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STATEMENT OF FACTS

A. The Crash

1. This matter arises out of a one-car motor vehicle crash that occurred on January 9, 2009. (*Exhibit A, Police Report pg. 9*).

2. The crash occurred on Interstate 695 in Maryland when the a cargo van in which decedent Ricardo Mendonca was a passenger ran off of the roadway into an embankment striking a large tree and caught fire. (*Exhibit A, Police Report pg. 10*).

3. According to the police report, both the driver of the vehicle, Pedro DaSilva and decedent Ricardo Mendonca, resided at 80 Washington Street, in Long Branch, New Jersey 07740. (*Exhibit A, Police Report*).

4. The Maryland State Police concluded that the driver of the cargo van, Pedro DaSilva was at fault for the crash as the investigation revealed that Mr. Da Silva lost control of the cargo van, resulting in it veering off the roadway and bursting into flames. Both the driver and passenger were trapped in the vehicle and received multiple traumas that resulted in their death. (*Exhibit A, Police Report pg. 10*).

B. Estate of Ricardo Mendonca

5. Following the death of Ricardo Mendonca, the Brazilian consulate in Washington, D.C., issued a death certificate dated February 12, 2009. (*Exhibit B, Death Certificates*).

6. Additionally, the City of De Uberaba in Brazil issued a death certificate for Ricardo Mendonca dated March 31, 2009. (*Exhibit B, Death Certificates*).

7. Ricardo Mendonca died intestate. *(Exhibit H, Order to Show Cause Certification of*

Counsel Sarah Delahant).

8. Prior to his death Ricardo Mendonca had one child, Gustavo Mendonca, born June 28, 2000, with his former girlfriend Vanessa Silva. Gustavo was 8 years old at the date of his father's death. (*Exhibit C, Gustavo Mendonca's Birth Certificate*).

9. Vanessa Silva and her son Gustavo reside together in Brazil. *(Exhibit H, Order to Show Cause Certification of Counsel Sarah Delahant).*

10. Ricardo Mendonca did not have any other children. (*Exhibit D, Certification of Vanessa Silva*).

11. Ricardo Mendonca's parents, Anilson & Vilma Mendonca, are both living and reside at Rua Araponga 641, Vallim de Melo 38010-130, Uberaba, Minas Gerais, Brazil. *(Exhibit H, Order to Show Cause Certification of Counsel Sarah Delahant).*

12. Ricardo Mendonca's parents were unwilling to renounce their rights to their son's estate and have represented to this firm that they have no intention of pursuing wrongful death or survivorship claims on behalf of their son's estate. *(Exhibit H, Order to Show Cause Certification of Counsel Sarah Delahant).*

13. However, Vanessa Silva, the mother and guardian of Ricardo Mendcona's only living child, Gustavo Mendonca, wishes to pursue wrongful death and survivorship claims for the benefit of her son Gustavo Mendonca. *(Exhibit H, Order to Show Cause Certification of Counsel Sarah Delahant).*

14. As discussed in depth infra, Vanessa Silva had Marc J. Comer, Esq. appointed Administrator Ad Prosequendum of the Estate of Ricardo Mendonca for the purposes of filing a

wrongful death lawsuit in New Jersey and to protect the interest of the decedent's only child and her son, Gustavo Mendonca.

C. Untoward "Settlement" with Progressive Insurance Company

15. Progressive Insurance Company insured the vehicle in which Ricardo Mendonca was a passenger. Gilberto DaSilva the owner of the vehicle was also the brother of Pedro DaSilva, the driver at fault for the crash. (*Exhibit A, Police Report pgs.4, 6, 10*).

16. On or about September 24, 2010 this law firm learned that Ricardo Mendonca's parents may have executed a power of attorney some time ago for the purpose of filing a wrongful death claim. This paper work was forwarded to Gilberto Da Silva, who is the owner of the vehicle at issue and brother of the driver of the car. Ricardo's parents entrusted Gilberto DaSilva to "handle" the claim in the United States. *(Exhibit H, Order to Show Cause Certification of Counsel Sarah Delahant).*

17. Additionally, this firm was advised that Giberto DaSilva may have been involved in a purported "settlement" of the wrongful death claim in the State of Maryland about six (6) months to one year ago with Progressive Insurance Company, the insurer of the vehicle. *(Exhibit H, Order to Show Cause Certification of Counsel Sarah Delahant).*

18. Further, this firm learned apparently one attorney, Randal Rose, Esq., of Maryland represented the "Estates" of both the passenger, Ricardo Mendonca, and the driver, Pedro DaSilva, in this single automobile crash. *(Exhibit H, Order to Show Cause Certification of Counsel Sarah Delahant).*

19. Moreover, Leonard H. Adoff, Esq., represented Gilberto DaSilva as local counsel in New Jersey in his applications for administrator of the "Estates" of Ricardo Mendonca and Pedro DaSilva. (Exhibit E, Court Application file re:Gilberto DaSilva as Administrator of the Estate of Ricardo Mendonca); (Exhibit F, Court Application file re: Gilberto DaSilva as Administrator of the Estate of Pedro DaSilva).

