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SUPREME COURT OF NEW JERSEY

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

BRIEF AND APPENDIX ON BEHALF OF APPELLANT SIR ELECTRIC, LLC IN SUPPORT OF MOTION FOR LEAVE TO APPEAL THE FINAL DISMISSAL OF ITS THIRD-PARTY COMPLAINT

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TABLE OF CONTENTS

Page

TABLE OF JUDGMENTS, ORDERS AND RULINGS

Page(s)

INDEX TO APPENDIX TO THIS BRIEF

[1] "Pa_" references are to SIR's Appellate Division appendix. "MLAa_" references are to the appendix to this brief.

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Rules

PRELIMINARY STATEMENT

In an opinion (MLAa1) that conflicts with another recent Appellate Division opinion on an important and recurrent point of unsettled law, the panel below held that SIR Electric, LLC ("SIR"), a solar-energy contractor that is being sued by an injured employee on claims of negligence and gross negligence, is owed no duty of defense by its workers' compensation carrier, The Hartford Underwriters Insurance Co. ("Hartford"). In reaching that anomalous result, the panel relied upon an "intentional wrongs" exclusion that appears in the employers' liability part of Hartford's two-part policy – an exclusion that, by its express terms, does not apply to the workers' compensation part of the policy.

In Rodriguez-Ortiz v. Interstate Racking & Shelving, II, Inc., Docket No. A-1614-19 (App. Div. Sept. 3, 2021), certif. den., 249 N.J. 90 (2021) (MLAa27), construing an insurance policy with an identical "intentional wrongs" exclusion, the Appellate Division held that an abiding duty to defend negligence-based claims exists under the workers' compensation part of the two-part policy, to which the exclusion here at issue does not apply. (MLAa30; "The workers' compensation coverage creates a duty to provide a defense to the negligence-based claims, notwithstanding that the policy excluded a duty to defend intentional-tort claims.") The Rodriguez-Ortiz holding conforms to longstanding case law; the holding below does not, and is in clear error. See Danek v. Hommer, 28 N.J. Super. 68, 77 (App.

Div. 1953), aff'd 15 N.J. 573 (1954) (workers' compensation policies must protect employers against "common law liability," including "of course, liability arising out of negligence actions").

Since the exclusion here at issue – which Hartford dubbed the "Enhanced Intentional Injury Exclusion" and the panel below abbreviated to "the Employer's Liability EII exclusion" – is now a fixture in all workers' compensation / employers' liability policies, the issue presented by this case is of importance not just to SIR but employers throughout the State. In the absence of review and correction by this Court, the Appellate Division's over-expansive reading of the "enhanced" exclusion will cause SIR to suffer an irreparable loss of its contract rights and, more importantly, will create a huge "Laidlow"-sized gap in the workers' compensation coverage that employers in this State are mandated to maintain. See Schmidt v. Smith, 155 N.J. 44, 48-49 (1998) (workers' compensation policies must cover "not only claims for compensation prosecuted in the Workers' Compensation court, but also claims … asserted in a common law court"). And SIR, quite unjustly, will be the first employer to fall headlong into that gap – with many others to follow.

Compounding the interpretive error committed below and adding urgency to the need for review by this Court, the Appellate Division upheld, on grounds of legal futility, the lower court's refusal to allow SIR to amend its third-party complaint to allege that the "enhanced" exclusion is contrary to public policy and unenforceable.

In Rodriguez-Ortiz, the Appellate Division expressly noted that, should a case arise where the legality of the exclusion had to be decided, the "broad view of the scope of mandated coverage" that the Supreme Court has espoused under the Workers' Compensation Act "may well override" the exclusion (MLAa32). In upholding the lower court's refusal to allow SIR even to amend its third-party complaint to plead such a claim, the Appellate Division violated this Court's admonition in Printing Mart-Morristown v. Sharp Electronics Corp., 116 N.J. 739 (1989), that any dismissal "should be without prejudice to a plaintiff's filing of an amended complaint," except in extraordinary circumstances (not present here). Id. at 772.

Non-precedential as the opinion below may be, its diametric inconsistency with and temporal proximity to the Rodriguez-Ortiz opinion bespeak a need for this Court to lend guidance to trial courts and resolve an important and recurrent issue on which appellate panels have disagreed. Laidlow suits are already commonplace in our trial courts and are being filed with ever-increasing frequency. If, as the Appellate Division has held, employers are now entirely "bare" of insurance in such suits, that resultant gap presents an issue of statewide concern that calls out for review by this Court, which should reverse and correct both of the clear errors committed by the Appellate Division.

