NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1816-09T1

NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA, as subrogee of GILBANE BUILDING COMPANY,

Plaintiff-Appellant,

v.

ZURICH INSURANCE COMPANY,

Defendant-Respondent,

and

MONTGOMERY KONE, INC.,

Defendant.

Argued February 16, 2011 - Decided March 28, 2011

Before Judges Axelrad, Lihotz, and J. N. Harris.

On appeal from the Superior Court of New Jersey, Law Division, Mercer County, Docket No. L-0518-04.

Steven J. Ahmuty, Jr., (Shaub, Ahmuty, Citrin & Spratt, LLP) of the New York bar, admitted pro hac vice, argued the cause for appellant (Harwood Lloyd, LLC, attorneys; Peter E. Mueller (Harwood Lloyd, LLC), Mr. Ahmuty, Timothy R. Capowski and Gerard S. Rath (Shaub, Ahmuty, Citrin & Spratt, LLP) of the New York bar, admitted pro hac vice, on the brief).

Jayne A. Risk argued the cause for respondent (DLA Piper, LLP, attorneys; Joseph Kernen and Nicholas T. Solosky, of counsel and on the brief).

PER CURIAM

This is an insurance coverage declaratory judgment action. It has its genesis in an incident that occurred on a construction site in Wilmington, Delaware in 2000. During the construction of an elevator for a new parking garage, a subcontractor's employee suffered catastrophic injuries when a tool was launched from above and struck the worker in the head. Plaintiff —— as subrogee of the construction manager on the jobsite —— appeals the summary judgment dismissal of its complaint, which sought indemnification of the multi-million dollar payment and expenses associated with the settlement of the worker's personal injury tort action. We affirm in part, reverse in part, and remand for further proceedings.

I.

A.

The construction project in this case —— known to the parties as Project Blue Hen (the Project) —— involved two related elements: (1) the complete renovation of an existing structure into a mixed use office and retail building and (2) the demolition of another existing building and the construction on the site of a 650-car parking garage. To facilitate the

Project, its owner, Barrow Street Blue Hens LLC (Barrow Street),[1] entered into a "Standard Form of Agreement Between Owner and Construction Manager" (the construction contract) with Gilbane Building Company (Gilbane). The construction contract obliged Gilbane to perform both design and construction services related to the Project. Gilbane's scope of work, among other things, was to furnish "efficient business administration and superintendence that comply with the standards of the construction profession," and to "provide leadership" on "all matters relating to construction."

During the construction phase of the Project, Gilbane agreed —— through its "competent full-time staff at the Project site" —— to "[p]rovide all supervision, labor, materials, construction equipment, tools, and subcontract items which are necessary for the completion of the Project which are not provided by either the [subcontractors] or the Owner." In addition, Gilbane was tasked to perform safety oversight responsibilities that included assessing and inspecting subcontractors' safety practices, though such services would not displace the subcontractors' own responsibilities for ensuring

[1] The record contains differing references to the name of the owner. For example, the first page of the construction contract refers to the owner as Barrow Street Blue Hens LLC, but the signature page of that document denotes the owner as BPG Office I, LLC. We shall refer to the owner as Barrow Street.

the safety of persons and property, as well as their compliance with safety laws and regulations. The "Tatnall Garage Project Safety Plan," developed by Gilbane pursuant to the construction contract, provided that Gilbane would "monitor all safety activities on the site."

Pursuant to the construction contract, Gilbane agreed to indemnify Barrow Street against claims for damages from bodily injuries "that may arise from [Gilbane's] operations under this Agreement." Gilbane was also contractually required to purchase a commercial general liability (CGL) insurance policy to protect itself from bodily injury claims arising from its operations, those of the subcontractors, and those of "anyone directly or indirectly employed by any of them, or by anyone for whose acts any of them may be liable." Barrow Street was to be named as an additional insured on Gilbane's CGL insurance policy.

B.

In order to install elevators in the multi-story parking garage, Gilbane entered into a "Trade Contractor Agreement" (the subcontract) with Montgomery KONE, Inc. (Kone) for that purpose, under Gilbane's general direction as construction manager. Pursuant to the subcontract's "General Conditions For Trade Contractor Under Construction Management Agreement" (General Conditions), Kone's safety responsibilities included a duty to

"take every precaution at all times for the protection of persons, including employees and property. [Kone] shall be responsible for initiating, maintaining and supervising all safety precautions and programs in connection with [its] work."

Article 5.2 of the subcontract, entitled "Insurance and Indemnity," required Kone to indemnify Gilbane (and others) for losses

> arising out of or resulting from the performance or failure in performance of [Kone's] work under this Agreement provided that any such claim, damage, loss, or expense (1) is attributable to bodily injury . . . [and] (2) is caused, in whole or in part, by any negligent act or omission of [Kone] or anyone directly or indirectly employed by [Kone], or anyone for whose acts [Kone] may be liable, regardless of whether caused in part by a party indemnified hereunder.

