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STATEMENT OF MATERIAL FACTS

A. Background[1]

1. This is a construction accident negligence case. The construction project at issued was a large scale Newark redevelopment project know as the Southwyck Estates/South Ward Redevelopment Project. The Southwyck Estates project included the construction of a new home located at 146 Ridgewood Avenue, Newark, N.J., the accident location. (*Exhibit A, Plaintiff's Answers to Interrogatories, # 2*)(*Exhibit B, Report of Vincent Gallagher, at 2-3*)(*Exhibit C, Deposition of Dino Gaglioti, at 10-14*).

2. The owner/developer The Southwyck Estates/South Ward Redevelopment Project and the house plaintiff was injured at was owned by Summit Real Estate Developers ("Summit"). (*Exhibit B, Report of Vincent Gallagher, at 1-2, 21*)(*Exhibit E, Contract between Summit Realty & D&J Home Builders*)(*Exhibit C, Deposition of Dino Gaglioti, at 10-14*).

3. As part of this large project, Dino Gaglioti ("Gaglioti"), operating under the name D&J Home Builders, LLC ("D&J") was awarded a contract to act as general contractor on approximately 200 new homes located within the Southwyck Estates, including the subject property at 146 Ridgewood Avenue. (*Exhibit C, Deposition of Dino Gaglioti, at 9-14, 23, 37 -38, 40, 42-44, 52,65*)(*Exhibit B, Report of Vincent Gallagher, at 2, 17-19, 22*)(*Exhibit E, Contract between Summit Realty & D&J Home Builders*).

4. In turn, D& J Home Builders hired Newark Builders to act as a "second tier subcontractor who was responsible for actual day-to-day activities on the site." (*Exhibit C, Deposition of Dino Gaglioti, at 18, 23-24*)(*Exhibit B, Report of Vincent Gallagher, at 18, 21-22*)(*Exhibit G, Deposition of Jorlinar Santos, at 24, 34, 53*)(*Exhibit H, Deposition Julmar Santos, at 27-28)*.

5. Newark Builders then subcontracted the plumbing work to plaintiff's employer, C. Frietas Plumbing. (*Exhibit J, Deposition of Mario J. Frietas, at 9-11*)(*Exhibit B, Report of Vincent Gallagher, at 19-21*)(*Exhibit G, Deposition of Jorlinar Santos, at 37*)(*Exhibit P, C Deposition of Carlos Ferreira, at 15)*.

6. On January 5, 2005, at approximately 3:00 p.m. plaintiff was working in a trench, located in an area that is now the driveway of the house located at 146 Ridgewood Avenue. Plaintiff was installing an underground sewer line when the trench he was working in collapsed around him causing a large boulder to strike his right knee, resulting in serious injuries. (*Exhibit P, Deposition of Carlos Ferreira at 22, 38, 53*)(*Exhibit B, Report of Vincent Gallagher, at 19-21*).

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[1] For further background information, a copy of the brief in support of Carlos Ferreira's opposition to the motion for summary judgment in the underlying matter entitled, *Carlos Ferreira v. D&J Home Builders, LLC, et. al,* ESX-L-10493-06, is attached for the Court only.

7. The trench that eventually caused plaintiff's injury was dug by Negron Fernandes, who worked for Newark Builders. (*Exhibit J, Deposition Mario J. Freitas, at 29-32, 72*)(*Exhibit F, Trial Testimony Carlos Ferreira, at 22-23, 30-31, 57-58, 67-68, 74*)(*Exhibit K, Trial Testimony of Rene Gonzalez, at 120, 129-130*).

8. Newark Builders was on the "jobsite" on the date of Carlos Ferreira's injury. (*Exhibit J, Deposition Mario J. Freitas, at 29-32, 72*)(*Exhibit F, Trial Testimony Carlos Ferreira, at 22-23, 30-31, 57-58, 67-68, 74*)(*Exhibit M, Trial Testimony Jorlinar Santos, at 62, 64, 67,72-73*).

9. On October 27, 2009 an Essex County Jury found defendant D&J Home Builders, Inc., 70 % and Newark Builders, Inc., 30% liable for the injuries sustained by Carlos Ferreira as a result of the January 5, 2005 trench collapse. (*Exhibit D, Order for Judgment*).

B. Despite the Verdict, Essex Insurance Company Has Failed to Pay the Judgement.

10. Essex Insurance Company issued a general liability insurance policy to Newark Builders, Inc. with policy number 3CM9739 and policy period from 4/29/04 through 4/29/05. (*Exhibit N, Essex Insurance Policy*).

11. The declaration page for the subject policy lists Newark Builders as the named insured and describes their business as "Contractor". (*Exhibit N, Essex Insurance Policy*).

12. D&J Home Builders is indicated as an additional insured pursuant to an endorsement, effective on October 14, 2004. (*Exhibit N, Essex Insurance Policy*).

13. The additional insured endorsement provides that "where no coverage shall apply herein for the Named Insured, no coverage nor defense shall be afforded to the above-identified additional insured." (*Exhibit N, Essex Insurance Policy*).

14. Of course, the subject of the instant declaratory judgment action stems from Essex's assertion that the named insured, Newark Builders, and additional insured, D&J, are not entitled to coverage under policy 3CM9739 as a result of exclusion "L" (a/k/a, "Independent Contractor Exclusion"). *See, Essex Insurance Company's Motion for Summary Judgment.*

15. This exclusion provides:

> L. INDEPENDENT CONTRACTORS/SUBCONTRACTORS-CONDITIONAL:
>
> (1) "Bodily Injury," "personal injury" or "property damage" caused by acts of Independent Contractors/subcontractors contracted by you or on your behalf unless you obtain Certificates of Insurance from them providing evidence of at least like coverage and limits as provided by this policy;

> (2) Nor does this insurance apply to "bodily injury," "personal injury" or "property damage" sustained by any independent contractor/subcontractor, or any employee, leased worker, temporary or volunteer help of any independent contractor/subcontractor, unless the Named Insured is on site, directly supervising the work of the independent contractor/subcontractor at the time of injury or damage, and the Named Insured's action, inactions or omissions are the direct cause of the injury or damage, **and/or** the injury or damage is directly caused by an employee of the Named Insured.

(*Exhibit N, Essex Insurance Policy*)(emphasis added).

16. This exclusion does not preclude coverage as it has already been decided that the actions of the "Named Insured" were the direct cause of Mr. Ferreira's injury. As such, Essex Insurance Company is estopped from now asserting that the "actions, inactions or omissions" of Newark Builders and D&J are not "the direct cause of the injury," as this question of fact has been foreclosed by the jury and is now the law of the case[2]. (*Exhibit D, Order for Judgment*).

C. Newark Builders Dug the Trench and Was on Site at the Time of Mr. Ferreira's Injury.

17. It is undisputed that D&J hired Newark Builders as a "second tier subcontractor who was responsible for actual day-to-day activities on the site." (*Exhibit C, Deposition of Dino Gaglioti, at 18, 23-24*)(*Exhibit B, Report of Vincent Gallagher, at 18, 21-22*)(*Exhibit G, Deposition of Jorlinar Santos, at 24, 34, 53*)(*Exhibit H, Deposition Julmar Santos, at 27-28*)(*Exhibit M, Trial Testimony Jorlinar Santos, at 56*).

18. Carlos Ferreira, Mario Frietas (president of C. Freitas Plumbing), Jorlinar Santos, and

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[2] Where a judge or court of equal position has resolved an issue on an interlocutory basis, the law of the case doctrine requires it be followed by a subsequent judge, unless there is substantially different evidence at a subsequent trial, new controlling authority, or the view expressed was clearly erroneous. *Higgins v. Swiecicki*, 315 N.J. Super. 488 (App. Div. 1998) A court of equal jurisdiction may not reconsider an issue where there has been presented no substantially new evidence at a subsequent trial, new controlling authority, or specific findings regarding why the judgment was clearly erroneous. *Monaco v. Hartz Mountain Corp.*, 178 N.J. 401 (2004) (Long, J.) (finding that the trial court "overstepped its bounds" by ruling that the defendant had no legal duty with respect to a sign it did not own because the issue had been previously resolved through motion practice). Of course in the instant matter this factual issue has been resolved by a jury.

Rene Gonzalez all testify that Newark Builders was on the Southwyck Estates jobsite[3] at the time of Mr. Ferreira's injury. (*Exhibit J, Deposition Mario J. Freitas, at 29-32, 72*)(*Exhibit F, Trial Testimony Carlos Ferreira, at 22-23, 30-31, 57-58, 67-68, 74*)(*Exhibit M, Trial Testimony Jorlinar Santos, at 62, 64, 67,72-73*)(*Exhibit K, Trial Testimony of Rene Gonzalez, at 120, 129-130*).

19. It is undisputed that Newark Builders dug trenches and did excavation work on the Southwyck Estates jobsite, and specifically at 146 Ridgewood Avenue. (*Exhibit M, Trial Testimony of Jorlinar Santos, at 43, 48, 50, 51, 69, 84*).

20. In order to do this excavation work, Newark Builders had a backhoe at 146 Ridgewood Avenue. (*Exhibit M, Trial Testimony of Jorlinar Santos, at 48*).

21. When trenches, like the one that collapsed on Mr. Ferreira, were dug on the Southwyck Estates jobsite, the trenches would be opened and closed within the same day. This was done for safety reasons and also to prevent theft of copper pipe. (*Exhibit M, Trial Testimony of Jorlinar Santos, at 65-67*)(*Exhibit K, Trial Testimony of Rene Gonzalez, at 122*).

22. As such, Mario Freitas, president of C. Freitas Plumbing, testified that on the day of Mr. Ferreira's injury:

> Q: Out of the four people who were there, was there someone who was senior, in charge?
> A: Yeah, because inside this day, he has the machine for Newark Builders. Okay? Newark Builders he has his own operator inside the property, the house, not outside, inside. And the people are digging for us, for do all the pipe inside the house. Okay?
>
> Q: Let me stop you there because I want to make sure I understand. Now, are you taking about on the day of this accident?
> A: Yes.
>
> Q: Newark Builders had its own excavating machine there?
> A: Yes.
>
> Q: And where was that machine? Did they did the hole for you, the trench? Did Newark Builders dig the trench?
> A: Yes. It's not all the time. Sometimes when we is busy with another machines, he help us out with his own machine.

---

[3] The jobsite in this instance is the Southwyck Estates; not 146 Ridgewood Avenue. (*Exhibit I, Contract between D&J Home Builders & Newark Builders*)(*Contract between Summit Realty & D&J Home Builders*)(*Exhibit M, Trial Testimony Jorlinar Santos, at 26, 56, 62, 66*)(*Exhibit H, Deposition Julmar Santos, 25-28*)(*Exhibit G, Deposition Jorlinar Santos, at 15*).

(*Exhibit J, Deposition Mario J. Freitas, at 29-30*).

23. Rene Gonzalez, a co-worker of Mr. Ferreira, who was also working at 146 Ridgewood Avenue on January 5, 2005, testified that a machinist named "Fernando" dug the trench that eventually collapsed on Mr. Ferreira. (*Exhibit K, Trial Testimony of Rene Gonzalez, at 129-130*).

24. Rene Gonzalez confirmed that the machinist known as "Fernando" worked for Newark Builders. (*Exhibit K, Trial Testimony of Rene Gonzalez, at 129-130*).

