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11. Admit.

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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[1] (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 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

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[1]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.

Gonsosa. The insurance policy that Western World issued to Third-Party Plaintiff, Gonsosa Construction clearly lists:

"Business Description" as GENERAL CONTRACTOR[2].

(*Exhibit B, Policy*).

16. The declaration pages for the subject insurance policy specifically references 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.

(*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[3], hereinafter

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[2] 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.

[3] 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).

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 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[4]. (*Exhibit B, Policy*).

[4] 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[5].

[5] 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[6].

(*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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[6] 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[7], 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

[7] (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*[8], 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,

[8] 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*)[9]. 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 subcontractors whom Gonsosa hired to work on one or two family construction projects, Western

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

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[10]. 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.

[10] 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,

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Dated: September 22, 2010

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