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BASF CATALYSTS, LLC (F/K/A ENGELHARD CORPORATION)

Plaintiff-Appellant

V.

ALLSTATE INSURANCE COMPANY, (AS SUCCESSOR-IN-INTEREST TO NORTHBROOK EXCESS & SURPLUS LINES INSURANCE COMPANY); CONTINENTAL INSURANCE COMPANY; EVEREST REINSRUANCE COMPANY (AS SUCCESSOR-IN-INTEREST TO PRUDENTIAL REINSURANCE COMPANY); FEDERAL INSURANCE COMPANY, GREAT NORTHERN INSURANCE COMPANY; HARTFORD ACCIDENT & INDEMNITY COMPANY; LEXINGTON INSURANCE COMPANY; NEW JERSEY MANUFACTURERS INSURANCE COMPANY (AS SUCCESSOR-IN-INTEREST TO NEW JERSEY MANUFACTURERS CASUALTY COMPANY); NEWARK

SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION
DOCKET NO: A-003029-22 TEAM 2

CIVIL ACTION

ON APPEAL FROM:
SUPERIOR COURT, LAW DIVISION, MIDDLESEX COUNTY
DOCKET No. MID-L-2061-05

SAT BELOW:
HON. THOMAS D. McCLOSKEY, J.S.C.

BRIEF OF PLAINTIFF-APPELLANT, BASF CATALYSTS, LLC (F/K/A ENGELHARD CORP.)

Pro hac vice admission pending in Appellate Division:

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INSURANCE COMPANY; ONEBEACON AMERICA INSURANCE COMPANY (AS SUCCESSOR-IN-INTEREST TO COMMERCIAL UNION INSURANCE COMPANY AND EMPLOYERS LIABILITY ASSURANCE CORPORATION); ROYAL INDEMNITY COMPANY; ROYAL INSURANCE COMPANY OF AMERICA (AS SUCCESSOR-IN-INTEREST TO ROYAL INSURANCE COMPANY AND ROYAL GLOBE INSURANCE COMPANY); TRAVELERS CASUALTY & SURETY COMPANY (AS SUCCESSOR-IN-INTEREST TO AETNA CASUALTY & SURETY COMPANY); UNITED STATES FIRE INSURANCE COMPANY; CERTAIN UNDERWRITERS AT LLOYD'S AND BRITISH COMPANIES; AND JOHN DOES 1-2

Defendants and, as to United States Fire Insurance Company, Appellee and Cross-Appellant.

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PRELIMINARY STATEMENT

In 2011, after years of extensive discovery and an evidentiary hearing that lasted over two months, the Hon. Nicholas Stroumtsos, J.S.C., entered an Order holding that the Plaintiff-Appellant, BASF Catalysts, LLC (f/k/a Engelhard Corp.) ("BASF"), was entitled to roughly $12.8 million in insurance coverage for costs that it incurred to remediate long-term environmental property damage caused by the release of chlorinated volatile organic compounds ("CVOCs") into the soil and groundwater at its former operating facility located in Plainville, Massachusetts (the "Site"). Significantly, a primary fact issue during the hearing was the timing and location of the release of CVOCs at the Site, because Defendant-Appellant United States Fire Insurance Company ("U.S. Fire") and the other remaining Defendants denied that any CVOC releases occurred during their policy periods. Because of this defense, BASF developed a detailed fact record and provided expert testimony demonstrating that most of the CVOC releases at the Site **did** occur during the U.S. Fire and other early policy periods. This fact record was cited by the Judge Stroumtsos in his January 2011 decision, with Judge Stroumtsos making detailed findings as to time periods during which releases of CVOCs occurred at several areas of the Site. These detailed findings, in turn, provided a foundation for the allocation of the $12.8 million in damages to specific policy periods, including the U.S. Fire policy period. That allocation

was initially performed by Judge William Dreier, J.A.D. (ret.), as Special Allocation Master, and adopted by the Hon. Vincent LeBlon, J.S.C. This appeal raises issues relating to Judge LeBlon's unexplained grant of a motion for reconsideration after first adopting Judge Dreier's allocation findings.

Two years after the trial court (J. LeBlon) unequivocally adopted Judge Dreier's August 3, 2015, Report and Recommendations ("RAR"), describing them as "well-reasoned" and "not clearly erroneous, contrary to law or an abuse of discretion," the trial court suddenly granted a Motion for Reconsideration and reversed itself, calling its original adoption of the RAR "palpably incorrect." In place of the fact-based allocation of BASF's damages adopted by Special Allocation Master Dreier after seven days of evidentiary hearings, and without any review of the extensive fact record in this case, the trial court adopted a a less-preferred and "probable fiction" of a "hybrid" time-on-the-risk allocation method and declared the date of the liability decision in this case, January 31, 2011, to be the end date of the allocation period. Tellingly, while Judge LeBlon rejected a fact-based allocation, the reconsideration decision nonetheless relied on the fact-based expert opinion from Dr. Powell as to the weighting of CVOC releases during the actual start and end dates for operational periods for five different areas at the Site. In contrast, the reconsidered and revised "end date" has no connection to factual history of operations at the Site, and, in particular,

the fact that, by 1986, operational releases of CVOCs had ceased and the CVOC plume in groundwater had stabilized.

