NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3436-13T1
A-3445-13T1

NEW JERSEY-AMERICAN WATER CO., INC., successor by merger to ELIZABETHTOWN WATER CO., a New Jersey Corporation,

Plaintiff-Respondent,

v.

WATCHUNG SQUARE ASSOCIATES, LLC and FIDELITY LAND CORPORATION,

Defendants/Third-Party Plaintiffs-Respondents,

v.

VOLLERS EXCAVATING & CONSTRUCTION, INC.,

Third-Party Defendant/ Fourth-Party Plaintiff-Appellant,

and

FRANK FERRARO,

Third-Party Defendant/ Fourth-Party Plaintiff,

v.

SALVATORE DAVINO, EDWARD D. MACEIKO, MORETRENCH AMERICAN CORPORATION, MENLO ENGINEERING ASSOCIATES, INC., PATRICK A. MARCHETTA, A.I.A., and CITIGROUP, INC.,

Fourth-Party Defendants,

and

TRAVELERS INSURANCE COMPANY, TRAVELERS INDEMNITY COMPANY OF ILLINOIS, TRAVELERS PROPERTY CASUALTY CORPORATION, TRAVELERS INDEMNITY COMPANY, PHOENIX INSURANCE COMPANY, CHARTER OAK FIRE INSURANCE CO., TRAVELERS INDEMNITY COMPANY OF CONNECTICUT, TRAVELERS INSURANCE GROUP HOLDINGS, INC., and MELICK-TULLY ASSOCIATES, P.A.,

Fourth-Party Defendants-Respondents.

NEW JERSEY-AMERICAN WATER CO., INC., successor by merger to ELIZABETHTOWN WATER CO., a New Jersey Corporation,

Plaintiff-Appellant,

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Fourth-Party Defendants-Respondents.

Argued February 2, 2016 – Decided July 15, 2016

Before Judges St. John, Guadagno and Vernoia.

On appeal from the Superior Court of New Jersey, Law Division, Morris County, Docket No. L-3027-01.

J. Charles Sheak argued the cause for appellant Vollers Excavating & Construction, Inc. in A-3436-13 (Sheak & Korzun, P.C., attorneys; Mr. Sheak, of counsel and on the briefs; Eugene Y. Song and Timothy J. Korzun, on the briefs).

Jay M. Levin argued the cause for appellant New Jersey-American Water Company in A-3445-13 (Reed Smith LLP, attorneys; Mr. Levin and Traci S. Rea of the Pennsylvania bar, admitted pro hac vice, on the briefs).

Frank E. Borowsky, Jr., argued the cause for respondents Charter Oak Fire Insurance Company, Travelers Indemnity Company, and

Travelers Indemnity Company of Illinois n/k/a The Travelers Property Casualty Company of America (Borowsky & Borowsky, LLC, attorneys; Mr. Borowsky, of counsel and on the brief; Stephanie M. Hehman, of counsel; Keith C. Northridge, on the brief).

PER CURIAM

In these back-to-back appeals,[1] we address disputes that arose between the owner/developer of a large shopping complex in the Borough of Watchung, and other parties involved in the project. The insurance coverage appeals before us arise out of a dispute concerning whether claims made against Vollers Excavating and Construction Company (Vollers) and Elizabethtown Water Company (EWC)[2] in connection with the collapse of a slope during the excavation of the site for the Watchung Square Mall in February 2000 (the February slope failure) come within the scope of a commercial general liability (CGL) policy issued to Vollers by the fourth-party defendants/respondents (collectively, Travelers). The appeals of Vollers and EWC are listed back-to-back, and consolidated in this opinion.

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[1] In Docket No. A-3208-13, by opinion of even date, we addressed the appeal by Watchung Square Associates, LLC (Watchung) of the trial court's decision in the breach of contract trial related to the February slope failure (the underlying litigation). We affirmed the decision of the trial court.

[2] EWC has since been merged into New Jersey-American Water Co., Inc.

Certain issues that ensued in the litigation were addressed by us in Elizabethtown Water Co. v. Watchung Square Associates, LLC, 376 N.J. Super. 571 (App. Div. 2005) (Elizabethtown I), Elizabethtown Water Co. v. Watchung Square Associates, LLC, Nos. A-3971-09, A-3972-09 (App. Div. Aug. 4, 2011) (Elizabethtown II), and by New Jersey-American Water Co., Inc. v. Watchung Square Associates, LLC, No. A-3208-13 (App. Div. July 15, 2016) (Elizabethtown III). Descriptions of the project and issues related to the excavation are set forth in those opinions and will not be repeated, except as relevant to the resolution of the issues raised on appeal here.

I.

On November 25, 2002, by way of amended counterclaim and third-party complaint filed in the underlying litigation, Watchung Square Associates, LLC (Watchung) asserted claims against Vollers (Watchung/Vollers claims). Watchung alleged that it had contracted with EWC to "supply a water main extension," that EWC had in turn subcontracted with Vollers "to perform the services required," and that "[d]uring the course of construction, [EWC] and/or Vollers breached the Contract and/or Subcontract resulting in a massive slope failure." Watchung also alleged in a separate count that EWC and Vollers "were negligent" in the "construction of the Water Main." Watchung alleged that it was "greatly damaged" by the breach of contract

and negligence. The Watchung/Vollers claims contained no additional details regarding either the alleged wrongdoing or Watchung's own damages.[3]

Although the record is not entirely clear on this point, Vollers had sought insurance coverage from Travelers at some point in 2002 for the Watchung/Vollers claims, and Travelers ultimately denied coverage.