25. Carlos Ferreira testified:

Q: Did either yourself, Martine or the other gentleman whose name you do not know, did either of you three dig the trench?
A: No.

Q: Okay. Who did dig the trench?
A: Well, the tench was dug by a young man whose nickname was Negron, he's the one who did it.

Q: And what is Negron's actual name?
A: His first name, Negron's first name, Fernando.

Q: And who did Fernando Negron work for?
A: Fernando Negron worked for the brothers building the house.
***
Q: What was the name of the the company that you understand built the house?
A: The ones who built the house? Newark Builders.

(*Exhibit F, Trial Testimony of Carlos Ferreira, at 22-23, 30-31, 57-58, 67-68, 74*).

26. Mario Frietas went on to testify:

Q: Do you know of a person that may have worked for you that goes by the name Negron or has a nickname Negron, N-e-g-r-o-n?
A: Yes. He not work for me. He's the one I told you Fernando. He called it Negron. That's the one's that's the machine operator for Santos.

Q: Are you sure Negron is Fernando who worked for Newark Builders?
A: Yes.

(*Exhibit J, Deposition Mario J. Freitas, at 72*).

27. Carlos Ferreira went into the trench immediately after Fernando had finished digging the trench. (*Exhibit F, Trial Testimony Carlos Ferreira, at 68*).

28. Within 15 to 20 minutes of entering the trench the trench collapsed on Ferreira. (*Exhibit F, Trial Testimony Carlos Ferreira, at 68*).

29. Unsurprisingly, Fernando was still in the area of the trench up to and including at the time of Mr. Ferreira's injury.

> Q: And how about Fernando Negron, was he in the area at the time or did he leave to go somewhere else?
> A: No, he was in the area at the time?
>
> Q: He was there?
> A: Yes.

(*Exhibit F, Trial Testimony Carlos Ferreira, at 30, 67- 68*).

30. This is confirmed by Rene Gonzalez who testified that after the trench collapsed, Martine (another C. Freitas employee) and the "machinist" pulled Mr. Ferreira out of the trench. (*Exhibit K, Trial Testimony of Rene Gonzalez, at 120*).

31. In addition to Fernando of Newark Builders having dug the faulty trench and remained on site during the collapse; Jorlinar Santos and Julmar Santos were supervising the 146 Ridgewood Avenue project. (*Exhibit M, Trial Testimony Jorlinar Santos, at 62, 64, 67*)(*Exhibit F, Trial Testimony Carlos Ferreira, at 59-60*).

32. The purpose of Julmar Santos being on the 146 Ridgewood Avenue on the date of Mr. Ferreira's injury was to:

> **Make sure the guys are okay, make sure the trench is being dug right, make sure about safety, make sure they got everything they needed, everything.**

(*Exhibit M, Trial Testimony Jorlinar Santos, at 67*)(emphasis added).

33. According to Jorlinar Santos:

> Q: The job at 146 Ridgewood Avenue. Didn't you give a statement and you said that "I was present during the city inspections that took place throughout the job?"
> A: Yes. Most of it. Yes.

(*Exhibit M, Trial Testimony Jorlinar Santos, at 72-73*).

34. Jorlinar Santos testified:

> Q: You indicated that your brother was there the day the trench was dug, but was he there when the trench was dug? Did he see the trench being dug?
> A: Yes.
> ***
> Q: So [Julmar] saw the trench being dug?
> A: Yes.

(*Exhibit M, Trial Testimony Jorlinar Santos, at 72-73*).

35. In addition, Carlos Ferreira recalls seeing one of the Santos brothers "two or three times" at 146 Ridgewood Avenue house on January 5, 2005, before the trench collapse. (*Exhibit F, Trial Testimony Carlos Ferreira, at 60*).

36. In fact, Carlos Ferreira testified:

> Q: And at one time that he [Santos brother] was there you were, in fact, working inside the trench before the accident happened?
> A: I think so.

(*Exhibit F, Trial Testimony Carlos Ferreira, at 60*).

37. Even counsel for Newark Builders admitted at the close of trial:

> And we had a - - we [Newark Builders] has a - - someone on site who was responsible to supervise the job, who - - Mr. Julmar Santos, who was there two times before and - - was there at the time of the trench being open and before the accident.

(*Exhibit L, Trial Transcript of 10/27/09, at 67-68*).

D. Construing the Policy in the Manner Advocated by Essex Would Render the Policy Illusory, Void Against Public Policy, and Contrary to Reasonable Public Expectation

38. As indicated above, the insured, Newark Builders and the additional insured, D&J, served in a general contractor role in connection with Southwyck Estates project. (*Exhibit C, Deposition of Dino Gaglioti, at 18, 23-24*)(*Exhibit B, Report of Vincent Gallagher, at 18, 21-22*)(*Exhibit G, Deposition of Jorlinar Santos, at 24, 34, 53*)(*Exhibit H, Deposition Julmar Santos, at 27-28*)(*Exhibit M, Trial Testimony Jorlinar Santos, at 56*).

39. As such, Newark Builders and D&J had a joint, non-delegable duty to maintain a safe workplace that includes "ensur[ing] 'prospective and continuing compliance' with the legislatively imposed non-delegable obligation to all employees on the job site, without regard to contractual or

employer obligations." *Alloway v. Bradlees Inc.,* 157 N.J. 221, 237-38 (1999), *citing, Kane v. Hartz Mountain*, 278 N.J.Super. 129, 142-43 (App. Div. 1994).

40. It is also 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 v. St. Paul Ins. Co.*, 100 N.J. 325, 337-38 (1985) ("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.") Furthermore, "the dictates of public policy may require invalidation of private contractual arrangements where those arrangements . . .are inconsistent with the public interest or detrimental to the common good." *Sacks Realty Co., Inc. v. Shore*, 317 *N.J. Super.* 258, 269 (App. Div. 1998) (citation omitted); *Henningsen v. Bloomfield Motors, Inc.*, 32 *N.J.* 358, 403-404 (1960).

41. Despite the clear law as to a contractor liability in the State of New Jersey, the policy issued to Newark Builders would be virtually nullified if the reading advocated by Essex were applied; as coverage would be so restrictive that it becomes illusory and therefore violative of New Jersey decision law regarding work place safety. (*Exhibit N, Essex Insurance Policy*).

E. The Court Should Find as a Matter of Law that Essex Insurance Company Consistently Hides Behind Exclusions In Effort to Avoid Indemnifying Its Insured for Claims Covered Under the Policy

42. Following trial in the third-party lawsuit concerning liability for the injury sustained by Carlos Ferreira, discovery in this declaratory judgment action commenced. In conjunction with same this firm propounded a notice to produce on Essex Insurance Company and sought depositions of Essex Insurance Company representatives. (*Exhibit O, Notice to Produce*).

43. The notice to produce sought information concerning the frequency with which Essex Insurance denies coverage to its insured. (*Exhibit O, Notice to Produce*).

44. Essex moved for and was denied a protective Order concerning the notice to produce items and was thus compelled to provide responses to this firm's notice to produce and to produce its representatives for deposition. (*Exhibit Q, Order Compelling Discovery*).

45. This firm specifically requested the following:

1) Any and all documents related to the claim denial in this case, including any reservation of rights letters, denial letters, etc.

2) Any and all reservation of rights or claim denial letters which reference the "Independent Contractors/Subcontractors" exclusion contained in the CGL policy at issue in this case, or which reference *similar language* excluding or limiting liability coverage for injuries to employees of independent or subcontractors, written anytime

from January 1, 2004 to January 1, 2010.

3) Any and all Essex Insurance company claim file(s) related to this case (absent any privileged materials which must be set forth in a detailed privilege log pursuant to the Court Rules).

(*Exhibit O, Notice to Produce*).

46. Despite discovery being compelled, to date, Essex has only provided a small amount of the documents requested[4]. (*Exhibit R, Disclaimer to Essex's Notice to Produce Response*).

47. Additionally, this firm noticed the deposition of Essex Insurance Company representatives most knowledgeable as to the "independent contractors/subcontractors" exclusion and the representative most knowledgeable as to the number of first party claims for coverage that were denied based upon said exclusion. (*Exhibit S, Deposition Notices*).

48. Despite the fact that this deposition was compelled to go forward within 45 days of the Order compelling same; and despite the fact that this firm noticed this deposition to go forward on multiple occasions, the Essex representatives were never produced for deposition. (*Exhibit S, Deposition Notices*).

49. As such, the Court should find as a matter of law that Essex Insurance Company consistently abandon's its insured pursuant to *R.* 4:23-2, 4:23-4. (*Exhibit Q, Order Compelling Discovery*).

<u>F. Carlos Ferreira's Cross-Motion in Aid of Litigant's Rights, Seeking to Enforce the Order for Judgment, Should be Granted.</u>

50. *Rule* 1:10-3 provides that where a verdict has been issued against a defendant, a plaintiff may seek enforcement of the order by way of a motion in aid of litigant's rights.

51. On December 4, 2009, the Honorable John C. Kennedy, J.S.C., executed an Order for Judgment concurrent with the jury verdict entered on October 27, 2009. (*Exhibit D, Order for Judgment*).

52. The competent evidence in this case makes clear that Essex has no basis upon which to deny coverage to Newark Builders or D&J; therefore, plaintiff's motion in aid of litigants rights

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[4] This firm has construction site injury cases where Essex Insurance Company insurers the general contractor and has denied coverage based on the "Independent Contractor" exclusion; yet these cases were not listed in documents produced by Essex. One matter in particular falls within the time frames for which Essex alleged to be providing documentation; yet, this matter was not listed.

should be granted and Essex compelled to pay the judgment. *R.* 1:10-3. (*Exhibit D, Order for Judgment*).

RESPONSE TO ESSEX INSURANCE COMPANY'S STATEMENT OF MATERIAL FACTS

1. Admit.

2. Admit.

3. Admit.

4. Admit.

5. Admit except to add that Essex Insurance Company ("Essex") also issued an additional insured endorsement to D&J Homebuilders ("D&J"). (*Exhibit N, Essex Insurance Policy*).

6. Admit.

7. Admit.

8. Admit.

9. Admit that Jorlinar Santos is the president of Newark Builders. Deny that the only employees of Newark Builders were Jolinar's brother and their wives. Rather, the competent evidence in this case supports the conclusion that Fernando a/k/a/ "Negron" worked for Newark Builders on the date of Mr. Ferreira's injury and further that Fernando had dug the faulty trench at at 146 Ridgewood Avenue and was still at this location when the trench collapsed on Mr. Ferreira. (*Exhibit J, Deposition Mario J. Freitas, at 72*)(*Exhibit K, Trial Testimony of Rene Gonzalez, at 129-130*)(*Exhibit F, Trial Testimony of Carlos Ferreira, at 22-23, 30-31, 57-58, 67-68, 74*).

10. Admit.

11. Admit.

12. Admit. Additionally, Fernando, a/k/a "Negron," an employee of Newark Builders was on site at the time of Mr. Ferreira's injury and had in fact dug the trench that collapsed on Mr. Ferreira. Fernando remained on site during the time Mr. Ferreira was working in the trench and even helped pull Mr. Ferreira out of the trench following the collapse. The trench collapse occurred within 15 -20 minutes of the trench being dug by Fernando. (*Exhibit K, Trial Testimony of Rene Gonzalez, at 120, 129-130*)(*Exhibit J, Deposition Mario J. Freitas, at 29-30, 72*)(*Exhibit F, Trial Testimony of Carlos Ferreira, at 22-23, 30-31, 57-58, 67-68, 74*).

