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PRELIMINARY STATEMENT

This matter arises out of a motor vehicle accident wherein plaintiff, Raquel Figueroa, a passenger in a 2003 Mitsubishi Montero operated by defendant Patricia Pacheco, sustained fatal injuries. Just before the accident Raquel Figueroa, plaintiff Joanna Lopez, and Patricia Pacheco had come from stopping for breakfast and were on their way to the their first cleaning job of the day with Pat's Housekeeping Service.

Pat's Housekeeping Service had a business auto insurance policy issued by The Proformance Insurance Company, which included a 2001 Ford minivan as a scheduled insured vehicle. (*Exhibit H, Photos of Pat's Housekeeping Service's Ford Minivan*)(*Exhibit B, Proformance Policy*). However, on the date of the accident, the Pat's Housekeeping Service 2001 Ford minivan was in the repair shop. As such, Patricia Pacheco was operating her personal vehicle, the Mitsubishi Montero as a temporary substitute auto in place of the Pat's Housekeeping Service minivan.

Coverage applies under the Proformance insurance policy at issue because it qualifies as either a "Nonowned auto" under symbol 9 of the policy, and/or because it qualifies as a "temporary substitute auto" under section C of the policy. These coverages apply to vehicles the "insured" does not own. Since the "insured" under the policy is the business, Pat's Housekeeping Service, and the vehicle involved in the accident was owned by the individual person, Patricia Pacheco, not the business entity, coverage is applicable under either one of these provisions.

Proformance's coverage denial, and its summary judgment motion, is based on the false assertion that the "named insured" under the policy and the owner of the subject vehicle are one and the same. As such, Proformance incorrectly asserts, since the subject vehicle was not a scheduled vehicle, and since the owner of the vehicle and the named insured are the same, there is no "Nonowned auto" nor "temporary substitute auto" coverage available. However, since the named

insured is the business, and the owner of the vehicle is the person, Patricia Pacheco, coverage is applicable. *Araya v. Farm Family Casualty Insurance Company*, 353 N.J. Super. 203, 207 (App. Div. 2002) is almost directly on point. In *Araya*, a commercial auto policy listed the named insured on that declarations page as, “Christopher Mahon Mahon Landscaping,” both the name of the business and its individual owner. For the same reasons that should apply here, the Court held that the named insured was the business, not the individual owner, and as such the injured plaintiff was entitled to UIM benefits under the policy.

For these reasons Proformance’s summary judgment motion should be denied and plaintiff’s cross motion for summary judgment seeking a finding of coverage as a matter of law should be granted.

RESPONSE TO MOVANT'S STATEMENT OF FACTS

1. Admit.
2. Admit.
3. Admit.
4. Admit.
5. Admit for the purposes of this motion only.
6. Admit. (*Exhibit O, Jorge Pacheco Examination Under Oath Transcript, at 10-11*).

7. Deny. The policy at issue is not a personal auto policy, it is a commercial policy issued to the sole proprietorship business entity "Pat's Housekeeping Service t/a Patricia Pacheco". (*Exhibit B, Proformance Insurance Policy*)(*Exhibit E, Insurance Application*)(*Exhibit D, Glenn Kennard Deposition Transcript, at 8-9, 14-15*)(*Exhibit H, Photos of Pat's Housekeeping Service Van*)(*Exhibit M, Proformance's Denial Letter*)(*Exhibit G, Notice of Cancellation*). Moreover, the policy was paid for by a check from the business account of Pat's Housekeeping Service, and the insurance card for the policy was issued to the business, Pat's Housekeeping Service. (*Exhibit F, Insurance Card Issued by Proformance*)(*Exhibit I, Pat's Housekeeping Service Check*).

8. Admit, except to add that the pages 1-11 of the referred to exhibit represent the boilerplate portion of policy. It is well settled that the declarations page is the best indicator of what an insured's reasonable expectations should be. Accordingly, "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).

Additionally, reference is made to the Declarations to determine the meaning of the words "you" and "your" used throughout the policy. The definition of "you" and "your" is determined by

the party listed as the “Named Insured”. The Declarations for the subject business policy provides that the named insured is the business, Pat’s Housekeeping Service. (*Exhibit B, Proformance Insurance Policy*). *Araya v. Farm Family Casualty Insurance Company*, 353 N.J. Super. 203, 207 (App. Div. 2002), citing, *Cook-Sauvageau v. PMA Group*, 295 N.J. Super. 629, 627-628 (App. Div. 1996).

9. Admit. However, it should be noted that the Proformance commercial auto policy issued to Pat’s Housekeeping Service t/a Patricia Pacheco also contains a temporary substitute auto clause that provides additional coverage as follows:

C. Certain Trailers, Mobile Equipment And Temporary Substitute Autos

3. Any “auto” *you* do not own while used with the permission of its owner as a temporary substitute for a covered “auto” you own that is out of service because of its:
 - a. Breakdown;
 - b. Repair;
 - c. Servicing;
 - d. “Loss”; or
 - e. Destruction

(*Exhibit B, Proformance Insurance Policy*).

10. Denied. The referenced policy was purchased by the business entity Pat’s Housekeeping Service. (*Exhibit I, Pat’s Housekeeping Service Check*)(*Exhibit E, Insurance Application*)(*Exhibit D, Glenn Kennard Deposition Transcript, at 8-9, 14-15*)(*Exhibit F, Insurance Card Issued by Proformance*)(*Exhibit M, Proformance’s Denial Letter*)(*Exhibit G, Notice of Cancellation*).

