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PRELIMINARY STATEMENT

Defendant/Appellant's motion for leave to file an interlocutory appeal should be denied for more reasons than can be articulated in the 25 brief pages allotted on this motion

For one thing, Defendant/Appellant has failed to comply with many Appellate Court rules governing this motion. Most importantly, their appeal focuses on a December, 2006 order granting defendant Fasano partial summary judgment on its breach of contract claim against its tenant, Fender Bender, who was contractually obligated to obtain general liability insurance for the landlord. Yet its motion for interlocutory appeal of this decision was not filed until May, 2006, well outside the 20 day time period of R. 2:5-6(a). Defendant/Appellant has also argued numerous points and cited many cases that were not before the Law Division. They even included for the first time in their haphazardly binder-clipped, in excess of 200 pages one volume appendix (See R. 2:6-1), an unreported decision. (See R. 1:36-3)

The substance of Defendant/Appellant's application is equally off the mark, both factually and legally. Defendant Fasono's motion for summary judgment which culminated in the December 15, 2006 Order sought to have the tenant defend and indemnify the landlord as contemplated under the Asurak line of cases. The motion also sought partial summary judgment on an entirely different basis, i.e., breach of contract for failing to procure

insurance coverage for the landlord. The Law Division denied the part of the motion which sought defense and indemnification on the Asurak basis, finding the lease did not unambiguously say the tenant had to indemnify for the landlord's own negligence. The Court however did grant partial summary judgment on the breach of contract claim because there was no, and could not be any dispute that the tenant failed to obtain insurance for the landlord as the lease clearly provided. Fender Bender did not contest this part of the motion and never took issue with this finding until this interlocutory appeal motion, months later.

Having obtained partial summary judgment on the breach of contract claim in December, the landlord thereafter filed a different motion, to fix damages on the breach of contract claim. That is, since the court found (and there was no dispute) that the tenant was supposed to obtain insurance for the landlord and did not, the only logical remedy on this claim would be to put the landlord in the place he would have been had the tenant not breached this part of the lease agreement. That is, the landlord would have had a defense and indemnification. As such, the court rightly found there is nothing for the jury to find on the issue; the only logical remedy flowing from the breach is that Fender Bender should defend and indemnify the landlord. This is entirely separate and apart from the Asurak line of cases, which has absolutely nothing to do with a breach of contract claim.

Defendant/Appellant argues interlocutory appeal is necessary because, "[T]here is no party to this case that has any interest in proving that Fasano was negligent in failing to properly maintain its sidewalk." (Db11) Defendant/Appellant neglects to mention that on April 27, 2007, it entered an order allowing Harleysville Insurance Company to intervene to prosecute this very claim against the landlord. It also fails to mention plaintiff has retained an engineering expert who has written two extensive reports explaining why the landlord was negligent. Even were this not the case, Fender Bender has only itself to blame for failing to procure the insurance for the landlord that it was contractually obligated to.

Plaintiff Cross Appellant/Respondent's Cross Motion for leave to file an interlocutory appeal should be granted. The Court should have ruled, as Defendant/Appellant erroneously argues it did, that the lease unambiguously provides the tenant shall be liable for any accidents in connection with the premises, even those resulting from the landlord's own negligence.

The Law Division also should not have permitted the insurance company for defendant Fender Bender, Harleysville, to intervene in this matter for the purpose of asserting a negligence claim against the landlord, Frank Fasano. Harleysville has no standing to bring a negligence claim against the landlord as the landlord owes no duty to this insurance company. No one from the insurance company was injured on the defective sidewalk and there is simply no

privity between the two.

Finally, the Law Division should have granted Defendant/Appellant Fender Bender's motion for summary judgment against its insurance carrier, Harleysville Insurance, under the reasoning set forth in *Griggs v. Bertram,* 88 N.J. 347, 355-56 (1982) and its progeny. Harleysville had full knowledge of Fasano's cross-claim against Fender Bender for breach of contract, but nevertheless undertook the defense of its insured without timely notifying them of the noncoverage of this claim. In fact, Harleysville did not even advise its insured a summary judgment motion had been filed against it on the breach of contract claim, and only denied coverage on that claim long after it opposed and lost that motion. Under- *Griggs*, 88 N.J. 347 (1982), *Merchants Indemnity*, 37 N.J. 114 (1962), *Ebert*, 83 N.J.Super. 545 (Co. Ct. 1964), and *Jorge v. Travelers Indemnity Co.,* 947 F.Supp. 150 (D.N.J. 1996), Harleysville is clearly and without doubt estopped under the law from now denying coverage on the breach of contract claim and the Law Division should have so found.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

This case arises from injuries plaintiff Geraldo Rodrigues sustained when he was caused to fall down on an admittedly severely defective and ill maintained commercial sidewalk in Long Branch, New Jersey. The tenant that leased the commercial premises

abutting this sidewalk is Defendant/Appellant Fender Bender, LLC. The landlord is defendant Frank Fasano. The general liability insurance carrier for Fender Bender is intervenor-plaintiff Harleysville Insurance Company. Defendant Fasano is uninsured because Fender Bender failed to procure him such as it was required to do under the explicit terms of the lease. Fasano however apparently owns, among other things, an entire block in Long Branch.