20. I further understand that the policy limits were $100,000, CSL. Moreover, the Progressive adjuster represented to the undersigned that Progressive "settled" the claims $50,000 to the Estate of DaSilva (the driver at fault for the crash) and $50,000 to the "Estate" of Mendonca (the innocent passenger in the vehicle). The adjuster said the settlement was so structured as the bodies were burned and it could not be determined who was the driver and who was the passenger. *(Exhibit H, Order to Show Cause Certification of Counsel Sarah Delahant).*

21. However, the bodies were identified by dental records and that the police report clearly list Pedro DaSilva as the driver and Ricardo Mendonca as the passenger in the vehicle. (*Exhibit A, Police Report pgs. 21, 28*).

22. The police investigation further determined, "Pedro DaSilva [was] at fault for the collision. He [Pedro DaSilva] was operating the vehicle and lost control." The investigation did not produce any information that would have indicated any other vehicle had contributed to the collision or mechanical failure. "This collision could have been avoided if Pedro DaSilva had maintained control of the vehicle." (*Exhibit A, Police Report pg. 10*).

23. Until very recently, Vanessa Silva, the mother of Ricardo Mendonca's only child, had no knowledge of the claim made and purportedly "settled" by Gilberto DaSilva on behalf of the Estate of Ricardo Mendonca. Nor was she aware of the attorney that apparently represented both the

defendant driver and plaintiff passenger in this single vehicle crash. (*Exhibit D, Certification of Vanessa Silva*).

24. Vanessa Silva, the mother of Ricardo's only child, has not received any money from the settlement to hold in trust for Gustavo; nor has Gustavo received any money from the claim brought by Gilberto Da Silva by and through attorneys in Maryland and New Kersey. In fact, no one connected with that claim ever spoke to Ms. Silva or otherwise communicated with her about it. Until recently, Vanessa Silva did not even know such a claim had been made. Neither Vanessa Silva nor her son have ever received any proceeds from that claim. (*Exhibit D, Certification of Vanessa Silva*).

25. Vanessa Silva also recently spoke with Ricardo's brother, Divaldo Mendocna. He advised Vanessa Silva that neither he nor Ricardo's mother, Vilma Mendonca, nor his father, Anilson Mendonca received any proceeds from that claim. (*Exhibit D, Certification of Vanessa Silva*).

26. Vanessa Silva maintains that she never received any notice of a claim filed by or being pursued by any individual or law firm other than Clark Law Firm and its predecessor firm, Keefe Bartels Clark. (*Exhibit D, Certification of Vanessa Silva*).

D. Appointment of Marc J. Comer, Esq. Administrator Ad Prosequendum of the Estate of Ricardo Mendonca

27. Given the above unusual and somewhat extraordinary circumstances, Ms. Silva, the mother of decedent's only child, requested that the Court appoint Marc J. Comer, Esq. as Administrator Ad Prosequendum of the Estate of Ricardo Mendonca for purposes of filing a wrongful death lawsuit in New Jersey and to protect the interests of decedent's only child and Ms. Silva's son, Gustavo Mendonca. *(Exhibit H, Order to Show Cause Certification of Counsel Sarah Delahant).*

28. On January 7, 2011 the Court appointed Marc J. Comer, Esq. as Administrator Ad Prosequendum of the Estate of Ricardo Mendonca for the purpose of bringing a wrongful death lawsuit in New Jersey arising out of the June 9, 2009 auto crash. (*Exhibit G, Court Order Appointing Marc J. Comer, Esq.).*

29. On January 7, 2011 Marc J. Comer, Esq., as Administrator ad Prosequendum of the Estate of the Decedent, Ricardo Mendonca, filed the within wrongful death lawsuit

30. Progressive Casualty Insurance ("Progressive") is a properly named defendant in the aforementioned lawsuit. Progressive issued an insurance policy to the owner of the vehicle at issue, Gilberto DaSilva, policy number 05992208. *(Exhibit H, Order to Show Cause Certification of Counsel Sarah Delahant).*

31. Progressive adjusted the claim arising from the crash in a negligent, careless or reckless manner. Progressive paid out liability proceeds that should have gone to the legitimate estate of the passenger to the defendant and driver of the vehicle on the basis that the police could not determine who the driver or passenger were since the bodies were burned beyond recognition.

Yet, the police report clearly indicates that Pedro DaSilva was the at fault driver and Ricardo Mendonca was the passenger. (*Exhibit A, Police Report pgs. 10, 28*).