PROCEDURAL HISTORY AND STATEMENT OF FACTS

This case arises out of a workplace injury sustained by SIR's employee,

Dionicio Rodriguez, on May 24, 2020, in which he sustained severe burns to the upper part of his body. SIR promptly notified Hartford of the incident, and in due course plaintiff began receiving workers' compensation benefits for his injury – benefits he has continued to receive up to the present (Pa117).

In February 2022, plaintiff filed suit below. In his complaint (Pa58), plaintiff alleged that his injuries were caused by SIR's negligence, gross negligence, recklessness and intentional misconduct, as well as the negligence of the other named defendants (Pa62-Pa63). SIR's conduct, in all its pled varieties, was alleged to have created a "substantial certainty" of injury to plaintiff (Pa64; Compl. ¶49), thereby rendering SIR liable for common law damages, under the principles of Laidlow v. Hariton Mach. Co., Inc., 170 N.J. 602, 614 (2002) (holding the workers' compensation "exclusivity" bar does not preclude a tort action where the employer's conduct is "substantially certain" to result in injury and the "context" places the conduct "plainly beyond anything the legislature could have contemplated as entitling the employee to recover *only* under the Compensation Act"). SIR denies having engaged in any such exacerbated conduct, and maintains that plaintiff's accident was the result of an unfortunate and simple misunderstanding by plaintiff and his co-worker of their job assignment (Pa36).

SIR duly referred plaintiff's complaint to Hartford and demanded that it assume SIR's defense (Pa117). Hartford, relying upon an exclusion for intentional

torts that appears in and applies only to the employers' liability part of the policy, refused to assume SIR's defense, even after SIR pointed out: (a) plaintiff's complaint contained allegations of negligence and gross negligence that fall squarely within Hartford's coverage obligations under ***the workers' compensation part*** of the policy and (b) in Rodriguez-Ortiz (in which the policy at issue contained an identical exclusion), the Appellate Division held that carriers have an abiding duty to defend Laidlow cases under the ***workers' compensation part*** of their policies, as to any pled "negligence-based claims." (MLAa30; citing the principle that, "[w]hen multiple alternative causes of action are stated, the duty to defend will continue until every covered claim is eliminated.")

Hartford stood by its disclaimer and maintained that the "enhanced" intentional tort exclusion in the Employers' Liability part of its policy absolved it of any duty to defend SIR (Pa124). Hartford was unable to cite any case in its disclaimer letters (Pa120; Pa127) holding that the "enhanced" exclusion relieved it of any duty to defend claims of negligence and gross negligence. Until now, no case had so held. As a ***factual*** matter, Rodriguez-Ortiz holds to the contrary (MLAa30).

I. Law Division Proceedings

SIR, having been cut loose by Hartford, filed a third-party complaint against it for breach of its duty of defense (Pa44). In lieu of an answer, Hartford moved for dismissal pursuant to R. 4:6-2(e) (Pa71), relying on what it called the "Enhanced

Intentional Injury Exclusion" in the Employer's Liability part of its policy.[2] SIR, pointing out that the "enhanced" exclusion did not apply to the workers' compensation part of the policy, which the Appellate Division had recently held (in Rodriguez-Ortiz) gave rise to a duty to defend any "negligence-based" claims pled in a "Laidlow" complaint, cross-moved for summary judgment as to the breach of Hartford's duty to defend SIR (Pa114).

By Order dated November 23, 2022, the Law Division (Hon. Daniel Lindemann, J.S.C.) granted Hartford's motion and dismissed SIR's third-party complaint "with prejudice." (Pa1). In explanation of its Order, the court wrote:

> The crux of the disagreement between the parties … is the construction of the cause of action pled by the underlying plaintiff in the underlying complaint against SIR. Even if the court here were to apply the unpublished Rodriguez case, the inescapable conclusion as to ***the nature of the claim presented by the plaintiff in the underlying complaint is one of gross negligence***, asserting a claim to go above the workers comp claim, pursuant to Laidlow. [Pa8-Pa9; emphasis added.]

