NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-5156-10T2

SPARTAN OIL COMPANY,

Plaintiff-Appellant,

v.

NEW JERSEY PROPERTY-LIABILITY
INSURANCE GUARANTY ASSOCIATION,

Defendant-Respondent,

and

PLANET INSURANCE COMPANY and
RELIANCE INSURANCE COMPANY,

Defendants.

Argued February 27, 2012 - Decided June 8, 2012

Before Judges Sabatino, Ashrafi and
Fasciale.

On appeal from the Superior Court of New
Jersey, Law Division, Morris County, Docket
No. L-2487-10.

Kristin V. Hayes argued the cause for
appellant (Wiley Malehorn Sirota &
Raynes, attorneys; Ms. Hayes, of counsel
and on the brief; Carolyn R. Conway, on the
brief).

Hugh P. Francis argued the cause for
respondent (Francis & Berry, attorneys;

Mr. Francis, of counsel; Joanna Huc, on the brief).

PER CURIAM

Plaintiff Spartan Oil Company appeals from a June 3, 2011 order granting summary judgment to defendant New Jersey Property-Liability Insurance Guaranty Association (NJPLIGA) and dismissing plaintiff's coverage action for environmental contamination. We affirm.

I.

In reviewing a grant of summary judgment, we apply the same standard under Rule 4:46-2(c) that governs the trial court. See Liberty Surplus Ins. Corp. v. Nowell Amoroso, P.A., 189 N.J. 436, 445-46 (2007). We 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). Viewed most favorably to plaintiff, the summary judgment record establishes the following facts.

Spartan Oil Company was in the business of delivering heating oil. In the early 1990s, while operating under the name Region Oil Company, it purchased and subsequently renewed a commercial motor vehicle liability policy from Planet Insurance

Company for coverage for its fleet of delivery vehicles. Spartan[1] delivered heating oil to Plaza Cleaners in Morristown during the coverage period of the insurance policies, March 1992 through March 1994. Its drivers pumped heating oil from its vehicles into an external intake pipe located on the outside of Plaza Cleaners, and the fuel traveled through an internal feed line to an underground tank under the basement. Unbeknownst to Spartan, the fuel line was corroded and had developed holes. Over time, seepage from the fuel line caused serious environmental contamination, which the owner of the property, Morristown Associates, did not discover until 2003.

Morristown Associates filed suit against several oil delivery companies in 2006, and Spartan was added as a defendant in 2009. The amended complaint of Morristown Associates alleged liability of the heating oil companies under three theories: violations of the Spill Compensation and Control Act, N.J.S.A. 58:10-23.11 to -23.11z; violations of the Water Pollution Control Act, N.J.S.A. 58:10A-1 to -35; and common law negligence. Eventually, Spartan was successful in obtaining dismissal of the complaint by summary judgment because the statute of limitations had run.

[1] Except when quoting from documents in the record, we will use the designation Spartan to mean both Region Oil Company and Spartan Oil Company.

In January 2010, Spartan notified defendant Reliance Insurance Company, as the successor to Planet Insurance Company, that it was seeking reimbursement of its defense costs based on the commercial motor vehicle liability policies it had purchased in 1992 and 1993. Because Reliance was insolvent at that time, defendant NJPLIGA was responsible for the policies pursuant to the New Jersey Property-Liability Insurance Guaranty Association Act, N.J.S.A. 17:30A-1 to -20.

NJPLIGA denied Spartan's claim of coverage based on subsection a(2) of the pollution exclusion provision of each policy, which stated in relevant part that the insurance coverage did not apply to:

> POLLUTION EXCLUSION
>
> . . . .
>
> a. "Bodily injury" or "property damage" arising out of the actual, alleged or threatened discharge, dispersal, release or escape of pollutants:
>
> 1) Before the pollutants or any property in which the pollutants are contained are moved from the place where they are accepted by the "insured" for movement into or onto the covered "auto" or
>
> 2) After the pollutants or any property in which the pollutants are contained are moved from the covered "auto" to place [sic] where they are finally delivered,

> disposed of or abandoned by the "insured".
>
> . . . .
>
> Pollutants means any solid, liquid, gaseous or thermal irritant or contaminant . . . .
>
> [Emphasis added.]