13. Denied. Newark Builders president Jorlinar Santos admits that Newark Builders did excavation, including digging trenches on the Southwyck Estates project, including at 146 Ridgewood Avenue. Newark Builders used a backhoe to dig trenches on the jobsite. (*Exhibit M, Trial Testimony of Jorlinar Santos, at 43, 48, 50, 51, 69, 84*). Fernando, a/k/a "Negron," a

machinists working with Newark Builders was on site at the time of Mr. Ferreira's injury and had in fact dug the trench that collapsed on Mr. Ferreira. Fernando remained on site during the time Mr. Ferreira was working in the trench and even helped pull Mr. Ferreira out of the trench following the collapse. The trench collapse occurred within 15 -20 minutes of the trench being dug by Fernando. (*Exhibit K, Trial Testimony of Rene Gonzalez, at 120, 129-130*)(*Exhibit J, Deposition Mario J. Freitas, at 29-30, 72*)(*Exhibit F, Trial Testimony of Carlos Ferreira, at 22-23, 30-31, 57-58, 67-68, 74*).

14. Objection. It is unclear what it is meant by this statement as it is vague in so far as it states that "he could not recall if he was there" on the day the trench was dug. It is unclear what is meant by, "there." As such, we cannot admit or deny this statement.

15. Admit that Jolinar so testified; however, Jolinar also testified as follows:

> Q: And you testified that both you and your brother, supervised the activities of C. Fretias Plumbing?
> A: Yes.

(*Exhibit M, Trial Testimony of Jorlinar Santos, at 72*).

> Q: How about your brother, was he there that day?
> A: Yes.

(*Exhibit M, Trial Testimony of Jorlinar Santos, at 67*).

Additionally, even counsel for Newark Builders admitted at the close of trial:

> And we had a - - we [Newark Builders] has a - - someone on site who was responsible to supervise the job, who - - Mr. Julmar Santos, who was there two times before and - - was there at the time of the trench being open and before the accident.

(*Exhibit L, Trial Transcript of 10/27/09, at 67-68*).

16. Denied. See response to #13 above.

17. Denied. Julmar Santos' testimony makes clear that he does not recall the 146 Ridgwood Avenue construction with any specificity.

> Q: Okay. Did you ever see a trench from the house to the curb, were you ever present when that was there at all?
> A: I don't remember. I probably pass by when I pass by the connection was already done probably. I am not sure because it's so many houses that time.

(*Exhibit H, Deposition Julmar Santos*, *at 33*, *42, 46*). Julmar Santos summed up his testimony when

he responded as follows to a question:

> I don't remember. You can't tell me - - it's like when you sell cars. You sell so many you don't remember which one was like last month.

(*Exhibit H, Deposition Julmar Santos*, *at 55*).

18. Denied. See response to #17 above.

19. Denied. See response to #17 above.

20. Admit that the policy contains such an exclusion; however, the exclusion is referenced as Exclusion "L" rather than Exclusion "K".

LEGAL DISCUSSION

POINT I

THIS DECLARATORY JUDGMENT ACTION IS PROPERLY DISPOSED OF BY WAY OF SUMMARY JUDGMENT

When litigant's arguments hinge upon the meaning of the provisions of an insurance policy, the matter is rightfully decided by way of summary judgment. *Hebela v. Healthcare Ins. Co.*, 370 N.J.Super. 260, 268 (App. Div. 2004) (citing *Nat'l Union Fire Ins. Co. v. Transp. Ins. Co.*, 336 N.J.Super. 437, 443 (App. Div. 2001)). *See also, Hammond v. Doan*, 127 N.J.Super. 67 (Law Div. 1974) (declaratory judgment is often used to determine the extent of coverage in insurance cases). Here, as set forth at length defendant Ferreira's Statement of Material Facts, Essex has premised its denial of coverage upon its interpretation of endorsements contained within the Policy. (*Exhibit N, Policy*). In this action, plaintiff seeks a declaration of the meaning of those endorsement in the (context of the entirety of the policy and declarations therein) and an Order requiring Essex Insurance Company ("Essex") to indemnify Newark Builders and D&J Home Builders for the January 5, 2005 incident. Consequently, this matter is ripe for summary judgment.

Summary judgment is appropriate when "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." *R.* 4:46-2(c). In determining whether there exists a genuine issue of material fact that precludes summary judgment, a court must consider "whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party." *Brill v. Guardian Life Ins. Co. of Am.,* 142 N.J. 520, 540 (1995).

As set forth at length *infra*, established jurisprudence governing the interpretation of insurance contracts makes clear that there is no genuine issue of material fact as interim contractor, Newark Builders, is entitlement to coverage under the policy. As such, the policy therefore clearly provides coverage to the general contractor D&J Home Builders, Inc. ("D&J").

POINT II

THE FACTS UNAMBIGUOUSLY FIT INTO THE POLICY LANGUAGE, THEREFORE COVERAGE SHOULD BE AFFORDED TO NEWARK BUILDERS AND D&J HOME BUILDERS.

An insurance policy generally should be interpreted according to its plain and ordinary meaning, *Longobardi v. Chubb Ins. Co. of New Jersey*, 121 N.J. 530, 537 (1990) "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); *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 v. Hommer, 28 N.J.Super. at 77. In this instance, the Essex policy language clearly and unambiguously provide coverage to Newark Builders and therefore to D&J for the January 5, 2005 trench collapse.

The "Independent Contractor" exclusion provides:

> Nor does this insurance apply to "bodily injury," "personal injury" or "property damage" sustained by any independent contractor/subcontractor, or any employee, leased worker, temporary or volunteer help of any independent contractor/subcontractor, unless the Named Insured is on site, directly supervising the work of the independent contractor/subcontractor at the time of injury or damage, and the Named Insured's action, inactions or omissions are the direct cause of the injury or damage, **and/or** the injury or damage is directly caused by an employee of the Named Insured.

(*Exhibit N, Essex Insurance Policy*)(emphasis added). Importantly, this exclusions contains two clauses.

A. The First Clause Unambiguously Provides Coverage For The January 5, 2005 Incident.

The first clause essentially states that the Named Insured must be "on site, directly supervising" at the time of injury and the Named Insured's action/inaction must be the direct cause of the injury. This clause, as set forth *infra.*, at Point III, could be interpreted to contain some ambiguities which should of course be construed in favor of the insured. *Argent v. Brady*, 386 N.J. Super. 343, 351 (App. Div. 2006). However, the Court need not reach any ambiguities as the facts of the instant matter in conjunction with the language of the exclusion squarely provide that coverage is not precluded.

First, the job site in question is the entire Soutwyck Estates project rather than a single house within the large project. There is no dispute that the Santos brothers were supervising the Southwyck Estates project at the time of Mr. Ferreira's injury. (*Exhibit I, Contract between D&J Home Builders & Newark Builders*)(*Contract between Summit Realty & D&J Home Builders*)(*Exhibit M, Trial Testimony Jorlinar Santos, at 26, 56, 62, 66*)(*Exhibit H, Deposition Julmar Santos, 25-28*)(*Exhibit G, Deposition Jorlinar Santos, at 15*). Moreover, trenches for the individual houses being built on the Southwyck Estates properties were opened and closed the same day. This was for safety reason and also to ensure that the copper pipe was not stolen during the night. (*Exhibit M, Trial Testimony of Jorlinar Santos, at 65-67*)(*Exhibit K, Trial Testimony of Rene Gonzalez, at 122*).

Carlos Ferreira went into the trench immediately after Fernando, a Newark Builders employee, had finished digging the trench. (*Exhibit F, Trial Testimony Carlos Ferreira, at 22-23,*

30-31, 57-58, 67-68, 74)(*Exhibit J, Deposition Mario J. Freitas, at 29-30, 72*)(*Exhibit K, Trial Testimony of Rene Gonzalez, at 129-130*). Within 15 to 20 minutes of entering the trench the trench collapsed on Ferreira. (*Exhibit F, Trial Testimony Carlos Ferreira, at 68*). Unsurprisingly, Fernando was still in the area of the trench up to and including at the time of Mr. Ferreira's injury.

> Q: And how about Fernando Negron, was he in the area at the time or did he leave to go somewhere else?
> A: No, he was in the area at the time?
>
> Q: He was there?
> A: Yes.

(*Exhibit F, Trial Testimony Carlos Ferreira, at 30, 67- 68*). In fact, after the trench collapsed, Fernando helped pulled Mr. Ferreira out of the trench. (*Exhibit K, Trial Testimony of Rene Gonzalez, at 120*). Accordingly, it is clear that Fernando of Newark Builders was on site at the time of plaintiff's injury.

Additionally, president of Newark Builder, Jorlinar Santos admits that he and his brother , Julmar Santo,s were supervising the 146 Ridgewood Avenue project. (*Exhibit M, Trial Testimony Jorlinar Santos, at 62, 64, 67*)(*Exhibit F, Trial Testimony Carlos Ferreira, at 59-60*). The purpose of Julmar Santos being on the 146 Ridgewood Avenue on the date of Mr. Ferreira's injury was to:

> **Make sure the guys are okay, make sure the trench is being dug right, make sure about safety, make sure they got everything they needed, everything.**

(*Exhibit M, Trial Testimony Jorlinar Santos, at 67*)(emphasis added). Accordingly, Jorlinar Santos admits that both he and his brother, Julmar, were at the 146 Ridgewood Avenue house at or around the time of the trench being dug. (*Exhibit M, Trial Testimony Jorlinar Santos, at 72-73*). In fact, Jorlinar Santos testified:

> Q: You indicated that your brother was there the day the trench was dug, but was he there when the trench was dug? Did he see the trench being dug?

A: Yes.
***
Q: So [Julmar] saw the trench being dug?
A: Yes.

(*Exhibit M, Trial Testimony Jorlinar Santos, at 72-73*).

Finally, Carlos Ferreira recalls seeing one of the Santos brothers at the job site "two or three times" at 146 Ridgewood Avenue on January 5, 2005, during the time Mr. Ferreira was working in the trench. (*Exhibit F, Trial Testimony Carlos Ferreira, at 60*). Even counsel for Newark Builders admitted at the close of trial:

> And we had a - - we [Newark Builders] has a - - someone on site who was responsible to supervise the job, who - - Mr. Julmar Santos, who was there two times before and - - was there at the time of the trench being open and before the accident.

(*Exhibit L, Trial Transcript of 10/27/09, at 67-68*). Therefore, it is clear and unambiguous that the January 5, 2005 trench collapse and injury to Mr. Ferreira fit squarely within the confines of policy and is not precluded by the "Independent Contractor" exclusion.