In October 2003, Vollers filed an amended fourth-party complaint in the underlying litigation (Vollers insurance complaint), adding Travelers as fourth-party defendants. Vollers alleged that the claims Watchung asserted against it and against EWC were within the scope of certain insurance policies and that the insurance defendants were obliged to defend and indemnify it. EWC did not file a direct claim against Travelers.

Vollers moved to compel the deposition of a Travelers' corporate representative, and Travelers cross-moved for a protective order. By orders dated April 5, 2012, the trial court denied Vollers' motion and granted Travelers' motion.

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[3] Although Vollers did not include it in the appendix for its appeal, the appendix for EWC's insurance coverage appeal, Docket No. A-3445-13, contains an additional amended counterclaim and third-party complaint dated December 29, 2011, in which Watchung asserts claims against both EWC and Vollers. The claims in that complaint are substantially the same as the Watchung/Vollers claims and additionally include claims against EWC seeking the return of monies already paid by Watchung.

Travelers moved for summary judgment as to all claims filed against it.

The contract in which EWC subcontracted with Vollers to relocate the water main (the EWC/Vollers Agreement) required Vollers to "furnish and maintain such public liability and property damage insurance so as to constitute adequate protection against any and all loss including losses caused by the negligence of [Vollers]." The EWC/Vollers Agreement also provided that Vollers would indemnify EWC "against any and all loss, damage or expense including legal fees and costs" connected with "injury (including death) to any person or damage to any property arising out of or in any manner connected with" Vollers, "unless due in whole or part of any act, omission or negligence" of EWC.

A Travelers company[4] issued policy number DT-CO-242N5405-COF-99 to Vollers, which included CGL coverage during the time period between July 1, 1999, and July 1, 2000 (the Vollers Policy).

The Vollers Policy uses the term "you" and "your" to refer to Vollers and "any other person or organization qualifying as a

[4] Although the parties appear to dispute which specific fourth-party defendants would be the responsible insurers under the policy, Travelers does not dispute that a valid CGL policy was in effect at the time of the February slope failure or that at least one Travelers company would be liable to pay the applicable coverage, if any.

Named Insured under this policy." A "Blanket Additional Insured" endorsement (blanket rider), amends the definition of an insured as follows:

> WHO IS AN INSURED (Section II) is amended to include any person or organization you are required by written contract to include as an insured, but only with respect to liability arising out of "your work". This coverage does not include liability arising out of the independent acts or omissions of such person or organization. The written contract must be executed prior to the occurrence of any loss.

The Vollers Policy provides that Travelers "will pay those sums that the insured becomes legally obligated to pay as damages because of 'bodily injury' or 'property damage' to which this insurance applies." "Property damage" is defined as:

> a. Physical injury to tangible property, including all resulting loss of use of that property. All such loss of use shall be deemed to occur at the time of the physical injury that caused it; or
>
> b. Loss of use of tangible property that is not physically injured. All such loss of use shall be deemed to occur at the time of the "occurrence" that caused it.

"Occurrence" is defined as "an accident, including continuous or repeated exposure to substantially the same general harmful condition."

The Vollers Policy states that "[t]his insurance does not apply to" various situations, including property damage "for which the insured is obligated to pay damages by reason of the

assumption of liability in a contract or agreement," unless that liability would attach "in the absence of the contract or agreement." The Vollers Policy also contained a specific exclusion (the particular part exclusion), which states that the insurance also does not apply to damage to:

> (6) That particular part of any property:
>
> > (a) On which you or any contractor or subcontractor working directly or indirectly on your behalf are performing operations, if the "property damage" arises out of those operations; or
> >
> > (b) That must be restored, repaired or replaced because "your work" was incorrectly performed on it.

In addition, the insurance does not apply to "property damage to 'impaired property' or property that has not been physically injured, arising out of . . . [a] defect, deficiency, [or] inadequacy . . . in . . . 'your work.'" "Your work" is defined to include "[w]ork or operations performed by you or on your behalf."

In granting summary judgment to Travelers, Judge Donald S. Coburn held that Watchung's claims did not come within the scope of the Vollers Policy or, if they did, were excluded by the particular part exclusion. The court concluded:

> Vollers was the contractor doing all of the excavation work on this particular property. The fact that there were two contracts or a second contract for one particular part of

> it is not relevant. It was one whole property on which they were responsible for all of the excavation work.
>
> The allegation is that they did not perform that work properly but were responsible for faulty workmanship and as a result of that faulty workmanship there was a slope failure and the slope failure delayed the project and also required Vollers to make a [retaining] wall stronger than . . . initially intended to fix the problem that they, Vollers had allegedly created due to its defective workmanship.

The judge noted that "under the case law" faulty workmanship is "not an occurrence," so the Vollers Policy provided no coverage. Moreover, he determined the particular part exclusion provided an additional basis to deny coverage. On October 11, 2013, Judge Coburn entered an order dismissing all claims against Travelers with prejudice.[5] It is from that order that Vollers and EWC appeal.

II.

