clear in order that the expectations of the parties will be fulfilled.” Mem’l Properties, LLC v. Zurich Am. Ins. Co., 210 N.J. 512, 525 (2012) (citations and internal quotations omitted). “[C]ourts cannot write for the insured a better policy of insurance than the one purchased.” Ibid. (citations and internal quotations omitted).

The interpretation of an insurance policy is a question of law for the court. See Selective Ins. Co. of Am. v. Hudson E. Pain Mgmt. Osteopathic Med., 210 N.J.

597, 605 (2012). The court’s “task in construing a contract of insurance ‘is to search broadly for the probable intent of the parties in an effort to find a reasonable meaning in keeping with the express general purposes of the policy.’” Argent v. Brady, 386 N.J. Super. 343, 350–51 (App. Div. 2006) (quoting Sinopoli v. N. River Ins. Co., 244 N.J. Super. 245, 250 (App. Div. 1990), certif. denied, 127 N.J. 325 (1991)). “In attempting to discern the meaning of a provision in an insurance contract, the plain language is ordinarily the most direct route. If the language is clear, that is the end of the inquiry.” Chubb Custom Ins. Co. v. Prudential Ins. Co. of Am., 195 N.J. 231, 238 (2008) (citations omitted).

It is well-settled that, “in the absence of an ambiguity, a court should not engage in a strained construction to support the imposition of liability or write a better policy for the insured than the one purchased.” Ibid. (citations and internal quotations omitted); see also Progressive Cas. Ins. Co. v. Hurley, 166 N.J. 260, 273 (2001). That proposition is quite significant when measured against the unambiguous Selective Policy provisions at issue here. Our Supreme Court holds that “courts will not manufacture an ambiguity where none exists” and “[a]n insurance policy is not ambiguous merely because two conflicting interpretations of it are suggested by the litigants.” Oxford Realty Grp. Cedar v. Travelers Excess & Surplus Lines Co., 229 N.J. 196, 207 (2017) (citations and internal quotations omitted). Policy terms are not ambiguous merely because they are undefined, and

courts “should not engage in a strained construction” of “clear and unambiguous” terms. Katchen v. Gov’t Emps. Ins. Co., 457 N.J. Super. 600, 606 (App. Div. 2019).

The duty to indemnify is triggered only when a claim is proven to satisfy the terms and conditions of the insurance policy’s coverage grant. See, e.g., Bldg. Materials Corp. of Am. v. Allstate Ins. Co., 424 N.J. Super. 448, 464 (App. Div. 2012) (insureds have the burden of proving that their claim “is covered under the policy’s insuring clause.”); Weedo v. Stone-E-Brick, Inc., 81 N.J. 233, 249 (1979) (an insurance claim must be “cognizable under the general grant of coverage in the first instance in order to constitute a claim to which th[e] insurance applies.”); see also Firemen’s Ins. Co. of Newark v. Nat’l Union Fire Ins. Co., 387 N.J. Super. 434, 441 (App. Div. 2006) (“Clearly, if there was no coverage under the insuring clauses, there is no need to consider whether coverage is negated by the exclusions.”). “If the insured offers sufficient credible evidence to establish a prima facie loss within the coverage of the policy, the burden of proving that the loss falls within the exclusionary provisions of the policy shifts to the insurer.” Bldg. Materials, 424 N.J. Super. at 464–65. “Exclusionary clauses are presumptively valid and are enforced if they are specific, plain, clear, prominent, and not contrary to public policy.” Flomerfelt, 202 N.J. at 441 (citations and internal quotations omitted). Simply stated, “the insured [is] required to present proof of coverage before it [can] invoke the duty

to indemnify.” Id at 466 (citing Heldor Indus., Inc. v. Atl. Mut. Ins. Co., 229 N.J. Super. 390, 399 (App. Div. 1988)).

The foregoing case law requires the trial court to do precisely what it did: consider what is now copious evidence of Maucione’s actual—not just alleged—conduct and determine whether it is covered under the Selective Policies. See, e.g., Bldg. Materials, 424 N.J. Super. at 464; Weedo, 81 N.J. at 249. Here, Selective has no duty to indemnify Maucione because the pleadings, discovery, testimony, admissions, and opinions of H.L.’s treating provider and expert confirm that Maucione sexually abused H.L. Since the Selective Policies do not afford coverage to sexual predators, and because it is contrary to New Jersey law and public policy to indemnify a sexual predator for the civil consequences of his wrongdoing, Judge Lynott correctly determined that Selective owes no duty to indemnify Maucione.

By way of example, Maucione made the following sexually explicit comments to Plaintiff: H.L. does not look like she is 16; has an “amazing body,” a “hot banging body,” and a “great set of boobs”; Maucione has sexually explicit dreams about H.L., wants to “give [H.L.] like so many orgasms,” “really wanted [H.L.] to give him head,” “wanted to pin [H.L.] down and . . . take advantage of [H.L.] and dominate [H.L.], and that H.L. has never had sex like that before.” See Pa1161–1274, Pa1291–1321. Maucione exchanged over 10,000 text messages with H.L. and coerced the 16-year-old to send sexually explicit text, picture, and video

messages, including pictures of H.L. in lingerie, a bra and thong, topless with one hand covering her nipples, “full boobs . . . everything included, no shirt, no bra, no hands covering, everything, ‘cause that’s what he asked,” and a video of H.L. sexually “pleasur[ing] [her]self”. See Pa243 at 248:13 to 249:9, Pa1161–1274, Pa1291–1321. Maucione also engaged in sexual physical contact with H.L. when he hugged and kissed her in his car. See Pa1088–1089, Pa1200–1202.

While expert testimony is not necessary to establish that Maucione’s objectively reprehensible conduct amounts to sexual abuse, Plaintiff’s expert reached that very conclusion. Dr. Farber found that Maucione: (1) “engaged in inappropriate sexually oriented communication (text messages, cell phone conversations, face to face conversations, pictures, videos) and inappropriate physical contact” with H.L.; (2) systematically victimized [H.L.] sexually and psychologically over the period of two years in a high school classroom via cell phone, computer and text messages.”; (3) resigned from his teaching position for “sending inappropriate texts, having a student in his vehicle (no less than three times), sending and receiving nude and semi-nude pictures, using school electronic devices to send and receive inappropriate messages and pictures, [and] inappropriate contact with a child among other grievous behaviors . . .”; (4) “systematically manipulate[d] a 15/16-year-old child for sexual favor and his own personal and sexual gratification.”; and (5) engaged in conduct summarized as “physical,

psychological and sexual abuse perpetrated against [H.L.] over at least a 2 year period from 2008-2010.” Pa777; Pa794; Pa798, ¶ 10.A; Pa802.