The motion judge did not cite any case holding that "gross negligence" suffices to establish liability under Laidlow – case law, in fact, holds exactly the opposite, see New Jersey Mfrs. Ins. Co. v. Delta Plastics Corp., 380 N.J. Super. 532,

[2] The panel below, as previously noted, adopted Hartford's "Enhanced Intentional Injury" coinage and (without attribution) converted it to an acronym, "EII." Since the panel below referred to the exclusion as the "Employer's Liability EII exclusion," SIR will use that nomenclature, despite its euphemistic nature.

536 n.2 (App Div. 2005) ("Gross negligence is clearly insufficient to avoid the workers' compensation bar"), aff'd 188 N.J. 582 (2006) – and did not discuss the many claims of pure negligence raised against SIR in the complaint, such as its alleged failure to follow "proper safety codes" (Pa28; ¶34).

SIR timely moved for reconsideration of the lower court's Order of dismissal and, in the alternative, sought leave to amend its complaint to allege that the "enhanced" exclusion, as construed by the court, was void as against public policy (Pa224). SIR contended that the motion judge had overlooked and violated established law in holding Hartford had no duty to defend SIR against claims of negligence and gross negligence, and also asserted that, under Printing Mart, any dismissal of SIR's complaint should be without prejudice to amendment – especially in light of the acknowledgement in Rodriguez-Ortiz that the "broad view of the scope of mandated coverage" taken by this Court in previous cases "may well override the exclusion," i.e., render it void as against public policy (MLAa32).

The Law Division denied SIR's reconsideration motion in all respects (Pa12). The court acknowledged that no case had ever found "gross negligence" sufficient to establish liability under Laidlow but determined, despite the lack of such precedent, that the "enhanced" exclusion unambiguously placed claims sounding in negligence or gross negligence beyond any duty of defense (Pa15). The motion judge flatly declined to consider the question of whether a duty of defense existed

under the workers' compensation part of the policy, as held in Rodriguez-Ortiz. As to SIR's request for leave to amend its third-party complaint, the motion judge stated, "SIR did not submit in its motion papers or at oral argument that Hartford's Enhanced Intentional Injury Exclusion violated public policy" (Pa18) – a statement refuted by the motion record, see Pa160; Pa224; Pa242 (instances where SIR did argue the enhanced exclusion was "void as against public policy"). The motion judge alternatively concluded that SIR's proposed amended third-party Complaint was "futile" because "Hartford's Enhanced Intentional Injury Exclusion is precisely the express exclusion of coverage which was described in Delta Plastics." (Pa20).

II. The Appellate Division Decision

With the Law Division having determined, on the initial pleadings, not just that SIR had no right to a defense under its workers' compensation policy but also no right to challenge the legality of the "enhanced exclusion," SIR moved for leave to appeal. By Order dated March 16, 2023, leave to appeal was granted.

On December 22, 2023, the Appellate Division issued a 26-page *per curiam* opinion affirming the lower court's judgment of dismissal in all respects (MLAa1). The Appellate Division agreed with the Law Division that the "Employer's Liability EII exclusion" obviated any duty on Hartford's part to defend SIR even as against plaintiff's claims of negligence and gross negligence (MLAa20). Like the Law Division, the appellate panel reached that conclusion without examining whether a

duty to defend the negligence-based claims exists under the workers' compensation part of the policy, to which the "Employers' Liability EII exclusion" does not apply – even though that was SIR's main contention on appeal.[3]

As to the 2021 opinion in Rodriguez-Ortiz, the panel below acknowledged in passing that the court there held that, "if an employee brings a negligence-based claim in Superior Court – whether it is instead of, or in addition to, filing a petition in the Workers' Compensation Division – the workers' compensation policy covers the cost of defending and, presumably, securing the lawsuit's dismissal and transfer to the Workers' Compensation Division." (MLAa14.) Having made that acknowledgement, the panel proceeded to reach the exact opposite conclusion, without any explanation of why it disagreed with the Rodriguez-Ortiz panel on the "duty of defense" issue.

