(NOTE: The status of this decision is **Unpublished**.)

NOT FOR PUBLICATION WITHOUT THE

APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY

APPELLATE DIVISION

DOCKET NO. A-0

ANNA MARIA NUCCI,

Plaintiff-Appellant,

v.

THE AMERICAN INSURANCE COMPANY,

Defendant-Respondent,

and

BRIAN MARTIN, JCL CONSTRUCTION, INC.,

RUBINSTEIN & SCIALLA, ARCHITECTS, P.A.,

CASEY & KELLER, INC., GROUP CONSTRUCTION,

INC., and MD DRILLING & BLASTING, INC.,

Defendants.

December 11, 2014

Argued November 3, 2014 – Decided

Before Judges Simonelli, Guadagno and Leone.

On appeal from the Superior Court of New Jersey, Law Division, Essex County, Docket No. L-5518-10.

Harry A. Cummins argued the cause for appellant (Wilkofsky, Friedman, Karel & Cummins, attorneys; Mr. Cummins, of counsel and on the briefs).

Stuart M. Bodoff argued the cause for respondent (Rivkin Radler, L.L.P., attorneys; Anthony J. LaPorta, of counsel; Mr. Bodoff, of counsel and on the brief).

PER CURIAM

Plaintiff Anna Maria Nucci appeals the grant of summary judgment in favor of defendant American Insurance Company (AIC). The trial court ruled that plaintiff's settlement with co-defendants interfered with AIC's subrogation rights against the settling co-defendants, and that plaintiff was therefore barred from pursuing her claim against AIC. We vacate the grant of

summary judgment and remand for further proceedings to determine whether the settlement actually interfered with AIC's subrogation rights.

I.

Plaintiff entered into a contract with AIC for homeowner's insurance. The policy provided that AIC had the right of subrogation, under which AIC could "require an assignment [from plaintiff] of rights of recovery [from others] for a loss to the extent that payment is made by us." The policy required plaintiff "to cooperate in every way possible to assist in such recovery from others" and that AIC would "take over [plaintiff's] rights against others to the extent of [plaintiff's] payment" from AIC.

Plaintiff alleges her home suffered damage as a result of blasting operations conducted during construction on an adjacent property. Asserting it was a covered peril under the policy, she tendered a claim to AIC. AIC issued a letter of denial, citing provisions of the policy excluding losses from wear and tear, settling, earth movement, weather, and defects in planning, design, construction, or maintenance of plaintiff's property. The denial letter was accompanied by two expert reports explaining that the damage was a result of those causes rather than the blasting. The denial letter said AIC "continue[d] to reserve all rights under the terms and conditions of [the] policy."

Plaintiff filed an action in the Law Division. In her amended complaint, she sued AIC for failing to honor her claim. She also raised tort claims against the persons and entities involved in the blasting and construction, namely Brian Martin, the owner of the adjacent property; JCL Construction, Inc., his general contractor; Rubinstein & Scialla, Architects, P.A.; Casey & Keller, Inc., the engineer; Group Construction, Inc., the excavating contractor; and MD Drilling & Blasting, Inc., the blasting company.

AIC answered the complaint and asserted cross-claims against all the co-defendants premised on its right of subrogation included in the insurance policy, and on "the doctrine of equitable subrogation." The cross-claim averred:

> While denying any and all liability, in the event AIC makes payment to Plaintiff under the policy for the damages claimed in the Amended Complaint, AIC would have the right, through subrogation, to recover from Co-Defendants to the extent they breached their respective duties to Plaintiff resulting in Plaintiff's losses.

Thereafter, plaintiff, without first informing AIC, settled her claims against certain co-defendants.[1] Plaintiff has taken the position that the settlement agreement is confidential, and she has revealed only that the settlement did not fully compensate her for her loss. After plaintiff released the settling co-defendants from liability for the alleged damage to her property, she informed AIC of the settlement.