Plaintiff’s treating social worker agrees. Ms. Adessa found that Maucione was “stalking” and “grooming [H.L.] to abuse her.” Pa823–824, 20:21 to 21:7. She did not mince words when asked if Maucione is a sexual predator: “no doubt this is sexual predator behavior.” Pa843, 40:13–17. She believes H.L.’s emotional distress and physical injuries were caused by Maucione’s abuse. Pa1303, 1319, ¶ 62.

The evidence of Maucione’s sexual abuse is overwhelming. That evidence is the prism through which the trial court conducted its coverage analyses, and it fully supports Judge Lynott’s ruling that there is no coverage for Maucione’s acts. Selective respectfully urges this Court to reject Plaintiff’s tactics of: (1) attempting to alter the allegations of the pleadings and facts of the case; (2) downplaying clear evidence of sexual abuse in an effort to obtain insurance coverage that does not exist; and (3) mischaracterizing this action as one that seeks insurance coverage for a victim, instead of one that seeks coverage for an alleged sexual predator following assignment of his purported “rights” under the Selective Policies. Against that backdrop, we proceed with an analysis of the relevant Selective Policy provisions.

B. The Abuse or Molestation Liability Coverage Part

The “Insuring Agreement” of the Abuse or Molestation Liability Coverage Part (the “AM Part”) of the Selective Policies states:

- a. We will pay on behalf of the insured those sums that the insured becomes legally obligated to pay for “loss” to which this insurance applies. . . .
- b. This insurance applies only to “loss” which results from a “wrongful act”

[See Pa146 (emphasis added).]

The phrase “[w]rongful act” is defined within the AM Part as follows:

- a. Any act of actual or threatened abuse or molestation (including sexual misconduct or sexual molestation) which results in injury to another, or
- b. The negligent:
 - (1) Employment;
 - (2) Investigation;
 - (3) Supervision;
 - (4) Reporting to the proper authorities, or failure to so report; or
 - (5) Retention;

of a person for whom any insured is or ever was legally responsible and whose conduct would be excluded by Paragraph a. above.

For the purpose of this coverage, abuse means an intentional, inherently harmful act.

[See Pa150 (emphasis added).]

The AM Part Coverage Form contains the following applicable exclusions:

This insurance does not apply:

- a. To any person who:

(1) Participated in or who conspired with or directed a participant in any “wrongful act”;
or

. . . .
b. To the cost of defense of, or payment of fines for, any person who actually or allegedly violated any penal or criminal statute. . . .

[See Pa146 (emphasis added).]

Succinctly summarized, the AM Part: (1) “applies only to ‘loss’ which results from a ‘wrongful act’”; (2) defines “wrongful act” as “[a]ny act of actual or threatened abuse or molestation (including sexual misconduct or sexual molestation) which results in injury to another”; (3) defines “abuse” as “an intentional, inherently harmful act”; and importantly, (4) “does not apply” to “any person who . . . [p]articipated in . . . any ‘wrongful act.’” See Pa146, Pa150. That means the AM Part unambiguously: (1) excludes coverage for the individual that “participated in” the “wrongful act” of “sexual misconduct” (i.e., Maucione); and (2) provides a potential basis for coverage for individuals that did not “participate in” the “wrongful act,” but rather, are alleged to have negligently supervised the person that committed the “wrongful act.” See Pa16, Pa146, Pa150.

Plaintiff continues to overlook that glaring reality and inaccurately characterizes the AM Part as “illusory.” It is important to reiterate that the Selective Policies were issued to the School Board Insurance Group, not Maucione. Pa123. Consequently, as recognized by the trial court, if Maucione “participated in” a

“wrongful act” of sexual abuse or misconduct, then there is no coverage available to Maucione for that “wrongful act” even though there may be coverage available to individuals who are alleged to have negligently supervised Maucione. Pa146, Pa150, Pa16 (“the Policy thus affords coverage for the acts of Maucione to the Board of Education, the Superintendent and the Principal, but not to Maucione himself. There is no other reasonable interpretation of the Policy text, and none has been advanced by H.L.”). That is precisely why Selective defended and resolved H.L.’s claims against the School Board Insurance Group in the UFA. As such, it cannot be credibly argued that the AM Part is “illusory.” See Pa17 (“Such coverage is hardly illusory as the results of the [UFA] amply demonstrate - Selective covered the claims lodged against the Board of Education, the Superintendent and the Principal.”).

There is no disputing the fact that Maucione “participated in” the intentional, inherently “wrongful act[s]” of sexual abuse and misconduct. H.L.’s own pleadings in the UFA and this matter declare that Maucione subjected her “to highly offensive sexual advances, inappropriate sexual contact and sexual harassment” Pa39, ¶ 5; Pa26, ¶ 10 (emphasis added). The UFA Complaint adds that he “committed sexual assault and engaged in improper sexual contact against [H.L.]” Pa44, ¶ 2 (emphasis added). Plaintiff’s counsel acknowledged that “[t]here’s clearly very strong, you know, sexual assault type allegations in the Complaint and we really don’t dispute that that would generally, probably, fall outside of the coverage, depending on

certain factual situation [sic].” Pa412, 89:3–11. Plaintiff’s expert, Dr. Farber, characterized Maucione’s conduct as “sexual abuse.” Pa802. Plaintiff’s treating social worker, Ms. Adessa, found that Maucione was “grooming” H.L. to have sexual intercourse with a minor child. Pa825, 22:17–23; Pa834, 31:2–8; Pa844, 41:2–5. When the pleadings and expert opinions are paired with Plaintiff’s admissions, it becomes unmistakably clear that Maucione’s conduct amounts to “wrongful act[s]” under the Selective Policies (i.e., “[a]ny act of actual or threatened abuse or molestation (including sexual misconduct or sexual molestation) which results in injury to another.”). Pa150. Since Maucione was the participant in the “wrongful act[s],” he is not entitled to coverage under the AM Part of the Policies.