B. The Second Clause Also, Unambiguously Provides Coverage For The January 5, 2005 Incident

The second clause, "[A]nd/or, the injury or damage is directly caused by an employee of the Named Insured," is unambig6uous. Jorlinar Santos admits that on the SouthWyck Estates project and particularly the 146 Ridgewood Avenue house, Newark Builders did excavation work and had a backhoe at the 146 Ridgewood Avenue property. (*Exhibit M, Trial Testimony of Jorlinar Santos, at 43, 48, 50, 51, 69, 84*). Moreover, Mario Freitas (owner of C. Freitas Plumbing), Carlos Ferreira and Rene Gonzalez (Mr. Ferreira's co-worker) all testify that on January 5, 2005, a machinist by the name of Fernando, a/k/a "Negron", dug the trench that collapsed on Carlos Ferreira. (*Exhibit J, Deposition Mario J. Freitas, at 29-30*)(*Exhibit K, Trial Testimony of Rene Gonzalez, at 129-*

130)(*Exhibit F, Trial Testimony of Carlos Ferreira, at 22-23, 30-31, 57-58, 67-68, 74*). All three witnesses confirm that Fernando a/k/a/ "Negron" worked for Newark Builders. (*Exhibit J, Deposition Mario J. Freitas, at 72*)(*Exhibit K, Trial Testimony of Rene Gonzalez, at 129-130*)(*Exhibit F, Trial Testimony of Carlos Ferreira, at 22-23, 30-31, 57-58, 67-68, 74*). As such, it is clear that an employee of the named insured dug the faulty trench that resulted in injury to Carlos Ferreira. Therefore, the injury to Mr. Ferreira was directly caused by an employee of the Named Insured; specifically, Fernando, a/k/a "Negron."

Additionally, as set forth in the brief submitted by counsel for Newark Builders, an Essex County jury has already determined that injury to Mr. Ferreira was as a result of Newark Builder's acts or omissions. As such, Essex Insurance Company is estopped from now asserting that the "actions, inactions or omissions" of Newark Builders and D&J are not "the direct cause of the injury," as this question of fact has been foreclosed by the jury and is now the law of the case[5]. (*Exhibit D, Order for Judgment*). Despite the foregoing, Essex Insurance Company ignores the simple facts in this case as well as the implication that any outstanding factual disputes have already been resolved, in favor of coverage. As a result, as set forth at length *infra*., Carlos Ferreira at this

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[5] Where a judge or court of equal position has resolved an issue on an interlocutory basis, the law of the case doctrine requires it be followed by a subsequent judge, unless there is substantially different evidence at a subsequent trial, new controlling authority, or the view expressed was clearly erroneous. *Higgins v. Swiecicki*, 315 N.J. Super. 488 (App. Div. 1998) A court of equal jurisdiction may not reconsider an issue where there has been presented no substantially new evidence at a subsequent trial, new controlling authority, or specific findings regarding why the judgment was clearly erroneous. *Monaco v. Hartz Mountain Corp.*, 178 N.J. 401 (2004) (Long, J.) (finding that the trial court "overstepped its bounds" by ruling that the defendant had no legal duty with respect to a sign it did not own because the issue had been previously resolved through motion practice). Of course in the instant matter this factual issue has been resolved by a jury.

time cross-moves to compel Essex Insurance Company to pay the judgement pursuant to the Order for Judgment. (*Exhibit D, Order for Judgment*).

POINT III

ANY AMBIGUITIES WITHIN THE INDEPENDENT CONTRACTOR EXCLUSIONS UPON WHICH ESSEX INSURANCE COMPANY BASES THE DENIAL MUST BE CONSTRUED IN FAVOR OF COVERAGE

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. *Meier v. New Jersey Life Insurance Co.*, 101 N.J. 597, 611 (1986). 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." *Erdo*, 275 N.J. Super. at 120, quoting *Mazzilli v. Accident and Casualty Insurance Company of Switzerland*, 35 N.J. 1, 8 (1961). Moreover, 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).

New Jersey courts often have construed ambiguous language in insurance policies in favor of the insured and against the insurer. *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); *Sandler v. New Jersey Realty Title Ins. Co.*, 36 N.J. 471, 479 (1962); *Matits v. Nationwide Mut. Ins. Co.*, 33 N.J. 488, 495 (1960); *Hunt v. Hospital Serv. Plan*, 33 N.J. 98, 102 (1960). To that extent, insurance contracts are "unipartite in character," having been drafted by the company's experts, "[people] learned in the law of insurance." *Mazzilli v. Accident & Cas. Ins. Co. of Winterthur*, 35 N.J. 1, 7 (1961). 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).

In the context of the average insured, it has long been established that while insurance policies are contractual in nature, they are not ordinary agreements. Instead, they are considered "contracts of adhesion between parties who are not equally situated." *Meier v. New Jersey Life Ins. Co.*, 101 N.J. 597, 611 (1986) (*citing Allen v. Metropolitan Life Ins. Co.*, 44 N.J. 294, 305 (1965)). As such, they are subject to special rules of interpretation. *Longobardi v. Chubb Ins. Co. of New Jersey*, 121 N.J. at537. Moreover, insurance contracts are not typically read or reviewed by the insured, whose understanding is often impeded by the complex terminology used in the standardized forms. *See Gaunt v. John Hancock Mutual Life Insurance Co.*, 160 F.2d 599, 601 (2d Cir.), *cert. den*, 331 U.S. 849 (1947).

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 v. St. Paul Ins. Co.*, 100 N.J. 325, 334-39 (1985). Courts are bound to protect the insured to the full extent that

any fair interpretation will allow. *Kievit v. Loyal Protective Life Ins. Co.*, 34 N.J. 475 (1961). Moreover, in evaluating the insurer's claim as to the meaning of the language under study, courts necessarily consider whether alternative or more precise language, if used, would have put the matter beyond reasonable question; also whether judicial decisions appear in the reports attributing a more comprehensive significance to it than that contended for by the insurer. *Mahon v. American Cas. Co.*, 65 N.J.Super. 148 (App.Div.1961).

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 v. Preferred Mut. Ins. Co.*, 128 N.J. 165, 175 (1992)). 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 v. Accident & Cas. Ins. Co. of Winterthur*, 35 N.J. at 8, 170 A.2d 800.

In this case, as set forth in Point II, *supra*. the facts of this case fit squarely within the policy language. *Danek v. Hommer*, 28 N.J.Super. at 77. However, if the Court were to find any ambiguities within same, those ambiguities should be construed in favor of Newark Builders and D&J. As set forth in the brief submitted on behalf of D&J Associates, there are several terms within the exclusion that are not defined. For purposes of this brief, Carlos Ferreira hereby adopts the arguments asserted by D&J concerning policy ambiguities.

Additionally, Mr. Ferreira would like to draw the Court's attention to a recent and very

similar case, *Gabriele v. Lyndhurst Residential Community, LLC*[6], 2008WL588543 (App. Div. 2008). In *Gabriele*, a general contractors, Pyramid Construction and Engineering, LLC sought to compel defense and indemnification from its insurer, Essex Insurance Company for an injury to an employee of a subcontractor. In *Gabriele*, Essex similarly advocated for a broad interpretation of nearly identical exclusionary language purportedly establishing that employees of subcontractors are not covered under the general contractor's, Pyramid's policy. *Id*. at *2-3. In denying to extend the Essex Insurance subcontract exclusion to employees of subcontractors, the Appellate Division cited to *President v. Jenkins*, 180 N.J. 550, 563 (2004):

> When an insurance policy's language fairly supports two meanings, one that favors the insurer, and the other that favors the insured, the policy should be construed to sustain coverage.

Accordingly, in *Gabriele*, the Appellate Division found in favor of the general contractor and compelled coverage under the Essex Insurance policy.

In the case at bar, as in *Gabriele v. Lyndhurst Residential Community, LLC,* the policy is could be construed to contain ambiguities as to whether coverage is afforded to an injured subcontractor. The exclusionary language upon which Essex seeks to disclaim coverage must be strictly construed against the insurer and thus interpreted as sustaining coverage.

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[6] A copy of this case is attached as Exhibit T to the Certification of Counsel, for the Court's ease of reference as it is an unpublished decision.

POINT IV

ASSUMING *ARGUENDO*, THE COURT ADOPTS ESSEX'S PROPOSED INTERPRETATION, NEWARK BUILDER'S REASONABLE EXPECTATIONS NEVERTHELESS DICTATE THAT COVERAGE IS AFFORDED UNDER THE POLICY

A fundamental tenet of insurance law is to fulfill the objectively reasonable expectations of the parties. *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).

Despite the above and the clear and objectively reasonable expectation concerning subcontractors whom Newark Builders hired to work on large two family construction project known as Southwyck Estates, Essex seeks a finding of no coverage. Essex advocates for a reading of the policy that would render coverage virtually meaningless. Same does not comport with the jurisprudence of insurance contract construction in this State. *Mazzilli v. Accident Cas. Ins. Co.*, 35 N.J. 1, 7 (1961)(explaining that a court should find the broadest coverage possible under an insurance policy when controlling language is susceptible to multiple interpretations).

As such, even assuming for purpose of this argument that the Exclusion “L” is construed to preclude for Carlos Ferreira’s injury, Newark Builders and D&J’s objectively reasonable expectations dictate that the Court Order defense and indemnification in this matter.

POINT V

EVEN IF CLEAR AND UNAMBIGUOUS, ESSEX'S INDEPENDENT CONTRACTOR EXCLUSION VIOLATE DECISIONAL LAW AND PUBLIC POLICY AND IS THEREFORE UNENFORCEABLE.

In attempting to persuade the Court that their policies do not provide coverage for Mr. Ferreira's injuries, Essex argues that Newark Builders and D&J are not entitled to coverage simply because the independent exclusion allegedly expressly excludes coverage in this instance. Significantly, however, Essex fails to acknowledge -- or recognize -- that even an otherwise clear and unambiguous exclusion is unenforceable if that exclusion violates decisional law and public policy. Here, Essex's exclusion directly contravenes well established legal principles as well as public policy. Accordingly, the exclusion it attempts to enforce is unenforceable and thus coverage must be afforded to Newark Builders and D&J.

It is also long settled that insurance policy exclusions that contravene decisional law or public policy are unenforceable. *Sparks v. St. Paul Ins. Co.*, 100 *N.J.* 325, 334 (1985); *accord Doto v. Russo*, 140 *N.J.* 544, 560 (1995) ("an exclusion that is specific, plain, clear, prominent and **not contrary to public policy** will be given effect") (emphasis added). Succinctly defined, public policy is "that principle of law which holds that no person can lawfully do that which has a tendency to be injurious to the public or against public good . . ." *Allen v. Commercial Cas. Ins. Co.*, 131 *N.J.L.* 475, 477-78 (1944). Significantly, "[p]ublic policy . . . finds expression in the Constitution, the statutory law and **in judicial decisions**." *Henningsen v. Bloomfield Motors, Inc.*, 32 *N.J.* 358, 404 (1960) (emphasis added); *Hennessey v. Coastal Eagle Point Oil Co.*, 129 N.J. 81, 90 (1992) ("The sources of public policy include legislation; administrative rules, regulations or decisions; **and judicial decisions**.") (emphasis added).

It is equally established that "the dictates of public policy may require invalidation of private contractual arrangements where those arrangements . . .are inconsistent with the public interest or detrimental to the common good." *Sacks Realty Co., Inc. v. Shore*, 317 *N.J. Super.* 258, 269 (App. Div. 1998) (citation omitted). While individuals must have freedom to contract, courts "do not hesitate to declare void as against public policy [contractual] provisions which clearly tend to the injury of the public in some way." *Henningsen*, *supra*, 32 *N.J.* at 403-04.