AIC filed a motion for summary judgment, which was granted on July 31, 2013. The trial court ruled that (a) AIC did not waive its potential subrogation rights by denying plaintiff's insurance claim; (b) plaintiff eliminated AIC's potential subrogation rights by settling with the co-defendants; and (c) plaintiff thus forfeited her right to seek reimbursement from AIC under the insurance policy. The court dismissed plaintiff's complaint with prejudice. She appeals.

Summary judgment must be granted if "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). The 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) (citation omitted). As "appellate courts 'employ the same standard that governs the trial court,'" we review these determinations de novo, and the "trial court rulings 'are not entitled to any special deference.'" Henry v. N.J. Dept. of Human Servs., 204 N.J. 320, 330 (2010) (citation omitted). We must hew to that standard of review.

II.

Subrogation "is highly favored in the law." Culver v. Ins. Co. of N. Am., 115 N.J. 451, 456 (1989). "It has long been appreciated that '[s]ubrogation is a device of equity to compel the ultimate discharge of an obligation by the one who in good conscience ought to pay it [and] . . . to serve the interests of essential justice between the parties.'" Id. at 455-56 (quoting Standard Accident Ins. Co. v. Pellecchia, 15 N.J. 162, 171 (1954)). "It is most often brought into play when an insurer who has indemnified an insured for damage or loss is subrogated to any rights that the insured may have against a third party, who is also liable for the damage or loss." Pellecchia, supra, 15 N.J. at 171. Subrogation "fulfills the dual purposes of avoiding unjust enrichment to an insured who obtains recovery for the same injury from both his insurer and the tortfeasor and, in the absence of such double recovery, of precluding the tortfeasor from escaping all liability for damages that the tortfeasor has caused." McShane v. N.J. Mfrs. Ins. Co., 375 N.J. Super. 305, 309-10 (App. Div. 2005) (citing Pellecchia, supra, 15 N.J. at 171).

Subrogation rights can arise from "(1) an agreement between the insurer and the insured, (2) a right created by statute, or (3) a judicial device of equity to compel the ultimate discharge of an obligation by the one who in good conscience ought to pay it." Culver, supra, 115 N.J. at 456 (citations and internal quotation marks omitted). Here, AIC invoked both equitable subrogation and contractual subrogation.

Subrogation is intended to allow the insurer to obtain reimbursement from the tortfeasor for the insurer's payment to the insured. Thus "it is not, of course, until the insurer has made payment of the insured's claim that its right of subrogation against the tortfeasor arises." Am. Reliance Ins. Co. v. K. Hovnanian at Mahwah IV, Inc., 337 N.J. Super. 67, 72 (App. Div. 2001) ("Hovnanian"); see Culver, supra, 115 N.J. at 457. However, an insurer has "standing to assert its claim as [its insured's] subrogee notwithstanding that it had not paid [its insured's] claim." Foley Mach. Co. v. Amland Contractors Inc., 209 N.J. Super. 70, 77 (App. Div. 1986). In Foley, an insured sued its insurer to compensate it for theft of property by a third party, against whom the insurer filed a third-party complaint as subrogee of the insured. Id. at 72. We reversed the trial court's dismissal of the insurer's claim, "find[ing] neither reason nor authority for that ruling, which is directly contrary to our firm and longstanding policy to dispose of all aspects of a controversy in a single action." Id. at 77 (citing R. 4:27-1(b)).

Here, plaintiff sued both the alleged tortfeasors and her insurer seeking compensation for the same damages. Under Foley, the fact that AIC had not paid plaintiff's claim was insufficient to deprive AIC of standing to cross-claim against the alleged tortfeasors to preserve its potential subrogation claim that would arise if it was found liable to plaintiff.

A.

Plaintiff first argues that AIC waived its subrogation rights by denying plaintiff's claim. This is an issue of first impression in New Jersey.