C. Maucione’s Intent to Injure H.L. can be Objectively Inferred

Plaintiff erroneously argues that the central issue is whether Maucione subjectively expected or intended to injure H.L. during his prolonged sexual abuse. That argument is belied by a perfunctory review of the applicable case law. It is now well-established that intent to injure a minor is objectively inferred in the sexual abuse context because “[a] subjective test suggests that it is possible to molest a child and not cause some kind of injury” Tots & Toddlers, 239 N.J. Super. at 283; see also Voorhees, 128 N.J. at 185 (“sexual assault of children is so inherently injurious that it can never be an accident”). Decisional law confirms that: (1) Maucione’s intent to injure should be objectively inferred; (2) his subjective intent

is irrelevant; (3) there is no coverage available to Maucione for his sexual misconduct; and, as such (4) Selective has no duty to indemnify Maucione.

Tots & Toddlers involved children who were “allegedly sexually abused” at day care. 239 N.J. Super. at 278. The day care’s insurer filed a motion for summary judgment maintaining that it had no obligation to defend or indemnify the owners, one of whom allegedly committed the sexual abuse. Id. at 278–79. The court granted the motion, and the victims appealed, citing a factual issue as to whether the wrongdoers intended to injure the children (i.e., whether the injury caused by the sexual abuse constituted an accidental “occurrence” under the policy). Id. at 281.

This Court began by reciting the general rule that coverage may exist “for the unintended results of an intentional act, but not for damages assessed because of an injury intended to be inflicted.” Id. at 281 (quoting Lyons v. Hartford Ins. Group, 125 N.J. Super. 239, 245 (App. Div. 1973), certif. denied, 64 N.J. 322 (1974)). However, this Court squarely rejected that general rule in the sexual assault context, concluded that there was no need to consider the alleged wrongdoer’s subjective intent, and held that the intent to injure could and should be objectively inferred:

As a matter of public policy and logic we conclude that the better rule warrants application of the objective approach. A subjective test suggests that it is possible to molest a child and not cause some kind of injury, an unacceptable conclusion. Certainly, one would and should expect some physical or psychological injury or both, to result from such acts.

....

It is simply against public policy to indemnify a person for a loss incurred as a result of his own willful wrongdoing.

[Id. at 282–84 (citations omitted) (emphasis added).]

Tots & Toddlers undermines the relevance of Maucione’s subjective intent and establishes that his intent to injure H.L. can and should be objectively inferred. This Court has clearly, forcefully, and unmistakably rejected the preposterous position Plaintiff continues to advance: that a jury must determine whether Maucione subjectively intended to injure H.L. because it is somehow possible to sexually abuse a child without injuring that child.

Application of the objective approach here is consistent with Voorhees:

When the actions are particularly reprehensible, the intent to injure can be presumed from the act without an inquiry into the actor’s subjective intent to injure. That objective approach focuses on the likelihood that an injury will result from an actor’s behavior rather than on the wrongdoer’s subjective state of mind. The Appellate Division adopted an objective test in [Tots & Toddlers] [T]he court, citing several out-of-state decisions holding that sexual assault of children is so inherently injurious that it can never be an accident, held that “[a]s a matter of public policy and logic the better rule warrants application of the objective approach,” . . . according to which the intent to injure would be presumed from the performance of the act.

[Voorhees, 128 N.J. at 184–85 (emphasis added).]

Since the alleged conduct in Vorhees—false statements about a teacher’s competence—is not even remotely comparable to the sexual abuse of minors, it

comes as no surprise that the Court elected not to apply the objective approach. Id. at 170; see also High Point Ins. Co. v. J.M., 398 N.J. Super. 562, 569 (App. Div. 2008) (“By allowing coverage, Lyons and Voorhees do not violate the public policy interest in protecting children; the torts in th[o]se cases do not involve sexual exploitation of children.”). Here, Tots & Toddlers and Voorhees support application of the objective approach due to the reprehensible nature of Maucione’s alleged acts.

This Court consistently applies the objective standard adopted in Tots & Toddlers and approved in Voorhees in cases involving sexual abuse allegations. In Prudential Prop. & Cas. Ins. Co. v. Boylan, 307 N.J. Super. 162, 166 (App. Div. 1998), a fifteen-year-old boy was accused of sexually assaulting a five-year-old girl. This Court held that there was no insurance coverage for the boy’s conduct because “where, as here, the actions are ‘particularly reprehensible,’ an intent to injure can be presumed from the act without an inquiry into the actor’s subjective intent.” Id. at 169. In High Point, an insurer argued that it was not obliged to defend or indemnify an insured charged with sexually abusing a minor. 398 N.J. Super. at 564. This Court rejected the subjective approach discussed in Lyons and Voorhees (cases that do not involve sexual abuse) and affirmed the trial court’s use of the objective approach because “sexual assault of children is so inherently injurious that it can never be an accident.” Id. at 571. Unsurprisingly, and as recognized by the Third Circuit, “the overwhelming majority of courts considering” whether an insurer is

obliged to cover sexual abuse of minors hold that “intent to harm will be inferred as a matter of law” Wiley v. State Farm Fire & Cas. Co., 995 F.2d 457, 463 (3d Cir. 1993).⁶