11. Admit in so far as the statement is an accurate summary of Symbol 7.

12. Admit. However, it should be noted that the 2003 Mitsubishi Montero was a temporary substitute auto used by Pat’s Housekeeping Service while the scheduled vehicle, the 2001 Ford

minivan, was being repaired. (*Exhibit B, Proformance Insurance Policy*)(*Exhibit, O, Jorge Pacheco Examination Under Oath Transcript, at 10-11*).

13. Deny. Symbol 9 of the Proformance policy makers reference to ““autos’ you do not own, lease, hire, rent or borrow that are used in connection with your business . . .” (*Exhibit B, Proformance Insurance Policy*). Pursuant to the BUSINESS AUTO COVERAGE FORM and the Declaration page, “you” and “your” refer to the business entity Named Insured, “Pat’s Housekeeping Service t/a Patricia Pacheco,” rather than Patricia Pacheco individually. Had Proformance wished to limit the coverage to Patricia Pacheco individually it could have easily drafted the policy as such and included the words “individually” or “personally”. *Araya v. Farm Family Casualty Insurance Company*, 353 N.J. Super. 203, 211 (App. Div. 2002). Moreover, the Mitsubishi was being used as a temporary substitute auto under the policy. (*Exhibit B, Proformance Insurance Policy*).

14. Admit only in so far as the 2003 Mitsubishi Montero was owned individually by Patricia Pacheco. (*Exhibit K, Certificate of Title*). However, the Mitsubishi was being used as a temporary substitute auto at the time of the accident, in place of the scheduled vehicle which was in the repair shop. (*Exhibit B, Proformance Insurance Policy*)(*Exhibit O, Jorge Pacheco Examination Under Oath Transcript, at 10-11*).

15. Deny. Proformance’s denial of coverage resulted from Proformance’s failure to properly recognize that the named insured on this business policy is the business entity Pat’s Housekeeping Service t/a Patricia Pacheco rather than the individual person Patricia Pacheco. As set forth at length below, the record reflects that Proformance has no grounds for summary judgment and Pat’s Housekeeping Service t/a Patricia Pacheco, is entitled insurance coverage under the commercial auto policy with Proformance for injuries resulting from the April 4, 2006 motor vehicle accident.

Accordingly, plaintiff respectfully requests the instant cross-motion for Summary judgment be granted.

STATEMENT OF FACTS

I. The Accident

1. This matter arises out of motor vehicle accident that occurred on April 4, 2006 wherein Raquel Figueroa, 27 year-old mother of two, sustained fatal injuries. The accident occurred when Patricia Pacheco failed to stop at a stop sign governing the intersection of Park Avenue and East Road in Middletown, New Jersey. As a result the 2003 Mitsubishi Montero was struck by a Middletown garbage truck operated by Raymond A. Hrbek. (*Exhibit A, Police Report*).

2. As a result of the crash, Patricia Pacheco was issued two summonses, one for reckless driving and the other for failing stop at a stop sign. Patricia Pacheco ultimately pled guilty to *N.J.S.A. 39:4-144*, failing to stop or yield. (*Exhibit A, Police Report*).

3. At the time of the accident, defendant Patricia Pacheco, and plaintiffs Joanna Lopez and Raquel Figueroa were on their way to their first cleaning job of the day. Ms. Lopez and Ms. Figueroa has been hired for the day to perform cleaning services for Ms. Pacheco's business known as Pat's Housekeeping Service. (*Exhibit N, Joanna Lopez Deposition transcript, at 18, 59-60*)(*Exhibit H, Photos of Pat's Housekeeping Service's Ford Minivan*).

II. Pat's Housekeeping Service

1. Pat's Housekeeping Service is a sole proprietorship registered with the State of New Jersey Department of Revenue since October 2003. (*Exhibit L, Pat's Housekeeping Service Business Registration Documents*)(*Exhibit H, Photos of Pat's Housekeeping Service's Ford Minivan*).

2. "Pat's Housekeeping Service" is also a trade name registered with the State of New Jersey. (*Exhibit L, Pat's Housekeeping Service Business Registration Documents*)(*Exhibit H, Photos of Pat's Housekeeping Service's Ford Minivan*).

3. Moreover, Pat's Housekeeping Service was issued an Employer Identification Number by the Internal Revenue Service in November 2003. (*Exhibit L, Pat's Housekeeping Service Business Registration Documents*).

4. Pat's Housekeeping Service is a private cleaning service engaged in the business of cleaning mainly private homes. One of the homes cleaned by Pat's Housekeeping Service was that of Glenn Kennard, an insurance broker with HTK Insurance Agency, Inc. (*Exhibit D, Glenn Kennard Deposition Transcript, at 8-9*).

III. Pat's Housekeeping Service's Purchase of the Commercial Auto Policy from Proformance.

1. In October 2004, Mr. Kennard sold Jorge Pacheco (Patricia Pacheco's ex-husband) a commercial auto policy for the Pat's Housekeeping Service business which included coverage for the 2001 Ford minivan for use in connection with Pat's Housekeeping Service. (*Exhibit D, Glenn Kennard Deposition Transcript, at 8-9*).

2. Mr. Kennard submitted an application for a commercial policy on behalf of Pat's Housekeeping Service t/a Patricia Pacheco. (*Exhibit E, Insurance Application*). In conjunction with the insurance application, a check written from Pat's Housekeeping Service's business account was submitted payable to The Proformance Insurance Company. (*Exhibit I, Pat's Housekeeping Service Check*).

3. During his deposition, Mr. Kennard testified that there are two distinct differences between commercial auto insurance policies and personal auto insurance policies; there is a different

application and a different rating system¹. (*Exhibit D, Glenn Kennard Deposition Transcript, at 12, 14*).

4. Specifically, Mr. Kennard testified:

A: There's different rates that are filed with the state that apply to commercial vehicles and personal and it's all pretty intricate really, depending on how they are used and different characteristics of the vehicle.