Puzzlingly, although noting that "gross negligence … is insufficient to" establish liability under Laidlow (MLAa18), the panel below failed to consider, anywhere, the implications of that observation as to SIR's contractual right to a defense of plaintiff's gross negligence claims. Claims of negligence and gross

[3] The panel, at the outset of its opinion, stated that the "employer's liability" part of Hartford's policy was "the focus of the parties' dispute." (MLAa4.) To the contrary, SIR's principal contention below was that Hartford had a duty to defend SIR against the negligence-based claims in the complaint under the ***workers' compensation part*** of its policy, to which the so-called "enhanced exclusion" does not apply – exactly as the panel in Rodriguez-Ortiz held.

negligence (whether brought in workers' compensation court or Superior Court) have long been held to fall squarely within the risks supposedly covered by workers' compensation insurance, see Schmidt v. Smith, 155 N.J. at 48-49 (workers' compensation policies must cover "not only claims for compensation prosecuted in the Workers' Compensation court, but also claims … asserted in a common law court"), but the panel below determined, without explanation, that the mere "categorization" of plaintiff's claims "as Laidlow claims" somehow deprived SIR of any entitlement to a defense of the negligence-based claims in the complaint under the workers' compensation part of the policy (MLAa20).

Highlighting the stark error of that holding, the panel cited, as supposed support for it, Voorhees v. Preferred Mut. Ins. Co., 128 N.J. 165 (1992), which holds (to the contrary), "When multiple alternative causes of action are stated the duty to defend will continue until every covered claim is eliminated." Id. at 174. (MLAa20.) See also Abouzaid v. Mansard Gardens Associates, LLC, 207 NJ 67, 80 (2011) ("The duty to defend is triggered by the filing of a complaint alleging a covered claim… [W]hen the complaint raises allegations that fall within a risk covered by the insurance contract, the insurer has a duty to defend … [and] the determination of an insurer's duty to defend requires review of the complaint with liberality … [I]f the complaint comprehends an injury which may be within the policy, a duty to defend will be found"; internal quotes omitted).

In reviewing the insurance law principles governing the dispute between SIR and Hartford, the Appellate Division notably omitted one that was central to SIR's appellate argument, namely, the principle that the duty to defend is broader than the duty to indemnify. See, e.g., W9/PHC Real Estate LP v. Farm Family Cas. Ins. Co., 407 N.J. Super. 177, 191 (App. Div. 2009). SIR, on appeal, had asserted that, in contravention of that principle, the Law Division had "erroneously ***equated*** the duties of defense and indemnification – in the process depriving SIR of its clear contractual right to a defense of plaintiff's 'non-intentional' tort claims." (Pb21). The Appellate Division, replicating the Law Division's error, failed to address that argument or acknowledge, anywhere, the difference under established insurance-law principles between the duty to defend and the duty to indemnify.

As to the Law Division's denial of SIR's motion for leave to amend its complaint to challenge the legality of the "enhanced" exclusion, the panel below determined that any such challenge would be legally futile, and opined:

> The legality of the Employer's Liability EII exclusion is not a novel legal question as SIR contends… [T]he exclusion language was in conformity with the Supreme Court's directives in Beseler II and Delta Plastics, where it struck down intentional tort claim exclusionary provisions it concluded were ambiguous. Hence, SIR's motion to amend its complaint was futile because it would have been dismissed for failure to state a claim. [Op. at 25.]

For the reasons that follow, leave to appeal should be granted to prevent SIR's final and irreparable loss of its contractual right to a defense, and to correct the error the Appellate Division committed on an issue of widespread public importance. The Appellate Division decision leaves employers throughout the State utterly bare of coverage in Laidlow cases, even where the complaints include claims of negligence that trigger a clear and well-established duty to defend on the part of the workers' compensation carrier. If employers are now to be left to defend such cases at their own expense and through their own engaged counsel, that is a profound change in the law, and one that should occur only after this Court has spoken on it.

As clear as it is that SIR has a contractual entitlement, under the workers' compensation part of its policy, to a defense of the claims of negligence and gross negligence that have been asserted against it, SIR also has a clear right, under this Court's landmark Printing Mart opinion, to challenge the legality of the "Employer's Liability EII exclusion." SIR has been conclusively denied both of those rights and will, in the absence of intervention by this Court, suffer an irreparable loss of them. The decision below represents a full and final adjudication, and ***extinguishment***, of those rights. Leave to appeal should accordingly be granted under R. 2:2-2(b).

Review of the Appellate Division opinion is especially warranted because it raises a recurrent and important question on which two distinguished appellate panels (three-judge panels in each instance) have recently reached opposite

conclusions: do workers' compensation carriers have an abiding duty under the workers' compensation part of their policies to defend negligence-based claims asserted in a "Laidlow" action, as held in Rodriguez-Ortiz, or does the "Employer's Liability EII exclusion" obviate any duty to defend Laidlow actions, even as to pled claims of negligence and gross negligence? See R. 2:12-4 (certification is warranted if an "appeal presents a question of general public importance which has not been but should be settled by the Supreme Court … or is in conflict with any other decision of the same or a higher court or calls for an exercise of the Supreme Court's supervision").