⁶ See, e.g., Fireman’s Fund Ins. Co. v. Hill, 314 N.W.2d 834, 835 (Minn. 1982) (Minnesota Supreme Court held that “an intention to inflict injury can be inferred as a matter of law” when an individual engages in sexual activity with a minor); Aetna Cas. & Sur. Co. v. Roe, 650 A.2d 94, 102 (Pa. Super. Ct. 1994) (Pennsylvania Supreme Court adopted the inferred intent rule for “cases involving the sexual abuse of a child by an insured adult”); CNA Ins. Co. v. McGinnis, 282 Ark. 90, 93 (1984) (Arkansas Supreme Court held that it “flies in the face of all reason, common sense and experience” to argue that one who sexually abuses a minor “did not expect or intend to cause injury”); Vermont Mut. Ins. Co. v. Malcolm, 128 N.H. 521, 524 (1986) (New Hampshire Supreme Court held that sexual abuse of minors is so “inherently injurious in the most obvious sense” that the resulting injuries cannot be considered “accidental”); Rodriguez v. Williams, 107 Wash. 2d 381, 387 (1986) (a case involving sexual abuse of a fifteen-year-old where the Washington Supreme Court held that the intent to injure “should be inferred to the insured in sex abuse cases.”); J. C. Penney Cas. Ins. Co. v. M. K., 52 Cal. 3d 1009, 1027 (1991) (California Supreme Court found that “allow[ing] coverage for child molestation would be contrary to the almost unanimous rule in other states” and held that since the intent to harm can be inferred from sexual abuse, “[a]n insured therefore cannot show or attempt to show that he subjectively intended no harm.”); State Farm Fire & Cas. Co. v. Davis, 612 So. 2d 458, 464 (Ala. 1993) (“Alabama now joins the growing number of states that have adopted the inferred-intent rule in child sex abuse cases.”); Foremost Ins. Co. v. Weetman, 726 F. Supp. 618, 622 (W.D. Pa. 1989) (“[a] person who sexually abuses a minor cannot expect his insurer to cover his misconduct and cannot escape personal liability by claiming that he did not intend to cause any harm. . . . [I]njury always ensues, and we conclude that one who manipulates children for his own sexual gratification intends any resulting injuries, as a matter of law.”), *aff’d sub nom.*, Foremost Ins. Corp. v. Weetman, 904 F.2d 694 (3d Cir. 1990); see also Wiley, 995 F.2d at 461 n.5–6 (citing thirty-four states that have “adopted the majority approach” where the intent to injure is inferred as a matter of law in cases involving sexual abuse of minors); Altena v. United Fire & Cas. Co., 422 N.W.2d 485, 485, 490 (Iowa 1988) (Iowa Supreme Court held that the intent to injure can be inferred in response to the sexual abuse of a 20-year-old adult).

Maucione’s documented sexual abuse of H.L. amounts to a hallmark example of reprehensible conduct that warrants application of the objective approach whereby his intent to injure H.L. is inferred. Voorhees declares: “we have long held that public policy denies insurance indemnification for the civil consequences of wrong-doing. On the other hand, we recognize the desire to compensate victims with insurance proceeds to the extent that that compensation will not condone and encourage intentionally-wrongful conduct.” 128 N.J. at 181 (internal citations omitted) (emphasis added). As recognized by Judge Lynott, both expressions of this State’s public policy support application of the objective approach:

the conduct at issue in this case is exactly the sort of reprehensible sexual misconduct that caused the Tots & Toddlers court, and other courts around the country, to hold that an objective assessment applies in cases involving such misconduct and that, pursuant to such assessment, finding that harm was expected and intended is warranted. . . . The impetus that informed the judicial determination, in cases such as Tots & Toddlers, to apply such an objective assessment is the need to achieve an appropriate balance between protecting the rights of an innocent victim while not countenancing, via insurance, acts of sexual predation. This essential logic applies with equal force in the circumstances of this case as it did in Tots & Toddlers. Put differently, there is no meaningful difference between that case and this one in relation to the necessity for examining the conduct on an objective basis and for disregarding the assertions of lack of subjective intent to harm.

. . . .

[E]ven putting aside that there is some evidence of contact of a sexual nature in this record - the hug and kiss between a teacher and a minor in the context in which it occurred -

there is ample evidence of reprehensible grooming and other sexual misconduct by Maucione to buttress the use of the objective assessment employed in Tots & Toddlers. To conclude otherwise is to ignore the modern-day reality that a sexual predator can effect significant harm with a computer, an email platform, a cell phone and camera, as occurred here. The record here reflects numerous communications in which Maucione asked for, and persuaded H.L. to submit, pictures and a video of herself in states of undress and engaging in sexually gratifying conduct.

Nothing more is required to support the application of the objective test to measure the availability of coverage. The imputation of an intent to cause harm to the victim is as appropriate and reasonable in this case as it was in Tots & Toddlers.

[Pa19–20 (emphasis added).]

Plaintiff is seeking a declaration that Selective owes a duty to indemnify a sexual predator for “the civil consequences of [his] wrong-doing.” Granting that relief would send a clear message to sexual predators that they may be entitled to insurance coverage for their misconduct so long as they make a convincing case (and a self-serving case to avoid potential criminal and civil consequences) that they never subjectively expected or intended to harm their victims. That repulsive result would incentivize sexual abuse and “condone and encourage intentionally-wrongful conduct”—outcomes that New Jersey decisional law and public policies endeavor to prevent. Since Maucione was a participant in the “wrongful act[s]” at issue, there

is no coverage for his “intentional, inherently harmful” sexual misconduct under a plain reading of the AM Part of the Selective Policies and the controlling case law.

The cases cited by Plaintiff that apply a subjective standard are inapposite to the present matter because they do not involve reprehensible sexual abuse allegations like the ones at the heart of this matter and Tots & Toddlers. See Voorhees (subjective approach used to determine whether statements regarding a teacher were expected or intended to injure); SL Indus., Inc. v. Am. Motorists Ins. Co., 128 N.J. 188, 212 (1992) (subjective approach used to assess whether an employer expected or intended to injure an employee alleging discrimination); Harleysville Ins. Companies v. Garitta, 170 N.J. 223, 240–42 (2001) (assailant who fatally stabbed a victim expected/intended to cause injury); and Cumberland Mut. Fire Ins. Co. v. Murphy, 183 N.J. 344, 350 (2005) (a divided Court affirmed an unpublished decision holding that a boy who shot BBs at passing cars did not expect or intend to injure anyone in light of visibility and weather conditions, distance from the road, and other factors). In fact, all four decisions confirm that an actor’s subjective intent need not be considered in response to the kind of objectively reprehensible conduct at issue here. See Voorhees, 128 N.J. at 184 (“When the actions are particularly reprehensible, the intent to injure can be presumed from the act without an inquiry into the actor’s subjective intent to injure.”); SL, 128 N.J. at 208 (intent to injure can be “presume[d]” under appropriate circumstances); Garitta,

170 N.J. at 241 (“If the insured’s conduct is particularly reprehensible, then the insured’s intent may be presumed as a matter of law.”); Murphy 183 N.J. at 349 (“if the acts are particularly reprehensible (for example, sexual abuse of children in a day care center), subjective intent can be presumed from the likelihood that injury will result from that reprehensible conduct”). Maucione’s intent to injure H.L. can—and should—be objectively inferred as a matter of law.

D. The Abuse or Molestation Liability Coverage Part of the Selective Policies is the Only Applicable Part of the Policies

The fact that the AM Part provides no coverage for Maucione’s conduct is quite significant insofar as it is the only potentially applicable Part of the Selective Policies. Indeed, the AM Part declares:

Except for the insurance provided by this Coverage Part, the policy to which this Coverage Part is attached does not apply to any claim or “suit” seeking damages arising out of any actual or alleged act of abuse or molestation (including sexual misconduct or sexual molestation).
[See Pa149 (emphasis added).]