32. Gustavo Mendonca, the sole beneficiary of the Estate of Ricardo Mendonca, was a minor at the time of the untoward settlement. However, apparently there was never any valid Friendly Hearing granting judicial approval of either agreement between Progressive and Gilberto DaSilva.

33. Progressive disbursed the settlement funds to Randal Rose, Esq., (lead counsel) and Leonard H. Adoff, Esq., (local counsel) who represented the interests of both the Estates of Ricardo Mendonca (passenger), and Pedro DaSilva (driver) in the New Jersey crash via Gilberto DaSilva. Gilberto DaSilva is the owner of the vehicle, the brother of the driver Pedro DaSilva and a defendant in this matter. *(Exhibit E, Court Application file re:Gilberto DaSilva as Administrator of the Estate of Ricardo Mendonca); (Exhibit F, Court Application file re: Gilberto DaSilva as Administrator of the Estate of Pedro DaSilva).*

34. The attorneys subsequently gave the settlement funds to Gilberto DaSilva who then ran off with the money and has not since been located. *(Exhibit H, Order to Show Cause Certification of Counsel Sarah Delahant).*

35. Finally, Progressive negligently and incompetently attempted to settle this matter with the wrong parties and apparently without any valid Friendly Hearing and as such, Gustavo Mendonca, a ten year old child and sole beneficiary of his father's estate, has not received any settlement proceeds.

<u>LEGAL ARGUMENT</u>

<u>I.</u> <u>DEFENDANT'S MOTION TO DISMISS PURSUANT TO R. 4:6-2(E) IS IN REALITY A MOTION FOR SUMMARY JUDGEMENT AND MUST BE DENIED AT THIS INFANCY STAGE</u>

New Jersey Court Rule, 4:6-2(e), expressly provides that if *any* material outside the pleadings is relied upon on a motion to dismiss for failure to state a claim under this Rule, it is automatically converted into a summary judgment motion. *See Lederman v. Prudential Life Ins. Co. of American, Inc.*, 385 N.J. Super. 324, 337 (App. Div. 2006)(*citing* Pressler, *Current N.J, Court Rules*, Comment 4.1.2. on <u>R</u>. 4:6-2(e)(2006)(when materials outside of pleadings are relied on by judge, motion treated as one for summary judgment); *Richardson v. Standard Guar. Ins. Co.*, 371 N.J. Super 449 (App. Div. 2004)(in considering a motion to dismiss for failure to state a claim, the examination is ordinarily limited to the four corners of the complaint, perused with great liberality to determine whether a cause of action can be gleaned from even an obscure statement); *Union Ink Co., Inc. v. AT&T Corp.*, 352 N.J. Super. 617 (App. Div.2002)(in considering a motion to dismiss for failure to state a claim, if matters outside the pleading are presented to and not excluded by the court, the motion *shall* be treated as one for summary judgment and disposed of as provided by the court rules governing summary judgment, and all parties shall be given reasonable opportunity to present all material pertinent to such a motion)(*emphasis added*).

Defendant's motion to dismiss for failure to state a claim pursuant to R. 4:6-2(e) clearly relies on numerous exhibits that are outside of the pleadings (13 in total). For example, movant attaches and relies upon the police report from the crash, numerous motions from separate but related proceedings, and a copy of the purported release agreement between Progressive and Gilberto DaSilva. Consequently, the motion must be converted into a motion for summary judgment and

treated as such. *Id.*

Summary judgment is not appropriate in this matter because discovery is not complete. In fact it has yet to begin. It is firmly established that a party is entitled to conduct full discovery before a motion for summary judgment will be entertained, especially when critical facts are within the knowledge of other parties to the action. *See James v. Bessemer Processing Co.,* 155 N.J. 279, 311 (1998); Velantzas *v. Colgate-Palmolive Co*., 109 N.J. 189, 193 (1988); Salomon *v. Eli Lilly and Co*., 98 N.J. 58 (1984). Furthermore, a motion for summary judgment under *R*. 4:46-2(e) filed before the completion of discovery "presents a real and frequently overlooked hazard to the granting of summary relief." *Chemical Bank v. Penny Plate, Inc.*, 144 N.J.Super. 390, 399-400 (App.Div.1976). Thus, summary judgment should be denied where the case was not ripe for a summary judgment determination because discovery, though proceeding in a timely fashion, was incomplete. *J. Josephson, Inc. v. Crum & Forster Ins. Co.*, 293 N.J.Super. 170, 203-04 (App.Div.1996); see *also Hermann Forwarding Co. v. Pappas Ins. Co.*, 273 N.J.Super. 54, 64 (App. Div.1994) (case was not ripe where critical issues were undeveloped before trial court, pretrial discovery was incomplete, interrogatories were unanswered, and depositions were not begun).