Vollers' Appeal

Although articulated in its brief as separate points, Vollers essentially makes a single argument that the judge erred, as a matter of law, in holding that the Watchung/Vollers claims did not fall within the Vollers Policy and that granting summary judgment to Travelers was in error. We disagree.

[5] The underlying litigation proceeded until, by order dated March 4, 2014, all remaining issues as to all parties were resolved.

In reviewing an order granting summary judgment, we apply the same standards that the trial court applied when ruling on the motion. Cypress Point Condo. Ass'n v. Adria Towers, LLC, 441 N.J. Super. 369, 372-73 (App. Div.), certif. granted, 223 N.J. 355 (2015). The interpretation of an insurance contract is a determination of law. Id. at 373. "We afford no special deference to a trial court's interpretation of the law and the legal consequences that flow from the established facts." Ibid. (citing Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995). Accordingly, a trial court's interpretation of an insurance policy is subject to review de novo. Ibid.

Generally, the insured must establish whether a particular claim falls within the basic terms of the policy. S.T. Hudson Eng'rs, Inc. v. Pa. Nat'l Mut. Cas. Co., 388 N.J. Super. 592, 603 (App. Div. 2006), certif. denied, 189 N.J. 647 (2007); Reliance Ins. Co. v. Armstrong World Indus., Inc., 292 N.J. Super. 365, 377 (App. Div. 1996). Once that basic inclusion is shown, the insurer bears the burden of establishing that the matter in dispute falls within an exclusionary provision of the policy. S.T. Hudson, supra, 388 N.J. Super. at 603 (citing Hartford Accident & Indem. Co. v. Aetna Life & Cas. Ins. Co., 98 N.J. 18, 26 (1984)). Accord Firemen's Ins. Co. of Newark v. Nat'l Union Fire Ins. Co., 387 N.J. Super. 434, 441 (App. Div.

2006) (noting that "if there was no coverage under the insuring clauses, there is no need to consider whether coverage is negated by the exclusions").

Several contractual construction principles are relevant to the interpretation of insurance policies. "Coverage clauses are interpreted liberally, whereas exclusions are strictly construed." S.T. Hudson, supra, 388 N.J. Super. at 604 (citing Butler v. Bonner & Barnewall, Inc., 56 N.J. 567, 576 (1970)). In either case, where the meaning of policy language is subject to two reasonable interpretations, the one supporting coverage will be applied. Simonetti v. Selective Ins. Co., 372 N.J. Super. 421, 428-29 (App. Div. 2004).

Moreover, "as with any contract, construing insurance policies requires a broad search 'for the probable common intent of the parties in an effort to find a reasonable meaning in keeping with the express general purposes of the policies.'" S.T. Hudson, supra, 388 N.J. Super. at 604 (quoting Royal Ins. Co. v. Rutgers Cas. Ins. Co., 271 N.J. Super. 409, 416 (App. Div. 1994)). An insurance policy must be construed "as a whole and effect given to every part thereof." Herbert L. Farkas Co. v. N.Y. Fire Ins. Co., 5 N.J. 604, 610 (1950). See also Arrow Indus. Carriers, Inc. v. Cont'l Ins. Co. of N.J., 232 N.J. Super. 324, 334-35 (App. Div. 1989) (noting that the court's "responsibility is to give effect to the whole policy, not just

one part of it"). Finally, construction of an insurance policy "must be 'consistent with the insured's reasonable expectations.'" Cypress Point, supra, 441 N.J. Super. at 376.

Applying these principles, we are convinced the motion court correctly determined that Watchung's claims did not fall within the general grant of coverage of the Vollers Policy and, alternatively, that coverage was excluded under the particular part exclusion.

Vollers argues that the trial court erred in holding that claims based on "faulty workmanship" do not come within the scope of the Vollers Policy. It frames the issue as whether the Vollers Policy does or does not cover "soil movement," arguing that it does and that the requirements for an "occurrence" causing "property damage" were met because the February slope failure "was a sudden event neither intended nor expected by the insured," and "[t]he earth movement, not the need to replace any installation, was the source of the claims."

In granting summary judgment to Travelers, the court noted that "under the case law" faulty workmanship is "not an occurrence." In order to establish that the Watchung/Vollers claims fell within the basic terms of the policy, Vollers needed to show both an occurrence and property damage, as those terms are defined in the Vollers Policy. See Firemen's, supra, 387

N.J. Super. at 437 (noting that both property damage and an occurrence are necessary elements).

Dealing with the same definition of "occurrence" that is in the Vollers Policy, the Cypress Point court noted that "[a]lthough the policy does not define the term 'accident,' our Supreme Court has held that 'the accidental nature of an occurrence is determined by analyzing whether the alleged wrongdoer intended or expected to cause an injury.'" Cypress Point, supra, 441 N.J. Super. at 376 (quoting Voorhees v. Preferred Mut. Ins. Co., 128 N.J. 165, 183 (1992)). Thus, the key determination of whether the "occurrence" requirement is satisfied is not whether the injury was caused by faulty workmanship or something else, but simply whether it was intended or not. Ibid.