The trial court's granting of reconsideration and adoption of a time-on-the-risk allocation method was an incorrect application of controlling Massachusetts law, which requires that damages for long-tail claims be allocated based on the quantum of damage that occurred during each policy period if possible. The court then compounded its error by selecting and combining fact-based start dates recognized by Judge Dreier with the date of the trial court's liability decision as the end date of the allocation period. The court's Order granting reconsideration (and ignoring the detailed factual findings of Judges Stroumtsos and Dreier) should be vacated, and this case should be remanded to the trial court for further proceedings consistent with the applicable Massachusetts law.

PROCEDURAL HISTORY

The case began as a dispute between BASF and 15 of its historic general liability insurance providers. (Pa0001-21). After nearly 18 years of litigation, only one of the insurance companies originally named as Defendants in this case remains, U.S. Fire. (Pa0041-42). All of the other Defendants have either settled or been dismissed through motion practice. (Pa0091-92).

BASF commenced this action by filing a Complaint in Middlesex County in March of 2005. (Pa0001-21). BASF's Complaint alleged claims of breach of contract and declaratory judgment arising out of its insurance companies' failure to fulfill their obligations under general liability insurance policies that BASF bought and paid for. (*Id*).

After an extended initial discovery period, in late 2009 and early 2010, the parties filed and briefed cross-motions for summary judgment on the issue of choice of law. BASF and certain of the insurance company Defendants moved for the application of New Jersey law. (Pa0088-89). Certain other insurance company Defendants moved for the application of Massachusetts law. (Pa0088). U.S. Fire did not file a motion on choice of law, nor did it join or oppose any of the other choice of law motions. (Pa0088-89).

On March 23, 2010, the trial court delivered a decision from the bench holding that Massachusetts law would apply to the interpretation of the "sudden and accidental" pollution exclusion contained in certain insurance policies involved in the case, and to the allocation of BASF's recoverable damages. (Pa0061-86). The trial court's choice of law decision is memorialized in a written Order dated April 7, 2010. (Pa0087-90).

A bench trial on the issue of liability was conducted between October 19, 2010, and January 6, 2011, with the Hon. Nicholas Stroumtsos, J.S.C., presiding

(the "2010 Liability Trial"). (Pa0091-92). As a result of summary judgment rulings and settlements, at the time of the trial, only three Defendants remained: U.S. Fire, OneBeacon America Insurance Company ("OneBeacon"), and Certain Underwriters at Lloyd's, London ("Underwriters"). (Pa0091)

The trial testimony and opening and closing arguments encompassed 30 trial days. (Pa0092). Live testimony was taken from seven witnesses, including multiple experts. (*Id*). Extensive exhibits, deposition testimony and written submissions were also made part of the court record. (*Id*). During the trial, U.S. Fire's primary defense was that despite heavy industrial operations during the 1950s and 1960s, none of the property damage at the site occurred until after 1973, when its policy expired. (Pa0094).

On January 31, 2011, the trial court issued a Letter Opinion and Order in which its rejected U.S. Fire's defense and found that property damage had occurred at the Site during U.S. Fire's policy period. (the "Jan. 31, 2011, Opinion and Order").[1] (Pa0091-137). In support of this determination, and as discussed further below, Judge Stroumtsos made detailed factual findings as to (i) where CVOC releases occurred based on differing plant operations, and (ii) and the start and end dates for each operation that resulted in CVOC releases.

[1] The Jan. 31, 2011, Opinion and Order was Judge Stroumtsos's last official order before retirement. (Pa0137).

(*Id*). The Jan. 31, 2011, Opinion and Order found that BASF had proven that it was entitled to insurance coverage for $12,827,154 of the investigation and remediation costs that it incurred as of December 31, 2009. (*Id*).[2] The Jan. 31, 2011, Opinion and Order also held that the allocation of BASF's covered damages and a determination of BASF's entitlement to attorneys' fees, costs, and interest would be resolved through subsequent proceedings. (Pa0137). Finally, the Jan. 31, 2011, Opinion and Order held that BASF is entitled to insurance coverage consistent with the Opinion for costs incurred after the date of the Opinion. *(Id)*.

After the trial court issued the Jan. 31, 2011, Opinion and Order, U.S. Fire moved for reconsideration, making the same arguments it made during trial, i.e., that BASF failed to prove that property damage occurred during U.S. Fire's policy period. (Pa0139). By Order dated June 21, 2012, the trial court denied U.S. Fire's Motion for Reconsideration.[3] (Pa0138-43). The court's opinion noted that Judge Stroumtsos sat as both the finder of fact and judge of the law and "in doing so, he heard the testimony of thirty-three (33) witnesses, reviewed

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[2] The court's Jan. 31, 2011, Opinion and Order contained a mathematical error that was corrected with consent of the parties by Order dated June 21, 2012. (Pa0146).

[3] After Judge Stroumtsos's retirement in 2011, the Hon. Vincent LeBlon, J.S.C., presided over this case until his retirement from the bench in 2022. Judge LeBlon issued the Order denying U.S. Fire's Motion for Reconsideration. (Pa0142-43).

more than 350 exhibits and listened to extensive argument by counsel." (Pa0141). The court concluded that under those circumstances, granting U.S. Fire's Motion for Reconsideration "would be acting as an appellate court without the benefit of reviewing the entire record." (*Id*).