In July 2010, Spartan filed the present action seeking a declaratory judgment that it is entitled to reimbursement of its defense expenses of $208,800 for the underlying action brought by Morristown Associates. NJPLIGA filed an answer denying liability for the defense costs. Both parties moved for summary judgment on the question of whether there was coverage under the policies in light of the pollution exclusion provisions.[2] In an oral decision, the trial court found that no genuine issues of material fact existed, and it concluded that the pollution exclusion of the policies barred coverage. The court reasoned:

> [T]his pollut[ion] occurred after the oil referred to as a pollutant . . . [was] moved from the covered auto, . . . into the pipes and into the system, and they were delivered. They were finally delivered. There is no way that the company could turn off or . . . retrieve the oil once it left the nozzle, and that's delivery.
>
> Consequently, given that policy [sic] direct, clear, and unambiguous meaning which

[2] Spartan had dismissed its complaint against defendants Planet Insurance and Reliance Insurance.

> I believe it has, under these circumstances, there is no coverage.

By order dated June 3, 2011, the court denied Spartan's motion and granted NJPLIGA's motion for summary judgment and dismissal of the cause of action. This appeal followed.

II.

Spartan contends the trial court erred in its "interpretation of the law and the legal consequences that flow from established facts[, which] are not entitled to any special deference." Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995). We agree that the interpretation of an insurance policy upon established facts is a question of law for the court to determine, Simonetti v. Selective Ins. Co., 372 N.J. Super. 421, 428 (App. Div. 2004), and that our standard of review is plenary.

A duty to defend under an insurance policy is "neither identical nor coextensive" with the duty to indemnify the insured against losses, and it "must be analyzed separately." Flomerfelt v. Cardiello, 202 N.J. 432, 444 (2010). Spartan argues that long-standing case law requires that the court examine only the four corners of the underlying complaint to determine whether the insurer has a duty to defend. See Abouzaid v. Mansard Gardens Assocs., LLC, 207 N.J. 67, 79-80 (2011); Flomerfelt, supra, 202 N.J. at 444-45; Voorhees v.

Preferred Mut. Ins. Co., 128 N.J. 165, 173-174 (1992); Ohio Cas. Ins. Co. v. Flanagin, 44 N.J. 504, 512 (1965); Danek v. Hommer, 28 N.J. Super. 68, 77 (App. Div. 1953), aff'd o.b., 15 N.J. 573 (1954).

The Supreme Court recently restated the procedural analysis and legal principles that govern an insurer's duty to defend:

> "[T]he complaint should be laid alongside the policy and a determination made as to whether, if the allegations are sustained, the insurer will be required to pay the resulting judgment, and in reaching a conclusion, doubts should be resolved in favor of the insured." Thus, if "the complaint comprehends an injury which *may* be within the policy," a duty to defend will be found. In other words, "potentially coverable" claims require a defense.
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> . . . .
>
> [T]he potential merit of the claim is immaterial: the duty to defend "is not abrogated by the fact that the cause of action stated cannot be maintained against the insured either in law or in fact — in other words, because the cause is groundless, false or fraudulent." Moreover, the duty to defend remains even if the asserted claims are "poorly developed and almost sure to fail."
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> [Abouzaid, supra, 207 N.J. at 79-81 (citations omitted).]

Thus, analysis of the duty to defend emphasizes "the nature of the claim asserted, rather than the specific details of the incident or the litigation's possible outcome . . . ."

Flomerfelt, supra, 202 N.J. at 444. It is the nature of the claim "that governs the insurer's obligation." Ibid. However, "[w]here . . . the complaint excluded the potential for a covered claim, no defense [is] warranted." Abouzaid, supra, 207 N.J. at 86.

Spartan contends the trial court erred in looking beyond the face of the complaint filed by Morristown Associates and considering the underlying facts. More specifically, it argues that "[t]he fundamental flaw in the trial court's reasoning is that it made determinations - when the delivery was complete; when the discharge occurred; and whether the delivery was made correctly - not relevant to the coverage determination."