Notwithstanding the foregoing, Article 12.3(D) of the subcontract, entitled "Alterations," stated that Kone would not indemnify against losses "arising out of or resulting from the sole negligence of [Gilbane]."

While Article 5.4 of the subcontract further obligated Kone to secure "such contractual liability insurance coverage and endorsements as will insure the indemnification obligation," Article 12.3(H) specified that Kone would obtain an "Owner's and Contractor's Protective Liability Policy" (OCP) naming Gilbane

and Barrow Street as insureds as follows:

> [Kone] shall name [Barrow Street] and Gilbane Building Company as named insured[s] on an Owner's and Contractor's Protective Liability Policy which shall have a per project aggregate limit o[f] $5 million dollars. This is <u>in lieu of</u> naming [Barrow Street] and Gilbane Building Company as additional insured[s] on the General Liability [policy] [w]ith a per project aggregate.
>
> [(emphasis added).]

C.

Gilbane's CGL insurance policy was provided by appellant National Union Fire Insurance Company of Pittsburgh, PA (National Union). Respondent Zurich Insurance Company (Zurich) issued the contractually-mandated $5 million OCP insurance policy to Kone for the garage portion of the Project, with Gilbane and Barrow Street as named insureds. Kone also obtained, and was a named insured in, a separate $10 million CGL insurance policy issued by Zurich. At issue in this appeal is whether National Union is entitled, as subrogee of Gilbane, to coverage under, and indemnification from, either or both of the insurance policies obtained by Kone.

The OCP insurance policy promised in its "Insuring Agreement" that it would pay those sums that Gilbane "becomes legally obligated to pay as damages because of 'bodily injury'

or 'property damage' to which this insurance applies." Furthermore, the OCP insurance policy stated that Zurich had "the right and duty to defend Gilbane . . . against any 'suit' seeking those damages," but "no duty to defend . . . against any 'suit' seeking damages for 'bodily injury' . . . to which this insurance does not apply." Without "reduc[ing] the limits of insurance," the OCP insurance policy further stated that it would pay the expenses for defending a claim against an insured "with respect to any claim [Zurich] investigates or settles."

The OCP insurance policy delineated a covered bodily injury as one that either (1) "arises out of . . . [o]perations performed for [Gilbane] by [Kone] at the [Project]" or (2) "arises out of . . . [Gilbane's] acts or omissions in connection with the general supervision of such operations." It excluded any bodily injury "arising out of [Gilbane's], or [Gilbane's] 'employees'[] acts or omissions, other than general supervision of 'work' performed for [Gilbane] by [Kone]." "Employee" was defined to include a "leased worker," but not a "temporary worker." A "leased worker" was one supplied by a "labor leasing firm under an agreement between [Gilbane] and the labor leasing firm," whereas a "temporary worker" was "a person who is furnished . . . to substitute for a permanent 'employee' on leave or to meet seasonal or short-term work load conditions."

Kone's separate CGL insurance policy that was issued by Zurich contained an endorsement titled "Additional Insured - Owners, Lessees or Contractors (Form B)," which provided liability coverage for certain persons or organizations. This endorsement required the identification of such persons or organizations, but in place of a list of names, the endorsement simply provided: "AS REQUIRED BY WRITTEN CONTRACT." A separate endorsement titled "Blanket Additional Insured Endorsement" further provided:

> In consideration of the premium charged, it is agreed that the following are added as additional insureds, but solely as respects to work performed by or on behalf of the named insured:
>
> All persons, organizations or entities for whose protection and benefits the named insured has agreed to procure liability insurance. However, insurance with respect to each such person, organization or entity shall not exceed coverage and/or applicable limits of liability that the named insured has agreed to provide, nor the coverage and/or applicable limits of liability of this policy.
>
> It is further agreed that this extension will not apply to any person, organization, or entity who has been specifically added as an additional insured to any other general liability policy issued to the named insured.

D.

On June 19, 2000, an employee of Kone —— Joseph P. Rapine, III —— was working on the ground floor of the parking garage in the vicinity of an elevator shaft that was under construction. Kevin Black[2] —— a worker performing services under the direction of a Gilbane employee —— was deployed on the seventh floor of the parking garage, along with others, to the task of collecting construction debris and securing tools known as slab grabbers. Slab grabbers are unwieldy, heavy pieces of construction equipment that are not easily moved, and which supposedly were located a safe distance away from the opening to the elevator shaft. There were no toe boards installed along the edge of the open elevator shaft to keep objects from sliding into the chasm, and it was during Black's tour of duty that Rapine was struck in the head by a slab grabber that fell from above through the elevator shaft.[3]

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[2] It appears that Black was employed directly by DiSabatino Construction Company, a subcontractor on the Project, having been placed in that position through the efforts of a temporary employment service, Pyramid Temporary Services. Black does not appear to have been on the payroll of Gilbane, even though on the date in question he was acting for it.