ARGUMENT

LEAVE TO APPEAL SHOULD BE GRANTED BECAUSE THE APPELLATE DIVISION OPINION REPRESENTS A FINAL ADJUDICATION OF SIR'S INSURANCE RIGHTS AND IS IN CLEAR LEGAL ERROR REGARDING A RECURRENT ISSUE OF PUBLIC IMPORTANCE ON WHICH TWO APPELLATE PANELS HAVE RECENTLY REACHED CONTRADICTORY RESULTS.

Under R. 2:2-2(b), this Court may grant leave to appeal from interlocutory orders of the Appellate Division "when necessary to prevent irreparable injury." In this case, SIR's insurance rights have been fully and finally adjudicated on the basis of a R. 4:6-2(e) dismissal motion and SIR has been determined to have no right to a defense by its workers' compensation carrier against asserted claims of negligence and gross negligence. That holding is contrary to well-settled law, Danek, supra,

contrary to the Appellate Division's 2021 opinion in Rodriguez-Ortiz, and contrary to SIR's clear contractual rights.

Barring review by this Court, SIR will become – ***unjustly*** become – the only employer in New Jersey history to have been determined to have no right to an insurer-provided defense against negligence-based claims asserted by an injured employee in a Superior Court action. SIR has no other recourse beyond this Court and the injury it will suffer is thus irreparable in both a technical legal sense and a real-world sense.

Other employers will soon face a similar loss of their contractual rights, unless this Court intervenes. The "Employer's Liability EII exclusion," as the Appellate Division has termed it, is now a standard feature of workers' compensation / employers' liability policies in this State, as is clear from the opinions in Rodriguez-Ortiz (involving an Amguard policy) and this case (involving a Hartford policy). Even though the "enhanced" exclusion appears to have received regulatory approval in 2007 (shortly after the double-barreled decisions in Delta Plastics and Charles Beseler Co. v. O'Gorman & Young, Inc., 188 N.J. 542 (2006) (holding that the then-existing "C5" exclusion did not relieve insurers of the duty to defend Laidlow suits)), no cases have arisen regarding it until recently – because carriers have generally continued to honor their duty to defend

employers in Laidlow cases.[4] No reason exists to think, however, that carriers will continue to honor that duty in the wake of the Appellate Division's decision here.

To prevent SIR's irreparable loss of its contract rights and head off the many wrongful disclaimers the Appellate Division's decision will engender, immediate review of the "Employer's Liability EII exclusion" by this Court is needed. Such review is warranted not merely to correct the substantial injustice SIR faces but to resolve an issue of public importance on which two appellate panels have recently reached contradictory results. Compare, Rodriguez-Ortiz (MLAa30; holding Amguard breached its duty to defend its insured against negligence-based claims in a Laidlow action; "if an employee brings a negligence-based claim in Superior Court … the workers' compensation policy covers the cost of defending" it), and the opinion below (MLAa20, holding that the "categorization of Rodriguez's claims as Laidlow claims" triggers the "Employer's Liability EEI exclusion" and obviates any duty to defend, even though the central claim "is one of gross negligence").

The lower courts' refusal to allow SIR to plead and pursue a claim that the "Employer's Liability EEI exclusion" is against public policy represents an

[4] SIR has consistently contended that discovery regarding the genesis and history of the "Employer's Liability EII exclusion" is needed, since the legality of the "enhanced" exclusion presents a novel and important issue. See, e.g., Grow Company, Inc. v. Chokshi, 403 N.J. Super. 443, 470 (App. Div. 2008) (reversing summary judgment on novel issue due to undeveloped record). The Appellate Division swept that contention aside in holding that any challenge to the exclusion would be futile – a ruling that, as discussed *infra*, is wrong as a matter of law.