This approach to analyzing "occurrence" was recommended in a law review article cited by us in Cypress Point, Christopher C. French, Construction Defects: Are They "Occurrences"?, 47 Gonz. L. Rev. 1 (2011). French notes that "[o]ne of the most litigated issues in the area of insurance law in recent years is whether construction defects constitute 'occurrences'" under CGL policies. Id. at 3. He concludes, "When one applies the relevant rules of insurance policy interpretation to the issue of whether construction defects constitute 'occurrences,' the inescapable conclusion is that construction defects are

'occurrences' unless the insurer can prove the policyholder actually expected or intended to do the construction work defectively and cause damage." Id. at 46.

We acknowledged that New Jersey precedent existing prior to our decision suggested a different analysis, when "we noted that 'the majority rule [at that time was] that faulty workmanship [did] not constitute an "occurrence."'" Cypress Point, supra, 441 N.J. Super. at 382 (quoting Firemen's, supra, 387 N.J. Super. at 448). However, Firemen's analyzed different standard policy language, which defined "occurrence" as "an accident . . . which results in . . . property damage neither expected nor intended from the standpoint of the insured," thus effectively making it impossible to satisfy the "occurrence" element where property damage did not exist. Id. at 379-80. By contrast, the policy language in Cypress Point, as here, defined "occurrence" as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions," without specific reference to property damage. Under this definition, we concluded, "faulty workmanship that is neither intended nor expected" can satisfy the "occurrence" requirement "under a post-1986 standard form CGL policy." Id. at 380-82.

This result is consistent with cases from other jurisdictions cited by Vollers in its brief. See, e.g., Ohio Cas. Ins. Co. v. Terrace Enters., 260 N.W. 2d 450, 452-53 (Minn.

1977) (holding that an "intentional failure to conform to building specifications was not an 'occurrence,'" but that faulty workmanship that was "perhaps negligent, but not reckless or intentional . . . was an 'occurrence' within the terms of the policy"); Acuity v. Soc'y Ins., 810 N.W. 2d 812, 819 (Wis. Ct. App. 2012) (noting that Wisconsin precedent explains that "faulty workmanship is not an 'occurrence'" by itself, but that "faulty workmanship may cause an unintended event . . . , and that event — the 'occurrence' — may result in harm to other property").

Here, there is no suggestion that Vollers intended to cause the February slope failure. Accordingly, it satisfied the "occurrence" element of establishing that Watchung's claims fell within the basic terms of the Travelers policy.

However, satisfying the "property damage" requirement is more nuanced. Vollers frames the issue as whether the Vollers Policy generally covers earth or soil movement, and it argues that "[t]he fact that insurers can add . . . an exclusion [for soil movement] means that in the absence of this specific exclusion in the policy, the general insuring clause covers liability for soil movements." Analyzing the issue as suggested, however, is not helpful, because the fact that the policy covers some claims based on soil movement does not necessarily mean that it covers all such claims. If the

February slope failure had, for example, caused a landslide onto the highway resulting in damage to passing automobiles or personal injury to drivers or pedestrians, the Vollers Policy would plainly cover claims arising from those injuries, even though caused by soil movement.

The dispositive issue is not whether the Vollers Policy covers property damage resulting from soil movement, but whether the soil movement at issue here, in and of itself, should be considered to be property damage under the policy. Viewed through the prism of the Vollers Policy, the excavation and the resultant damage, the February slope failure was a business risk that did not come within the grant of coverage.

We have "analyze[d] the purposes a CGL policy is designed to achieve" and explained that certain risks "such as breach of contract, and liability for business torts, are not covered by CGL insurance." Ohio Cas. Ins. Co. v. Island Pool & Spa, Inc., 418 N.J. Super. 162, 174-75 (App. Div.), certif. denied, 206 N.J. 329 (2011). "Thus, a CGL policy is not intended to insure business risks that are the normal, frequent, or predictable consequences of doing business and which businesses can control and manage." Id. at 175 (internal quotation marks omitted).

The Supreme Court explained the boundaries between "business risks," which were not insured, and "occurrences

giving rise to insurable liability" in the seminal case Weedo v. Stone-E-Brick, Inc., 81 N.J. 233 (1979). The Court explained:

> While it may be true that the same neglectful craftsmanship can be the cause of both a business expense of repair and a loss represented by damage to persons and property, the two consequences are vastly different in relation to sharing the cost of such risks as a matter of insurance underwriting.
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> In this regard Dean Henderson has remarked:
>
> > The risk intended to be insured is the possibility that the goods, products or work of the insured, once relinquished or completed, will cause bodily injury or damage to property other than to the product or completed work itself, and for which the insured may be found liable. The insured, as a source of goods or services, may be liable as a matter of contract law to make good on products or work which is defective or otherwise unsuitable because it is lacking in some capacity. This may even extend to an obligation to completely replace or rebuild the deficient product or work. This liability, however, is not what the coverages in question are designed to protect against. The coverage is for tort liability for physical damages to others and not for contractual liability of the insured for economic loss because the product or completed work is not that for which the damaged person bargained.
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> [Id. at 240 (quoting Roger C. Henderson, Insurance Protection for Products Liability and Completed Operations—What Every Lawyer

Should Know, 50 Neb. L. Rev. 415, 441 (1971)).]

Providing an "illustration of this fundamental point," the Weedo Court explained that "[w]hen a craftsman applies stucco to an exterior wall of a home in a faulty manner," the "discoloration, peeling and chipping" that result is not an insured risk and "will perforce have to be replaced or repaired by the tradesman or by a surety." Ibid. "On the other hand, should the stucco peel and fall from the wall, and thereby cause injury to the homeowner or his neighbor standing below or to a passing automobile," then "injury to persons and damage to other property constitute the risks intended to be covered under the CGL." Id. at 240-41.