[3] The parties sharply dispute whether the slab grabber was negligently pushed into the elevator shaft or was intentionally hurled into the abyss by Black or someone else on the seventh floor. We do not find this factual dispute to be material.

E.

Three months later, on September 18, 2000, a duly authorized agent of Gilbane notified Zurich of Rapine's intention to file a civil action seeking damages for bodily injuries. The agent tendered Gilbane's future defense and alleged right of indemnity to Zurich on the partially mistaken grounds that (1) the subcontract between Kone and Gilbane required contractual indemnification (which was accurate) and (2) Gilbane was supposed to be listed as an additional insured on Kone's CGL insurance policy (which was inaccurate). On February 28, 2001, Zurich responded that Kone's CGL insurance policy did not include Gilbane as an additional insured, and asserted that the subcontract "fail[ed] to include any language requiring" Kone to have secured additional insured status on behalf of Gilbane. Two years after its initial tender, on October 23, 2002, Gilbane's agent sent Zurich a copy of Rapine's civil action complaint and formally tendered Gilbane's defense thereof, again citing Kone's putative obligations under the subcontract regarding indemnification and the supposed additional insured status of Gilbane.

On July 26, 2004, Gilbane's attorney wrote to Zurich demanding that Zurich "settle [the Rapine] case within its policy limits," based upon the then-wishful thinking that

although Zurich had disclaimed coverage under the CGL insurance policy, its status as Gilbane's insurer pursuant to the OCP insurance policy might impel Zurich to now provide appropriate coverage thereunder. On August 12, 2004, Zurich's attorney replied that Zurich had already recognized Gilbane as a named insured on the OCP insurance policy, but that such insurance policy covered only "[Kone's] own acts and omissions and/or Gilbane's supervision thereof," with no coverage for "losses attributable to Gilbane's own active negligence." Zurich's counsel explained that his "understanding of the facts" was that Kone was not negligent, and that "this case does not sound in passive negligence related to Gilbane's supervision of [Kone]," but rather "derives from the active negligence of persons and entities other than [Kone]."

F.

In October 2002, as foretold to Zurich in 2000, Rapine filed a civil action in Pennsylvania against Gilbane and others[4] for the injuries he sustained while employed by Kone on the Project. He alleged that Gilbane breached its duty of providing a safe workplace by failing to implement necessary safety

[4] Kone was not directly sued by Rapine due to Pennsylvania's worker's compensation bar. Nevertheless, Gilbane joined Kone in the action in order to obtain contractual indemnification pursuant to Article 5 of the subcontract.

precautions, failing to prevent persons under its control from creating the risk from which Rapine's injuries arose, and failing to supervise activity at the jobsite to prevent such occurrences. Because of Zurich's declination of a defense and indemnity, National Union paid for Gilbane's defense costs.

In September 2004, in the midst of the trial of Rapine's civil action, Rapine settled his grievances with Gilbane for $9.25 million, which National Union paid. Other defendant-subcontractors paid an additional $6.9 million, which resolved all of the tort-based claims. Although the Pennsylvania court attempted to continue the already underway trial and resolve the remaining contract-based indemnification issues, it was unsuccessful in reaching a final disposition by that means.

A second trial in Pennsylvania to resolve the contractual indemnification dispute was finally commenced in late 2006. In an in limine ruling, the trial court determined that Delaware law, which governed the subcontract, limited the contractual indemnification that Kone owed Gilbane to Kone's percentage of negligence. Subsequently, pursuant to "Questions to be Answered by the Jury," the Pennsylvania jury allocated sixty percent of the "causal liability" for Rapine's injuries to Gilbane, and twenty percent each to Kone and another subcontractor. In May 2007, the Pennsylvania court entered a final judgment in favor

of Gilbane, and against Kone, for twenty percent of what was paid on Gilbane's behalf by National Union in the settlement of Rapine's action ($1.85 million), plus Gilbane's legal fees ($621,665.40), and prejudgment interest. At Gilbane's request, Zurich (for Kone) paid the $2,532,623.40 judgment to National Union in June 2007. Zurich allocated the entire payment to the $5 million OCP insurance policy.

G.

While Rapine's civil action was progressing, but before its settlement, Gilbane filed a declaratory action in New Jersey against Zurich for a defense and indemnification under both the OCP and the CGL insurance policies. Presumably because the Pennsylvania litigation was still unresolved —— with the rights, duties, and obligations of the parties to that litigation still undecided —— the New Jersey declaratory judgment action was dismissed without prejudice in June 2005.