Since the AM Part is the only Part that could apply to any “suit” alleging abuse, sexual molestation, or sexual misconduct, that necessarily means there is no other applicable Part of the Selective Policies. Thus, the trial court properly granted summary judgment. Pa18 (“the Policy also excludes coverage altogether under the General Liability Coverage part in light of provisions clearly-establishing the Abuse and Molestation Coverage Part as the sole source of coverage for such conduct.”).

IV. The Trial Court Properly Concluded that Selective has no Duty to Indemnify Maucione under the Commercial General Liability Coverage Part of the Policies (Pa1-23; Da1-2).

In the interest of completeness, even if it could be argued that the Commercial General Liability Coverage Part (the “CGL Part”) of the Selective Policy was applicable, that Part still would not provide coverage to Maucione. The “Insuring Agreement” within the CGL Coverage Forms states, in relevant part:

- a. 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. . . .
- b. This insurance applies to “bodily injury” and “property damage” only if:
 - (1) The “bodily injury” or “property damage” is caused by an “occurrence” that takes place in the “coverage territory”

[See Pa128 (emphasis added).]

The CGL Coverage Forms contain the following exclusion:

This insurance does not apply to:

- a. **Expected Or Intended Injury**
“Bodily injury” or “property damage” expected or intended from the standpoint of the insured. . . .

[See Pa129 (emphasis added).]

The CGL Part also contains the following pertinent definitions:

3. “Bodily injury” means bodily injury, sickness or disease sustained by a person

13. “Occurrence” means an accident

[See Pa140–142 (emphasis added).]

Finally, the CGL Part includes an Abuse or Molestation Exclusion Endorsement stating that the GL Part “does not apply to bodily injury” . . . arising out of:

1. The actual or threatened abuse or molestation by anyone of any person while in the care, custody or control of any insured, or

2. The negligent:
 - a. Employment;
 - b. Investigation;
 - c. Supervision;
 - d. Reporting to the property authorities, or failure to so report; or
 - e. Retention;

of a person for whom any insured is or ever was legally responsible and whose conduct would be excluded by Paragraph 1. above.

For the purpose of this endorsement, abuse means an intentional, inherently harmful act.

[See Pa144 (emphasis added).]

To summarize, the CGL Part: (1) “applies to ‘bodily injury’ . . . only if . . . [t]he ‘bodily injury’ . . . is caused by an “occurrence”; (2) defines “Occurrence” as “an accident”; (3) “does not apply to . . . ‘Bodily injury’ . . . expected or intended from the standpoint of the insured”; (4) “does not apply to ‘bodily injury’ . . . arising out

of . . . actual or threatened abuse or molestation”; and (5) defines “abuse” as “an intentional, inherently harmful act.” See Pa128–129, Pa140–142, Pa144.

Tots & Toddlers and its progeny confirm that Maucione’s conduct is not covered under the CGL Part because the injury allegedly caused by his actions is not an accidental “occurrence.” One cannot “accident[ally]” injure a minor during sexual abuse because it is not “possible to molest a child and not cause some kind of injury Certainly, one would and should expect some physical or psychological injury or both, to result from such acts.” Tots & Toddlers, 239 N.J. Super. at 283. Even if it could be rationally argued that Maucione accidentally injured H.L. through his alleged sexual misconduct, coverage would nevertheless be excluded under: (1) the “Expected or Intended Injury” Exclusion (“[t]his insurance does not apply to . . . ‘Bodily injury’ . . . expected or intended from the standpoint of the insured”); and (2) the Abuse or Molestation Exclusion Endorsement (“[t]his insurance does not apply to ‘bodily injury’ . . . arising out of . . . “actual or threatened abuse or molestation”). See Pa129, Pa144.

Based on the foregoing, the trial court properly applied the objective standard. Maucione’s intent to injure H.L. can be presumed based on the particularly reprehensible nature of his alleged sexual abuse and misconduct. Any attempt to mischaracterize his actions as merely “inappropriate” or “stupid” is outrageously misleading and should be rejected. Insofar as H.L.’s alleged injuries arise out of

**H.L., H.S. and H.D., NAMES BEING
FICTITIOUS**

Plaintiffs,

v.

**GIANFRANCO MAUCIONE; SELECTIVE
INSURANCE COMPANY OF AMERICA;
SELECTIVE WAY INSURANCE
COMPANY; JOHN/JANE DOE SECURITY
OFFICERS (1-5) (FICTITIOUS
DEFENDANTS), JOHN/JANE DOES (1-10)
(FICTITIOUS DEFENDANTS), ABC
ENTITIES (1-10) (FICTITIOUS
DEFENDANTS),**

Defendants.

**SUPERIOR COURT OF NEW
JERSEY APPELLATE DIVISION
DOCKET NO.: A-3977-23**

On Appeal From:

**LAW DIVISION: ESSEX COUNTY
DOCKET NO.: ESX-L-4567-15**

Sat Below: Hon. Keith Lynott, J.S.C.

Civil Action

PLAINTIFFS/APPELLANTS' H.L, H.S. AND H.D. REPLY BRIEF

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PRELIMINARY STATEMENT

There are essentially two questions before the Court on this appeal: (1) should Maucione's actions be analyzed under the subjective intent to harm standard of *Voorhees v. Preferred Mut Ins. Co.*, 128 N.J. 165 (1992) or the objective intent to harm standard of *At. Employers Ins. Co. v. Tots & Toddlers Pre-Sch. Day Care Ctr., Inc.*, 239 N.J. Super. 276 (App. Div. 1990) and (2) if *Voorhees* applies, does the general liability, additional abuse and molestation, or both portions of Selective's insurance policy provide coverage for Maucione's actions.

In granting summary judgment in favor of the Defendants, the trial court erred in (1) finding that Defendant Maucione's actions objectively intended to harm Plaintiff; (2) finding that the policy exclusions in the Selective Policy are not ambiguous nor illusory; (3) finding that Maucione's actions are not covered by the abuse and molestation coverage section of the Selective Policy and (4) finding that Maucione's actions were not covered by the general liability section of the Selective Policy.