The lease between Fasano (landlord) and Fender Bender (commercial tenant) required the tenant to be responsible for maintenance of the sidewalk and to be the responsible party in the event anyone sustained injury on the premises.

The initial complaint in this case named only Fender Bender, LLC as a defendant and it was filed in November, 2005. A First Amended Complaint named the landlord, Frank Fasano, and was served on him in April, 2006. On October 16, 2006 the landlord answered the complaint and interposed a cross claim against the tenant for, among other things, breach of contract in failing to procure the general liability insurance it was required to as per the explicit provisions of the lease. Apparently, Harleysville never advised it insured any such claim had been made against it until many months later after it lost the summary judgement motion on that claim.

On December 29, 2005 Harleysville corresponded with its insured, advising that they would defend them from plaintiff's

lawsuit under the policy. However, Harleysville never disclaimed coverage for Fasano's breach of contract claims against Fender Bender until February 12, 2007, almost six months after Fasano interposed its cross-claim for breach of contract. (*See Exhibit E to Fender Bender summary judgment motion*).

Moreover, Harleysville never even advised Fender Bender that Fasano filed a cross-claim against its insured for breach of contract, until January 15, 2007, thirty (30) days after defendant Fasano's motion for summary judgment on the breach of contract claim was granted, thereby precluding any opportunity for Fender Bender to obtain personal counsel to defend itself on Fasano's breach of contract claim.

At no time during Harleysville's active defense of Fender Bender on the breach of contract claim did assigned Harleysville counsel retain a damages or liability expert for Fender Bender to defend itself on the damages that could flow from the breach of contract claim. Harleysville waited until after it defended and lost the breach of contract summary judgment motion to advise its insured that a breach of contract claim had even been made against it, much less advise them it would no longer defend them on that critical claim.

Furthermore, once Harleysville disclaimed coverage on the breach of contract claim, both plaintiff and the landlord Fasano were compelled to file an amended complaint and cross claim,

respectively, to name the principal of Fender Bender, Paul Guiomar, as a defendant for his own acts of negligence.

LEGAL DISCUSSION

I. PLAINTIFF CROSS APPELLANT/RESPONDENT'S CROSS MOTION TO DISMISS DEFENDANT/APPELLANT FENDER BENDER'S MOTION FOR LEAVE TO FILE AN INTERLOCUTORY APPEAL SHOULD BE GRANTED BECAUSE DEFENDANT APPELLANT HAS FAILED TO COMPLY WITH APPELLATE PROCEDURAL RULES

Defendant/Appellant's motion for leave to file an interlocutory appeal should be denied because Defendant/Appellant has failed to comply with the Appellate procedural rules in numerous respects. For example, *Rule* 2:6-1(a)(2)clearly states, "Prohibited Contents". Briefs submitted to the trial Court shall not be included in the Appendix..." The Rule goes on to give exceptions to this general rule, none of which apply here. In this case Defendant/Appellant has annexed a number of briefs filed in the Law Division. This is clearly in contravention of the Appellate rules and grounds for dismissal of their motion to appeal.

Furthermore, under subsection (b) of *Rule* 2:6-1, documents included in the appendix shall be abridged to omit irrelevant and merely formal portions. However, once again defendant has included numerous such materials which should have been omitted. Additionally, defendant did not include any notations at the head of the various copies to identify exactly what the documents are.

This is also in contravention of subsection (b) of *Rule* 2:6-1. Defendants' appendix alsoconsists of a single volume which exceeds 200 pages. This too is inconsistent with the Rules. See *Rule* 2:6-1; *Rule* 2:6-2 and *Official Comment.*

Defendant/Appellant's motion for leave to appeal should be dismissed because Defendant/Appellant has presented material which was not in the record below. Specifically, Defendant/Appellant has submitted on this motion for appeal an unpublished opinion which was not part of the record below. (Da195-204) This is clearly inappropriate as the record should be limited to that put before the Law Division. *Rule* 2:5-4. In the same vein, Defendant/Appellant has for the first time made numerous arguments and cited a plethora of cases which were not before Law Division. (E.g., Db14-18, 21-23) In the absence of a motion to supplement the record pursuant to *Rule* 2:5-5 this standing alone is reason enough for the Court to dismiss this motion for leave to appeal. Accordingly, for all these reasons it is respectfully requested that Defendant/Appellant's motion for leave to file an interlocutory appeal be dismissed.