Almost two years later, just after the final judgment was entered in the Pennsylvania litigation, the New Jersey declaratory action was reinstated. Gilbane amended its complaint to add Kone as a defendant, and later successfully substituted National Union as its subrogee by the filing of a second amended complaint.

Zurich moved for partial summary judgment seeking a declaration that it was only the OCP insurance policy that covered Gilbane and not the CGL insurance policy, which named Kone as the insured. National Union cross-moved for a ruling that Kone's CGL insurance policy insured National Union as well. At the August 14, 2009 motion hearing, the court granted Zurich's application and denied National Union's. On August 28, 2009, it entered an order declaring that the $5 million OCP insurance policy "may provide indemnification coverage for settlement amounts paid by National Union . . . in the underlying Rapine action." The order also determined, "[t]he [CGL insurance policy] is not applicable to this case; and therefore provides no insurance coverage of any kind for settlement of amounts paid by National Union . . . in the underlying Rapine action."

Zurich and Kone then moved for summary judgment to dismiss the second amended complaint in its entirety, and National Union cross-moved for partial summary judgment seeking a declaration that Zurich was liable to it up to the limit of Kone's OCP policy for failing to defend and indemnify its subrogor. At the November 6, 2009 motion hearing, the court granted Zurich's and Kone's motions thereby dismissing the second amended complaint with prejudice, and denied National Union's cross-motion. An

order memorializing this final disposition was entered that same day. This appeal followed.

II.

A.

"An appellate court reviews a grant of summary judgment de novo, applying the same standard governing the trial court under Rule 4:46." Chance v. McCann, 405 N.J. Super. 547, 563 (App. Div. 2009) (citing Liberty Surplus Ins. Corp. v. Nowell Amoroso, P.A., 189 N.J. 436, 445-46 (2007)). In such review, "'[a] trial court's interpretation of the law and the legal consequences that flow from established facts are not entitled to any special deference.'" Estate of Hanges v. Metro. Prop. & Cas. Ins. Co., 202 N.J. 369, 382 (2010) (quoting Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995)).

In like vein, as a general principle, "'[i]nterpretation and construction of a contract is a matter of law for the court.'" Kaur v. Assured Lending Corp., 405 N.J. Super. 468, 474 (App. Div. 2009) (quoting Spring Creek Holding Co. v. Shinnihon U.S.A. Co., 399 N.J. Super. 158, 190 (App. Div.), certif. denied, 196 N.J. 85 (2008)); see also Kieffer v. Best Buy, ___ N.J. ___, ___ (2011) (slip op. at 11).

More particularly, this court's interpretation of an insurance contract is a determination of law. Sealed Air Corp.

v. Royal Indemn. Co., 404 N.J. Super. 363, 375 (App. Div.), certif. denied, 196 N.J. 601 (2008). We therefore owe no special deference to the motion court's interpretation of the insurance policies in this case or "the legal consequences that flow from the established facts." Zabilowicz v. Kelsey, 200 N.J. 507, 513 (2009). Accordingly, we review the Law Division's analysis of the insurance policies de novo and "look at the contract[s] with fresh eyes." Kieffer v. Best Buy, supra, slip op. at 12; see also Homesite Ins. Co. v. Hindman, 413 N.J. Super. 41, 46 (App. Div. 2010).

B.

We start with the OCP insurance policy. Zurich argues that this insurance policy provided Gilbane "a limited brand of indemnification insurance," which consisted of protection against damages arising out of either Kone's operations at the Project or Gilbane's general supervision of those operations. Zurich asserts that "by its clear and unambiguous language," the OCP insurance policy did not insure all of Gilbane's liability to an injured third-party such as Rapine.

National Union contends that Zurich's analysis is incomplete, and fails to "read the document as a whole in a fair and common sense manner." See Hardy v. Abdul-Matin, 198 N.J. 95, 103 (2009). It too asserts that the OCP insurance policy

contains "unambiguous language," but argues that the overall contractual terms demonstrate the nature of the coverage as protecting Gilbane's obligation —— here, $9.25 million, but constrained by the policy's limit to $5 million —— to respond in damages to an injured person involved in Kone's operations, rather than merely paying Gilbane for Kone's parallel obligation —— twenty percent of $9.25 million plus counsel fees.

We agree with both sides that the OCP insurance policy is unambiguous. Moreover,

> [l]iberal rules of construction of insurance policies do not sanction . . . emasculation of the clear language of the policy. Unambiguous insurance contracts are enforced in accordance with the reasonable expectations of the insured. The court should read policy provisions so as to avoid ambiguities, if the plain language of the contract permits. The court should not torture the language of the policy to create an ambiguity.
>
> [Stiefel v. Bayly, Martin & Fay of Conn., Inc., 242 N.J. Super. 643, 651 (App. Div. 1990) (internal citations omitted).]