Q: With respect to the policy we've been talking about that's going to be marked Kennard-4 and Kennard-1, can you tell me what rating system would be applied to this policy.

A: Commercial auto rates.

Q: What was your understanding of the need for this policy when it was applied for?

A: That it was being used in business

Q: Does it make a difference if the business that's applying for commercial auto insurance is incorporated, an LLC, sole proprietorship, S Corp., anything like that, does it make a difference to you?

A: In what respect?

Q: When they're applying for coverage is there a separate application?

A: No.

Q: So it's the same application for a sole proprietorship and the same application for a corporation if they're applying for [coverage]?

A: Yes.

(*Exhibit D, Glenn Kennard Deposition Transcript, at 14-15*)

¹ Jennifer DeLong, an underwriter for Proformance who was involved in underwriting the policy at issue and the decision to deny coverage to Pat's House Keeping Service; t/a Patricia Pacehco testimony confirmed Mr. Kennard's account of the two main differences between personal auto insurance and commercial auto insurance. (*Exhibit C, Jennifer DeLong Deposition Transcript, at 10-11*).

(Exhibit D, Glenn Kennard Deposition Transcript, at 14)(Exhibit E, Insurance Application).

5. Proformance ultimately issued a commercial auto insurance policy to Pat's Housekeeping Service which included the 2001 Ford minivan. *(Exhibit D, Glenn Kennard Deposition Transcript, at 17-18)*. The Proformance policy provided on the page entitled BUSINESS AUTO COVERAGE FORM:

Throughout this policy the words "you" and "your" refer to the Named Insured shown in the Declarations.

(Exhibit B, Proformance Insurance Policy).

6. The Declarations provides that Named Insured is the business entity, "Pat's Housekeeping Service T/A Patricia Pacheco." *(Exhibit B, Proformance Insurance Policy).*

7. The insurance card issued in connection the Proformance policy was also issued to the business entity "Pat's Housekeeping Service." *(Exhibit F, Insurance Card Issued by Proformance).*

8. After selling Jorge Pacheco the commercial policy for the Ford minivan used in connection with Pat's Housekeeping Service, Mr. Kennard's agency also sold Jorge Pacheco personal auto insurance coverage for other vehicles owned by the Pachecos. *(Exhibit D, Glenn Kennard Deposition Transcript, at 13).*

IV. Proformance's Flawed Denial of Coverage to Pat's Housekeeping Service

1. It is undisputed that on the date of the accident, Patricia Pacheco was operating a 2003 Mitsubishi Montero. *(Exhibit A, Police Report).*

2. The Mitsubishi was owned by the individual person, Patricia Pacheco individually. *(Exhibit J, Certificate of Title).*

3. On the date of the accident, Patricia Pacheco was operating the Mitsubishi rather than the Ford minivan because the Pat's Housekeeping Service minivan was in the repair shop. (*Exhibit O, Jorge Pacheco Examination Under Oath Transcript, at 10*). The Pat's Housekeeping Service Ford minivan had been at the shop since the day before the accident for the purposes of repairing a tire. (*Exhibit O, Jorge Pacheco Examination Under Oath Transcript, at 11*).

4. Despite the fact that the 2003 Mitsubishi was being used as a temporary substitute auto, shortly after the motor vehicle accident, Proformance denied coverage to Pat's Housekeeping service t/a Patricia Pacheco based on Symbols 7 & 9 of the commercial policy. More specifically, Proformance's improvident decision to disclaim coverage was based on the excuse that vehicle itself was not a scheduled vehicle "nor was it a non-owned auto." (*Exhibit C, Jennifer DeLong Deposition Transcript, at 16*)(*Exhibit M, Proformance's Denial Letter*).

5. Rosanna Kepler, the adjuster who issued the denial letter testified that:

We had come to find out that the vehicle that was involved in the loss was not listed on the policy. We had come to find out that it was registered to Miss Pacheco, which again, under specific policy states that, you know, based on Symbol 9 that the vehicle is – as it state here, "Only those autos which you do not own, lease, hire or rent." She obviously owned the vehicle; so that's why the concern was brought up and looked into.

(*Exhibit K, Rosanna Kepler Deposition Transcript, at 13-15, 18*).

6. However, the declarations page which controls the definition of "you" referred to throughout the boilerplate of the business policy provides that the Named Insured is the business "Pat's Housekeeping Service T/A Patricia Pacheco," not the individual person, Patricia Pacheco. (*Exhibit B, Proformance Insurance Policy*).

7. Accordingly, in denying coverage, Proformance failed to properly recognize that the named insured is the business entity, Pat's Housekeeping Service t/a Patricia Pacheco rather than the

individual Patricia Pacheco. The case law is clear that this is not a semantical distinction and the coverage should not have been denied. *Araya v. Farm Family Casualty Insurance Company*, 353 N.J. Super. 203, 207 (App. Div. 2002), citing, *Cook-Sauvageau v. PMA Group*, 295 N.J. Super. 629, 627-628 (App. Div. 1996). Since the named insured is the cleaning service business and the owner of the subject vehicle is the individual Patricia Pacheco, coverage is applicable under either symbol 9, the “non-owned autos” provision or under section C, the temporary substitute autos provision. Therefore, Proformance’s motion for summary judgment should be denied and plaintiff’s cross-motion should be granted.