We have applied the "business risk" analysis or "Weedo principle" to the basic question of whether a claim asserts property damage that falls within the general grant of coverage. See, e.g., Firemen's, supra, 387 N.J. Super. at 437 ("While Weedo addressed 'business risk' in the context of whether certain exclusions applied, the Weedo principle has been extended to the threshold issue of whether the risk was within the scope of the standard insuring clause."). See also, Newark Ins. Co. v. Acupac Packaging Inc., 328 N.J. Super. 385, 443-44 (App. Div. 2000) (Acupac Packaging) (examining whether an insurance policy covered damage caused by leaky pacquettes of

lotion that had been attached to advertising cards as part of a cosmetic company's promotion and noting that "[t]here is a critical distinction between insurance coverage for tort liability for physical damages to other persons or property, and protection from contractual liability of the insured for economic loss caused by improper workmanship"); Heldor Indus., Inc. v. Atl. Mut. Ins. Co., 229 N.J. Super. 390, 396 (App. Div. 1988) (explaining that "the insured assumes the risk of necessary replacement or repair of faulty goods as part of the cost of doing business, but passes on to the insurance carrier the risk of personal injury or damage to property of third parties caused by the faulty goods").

The question of whether alleged damage is a business risk or property damage falling within the coverage of a CGL hinges on whether the damage can be resolved by replacement or repair of the products or services that were provided under a contract, or whether some additional third-party damage is at issue.

Thus, in Cypress Point, we noted that claims that the "subcontractors failed to properly install the roof, flashing, gutters and leaders, brick and EIFS facade, windows, doors, and sealants" were claims for defective work giving rise to replacement costs that "[i]n the insurance industry, . . . are usually regarded as a cost of doing business and are considered a 'business risk.'" Cypress Point, supra, 441 N.J. Super. at

373-74. By contrast, claims that "the faulty workmanship also caused consequential damages to the 'common areas and unit owners' property [including] damage to steel supports, exterior sheathing and interior sheathing and sheetrock, insulation and other interior areas of the building, both visible and latent'" were "vastly different than the costs associated with replacing the defective work" and were within the scope of coverage. Id. at 374.

Other cases elucidate the importance of this distinction. In Acupac Packaging, the insured supplied two million pacquettes to be filled with skin cream, which in turn were to be attached to an advertising card that would be included within a magazine. Acupac Packaging, supra, 328 N.J. Super. at 388-89. The pacquettes were allegedly defective in that they "could not withstand the pressure applied to them in the binding process," causing leaks and damage to the printed advertising cards to which they were attached. Ibid. Noting that damage to third-party property is a tort liability and not a business risk or work performance issue, we held that the claims for damage to the advertising cards fell outside of the business risk exclusion because the cards were separate and distinct from the pacquettes prepared by the insured. Id. at 398-99.

Similarly, in Firemen's, we explained that "the alleged damage was the cost of replacing sub-standard firewalls" and

"[t]he complaint did not allege that the firewalls caused damage to the rest of the building or to any other person or property." Firemen's, supra, 387 N.J. Super. at 445. "Moreover, our courts have stressed that actual physical damage is required, not just economic loss or diminution, as a result of the faulty work." Ibid. Put another way, coverage does not exist where the alleged harm is "limited to the cost of curing the defects." Ibid. See also Aetna Cas. & Sur. Co. v. Ply Gem Indus., Inc., 343 N.J. Super. 430, 450 (App. Div.) (holding that the complaints at issue alleged damage to property other than that installed by the contractor), certif. denied, 170 N.J. 390 (2001); Hartford Ins. Grp. v. Marson Constr. Corp., 186 N.J. Super. 253, 259 (App. Div. 1982) (noting that the cost of correcting defective workmanship would not be covered but that "damage done by [the] defective workmanship to the metal panels installed by another prime contractor" would be), certif. denied, 93 N.J. 247 (1983).

Here, Vollers was engaged to both (1) excavate the entire property and install a retaining wall under its contract with Joseph A. Natoli Construction Corporation (Natoli site contract), and (2) relocate a water main under the EWC/Vollers Agreement. At the time of the February slope failure, Vollers crews were engaged in both excavating the specific slope that failed and in trenching for the water line about seventy feet

away. Although damages were not specified in its original claims, Watchung ultimately alleged that the slope failure harmed it because of the time and cost involved in properly re-excavating the slope and installing a more substantial retaining wall.

Put simply, the damages alleged were "limited to the cost of curing the defects" of Vollers' work. Firemen's, supra, 387 N.J. Super. at 445. Vollers was contractually obligated to provide a properly-excavated site and completed retaining wall and Watchung's damages were directly related to getting the building site and wall into an acceptable condition, by re-excavating the site and installing an enhanced retaining wall. The scope of the "fix" needed in this case was broad, but the Court has recognized that a party's obligation "as a matter of contract law to make good on products or work which is defective" could "extend to an obligation to completely replace or rebuild the deficient product or work." Weedo, supra, 81 N.J. at 240 (citation omitted).