especially stark error. The Appellate Division determined that any such claim would be futile because the exclusion adopts, or approximates, language that Judge Wecker opined, in Delta Plastics, would be unambiguous. See 380 N.J. at 542 ("The [C5] exclusion would be unambiguous if it expressly excluded coverage for 'all intentional wrongs within the exception allowed by N.J.S.A. 34:15-8.'") As is clear on a moment's thought, however, a finding that an exclusion is unambiguous does not render it invulnerable to legal attack on other grounds. Our courts have struck down, as being contrary to public policy, numerous unambiguous exclusions in the past. See Schmidt, supra (invalidating an unambiguous exclusion as contrary to the coverage mandate of the Workers' Compensation Act); Variety Farms, Inc. v. New Jersey Mfrs. Ins. Co., 172 N.J. Super. 10, 22 (App. Div. 1980) (holding an unambiguous exclusion to be contrary to public policy). Under the well-known Printing Mart standards, SIR was entitled to pursue such a claim here, especially since, in the assessment of three seasoned appellate judges, this Court's broad view of mandated coverage under the Workers' Compensation Act "may well override the exclusion." (Pa138).[5]

[5] The fact that the "enhanced" exclusion received regulatory approval – a fact mentioned several times by the Appellate Division – does not render the exclusion invulnerable to legal challenge, needless to say. Had the exclusion not received such approval it would be illegal *per se*. The exclusions that were stricken down in Schmidt and Variety Farms had both received regulatory approval – else they would have been invalidated for lack of it.

The Appellate Division's determination that SIR's request for leave to challenge the "Employer's Liability EII exclusion" would be futile rests on a clear misreading of the opinions in Delta Plastics and Beseler, as no issue of conformity with public policy was involved in those cases. This Court, which was called upon in those cases to defend the legislative scheme of the Workers' Compensation Act, should act to defend it again now, as the Appellate Division's over-expansive interpretation of the "enhanced" exclusion threatens it anew.

As the only New Jersey employer in the last 70 years to be held to have no right to an insurer-provided defense of claims of negligence asserted by an injured employee in a Superior Court action, SIR should be allowed, as a matter of basic right, to file and pursue a complaint challenging the legality of the exclusion that has been its undoing. Printing Mart, 116 N.J. at 448 (dismissals under R. 4:6-2(e) "should be without prejudice to a plaintiff's filing of an amended complaint"). Nothing in Delta Plastics or Beseler supports a conclusion that such a challenge would be futile.

I. The Appellate Division's "No Duty to Defend" Decision Is Contrary to Established Case Law

SIR's primary appellate argument was that Hartford had a duty, under the workers' compensation part of its policy, to defend the claims of negligence and gross negligence set forth in plaintiff's complaint – because the risks associated with such claims fall squarely within the scope of Hartford's workers'

compensation coverage. The Appellate Division failed to address that argument anywhere in its 26-page opinion and instead focused its analysis exclusively on the "Employer's Liability EII exclusion" – which, by its plain terms, does not ***apply*** to the workers' compensation part of the policy. The panel's failure to address SIR's primary argument on appeal is particularly conspicuous since, in raising it, SIR was simply asking the panel to follow the holding of a 2021 appellate opinion, albeit a non-precedential one.

Rodriguez-Ortiz squarely holds that a duty to defend negligence-based claims resides in the workers' compensation part of a standard workers' compensation / employers' liability policy – of that there can be no doubt. See Rodriguez-Ortiz (MLAa30; holding that Amguard had a duty, under the workers' compensation part of its policy, to defend "negligence-based claims" in a Laidlow suit brought against its insured). Appellate authority of such cogency and recency is hard to find on any issue, and the holding represents a well-reasoned application of the bedrock insurance-law principle that the "duty to defend is broader than the duty to indemnify." See, e.g., W9/PHC Real Estate LP, supra, 407 N.J. Super. at 191; Polarome Int'l, Inc. v. Greenwich Ins. Co., 404 N.J. Super. 241, 273 (App. Div. 2008). The panel below should have followed the holding in Rodriguez-Ortiz based on its legal soundness – a soundness underscored by the panel's inability to identify, anywhere, a flaw or defect in the reasoning of that on-point opinion.

In its appellate submissions, SIR asserted, as a cardinal error committed by the motion court, that the court had conflated Hartford's duty to defend with its duty to indemnify, and failed to consider the two duties separately. See generally 14 L. Russ & T. Segalla, Couch on Insurance § 200:1 (3d ed. 2007) ("[T]he duty to defend is distinct from, and broader than, the duty to indemnify.") Just as the panel below ignored SIR's primary contention on appeal, i.e., that a duty to defend exists in the workers' compensation part of Hartford's policy, the panel failed to discuss or consider that second contention – thereby repeating the motion court's error.