LEGAL DISCUSSION

I. THIRD PARTY DEFENDANT’S SUMMARY JUDGMENT MOTION SHOULD BE DENIED AND PLAINTIFF’S CROSS-MOTION SHOULD BE GRANTED BECAUSE COVERAGE APPLIES UNDER THE PROFORMANCE COMMERCIAL AUTO INSURANCE POLICY

A basic tenant of insurance law is that insurance policies, as contracts of adhesion are subject to special rules on interpretation. *Longobardi v. Chubb Insurance Co.*, 121 N.J. 530, 537 (1990), citing *Meir v. New Jersey Life Insurance*, 101 N.J. 597, 611-612 (1986). Accordingly, insurance policies should be liberally construed in favor of the insured and coverage afforded to the full extent that a fair interpretation of the policy will allow. *Meier v. New Jersey Life Insurance Co.*, 101 N.J. at 611. Observing that “the primary object of all insurance is to insure,” the Appellate Division has stated that when reviewing insurance policies, “[a] construction should be taken which will render the contract operative, rather than inoperative, and which will sustain the claim for indemnity, if reasonably possible, rather than exclude it.” *Erdo v. Torcon Construction Company*, 275 N.J. Super. 117, 120 (App. Div. 1994). As such, 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.*

Moreover, the insurer is charged with the responsibility of phrasing its contracts with such clarity as to avoid ambiguity as to their meaning; otherwise "they must be construed most strongly against the insurer." *Id.* at 607. When an insurance carrier puts in issue its coverage of a loss under a contract of insurance, it bears a substantial burden of demonstrating that the loss falls outside the scope of coverage. *United Rental Equip. Co. v. Aetna Life & Cas. Ins. Co.*, 74 N.J. 92, 99 (1977); *Ruvolo v. American Cas. Co.*, 39 N.J. 490, 498 (1963); *Weedo v. Stone-E-Brick, Inc.*, 81 N.J. 233 (1979).

In the instant matter, Proformance's denial of coverage is based in part upon the assertion that the 2003 Mitsubishi Montero (in which the accident occurred) is not a "scheduled vehicle". (*Exhibit A, Police Report*)(*Exhibit M, Proformance's Denial Letter*). In support of its position, Proformance points to the "Coverage Summary Declarations" relying on two provisions, namely symbols 7 & 9. Symbol 9 provides that a covered auto is "Only those 'auto's you do not own, lease, hire, rent or borrow that are used in connection with your business." (*Exhibit B, Proformance Insurance Policy*).

Proformance's reliance on this provision is flawed because it is grounded in the incorrect assumption that "you" referred to throughout the policy corresponds to Patricia Pacheco. However, as set forth clearly on the page entitled BUSINESS AUTO COVERAGE FORM:

Throughout this policy the words "you" and "your" refer to the Named Insured shown in the Declarations.

(*Exhibit B, Proformance Insurance Policy*)(emphasis added). The Declarations on this business policy provides that Named Insured is the business entity, "Pat's Housekeeping Service T/A Patricia Pacheco." (*Exhibit B, Proformance Insurance Policy*). 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.* Therefore, in this instance a fair interpretation of the policy connotes that the insured is the business entity, Pat's Housekeeping Service and coverage was intended to extend to vehicles used in connection with the cleaning business. On the date of the accident, Patricia Pacheco was operating her personal vehicle, a 2003 Mitsubishi. (*Exhibit J, Certificate of Title*). Since the vehicle was personal to Patricia Pacheco and being used as a

temporary substitute auto for the business Pat’s Housekeeping Service (in place of the Ford minivan that was being repaired), it follows that the Mitsubishi qualifies as a covered auto pursuant to Symbol 9 of the policy as well as the temporary substitute auto provision of the policy.

The Mitsubishi qualifies as a covered auto pursuant to the temporary substitute auto clause of the policy which provides additional coverage as follows:

C. Certain Trailers, Mobile Equipment And Temporary Substitute Autos

3. Any “auto” you do not own while used with the permission of its owner as a temporary substitute for a covered “auto” you own that is out of service because of its:

Breakdown;

b. Repair;

c. Servicing;

d. “Loss”; or

e. Destruction

*(Exhibit B, Proformance Insurance Policy)*². Both Symbol 9 and the additional coverage afforded pursuant to the temporary substitute auto provision refer and rely upon the definition of “You” under the policy. In denying coverage Proformance disregarded the clear intent of the commercial policy and the business entity Named Insured on the declaration page and took the incorrect position that “You” refers to the individual person, Patricia Pacheco. However, Proformance’s position does not comport with the clear and unambiguously Name Insured listed on the declaration page, the business entity, “Pat’s Housekeeping Service; t/a Patricia Pacheco.” *(Exhibit B, Proformance Insurance Policy)*. As set forth below, the documents and testimony support the conclusion that the “You” in the Declarations and throughout the policy (including for purposes of Symbol 9 and the temporary

² It should be noted that copy of the Proformance policy attached to the moving papers as Exhibit F, is not a complete copy. Accordingly, plaintiff has attached an entire copy of the policy as Exhibit B, Proformance Insurance Policy.

substitute auto provision) refers to the business entity Pat’s Housekeeping Service, rather than the individual Patricia Pacheco. Therefore, the reasonable expectations is to provide coverage for the Mistubishi driven on the date of the accident as a covered auto “you” do not own and/or as a temporary substitute auto.

A. The Business Policy Issued to Pat’s Housekeeping Service; t/a Patricia Pacheco was Issued to the Business Entity.

In a case similar to the instant matter, *Araya v. Farm Family Casualty Insurance Company*, 353 N.J. Super. 203 (App. Div. 2002), the Appellate Division held a business policy issued to a sole proprietorship was issued to the business entity rather than the individual and therefore, UIM coverage was extended to an employee of the business. *Araya* involved an employee injured while working for a landscaping company owned by Christopher Mahon, known as Mahon Landscaping. *Id.* at 206. The employee was denied UIM benefits under a policy issued with the declaration page listing the insured as:

Christopher Mahon
Mahon Landscaping
P.O. Box 1359
Union, NJ 07083-1358

Id. at 208³. As in the instant matter, in *Ayara*, “the question of coverage turned on whether named insured is Mahon or the business entity Mahon Landscaping.” *Id.* at 206.