Vollers argues that the claims at issue do not involve "recovery for the repair of its own work" because "EWC made no breach of contract or warranty claim seeking to have Vollers complete, repair or replace the relocated waterline." However, regardless of whether EWC or Watchung sought to compel Vollers to redo its own faulty work or hired others to provide proper

excavation and an appropriate retaining wall, the damages Watchung sought were solely to correct the alleged defects in Vollers' work and to put the site in the condition it bargained for had the excavation been performed correctly.

Vollers also argues that the business risk rule should not apply because damage to other property was alleged and, here, all that Vollers was doing was installing a water line in an isolated corner of the development site, yet the problem was that the entire slope collapsed. Under the business risk rule, a CGL policy does not cover the cost of replacing or redoing the insured's work. Whether the insured is performing that work under one contract or many does not change the basic analysis.

Accordingly, we affirm Judge Coburn's decision that Vollers failed to establish that Watchung's claims came within the general grant of CGL coverage in the Vollers Policy.

Vollers also contends that the judge erred in holding that the particular part exclusion applied by improperly accepting "the position that the entire shopping center should be viewed as one undifferentiated worksite at which Vollers was working, rather than as discrete contracts and discrete properties and areas." It argues, "Vollers was not sued for damage to the same property it was working on, nor even an installation to be used for the same owner. It was being sued for alleged negligence in

the construction of a pipeline to be owned, operated (and produce revenue) for EWC."

Since we agree with the trial judge that Watchung's claims did not come within the general grant of coverage under the Vollers Policy, we need not reach this issue. However, the judge determined that the particular part exclusion also applied and for completeness we briefly address this issue.

The particular part exclusion provides that the Vollers Policy does "not apply to damage to [] [t]hat particular part of any property" where the insured is "performing operations, if the 'property damage' arises out of those operations" or that requires restoration, repair or replacement because the insured's work "was incorrectly performed on it."

The Court has noted that exclusions in an insurance policy should be narrowly construed. Nav-Its, Inc. v. Selective Ins. Co., 183 N.J. 110, 119 (2005) (citing Princeton Ins. Co. v. Chunmuang, 151 N.J. 80, 95 (1997)). "Nevertheless, if the exclusion is 'specific, plain, clear, prominent, and not contrary to public policy,' it will be enforced as written." Ibid.

Vollers' primary argument is that the "particular part" of property where it was performing operations should only be considered to be the precise area of the EWC's easement for the water line and any alleged damage outside that easement area

does not fall within the exclusion. However, Vollers does not deny the accuracy of the trial court's statement that "Vollers was the contractor doing all of the excavation work on this particular property," nor does it contend that Watchung alleged any type of damage caused by work other than excavation work. Moreover, the Vollers Policy was not limited to coverage for work done on the water main alone, but insured Vollers as a company for all of its work. We agree the particular part exclusion operates to preclude coverage here because, even under a narrow construction, the facts require the conclusion that the location of the February slope failure was the "particular part" of Watchung's property where Vollers was "performing operations" and the damage alleged resulted from Vollers' work.

Vollers contends that the law of the case doctrine requires the application of the narrow reading of the particular part exclusion. However, the fact that Vollers was performing operations under two separate contracts in the vicinity of the February slope failure and that, as a result, Watchung was obliged to pursue separate remedies in separate forums against EWC and others does not alter the analysis concerning the scope of the exclusion.

Finally, Vollers asserts that the trial court erred in interpreting the "arising out of" language in the particular part exclusion because Vollers presented evidence at arbitration

that the slope failures were not caused by Vollers' work, but because "the slope was inherently unstable" and Watchung "attempt[ed] to conceal that condition." We disagree, and affirm the judge's determination that the particular part exclusion applies to bar coverage for the Watchung/Vollers claims.

Vollers furthers contends that "the trial court presumed that the dismissal of the tort claims excused Travelers from ever having any duty to defend" Vollers and EWC, and that this was in error.

The Court has recently reiterated that "an insurer's duty to defend is determined by the nature of the claims alleged in the complaint and not the merits of those claims." Occhifinto v. Olivo Constr. Co. LLC, 221 N.J. 443, 452-53 (2015) (citing Voorhees, supra, 128 N.J. 165). "[W]here an insured or a third-party beneficiary of an insurance policy has established the carrier's duty to defend, counsel fees are recoverable regardless of the liability determination in the underlying case." Ibid. See also Pressler & Verniero, Current N.J. Court Rules, comment 2.6 on R. 4:42-9 (2016) ("[A]n insured entitled to a defense under the policy is entitled to an award of attorney's fees for the defense even if he is later determined not to be entitled to indemnification.").

We have noted that the duty to defend is broader than the duty to indemnify and is "itself a meaningful benefit." S.T. Hudson, supra, 388 N.J. Super. at 606 (quoting Robert W. Hayman, Inc. v. Acme Carriers, Inc., 303 N.J. Super. 355, 357 (App. Div. 1997)). The duty to defend "is triggered when the complaint against the insured 'states a claim constituting a risk insured against.'" Ibid. (quoting Danek v. Hommer, 28 N.J. Super. 68, 77 (App. Div. 1953), aff'd o.b., 15 N.J. 573 (1954)).