II. DEFENDANT/APPELLANT FENDER BENDER'S MOTION FOR LEAVE TO FILE AN INTERLOCUTORY APPEAL SHOULD BE DENIED BECAUSE THEY HAVE FAILED TO MEET THE APPLICABLE STANDARD FOR GRANTING AN INTERLOCUTORY APPEAL

Defendant has failed to carry its burden of demonstrating that interlocutory review of the trial court's decision is warranted at

this time. Motions for leave to appeal an interlocutory order are governed by *Rule* 2:2-4, which states that the Appellate Division may grant leave to appeal, "in the interests of justice..." This standard has been fleshed out in New Jersey's case law which has described the power to grant leave to file an interlocutory appeal as "highly discretionary" and "exercised only sparingly." *State v. Reldan*, 100 N.J. 187, 205 (1985). This case is cited repeatedly throughout our jurisprudence for the maxim that "interlocutory appellate review runs counter to a judicial policy that favors an uninterrupted proceeding at the trial level with a single and complete review,"*Golden Estates v. Continental Cas.*, 317 N.J. Super. 82, 88 (App.Div. 1998) *quoting State v. Reldan*, 100 N.J. at 205 (1985).

The standard applicable to motions for leave to appeal from interlocutory order to the Supreme Court is illustrative of how these motions should be viewed, that standard being "when necessary to prevent irreparable injury." *Rule* 2:2-2(b). As even a cursory review of defendant's motion reveals defendant has failed to demonstrate how a denial of interlocutory review at this juncture will result in anything akin to an "irreparable injury."

As *Reldan* further explains, a denial of a motion for leave to appeal does not prejudice further review of the issue on appeal from a final judgment. In short, a denial of leave to appeal the underlying decision at issue will not hamstring this defendant

should they later seek appellate review. This is precisely why courts are reluctant to grant leave to file an interlocutory appeal. *See CPC Intern, Inc., v. Hartford Acc.*, 316 N.J.Super. 351, 365 (App.Div. 1998), *cert. denied* 158 N.J. 74 (1999) (noting that "piecemeal reviews ordinarily are anathema to our practice.")

In its brief, Defendant/Appellant argues that interlocutory appeal should be granted because, "[T]here is no party to this case that has any interest in proving that Fasano was negligent in failing to properly maintain its sidewalk." (Db11) Defendant/Appellant neglects to mention that on April 27, 2007, the Court entered an order allowing Harleysville Insurance Company to intervene to bring the very negligence claim against the landlord Fender Bender claims no one will assert at trial. (Da163-163) The Court also granted this new party expedited discovery and it will certainly vigorously pursue the claim against Fasano to protect its own interests, shockingly, without regard for the fact that doing so will be directly adverse to the interests of its insured, Fender Bender. This is the same insured whom for some 6 months it defended on the breach of contract claim, incredibly inexplicably, only denied coverage on that claim after it lost the summary judgment motion.[1]

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[1]All during that time it did not even advise the insured a breach of contract claim had been made against it, much less timely notify them of non coverage as they are obligated to do under *Griggs*, 88 N.J. 347 (1982), *Merchants Indemnity*, 37 N.J. 114 (1962), *Ebert*, 83 N.J.Super. 545 (Co. Ct. 1964), and *Jorge,* 947 F.Supp. 150 (D.N.J. 1996). *See Point 5 Infra.*

It also fails to mention plaintiff has retained an engineering expert who has written two extensive reports explaining why, among other things, the landlord was negligent. Even were this not the case, Fender Bender has only itself to blame for failing to procure the insurance for the landlord that it was contractually obligated to. And while Fasano is uninsured, he does apparently own at least an entire block in Long Branch. Given the limited policy of Harleysville, Fasano may be the "deepest pocket" in this case. Even were all this not the case, there is simply no reason these issues could not be decided via a post final order as of right appeal and there is clearly no sound reason to grant an interlocutory appeal.

Furthermore, the factual recitation underpinning Defendant/Appellant's application is off the mark. The Law Division did not rule under the *Azurak* line of cases that the tenant must indemnify the landlord for its own negligence. In fact, the Court ruled just the opposite, finding that the lease language in this regard was ambiguous. As such, based on *Azurak*, it denied that portion of the landlord's summary judgment motion on December 15, 2006.