After the trial court disposed of the Motions for Reconsideration, the parties moved to the allocation phase of the case. On May 20, 2013, the trial court appointed Judge William A. Dreier (ret.) to serve as the Special Allocation Master ("SAM") to preside over an evidentiary hearing on the allocation of damages and prepare and submit to the court a written RAR.[4] (Pa0144).

During the allocation phase, the parties engaged in further extensive discovery, after which the SAM held evidentiary hearings on the allocation of the covered damages identified in the Jan. 31, 2011, Opinion and Order. (Pa0144-45). The allocation hearing consisted of seven days of testimony and presentations that took place in the Spring of 2015. (*Id*). During the hearing, five witnesses, both fact and expert, testified live and the testimony of several other fact witnesses was presented by way of deposition. (Pa0145). As Judge Dreier noted in his RAR, the written material submitted to and reviewed by the SAM,

[4] The SAM also had authority to make a Report and Recommendation to the court on any dispositive motions relating to allocation issues. No such motions were filed.

"including motions, exhibits and transcripts, encompass four linear feet of material." (*Id*).

In his RAR, issued on August 3, 2015, the SAM first found that the "occurrence" that gave rise to the property damage at the Site "was the continued active release of hazardous materials into the soil and groundwater." (Pa0151). The SAM then applied a fact-based methodology by which he determined the costs incurred to remediate the property damage that occurred during each insurance policy period and allocated BASF's damages accordingly.[5] (Pa0151-58). When he allocated BASF's damages, the SAM relied on the factual findings in Judge Stroumtsos's Jan. 31, 2011, Opinion and Order as to the start and end dates for different plant operations where CVOC releases occurred and the testimony of BASF's environmental expert, Dr. Robert Powell, who the SAM described as "one of the most knowledgeable and articulate expert witnesses the SAM has had appear before him over the last 42 years." (Pa0148).

Based upon the trial court's factual findings, and the extensive testimony, exhibits and presentations of counsel, the SAM allocated BASF's covered damages incurred up to and including December 31, 2009, "according to the

[5] *See Bos. Gas Co. v. Century Indem. Co.*, 910 N.E.2d 290, 312 (Mass. 2009) ("The ideal [allocation] method is a 'fact-based' allocation, under which courts would determine precisely what injury or damage took place during each contract period or uninsured period and allocate the loss accordingly").

percentage that each responsible party had time on the risk while the then-existing conditions contributed to the contamination." (Pa0157). Specifically, the SAM allocated BASF covered damages as follows:

- $3,314,536.70 (25.84%) was allocated to U.S. Fire;
- $4,860,208.81 (37.89%) was allocated to OneBeacon; and
- $4,652,408.91 (36.27%) was allocated to BASF for periods that were either covered by insurance companies with whom it had settled or not covered because of the application of policy exclusions. [6]

(Pa0158). The SAM did not allocate any of BASF's damages incurred December 31, 2009, because he viewed that task as beyond the scope of the authority granted to him by the trial court. (Id).

After the SAM issued his RAR, all parties filed objections. (Pa0162-87). On June 29, 2018, trial court entered an Order and Opinion overruling all objections and adopting the SAM's RAR in its entirety, describing it as "well-reasoned," and finding that the SAM's conclusions were not "clearly erroneous,

[6] After the allocation hearing, but before the SAM issued his RAR, BASF and Underwriters agreed to a resolution of their dispute. (Pa0145). In 2021, OneBeacon, was declared insolvent and ordered into liquidation by the Pennsylvania Commonwealth Court. *Altman v. Bedivere Ins. Co.*, No. 1 BIC 2021 (Pa. Cmwlth. Ct. Mar. 11, 2021) (Pa0510).

contrary to the law or an abuse of discretion" (the "June 29, 2018, Order and Opinion"). (Pa0186-87). The June 29, 2018, Order and Opinion expanded the SAM's mandate to allocate BASF's damages incurred after December 31, 2009, and to consider evidence discovered after the 2010 Liability Trial in doing so. (Pa0162).

After the court issued its June 29, 2018, Order, both U.S. Fire and OneBeacon filed Motions for Reconsideration. (Pa0210). While those Motions were pending, the parties entered a Stipulation in which they agreed to the amount and allocation of BASF's covered damages incurred between January 1, 2010, and December 31, 2018, and a procedure to calculate and allocate BASF's covered costs incurred after December 31, 2018. (Pa0188-94). The parties stipulated that between January 1, 2010, and December 31, 2018, BASF incurred $5,237,033 in covered investigation and remediation costs at the Site. (Pa0191). Together with the $12.8 million found by the trial court after the 2010 Liability Trial, as of December 31, 2018, BASF incurred a total of $18,064,187 in covered costs.[7]

[7] Costs continue to be incurred and pursuant to the parties' Stipulation, in 2020, BASF began providing annual calculations of its covered costs incurred during the preceding year to U.S. Fire.

After entering into the Stipulation, on June 17, 2020, in an effort to end this interminable coverage dispute, BASF filed a Motion for Entry of Judgment and Award of Attorneys' Fees, Interest, and Costs (the "Fees and Interest Motion"). (Pa0195-98). BASF's Fees and Interest Motion sought entry of judgment against OneBeacon and U.S. Fire in the stipulated amounts, plus an award of attorneys' fees pursuant to R. 4:42-9, litigation costs, and interest. In its Fees and Interest Motion, BASF requested a total judgment, including attorneys' fees, costs and interest, against U.S. Fire in the amount of $11,211,830, plus a declaration that U.S. Fire is liable for 27.5% of any covered costs incurred after December 31, 2018. (Pa0196).