In the present case Progressive's motion for summary judgment must be denied as no discovery has taken place. The case is in its infant stages as the other named defendants have not filed an answer to the original complaint. Furthermore, much relevant information involving the related previous court proceedings are in the possession of the defendants. Accordingly, the motion can and should be denied as grossly premature.

II. EVEN IF VIEWED AS A R. 4:6-2(E) MOTION TO DISMISS IT SHOULD STILL BE DENIED.

Even if viewed as a proper motion to dismiss pursuant to *R.* 4:6-2(e), it should still be denied because the complaint states a claim upon which relief can and should be granted. 1It is boilerplate law in New Jersey that a pre-answer motion to dismiss pursuant to *R.* 4:6-2(e) requires the Court to engage in a "painstaking" examination of "the complaint in depth and with liberality to ascertain whether the fundament of a cause of action may be gleaned even from an obscure statement of claim, opportunity being given to amend if necessary." *Printing Mart v. Sharp Elecs. Corp*., 116 N.J. 739, 746 (1989) (*quoting Di Cristofaro v. Laurel Grove Mem'l Park*, 43 N.J.Super. 244, 252 (App.Div.1957); *Talalai v. Cooper Tire & Rubber Co.*, 360 N.J.Super. 547, 555-56 (Law Div. 2001). The alleged facts are viewed indulgently to plaintiffs, *See, e.g.*, *Printing Mart*, 116 N.J. at 746; *Brill v. Guardian Life Ins. Co. of Am.*, 142 N.J. 520, 540 (1995); *Talalai*, 360 N.J.Super. at 555-56. When deciding a *R.* 4:6-2(e) motion to dismiss, the Court should "not [be] concerned with the ability of plaintiffs to prove the allegation[s] contained in the complaint" and is required to afford plaintiffs "every reasonable inference of fact." *Id*. "The examination of a complaint's allegations of fact required by the aforestated principles should be one that is ... undertaken with a generous and hospitable approach." *Id*. In this motion the allegations of the complaint are accepted as true and the matter is to be resolved based on the pleadings themselves. *See, Rieder v. State Dept. of Transp*., 221 N.J.Super. 547 (App.Div.1987); *see also, Velantzas v. Colgate-Palmolive Co.*, 109 N.J. 189 (1988). The test is whether the alleged facts "suggest" a cause of action. *Velantzas*, 109 N.J. at 192. Indeed, pre-answer motions to dismiss are more often reserved for cases where relevant facts are not in dispute and the question of law is clear, such as in the statute of limitations context. *See, e.g.*,

O'Connor v. Abraham Altus, 67 N.J. 106, 116 (1975) (statute of limitations defense where relevant facts are not in dispute is sufficiently akin to failure to state a claim as to permit its disposition by way of a motion under *R*. 4:6-2(e); *Rappeport v. Flitcroft*, 90 N.J.Super. 578, 580-581 (App.Div.1966); *Vaccaro v. DePace*, 137 N.J.Super. 512, 513-514 (Law Div.1975). Plaintiff's complaint properly state a claim as Progressive's failure to investigate the insurance claim arising from the crash led to their negligent and incompetent adjustment of the claim. Moreover, Progressive did not receive a valid release from the Estate of Ricardo Mendonca for "any and all claims" arising from the crash because the original settlement involved a minor and apparently did not receive valid judicial approval pursuant to *R*. 4:44-3. That is apparently no valid Friendly Hearing took place.

A. Defendant Progressive Failed to Conduct a Proper Investigation into the Matter and Adjusted the Claim in a Shockingly Incompetent Manner.

New Jersey has recognized the strong public policy behind requiring automobile insurance as a way to compensate innocent victims for the negligence of others. Moreover, every insurance carrier owes a duty to operate in good faith and perform an investigation into each claim to ensure an equitable disposition of each claim. *Fireman's Fund Ins. Co. v. Security Ins. Co. of Hartford*, 72 N.J. 63, 72-73 (1976). Progressive's failure to perform an appropriate investigation into the claim caused them to pay out one half of the $100k policy limit to the estate of the defendant/driver whose negligence took the life of Ricardo Mendonca. Furthermore, Progressive distributed the entire insurance settlement to Gilberto DaSilva, who was the owner of the vehicle, the brother of the at fault driver and also a defendant in the matter. Consequently, Gustavo Mendonca, an eleven year old child and sole beneficiary of his father's estate has not received any settlement proceeds.

i. New Jersey Views Automobile Insurance as a Vehicle to Protect Injured Third Parties and the Public.