It did however grant partial summary judgment to the landlord on the breach of contract claim. (Da35-36) Indeed it was not, and could not have been, seriously disputed that the contract required the tenant to obtain the insurance. There was no dispute it did

not and summary judgment on that claim was in order.[2]

The landlord later made an entirely different motion to set damages for that breach of contract claim. The only damages that could possibly flow from that claim would be to require the tenant to put the landlord in the position it would have been had it honored its obligations under the contract. That is, the landlord would have been entitled to a defense and indemnification, and it so ordered that as there would simply be nothing for the jury to decide on the issue. Defendant/Appellant's quarrel with that December 15, 2006 summary judgment order in this forum is too little to late as they had 20 days after that order was entered to seek interlocutory review. They did not and their motion should be denied.

Defendant/Appellant also argues its interlocutory appeal should be granted because the trial court should have taken discovery on these claims before granting summary judgment in December, and later setting damages on that claim. The problem however is, beside the fact that no such argument or request was ever made below, discovery in this case ended as to Fender Bender in November, 2006.[3]

Defendant/Appellant also argues that interlocutory appeal

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[2]All these contrary arguments in Defendant/Appellant's brief we are hearing for the first time on this appeal motion. They are, in any event, without merit.

[3]There was a limited extension granted to Fasano only, to February, 2007.

should be granted because defendant Fasano bears the most responsibility to maintain the sidewalk. While this may be true vis a vis the plaintiff based on common law sidewalk liability under the *Antenucci* case and its progeny, it is not the case vis a vis Fender Bender. Defendant/Appellant fails to direct the Court's attention to the multiple paragraphs in the master lease, and fails to include all the addendums to same which were before the Law Division, which repeatedly place responsibility for repairs and maintenance, and responsibility for insurance coverage, on the tenant. Either way, the jury will decide who is more responsible and interlocutory appeals should not be based on speculative premonitions about how a trial will turn out.

III. PLAINTIFFS' CROSS MOTION FOR LEAVE TO FILE AN INTERLOCUTORY APPEAL SHOULD BE GRANTED BECAUSE THE LAW DIVISION SHOULD HAVE FOUND THE LEASE UNAMBIGUOUSLY REQUIRES THE TENANT TO INDEMNIFY THE LANDLORD FOR HIS OWN NEGLIGENCE

Plaintiff Cross Appellant/Respondent's Cross Motion for leave to file an interlocutory appeal should be granted. The Court should have ruled (as Defendant/Appellant erroneously argues it did) that the lease unambiguously provides the tenant shall be liable for any accidents in connection with the premises, even those resulting from the landlord's own negligence.

Paragraph 12 of the lease unambiguously requires the tenant to indemnify the landlord for, among other things, personal injury

claims, which this case is. Paragraph 11 further requires the tenant to provide liability insurance to the landlord. Paragraph 5 further requires the tenant to be responsible for maintenance of the premises, including the sidewalks.

The lease further, in no uncertain terms, requires the tenant to be responsible for all injuries, even those occurring from its own negligence. Paragraph 23 clearly states:

> 23. Non-Liability of the Landlord. The Landlord shall not be liable for any damage or injury which may be sustained by ... any ... person, as a consequence of ... the carelessness, negligence or improper conduct on the part of ... the Landlord...

(Da34) This language must be read in *pari materia* with the other parts of the lease, and addendums thereto, which clearly say the tenant is responsible and must indemnify the landlord, as this paragraph clearly says, even for the "the carelessness, negligence or improper conduct on the part of ... the Landlord..." When the terms of a contract are clear, it is the function of the court to enforce the contract as written and not make a better contract for either party. *Schenck v. HJI Associates*, 295 N.J.Super. 445, 450 (App.Div. 1996) The language of a contract should not be tortured to create an ambiguity. *Stiefel v. Bayly, Martin and Fay of*

Connecticut, Inc., 242 N.J.Super. 643, 651 (App Div 1990)

IV. PLAINTIFFS' CROSS MOTION FOR LEAVE TO FILE AN INTERLOCUTORY APPEAL SHOULD BE GRANTED BECAUSE HARLEYSVILLE INSURANCE COMPANY HAS NO STANDING TO BRING A NEGLIGENCE CLAIM AGAINST THE LANDLORD

The Law Division also should not have permitted the insurance company for defendant Fender Bender, Harleysville Insurance, to intervene in this matter for the purpose of asserting a negligence claim against the landlord, Frank Fasano. Harleysville Insurance Company has no standing to bring a negligence claim against the landlord as the landlord owes no duty to this insurance company. No one from the insurance company was injured on the defective sidewalk and there is simply no privity between the two and no precedent for such a claim.