Consequently, New Jersey courts have historically refused to enforce contractual provisions that are inconsistent with the public policy of the State. *Vasquez v. Glassboro Serv. Ass'n, Inc.*, 83 *N.J.* 86, 98,105 (1980) ((finding that public policy requires implication of provision in migrant farm worker's employment contract allowing for reasonable time to find alternate housing after termination of employment where contract allowed for dispossession without notice), *citing Houston Petroleum Co. v. Automotive Products Credit Ass'n*, 9 *N.J.* 122, 130 (1952) (finding contract's restrictive covenants regarding permissible use of land not enforceable because they violated public policy implicit in zoning laws); *Shell Oil Co. v. Marinello*, 63 *N.J.* 402, 409 (1973) (invalidating at-will termination provision of oil company's lease and dealer agreement finding it to be detrimental to public to whom supply and distribution of oil are vital). Indeed, because insurance policies are contracts of adhesion, courts must "assume a particularly vigilant role in ensuring their conformity to public policy and principles of fairness." *Voorhees*, *supra*, 128 *N.J.* at 175. "Where there is grossly disproportionate bargaining power, the principle of freedom to contract is non-existent and unilateral terms result. In such a situation courts will not hesitate to declare void as against public policy grossly unfair contractual provisions that clearly tend to the injury of the public in some way. *Shell Oil Co.*, *supra*, 63 *N.J.* at 408 (citing *Henningsen*, *supra*, at 32 N.J. at 403-04); *see also*

Ellsworth v. Dobbs, Inc. v. Johnson, 50 *N.J.* 528, 55 (1967) (property owner not liable for real estate broker commission where sale not consummated due to purchaser default because of "substantial inequality of bargaining power" between owner and broker); *Allen Metropolitan Life Ins. Co.*, 44 *N.J,* 294, 305 (1965) (life insurance binder construed against insurer to permit recovery under life insurance policy where insured and insurer "not equally situated."); *Henningsen*, *supra*, 32 *N.J.* at 404(automobile manufacturer's implied warranty of merchantability invalidated due to "grossly disproportionate bargaining power" between manufacturer and buyer).

In the case at bar, as discussed *supra*, the exclusionary provision at issue, if read in the manner advocated by Essex, are so limiting so as to render the coverage a nullity. As indicated above, the insured, Newark Builders and the additional insured, D&J, served in a general contractor role in connection with Southwyck Estates project. (*Exhibit C, Deposition of Dino Gaglioti, at 18, 23-24*)(*Exhibit B, Report of Vincent Gallagher, at 18, 21-22*)(*Exhibit G, Deposition of Jorlinar Santos, at 24, 34, 53*)(*Exhibit H, Deposition Julmar Santos, at 27-28*)(*Exhibit M, Trial Testimony Jorlinar Santos, at 56*). As such, Newark Builders and D&J had a joint, non-delegable duty to maintain a safe workplace that includes "ensur[ing] 'prospective and continuing compliance' with the legislatively imposed non-delegable obligation to all employees on the job site, without regard to contractual or employer obligations." *Alloway v. Bradlees Inc.,* 157 N.J. 221, 237-38 (1999), *citing, Kane v. Hartz Mountain*, 278 N.J.Super. 129, 142-43 (App. Div. 1994).

The Court can take judicial notice that the bulk of injury liability exposure contractors like Newark Builders and D&J face on a project arises from injuries by employees of subcontractors alleging OSHA was not complied with. Yet the Exclusion "L", if applied in the manner advocated by Essex, would virtually never provide coverage for such claims.

This exclusion is unreasonable, render coverage a nullity, and are against the public policy of this State. In fact, under the law in New Jersey, all contractors like Newark Builders and D&J are required to maintain at least $500,000 in general liability coverage. *See N.J.A.C.* 45A-17.5(b); 45A-17.12. The obvious policy behind this requirement is so that members of the injured pubic have available a fund of compensation for injuries sustained by the negligence of contractors. In short, the New Jersey Legislature has found it in the public interest to require contractors like Newark Builders and D&J to maintain insurance to cover, among other things, injury claims brought by employees of subcontractors. Yet, Essex writes policies purporting to satisfy these requirements and provide a pool of compensation injured workers like Carlos Ferreira can draw from. However, due to exclusions - that are akin to an aviation policy excluding injury claims arising from airplane crashes, or malpractice policies that exclude injury claims brought by patients– this coverage is in fact not available as it essentially excludes claims brought by employees of subcontractors[7]. This

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[7]It is well settled that the covenant to defend is identified with the convent to pay. *Burd v. Sussex Mutual Insurance Company*, 56 N.J. 383, 389-90 (1970)**.** *Merchants Indemnity Corp. of New York v. Eggleston*, 37 N.J. 114, 127 (1962); *Griggs v. Betram*, 88 N.J. 347, 362 (1982). The reasoning behind this premise is that the stipulation for defense of actions, even if groundless, would be of limited value if that obligation did not arise when a claim is stated in the pleadings, which if sustained, would be within the protection afforded by the policy. *Burd v. Sussex Mutual Insurance Company*, 56 N.J. at 390, *citing, Danek v. Hommer*, 28 N.J. Super. 68, 80 (App. Div. 1953). Where, as here, an insurer and insured's interest are adverse,

> [T]he carrier should not be permitted to assume the defense if it intends to dispute its obligation to pay a plaintiff's judgment, unless of course the insured expressly agrees to that reservation. *This is not to free the carrier from its covenant to defend, but rather to translate its obligation into one to reimburse the insured if it is later adjudged that the claim was one within the policy covenant to pay.*

Burd v. Sussex Mutual Insurance Company, 56 N.J. at 390 (citation omitted)(emphasis added).

In this instance, Essex provided a defense to its insured without undertaking the obligation to pay. This clearly presents a direct conflict between the insured and Essex. Counsel

is contrary to the public policy as well established decisional law. Therefore, coverage should be compelled under the policy and plaintiff's cross-motion for summary judgment granted.

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for Newark Builders, being paid for defense only by Essex Insurance Company, had motivation during discovery and trial in the underlying to ensure that Newark Builders fit squarely within Exclusions "L." Based on this clear conflict, Essex should now be estopped from denying indemnification to its insured and additional insured.

POINT VI

THE COURT SHOULD TAKE JUDICIAL NOTICE THAT ESSEX DOES NOT PAY ANY CLAIMS FOR INJURIES TO SUBCONTRACTOR EMPLOYEES

New Jersey Court Rule 4:23-2 specifically provides that "[i]f a party . . . fails to obey an order to provide or permit discovery [such as a deposition] the court in which action is pending may make such orders in regard to the failure as are just . . " including (1) [a]n order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order; (2) [a]n order refusing to allow the disobedient party to support or oppose designated claims or defenses . . ." *R*. 4:23-2(b)(1) & (b)(2). Moreover, *R*. 4:23-4. Failure of Party to Attend at Own Deposition, provides that "if a party . . . fails to appear [for]. . . his deposition, after being served with proper notice, the court in which the action is pending on motion may make such orders in regard to the failure as are just, and among others it may take action authorized under paragraphs (1) (2) and (3) of *R*. 4:23-2(b).

In this case, this firm propounded a notice to produce on Essex Insurance Company and sought depositions of Essex Insurance Company representatives. (*Exhibit O, Notice to Produce*)(*Exhibit S, Deposition Notices*). The notice to produce sought information concerning the frequency with which Essex Insurance denies coverage to its insured; specifically based on similar "Independent Contractor" exclusions. (*Exhibit O, Notice to Produce*). Essex moved for and was denied a protective Order concerning the notice to produce items and was thus compelled to provide responses to this firm's notice to produce and to produce its representatives for deposition. (*Exhibit Q, Order Compelling Discovery*). Despite the denial of the protective order, to date, Essex has only

provided a small amount of the documents requested. (*Exhibit R, Disclaimer to Essex's Notice to Produce Response*).

In addition to compelling Essex's responses to the notice to produce, the deposition of Essex representatives were compelled to go forward within 45 days of the April 1, 2010 Order. (*Exhibit Q, Order Compelling Discovery*). This firm repeatedly sought, the deposition of Essex Insurance Company representatives most knowledgeable as to the "independent contractors/subcontractors" exclusion and the representative most knowledgeable as to the number of first party claims for coverage that were denied based upon said exclusion. (*Exhibit S, Deposition Notices*). This deposition was noticed to go forward on multiple occasions; however, the Essex representatives were never produced for deposition. (*Exhibit S, Deposition Notices*).

Essex has failed to provide complete responses to the notice to produce and failed to produce its representatives for deposition despite the April 1, 2010 Order. As such, pursuant to *R*. 4:23-2 and *R*. 4:23-4 it is respectfully requested that the Court deem the facts sought to be discovered - that Essex rarely if ever provides coverage for injuries to a subcontractor - established, as a matter of law.

POINT VII

PLAINTIFF'S CROSS-MOTION IN AID OF LITIGANTS' RIGHTS, TO ENFORCE THE ORDER FOR JUDGMENT, SHOULD BE GRANTED AS, BASED ON THE COMPETENT EVIDENCE, ESSEX HAS NO LEGITIMATE BASIS UPON WHICH TO DISCLAIM COVERAGE.

Rule 1:10-3, provides that where a verdict has been issued against a defendant, a plaintiff may seek enforcement of the order by way of a motion in aid of litigant's rights. Where a party is acting in violation of a court order, the party seeking to enforce the order may bring a motion in aid of litigants' rights brought before the court that issued the original order. *Asbury Park Bd. Of Educ. v. New Jersey Dept. Of Educ.,* 369 N.J. Super. 481, 486, (App. Div. 2004), *judgment aff'd in part, rev'd in part*, 180 N.J. 109 (2004), *order clarified*, 180 N.J. 113;.*Pasqua v. Council*, 186 N.J. 127, 140, (2006) (citing *Essex County Welfare Bd. V. Perkins,* 133 N.J. Super. 189, 195, 336 A.2d 16 (App. Div.), *certif. denied*, 68 N.J. 161(1975)(internal citations omitted)). Here Essex has failed to comply with the December 4, 2009 Order for Judgment. (*Exhibit D, Order for Judgment*). In failing to comply with this Court's order, Essex has essentially deprived Carlos Ferreira of the judgment to which he is entitled under the law. As such, Carlos Ferreira makes the instant motion to facilitate the enforcement of the court order.

The only real means by which the plaintiff's rights can be properly protected is by way of a motion in aid of litigant's rights. Essex has failed to comply with the Order for Judgment in this matter, and as set forth *supra*, the competent evidence in this case makes clear that there is no basis by which Essex should not be responsible for the judgement. As such, the plaintiff's motion in aid of litigant's right should be granted, thereby compelling Essex to comply with the court's decision.

CONCLUSION

For the foregoing reasons, plaintiff respectfully request that Essex Insurance Company's motion for summary judgment be denied and plaintiff's cross-motion for summary judgment and cross-motion in aid of litigants rights to enforce the Order for Judgment be granted.