"To determine whether an insurer has a duty to defend, the complaint is 'laid alongside the policy' to compare the allegations with the language of the policy." Ibid. (citation omitted). If "the comparison reveals that, if the allegations of the complaint are sustained, the insurer will be required to pay any resulting judgment," then the duty to defend arises. Ibid. "Any doubts are resolved in favor of the insured." Ibid. (citing Voorhees, supra, 128 N.J. at 173; Danek, supra, 28 N.J. Super. at 77). If a complaint states "multiple alternative causes of action" and one or more of them would be covered, then "the duty will continue until every covered claim is eliminated." Voorhees, supra, 128 N.J. at 174. "The wording of the complaint need not be articulate so long as a covered claim is made." S.T. Hudson, supra, 388 N.J. Super. at 606.

However, "[i]f an excluded claim is made, the insurer has no duty to undertake the expense and effort to defeat it,

however frivolous it may appear to be." Horesh v. State Farm Fire & Cas. Co., 265 N.J. Super. 32, 39 (App. Div. 1993). "The insurer need not provide the defense at the outset if the allegations include claims that are not covered by the policy as well as claims that are covered or if the question of coverage is not, by its nature, capable of determination in the underlying action against the insured." Muralo Co. v. Emp'rs Ins. of Wausau, 334 N.J. Super. 282, 289-90 (App. Div. 2000), certif. denied, 167 N.J. 632 (2001).

The mere assertion of a claim for "negligence" does not necessarily trigger a duty to defend. In Harleysville Ins. Cos. v. Garitta, 170 N.J. 223, 236 (2001), the Court rejected the argument that "allegations of 'recklessness, negligence and carelessness' contained in the wrongful death complaint" triggered the insurer's duty to defend, where "the gravamen of the wrongful death action" was that the injury was caused by a "single course" of intentional conduct.

Similarly, although Watchung used the word "negligence" in its action against Vollers, the gravamen of the Watchung/Vollers claims was that Vollers was contractually obligated to properly excavate the site, and failed to do so. Also, Watchung failed to point to any independent, non-contractual duty owed by Vollers that could arguably have supported a claim for tort liability. Therefore, the inclusion of an allegation of

"negligence" did not change the gravamen of the Watchung/Vollers claims from contract to tort and the duty to defend was not triggered.

Lastly, Vollers contends that its policy "includes a special blanket contractual liability rider" that modifies the standard policy and "explicitly removes the 'your work' exclusion with respect to any work that Vollers contracts for EWC." Vollers argues that the indemnification provision of the EWC/Vollers Agreement "falls precisely within the [blanket] rider's scope of coverage."

Vollers relies on the "BLANKET ADDITIONAL INSURED (Contractors)" endorsement (additional insured endorsement), which provides, in pertinent part:

> WHO IS AN INSURED (Section II) is amended to include any person or organization you are required by written contract to include as an insured, but only with respect to liability arising out of "your work". This coverage does not include liability arising out of the independent acts or omissions of such person or organization. The written contract must be executed prior to the occurrence of any loss.

We reject Vollers' argument on this point. By its plain language, the additional insured endorsement merely enlarges the universe of persons to be included within the scope of a "named insured" under the Vollers Policy. It does not broaden the

scope of the general coverage to be provided or weaken the specific exclusions at issue in this case.

Accordingly, we affirm Judge Coburn's grant of summary judgment to Travelers.

EWC Appeal

EWC, in this back-to-back matter, also appeals the October 11, 2013 order, dismissing all claims against Travelers with prejudice. The EWC/Vollers Agreement required Vollers to "furnish and maintain such public liability and property damage insurance so as to constitute adequate protection against any and all loss including losses caused by the negligence of [Vollers]." As discussed above, the EWC/Vollers Agreement provided that Vollers would indemnify EWC, and Travelers issued the Vollers Policy. As we decided with regard to Vollers' appeal, we have affirmed the court's decision granting summary judgment to Travelers.

Travelers moved to dismiss EWC's appeal, contending that EWC did not have standing to appeal, and EWC moved to consolidate this appeal with Vollers' appeal. By orders dated June 12, 2014, we denied both motions, further ordering that (1) the issue of EWC's standing could be briefed by the parties and decided by the merits panel, and (2) the related appeals would be calendared back-to-back.

Travelers argues that EWC lacks standing to pursue the

appeal because it asserted no direct claim for coverage, filed no papers in response to Travelers' motion for summary judgment, and did not appear at the hearing on the motion. In response, EWC contends that New Jersey law takes a very liberal view of standing and that it "has an undisputed financial interest in its coverage under the Travelers Policy sufficient to confer standing to bring this appeal."

"Ordinarily, an issue may not be raised on appeal if not raised in the proceedings below." N.J. Dep't of Envtl. Prot. v. Huber, 213 N.J. 338, 372 (2013) (citing N.J. Div. of Youth & Family Servs. v. M.C. III, 201 N.J. 328, 339 (2010)). See also State v. Rockford, 213 N.J. 424, 450 n.8 (2013) (criticizing the Appellate Division panel for deciding an issue "not raised by either party before the trial court or the Appellate Division panel"); State v. Robinson, 200 N.J. 1, 21 (2009) (stating that generally, "an appellate court should stay its hand and forego grappling with an untimely raised issue").

EWC argues that "the insurance coverage issues" were adequately raised and preserved at the trial level because "[t]he issue of whether Watchung's claims presented an occurrence under the Traveler's Policy was fully briefed by Travelers and considered by the trial court." However, because EWC filed no direct claims against Travelers and did not

participate in the summary judgment motion, the issue of EWC's rights under the policy, if any, were never addressed by the trial court. EWC seeks to raise this issue for the first time on appeal, and we discern no reason to depart from the general principle precluding such consideration.