Spartan's argument relies on an incomplete picture of the law. At times and in particular circumstances, the Supreme Court has condoned looking beyond a complaint to the underlying facts alleged by the claimant. Harleysville Ins. Cos. v. Garitta, 170 N.J. 223, 236, 238 (2001) (duty to defend wrongful death action was assessed by looking past the complaint to the insured's actual intent "in unique circumstance[s]" where the "heart" of the complaint was based on "a single course of conduct"); SL Indus., Inc. v. Am. Motorists Ins. Co., 128 N.J. 188, 198-99 (1992) (duty to defend age discrimination action was triggered by facts disclosed in interrogatories, which insurer

could not ignore even though they were not in the pleadings); Hartford Accident & Indem. Co. v. Aetna Life & Cas. Ins. Co., 98 N.J. 18, 24-25 (1984) (duty to defend negligence action required examination of extrinsic evidence because critical fact for coverage to apply was not relevant to underlying action and thus was not pleaded); Burd v. Sussex Mut. Ins. Co., 56 N.J. 383, 388-89 (1970) (duty to defend atrocious assault action required examination of facts beyond complaint when existence of coverage required resolution of factual issue not decided by the underlying case); Polarome Int'l, Inc. v. Greenwich Ins. Co., 404 N.J. Super. 241, 272-277 (App. Div. 2008) (duty to defend personal injury action required examination of facts beyond the complaint because it was impossible for the insurer to determine from the complaint whether exposure to insured product occurred during the policy period), certif. denied, 199 N.J. 133 (2009).

In Burd, supra, 56 N.J. at 388, Chief Justice Weintraub stated: "when coverage, *i.e.*, the duty to pay, depends upon a factual issue which will not be resolved by the trial of the third party's suit against the insured, the duty to defend may depend upon the actual facts and not upon the allegations in the complaint." Chief Justice Weintraub provided the following illustration:

> [I]f a policy covered a Ford but not a Chevrolet also owned by the insured, the

> carrier would not be obligated to defend a third party's complaint against the insured which alleged the automobile involved was the Ford when in fact the car involved was the Chevrolet. The identity of the car, upon which coverage depends, would be irrelevant to the trial of the negligence action.
>
> [Ibid.]

We must view the allegations of Morristown Associates' amended complaint side-by-side with the terms of the insurance policies to determine if it alleges facts requiring coverage. If the policies are ambiguous, they will be interpreted most favorably to Spartan to give effect to the insured's reasonable expectation of coverage. Flomerfelt, supra, 202 N.J. at 441-43.

The policies provided coverage for "property damage . . . caused by an accident and resulting from the ownership, maintenance or use of a covered auto," but they excluded coverage for "discharge, dispersal, release or escape of pollutants: . . . [a]fter the pollutants . . . are moved from the covered auto to [the] place where they are finally delivered, disposed of or abandoned by the insured." (Emphasis added). Spartan argues that the Morristown Associates complaint alleged negligence of Spartan "during" the delivery of heating oil to Plaza Cleaners and, therefore, the pollution exclusion did not apply.

The amended complaint alleged generally that Spartan was negligent because it "knew, or in the exercise of reasonable care, should have known, that the improper delivery of fuel oil created a risk of harm to the Property of [Morristown Associates]," and that "contamination of [the] Property was proximately caused by [Spartan's] negligence, including the failure to use reasonable care in the delivery of fuel oil, [and] the failure to promptly notify [Morristown Associates] of the contamination." (Emphasis added). More specifically, the factual allegations of the complaint stated the following in paragraphs twelve and thirteen:

> 12. On multiple occasions . . Region Oil . . . delivered fuel oil to an underground storage tank, owned by Plaza Cleaners, and located in the leasehold of Plaza Cleaners.
>
> 13. On information and belief, the fill and vent lines to the underground storage tank at Plaza Cleaners were corroded. As a result, the fuel oil delivered by . . . Region Oil . . . was discharged into the soil and groundwater at the Property.
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> [Emphasis added.]

The complaint contained no explicit allegation either that Spartan's negligence occurred "during" delivery of the heating oil or "after" the oil was "finally delivered." However, the reference to "the fuel oil delivered" implied that the delivery had already occurred.

While the allegations of the complaint may contain some ambiguity as to the specific time that the pollution occurred in relation to the oil that was delivered, the policies themselves are not ambiguous. They exclude coverage after final delivery of the oil. In an insurance policy, an ambiguity exists when "the phrasing of the policy is so confusing that the average policyholder cannot make out the boundaries of coverage." Weedo v. Stone-E-Brick, Inc., 81 N.J. 233, 247 (1979). The phrasing of the exclusion in this case is not confusing.