Respectfully submitted,

SARAH K. DELAHANT

Dated: October 11, 2011

And the law is clear, "When the language of a policy will support two meanings, one favorable to the insured and the other favorable to the insurer, the interpretation sustaining coverage must be applied." *Franklin Mutual v. Sec. Indemn. Ins.* 275 N.J.Super. 335 (App.Div. 1993); *See also Sparks v. St. Paul Ins. Co.*, 100 N.J. 325, 334-39 (1985).

And even if hypothetically were plaintiff's interpretation tortured and Essex's reasonable (both untenable conclusions), coverage would still apply because Essex's conclusion would result in illusory coverage:

> Where the additional insured is held no more than vicariously liable for the acts of the named insured, the additional insured would have an action for indemnity against the primary wrongdoer. "Thus, an endorsement that provides coverage only for the additional insured's vicarious liability may be illusory and provide no coverage at all." Douglas R. Richmond & Darren S. Black, *Expanding Liability Coverage: Insured Contracts and Additional Insureds,* 44 DRAKE L.REV. 781, 806 (1996). In this light, it is obvious that additional insureds expect more from an endorsement clause than mere protection from vicarious liability.

Marathon Ashland Pipe Line LLC v. Maryland Casualty Co., 243 F.3d. 1232, 1240(10th Cir. 2001); *See also Auto Lenders Acceptance Corporation v. Gentilini Ford, Inc.*, 181 N.J. 245, 276 (2004) (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.'"); *Zurich v. Gemini*, 2005 WL 1102650, *5 (Cal. App. 4th Dist 2005) ("The coverage provided by this endorsement was so credit card narrow that it could hardly be said that it provided any real primary coverage to the general [contractor]") Indeed, there is no such thing as

"vicarious liability" in construction site safety cases of this type.

Essex's most recent argument, that somehow the verdict must be "collaterally attacked" for coverage to apply is a nonsensical red herring argument of confusion. We do not in any way "attack" the verdict nor attempt to ascribe some hidden meaning to it. Coverage here does not turn on arguments made at trial. It turns on the simple fact that Newark was found negligent and D&J's negligence is clearly related to that. Under a valid (in fact the only reasonable) interpretation of the "as respects" language here, this relationship between the negligence of Newark and the injuries to Ferreira compel coverage for D&J.

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RESPONSE TO MOVANT WESTERN WORLD INSURANCE COMPANY'S STATEMENT OF MATERIAL FACTS

1. Admit.

2. Admit.

3. Admit.

4. Admit.

5. Admit.

6. Admit.

7. Admit.

8. Admit.

9. Admit.

10. Admit.

11. Admit.

12. Admit that the stated section is quoted accurately.

13. Deny. The quoted endorsement is located within the body of the policy, not the declarations page. However, the stated section is quoted accurately.

14. Deny. The quoted endorsement is located within the body of the policy, not the declarations page. However, the stated section is quoted accurately.

PLAINTIFF'S STATEMENT OF MATERIAL FACTS

A. Hierarchy of the Job Site

1. Gonsosa Construction is a company that on May 18, 2007, the date of Welber DeOliveria's injury, was in the general contracting business. (*Exhibit A, Declaration Pages*).

2. On the date of Mr. DeOliveria's injury, he was performing sheathing work for his employer, MP4 Construction, at a job site located at 559 57th Street, West New York, New Jersey. (*Exhibit C, Construction Contract*).

3. The construction project at 559 57th Street in West New York involved new construction of a two family home at property owned by Joseph and Rosemarie Rivelli. (*Exhibit C, Construction Contract*).

4. In or around December 2006 Gonsosa Construction and the Rivelli's entered into a Construction Contract for construction of a new two family house at 559 57th Street. The contract outlined the work and payment schedule for the project. (*Exhibit C, Construction Contract*).

5. Gonsosa was the general contractor on the Rivelli job. (*Exhibit C, Construction Contract*).

6. Thereafter, Gonsosa subcontracted out framing and sheathing work to WM Power. (*See Exhibit D, Subcontractor Agreement*).

7. As a result of being a subcontractor on the jobsite, WM Power provided a certificate of insurance naming "Gonsosa Construction" as an additional insured. (*Exhibit E, WM Power Certificate of Insurance*).

8. WM Power subcontracted the sheathing work at 559 57th Street to MP4 Construction,

plaintiff's employer. (*Exhibit F, MP4 Invoice*).

9. On May 18, 2007, plaintiff Welber DeOliveira, was injured while working at the Rivelli job site. (*See Exhibit C, to Movant Western World's Brief, Plaintiff's Deposition Transcript at 45-47*).

10. As a result, plaintiff brought a claim for personal injury as to the Rivelli's (homeowners), Gonsosa Construction (general contractor), WM Power (subcontractor), and MP4 Construction (employer) as well as a products liability claim as to Hitachi[8] (manufacturer/distributor of the nail gun that plaintiff was using at the time of his injury), among others. (*See Exhibit A, to Movant Western World's Brief, Third Amended Complaint*).

B. Contradictory, Ambiguous and Inoperable Insurance Policy Violative of Public Policy

11. In connection with the Rivelli job, Gonsosa sought insurance coverage for its role as a general contractor. (*Exhibit G, Application for Insurance*).

12. Gonsosa Construction was clear in its insurance application that it was a general contractor. (*Exhibit G, Application for Insurance*).

13. Specifically, the insurance application states in part that the nature Gonsosa's business was:

> INTERIOR CARPENTRY PAINTING SHEET ROCK DOORS WINDOWS FLOORING SUBS OUT ROOFING SIDING PLUMBING AND ELECTRIC

(*Exhibit G, Application for Insurance, at page 1*)(emphasis added).

14. The application goes on to inform the insurer in the Commercial General Liability

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[8]It should be noted that plaintiff has settled his claims with all defendants. Particularly noteworthy, is that plaintiff's settlement with Gonsosa Construction was entered into pursuant to the holding in *Griggs v. Bertram*, 88 N.J. 347 (1982). Accordingly, plaintiff acts on assignment from the insured in seeking to compel defense and indemnification from Western World Insurance Company from Mr. DeOliveria's injury.

Section that its “Subcontractor Costs are $50,000". (*Exhibit G, Application for Insurance, at page 3, 4*).

15. Based upon Gonsosa’s application, Western World issued a policy of insurance to Gonsosa. The insurance policy that Western World issued to Third-Party Plaintiff, Gonsosa Construction clearly lists:

> “Business Description” as GENERAL CONTRACTOR[9].

(*Exhibit B, Policy*).

16. The declaration pages for the subject insurance policy specifically references that <u>subcontractors are covered</u> under the policy. Specifically, the final page of declarations entitled, COMMERCIAL GENERAL LIABILITY EXTENSION OF DECLARATIONS dated 1/2/07 (approximately five months before Mr. DeOliveira’s injury) provides coverage for:

> Contractors - subcontracted work - in connection with building construction, reconstruction repair or erection - one or two family dwelling.

(*Exhibit A, Insurance Declarations*).

17. As per the declaration page, Gonsosa paid an additional $300.00 to have subcontractors covered under the policy. (*Exhibit A, Insurance Declarations*).

18. Despite knowingly issuing an insurance policy to a general contractor and including additional coverage for subcontractors, Western World Insurance Company disclaimed coverage for Mr. DeOliveria’s injury (and thus defense and indemnification for Gonsosa Construction) pointing to two endorsements in the policy, namely WW 253 and WW 257[10], hereinafter

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[9] It is well settled that a the role of a general contractor is just that - general. Typically they do not get involved with the manner and means of completing the job. *Meder v. Resorts International*, 240 N.J. Super. 470, 473-77 (App Div. 1989). Rather, general contractors often hire subcontractors to perform the actual work on a job.

[10] WW253, "Independent Contractor Exclusion" provides in part that coverage "does not apply to any claim arising out of the operation of any *independent contractor* or to any act or

collectively referred to as the “subcontractor exclusions”. (*Exhibit B, Policy, at WW253, WW 257*).

19. However, the aforementioned endorsements are ambiguous in that the policy fails to define what constitutes an "independent contractor" under the policy for purposes of the exclusion. Accordingly, one of the phrases central to the exclusion is undefined. (*Exhibit B, Policy*).

20. Moreover, the declarations pages of the policy directly contradict the subcontractor exclusion upon which movant Western World bases its argument that Gonsosa is not entitled to defense or indemnification for Mr. DeOliveira’s injury. Specifically, the declaration page states that the general contractor, Gonsosa Construction, has coverage for subcontractors, yet the endorsements WW 253 and WW257 contradict the declarations. (*Exhibit A, Insurance Declarations*)(*Exhibit B, Policy*).

21. It is well settled that the Declarations Page is the best indicator of what an insured’s reasonable expectations should be. Accordingly, the Appellate Division recognized that “it is the declarations page, the one page of the policy tailored to the particular insured and not merely boilerplate, which must be deemed to define coverage and the insured’s expectations of coverage.” *Lehrhoff v. Aetna Casualty & Surety Co.*, 271 N.J. Super. 340, 346-347 (App. Div. 1994).

22. As indicated above, the insured, Gonsosa Construction served in general contracting

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omission of any insured in the general supervision of such operations;" and (2) WW257,"Injury to Independent Contractors," provides that coverage does not apply to claims arising out of "injury to an independent contractor or to an 'employee' or 'temporary worker' of an *independent contractor* hired by you or by any subcontractor."(*Exhibit B, Policy, at WW253, WW 257*)(emphasis added).

roles on this project. As such, Gonsosa had a joint, non-delegable duty to maintain a safe workplace that includes "ensur[ing] 'prospective and continuing compliance' with the legislatively imposed non-delegable obligation to all employees on the job site, without regard to contractual or employer obligations." *Alloway v. Bradlees Inc.,* 157 N.J. 221, 237-38 (1999), *citing, Kane v. Hartz Mountain*, 278 N.J.Super. 129, 142-43 (App. Div. 1994).

23. Despite the clear law as to a general contractors liability in the State of New Jersey, the policy issued to Gonsosa would be virtually nullified if a literal reading of policy exclusions WW 253 and WW 257 were applied. More specifically, a literal reading would essentially limit coverage for bodily injuries to those few individuals unconnected by employment to a given work site, i.e. governmental inspectors or pedestrians, rather than the host of workers employed by contractors and subcontractors with whom the insured cannot bargain for indemnity[11]. (*Exhibit B, Policy*).

[11] As it clearly did in subcontracting the work to WM Power. (*Exhibit E, WM Power Certificate of Insurance*).

LEGAL ARGUMENT

POINT I

THIS DECLARATORY JUDGMENT ACTION IS PROPERLY DISPOSED OF BY WAY OF SUMMARY JUDGMENT

When litigant's arguments hinge upon the meaning of the provisions of an insurance policy, the matter is rightfully decided by way of summary judgment. *Hebela v. Healthcare Ins. Co.*, 370 N.J.Super. 260, 268 (App. Div. 2004) (citing *Nat'l Union Fire Ins. Co. v. Transp. Ins. Co.*, 336 N.J.Super. 437, 443 (App. Div. 2001)). *See also, Hammond v. Doan*, 127 N.J.Super. 67 (Law Div. 1974) (declaratory judgment is often used to determine the extent of coverage in insurance cases). Here, as set forth at length in plaintiff's Statement of Material Facts, defendant has premised its denial of coverage upon its interpretation of endorsements contained within the Policy. (*Exhibit B, Policy*). In this action, plaintiff seeks a declaration of the meaning of those endorsement in the (context of the entirety of the policy and declarations therein) and an Order requiring defendant to provide plaintiff with a defense and indemnification. Consequently, this matter is ripe for summary judgment.