Two weeks after BASF filed its Fees and Interest Motion, on July 30, 2020, the trial court abruptly granted the Motions for Reconsideration filed two years earlier. (Pa0199-209). Judge LeBlon inexplicably found that his June 29, 2018, Order adopting and approving the SAM's Report and Recommendations, which specifically held that the SAM's RAR had been "well-reasoned," was palpably incorrect. (Pa0205). The court cited *Bos. Gas Co. v. Century Indem. Co.*, 910 N.E.2d 290 (Mass. 2009), noting that Massachusetts law requires use of the time-on-the-risk allocation method only "where the evidence will not permit a more accurate allocation of losses during each policy period." (Id). Then, without any discussion or analysis of the evidence (including the four

linear feet of documents and the extensive testimony involving credibility determinations presented to the SAM) and whether a "more accurate allocation" was possible based on Judge Stroumtsos's detailed factual findings as to start and end dates for plant operations where CVOC releases occurred, the court determined that the non-evidence-based time-on-the-risk method should apply. (Pa0205-08).[8]

The Court's July 30, 2020, Opinion adopted January 31, 2011, the date of decision in the 2010 Liability Trial, as the "end date" for the allocation period but left all other findings and conclusions of the SAM in place. (Pa0208-09). As a result, U.S. Fire's allocated share of BASF's covered damages changed from 25.84% to 6.4%. The court memorialized its July 30, 2020, Opinion in an Order dated January 6, 2021. (Pa0210-11).

Based on the Court's July 30, 2020, Opinion and January 6, 2021, Order, BASF filed an Amended Motion for Entry of Final Judgment and Award of Attorneys' Fees, Costs and Interest. (Pa0212-14). After yet another round of

[8] In reaching this determination, Judge LeBlon ignored and contradicted his own reasoning in denying the U.S. Fire Motion to Reconsider the Jan. 31, 2011, Opinion and Order by Judge Stroumtsos. Specifically, that earlier motion was denied because, under similar circumstances, granting U.S. Fire's Motion for Reconsideration "would be acting as an appellate court without the benefit of reviewing the entire record." (Pa0141).

discovery, further briefing and oral argument, on February 10, 2023, the trial court entered judgment in favor of BASF and against U.S. Fire as follows:

- $918,894 for covered costs incurred before December 31, 2018;
- $511,005 for attorneys' fees;
- $88,827 for costs; and
- $1,068,835.87 in interest,

for a total judgment against U.S. Fire in the amount of $2,587,561.87. (Pa0043).[9] The trial court's judgment also declared that U.S. Fire is responsible for indemnifying BASF for 6.4% of its covered costs incurred after December 31, 2018. *(Id)*.

On March 2, 2023, U.S. Fire filed another Motion for Reconsideration, this time asking the trial court to reconsider the February 10, 2023, Judgment. (Pa0215). On May 24, 2023, the trial court denied U.S. Fire's Motion. *(Id)*. The court concluded its Statement of Reasons in support of the May 24, 2023, Order by stating as follows:

> Without belaboring the point any further here, in its opposition brief, BASF succinctly argues and concludes as follows:
>
> > U.S. Fire's latest motion is not merely an effort to take a second bite at the apple.

[9] After Judge LeBlon's retirement in 2022, this case was presided over, and judgment was ultimately entered by the Hon. Thomas D. McCloskey, J.S.C.

> That is because, in 18 years, U.S. Fire has already consumed the entire apple several times over. It is time for U.S. Fire's long fight against BASF's insurance claim to end. Each of the issues about which U.S. Fire complains is a matter left to the sound discretion of this Court. The Feb. 10, 2023, Order was a reasonable exercise of that discretion. There is nothing in the Feb. 10, 2023, Order or this Court's reasoning that is arbitrary, capricious, or unreasonable.

The Court agrees.

(Pa0221).

After the court denied U.S. Fire's Motion for Reconsideration, BASF filed a Notice of Appeal on June 7, 2023. (Pa0222-30). U.S. Fire filed a Notice of Cross-Appeal on June 30, 2023. (Pa0231-41). This Court has jurisdiction over the appeals under R. 2:2-3(a), as they involve appeals as of right from a final judgment of the Superior Court trial division.

FACTUAL BACKGROUND

I. The Insurance Policy Sold to BASF by U.S. Fire

U.S. Fire sold one general liability policy to BASF. Policy number DCL 53-72-68 (the "U.S. Fire Policy") was an umbrella liability policy covering the period February 26, 1970, through February 26, 1973. The terms of the U.S. Fire Policy are not disputed. (Pa0092). Before the 2010 Liability Trial, BASF and U.S. Fire stipulated to its contents. (Pa0316-335).

The U.S. Fire Policy promised:

> To indemnify the insured for ultimate net loss in excess of the retained limit hereinafter stated, which the insured may sustain by reason of the liability imposed upon the insured by law, or assumed by the insured under contract.
>
> ***
>
> (b) Property Damage Liability. For damages because of injury to or destruction of tangible property including consequential loss resulting therefrom, caused by an occurrence.