Plaintiff concedes that New Jersey has not addressed this question, but cites cases from other jurisdictions.[2] "While some courts have found that certain actions or inactions by an

insurer, such as denial of policy benefits . . . , constitute a waiver or estoppel of the insurer's subrogation rights, not all such actions or inactions by the insurer have resulted in a waiver or estoppel of the right of subrogation," and courts are split on the subject. See Randy J. Sutton, Conduct or Inaction by Insurer Constituting Waiver of, or Creating Estoppel to Assert, Right of Subrogation, 125 A.L.R.5th 1, p. 1 & § 10 (2013).

One rationale for holding that the insurer's denial of the claim waives its subrogation rights is insurer misconduct:

> Where, however, an insurer has denied a claim or unreasonably delayed payment of it, courts have found that the insurer waived its subrogation rights and that the policyholder is free to settle with the tortfeasor in anyway it sees fit. When an insurer erroneously or wrongfully denies coverage, the policyholder should not be punished for mitigating its damages—and perhaps the insurer's as well—by settling the underlying matter. This is because the denial is a breach of contract on the part of the insurer, and its breach should relieve the policyholder of the punitive effects of its failure to comply with the consent provisions of the insurance policy. But good faith disputes regarding the value of a claim or the scope of coverage may not, in some jurisdictions, result in waiver of the insurer's subrogation rights.
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> [5 New Appleman Insurance Law Library Edition, §53.08(a)(b), at 53-175 to -176 (2014).]

Other courts have stated a rationale based on the needs of the insured:

> "To require that the insured first fully litigate its dispute with the insurer before pursuing the third party would be manifestly unfair. The possibility of prompt reimbursement would be lost. Moreover, because of the financial condition of the third party or the size of other claims pending against it, it might be essential that redress against the third party be promptly pursued lest nothing remain to satisfy the insured's claim."
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> [First Hays Banshares, Inc. v. Kan. Bankers Sur. Co., 769 P.2d 1184, 1189 (Kan. 1989) (quoting Bunge, supra, 394 F. 2d at 497).]

These courts note that "'the self-interest on the insured affords considerable protection to the insurer,'" because "'the insured will attempt to recoup as much of his losses as possible from the third party. If the insurer is ultimately held liable, the amount so recovered will inure to its benefit.'" Ibid. (quoting Bunge, supra, 394 F. 2d at 497).

On the other hand, the "public policy" rationale for rejecting "an absolute waiver of subrogation rights any time an insurer denies coverage to its insured, regardless of the reasoning for the denial and regardless of subsequent events," has been expressed as follows:

> Such a rule would force insurance companies to pay any and all claims by its insureds, regardless of the arguable merit of the claim, for fear that they would lose their subrogation rights. This would certainly result in increased premiums for all insureds. Of course, the counter-concern is that by not adopting an absolute waiver rule the Court is opening the door for insurance companies to deny all claims and force their insureds to spend their own time and money in efforts to recover from third parties.

> However, insurers are still susceptible to bad faith claims for denying claims without arguable reasons. The prospect of punitive damages for such denials protects the interests of the insureds.
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> [TV-3, Inc. v. Royal Ins. Co. of Am., 102 F. Supp.2d 347, 350-51 (S.D. Miss. 2000).]

Furthermore, as the trial court here noted, an absolute waiver rule is inconsistent with the purpose of subrogation "to compel the ultimate discharge of an obligation by the one who in good conscience ought to pay it." Pellecchia, supra, 15 N.J. at 171. Under an absolute waiver rule, once an insurer has denied the claim, a tortfeasor's partial settlement for any sum may result in the tortfeasor escaping liability for the remaining damages it has caused, even if the insurer is ultimately required to indemnify the insured for those damages. Cf. McShane, supra, 375 N.J. Super. at 309-10. This would defeat "the principal rationale behind insurance subrogation, namely, that 'the insurer should be reimbursed for his payment to the insured.'" Culver, supra, 115 N.J. at 457 (quoting Pellecchia, supra, 15 N.J. at 171). Plaintiff's argument could leave AIC paying for damage caused by the settling co-defendants without recourse against them.