Harleysville wants to intervene under *R.* 4:33-1 or *R.* 4:33-2 in order to bring a "negligence" action against the landlord defendant, Frank Fasano. This motion should have been denied because Harleysville does not meet the necessary standard. As we all learned in Torts 101 from the *Palsgraf* case, in order to have a "negligence" claim, a plaintiff has to be able to show duty, breach, cause and harm. Here the landlord owed absolutely no duty to Fasano. As such, Fasano has not and could not possibly have breached any duty to that insurance company. As such, Harleysville is fundamentally without basis to assert any claim against Fasano. There is no contractual relationship nor privity between the two,

and there is certainly no tort relationship either.

While Harleysville argued below none of the real parties in interest have any "incentive" to "point the finger" at the landlord at trial, incentives, or the lack thereof, do not create common law causes of action. As such, this "incentive" basis for Harleysville's claim against Fasano as plead would in reality be a frivolous pleading.

Even if New Jersey had an incentive based tort system as Harleysville seems to argue, they are incorrect in their leap assumption that plaintiff does not ascribe liability to the landlord. In fact, plaintiff's engineering expert spent an entire 5 page report attacking the landlord's liability expert report that says the landlord has no liability.

Even if New Jersey did recognize an incentive based negligence claim without the need for duty, breach, cause and harm, and even if there were a secret conspiracy against Harleysville as it seemed to argue, their motion should still have been denied because it was long out of time. Harleysville had known since at least September, 2006, that a breach of contract claim was made against its insured. It also knew at the time they issued the policy to Fender Bender (at least a year earlier) that the policy does not cover breach of contract claims. Nevertheless, it defended its insured on that claim for months, including opposing a summary judgment on it. It only denied coverage on the claim many months later, after it lost

that summary judgment motion. Under- *Griggs*, 88 N.J. 347 (1982), *Merchants Indemnity*, 37 N.J. 114 (1962), *Ebert*, 83 N.J.Super. 545 (Co. Ct. 1964), and *Jorge,* 947 F.Supp. 150 (D.N.J. 1996)- this is, respectfully, not even a close call; Harleysville is clearly and without doubt estopped under the law from now denying coverage on the breach of contract claim.

The fact that Harleysville has not "owned up" to its mistakes in this regard, and instead has chosen to run its insured "through the ringer" which it knows has limited resources and funds, is rather deplorable. They have even gone so far as to retain a top 10 New Jersey law firm to essentially prosecute a claim against its own insured (by prosecuting a claim against Fasano who is entitled to a liability pass though to its tenant), in the very same case where it has appointed their own in house counsel to represent it. Their actions in "hanging the insured out to dry" like this are probably in contravention of their obligations under the regulations the New Jersey Department of Banking and Insurance has promulgated and the kind of thing that shakes the public's confidence in insurance companies.

Not only has Harleysville belatedly denied coverage for its insured on a claim after it lost the summary judgment motion on that claim, for which it defended for 6 months and failed to retain any experts to protect the insured, or even notify the insured the claim was being made against it, but it has actually intervened for

purposes of seeing to it its insured gets "tagged" at trial on that very uninsured claim by prosecuting the claim against the landlord which goes right back to its very own insured, an insured which can barely pay its lawyer to defend itself, much less survive a judgment in this serious injury case. Under any notion of fundamental fairness, this is twisted, shocking and difficult to create in a work of fiction[4], much less fathom in reality.

V. PLAINTIFFS' CROSS MOTION FOR LEAVE TO FILE AN INTERLOCUTORY APPEAL SHOULD BE GRANTED BECAUSE FENDER BENDER'S MOTION FOR SUMMARY JUDGMENT AGAINST HARLEYSVILLE INSURANCE COMPANY SHOULD HAVE BEEN GRANTED

The Law Division should have granted Defendant/Appellant Fender Bender's motion for summary judgment against its insurance carrier, Harleysville Insurance, under the reasoning set forth in *Griggs v. Bertram,* 88 N.J. 347, 355-56 (1982) and its progeny. Harleysville had full knowledge of Fasano's cross-claim against Fender Bender for breach of contract, but nevertheless, undertook the defense of its insured, Fender Bender, without timely notifying them of the possibility of noncoverage on the breach of contract claim. In fact, here Harleysville did not even advise its insured a summary judgment motion had been filed against it on the breach of contract claim, and only denied coverage long after it opposed and lost that motion. Under- *Griggs*, 88 N.J. 347 (1982), *Merchants*

[4]I.e. "You can't make this stuff up."

Indemnity, 37 N.J. 114 (1962), *Ebert*, 83 N.J.Super. 545 (Co. Ct. 1964), and *Jorge*, 947 F.Supp. 150 (D.N.J. 1996). Harleysville is clearly and without doubt estopped under the law from now denying coverage on the breach of contract claim and the Law Division should have so found.