(Pa0333). The U.S. Fire Policy defines "ultimate net loss" as:

> All sums which the insured, or any company as his insurer, or both, becomes legally obligated to pay as damages, whether by reason of adjudication or settlement, because of personal injury, property damage or advertising liability to which this policy applies.

(Id). The U.S. Fire Policy defines an "occurrence" as either "an accident happening during the policy period or a continuous or repeated exposure to conditions which unexpectedly and unintentionally causes injury to persons or tangible property during the policy period." (Pa0335). The U.S. Fire Policy does not define "accident," and does not contain a pollution exclusion.

The property damage limits stated in the U.S. Fire Policy were $25 million per occurrence, excess of $50,000 per occurrence. (Pa0318, 0320). Because the U.S. Fire Policy was a multi-year policy that provided coverage excess to several sequential single-year policies, the SAM determined, and the trial court agreed,

that the sum of the limits underlying the U.S. Fire Policy was $200,000. (Pa0155-57).

II. BASF's Operations at the Plainville Site

The Site is a former metal fabrication, processing, and finishing plant located on about 22 acres of land abutting Massachusetts State Route 152, also known as Taunton Street, in Plainville, Massachusetts. (Pa0420). The Site is bounded on the east by Route 152, on the south and west by a man-made lake known as Turnpike Lake, and on the north by a forested and wetland area owned by the Natural Resources Trust of Plainville. *(Id)*. On the other side of Route 152 are five vacant, formerly residential lots and a wetland/swampy area. (*Id*).

Operations at the Plainville Site began in 1957 and originally consisted of "form roll" operations, which rolled and shaped metals such as steel and titanium; and nuclear operations, which fabricated uranium fuel elements for the civilian nuclear industry under licenses from the Atomic Energy Commission. (Pa0093). The early operations were conducted in two separate buildings, known as Building 1 and Building 2. *(Id)*. Over time, the operations conducted changed and the Site was expanded by the construction of additional, adjoining buildings, eventually covering a contiguous area of approximately 300,000 square feet, and consisting of twelve sequentially numbered buildings. *(Id)*. All operations at the Plainville Site ended in 1993. (Pa0092).

III. BASF's Discovery and Investigation of the Property Damage at the Plainville Site

The operations conducted at the Site unexpectedly caused property damage in the form of contamination of groundwater, surface water, soils, and sediments at and around the Site. The primary contaminants of concern in the groundwater are CVOCs, primarily perchloroethylene ("PERC"), trichloroethylene ("TCE") and trichloroethane ("TCA"). (Pa0094). In addition to CVOCs in the groundwater, the soil and sediments at the Site have been contaminated by radionuclides, heavy metals, and PCBs.[10] *(Id)*.

BASF first became aware of property damage at the Site upon receipt of, and investigation in response to, a United States Environmental Protection Agency ("EPA") Request For Information dated March 31, 1986. (Pa0093). In response to the Request for Information, BASF engaged Environ Corporation ("Environ") to investigate the nature and extent of the property damage at the Site.[11] *(Id)*.

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[10] The trial court found that the radionuclide, metal, and PCB contamination was confined to on-site soils and sediments and had not migrated off-site. (Pa0101-16). Therefore, the court concluded that coverage for remediation of those contaminants was precluded by the owned property exclusion contained in the policies. *(Id)*.

[11] Dr. Powell was the Environ principal in charge of the Plainville investigation in 1986. (Pa0259).

Environ's investigation revealed that CVOCs found in the groundwater on the Site had migrated through the soil and created an off-site plume of groundwater contamination that extended across Route 152 into the wetland area. (Pa0094). Dr. Powell, a longtime employee of Environ, testified that in 1986 or 1987, as part of Environ's early investigation, he reached the conclusion that the size of the plume of contaminated groundwater had stabilized and was no longer expanding. (Pa0260).

BASF's investigations at the Site have shown that CVOCs were discharged in an undiluted, oil-like form, known as a dense non-aqueous phase liquid ("DNAPL") and also as aqueous solutions. (Pa0257-58). CVOCs that are released in DNAPL form tend to be more "persistent" and difficult to clean up. *(Id)*. Conversely, CVOCs released diluted in wastewater are "relatively easier to clean-up." *(Id)*.

On September 9, 1993, BASF and the EPA entered into an Administrative Order on Consent (the "1993 Administrative Order"). (Pa0363). The 1993 Administrative Order required BASF to investigate 20 Areas of Concern ("AOCs") at the Site. (Pa0365; Pa0093). The 1993 Administrative Order defines an AOC as "an area at the Facility where solid or Hazardous Waste or Hazardous Constituents may have been managed or may have come to be located

and from which releases of Hazardous Waste or Hazardous constituents have or may have occurred." (Pa0364).

The 1993 Administrative Order required BASF to evaluate the nature and extent of releases of hazardous substances at each identified AOC, to complete a RCRA Facility Investigation, to conduct certain specified remedial measures at the Site. (Pa0093). Pursuant to the 1993 Administrative Order, in December of 1997, BASF sought the EPA's approval of a plan to design and construct a system to collect and treat CVOC contaminated groundwater and prevent its further migration from the Site. (Pa0366-67; Pa0416, 0418-19).