Nevertheless, the weight of authority in other jurisdictions supports an absolute waiver rule. See also Midland Bank & Trust Co. v. Fid. & Deposit Co., 442 F. Supp. 960, 973 (D.N.J. 1977). However, the appellate courts of New Jersey have not yet taken a position on whether denial of an insured's claim waives the insurer's subrogation rights against a third-party tortfeasor.

AIC cites Ambassador Ins. Co. v. Montes, 76 N.J. 477 (1978), and Malanga v. Mfrs. Cas. Ins. Co., 28 N.J. 220 (1958). But, in those cases, the insured was the tortfeasor, who had injured third persons. Our Supreme Court held that "subrogating the insurer to the injured person's

rights so that the insurer may be reimbursed for its payment of the insured's debt to the injured person" honors the public policy principle "that the [tortfeasor] may not be relieved of financial responsibility arising out of his criminal act." Montes, supra, 76 N.J. at 484 (emphasis added). Montes and Malanga did not address whether an insurer's denial of an insured's claim waives subrogation to the insured's rights.

AIC also cites Foley, but Foley addressed standing, not waiver. Moreover, Foley does not explicitly state whether the insurer denied the insured's claim, although one might infer denial from the fact the insured sued the insurer. See Foley, supra, 209 N.J. Super. at 72.

Here, plaintiff claims that AIC denied her claim for a covered loss despite her timely notice. Plaintiff's complaint did not expressly assert that AIC acted in bad faith, in which case equity would preclude subrogation. Moreover, the trial court has not yet decided whether AIC denied the claim "erroneously or wrongfully," and thus in "breach of contract." 5 New Appleman, supra, at § 53.08[4][b] at 53-175 to -176. AIC denied the claim after two inspections of the insured's property. The trial court may find that the denial was in "good faith." Ibid.

Thus, we are faced with the novel and difficult question of whether an insurer that denied a claim automatically waived its right to subrogation, even if the insurer acted in good faith in denying the claim and promptly asserted its potential subrogation rights. The parties also raise the question of whether an insured's subsequent partial settlement with the alleged tortfeasors forfeits the insured's right to collect under the insurance policy. This question too is complicated by competing policy concerns. Before we can determine those questions, an issue raised by plaintiff must be considered.

III.

The trial court resolved the two questions above based on the premise that an insured's settlement with an alleged tortfeasor would extinguish the insurer's subrogation right against

the tortfeasor. At the hearing on the motion for summary judgment, the trial court posited that "[p]resumably" the settlement between the plaintiff and the tortfeasors eliminated any subrogation claim that AIC would have against the tortfeasors. Counsel for AIC agreed. The court asked plaintiff's counsel if he agreed, saying: "If they had a subrogation claim, if they had one, you took it away." Plaintiff's counsel responded, "I would acknowledge that if that were so then — then — yeah." The court decided the motion on that premise.

However, that premise has since been questioned. On appeal, plaintiff argues that the settling co-defendants were aware from AIC's cross-claim of a potential subrogation claim against them, that the settlement without AIC's consent thus did not impair any subrogation rights AIC may have had at the time, and that the settling co-defendants therefore remain liable to AIC. Plaintiff cites cases to that effect.[3]

It is not only plaintiff who questions the basis of the trial court's decision. At oral argument before us, AIC's counsel stated that AIC and plaintiff may be "on the same page" that AIC's subrogation rights were not impaired by plaintiff's settlement with the co-defendants. Neither party denies that the settling co-defendants had actual knowledge of AIC's cross-claim for subrogation before settling with plaintiff.

"[I]n most jurisdictions, where a tortfeasor knows of an insurer's subrogation rights, a release has no effect because the tortfeasor remains liable if the insurer has not consented to the settlement and release." 5 New Appleman, supra, § 49.01[3], at 49-11. "Courts have held that when a policyholder settles with and releases a tortfeasor without the insurer's knowledge or consent so as to foreclose the insurer's right of subrogation, the release does not extinguish the insurer's subrogation rights if the tortfeasor knew of the insurer rights." 5 New Appleman, supra, at § 53.08[4][b], at 53-174.