Defendant Fender Bender below filed a motion for summary judgment against its insurer, arguing that Harleysville is required to assume defense of its, since Harleysville failed to timely notify Fender Bender of its disclaimer of coverage, or provide a reservation of rights as to defendant Fasano's cross-claim for breach of contract against them. Likewise, Harleysville had opposed this summary judgment motion and filed a cross-motion for summary judgment against Fender Bender arguing that Harleysville is not estopped from denying coverage to Fender Bender on the breach of contract claim since claims for breach of contract are not covered by the policy, and that Fender Bender has suffered no prejudice as a result of Harleysville denial of coverage for the breach of contract claim. However, Fender Bender's motion for summary judgment should have been granted since Harleysville had full knowledge of Fasano's cross-claim against Fender Bender for breach of contract, but nevertheless, undertook the defense of its insured, Fender Bender, without timely notifying them of the possibility of noncoverage on the breach of contract claim.

Where an insurer has complete knowledge of facts giving rise

to a defense under the policy but nonetheless continues unequivocally to treat the policy as operative and to undertake the defense of the insured, it is held to have waived its right later to assert that defense. *Merchants Indemnity Corp. of New York v. Eggleston*, 68 N.J. Super. 235, 254 (App. Div.), *aff'd* 37 N.J. 114, 131 (1962). Assumption of complete control of the insured's defense, a contractual condition of the insurer's liability, is considered a substantial deprivation and should be timely relinquished when the asserted right of the insurer to avoid liability accrues. *Id.* at 255. This relinquishment generally takes the form of either an express notice of disclaimer, or a reservation of rights by way of a notice of non-waiver of defenses, thereby affording the insured an opportunity to decide whether to engage new counsel or otherwise play a more active role in the defense of the primary action. *Id.* As such, when the insurer has had full knowledge of all facts giving rise to possible rights of disclaimer before commencement of the primary action against the insured, but nevertheless assumes command of that action without reservation of rights and proceeds to file all necessary pleadings and to engage in discovery maneuvers, it has embarked on a firm commitment which must reasonably be construed as a waiver of those rights. *Id.* at 257.

Accordingly, an insurance carrier that undertakes the defense of a lawsuit based upon a claim against its insured with knowledge

of the facts that are relevant to policy defense and has failed for a substantial period of time to notify its insured of the possibility of noncoverage will be estopped from denying coverage of the claim against the insured. *Griggs v. Bertram,* 88 N.J. 347, 355-56 (1982). Under certain circumstances, an insurance carrier may be estopped from asserting the inapplicability of insurance to a particular claim against its insured despite a clear contractual provision excluding the claim from the coverage of the policy. The strongest and most frequent situation giving rise to such an estoppel is one wherein a carrier undertakes to defend a law suit based upon a claim against its insured. If it does so with knowledge of facts that are relevant to a policy defense or to a basis for noncoverage of the claim, without a valid reservation of rights to deny coverage at a later time, it is estopped from later denying coverage. *Id.* at 356*; Merchants Indemnity Corp. v. Eggleston*, 37 N.J. 114, 127-129 (1962); *O'Dowd v. United States Fidelity & Guaranty Co.*, 117 N.J.L. 444, 451-52 (E. & A. 1937).

The rationale behind estoppel in this context is that once the insurer has acknowledged the claim and assumes control of the defense, the insured is justified in relying upon the carrier to protect it under its policy and to be responsible for any judgment against it. *See Eggleston, supra*, 37 N.J. at 127. The insured's justifiable reliance arises from the insurer's contractual right to control the defense under the policy. In assuming this contractual

right of control, the insurer preempts its insured from defending itself. If the insurer could later repudiate its responsibility and ultimate liability under the policy, it would in effect have left its insured defenseless or seriously hampered in its ability to protect itself. That resultant inequity is a necessary ingredient of an estoppel. *Griggs, supra, at* 356.

Thus, upon the receipt from its insured of a claim or notification of an incident that may give right to a claim, an insurer is entitled to a reasonable period of time in which to investigate whether the particular incident involves a risk covered by the terms of the policy. *See Bonnet v. Stewart*, 68 N.J. 287, 296-97 (1975); *Jones v. Continental Casualty Co.*, 123 N.J. Super. 353, 357 (Ch. Div. 1973). But once an insurer has had a reasonable opportunity to investigate, or has learned of grounds for questioning coverage, it then is under a duty to promptly inform its insured of its intention to disclaim coverage or of the possibility that coverage will be denied or questioned. *See Eggleston, supra*, 37 N.J. at 127; *Bonnet, supra* at *Id.*; *Sneed v. Concord Ins. Co.*, 98 N.J.Super. 306 (App. Div. 1967); *Ebert v. Balter*, 83 N.J. Super. 545 (Law Div. 1964).