Construction of the Groundwater Stabilization Measure ("GSM") began on June 2, 1997. (Pa0393; Pa0366-67; Pa0416, 0418-19). The GSM started operations on November 3, 1997. (Pa0393). The GSM consists of a high-density polyethylene barrier anchored to bedrock that acts as a physical barrier to prevent contaminated groundwater from migrating off-site, a series of six extraction wells that pump contaminated groundwater to an on-site groundwater treatment facility, and a series of on- and off-site monitoring wells. (Pa0430-31). The purpose of the GSM is to ensure that contaminated groundwater does not migrate from the Site. (Pa0313-14).

The GSM relies on the flow of groundwater under the Site, which originates in Turnpike Lake, to operate. (Pa0313-15). As the water passes under

the Site, it flushes the DNAPL solvent that has become trapped in the soil and bedrock. *(Id)*. That groundwater is then captured by extraction wells that pump it to an on-site groundwater treatment facility where the CVOCs are stripped from the water. (Pa0430-31). After treatment, the GSM discharges the clean groundwater back into Turnpike Lake under a permit to do so from the EPA, where it begins the cycle again. *(Id)*.

After approximately five years of operating the GSM, BASF commissioned an evaluation of its performance and shared that evaluation with the EPA. (Pa0432-33). As a result of the evaluation, in 2005, BASF made certain modifications to the GSM, resulting in further improvements to the control and migration of CVOCs. *(Id)*. BASF made additional modifications in 2010. (Pa0251-54). As a result of the 2005 and 2010 modifications, the GSM is exceeding the performance standards set by the 1993 Administrative Order. (Pa0306-311).

The GSM remains in operation and continues to treat groundwater at the Site. It is uncertain how much longer the GSM will be required to operate, but it has been estimated that it may continue in operation for another twenty years or more because of the presence of DNAPL solvents at the Site. (Pa0312).

IV. BASF's Notice and Updates to its Insurance Companies and the Insurance Companies' Lack of Action

On December 10, 1986, BASF notified all of its historic general liability insurance companies of the EPA's Request for Information and requested defense and indemnification under the policies it had purchased. (Pa0336-52). After providing this initial notice, BASF regularly provided updates relating to the Plainville Site through its law firms. (*e.g.,* Pa0435-63; Pa0353-62; Pa0410-14; Pa0464-71; Pa0472-86). BASF's first update was on February 5, 1987. (Pa0435-63). The updates continued on an annual or nearly annual basis until August of 2004. (Pa0472-86).

Despite the numerous status reports provided and opportunities to investigate BASF's claim further, none of the insurance companies, including U.S. Fire, took any steps to do so. (Pa0244-48; Pa0492-99). Yet, in 1995, almost nine years after receiving BASF's original notice, and without having conducted any investigation, U.S. Fire sent a reservation of rights letter in which it asserted numerous grounds on which it might deny coverage. (Pa0368-69).

V. AOCs Where the Trial Court Found Property Damage During U.S. Fire's Policy Period

In a detailed factual analysis contained in the Jan. 31, 2011, Opinion and Order, the court found that BASF proved property damage during U.S. Fire's policy period arising from five specific AOCs, identified as AOC 5, AOC 16,

AOC 22, AOC 26, and AOC 30. (Pa0116-30). A description of each AOC, a summary of the trial court's findings concerning its period of operations, and a description of the primary contaminants discovered is set forth below.

A. AOC 5

AOC 5 is land area and disposal pit located under the northeast corner of what was Building 8, which was constructed in 1972. (Pa0423-25; Pa0120). AOC 5 received discharges of solvents and other wastewaters beginning in 1965 and continuing until 1972, when Building 8 was erected over the location. (Pa0423-25; Pa0120-21). The CVOCs detected at AOC 5 include PERC, TCE and TCA. *(Id)*. The court found, based on the extensive evidentiary record, that the "contamination that exists under Building 8 in AOC 5 occurred sometime in 1966 and continued through 1972 when Building 8 was built." (Pa0121).

B. AOC 16

AOC 16 is described as a wastewater disposal system consisting of two drywells and an associated leach field located on the southeast portion of the property. (Pa0426). AOC 16 was the first area at the Site to receive discharges of CVOCs. (Pa0279-80). Between 1957 and 1962, AOC 16 received wastewaters from the nuclear operations conducted at the Site. (Pa0426). After the nuclear operations ended, AOC 16 received wastes from the wire operations, locker room waste and wastes from an assay laboratory. *(Id)*. Although AOC

16 has been identified as a source of CVOC contamination in the groundwater, it is not a significant contributor to the overall site-wide contamination problem. (Pa0426-27; Pa0261-62). The trial court found that degreasers used in connection with the wire operations "were a source of contamination that occurred during the defendants' policy periods." (Pa0120). The court concluded its discussion of AOC 16 stating "the Court finds that liability attaches in this AOC from the start of operations until 1979, and therefore, the appropriate policies are triggered." *(Id)*.

C. AOC 22

AOC 22 is a dry well located in what was known as the courtyard area of the Site. (Pa0126). The dry well was first used in 1965 or 1966 and remained in use until 1977. *(Id)*. During its period of operation, the dry well received discharges of steam condensate from a sump containing two pit degreasers. (Pa0126-27). This dry well is one of the primary sources of DNAPL CVOC contamination at the Site. (Pa0128). PERC, TCE and TCA all reached the groundwater from AOC 22 during its period of operations. *(Id)*. The subsurface disposal of wastewaters at the Site ended with the closure of AOC 22 in 1977 (Pa0280-81).