In concluding that “[t]here is nothing about the policy that alerts a reasonable person that the intended coverage was personal to Mahon” the Appellate Division in *Araya*, relied on the testimony of the insurance agent to interpret the intent of parties with respect to coverage. *Id.* at 209. In that

³ It is noteworthy that in *Araya*, unlike the instant matter, the “trading as” designation was not made, and the reference to the individual owner was specifically referenced first.

case, the insurance agent's testimony mirrors that of the testimony of Glenn Kennard, the insurance agent that sold Pat's Housekeeping Service the commercial auto insurance policy at issue. The broker in *Araya* testified as follows:

AGENT: There was a personal auto policy for Christopher and Jackie [wife] Mahon, and a home owners's policy of Christopher.

QUESTION: That doesn't come under the business policies?

AGENT: No. Those are personal.

QUESTION: There's a different type of rating system, is that why?

AGENT: No. It's personal lines and the commercial lines. We keep it separate.

QUESTION: So they kept the company separate from the personal coverage?

AGENT: Yes. I wrote their commercial coverage, their business coverage first, and then once they were a client of mine sometime after that, I don't know the exact dates, they asked me to take a look at their personal insurance. Then I wrote their auto and homeowners as well, and there's also a disability policy on Christopher. *Id.* at 208

In the instant matter, Mr. Kennard testified that he knew of the Pat's Housekeeping Service business because it serviced his house. Ultimately, Jorge Pacheco (Patricia Pacheco's ex-husband) purchased a commercial auto policy for Pat's Housekeeping Service which included the 2001 Ford minivan. The policy was purchased in October 2004 from Mr. Kennard's insurance agency, HTK Insurance Agency, Inc. (*Exhibit D, Glenn Kennard Deposition Transcript, at 8-9*). Thereafter, Jorge Pacheco purchased personal auto insurance coverage from HTK Insurance Agency, Inc. for other vehicles owned by the Pachecos. (*Exhibit D, Glenn Kennard Deposition Transcript, at 13*).

Almost identical to the testimony of the insurance broker in *Ayara*, Mr. Kennard in the case *sub judice* testified that there are two distinct differences between commercial auto insurance policies

and personal auto insurance policies; there is a different application and a different rating system⁴.

(*Exhibit D, Glenn Kennard Deposition Transcript, at 12, 14*). Mr. Kennard testified:

A: There's different rates that are filed with the state that apply to commercial vehicles and personal and it's all pretty intricate really, depending on how they are used and different characteristics of the vehicle.

Q: With respect to the policy we've been talking about that's going to be marked Kennard-4 and Kennard-1, can you tell me what rating system would be applied to this policy.

A: Commercial auto rates.

Q: What was your understanding of the need for this policy when it was applied for?

A: That it was being used in business

(*Exhibit D, Glenn Kennard Deposition Transcript, at 14*)(*Exhibit E, Insurance Application*).

Further, the agent in *Ayara* testified that he believed that the scheduled vehicles of the business policy were to be used only in connection with the landscaping business. *Id.* at 208. In *Ayara* the agent stated that there was one separate form for commercial insurance whether the business was a corporation or sole proprietorship. *Id.* at 209. Similarly, Mr. Kennard testified:

Q: Does it make a difference if the business that's applying for commercial auto insurance is incorporated, an LLC, sole proprietorship, S Corp., anything like that, does it make a difference to you?

A: In what respect?

Q: When they're applying for coverage is there a separate application?

A: No.

⁴ Jennifer DeLong, an underwriter for Proformance who was involved in underwriting the policy at issue and the decision to deny coverage confirmed Mr. Kennard's account of the two main differences between personal auto insurance and commercial auto insurance. (*Exhibit C, Jennifer DeLong Deposition Transcript, at 10-11*).

Q: So it's the same application for a sole proprietorship and the same application for a corporation if they're applying for [coverage]?

A: Yes.

(*Exhibit D, Glenn Kennard Deposition Transcript, at 15*). Mr. Kennard confirmed that after the application for insurance was submitted, Pat's Housekeeping Service was issued a commercial auto insurance policy through The Proformance Insurance Company. (*Exhibit D, Glenn Kennard Deposition Transcript, at 17-18*). In fact, the insurance card issued by Proformance names "Pat's Housekeeping Service" as the named insured. (*Exhibit F, Insurance Card Issued by Proformance*). In addition, Pat's Housekeeping Service paid for the policy with a business check written from its business account. (*Exhibit I, Pat's Housekeeping Service Check*).

In this instance Proformance issued a commercial auto policy to "Pat's Housekeeping Service t/a Patricia Pacheco". Had the drafters of the Proformance policy wished to limit symbol 9 and the temporary substitute auto policy to vehicles not personal to and owned by *Patricia Pacheco*, it could have easily and unambiguously drafted the policy to properly name the individual. As the Appellate Division addressed this question *Ayara*:

Here the drafters could have easily and unambiguously identified the named insured. If Mahon as an individual was the intended insured, the policy should not have included a reference to the business entity and should have clearly identified Mahon as an individual by including the words "individually" or "personally."

Id. at 211. However, Proformance drafted the declaration page of the commercial policy to refer to the business entity, "Pat's Housekeeping Service; t/a Patricia Pacheco"; thus creating the expectation and intention that the "You" on the declaration page and throughout the policy refers to the business entity rather than the individual. The insurance agent, Glenn Kennard, and the Proformance underwriter Jennifer DeLong, confirmed that the policy was issued as and intended to be a business

policy to cover the business just like the broker in the *Araya* case. (*Exhibit D, Glenn Kennard Deposition Transcript, at 8-9, 14-15*)(*Exhibit C, Jennifer DeLong Deposition Transcript, at 21*). Therefore the references to “You” throughout the policy unambiguously refers to the business entity rather than the individual. As such, coverage applies the Mitsubishi driven on the date of the accident under Symbol 9 and/or as a Section I, C. 3 - Temporary Substitute Auto.