"'In the absence of any ambiguity, courts should not write . . . a better policy of insurance than the one purchased.'" Zacarias v. Allstate Ins. Co., 168 N.J. 590, 595 (2001) (quoting Gibson v. Callaghan, 158 N.J. 662, 670 (1999)).

In reading the OCP insurance policy, we observe that two species of coverage were provided. The first protected the

named insured —— Gilbane —— for its pure vicarious liability relating to bodily injury that "arises out of [o]perations performed for [Gilbane] by [Kone] at the [Project]." The second gave Gilbane sole fault coverage based upon its negligence in the general supervision of work performed for Gilbane by Kone. Clearly, Gilbane's insurance protection under the OCP insurance policy was not global; the insuring provisions of the OCP insurance policy did not act as a complete substitute for CGL insurance coverage, which would protect Gilbane for breaches of duties in almost any circumstance on the jobsite. Instead, the bodily injuries that were covered by the OCP insurance policy must have been linked to Kone's "operations" —— an undefined term in the OCP insurance policy —— at the Project. From our review of this extensive record, we conclude that Rapine's injuries were so linked. That is, Rapine's injuries unquestionably were bodily injuries "aris[ing] out of" Gilbane's negligent supervision of Kone's operations.

The OCP insurance policy does not require that Kone's operations be a proximate cause of Rapine's injuries. Rather, the injuries must be proximately caused by the specific type of negligence detailed in the insurance policy —— negligent supervision of such operations of Kone —— wherever they occur. See Matsushita Elec. Corp. of Am. v. Home Indem. Co., 907 F.

Supp. 1193, 1197 (N.D. Ill. 1995) (holding that the OCP policy requires only that the damage arise out of the subcontractor's operations, not its negligence). Therefore, Zurich's claim that Gilbane's ineffectual supervision related only to those operations on the seventh floor of the parking garage on the date in question overlooks the fact that supervisory functions were also due and owing to Rapine —— who was actively engaged in the performance of his duties as a member of Kone's operations —— on the ground floor.

Zurich argues that the case of National Union Fire Insurance Co. of Pittsburgh v. Nationwide Insurance Co., 82 Cal. Rptr. 2d 16 (Cal. Ct. App. 1999), is "squarely on point, both factually and procedurally, and affirms the trial court's decision." Other than National Union being a party to this appeal and to the cited case, the parallels end. We do not find National Union to be instructive, and are unpersuaded that the opinion accurately illuminates the particularized language employed by Zurich in the OCP insurance policy in the instant appeal.

In National Union, supra, the California trial court found that the general contractor (as an additional insured, most probably of a CGL insurance policy) was solely at fault for its failure to prevent accumulated rainwater, which resulted in

bodily injuries to a subcontractor's employee when he slipped and fell on a wet floor, and that its negligence did not arise out of its supervision of the subcontractor's work. Id. at 22. The court therefore declared that the general contractor was not entitled to indemnification, and the judgment was affirmed on appeal. Id. at 22-23.

We note that National Union's discussion of the applicable insuring clauses was preceded by its recognition that the appellant's argument concerning indemnification under the insurance policy was "half-hearted," and its affirmance of the finding that the negligence did not arise out of "general supervision" was based upon supposed allegiance to California's public policy of discouraging moral hazard. Id. at 18-21. More importantly —— unlike in the instant appeal —— the general contractor in National Union was found to be the sole negligent party, and here, although Gilbane was assigned sixty percent of the fault, Kone shouldered twenty percent. This alone distinguishes National Union's holding from the instant matter.

We find that Zurich's decision not to define the OCP insurance policy's words and phrases "general supervision" and "operations," coupled with this State's common understanding of the phrase "arising out of," combine to invoke an interpretation that leads ineluctably to a declaration of coverage in favor of

Gilbane's subrogee under the OCP insurance policy. See Pep Boys v. Cigna Indem. Ins. Co., 300 N.J. Super. 245, 249-51 (App. Div. 1997) (noting that the phrase "arising out of" has been construed to mean a "substantial nexus," causally connected but not proximately caused by); Cnty. of Hudson v. Selective Ins. Co., 332 N.J. Super. 107, 113 (App. Div. 2000) (approving a broad and liberal view so that an insurance policy is construed in favor of the insured); Franklin Mut. Ins. Co. v. Sec. Indem. Ins. Co., 275 N.J. Super. 335, 340 (App. Div.) (construing "arising out of" in a broad and comprehensive sense), certif. denied, 139 N.J. 185 (1994).