D. AOC 26

AOC 26 is an area inside Building 1 where the pit degreasers that discharged to AOC 22 were located. (Pa0129). The pit degreasers in Building 1 were first used in 1965 or 1966. *(Id)*. CVOCs, including PERC, TCE, and TCA were released in AOC 26 and caused property damage during U.S. Fire's policy period. *(Id)*.

E. AOC 30

AOC 30 in the location of a former degreaser pit in the floor of Building 6. (Pa0422; Pa0129). The degreaser located in AOC 30 was first used in 1966 and was removed in 1970. (Pa0129). Although solvents, including PERC, TCE, and TCA have been detected in the soil and soil gas, AOC 30 is not a significant source of groundwater contamination. (Pa0428-29; Pa0249-50; Pa0255).

VI. BASF's Costs Incurred to Remediate Property Damage Originating at Each AOC

Dr. Powell testified that while it is not possible to determine the specific AOC at the Site from which the CVOCs found in the groundwater originated (Pa0265-66), it **is** possible to perform a fact-based allocation of BASF's damages. (Pa0289-90). Dr. Powell's allocation calculations were based on the specific facts as to where and when the CVOC contamination originated, and how it is distributed in the groundwater and managed. *(Id)*.

Dr. Powell began his allocation calculations by considering the specific operations conducted at each AOC, the nature of the property damage emanating from each AOC, and the relative contribution of each AOC to the Site-wide groundwater problem to calculate a weighting factor for each AOC. (Pa0290-99). The weighting factor reflects the relative contribution of each AOC to the CVOC contamination of the groundwater and thus, to the overall cost of operating the GSM. *(Id)*. AOCs that involved direct releases of degreasing solvents to the subsurface, such as AOC 22, were assigned a higher weighting factor and those that involved either releases above the water table or indirect releases, such as AOC 30, were assigned a lower weighting factor. *(Id)*. The AOC weighting factors calculated by Dr. Powell were:

AOC 5	40%
AOC 6[12]	5%
AOC 14	5%
AOC 16	4%
AOC 22	41%
AOC 26	4%
AOC 30	1%

(Pa0487).

[12] The trial court found that BASF had not proven property damage during the applicable policy periods originating from AOC 6. (Pa0123). However, Dr. Powell included AOC 6 in his calculations because investigations conducted after the initial trial show that AOC 6 is contributing to the Site-wide groundwater problem.

Next, BASF's covered damages were multiplied by the weighting factor assigned to each AOC to calculate of BASF's covered costs for each AOC, set forth below.[13]

AOC 5	$4,988,046
AOC 6	$623,505
AOC 14	$623,505
AOC 16	$498,804
AOC 22	$5,424,703
AOC 26	$498,804
AOC 30	$169,782

(Pa0487-88; Pa0490).

Finally, Dr. Powell testified that based on the extensive investigation conducted at the site and the findings by Judge Stroumtsos, it was his opinion that after the period of operations of each AOC, nothing further was done to add to the contamination originating from that AOC. (Pa0284). Thus, BASF's covered damages for each AOC were pro-rated over the period of operations of each AOC, with the result being an allocation of BASF's covered costs to each

[13] The majority of covered costs incurred by BASF were for the site-wide groundwater investigation and the construction and operation of the GSM. However, a small portion of BASF's covered costs were for remediation efforts directed at specific AOCs. BASF excavated a dry well in AOC 22 and a pit degreaser located in AOC 30. Because these costs are attributable to specific AOCs, they were allocated separately using the same methodology as was used for allocating the Site-wide costs. (Pa0488; Pa0490; Pa0291).

policy period. (Pa0487-88; Pa0490).[14] Dr. Powell calculated that $3,514,840.83 of BASF's covered damages was allocated to U.S. Fire's policy period. (Pa0487-88; Pa0490). After deduction of the underlying limits, the SAM allocated $3,314,840.83 to U.S. Fire. (Pa0158).

Dr. Powell performed a similar calculation to allocate covered costs incurred after December 31, 2009. (Pa0489; Pa0291-92; Pa0300-03). The result of Dr. Powell's calculations was the allocation to U.S. Fire of 26.2% of all covered costs incurred after December 31, 2009.[15] (Pa0487-90; Pa0303-05).

[14] Dr. Powell's intent was not to allocate BASF's damages to specific policies, so his allocation did not consider underlying limits. (Pa0290-91). The limits underlying the U.S. Fire Policy were decided and considered by the SAM. (Pa0155-57).

[15] The remainder of BASF's covered costs found by the trial court were allocated to periods when BASF either was covered by insurance companies with whom it settled or was uninsured. (Pa0487-90).