The Court erred in applying the objective intent to harm standard of *Tots & Toddlers* as the matters are factually distinct. In *Tots & Toddlers* the assailant gave one-year old children venereal diseases, among other heinous acts, with clear objective intent to physically harm children. Likewise in every case Defendants cite in their opposition, it involved an adult performing intimate, physical and often

violent acts with a child. Here, there is simply no evidence to suggest that Maucione performed any comparable actions. There is no debate that Maucione's actions are wrongful; that is not the question here. Insurance covers wrongful actions, insurance covers horrific and reprehensible actions such as drunk driving or aggravated assault with a deadly weapon, as in *Cumberland Mut. Fire Ins. Co. v. Murphy*, 183 N.J. 344 (2005). In finding that Maucione's actions meet the objective standard in *Tots & Toddlers*, the trial Court erred in redrawing the bright line from a clear set of circumstances to a less defined and more nebulous standard. *Tots & Toddlers*, despite Defendants' arguments, is clearly not about a hug, kiss, or the sending of text messages between a student and teacher.

Additionally the Court erred in finding that the policy would not cover Maucione who is an insured by definition and committed a covered wrongful act. Applying coverage to both Maucione and his actions is no different than applying the coverage to the other insureds, which Selective did offer coverage for. Each one of those insureds committed what would be considered a wrongful act under the policy and/or the abuse and molestation policy. To find one insured participant is covered and one is not highlights the illusory and ambiguous nature of the policy. Put simply, either all or none of the bad actors who are insured should be covered. There is no reason why Mr. Saxton, who committed the wrongful acts of negligent

hiring, negligent supervision, and negligent investigation of Maucione, *inter alia* wrongs, is covered under the policy while Maucione is not.

Here, Maucione's actions should be analyzed through the subjective intent of *Voorhees* as his actions do not mirror those of *Tots & Toddlers*. As there is no evidence to show Maucione subjectively intended to harm Plaintiff, Selective must cover Maucione's actions either under the general liability and/or the abuse and molestation portions of the insurance policy at issue, just as every other insured who committed a wrongful act in this matter was.

For the reasons stated herein, it is respectfully requested the Court's July 12, 2024 Order granting summary judgement for Defendants be vacated and this Court should find that summary judgment in favor of Plaintiff is proper.

LEGAL DISCUSSION

A. Maucione Should Be Treated as an Insured Like Every Other Named Insured that Committed a Wrongful Act

The simplest form of one the issues before the Court is whether Selective can treat insureds differently if both committed a wrongful act under the express language of the policy. Once the wrongful act is committed, Defendants argue that coverage is excluded. *Pal46* at 2(a). This argument flies in the face of both the policy and Defendants' actions as numerous insured were covered despite being alleged to have participated in a number of negligent-based causes of actions which would fit into the "wrongful act" definition of the policy.

Defendants' circular logic is that because Maucione committed a "wrongful act" he should not be covered. Yet the "wrongful acts" committed by Henry P. Becton Regional High School, Carlstadt-East Rutherford Regional Board of Education, David Mango, Paul Saxton, Bruce Young and other governmental entities as alleged in Plaintiff's underlying complaint should be covered. *Pa.35*. Messrs Mango, Saxton, and Young were individuals employed by either the school or the board of education.

The abuse and molestation addendum in question (*Pa.144-150*) specifically states that a "wrongful act" includes negligent employment, negligent investigation, negligent supervision, negligently failing to report the incident and negligent retention. *Pa150* at 5(b)(1)-(b)(5). As one such direct example, Mr. Mango was alleged to have negligently failed to report and/or investigate the relationship between Maucione and Plaintiff even after Maucione told Mr. Mango what was occurring. *See Pa.35-59; Pa.996* at 110; and *Pa230* at 194. Yet, Defendants fully covered Mr. Mango despite Mr. Mango clearly being a participant in a wrongful act as defined in the policy at 5(b)(2) and 5(b)(4). *Pa.150*.

Defendants' arguments clearly show the illusory and ambiguous nature of the insurance agreement wherein Selective decides which of its insureds it will cover, despite all insureds committing an action which is defined as a wrongful act. It is axiomatic that Defendants could have included the plain language wherein the

participation exclusion only applied to section 5(a) of the wrongful act definition, but they did not do so. *Pa.150*. Defendant could have also not included numerous negligent actions in the definition of wrongful act. *Pa150* at 5(b)(1)-(b)(5). Currently, under the plain reading of the insurance agreement, it is either an all or nothing: either all insureds are covered or no insured is covered as the claims in the underlying complaint clearly allege that each insured committed what Defendant admits is a wrongful act. As Defendants did in fact provide coverage for participants of wrongful acts, the same policy must also cover Maucione as his actions are identical under the policy. Providing no coverage to any actor would also clearly render the policy illusory as it would create a situation in which the premium paid for the abuse and molestation policy would never result in coverage.

To highlight the illusory and ambiguous nature of the policy, Count Seven in Plaintiff's original complaint (*Pa52-55*), alleges a claim of negligent supervision, *inter alia*, against Carlstadt-East Rutherford Regional Board of Education, Henry P. Becton Regional High School, other governmental entities, and individuals Saxton, Young and Mango. The allegation was that these defendants failed to properly supervise, hire, and investigate Maucione. *Id.* In terms of Selective's policy, the claim is that these named defendants participated in the negligent supervision of Maucione, a clearly defined wrongful act under the policy. *See Pa.150* and *Pa146*. Despite these named defendants participating in the negligent supervision of

Maucione, Defendants defended and indemnified them. As such, either the participation exception is meaningless or it is enforced on an arbitrary basis rendering it illusory.

Defendants, as the drafters of this policy and its exclusions, chose to not differentiate the wrongful acts of the school board from the wrongful acts of the individuals employed by the school board from the wrongful acts committed by Maucione. Defendants are clearly cherry picking which insured they will cover and which they will not despite both committing a wrongful act.

Defendants' arguments also assume that Maucione's actions would not be covered under the general liability portion of the policy and would only be covered under the abuse and molestation addendum. Absent from the definition sections of Selective's policy is a definition of what "abuse" or what "molestation" is. Selective's own representative could not even define the terms. *Pa450* at 54-55. Defendants' own arguments that somehow any text message between a teacher and student, any time a teacher hugged a student, and that even flicking a rubberband at a student (*Pa463* at 106) is "abuse" or "molestation" ignores reality. Quite obviously, if a teacher sent out a text message to his students class was cancelled or a special education teacher receives a hug from her kindergarten student after graduation these are not acts of abuse or molestation. Defendants' failure to define

these terms is a self-inflicted wound and as such it is clear that the general liability section of the policy is also applicable.