The management, oversight, and supervision of a large scale construction site such as the parking garage in this case required constant vigilance and a highly coordinated effort in order to succeed. The recognition that success was not achieved in Rapine's situation is a gross understatement. Indeed, Rapine's complaint in Pennsylvania alleged forty separate supervisory failures against Gilbane, including its "failing to provide [Rapine] a safe place in which to work." The particularized demands of the Project's owner coupled with the numerous construction trades present on the jobsite militate against our acceptance of the highly compartmentalized argument made by Zurich. Supervision of the countless work movements and

operations going on in and around the elevator shaft on June 19, 2000, was inextricably linked to what was happening stories above on the seventh floor. We have no hesitation in concluding that Rapine's bodily injuries directly arose out of Gilbane's "acts or omissions with the general supervision" of Kone, and accordingly find that coverage and indemnification to the full limits of the policy, not just the twenty percent of the settlement amount, was required.

C.

Before turning our attention to the $10 million CGL insurance policy, we address National Union's argument that Zurich's allocation of the Pennsylvania indemnification judgment was improperly applied against the $5 million OCP insurance policy. We agree with National Union that none of the monies paid by Zurich pursuant to the Pennsylvania judgment were properly allocable to the OCP insurance policy.

In Rapine's action in Pennsylvania, as noted, Gilbane added Kone as a party to seek "full and complete indemnification . . . based upon the provisions of Article 5.2 of the [subcontract]." Article 5.2 provided, in part, the following:

> [Kone] agrees to indemnify and hold harmless [Gilbane] . . . against claims, damages, losses and expenses . . . arising out of or resulting from the performance or failure in performance of [Kone's] work under this Agreement provided that any such claim,

> damage, loss, or expense (1) is attributable to bodily injury . . . [and] (2) is caused, in whole or in part, by any negligent act or omission of [Kone] or anyone directly or indirectly employed by [Kone], or anyone for whose acts [Kone] may be liable, regardless of whether caused in part by a party indemnified hereunder.

Zurich attempts to divorce Kone from any shared responsibility by contending, among other things, that Black committed an intentional tort when he propelled the slab grabber into the elevator shaft. Obviously, the Pennsylvania jury disagreed because it allocated twenty percent of the liability for Rapine's injuries to Kone. Thus, the Pennsylvania final judgment crystallized Kone's fault, as well as its consequent shared liability with Gilbane and another subcontractor.

There is nothing in the OCP insurance policy that provides coverage for Kone's liability, and Zurich has not directed us to any persuasive language that supports its skewed position that the molded judgment against Kone could be paid pursuant to the OCP insurance policy. Indeed, Zurich recognized that the OCP insurance policy provided insurance protection to Gilbane, as the insured, not Kone. Thus, it was improper to fund Kone's judgment obligation out of the OCP insurance policy. We presume that Kone's direct insurance protection —— probably the $10 CGL insurance policy that National Union also seeks to tap —— was available to cover the judgment against Kone as a covered risk.

Even if it were not, Zurich's depletion of the amount available under the OCP insurance policy was unwarranted.

D.

We next turn to the question of whether the fortuitous coverage that National Union claims to exist in favor of Gilbane pursuant to the CGL insurance policy actually is available to Gilbane as an additional insured. We conclude that it is not, and in this regard, we affirm the motion court's determination.

National Union argues that our inquiry should be limited to the unambiguous language of the CGL insurance policy, without regard to any extrinsic evidence such as the subcontract between Gilbane and Kone.[5] See Jeffrey M. Brown Assocs., Inc. v. Interstate Fire & Cas. Co., 414 N.J. Super. 160 (App. Div.), certif. denied, 204 N.J. 41 (2010). Utilizing that analysis, it contends that the endorsements provided by Zurich to its insured Kone, and paid for by Kone's premiums —— the "Additional Insured - Owners, Lessees or Contractors" and the "Blanket Additional Insured Endorsement" —— automatically invoked Gilbane's right to be treated as an additional insured.

[5] Both parties appear to agree that the terms of the CGL insurance policy are unambiguous. Zurich's position in this regard is unsurprising since it is its own home-brewed insurance policy that is being interpreted.

Zurich contends that by dint of the subcontract, Gilbane "voluntarily gave up coverage under the CGL [insurance policy] in lieu of the coverage provided by the OCP [insurance policy]" and furthermore, "the language of the CGL [insurance policy] itself specifically provides that a party in Gilbane's shoes is not entitled to coverage under its terms."