Automobile liability insurance is viewed as primarily protecting and benefitting those third parties that are injured because the New Jersey views insurance as an "instrument of [the] social policy that the victims of negligence be fully compensated." *Cooper v. Government Employees Ins. Co.,* 51 N.J. 86, 94 (1968). "It can be said that the [insurance] policy protects the assets of the insured; of equal importance, it is intended to provide a source of recovery for an innocent injured party who, because of the insolvency of the insured, would have no other means of redress." *Werrman v Aratusa*, 266 N.J. Super. 471, 478 (App. Div. 1993). "From a pragmatic viewpoint, it is quite true that in many of the liability insurance cases, the real dispute is between the injured third party and the insurance company, not between the injured and often impecunious insured." *Constant v. Pacific National Ins. Co.,* 84 N.J. Super. 211, 218-19 (App. Div. 1964). Accordingly there is a strong public policy in New Jersey favoring the availability to injured persons of the liability insurance of those whose negligence is the cause of their plight. *Sneed v. Concord Ins. Co*., 98 N.J.Super. 306, 321 (App.Div.1967).

An innocent injured third-party is a third-party beneficiary of the liability insurance policy between the at fault insured and their insurer. *N.J.S.A.* 2A:15-2 states that a beneficiary to a contract is "[a] person for whose benefit a contract is made [and] may sue thereon in any court[.]" To determine whether a person qualifies as a third-party beneficiary, the test is "whether the contracting parties intended that a third party should receive a benefit which might be enforced in courts.' *Rieder Communities Inc. v. North Brunswick Twp.,* 227 N.J. Super 214, 222 (App.Div.1988). In *Eschle v. Eastern Freight Ways Inc.,* 128 N.J. Super. 299, 303 (App.Div.1974), the court stated that

the public policy behind requiring auto insurance is "to see that drivers are insured, not only for their own benefit, … but also to provide a fund from which the damage claims of others may be satisfied." Therefore, *"[t] he beneficiaries of the agreement are not merely the insured who will have obtained coverage, and the insurance company which will obtain the premium, but also a potential injured party who will have a fund from which he can receive payment*. The contract is made for his benefit as surely as if the provision appeared therein." *Id. (emphasis added).*

It is widely held that a "[t]hird-party beneficiary's rights depend upon, and are measured by, terms of contract between promisor and promisee." *Roehers v. Lees,* 178 N.J.Super. 399, 409 (App.Div.1981). Thus, as a third party beneficiary, one who is injured by an automobile that is covered by a liability policy, derives his rights from the insured**.** *Whittle v. Associated Indem. Corp***.,** 130 N.J.L. 576, 578 (E.&A.1943). Because his rights are purely derivative, the injured party's rights are no greater or less than the insured's, whose shoes he stands in. *Id*. Under this rule, the third party beneficiary, "may, in his or her own;134;134 right and name, enforce a promise made for his or her benefit even though such person is a stranger both to the contract and to the consideration." *Robins Dry Dock & Repair Co. v. Flint*, 275 U.S. 303, 307 (1927). Therefore, under an automobile liability insurance policy, anyone injured in an crash is, by law, a third party beneficiary of the contract and may assert any rights that the insured party is deemed to possess. Additionally, upon the happening of an crash an injured party acquires an interest in an insurance policy which may be available, *In re Estate of Gardinier*, 40 N.J. 261, 265 (1963), and that construction of such policy should be adopted which will afford the widest possible coverage. *American Policyholders Ins. Co. v. Portale*, 88 N.J.Super. 429, 439-440 (App.Div.1965).

As an injured passenger in the insured automobile, the Estate of Ricardo Mendonca is an intended third-party beneficiary of the auto insurance policy between the insured/owner of the vehicle, Gilberto DaSilva, and the insurer, Progressive Casualty Insurance Company. Furthermore, as an injured party, the Estate of Mendonca and its ten year old sole beneficiary also have a significant interest the availability of the policy. Accordingly, the Estate of Ricardo Mendonca and the child may use the judicial process to ensure the availability of the policy in order to compensate Gustavo Mendonca for the death of his father.

ii. Progressive Failed to Conduct a Proper Investigation and as Such Paid the Policy Proceeds to the Very Defendant in this Case

An auto insurance provider has a duty to conduct a prompt and thorough investigation into each claim. *Fireman's Fund Ins. Co.,* 72 N.J. at 73; *see also Ebert v. Balter,* 83 N.J. Super. 545 (Law Div. 1964). Moreover, N.J.A.C. 11:2-17.7 provides that every insurer shall commence a prompt investigation of all claims within 10 days of receiving notification of claim. *See also Griggs v. Bertram,* 188 N.J. 347, 361 (1982*)* (Upon receiving a potential claim an insurance carrier has a duty to conduct an investigation within a reasonable amount of time). Furthermore, an auto insurance policy is a contract and in every contract there is an implied covenant that neither party shall do anything which will have the effect of destroying or injuring the right of the benefiting party to receive the fruits of the contract; in other words, in every contract there exists an implied covenant of good faith and fair dealing. *Fireman Fund Ins. Co,* 72 N.J. at 72; *citing Association Group Life, Inc. v. Catholic War Vets. of U.S.*, 61 N.J. 150, 153 (1972). It is recognized that considerations of good faith and fair dealing create a duty of the insurer to conduct an investigation into each claim in order to reach an equitable settlement. *Id.* at 73. In this case there was no equitable settlement.