The primary purpose of an insurance contract is to insure. *Erdo v. Torcon Const. Co.*, 275 N.J. Super 117, 120 (App. Div. 1994). Defendants in this matter defended and indemnified insureds who directly or indirectly participated in wrongful acts such as those stated *supra*. A fundamental fairness is that such policy is extended to Maucione as his actions, for the purposes of determining coverage, are exactly the same as all other insureds. As such, the Court erred in finding that Defendants can treat insured who committed wrongful acts different from other insured who committed wrongful acts.

In addition, the Court erred in finding that the general liability section of the policy does not apply as the terms abuse and molestation are undefined terms. For such reasons, the general liability section of the Selective policy should also apply to Maucione. For all the reasons discussed herein, it is respectfully requested that the Court vacate the July 12, 2024 Orders, deny Defendants' motion for summary judgment, and grant Plaintiff's request for summary judgment.

B. Maucione's Actions Do Not Rise to the Objective, Bright Line Rule of *Tots & Toddlers*

The other issue before this Court is whether Maucione's actions should be analyzed under the subjective intent to harm standard of *Voorhees* or the objective intent to harm standard of *Tots & Toddlers*. The bright line rule of *Tots & Toddlers*

is that the violent rape of preschool children is objectively reprehensible. *Id.* at 278-279; *see also R.S. v. Knighton*, 125 N.J. 79, 82 (1991) (detailing the heinous crimes committed by Mr. Knighton who was the teacher in the *Tots & Toddlers* matter). In the matter at bar, it is undisputed that Maucione and Plaintiff did not engage in this conduct and that there was no sexual intercourse. At worst, the extent of the physical contact in this matter is a hug and a kiss, which is objectively different from the actions in *Tots & Toddlers*.

Even Defendants' own cases make clear that intercourse or overt sexual contact is the bright line standard. *See e.g. Prudential Prop. & Cas. Ins. Co. v. Boylan*, 307 N.J. Super. 162, 167 (App. Div. 1998) (Defendant made a five year old perform oral sex on him); *High Point Ins. Co. v. J.M.*, 398 N.J. Super 562, 567, 569, 574 (App. Div. 2008) (Defendant pled guilty to both sexual assault and was found to have molested a a young boy and the husband should have been aware of "his wife's sexual proclivities"); *Wiley v. State Farm & Casualty Co.*, 995 F.2d 457, 459 (3d Cir. 1993) (an uncle sexually molested his 13 year old niece while drunk); *Fireman's Fund Ins. Co. v. Hill*, 314 N.W.2d 834 (Minn. 1982) (defendant was molesting a foster child); *Aetna Cas. & Sur. Co. v. Roe*, 650 A.2d 94 (Pa. Super. Ct. 1994) (defendant performed penetrative sex as well as demonic rituals to instill fear in multiple children); *CNA Ins. Co. v. McGinnis*, 282 Ark. 90, 92 (1984) (Defendant had "sexual relations...almost daily" with his stepdaughter for 10 years); *Vermont*

Mut. Ins. Co. v. Malcolm, 128 N.H. 521, 522 (1986) (defendant committed multiple acts including “fellatio and sodomy”); *Rodriguez v. Williams*, 107 Wash. 2d 381, 382 (1986) (Defendant had sexual intercourse with his stepdaughter); *J.C. Penny Cas. Ins. Co. v. M.K.*, 52 Cal. 3d 1009 (1991) (Defendant admitted to sexually molesting a 5 year old on nearly two dozen occasions); *State Farm Fire & Cas. Co. v. Davis*, 612 So. 2d 458 (Ala. 1993) (it is unclear what actions defendant took other than it arose out of his time with four minor girls at his house); *Foremost Ins. Co. v. Weetman*, 726 F. Supp. 618, 619 (W.D. Pa. 1989) (Defendants performed various acts of touching); see also *Altena v. United Fire & Cas. Co.*, 422 N.W.2d 485, 486 (IA1998) (defendant “forcibly” undressed the victim and “comit[ted] the sex acts without her consent or active participation”). Defendants also failed to address *Shelby Cas. Ins. Co. v. H.T.*, 391 N.J. Super. 406, 408-409 (App. Div. 2007) in which the Court declined to apply the objective standard of *Tots & Toddlers* despite the defendant performing penetrative sexual acts on a minor.

Noticeably absent from Defendants’ arguments is any court which has held an objective standard shall apply when there is no evidence of sexual intercourse or touching of intimate body parts. No court has held that sending text messages or a simple hug or kiss raise to the same objective level as forcibly removing a victim’s clothes and raping them as in Defendants’ cited case *Altena*.

Simply put, the error of the Court below is that the goalposts of the bright line rule have been moved from sexual intercourse or other overtly physical sexual acts to something much more nebulous in this matter. If an excited student runs to hug their teacher at the end of a graduation ceremony, is this an objectively reprehensible act of sexual assault? If a teacher sends a text message saying an afterschool club is cancelled does this make them a monster who molests children? The obvious answer shows that the bright line test exists for a reason and if a line is not crossed then the correct standard to apply is the subjective intent to harm test of *Voorhees*.

As Defendants and the Court are well-aware, this bright line exists to balance multiple public policy considerations. The first is to ensure that victims of a tort have an ability to recover. The second is to ensure that insurance carriers honor their agreements. The third is that New Jersey does not want to provide coverage for the actions which happened in *Tots & Toddlers*. As such, a clear bright line was created wherein when there was intercourse or the touching of more intimate areas, then such would be found to be objectively harmful. Everything else, by default, would fall into the subjective intent category of *Voorhees*. Insurance routinely covers the wrongful actions of their insureds, including horrific and morally objectionable actions such as aggravated assault and drunk driving. The “monster” whose negligence kills a family of four because he ran a red light because he was in a rush to get home to watch a baseball game is still afforded insurance coverage. The true

issue in this matter is that the moment the line was crossed has not been shown by Defendants nor by the Court below. Whether Maucione was or was not attempting to have relations with Plaintiff *after* she turned 18 is irrelevant as he did not have any sexual relations with her at any point during the alleged conduct.