B. Proformance’s Motion for Summary Judgment Should be Denied and Plaintiff’s Cross Motion For Summary Judgment Granted Because Proformance Failed to Demonstrate that the Mitsubishi Driven on the Date of the Accident was Excluded From Coverage Pursuant to Symbol 9 and Not Covered as a Temporary Substitute Auto.

It is undisputed that on the date of the accident, Patricia Pacheco was operating a 2003 Mitsubishi Montero. (*Exhibit A, Police Report*). The Mitsubishi was owned by Patricia Pacheco individually. (*Exhibit J, Certificate of Title*). On the date of the accident Patricia Pacheco was operating the Mitsubishi rather than the Pat’s Housekeeping Service Ford van because it was in the shop. (*Exhibit O, Jorge Pacheco Examination Under Oath Transcript, at 10*). The Ford van had been at the shop since the day before the accident for the purposes of repairing a tire. (*Exhibit O, Jorge Pacheco Examination Under Oath Transcript, at 11*).

Although the Mitsubishi, owned individually by Patricia Pacheco was used as a temporary substitute auto, neither the Proformance claims adjuster, Rosanna Kepler, nor the underwriter, Jennifer DeLong, had reviewed either Patricia Pacheco or Jorge Pacheco’s EUO transcripts prior to determining that coverage did not apply. (*Exhibit K, Rosanna Kepler Deposition Transcript, at 13-15, 18*)(*Exhibit C, Jennifer DeLong Deposition Transcript, at 16*). In fact, Proformance’s decision to deny coverage was based on the incorrect position hat Patricia Pacheco is “You”, or the “Name Insured” for purposes of the policy. (*Exhibit K, Rosanna Kepler Deposition Transcript, at 13-15, 18*)(*Exhibit C, Jennifer DeLong Deposition Transcript, at 16*)(*Exhibit M, Proformance Denial*

Letter). In denying coverage, Proformance failed to properly recognize that the named insured is the business entity, Pat's Housekeeping Service t/a Patricia Pacheco, rather than the individual person, Patricia Pacheco. (*Exhibit C, Jennifer DeLong Deposition Transcript, at 16*). As such, coverage was improvidently disclaimed because the Mitsubishi. Specifically, Ms. Kepler testified that:

We had come to find out that the vehicle that was involved in the loss was not listed on the policy. We had come to find out that it was registered to Miss Pacheco, which again, under specific policy states that, you know, based on Symbol 9 that the vehicle is – as it state here, “Only those autos which you do not own, lease, hire or rent.” She obviously owned the vehicle; so that’s why the concern was brought up and looked into.

(*Exhibit K, Rosanna Kepler Deposition Transcript, at 13-15, 18*).

As set forth at length above, the declarations page controls the definition of “you” referred to throughout the policy is the “Name Insured”. The declarations page provides that the “Named Insured” is “Pat’s Housekeeping Service T/A Patricia Pacheco.” (*Exhibit B, Proformance Insurance Policy*). Proformance has failed to meet its burden in this case for obtaining summary judgment.

Based on the foregoing, even when viewed in light most favorable to Proformance (which is not the standard with respect to Proformance’s motion), the record reflects that Proformance has no grounds for summary judgment and Pat’s Housekeeping Service t/a Patricia Pacheco is entitled insurance coverage under the commercial auto policy with Proformance for injuries resulting from the April 4, 2006 motor vehicle accident. The policy and specifically the Declarations, is *not* ambiguous⁵. The policy at issue is a commercial policy issued to a business entity, Pat’s

⁵Even if third-party defendant could provide a basis to argue that the policy is somehow ambiguous, it is well settled that an ambiguity must be strictly construed against the insurer so that the liability coverage that the insured reasonably anticipated would be provided for injuries sustained in an auto accident in connection with the cleaning service. *See American Wrecking Corp. v. Burlington Insurance Co.*, 400 N.J. Super. 276 (App. Div. 2008), citing *Argent v. Brady*, 386 N.J. Super. 343, 351 (App. Div. 2006); *Kievit v. Loyal Protective Life*

Housekeeping Service, which included scheduled coverage for a Ford minivan used by the business. (*Exhibit B, Proformance Insurance Policy*). That vehicle was in the repair shop at the time of the accident and therefore the , the 2003 Mitsubishi which was personal to Patricia Pacheco, was a qualifying “non-owned” or “temporary substitute auto”.

Accordingly, third-party defendant Proformance should be compelled to provide coverage arising out of the April 4, 2006 motor vehicle accident. Coverage issues such as these are questions of law for the Court to decide. There is simply no trial issue of fact. Therefore, third-party defendant’s motion for summary judgment should be denied and plaintiff’s cross motion for summary judgment should be granted.

Ins. Co., 34 N.J. 475 (1961) (If the controlling language of a policy will support two meanings, one favorable to the insurer, and the other favorable to the insured, the interpretation sustaining coverage must be applied.).

CONCLUSION

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

Respectfully submitted,

GERALD H. CLARK

Dated: June 5, 2009

June 25, 2009

VIA FAX 732-677-4369

Honorable Dennis R. O'Brien, J.S.C.
Monmouth County Superior Court
71 Monument Park, Courtroom 318W
Freehold, N.J. 07728

**Re: Marc J. Comer, as administrator ad prosequendum of
the Estate of Raquel Figueroa v. Pacheco, et al.**

Docket No: MON-L-717-09

Our File No.: 61-8590

Dear Judge O'Brien:

Please accept the following reply brief in support of plaintiff, the Estate of Raquel Figueroa's, cross motion for summary judgment for a declaration that the Proformance Insurance Company (hereinafter, "Pro-F") policy of insurance must cover the claims in this case.