One half of the policy was paid to the at fault driver. All of the settlement proceeds were given to the unscrupulous owner of vehicle and defendant who also served as the Administrator Ad Prosequendum to both Estates. This was all apparently done with no Friendly Hearing. Gilberto DaSilva subsequently cashed the settlement checks and has not been heard from since.

Accordingly, Progressive had a duty to conduct a prompt and thorough investigation of the crash once they received the claim. At a minimum, this duty would require Progressive to obtain and review a copy of the police report regarding the occurrence. As such Progressive knew or should have known that the driver of the cargo van, Pedro DaSilva, was at fault for the crash. The investigation report clearly stated that Mr. DaSilva lost control of the cargo van, resulting in it veering off the roadway and bursting into flames. Progressive also knew or should have known that Gilberto DaSilva was the owner of the vehicle and brother of Pedro DaSilva, and as such a proper defendant in the action.

Moreover, Progressive negotiated and finalized the settlement with facially conflicted attorneys representing the interests of Gilberto DaSilva (the insured owner of the vehicle), Pedro DaSilva (the at fault driver), and Ricardo Mendonca (the innocent deceased passenger). Furthermore, although the Mendonca Estate had a minor as its sole beneficiary, there apparently was never any valid Friendly Hearing to approve the settlement. Finally, Gustavo Mendonca, Ricardo Mendonca's eleven year old son and sole beneficiary never received any of the settlement proceeds.

iii. Progressive Adjusted the Claim in a Careless and Inept Fashion

Progressive did not conduct a proper investigation into the claim and it failed to competently review the police report. Consequently, Progressive adjusted and settled the resulting claims $50k to the Estate of Pedro DaSilva (the party at fault for the crash) and $50k to Gilberto DaSilva, the co-defendant and owner of the vehicle who purportedly represented the Estate of Ricardo Mendonca but in actuality was allowed to run off with the money. The adjuster claimed the settlement was so structured as the bodies were burned and it could not be determined who was the driver and who was the passenger. However, the bodies were identified by dental records and the police report clearly states that Ricardo Medonca was the passenger and Pedro DaSilva was the driver.

PASSENGER INFORMATION

Name: Ricardo Abadio De Mendonca
Race: Hispanic
Sex: Male
Height: Unknown
Age: 30
Address: 80 Washington Street Apartment 1, Longbranch, New Jersey 07740
Vehicle Unit Number: 01
Seating Position: 03 Front Passenger

DRIVER INFORMATION

Number One:

Name: Pedro Junior Da Silva
Race: Hispanic
Sex: Male
Height: 5'08
Date of Birth: 03/02/1984
Address: 80 Washington Street Apartment 1, Longbranch, New Jersey 07740
Vehicle or Pedestrian Unit Number: 01
Seating Position: 01 Driver

(*Exhibit A, Police Report pgs. 6-7).*

As a result of Progressive negligently settling with the incorrect party, the sole beneficiary, ten year old Gustavo Menconca has received no settlement funds and no trust has been established for his benefit. As a third-party beneficiary with a significant interest in the insurance policy, the legitimate Estate of Ricardo Mendonca has the right to bring the within claims.

III. THE PURPORTED "SETTLEMENT" BETWEEN PROGRESSIVE AND THE OWNER OF THE VEHICLE ON BEHALF OF THE ESTATE OF THE PASSENGER IS INVALID

Defendant Progressive claims that it was discharged from any liability once it entered into the "lawful settlement" with the Estate of Ricardo Mendonca. This allegation is clearly false as the sole beneficiary of Ricardo Mendonca's Estate is a minor and apparently no valid Friendly Hearing took place. *Rule* 4:44-3 requires that "all proceedings to enter a judgment to consummate a settlement in matters involving minors … shall be heard by the court without a jury. The court shall determine whether the settlement is fair and reasonable as to its amount and terms." *Id*. Moreover, a minor's parent or representative may not dispose of a minor's existing cause of action without judicial approval, regardless of whether suit has been filed on the minor's behalf. *Hojnowski v. Vans Skate Park*, 187 N.J. 323, 335 (2006). Unless judicial approval is received pursuant to this Rule, a minor is not bound to his parent's settlement or release of his cause of action. *See Reimer v. St. Claire's Riverside Medical Center*, 300 N.J. Super. 101, 110 (App. Div. 1997) (Once the judge approves the amount and allocation of the settlement figure, the fully represented minor is bound by the settlement just as if he or she was an adult); *see also Hojnowski*, 187 N.J. at 335-36 (Absent judicial approval a parent does not have the authority to bind the minor to a pre-tort limited liability agreement). The purpose of the rule that a minor's parent representative may not dispose of minor's existing cause of action without judicial approval is to guard minor against an improvident compromise and to secure the minor against dissipation of the proceeds. *Hojnowski*, 187 N.J. at 335. Dissipation of the proceeds is precisely what happened here as Gilberto DaSilva ran off with proceeds.