EWC does not dispute that it never made a claim against Travelers in the underlying litigation and that it did not oppose Travelers' motion for summary judgment as to the claims Vollers asserted. In contending that it nevertheless has standing to appeal that summary judgment, EWC relies on our decision in Sierfeld v. Sierfeld, 414 N.J. Super. 85 (App. Div. 2010), but that reliance is misplaced.

In Sierfeld, the plaintiff sued her parents for injuries she sustained as a result of a dog bite, and she also filed a declaratory judgment action against Allstate, her parents' insurer, contending it was obliged to provide coverage under her parents' homeowners and umbrella insurance policies. Id. at 89. We disagreed with Allstate's contention that the plaintiff's parents had no standing to appeal the order granting summary judgment in its favor, noting, among other factors, that (1) Allstate had filed a cross-claim directly against the parents seeing a declaration that it had no duty to provide coverage; (2) the parents filed a "John Doe" cross-claim that was "based on their rights under the policies" even though

Allstate was not specifically named; and (3) the parents joined in their daughter's cross-motion for summary judgment against Allstate. Id. at 93. Therefore, direct claims were filed by both Allstate and the parents against the other, the parents took a position, and appeared on Allstate's motion for summary judgment. Those circumstances do not exist here, and EWC offers no support suggesting that a party who does not assert a claim in the trial court, can appeal the dismissal of another party's claims.

In Donofrio v. Farr Lincoln Mercury, Inc., 54 N.J. Super. 500, 503 (App. Div. 1959), we considered an appeal by Farr Lincoln Mercury, Inc. (Farr), which effectively did not challenge the judgment that had been entered in the plaintiff's favor against Farr, but argued that the jury should have also assessed liability against Farr's two co-defendants. Id. at 504-05. As to one of those co-defendants, we held that Farr had no standing to argue on appeal that an erroneous jury charge had improperly benefited that defendant, noting that "Farr filed no cross-claim against [that defendant] nor did he ask [for] any relief against him in the pleadings, the pretrial order, or at the trial." Id. at 504-07. We also noted that Farr's choice "not [to] file any cross-claim, nor even say orally at the trial that it asserted one" may have resulted from the view that Farr "had no right of contribution or indemnity against" that co-

defendant, and it held that asserting a different view for the first time on appeal was inappropriate. Id. at 507. We concluded Farr should be barred from challenging actions benefiting another, noting, "Any other course would enable an appellant who never believed that he had any rights against his exonerated co-defendant, and who never asserted any claim against him, to appeal upon alleged errors favorable to the exculpated defendant." Ibid. EWC, like Farr, did not assert any direct claim or object below to the trial court's decision that benefited another party, yet now on appeal seeks to reverse that decision.

Our decision in Yun v. Ford Motor Co., 276 N.J. Super. 142 (App. Div. 1994), rev'd on dissent on other grounds, 143 N.J. 162, 163 (1996), is also instructive. At the summary judgment stage, the plaintiff "specifically told the court that he did 'not oppose the motion made by Ford Motor Company'" (Ford). Id. at 149. Both the majority and dissent agreed that, accordingly, the plaintiff had no standing to appeal the grant of summary judgment in favor of Ford. Id. at 149, 158. Here, too, EWC, although it did not consent, did not oppose Travelers' summary judgment motion, so it should not be heard to complain to this court about the trial court's decision on that motion.

In a footnote to its brief, EWC attempts to distinguish Yun on the grounds that the plaintiff's attorney in Yun made an

"affirmative representation" of non-opposition at the motion hearing. This, however, is a distinction without a difference. A party cannot appeal from an order to which it consented. See, e.g., N.J. Sch. Constr. Corp. v. Lopez, 412 N.J. Super. 298, 308-09 (App. Div. 2010) (citations omitted) (noting that the right of appeal "contemplates a judgment entered involuntarily against the losing party" and "an 'order . . . consented to by the attorneys for each party . . . is . . . not appealable'").

EWC stresses the Court's "liberal standing policy elevates substance over form and furthers the interests of justice," and argues that "[s]tanding in New Jersey requires solely that a party have a sufficient stake and real adverseness with respect to the subject matter." This contention, however, might have supported an argument that EWC had standing to assert a claim for coverage against Travelers at the trial level, had it opted to do so, but it does not inform the question of whether EWC has standing to assert such claims for the first time on appeal.

Moreover, EWC's contention that it "is a real party in interest" and "has an undisputed financial interest in its coverage under the Travelers' Policy" ignores the fact that it never directly demanded coverage from Travelers and never made a claim on its own behalf. While it is true that Vollers alleged in the fourth-party complaint that the Vollers Policy covered claims against EWC as well as itself, Vollers could only have

enforced its own rights to coverage, not another's. See Abbott v. Burke, 206 N.J. 332, 371 (2011) (noting that "a litigant typically does not have standing to assert the rights of third parties"). Because EWC made no demand for coverage and no direct claim below, we dismiss EWC's appeal.

Accordingly, we affirm the grant of summary judgment to Travelers in the Vollers' appeal and dismiss EWC's appeal.