An unambiguous insurance contract is interpreted in accordance with the plain and ordinary meaning of its terms, Voorhees, supra, 128 N.J. at 175, in light of "'the objectively reasonable expectations of the insured,'" Nav-Its, Inc. v. Selective Ins. Co., 183 N.J. 110, 118 (2005) (quoting Doto v. Russo, 140 N.J. 544, 556 (1995)). Exclusions are to be interpreted narrowly. Princeton Ins. Co. v. Chunmuang, 151 N.J. 80, 95 (1997).

We are not aware of legal authority that explicitly defines "delivery" in this insurance context. The policies themselves also do not define the phrase "finally delivered." The trial court reasonably relied on a common definition of "deliver" as meaning to have given into another's possession. The court stated:

> I refer to the simple definition of deliver. It's commonly interpreted as meaning, quote, "to have given into another's possession or keeping or surrender something." That's what happened here.
>
> Although the fuel oil discharge and the resulting contamination occurred while the fuel oil was traveling through the fill pipes toward the tank, it occurred after Spartan Oil deposited the oil from its truck into the heating oil system. As such, Spartan Oil had already surrendered the fuel oil in any rational meaningful and unambiguous way.
>
> Under these circumstances, the pollution exclusion is clearly triggered.

The trial court also found that the complaint contained no allegation of negligence in the manner in which Spartan's drivers delivered the oil into the intake pipe at Plaza Cleaners. We agree with the trial court's interpretation of the policies and its reading of the Morristown Associates complaint.

Whether the term is "delivered" or "finally delivered," the delivery of the oil occurred upon the fuel entering the property and heating system of Spartan's customer, Plaza Cleaners. At that point, Spartan no longer had possession or control of the oil. It had been transferred into the possession of Plaza Cleaners.

There is no allegation in the complaint that the seepage and contamination occurred while the oil was in possession of Spartan and before its delivery to Plaza Cleaners. There is

also no allegation that Spartan spilled oil onto the soil and into groundwater in the course of pumping it from its vehicle to the intake pipe at Plaza Cleaners.[3]

The policies in this case contained an exception to the pollution exclusion for circumstances where the fuel was discharged from the vehicle but not delivered to the place delivery was intended. The exception stated:

> Paragraphs a. and b. of this exclusion do not apply if:
>
> 1) The pollutants or any property in which the pollutants are contained are upset, overturned or damaged as a result of the maintenance or use of a covered "auto" and
>
> 2) The discharge, dispersal, release or escape of the pollutants is caused directly by such upset, overturn or damage.

While not directly applicable to spillage from the nozzle or the hose at the delivery point, this exception indicates that an accidental spill from the vehicle while the oil was still in Spartan's possession would be covered by the policy. The exception addresses the finding of no coverage in circumstances

[3] Although outside the allegations of Morristown Associates' complaint, expert reports were prepared in the underlying case, and they included no contention that Spartan or any other oil delivery companies had spilled oil onto the ground as they were transferring the fuel from their vehicles to the intake pipe.

where the fuel is unintentionally discharged from the vehicle and causes property damage, as occurred in A & S Fuel Oil Co., Inc. v. Royal Indem. Co., Inc., 279 N.J. Super. 367, 368 (App. Div.), certif. denied, 141 N.J. 98 (1995).

More to the point, the trial court in this case did not conclude, as Spartan argues, that the pollution exclusion applied simply because the fuel was discharged from the nozzle of Spartan's truck. It was its discharge into Plaza Cleaners' heating system that constituted final delivery and triggered the pollution exclusion.

The essential fact for determining insurance coverage in this case is when delivery of the fuel oil to its final destination occurred. That fact was not determined during the underlying Morristown Associates litigation because the claims against Spartan were dismissed on the statute of limitations, not their merits. Consequently, Burd, supra, 56 N.J. at 388-89, suggests these circumstances are appropriate for a court to look past the express words of the underlying complaint to come to an understanding of what the claimant actually alleged as the basis for Spartan's liability.

We conclude that the meaning of "finally delivered" in the pollution exclusion is the same as the meaning of "delivered" in the Morristown Associates complaint. The heating oil was

"finally delivered" or just "delivered" when it was placed into the possession of the customer. That occurred when the oil entered the customer's heating system, which included its intake and fill lines.

In sum, we agree with the trial court's interpretation of the insurance policies and its understanding of the allegations of the underlying complaint. Because Spartan had already and finally "delivered" the oil before the contamination occurred, the pollution exclusion applied and the insurance policies did not cover liability for the contamination.

Affirmed.