Unreasonable delay in disclaiming coverage, or in giving notice of the possibility of such a disclaimer, even before assuming actual control of a case or a defense of an action, can estop an insurer from later repudiating responsibility under the

insurance policy. *Griggs, supra* at 357-58; *Bonnet, supra* (holding that the *Eggleston* principles of estoppel were potentially applicable where there was a disclaimer only four months after receiving the summons and complaint from insureds.)

Moreover, the insurer's failure to promptly inform its insured of its intention to disclaim coverage or of the possibility that coverage will be denied or questioned will automatically result in prejudice to the insured. In *Eggleston*, *supra*, the Court recognized that "prejudice is inevitable when the insured is denied the right to maintain complete control of the defense of the damage action." 37 N.J. at 129. As such, the *Eggleston* Court found that prejudice against an insured is presumed as a matter of law where a carrier has undertaken to defend a damage suit. *Id.* "Actual prejudice is presumed and need not be proven by the insured" *Griggs*, *supra* at 358; *Sneed, supra.*

These obligations upon the insured to turn over claims promptly, to abstain from any conduct that might interfere with the contractual rights of the insurer and to affirmatively cooperate with the insurance carrier, in turn, impose commensurate duties upon the insurer. *Griggs*, *supra* at 360. Upon receiving notice of a possible claim against its insured, an insurer has the duty to investigate the matter within a reasonable time. "(C)onsiderations of good faith and fair dealing require that the insurer make . . . investigation(s) (of any claim) within a reasonable time."

Fireman's Fund Ins. Co. v. Security Ins. Co. of Hartford, 72 N.J. 63, 73 (1976). *See also Ebert v. Balter, supra.*

The insurer's obligation to deal in good faith also includes a "duty of fair and full disclosure between the insured and his insurer." *Yeomans v. All State Ins. Co.*, 121 N.J.Super. 96, 102 (Law Div.1972), aff'd 130 N.J.Super. 48 (App.Div.1974). See generally Keeton, "Insurance Law Rights," 83 Harv.L.Rev. 961, 965 (1970). This duty necessarily requires that an insurer communicate to the insured in a timely fashion the results of any investigation. Cf. *Bollinger v. Nuss*, 449 P.2d 502, 512 (Kan.1969). Such disclosure is especially important where the results of an investigation reveal a conflict between the interests of the insured and its insurer. *Cf. Board of Ed. of Bor. of Chatham v. Lumbermens Mut. Cas. Co.*, 293 F.Supp. 541, 544 (D.N.J.1968), aff'd 419 F.2d 837 (3 Cir. 1969) ("when a conflict of interest arises between the insurer as agent and its insured as principal, the insurer's conduct will be subject to closer scrutiny than that of the ordinary agent because of the adverse interest.") Failure to give prompt notice of such a conflict, or potential conflict, is inconsistent with the overriding fiduciary duty of an insurer to deal with an insured fairly and candidly so that the insured can, if necessary, protect itself. *Yeomans, supra; see Herges v. Western Casualty and Surety Company*, 408 F.2d 1157, 1162 n.7 (8 Cir. 1969); *Tannerfors v. American Fidelity Fire Insurance Co.*, 397 F.Supp.

141, 147 (D.N.J.1975), aff'd 535 F.2d 1247 (3 Cir. 1976).

Here, plaintiff filed his complaint against the tenant of the property where the accident occurred, defendant Fender Bender, on November 29, 2005, and later amended his complaint to add the landlord defendant Fasano on March 23, 2006. Defendant Fasano subsequently filed a cross-claim in September 2006 alleging several counts against defendant Fender Bender including a breach of contract claim. Although Harleysville initially corresponded with its insured, Fender Bender on December 29, 2005 advising that they would defend Fender Bender from plaintiff's lawsuit under the policy, Harleysville never disclaimed coverage for Fasano's breach of contract claims against Fender Bender until February 12, 2007, almost six months after Fasano's cross-claim for breach of contract. (Da188)

Moreover, Harleysville never even advised Fender Bender that Fasano filed a cross-claim against its insured for breach of contract, until January 15, 2007, thirty (30) days after defendant Fasano's motion for summary judgment on the breach of contract claim was granted, thereby precluding any opportunity for Fender Bender to obtain personal counsel to defend itself on Fasano's breach of contract claim. Not until February 12, 2007 did Harleysville provide notice to Fender Bender that it may want to retain personal counsel, at its own expense, to protect its interests for the breach of contract claim. (Da188)

As such, Harleysville has waived its right to disclaim coverage for defendant Fasano's breach of contract claim against its insured, Fender Bender, since Harleysville failed to express notice of a disclaimer, or a reservation of rights, within a substantial period of time to Fender Bender of the breach of contract claim which thereby would have afforded Fender Bender the opportunity to decide whether to retain personal counsel or play a more active role in the defense of the breach of contract claim. Accordingly then, Harleysville should be estopped from denying coverage of the breach of contract claim against Fender Bender since it had knowledge of defendant Fasano's cross-claim against its insured for breach of contact since September 2006 and failed to notify its insured until February 12, 2007, almost six (6) months after Fasano's cross-claim for breach of contract, and two (2) months after defendant Fasano's motion for summary judgment on the breach of contract claim against Fender Bender was granted.