We have applied that general rule in Hovnanian, supra, 337 N.J. Super. at 71-72. The parties here apparently did not bring Hovnanian to the attention of the trial court. There, the insurer paid the insured's claim but failed to notify the alleged tortfeasor, Hovnanian, until after Hovnanian settled with the insured. We stated:

> The rule is well settled that although a release of the tortfeasor by the victim-insured will ordinarily bar the insurer's subsequent assertion of a subrogation claim against the tortfeasor, the tortfeasor is not entitled to that immunization if he was on notice, at the time of the release, that the insurer had already paid the claim and hence had a subrogation right against him. As stated by Melick v. Stanley, 174 N.J. Super. 271, 282 (Law Div. 1980), aff'd o.b., 181 N.J. Super. 128 (App. Div. 1981), "[a] release procured by a tortfeasor, knowing that the insured has already received payment from the insurer, has generally been held not to constitute a defense to the insurer's action against the wrongdoer to enforce its right of subrogation."
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> [Id. at 72.]

We broadly stated that "[t]he application of this rule requires the insurer's actual payment of the insured's claim since it is not, of course, until the insurer has made payment of the insured's claim that its right of subrogation against the tortfeasor arises." Ibid. "Hence, it is not until the tortfeasor knows or is chargeable with knowledge that a claim has been paid that he can be charged with having knowingly impaired the insurer's subrogation right since the insurer has no subrogation right until that time." Ibid. We determined that though "Hovnanian was well aware of [the insurer's] status as the insurer covering the [insured's] claim," the insurer did not

assert its subrogation rights until after the settlement had occurred. Id. at 72-74. We held that "because there is no indication Hovnanian knew the claim was paid, it cannot be charged with having knowingly impaired the insurer's subrogation rights." Id. at 75.

Thus, in Hovnanian, the insurer had paid the claim prior to settlement, but did not assert its subrogation rights until after settlement. Here, the insurer asserted its subrogation rights prior to settlement, but has not paid the claim. We have yet to address that scenario, despite the broad language in Hovnanian. Indeed, in Hovnanian we cautioned:

> We do not intend to imply that it is only the tortfeasor's actual knowledge of payment of the claim by the insurer that can ever defeat the protection of the release. Obviously, that protection is forfeited by a tortfeasor who knows that the claim against him is covered by an insurer and who accepts a release from the insured with fraudulent or collusive intent or in culpable disregard of the insurer's protectable interest in acquiring its subrogation rights.
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> [Id. at 75.]

Thus, plaintiff's appellate argument raises an important issue. We are reluctant to reach that issue because plaintiff failed to raise the issue, or Hovanian, in the trial court. New Jersey "'appellate courts will decline to consider questions or issues not properly presented to the trial court when an opportunity for such a presentation is available unless the questions so raised on appeal go to the jurisdiction of the trial court or concern matters of great public interest.'" State v. Robinson, 200 N.J. 1, 20 (2009) (quoting Nieder v. Royal Indem. Ins. Co., 62 N.J. 229, 234 (1973)). Indeed, plaintiff explicitly agreed with the trial court's presumption that the settlement eliminated any subrogation claim AIC would have against the tortfeasors.

However, the trial court and the parties appear to have been unaware of the general rule, as applied in Hovnanian, that a tortfeasor who knowing of an insurer's subrogation rights settles with the insured, remains liable for subrogation if the insurer has not consented to the settlement.

Despite plaintiff's failure to raise that issue in the trial court, we exercise our discretion to allow the issue to be raised now. Whether the general rule applies when an insurer has put the alleged tortfeasors on notice of its potential subrogation rights, but has not paid the claim, is important not only in this case, but also in any case in which the parties simultaneously dispute the liability of the alleged tortfeasor and the insurer. It thus raises an issue "'of sufficient public concern.'" Alan J. Cornblatt, P.A. v. Barow, 153 N.J. 218, 230 (1998) (citation omitted) (considering issue not raised below because it "would have a substantial impact on both malpractice plaintiffs and defendants as well as the attorneys who represent them"). Moreover, the issue is integral to the difficult and novel questions before us. Importantly, we may be able to avoid resolving at least one of the difficult issues posed by this appeal if the co-defendants remain liable to subrogation claims by AIC. Indeed, plaintiff and AIC may be "on the same page" that the settling co-defendants remain liable.