In attempting to avoid summary judgment, Pro-F's opening salvo is that plaintiff has no standing to be heard in this matter. This is incorrect. It is well settled under New Jersey law that an injured plaintiff is a third party beneficiary to a liability insurance contract and has the right to assert the claims of the insured. *See, e.g Atlantic Employees Insurance Company v. Tots & Toddlers Day Care Center, Inc.*, 239 N.J. Super. 276 (App. Div. 1990) (permitting sexual abuse victim's right to intervene in a declaratory judgment to protect rights under liability insurance policy); *Eschle v. Eastern Freight Ways, Inc.*, 128 N.J. Super. 299, 305-06 (Law Div. 1974) Furthermore, personal counsel for Patricia Pacheco, Pat's Housekeeping t/a Patricia Pacheco has advised that by the close of business today his client will execute a written assignment of the insured's rights under the policy to plaintiff/cross-movant pursuant to *Griggs v. Betram*, 88 N.J. 347 (1982).

Pro-F's apparent second best argument is that they should be allowed to run away from their coverage obligations because the registration for the Ford Minivan that was not involved in the accident was not included in the cross-moving papers. This is an empty argument that only highlights the unreasonableness of Pro-F's treatment of its insured in this matter. It is well settled that determination of who is insured under a policy is best made by looking at the declarations page, *Araya v. Farm Family Casualty Insurance Company*, 353 N.J. Super. 203, 209, *citing*, (App. Div. 2002); *Lehrhoff v. Aetna Casualty & Surety Co.*, 271 N.J. Super. 340, 346-347 (App. Div. 1994). Here this is a commercial, business policy declaration that insures the cleaning service business; this is not a personal auto policy of Patricia Pacheco. This is echoed in the insurance card Pro-F issued and subsequent letters which so identify the business as the insured. The registration card for the Ford Minivan does not change this reality nor the controlling nature of the applicable law.

As explained in the cross-moving papers, coverage is applicable to this accident under at least two distinct provisions of the policy. Under the policy "You" is defined as the "Named Insured," as so named in the declarations page. This is a *commercial, business* auto policy. As such it naturally follows that the "Named Insured" is in fact a business, not a person. Specifically, the "Named Insured" is the business, Pat's Housekeeping Service.

In its claim denial letter, Pro-F based its denial on one simple position; that the named insured is the person, Patricia Pacheco, and since the Mitsubishi vehicle involved in the accident was not a scheduled vehicle and was owned by Patricia Pacheco, that therefore there is no coverage as per Symbol 7 (covering scheduled vehicles) and Symbol 9 (covering certain non-owned autos). (*See Exhibit M, 11/16/07 Claim Denial Letter*) This position is plainly incorrect; the "Named Insured" is not the *person* Patricia Pacheco, it is the *business*, Pat's Housekeeping Service. Therefore, this is in fact a "non-owned" vehicle and coverage applies. This was virtually the same situation in *Araya v. Farm Family Casualty Insurance Company*, 353 N.J. Super. 203 (App. Div. 2002). If anything, the carrier's argument that the named insured was the owner of the business, Christopher Mahon, was even more compelling because he was specifically listed on the declarations page separate from the sole proprietorship business name, Mahon Landscaping, whereas in this matter Pacheco is referenced as the "trading as" designation.

In any event however, and most importantly, now that the fallacy of the carrier's incorrect pre-supposition (that the "Named Insured" is Patricia Pacheco, not the business, Pat's Housekeeping Service) has been exposed, the carrier has concocted additional arguments and reasons to support their claim denial— arguments and positions that were not made in their claim denial letter of November 16, 2007. These arguments are too little, too late.

It is well settled insurance law in New Jersey that a carrier waives its right to disclaim coverage when it fails to include the basis for such disclaimers in its claim denial letter or otherwise in the early stages of declaratory judgment litigation. *Mariani v. Bender*, 85 N.J. Super. 490, 499 (App. Div. 1964) (breach of notice exclusion clause waived where not included in letter of disclaimer); *Capece v. Allstate Ins. Co.*, 86 N.J. Super. 462, 473 (Law Div. 1965) (notice exclusion waived where not included in disclaimer letters); *Continental Ins. Co. v. Beecham*, 836 F.Supp. 1027, 1045 (D.N.J. 1993); *Elizabethtown Water Co. v. Hartford Cas. Ins.*, 15 F. Supp.2d 561, 565 (D. N.J.

1998) (insurer waived right to raise contract liability exclusions because it raised them after the deadline for dispositive motions and less than a month before the trial date). That is, when a carrier issues a claim denial letter, and the grounds for that denial are shown to be incorrect, a carrier may not 3 years later, for the first time in a reply brief, backfill that invalid denial with new and alternative arguments.

Therefore, Pro-F's new argument-- that even if the "Named Insured" is in fact not Patricia Pacheco and is instead the business, that Symbol 9 coverage still does not apply because the Mitsubishi was "borrowed"-- should not be heard. Indeed, this argument was never raised in the denial letter, never raised in discovery⁶ and is only now being raised in a reply brief on summary judgment. Accordingly, this argument should not be considered. *Mariani*, 85 N.J. Super at 499; *Capece*, 86 N.J. Super. at 473; *Continental Ins. Co.*, 836 F.Supp. at 1045; *Elizabethtown Water Co.*, 15 F. Supp.2d at 565; *see also A.D. v. Morris County Bd. of Social Services*, 353 N.J. Super. 26, 30 (App. Div. 2002) ("It is improper to raise an argument for the first time in a reply brief. Typically, such an argument will not be recognized.") (citations omitted); *Pressler, Current N.J. Court Rules*, comment on R. 2:6-5 (2002).