For all the reasons discussed herein, it is respectfully requested that the Court vacate the July 12, 2024 Orders, deny Defendants' motion for summary judgment, and grant Plaintiff's request for summary judgment.

C. Maucione's Criminal Plea Does Not Prove Intent to Harm Plaintiff

The criminal charges concerning sexual conduct filed against Maucione were never proven. Defendants wish to use an allegation of a crime as evidence of a crime would undermine the very foundations of our justice system. Maucione was never found guilty of any such acts. Maucione instead only pled guilty to Third-Degree Official Misconduct, and the remaining charges were dismissed. In order to convict for Official Misconduct, the prosecution must prove: (1) a public servant acted to **"obtain a benefit for himself or another or to injure or to deprive another of a benefit;"** and (2) "commits an act relating to his office but constituting an unauthorized exercise of his official functions" or "knowingly refrains from performing a duty which is imposed upon him by law..." *N.J.S.A. 2C:30-2* (emphasis added). Official misconduct is normally a crime of the second degree, however, it may be reduced to third degree if the benefit obtained or sought or of

which another is deprived is of a value of \$200.00 or less. *Ibid.* The Court in *State v. Phelps*, 187 N.J. Super 364, 373-5 (App. Div. 1983), *aff'd*, 96 N.J. 500 (1984) found that the third-degree grading of the crime is clearly “an exception from the more general treatment of official misconduct as a second degree offense.” Specifically:

This exception is clearly pecuniary in nature. The use of the words “of a value” convinces us that the Legislature in this downgrading provision intended to **treat more moderately offenses** which, by an objective standard, could be measured to be **relatively less consequential in nature than would otherwise be the case**. It carved out a type of official misconduct for lenient treatment.

Id. at 375 (emphasis added).

Accordingly, the State of New Jersey offered a plea deal in which it saw the conduct of Maucione “less consequential” and more moderate than other forms of official misconduct. Thus, the only finding by a Court was that Maucione committed an unauthorized act in relation to his public position which benefitted himself or deprived someone with a value of under \$200—there was no finding of an intent to harm. By the State of New Jersey offering a plea deal in the third degree, it was established that Maucione did not intend to injure Plaintiff, as such would be a crime in the second-degree.

Defendants’ rhetorical questioning about “sex offender counseling” is wholly devoid of any factual basis to be used as evidence in this matter. There is no evidence as to whether such a determination was to be made as part of the plea deal or why

such determination was made and Defendant never presented any evidence as to the same either here nor in the underlying papers. Furthermore, it is clear if Maucione intended to injure Plaintiff without a benefit or such a benefit either had no monetary value or was valued more than \$200, then it would be a second-degree crime; which is not the crime to which Maucione pled guilty.

Finally, regardless of what intent is attached to a crime, the Supreme Court has clearly expressed that an intent based crime does not mean that a defendant had an intent to injure. In *Cumberland Mut. Fire Ins. Co. v. Murphy*, 183 N.J. 344 (2005) the insured admitted to “aggravated assault.” *Id.* at 534-5. As codified by *N.J.S.A.* 2C:12-1(b)(1) and (2), aggravated assault requires a person to “purposely or knowingly” cause injury, or cause injury “recklessly.” The State also brought charges for possession of a firearm for an unlawful purpose. *Murphy, supra*, 183 N.J. 344 at 535. Even then, the Court found that the defendant's intent must be determined under the subjective intent test of *Voorhees*.

For all the reasons discussed herein, it is respectfully requested that the Court vacate the July 12, 2024 Orders, deny Defendants' motion for summary judgment, and grant Plaintiff's request for summary judgment.

CONCLUSION

The Court below erred in finding that 1) Maucione's actions were objectively harmful under the bright line rule in *Tots & Toddlers* and 2) Maucione's actions were not covered by the Selective insurance policy.

As stated at length in Plaintiff/Appellant's brief, Maucione never intended to harm Plaintiff and there was no intimate physical contact. A hug or kiss are a far cry from the actions which took place in *Tots & Toddlers*. This is not an antiquated thinking about what is or is not sexual assault, but rather the reality that the bright line exists for a reason and terrible actions committed by insureds can be damaging without crossing over the line. The issue is not whether Maucione did or did not commit a wrong; he did. The issue is whether any of Maucione's actions crossed the bright line. As such, the trial court below erred by finding actions that amount to less than the actions taken in *Tots & Toddlers* pass the bright line.

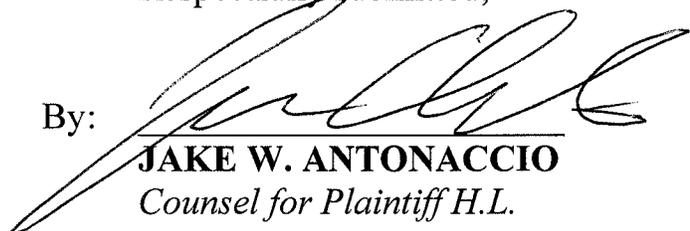
The second issue is whether the Selective policy in this matter applies under either the general liability or the abuse and molestation. As the terms sexual abuse and molestation are not defined in the policy, and Maucione's actions do not constitute sexual abuse for the reasons stated *supra* and in Plaintiff/Appellant's Brief, the general liability policy should apply. Under the abuse and molestation addendum, if such does apply, this section of the policy is entirely illusory as it cherry picks which insureds that committed a wrongful act will be defended and/or

indemnified. This section includes negligent hiring, negligent supervision, negligent investigation and other negligent charges as wrongful acts under the policy. Selective's policy covered numerous other insureds who participated in a wrongful act under the policy but treated Maucione differently despite him being an insured who committed a wrongful act. As drafters of the policy, Selective had the ability to limit the participation exclusion but did not do so. As such, either all or none of the insureds should have been given a defense. Under the terms of the policy, there is no reason Maucione should have been treated any differently than the Board of Education as both would be participants of a wrongful act according to Selective. This also creates the illogical stance that an insured is paying a premium for additional abuse and molestation policy while the insurance carrier is saying that it will not cover the exact thing the additional insurance is purchased to cover. As such, the trial court erred in finding that neither the general liability or abuse and molestation addendum covered Maucione's actions.

For all the reasons discussed herein, it is respectfully requested that the Court vacate the July 12, 2024 Orders, deny Defendants' motion for summary judgment, and grant Plaintiff's request for summary judgment.

Respectfully submitted,

By:



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Dated: September 19, 2025