In Jeffrey M. Brown Associates we held that an additional insured endorsement in a CGL insurance policy was unambiguous, and resort to extrinsic evidence —— a subcontract for demolition work —— was inappropriate. Id. at 170. The additional insured endorsement in that case stated:

> In consideration of the premium charged:
>
> The following provision is added to Section II, PERSONS INSURED, of the Comprehensive General Liability Coverage Part:
>
> > (f) any entity the Named Insured is required in a written contract to name as an insured (hereinafter called Additional Insured) is an insured but only with respect to liability arising out of work performed by or on behalf of the Named Insured for the Additional Insured.
>
> [Id. at 165.]

Zurich's additional insured endorsement in the instant CGL insurance policy is not identical, but does contain somewhat similar language:

> In consideration of the premium charged, it is agreed that the following are added as additional insureds, but solely as respects to work performed by or on behalf of the named insured:
>
> All persons, organizations or entities for whose protection and benefits the named insured has agreed to procure liability insurance. However, insurance with respect to each such person, organization or entity shall not exceed coverage and/or applicable limits of liability that the named insured has agreed to provide, nor the coverage and/or applicable limits of liability of this policy.
>
> It is further agreed that this extension will not apply to any person, organization, or entity who has been specifically added as an additional insured to any other general liability policy issued to the named insured.
>
> [(emphasis added).]

The difference between the instant additional insured endorsement and the one found self-evident in Jeffrey M. Brown Associates lies in two areas: (1) the use of the undefined term "liability insurance" as a description of what the named insured "agreed to procure" for its contracting partner and (2) the lack of self-executing limits of liability, which can only be determined by reference to the subcontract. These deficiencies frustrate the uncomplicated and straightforward analysis under Jeffrey M. Brown Associates.

We hew to the principle that an additional insured endorsement of a CGL insurance policy cannot be overridden by the language of the contract between the named insured (Kone) and a party described under the additional insured endorsement (Gilbane) where that contract purports to change the terms of a self-evident additional insured endorsement. See Jeffrey M. Brown Assocs., supra, 414 N.J. Super. at 170; cf. Cnty. of Hudson, supra, 332 N.J. Super. at 112-13; Pennsville Shopping Ctr. Corp. v. Am. Motorists Ins. Co., 315 N.J. Super. 519 (App. Div. 1998), certif. denied, 157 N.J. 647 (1999). Here, we find that the language of Zurich's additional insured endorsement is not sufficiently self-evident to preclude resort to the subcontract for additional context and meaning. See Chubb Custom Ins. Co. v. Prudential Ins. Co., 195 N.J. 231, 238 (2008).

Thus, utilization of the subcontract to assist in interpreting and fully understanding the language of the additional insured endorsement is appropriate because that is the only way to give vitality to the otherwise unilluminated contract language.

When we view the insurance contract under the lens of the subcontract, it is apparent that neither Kone nor Zurich intended to provide the far reaching additional insured coverage

claimed by National Union. Indeed, it cannot fairly be argued that even Gilbane subscribed to that overly-aggressive view, in light of its agreement to accept an OCP insurance policy in lieu of additional insured status as an adjunct to Kone's CGL insurance policy. Article 12.3(H) of the subcontract specified that Kone would obtain an "Owner's and Contractor's Protective Liability Policy" (OCP) naming Gilbane and Barrow Street as insureds as follows:

> [Kone] shall name [Barrow Street] and Gilbane Building Company as named insured[s] on an Owner's and Contractor's Protective Liability Policy which shall have a per project aggregate limit o[f] $5 million dollars. This is in lieu of naming [Barrow Street] and Gilbane Building Company as additional insured[s] on the General Liability [policy] [w]ith a per project aggregate.

This provision adequately provided Gilbane with bargained-for OCP insurance protection, but not additional insured status under a "General Liability [policy] [w]ith a per project aggregate" such as the $10 million CGL insurance policy here.

E.

We last turn to National Union's claim that seeks to recover all of the counsel fees incurred by Gilbane in defending Rapine's civil action in Pennsylvania. Those counsel fees, except for the amount that was embraced in the Pennsylvania indemnification judgment, were apparently paid by National Union

pursuant to its insurance contract with its insured, Gilbane. As subrogee, it seeks the balance of such defense counsel fees.

"'[T]he duty to defend comes into being when the complaint states a claim constituting a risk insured against.'" Voorhees v. Preferred Mut. Ins. Co., 128 N.J. 165, 173 (1992) (quoting Danek v. Hommer, 28 N.J. Super. 68, 77 (App. Div. 1953), aff'd o.b., 15 N.J. 573 (1954)). "Whether an insurer has a duty to defend is determined by comparing the allegations in the complaint with the language of the policy." Ibid. When the allegations in the complaint and the language of the policy correspond, "the duty to defend arises, irrespective of the claim's actual merit." Ibid. An insurer's duty to defend is determined by "whether a covered claim is made, not by how well it is made." Id. at 174. An insurer's "duty to defend is not abrogated by the fact that the claim may have no merit and cannot be maintained against the insured, either in law or in fact, because the cause of action is groundless, false, or fraudulent." Sears Roebuck & Co. v. Nat'l Union Fire Ins. Co., 340 N.J. Super. 223, 241-42 (App. Div.), certif. denied, 169 N.J. 608 (2001). The guiding criterion in determining the existence of the insurer's duty to defend is not whether the insured is liable to the plaintiff in an action, but rather whether the allegations in the complaint, if proven, would

impose liability that is covered by the policy in question. Id. at 242. In essence, the risk or threat of adverse judgment in an action against an insured triggers the insurer's duty to defend.