Harleysville argued, relying on *Griggs*, that it is not estopped from denying coverage to Fender Bender on the breach of contract claim since the New Jersey Courts have refused to estop a carrier from denying coverage absent proof of actual prejudice to the insured. However, Harleysville reliance on *Griggs* is misguided. As stated in *Eggleston, supra,* "prejudice is inevitable when the insured is denied the right to maintain complete control of the defense of the damage action." 37 N.J. at 129. As such,

the prejudice against Fender Bender, here, for Harrleysville's failure to timely disclaim coverage is presumed as a matter of law where a carrier has undertaken to defend a damage suit. Presumption is not even necessary here because, as set forth above, Fender Bender is mired in the prejudice Harleysville Insurance Company has caused this small, family owned business.

However, even if the insured was required to show proof of actual prejudice, Fender Bender has clearly shown extreme prejudice by Harleysville failure to timely disclaim coverage. Harleysville never even told its insured a break of contract lawsuit had been brought against it. Harleysville further failed to notify Fender Bender that the policy did not cover Fasano's breach of contract claim until well after the Court granted summary judgment on that claim. Once Harleysville notified Fender Bender that coverage was not available for Fasano's breach of contract claim on February 12, 2006, two months after the Court granted summary judgment on that claim, it was too late for Fender Bender to retain personal counsel, at its own expense, to defend the breach of contract claim.

If Harleysville provided a notice of disclaimer, or reservation of rights to Fender Bender, at the very least before Fasano's summary judgment motion on the breach of contract claim was granted, Fender Bender could have retained personal counsel to protect its interests for the breach of contract claim. However,

Fender Bender now has been left with no remedy as summary judgment has already been entered on the breach of contract claim. As such, Fender Bender is exposed to "uncovered" damage awards resulting to the defendant Fasano as a results of costs from litigation as well as a personal injury award. Therefore, Fender Bender's motion for summary judgment requiring Harleysville to assume defense of its insured, Fender Bender, on the breach of contract claim should had been granted.

Furthermore, Harleysville has failed to deal in good faith with Fender Bender by not providing fair and full disclosure with its insured, Fender Bender. As indicated in Fender Bender's motion for summary judgment below, there is no indication that Harleysville advised Fender Bender of defendant Fasano's cross-claims, including Fasano's breach of contract cross-claim until Harleysville sent a letter to Fender Bender 30 days after summary judgment was granted against them. Moreover, there is also no indication that Harleysville ever advised Fender Bender of the letter from Fasano's counsel that Harleysville was in a conflict position in defending Fender Bender in order for Fender Bender. The failure of Harleysville to apprise Fender Bender of this letter is a clear breach of its fidicuiary duty to its insured, and prevented Fender Bender to be aware of the conflict and protect itself.

VI. PLAINTIFF CROSS APPELLANT/RESPONDENT'S CROSS MOTION TO FILE AN OVER LENGTH BRIEF SHOULD BE GRANTED

Plaintiff Appellant/Respondent's request leave to file a brief that exceeds the 25 page maximum as described in *Rule* 2:8-1(a). This Rule also permits relaxation of this limit upon leave of court. *Rule* 2:8-1(a). Plaintiff's brief would be significantly shorter, were it not simultaneously filing the within cross motions. Therefore, in lieu of filing separate brief in support of these motions, plaintiff requests to file one slightly overlength brief.

Plaintiff further submits that this brief is analogous to the Respondent/Cross Appellant brief, which is afforded up to 90 pages pursuant to *Rule* 2:6-7 and *Rule* 2:602(d). While this brief will not approach such proportion, plaintiff respectfully requests leave of Court for permission to exceed the 25 page limitation based on these circumstances. Furthermore, since defendants failed to comply with various appellate procedural rules, it is necessary for a longer brief to be filed discussing same.

CONCLUSION

For all the foregoing reasons, Plaintiff/Respondent's respectfully request that Defendant/Appellant's motion for leave to file an interlocutory appeal should be denied, and Plaintiff/ Respondent's cross motion to file an interlocutory appeal should be granted.

Keefe Bartels
Attorney for Plaintiff Cross Appellant/Respondent Geraldo Rodrigues

By:_____
GERALD H. CLARK

Dated: May 14, 2007