Addressing an argument that SIR did ***not*** raise below, the appellate panel wrote that SIR's "reliance" on Delta Plastics and Beseler was misplaced (MLAa20) – because the "unenhanced" exclusion at issue in those cases was determined to be ambiguous, whereas the "enhanced" exclusion (by the court's reading) is unambiguous. SIR did not maintain in the Appellate Division that the decisions in Delta Plastics and Beseler controlled; to the contrary, SIR asserted that those cases focused solely on the Employer's Liability part of the standard two-part policy, and therefore did not speak to the question of whether a duty to defend negligence claims resides in the workers' compensation part of the policy, as determined in Rodriguez-Ortiz. SIR's position on appeal was that, in so holding, the Rodriguez-Ortiz panel got it exactly right. Nothing in the decision below militates against that conclusion.

Consider: unless this Court intervenes, SIR will have to defend itself, at its own expense, at trial and a wholly foreseeable result is that the trier of fact may find SIR's conduct to have been, at worst, grossly negligent, and thus insufficiently exacerbated to support Laidlow liability. Were that to happen, SIR would have ***proved***, beyond peradventure, that the claims asserted by plaintiff fall squarely within the coverage of the workers' compensation part of Hartford's policy – and yet SIR would have been denied any defense of those claims by Hartford, without any recourse for recoupment. That result is not just paradoxical; it is in clear legal error. See Voorhees, supra, 128 N.J. at 174 (When "multiple alternative causes of action are set forth, the duty to defend will continue until every covered claim is eliminated."); Abouzaid, supra, 207 N.J. at 80 ("[I]f the complaint comprehends an injury which may be within the policy, a duty to defend will be found.")

No principle of insurance law is more fundamental than the rule that insurance policies must be interpreted in accordance with the reasonable expectations of the policyholder. E.g., Sosa v. Mass. Bay Ins. Co., 458 N.J. Super. 639, 646 (App. Div. 2019). Here, in 2021, the Appellate Division held in Rodriguez-Ortiz that a duty to defend negligence-based claims resides in the ***workers' compensation part*** of the standard two-part policy, a duty that is unaffected by the "enhanced" exclusion that now appears in the employer's liability part of the policy. SIR naturally had, and still has, a "reasonable expectation" that its policy will be similarly construed, since the

policy at issue in Rodriguez-Ortiz is in all material respects identical to SIR's policy. In denying SIR a right of defense that the insured in Rodriguez-Ortiz was found to have, the panel below thwarted SIR's reasonable expectations, and erred.

It is not an overstatement to say that claims of negligence and gross negligence fall at the ***core*** of workers' compensation coverage. Workers' compensation carriers have been held to be obligated to defend such claims since at least 1953 (when Danek v. Hommer was decided), without break up to and through the Appellate Division's 2021 opinion in Rodriguez-Ortiz. In holding that the "Employers' Liability EII exclusion" obviates the duty to defend negligence-based claims that exists under the workers' compensation part of the policy, the panel below erred – because the "Employers' Liability EII exclusion" does not even ***apply*** to the workers' compensation part of the policy.

Delta Plastics and Beseler are relevant to this case in one major respect. In those cases, this Court addressed a concerted attempt by the insurance industry to leave employers sued on "Laidlow" claims bare of insurance. The Court, hearkening back to its landmark decision in Schmidt v. Smith, 155 N.J. at 48-49 (holding that workers' compensation "policies must cover not only claims for compensation prosecuted in the Workers' Compensation court, but also claims for work-related injuries asserted in a common law court"), rebuffed that attempt. Now, the insurance industry is back with an "enhanced" exclusion that it says deprives employers of any

right of defense in Laidlow suits, even where (as here) the injured employee's complaint includes claims of negligence and gross negligence. If that is now to be the law of New Jersey – i.e., if employers must defend themselves at their own expense in Laidlow cases that include claims of negligence and gross negligence – it represents a radical change in the law, and is a change that should be wrought only after this Court passes upon the issue.

II. The Appellate Division Erred in Holding Any Challenge to the "Employer's Liability EII exclusion" to be Legally Futile and in Affirming the Law Division's Denial, on That Ground, of SIR's Motion for Leave to Amend Its Complaint

Few admonitions are more deeply ingrained into the jurisprudence of New Jersey than these:

> [T]rial courts [are] to approach with great caution applications for dismissal under *Rule* 4:6-2(e) for failure of a complaint to state a claim on which relief may be granted," and "should be granted in only the rarest of instances" because "such motions [are] almost always brought at the very earliest stage of the litigation. If a complaint must be dismissed after it has been accorded the kind of meticulous and indulgent examination counselled in this opinion, then, barring any other impediment such as a statute of limitations, ***the dismissal should be without prejudice to a plaintiff's filing of an amended complaint***. [Printing Mart, 116 N.J. at 48; emphasis added.]