When a person dies intestate without a surviving spouse, their descendants become the heirs to the estate. *N.J.S.A*. 3B:5-3. Gustavo Mendonca, a minor, was the sole heir and beneficiary of his father's Estate. Ricardo Mendonca died intestate and prior to his death he had one child, Gustavo Mendonca (born June 28, 2000) with his then girlfriend Vanessa Silva. Ricardo Mendcona did not have any other children. Accordingly, Gustavo Conclaves was the sole heir and beneficiary of his father's Estate. *See N.J.S.A*. 3B:5-3.

At the time of the settlement Gustavo Mendonca was a minor and the sole beneficiary of the Estate of Ricardo Mendonca. Accordingly, any insurance settlement or release of a cause of action arising from his father's death should have received valid court approval pursuant to *R.* 4:44-3 in order to be binding on the estate. However, Progressive and Gilberto DaSilva apparently never received valid court approval of the purported "settlement." Nor did they receive judicial approval of the supposed agreement releasing Progressive from "any and all claims" arising from the crash. Consequently, neither the settlement nor the release are binding upon the Estate of Ricardo Mendonca.

The reason for a rule requiring judicial approval of a settlement involving a minor is to assure that the minor's interest be protected. *Baldi v. Reynes*, 396 N.J. Super. 553 (App. Div. 2007). It should be noted that there were extraordinary circumstances involving the settlement that created an increased need for judicial approval to insure the interest of Gustavo Mendonca were protected. Were it not so tragic, Defendant's assertion on page 19 of their brief that, "Gilberto DaSilva was the best person to serve as Administrator" is laughable. Gilberto DaSilva, as the Administrator of the Estate of Ricardo Mendonca, had a toxic conflict of interest with regards to the settlement. Gilberto

DaSilva was involved in the settlement in three different capacities that allowed him to squander the settlement proceeds. First, he was a proper defendant as the owner/insured of the vehicle involved in the crash. Secondly, he was a potential defendant as the Administrator of the Estate of Pedro DaSilva (the party at fault for the crash). Finally, he simultaneously served as a potential plaintiff in his capacity as the Administrator of the Estate of Ricardo Mendonca. This glaring conflict of interest compromised Gilberto DaSilva's ability to serve as an administrator as it placed him in the role of approving the resolution of a claim against himself. *See e.g. In re Estate of Di Bella,* 372 N.J. Super. 350, 352-53 (Ch. Div. 2004) (Court refused to appoint husband, whose estranged wife died intestate while their divorce complaint was pending, as administrator of her estate because it would create a conflict of interest when settlement was explored since as Administrator he would approve the resolution of a claim against himself).[1]

This conflict prevented Gilberto DaSilva from performing his fiduciary duties owed to the Estate when executing the settlement agreement. *See Taylor v. Errion,* 137 N.J. Eq. 221, 226 (1945) (There is perhaps no rule more firmly imbedded in our legal and equitable concepts than that which positively forbids every person who acts in a representative capacity from placing himself amid opportunities to manipulate his authority for his own personal gain to the disadvantage of his principal). Moreover, the conflict compromised any chance of Gustavo Mendonca's receiving the settlement funds. Gilberto subsequently approved an even split of the $100K policy between the Estates of Pedro DaSilva and Ricardo Mendonca. Obviously no disinterested representative would ever approve a settlement agreement that split an insurance policy between the party at fault and the

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[1] A motion to invalidate Gilberto DaSilva as the Administrator Ad Prosequendum of the Estate of Ricardo Mendonca is being simultaneously filed with the Surrogate Court.

innocent victim who was purportedly represented by the defendant vehicle owner. Had a proper hearing been performed to approve the settlement this miscarriage of justice could have likely been avoided.[2]

IV. PLAINTIFF HAS STANDING

The concept of "standing" refers to a litigant's ability or entitlement to maintain an action before the court. *Manalapan Realty, L.P. v. Twp. Comm. of Manalapan,* 140 *N.J.* 366, 378 (1995). To the extent that standing may implicate questions of fact, on a summary judgment motion plaintiffs' assertions must be accepted as true and plaintiffs, as the non-moving party, are given the benefit of all favorable inferences supporting their claim. *Garrison v. Twp. of Middletown,* 154 *N.J.* 282, 284 (1998). The "essential purpose" of the standing doctrine in New Jersey is to:

> [A]ssure that the invocation and exercise of judicial power in a given case are appropriate. Further, the relationship of plaintiffs to the subject matter of the litigation and to other parties must be such to generate confidence in the ability of the judicial process to get to the truth of the matter and in the integrity and soundness of the final adjudication. Also, the standing doctrine serves to fulfill the paramount judicial responsibility of a court to seek just and expeditious determinations on the ultimate merits of deserving controversies.