Even if this argument were articulated in the claim denial letter some 3 years ago (which it was not) summary judgment should still be granted to plaintiffs. First, there is no evidence the vehicle was in fact "borrowed." Second, even if there were, what is meant by "borrowed" is entirely ambiguous because the balance of the inclusion states, "This includes 'autos' owned by your "employees," partners (if you are a partnership), members (if you are a limited liability company),

⁶In fact, at no time during discovery has Pro-F alleged that the denial was based on the fact that the Mitsubishi was "borrowed". During discovery, plaintiff requested "Each and every document . . . [indicating] whether or not coverage would be afforded." None of the documents received pursuant to this request indicated that the denial resulted from the Mitsubishi being "borrowed".

Moreover, the deposition of the Pro-F underwriter that participated in the decision to disclaim coverage to Pat's Housekeeping t/a Patricia Pacheco, stated that the reason for Pro-F's decision was based on the fact that the vehicle itself was not a scheduled vehicle "nor was it a non-owned" auto. (*Exhibit C, Jennifer DeLone Deposition Transcript, at 16*) Further, the adjuster who signed the subject denial letter stated that Pro-F disclaimed coverage "based on Symbol 9 that the vehicle is- as it states here, 'Only those autos which you do not own, lease hire, or rent.' She obviously owned the vehicle; so that's why the concern..." (*Exhibit K, Rosanna Kepler Deposition Transcript, at 13-15, 18*). In fact, Pro-F has not attached any documents to either their moving papers or reply brief that elicits that the denial is based the Mitsubishi being "borrowed." Accordingly, despite the abundance of discovery specifically targeted to determine Pro-F's basis for the denial of coverage in this matter, not until the reply brief has it even been alleged that the denial was based on any "borrowed vehicle" argument.

or members of their households...”⁷ At the very least, Patricia Pacheco is an employee of the cleaning service. Furthermore, the clause states that vehicles owned by owners of businesses are covered, and gives various examples (such as partners and members). Clearly then too, since Pacheco is also an owner of this business, the vehicle is included. At the very least, this clause is ambiguous, and under boilerplate insurance coverage law, such ambiguities must be read in favor of the insured. Therefore, even had defendant timely asserted this basis for the denial, plaintiff’s summary judgment motion should be granted.

There are still even more compelling reasons why coverage should be afforded. The Mitsubishi vehicle at issue clearly and in no uncertain terms falls within the alternative coverage afforded under Section I C. 3, “Temporary Substitute Autos.” The scheduled or “covered” auto, the Ford Minivan, was in the repair shop. This coverage applies to vehicles the business does not own, but which are being used temporarily because a scheduled vehicle is in the repair shop. Therefore, even if the carrier’s argument as to Symbol 9 had merit (which it does not), summary judgment should still be granted to plaintiff under the Temporary Substitute Autos clause.

Given its bankrupt coverage position, and with nowhere else to turn, Pro-F continues on with other wild arguments, such that it was somehow deceived into issuing a commercial business policy to the Pat’s Cleaning Service business, and that it actually meant to issue a personal auto policy to Patricia Pacheco individually. The public is familiar with the insurance industry’s mantra of “deny, delay, defend,” or as otherwise articulated by Judge Baime in *Owens v. United Ins, Co.*, 264 N.J.Super. 460, 491 (App.Div. 1993) as, “the unholy mantra” of “we collect premiums, we do not pay claims.” There is perhaps no greater example of this abuse than the reckless 11th hour arguments of Pro-F that it was somehow defrauded by its insured.

The carrier’s claim denial letter was issued in November, 2007. In that letter Pro-F wrote, “After a complete investigation of this file, it has been determined that there is no coverage for this loss.” (See *Exhibit M, 11/16/07 Claim Denial Letter*) This investigation included sworn statements of both Patricia and Jorge Pacheco, as well as a detailed review of their auto and business documents, which are also part of this motion record. At no time after this “complete investigation” did the carrier claim they were somehow deceived into issuing this coverage. They did not because they could not. With the assistance and guidance of the insurance agent, the insured completed the insurance application. The carrier fully knew the risk it was insuring and issued the policy, declarations and insurance card, all clearly listing the named insured as the business.⁸ Pro-F the insured, and all concerned know this to be the case. The carrier’s groundless claim that it was somehow fraudulently deceived, is frivolous and sanctionable.

⁷Would not a car owned by an LLC member but used by the company be fairly considered “borrowed?”

⁸With full knowledge, it issued a commercial, business policy to the business, a declaration page with the business as the named insured, an insurance card listing the business as the insured and wrote subsequent letters identifying the business as the insured.

The insurance company's attempts to distinguish *Araya v. Farm Family Casualty Insurance Company* are equally without merit. The carrier's arguments that the reasoning of *Araya* does not apply because that dealt with UIM auto insurance provisions while this case deals with liability auto insurance provisions are distinctions without a difference. The underlying principles of *Araya*, which are based on long standing insurance precedent, as discussed in the cross moving papers, apply to this case. Pro-F's attempts to take "pot shots" at the applicability of the decision, and its failure to cite any contrary authority or support for its position- indeed- its wholesale and telling failure to cite a single supporting case in its entire reply submission- should be given little attention and rejected.

Accordingly, for all these reasons, it is respectfully requested defendant's motion for summary judgment be denied and plaintiff cross motion for summary judgment be granted.

Respectfully submitted,

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For the firm

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