Here, after determining that the "Employer's Liability EII exclusion" relieved Hartford of any duty to defend SIR against plaintiff's lawsuit, the Law Division refused to allow SIR to file an amended complaint alleging that the "enhanced"

exclusion (as so interpreted) was against public policy. The primary rationale given by the lower court to support its refusal was that SIR had supposedly failed to assert, in its briefs and at oral argument, that the "enhanced" exclusion was against public policy (Pa18). That rationale was refuted by the black and white of the record, which reflected that SIR ***repeatedly*** made that very contention – although SIR's main contention was that the lower court should adhere to the holding of Rodriguez-Ortiz (and render moot any issue regarding the legality of the exclusion).

Recognizing that the motion judge's primary reason for denying leave to appeal was unsustainable on the record, the Appellate Division bypassed it and endorsed a secondary rationale, which was that amendment of SIR's third-party complaint was futile. Specifically, the panel below opined that "Hartford's Employer's Liability EII exclusion provision mirrors the advice [sic] the Court pronounced in" the Delta Plastics and Beseler decisions, and concluded, for that stated reason, the "enhanced" exclusion was beyond legal attack. As the panel put it, "the exclusion language was in conformity with the Supreme Court's directives in Beseler II and Delta Plastics, where it struck down intentional tort claim exclusionary provisions it concluded were ambiguous … [and] SIR's motion to amend its complaint was [therefore] futile because it would have been dismissed for failure to state a claim." (MLAa25).

That conclusion, which is subject to review under a *de novo* standard, not abuse of discretion, is in clear legal error. In Delta Plastics and Beseler, this Court did not render any "advice" at all; it addressed a specific legal issue – namely, whether the intentional tort exclusion that then existed in the employer's liability part of the standard two-part workers' compensation / employer's liability policy relieved insurers of their defense and indemnity obligations in Laidlow suits. The Court held that the existing exclusion did not unambiguously exclude all claims that might be asserted under a Laidlow theory of liability and therefore did not suffice to relieve insurers of their defense and indemnity obligations. The Court did not issue any "directive" to the insurance industry at all, except (implicitly) to honor its contractual obligations to its employers.

Under circumstances that SIR has been afforded no opportunity to explore, the insurance industry thereafter proposed and evidently obtained regulatory approval of an "enhanced" exclusion – an exclusion that applies only to the employer's liability part of the policy and not at all to the workers' compensation part of the policy. As interpreted in Rodriguez-Ortiz, the "enhanced" exclusion unambiguously relieves insurers of ***indemnity*** obligations in Laidlow cases but does not relieve them of a duty to defend negligence-based claims raised in a Laidlow complaint. The panel in Rodriguez-Ortiz found no need to determine the legality of the "enhanced" exclusion as so interpreted, but took pains to opine that, should such

a need arise, the "broad view of the scope of mandated coverage" that this Court has espoused in cases like Schmidt v. Smith "may well override" the exclusion (Pa138).

To state it plainly, in Delta Plastics and Beseler, the question of whether the "Employer's Liability EII exclusion" is against public policy was not before the Court. Nor has the Appellate Division ever decided that issue – although in Rodriguez-Ortiz it did express serious doubts about the legality of the exclusion. In denying SIR an opportunity to amend its complaint to challenge the legality of the exclusion, the lower courts plainly erred, and denied SIR of basic procedural rights vouchsafed to it in this Court's Printing Mart decision.

CONCLUSION

There are two known recent instances in which a workers' compensation carrier has refused to defend an insured employer against claims of negligence raised in a Laidlow suit. In Rodriguez-Ortiz, Amguard refused to defend its insured and a panel consisting of Judges Ostrer, Accurso and Enright held, in an opinion issued in September 2021, that Amguard had breached its duty of defense and remanded the case for quantification of damages. In this case, the Appellate Division held, contrary to the holding in Rodriguez-Ortiz, that Hartford had no duty to defend SIR against such claims. The contrast between the two opinions – one supported by precedent and basic insurance law principles, one contrary to them – presents a clear need for review and supervisory intervention by this Court.

Respectfully submitted,

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