N.J. State Chamber of Commerce v. N.J. Election Law Enforcement Comm'n, 82 *N.J.* 57, 69 (1980).

The New Jersey cases have historically taken a much more liberal approach on the issue of standing. Unlike the Federal Constitution, there is no express language in New Jersey's Constitution which confines the exercise of its judicial power to actual cases and controversies. *Crescent Park Tenants Ass'n v. Realty Equities Corp.,* 58 N.J. 98, 108 (1971). In *N.J. State Chamber of Commerce,*

[2] Progressive paid out the settlement funds to Randall Rose, Esq., and Leonard Adoff, Esq., who then disbursed the funds to Gilberto DaSilva. He apparently ran off with the money and has not been heard of since.

the Court again stressed that our standing rules serve to preclude actions initiated by persons whose relation to the dispute may be described as "total strangers or casual interlopers," a threshold described as "fairly low." 82 N.J. at 68. Not being bound by the federal case or controversy restriction, New Jersey Courts "remain free to fashion its own law of standing consistent with notions of substantial justice and sound judicial administration." *Salorio v. Glaser,* 82 *N.J.* 482, 491 (1980).

Thus, the Court has "consistently held that in cases of great public interest, any 'slight additional private interest' will be sufficient to afford standing." *People for Open Govt. v. Roberts,* 397 N.J. Super 502, 511 (App. Div. 2008). "[A] plaintiff's particular interest in the litigation in certain circumstances need not be the sole determinant. That interest may be accorded proportionately less significance where it coincides with a strong public interest." *N.J. State Chamber of Commerce,* 82 *N.J.* at 68 (citing *Elizabeth Fed. Sav. & Loan Assn. v. Howell,* 24 *N.J.* 488, 499 (1957)). In *Al Walker, Inc. v. Borough of Stanhope,* 23 N.J. 657 662 (1957), the Court stated that "it takes but slight private interest, added to and harmonizing with the public interest to support standing to sue." *See also Ridgewood Educ. Ass'n v. Ridgewood Bd. Of Educ.,* 284 *N.J.Super.* 427, 432-33 (App. Div. 1995).

In the present case, the Estate of Ricardo Mendonca has standing to assert a claim because Progressive's shockingly incompetent adjustment of their claim resulted in the Estate's sole beneficiary, Gustavo Medonca, not receiving any settlement proceeds from his father's death. This has been discussed in detail *supra.*

A. Standing Should Be Afforded Because Both the Estate of Ricardo Mendonca and the Public Has a Strong Interest in this Litigation.

A court must look at both the public's interest and the plaintiff's own private interest in the litigation when determining if a plaintiff has standing to sue. *See People for Open Govt.,* 397 N.J. Super. at 511. In the present matter, the Estate of Ricardo Mendonca has a significant interest in the suit as they filed this action to ensure Ricardo's eleven year old son and sole beneficiary, Gustavo Mendonca, is compensated for his father's death. Moreover, the public has a strong interest in holding insurance carriers accountable for breaching their duties and all egregious conduct that occurred here. Automobile insurance as discussed in detail *supra*, is designed primarily to provide compensation for innocent third parties who are injured due to the negligence of others. Consequently, the legitimate Estate of Ricardo Mendonca and the boy have a standing to assert these claims.

B. Marc J. Comer, Esq., Was Appropriately Appointed Administrator Ad Prosequendum of the Estate of Ricardo Mendonca for the Purpose of Bringing this Lawsuit.

Defendant, incorrectly argues that in order to properly appoint Marc J. Comer, Esq., Administrator Ad Prosequendum of the Estate of Ricardo Mendonca, the order granting Gilberto DaSilva administration of the Estate must first be vacated. Nevertheless, defendant has not and cannot provide any legal precedent to support this proposition. Furthermore, the order appointing Marc J. Comer Administrator Ad Prosequendum was approved by the Monmouth County Surrogate Court. Surely, had such a precedent existed, the Court would not have appointed Mr. Comer as administrator.

CONCLUSION

Based upon the foregoing facts and precedent, Plaintiff respectfully requests that Defendant's motion to dismiss pursuant R 4:6-2(e) be denied.

Respectfully submitted,

Clark Law Firm

By: ______________________________

GERALD H. CLARK
Counsel for Plaintiff Marc Comer, Esq. as administrator ad prosequendum of the Estate of Ricardo Mendonca

Dated: June 22, 2011

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