This position by plaintiff and AIC obviously implicates the rights of parties not before us — the settling co-defendants. They have not participated in this appeal. They also did not participate in the summary judgment proceedings. The settling co-defendants have not had an opportunity to respond to plaintiff's belated argument that their potential subrogation liability was not extinguished because they settled with notice of AIC's cross-claim asserting its potential subrogation rights.

We are unwilling to resolve this issue, or impose liability on the settling co-defendants, without giving them the opportunity to respond. As the Supreme Court has indicated:

> A limited remand to the trial court pending an appeal is appropriate, however, when "consideration of a particular issue by the trial court will enable full resolution of the controversy by the appellate court or is necessary to deal with an essential matter implicating the issues on appeal arising after the notice of appeal is filed."
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> [State v. Hogue, 175 N.J. 578, 583 (2003) (quoting Pressler, Current N.J. Court Rules, comment 1 on R. 2:9-1 (2003)).]

Accordingly, we find it appropriate to vacate the grant of summary judgment and remand this matter to the trial court for the limited purpose of affording the settling co-defendants the opportunity to brief whether their potential subrogation liability continues because they settled with notice of AIC's cross-claim. We believe it is also appropriate to give the settling co-defendants the opportunity on remand to brief whether AIC waived its potential subrogation rights by denying plaintiff's claim, or by failing to pay that claim before the settling co-defendants settled with plaintiff. They should also be offered the opportunity to participate in any oral argument on remand on those issues. Plaintiff and AIC shall also have the opportunity to brief and argue those issues before the trial court.

As indicated above, the identity of the settling co-defendants is not entirely clear because plaintiff declines to disclose any information about that settlement except that it did not fully compensate her for her loss. On remand, plaintiff shall disclose the identity of the settling co-defendants so they can receive notice of the above opportunities at the trial court's direction. On proper notice to the settling co-defendants, the trial court may consider whether any portions of the "confidential" settlement agreement must be disclosed in order for the trial court and this court to decide the remand issues.

Within sixty days of the date of our opinion, the trial court shall hold a hearing after receiving the briefing mentioned above. Within thirty days after the date of the hearing, the trial court shall issue its decision on the remand issues, and determine whether summary judgment remains appropriate. Within fourteen days of the trial court's decision, any party seeking review of that decision, including the settling co-defendants, may file a motion to reinstate this appeal. We retain jurisdiction to entertain such a motion.

Vacated and remanded.

[1] It is unclear exactly which co-defendants have settled. Plaintiff's brief states that she settled with "all of the non-insurance company defendants." However, plaintiff's appellate case information statement indicated that Rubinstein & Scialla and Casey & Keller were dismissed earlier in the litigation, and that plaintiff settled with the "remaining" co-defendants. MD Drilling and JCL informed us they settled with plaintiff, but we have no such information from Martin or Group Construction.

2 Liberty Mut. Ins. Co. v. Flitman, 234 So.2d 390, 392-93 (Fla. Dist. Ct. App. 3d Dist. 1970); Bunge Corp. v. London & Overseas Ins. Co., 394 F.2d 496, 497 (2d Cir.), cert. denied, 393 U.S. 952, 89 S. Ct. 376, 21 L. Ed.2d 363 (1968); Roberts v. Fireman's Ins. Co., 101 A.2d 747, 750 (Pa. 1954); Powers v. Calvert Fire Ins. Co., 57 S.E.2d 638, 642 (S.C. 1950).

3 Plaintiff cited Grp. Health, Inc. v. Mid-Hudson Cablevision, Inc., 871 N.Y.S.2d 780 (N.Y. App. Div. 2009); N.Y. Cent. Mut. Fire Ins. Co. v. Barry, 884 N.Y.S.2d 61 (N.Y. App. Div. 2009).

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