Summary judgment is appropriate when "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." *R.* 4:46-2(c). In determining whether there exists a genuine issue of material fact that precludes summary judgment, a court must consider "whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party." *Brill v. Guardian Life Ins. Co. of Am.,* 142 N.J. 520, 540 (1995).

As set forth at length *infra*, established jurisprudence governing the interpretation of insurance contracts makes clear that there is no genuine issue of material fact as to third-party plaintiff, general contractor Gonsosa Construction's ("Gonsosa") entitlement to coverage under the policy[12].

[12] While not raised in movant's papers, plaintiff Welber DeOliveria has standing to act on behalf of Third-Party Plaintiff, Gonsosa Construction, by way of a settlement entered into pursuant to *Griggs v. Bertram*, 88 N.J. 347 (1982).

POINT II

THE INDEPENDENT CONTRACTOR EXCLUSIONS UPON WHICH WESTERN WORLD BASES THE DENIAL ARE AMBIGUOUS, AND THEREFORE MUST BE CONSTRUED IN FAVOR OF COVERAGE

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. *Meier v. New Jersey Life Insurance Co.*, 101 N.J. 597, 611 (1986). 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." *Erdo*, 275 N.J. Super. at 120, quoting *Mazzilli v. Accident and Casualty Insurance Company of Switzerland*, 35 N.J. 1, 8 (1961). Moreover, 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).

New Jersey courts often have construed ambiguous language in insurance policies in favor of the insured and against the insurer. *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); *Sandler v. New Jersey Realty Title Ins. Co.*, 36 N.J. 471, 479 (1962); *Matits v. Nationwide Mut. Ins. Co.*, 33 N.J. 488, 495 (1960); *Hunt v. Hospital Serv. Plan*, 33 N.J. 98, 102 (1960). To that extent, insurance contracts are "unipartite in character," having been drafted by the company's experts, "[people] learned in the law of insurance." *Mazzilli v. Accident & Cas. Ins. Co. of Winterthur*, 35 N.J. 1, 7 (1961). 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).

In the context of the average insured, it has long been established that while insurance policies are contractual in nature, they are not ordinary agreements. Instead, they are considered "contracts of adhesion between parties who are not equally situated." *Meier v. New Jersey Life Ins. Co.*, 101 N.J. 597, 611 (1986) (*citing Allen v. Metropolitan Life Ins. Co.*, 44 N.J. 294, 305 (1965)). As such, they are subject to special rules of interpretation. *Longobardi v. Chubb Ins. Co. of New Jersey*, 121 N.J. 530, 537 (1990). Moreover, insurance contracts are not typically read or reviewed by the insured, whose understanding is often impeded by the complex terminology used in the standardized forms. *See Gaunt v. John Hancock Mutual Life Insurance Co.*, 160 F.2d 599, 601 (2d Cir.), *cert. den*, 331 U.S. 849 (1947).

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 v. St. Paul Ins. Co.*, 100 N.J. 325, 334-39 (1985). Courts are bound to protect the insured to the full extent that

any fair interpretation will allow. *Kievit v. Loyal Protective Life Ins. Co.*, 34 N.J. 475 (1961). Moreover, in evaluating the insurer's claim as to the meaning of the language under study, courts necessarily consider whether alternative or more precise language, if used, would have put the matter beyond reasonable question; also whether judicial decisions appear in the reports attributing a more comprehensive significance to it than that contended for by the insurer. *Mahon v. American Cas. Co.*, 65 N.J.Super. 148 (App.Div.1961).

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 v. Preferred Mut. Ins. Co.*, 128 N.J. 165, 175 (1992)). 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 v. Accident & Cas. Ins. Co. of Winterthur*, 35 N.J. at 8, 170 A.2d 800.

In this case, Gonsosa obtained insurance through Western World to ensure that it would be provided coverage (as a general contractor) in the event that an individual, including an employee of a subcontractor, sustained injury on the jobsite. However, Western World seeks to disclaim coverage based on independent contractor exclusions. (*Exhibit B, Policy*, *at WW253 and WW257*). These two exclusions are directly contradictory to insurance declaration page. (*Exhibit A, Insurance Declarations*).

At the outset, Gonsosa Construction’s insurance application obviates that the company is

seeking insurance for its general contracting business. (*Exhibit G, Application for Insurance*). The insurance application states in part that the nature Gonsosa's business was:

> INTERIOR CARPENTRY PAINTING SHEET ROCK DOORS WINDOWS FLOORING SUBS OUT ROOFING SIDING PLUMBING AND ELECTRIC

(*Exhibit G, Application for Insurance, at page 1*)(emphasis added). The application goes on to inform the insurer in the Commercial General Liability Section that its "Subcontractor Costs are $50,000". (*Exhibit G, Application for Insurance, at page 3, 4*). Accordingly, it logically follows that the insurance policy that Western World issued to third-party plaintiff, Gonsosa Construction clearly lists:

> "Business Description" as GENERAL CONTRACTOR[13].

(*Exhibit A, Insurance Declarations*). Further, the declaration pages goes on to specifically reference that subcontractors are covered under the policy. Specifically, the final page of declarations entitled, COMMERCIAL GENERAL LIABILITY EXTENSION OF DECLARATIONS dated 1/2/07 (approximately five months before Mr. DeOliveira's injury) provides coverage for:

> Contractors - subcontracted work - in connection with building construction, reconstruction repair or erection - one or two family dwelling.

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[13] It is well settled that a the role of a general contractor is just that - general. Typically they do not get involved with the manner and means of completing the job. *Meder v. Resorts International*, 240 N.J. Super. 470, 473-77 (App Div. 1989). Rather, general contractors often hire subcontractors to perform the actual work on a job.

Moreover, as a general contractor, Gonsosa had a joint, non-delegable duty to maintain a safe workplace that includes "ensur[ing] 'prospective and continuing compliance' with the legislatively imposed non-delegable obligation to all employees on the job site, without regard to contractual or employer obligations." *Alloway v. Bradlees Inc.,* 157 N.J. 221, 237-38 (1999), *citing, Kane v. Hartz Mountain*, 278 N.J.Super. 129, 142-43 (App. Div. 1994). The Court can take judicial notice that the bulk of injury liability exposure contractors like Gonsosa face on a project arises from injuries by employees of subcontractors alleging OSHA was not complied with.

(*Exhibit A, Insurance Declarations*). It is well settled that the Declarations Page is the best indicator of what an insured's reasonable expectations should be. *Lehrhoff v. Aetna Casualty & Surety Co.*, 271 N.J. Super. 340, 346-347 (App. Div. 1994). Accordingly, the Appellate Division recognized that "it is the declarations page, the one page of the policy tailored to the particular insured and not merely boilerplate, which must be deemed to define coverage and the insured's expectations of coverage." *Id.*

In this case is undisputed that the Mr. DeOliveria was injured while working as an employee of MP4 Construction, a subcontractor of general contractor, Gonsosa Construction at the new construction of a two family dwelling. It is well settled that the role of the general contractor is just that- general. Typically they hire subcontractors to perform some or all of the work on a particular job. *Meder v. Resorts International*, 240 N.J.Super. at 473-77. While the is clear from the policy that Gonsosa was known to Western World to be a general contractor and thus Mr. DeOliveira's injury should in fact be covered, Western World disputes this by pointing to two endorsements, WW 253 and WW 257[14], collectively referred to as the "subcontractor exclusions". (*Exhibit B, Policy, at WW253, WW 257*) However, these endorsements are ambiguous, vague and directly contradicted by the declaration pages of the policy. Surprisingly, while endorsement WW253 excludes coverage for "any claim arising out of the operation of any *independent contractor*", the policy fails to define what constitutes an independent contractor. (*Exhibit B, Policy, at WW253, WW 257*)(emphasis

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[14] (1) WW253, "Independent Contractor Exclusion" provides in part that coverage "does not apply to any claim arising out of the operation of any *independent contractor* or to any act or omission of any insured in the general supervision of such operations;" and (2) WW257,"Injury to Independent Contractors," provides that coverage does not apply to claims arising out of "injury to an independent contractor or to an 'employee' or 'temporary worker' of an *independent contractor* hired by you or by any subcontractor."(*Exhibit B, Policy, at WW253, WW 257*)(emphasis added)

added). Accordingly, perhaps the most central phrase to the WW253 endorsement is undefined and is therefore ambiguous as to whom it was intended to include or exclude under the policy. However, Western World (seemingly) urges the Court to adopt an amorphous definition of independent contractor that would be broad enough to include an employee of a Gonsosa's subcontractor's (WM Power) subcontractor, MP4. (*Exhibit D, Subcontractor Agreement*)(*Exhibit F, MP4 Invoice*). Yet there is no factual or legal basis by which to extend this ambiguous term to include Mr. DeOliveira.

In a recent and very similar case, *Gabriele v. Lyndhurst Residential Community, LLC*[15], 2008WL588543 (App. Div. 2008), a general contractors, Pyramid Construction and Engineering, LLC sought to compel defense and indemnification from its insurer, Essex Insurance Company for an injury to an employee of a subcontractor. In *Gabriele*, Essex similarly advocated for a broad interpretation of nearly identical exclusionary language purportedly establishing that employees of subcontractors are not covered under the general contractor's, Pyramid's policy. *Id*. at *2-3. In denying to extend the Essex Insurance subcontract exclusion to employees of subcontractors, the Appellate Division cited to *President v. Jenkins*, 180 N.J. 550, 563 (2004):

> When an insurance policy's language fairly supports two meanings, one that favors the insurer, and the other that favors the insured, the policy should be construed to sustain coverage.

Accordingly, in *Gabriele*, the Appellate Division found in favor of the general contractor and compelled coverage under the Essex Insurance policy.

Additionally, Western World's proposed exclusions contradict the declaration page. (*Exhibit A, Insurance Declarations*)(*Exhibit B, Policy*). Of course the declaration page defines coverage,

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[15] A copy of this case is attached as for the Court's ease of reference as it is an unpublished decision.

rather than the body of the policy. *Lehrhoff v. Aetna Casualty & Surety Co.*, 271 N.J. Super. at 346-347. In this instance, the declaration page makes clear that Gonsosa is a *general contractor* and includes a specific reference indicating that subcontractors are covered under the policy. (*Exhibit A, Insurance Declarations*). As such, the declaration page should govern and in this instance act to nullify the subcontractor exclusions Western World attempts to rely upon to disclaim coverage for Mr. DeOliveira's injury.

The contradiction between the declaration pages and endorsements within the body of the policy also served as the basis for the Appellate Divisions's decision to compel coverage for the death of a subcontractor's employee in *Gabriele v. Lyndhurst Residential Community, LLC,* 2008WL588543 (App. Div. 2008). In that case the Appellate Division noted that the "facial conflicts between the policy's declarations page, which indicates unrestricted coverage for subcontractors and the exclusionary language." *Id*. at *1. As such, the court noted that their "task is not merely to scrutinize the particular clauses upon which Essex relies but to look at the entire policy." *Id*. at *2.