From our previous discussion concerning the OCP insurance policy's coverage, we are satisfied that Zurich had a concomitant duty to defend Gilbane in Rapine's Pennsylvania lawsuit under the plain terms of the OCP insurance policy. Where we harbor uncertainties relates to (1) the timeframe for which an award of counsel fees is sought, (2) the reasonableness of any such counsel fees, and (3) the extent to which the Pennsylvania indemnification judgment may have already made Gilbane (and, perforce, National Union) whole.

According to the Pennsylvania court's "Findings of Fact/Conclusions of Law As to the Issue of Reasonable Attorneys' Fees and Expenses Owed to Gilbane Pursuant to Article 5.2 and 12D of the Trade Contract" (the Findings), Kone "would be responsible for [twenty] percent of Gilbane's attorneys' fees and expenses prior to the settlement entered into between Gilbane and Rapine, . . . and 100 percent of Gilbane's fees which arose from enforcing its right to indemnification." No appeal from that determination was filed, and payment for Kone's judgment debt ($2,532,623.40) was paid by Zurich in June 2007.

It should be noted that the trial court in Pennsylvania did not determine Gilbane's right to reimbursed counsel fees pursuant to the language of the OCP insurance policy; instead, it was parsing the provisions of the subcontract between Kone and Gilbane. The terms of those instruments are obviously not identical, although we believe that there probably are numerous overlaps. Because National Union's subrogor was entitled to a defense paid for by the non-erosive requisites of the Zurich OCP insurance policy, and because the Pennsylvania indemnification judgment was not intended to conclusively address the total amount due from all sources, we must remand this matter to the Law Division to determine Gilbane's appropriate entitlement to reimbursed counsel fees and expenses in the defense of Rapine's civil action. See Burd v. Sussex Mut. Ins. Co., 56 N.J. 383, 390 (1970) (holding that if the insurer fails to provide a defense that the insurance policy requires, it must reimburse the defense costs that the insured incurred). That determination may, as appropriate, be made by trial or motion practice and must take into account the effect of the payment of the judgment by Zurich pursuant to the Findings, as well as all other relevant considerations connected to Zurich's promise in the OCP insurance policy to pay the expenses connected with "the

right and duty to defend Gilbane . . . against any 'suit' seeking [bodily injury] damages."

In addition, on remand, National Union is entitled to apply to the Law Division for the award of counsel fees pursuant to Rule 4:42-9(a)(6), which allows such an award to an insured that has successfully sued its liability or indemnity insurer for coverage. The purpose of this Rule is "'to discourage groundless disclaimers.'" Sears Mortg. Corp. v. Rose, 134 N.J. 326, 356 (1993) (quoting Guarantee Ins. Co. v. Saltman, 217 N.J. Super. 604, 610 (App. Div. 1987).

National Union is accordingly permitted, subject to the Law Division's oversight, to the reasonable counsel fees and costs in this action that it incurred to vindicate Gilbane's rights under the OCP insurance policy. We leave it to the Law Division to determine the appropriate treatment of any counsel fees and expenses that are related to National Union's unsuccessful efforts to actualize coverage under the CGL insurance policy.

III.

In summary, we affirm the Law Division's declination of coverage vis-à-vis the $10 million CGL insurance policy. Otherwise, we reverse the determination of the Law Division regarding coverage under the $5 million OCP insurance policy, and hold that because it paid $9.25 million towards the Rapine

settlement, National Union is entitled to be paid the full $5 million limit of the OCP insurance policy. Even after application of the $1.85 million pursuant to the Pennsylvania indemnification judgment, National Union is still out of pocket by $7.4 million, and is therefore entitled to the full benefit of the bargained-for insurance contract without being unjustly enriched. Additionally, we remand for further proceedings the related issues of counsel fees and expenses engendered by National Union's Rapine defense and its pursuit of the now-successful claim under the OCP insurance policy.

Affirmed in part; reversed in part; and remanded for further proceedings in accordance with this opinion.

I hereby certify that the foregoing is a true copy of the original on file in my office.

CLERK OF THE APPELLATE DIVISION