In the case at bar, as in *Gabriele v. Lyndhurst Residential Community, LLC,* the policy is at best ambiguous as to whether coverage is afforded to subcontractors. The exclusionary language upon which Western World seeks to disclaim coverage must be strictly construed against the insurer and thus interpretation sustaining coverage. Additionally, the facial conflict between the exclusionary language and the coverage statements of the declarations page resolved to reflect coverage; as the declaration pages controls. *Id.; Lehrhoff v. Aetna Casualty & Surety Co.*, 271 N.J. Super. at 346-347*; Mazzilli v. Accident & Cas. Ins. Co. of Winterthur*, 35 N.J. at 8, 170 A.2d 800.

POINT III

ASSUMING *ARGUENDO*, THE COURT ADOPTS DEFENDANT'S PROPOSED INTERPRETATION, GONSOSA'S REASONABLE EXPECTATIONS NEVERTHELESS DICTATE THAT COVERAGE IS AFFORDED UNDER THE POLICY

A fundamental tenet of insurance law is to fulfill the objectively reasonable expectations of the parties. *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).

Therefore, assuming *arguendo*, this Court determines that the language of the Policy, and in particular endorsements WW537 and WW257, are unambiguous in excluding coverage for bodily injury sustained by the employees of any subcontractor, Gonsosa's reasonable expectations are nevertheless controlling and require Western World to provide coverage.

In this regard, the final page of declarations entitled, COMMERCIAL GENERAL LIABILITY EXTENSION OF DECLARATIONS dated 1/2/07 (approximately five months before Mr. DeOliveira's injury) is illustrative of Gonsosa's intention (and thus reasonable expecatation) to provide coverage for subcontractor and employees of subcontractions on the job site. The additioanl declaration provides coverage for:

> Contractors - subcontracted work - in connection with building construction, reconstruction repair or erection - one or two family dwelling.

(*Exhibit A, Insurance Declarations*)[16]. This portion of the declaration page acknowledges that Gonsosa intended and reasonably expected that subcontractors and subcontractors' employees would be covered under the policy.

Despite the above and the clear and objectively reasonable expectation concerning

[16] *See also, Exhibit G, Insurance Application.*

subcontractors whom Gonsosa hired to work on one or two family construction projects, Western World seeks a contract finding. Western World asks the Court to hold that coverage for personal injury under the policy would be covered **only** for rare occasions of bodily injuries incurred by those unconnected by employment to a given work site, i.e. governmental inspectors or pedestrians. Such an interpretation would render the policy of little value to Gonsosa, a general contracting copany, does not comport with the jurisprudence of insurance contract construction in this State. *Mazzilli v. Accident Cas. Ins. Co.*, 35 N.J. 1, 7 (1961)(explaining that a court should find the broadest coverage possible under an insurance policy when controlling language is susceptible to multiple interpretations).

As such, even assuming for purpose of this argument that the exclsions WW253 and WW257 are construed to preclude coverage for bodily injuries to employees of any subcontractor, no matter by whom retainer, third-party plaintiff's objectively reasonable expectations dictate tha the Court Order defense and indemnification in this matter.

POINT IV

A LITERAL READING OF THE ENDORSEMENT RELIED UPON BY PLAINTIFF NULLIFIES THE PROTECTIONS AFFORDED BY THE POLICY

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. *Id.* 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.*

In the case at bar, as set forth above, a literal reading of policy exclusions WW253 and WW257, would virtually nullify the protections afforded by the Policy. More specifically, a literal reading would essentially limit coverage for bodily injuries to those few individuals unconnected by employment to a given work site, i.e. governmental inspectors or pedestrians, rather than the host of workers employed by contractors and subcontractors with whom Plaintiff cannot bargain for indemnity[17]. Of course a large majority of the claims made against a general liability insurance policy issued to a general contractor, such as Gososa, would likely arise from an injury from a subcontractor on the jobsite. However, read literally endorsements WW253 and WW 257 would render coverage a virtual nulity. Accordingly, to the extent exclusion WW253 and WW257 can be read to exclude coverage for bodily injury to the employees of any subcontractor, whether or not retained by Plaintiff, it should be disregarded by this Court in favor of an interpretation requiring coverage for the Personal Injury Lawsuit underlying this matter. *Kievit*, *supra*, 34 N.J. at 483.

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[17] As Gonsosa did in entereing into a subcontract with WM Power. (*Exhibit E, WM Power Certificate of Insurance*).

POINT V

EVEN IF CLEAR AND UNAMBIGUOUS, DEFENDANT'S SUBCONTRACTOR EXCLUSIONS VIOLATE DECISIONAL LAW AND PUBLIC POLICY AND ARE THEREFORE UNENFORCEABLE.

In addition to their attempts to persuade the Court that their policies do not provide coverage for Mr. DeOliveira's injuries, defendant also argues that Gonsosa is not entitled to coverage simply because the subcontractor exclusions supposedly clear provisions expressly excluding coverage in this instance. Significantly, however, defendants fail to acknowledge -- or recognize -- that even an otherwise clear and unambiguous exclusion is unenforceable if that exclusion violates decisional law and public policy. Here, the defendant-insurer's exclusions directly contravenes well established legal principles as well as public policy. Accordingly, the subcontractor provision it attempts to enforce is unenforceable and thus coverage must be afforded to general contractor Gonsosa.

It is also long settled that insurance policy exclusions that contravene decisional law or public policy are unenforceable. *Sparks v. St. Paul Ins. Co.*, 100 *N.J.* 325, 334 (1985); *accord Doto v. Russo*, 140 *N.J.* 544, 560 (1995) ("an exclusion that is specific, plain, clear, prominent and **not contrary to public policy** will be given effect") (emphasis added). Succinctly defined, public policy is "that principle of law which holds that no person can lawfully do that which has a tendency to be injurious to the public or against public good . . ." *Allen v. Commercial Cas. Ins. Co.*, 131 *N.J.L.* 475, 477-78 (1944). Significantly, "[p]ublic policy . . . finds expression in the Constitution, the statutory law and **in judicial decisions**." *Henningsen v. Bloomfield Motors, Inc.*, 32 *N.J.* 358, 404 (1960) (emphasis added); *Hennessey v. Coastal Eagle Point Oil Co.*, 129 N.J. 81, 90 (1992) ("The sources of public policy include legislation; administrative rules, regulations or decisions; **and judicial decisions**.") (emphasis added).

It is equally established that "the dictates of public policy may require invalidation of private contractual arrangements where those arrangements . . .are inconsistent with the public interest or detrimental to the common good." *Sacks Realty Co., Inc. v. Shore*, 317 *N.J. Super.* 258, 269 (App. Div. 1998) (citation omitted). While individuals must have freedom to contract, courts "do not hesitate to declare void as against public policy [contractual] provisions which clearly tend to the injury of the public in some way." *Henningsen*, *supra*, 32 *N.J.* at 403-04.

Consequently, New Jersey courts have historically refused to enforce contractual provisions that are inconsistent with the public policy of the State. *Vasquez v. Glassboro Serv. Ass'n, Inc.*, 83 *N.J.* 86, 98,105 (1980) ((finding that public policy requires implication of provision in migrant farm worker's employment contract allowing for reasonable time to find alternate housing after termination of employment where contract allowed for dispossession without notice), *citing Houston Petroleum Co. v. Automotive Products Credit Ass'n*, 9 *N.J.* 122, 130 (1952) (finding contract's restrictive covenants regarding permissible use of land not enforceable because they violated public policy implicit in zoning laws); *Shell Oil Co. v. Marinello*, 63 *N.J.* 402, 409 (1973) (invalidating at-will termination provision of oil company's lease and dealer agreement finding it to be detrimental to public to whom supply and distribution of oil are vital). Indeed, because insurance policies are contracts of adhesion, courts must "assume a particularly vigilant role in ensuring their conformity to public policy and principles of fairness." *Voorhees*, *supra*, 128 *N.J.* at 175. "Where there is grossly disproportionate bargaining power, the principle of freedom to contract is non-existent and unilateral terms result. In such a situation courts will not hesitate to declare void as against public policy grossly unfair contractual provisions that clearly tend to the injury of the public in some way. *Shell Oil Co.*, *supra*, 63 *N.J.* at 408 (citing *Henningsen*, *supra*, at 32 N.J. at 403-04); *see also*

Ellsworth v. Dobbs, Inc. v. Johnson, 50 *N.J.* 528, 55 (1967) (property owner not liable for real estate broker commission where sale not consummated due to purchaser default because of "substantial inequality of bargaining power" between owner and broker); *Allen Metropolitan Life Ins. Co.*, 44 *N.J,* 294, 305 (1965) (life insurance binder construed against insurer to permit recovery under life insurance policy where insured and insurer "not equally situated."); *Henningsen*, *supra*, 32 *N.J.* at 404 (automobile manufacturer's implied warranty of merchantability invalidated due to "grossly disproportionate bargaining power" between manufacturer and buyer).

In the case at bar, as discussed *supra*, the exclusionary provisions at issue are so limiting so as to render the coverage a nullity. As indicated above, the insured, Gonsosa Construction served in general contracting roles on this project. As such, Gonsosa had a joint, non-delegable duty to maintain a safe workplace that includes "ensur[ing] 'prospective and continuing compliance' with the legislatively imposed non-delegable obligation to all employees on the job site, without regard to contractual or employer obligations." *Alloway v. Bradlees Inc.,* 157 N.J. 221, 237-38 (1999), *citing, Kane v. Hartz Mountain*, 278 N.J.Super. 129, 142-43 (App. Div. 1994). The Court can take judicial notice that the bulk of injury liability exposure contractors like Gonsosa face on a project arises from injuries by employees of subcontractors alleging OSHA was not complied with. Yet the exclusionary clauses, specifically WW253 and WW257, are so broad and unreasonable that they would virtually never provide coverage for such claims.

These exclusionary clauses are unreasonable, render coverage a nullity, and are against the public policy of this state. In fact, under the law in New Jersey, all contractors like Gonsosa are required to maintain at least $500,000 in general liability coverage. *See N.J.A.C.* 45A-17.5(b); 45A-17.12. The obvious policy behind this requirement is so that members of the injured pubic have

available a fund of compensation for injuries sustained by the negligence of contractors. In short, the New Jersey Legislature has found it in the public interest to require contractors like Gonsosa to maintain insurance to cover, among other things, injury claims brought by employees of subcontractors. Western World writes policies purporting to satisfy these requirements and provide a pool of compensation injured workers like Welber DeOliveira can draw from. However, due to exclusionary clauses– clauses that are akin to an aviation policy excluding injury claims arising from airplane crashes, or malpractice policies that exclude injury claims brought by patients– this coverage is in fact not available as it essentially excludes claims brought by employees of subcontractors. This is contrary to thepublic policy as well established decisional law. Therefore, coveage should be compelled under the policy and plaintiff's cross-motion for summary judgment granted.

CONCLUSION

For the foregoing reasons, plaintiff respectfully request that Western World's motion for summary judgment be denied and plaintiff's cross-motion for summary judgment be granted.

Respectfully submitted,

SARAH K. DELAHANT

Dated: September 22, 2010

I:\CLF Copy 5-12-17\Bank- Briefs, Forms, Other\Insurance Coverage Issues\Coverage.SJ.Opp.2wpd- Carlos Ferreira brief.wpd