ARGUMENT

POINT I

THE TRIAL COURT ERRED BY GRANTING U.S. FIRE'S MOTION FOR RECONSIDERATION AND ADOPTING A TIME ON THE RISK ALLOCATION METHOD (Pa0210-11)

I. A Fact-Based Allocation of Damages is the Preferred Method Under Massachusetts Law

In *Bos. Gas Co. v. Century Indem. Co.*, 910 N.E.2d 290 (Mass. 2009), the United States Court of Appeals for the First Circuit certified the following questions to the Supreme Judicial Court of Massachusetts:

> 1. Where an insured protected by standard CGL policy language incurs covered costs as a result of ongoing environmental contamination occurring over more than one year and the insurer provided coverage for less than the full period of years in which contamination occurred, should the direct liability of the sued insurer be pro rated in some manner among all insurers "on the risk," limiting the direct liability of the sued insurer to its share but leaving the insured free to seek the balance from other such insurers?
>
> 2. If some form of pro rata liability is called for in such circumstances, what allocation method or formula should be used?

Bos. Gas, 910 N.E.2d at 292-93.

When it answered the certified questions, the Court first discussed the two principal methods that courts have adopted for allocating long-tail losses among multiple insurance companies. The first method the court discussed was the "joint and several" method, which the intermediate Massachusetts appellate

court adopted in *Rubenstein v. Royal Ins. Co. of Am.*, 694 N.E.2d 381 (Mass. App. Ct. 1998). *Bos. Gas*, 910 N.E.2d at 301. Under the "joint and several" approach,

> [A]ny policy on the risk for any portion of the period in which the insured sustained property damage or bodily injury is jointly and severally obligated to respond in full, up to its policy limits, for the loss.

Bos. Gas, 910 N.E.2d at 302 (quoting Jones, *An Introduction to Insurance Allocation Issues in Multiple-Trigger Case*s, 10 Vill. Envtl. L.J. 25, 37-38 (1999)).

The second method discussed by the court was the pro rata method. *Bos. Gas*, 910 N.E.2d at 302-03. Courts that apply the pro rata approach "allocate a portion of the total loss to each triggered policy using a variety of different formulas." *Bos. Gas*, 910 N.E.2d at 302-03 (*citing* S.M. Seaman & J.R. Schulze, Allocation of Losses in Complex Insurance Coverage Claims § 4.3[b], at 4-17--4-21 (2d ed. 2008) (describing nine pro rata allocation formulas)).

After analyzing the policy language at issue and the applicable case law, the court concluded that a "pro rata allocation produces a more equitable result than joint and several allocation." *Bos. Gas*, 910 N.E.2d at 311. The court reasoned that,

> the pro rata allocation method promotes judicial efficiency, engenders stability and predictability in the

> insurance market, provides incentive for responsible commercial behavior, and produces an equitable result.

Id.

After concluding that damages arising from long tail losses should be pro-rated among triggered policies, the court next considered which pro-rata method should be applied. *Id.* at 312. The court first held that the "ideal" method for pro-rating long-tail losses among multiple insurers and the one which is the "most consistent with the contract language" is a "fact-based" approach. *Id.* Under a fact-based approach, a court should "determine precisely what injury or damage took place during each contract period or uninsured period and allocate the loss accordingly." *Id.* (*quoting* S.M. Seaman & J.R. Schulze, *Allocation of Losses in Complex Insurance Coverage Claims* § 4.3[b] [1], at 4-18 (2d ed. 2008)).

The Court then held that when it is not possible to make a fact-based allocation to each policy, only then should losses be pro-rated using the time-on-the-risk method. *Bos. Gas*, 910 N.E.2d at 316. Under the time-on-the-risk method,

> each triggered policy bears a share of the total damages [up to its policy limit] proportionate to the number of years it was on the risk [the numerator], relative to the total number of years of triggered coverage [the denominator]."

Id. at 313 (*quoting* 23 E.M. Holmes, Appleman on Insurance § 145.4[A][2][b], at 24 (2d ed. 2003).

The Court described the time-on-the-risk method as a "probable fiction," that should only be used when it is not possible to estimate the quantum of property damage that occurred during each policy period. *Bos. Gas,* 910 N.E.2d at 314, 316. "[I]f the evidence permits an accurate estimation of the quantum of property damage in each policy period," then proration by time-on-the-risk is inappropriate. *Id.* at 316.

In this case, after seven days of evidentiary hearings, the SAM determined that it was possible to make an accurate estimation of the property damage that occurred during each policy period and thereby apply the preferred fact-based pro-rata allocation method under Massachusetts law. (Pa0151-58). Initially, Judge LeBlon adopted the SAM's findings, describing them as "well-reasoned" and finding that they were not "clearly erroneous, contrary to law or an abuse of discretion." (Pa0186-87).

However, two years later, after BASF filed its Motion for Entry of Judgment and Award of Attorneys' Fees, Costs and Interest, Judge LeBlon reversed himself, granted U.S. Fire's Motion for Reconsideration, and rejected the SAM's findings. (Pa0199-0211). "Reconsideration should be utilized only for those cases . . . that fall within that **narrow corridor** in which either 1) the

[c]ourt has expressed its decision based upon a palpably incorrect or irrational basis, or 2) it is obvious that the [c]ourt either did not consider, or failed to appreciate the significance of probative, competent evidence." *D'Atria v. D'Atria*, 242 N.J. Super. 392, 401, 576 A.2d 957 (Ch. Div. 1990) (emphasis added). Stated differently, "a litigant must initially demonstrate that the Court acted in an arbitrary, capricious, or unreasonable manner, before the Court should engage in the actual reconsideration process." *Id*.

When it belatedly granted reconsideration, the trial court stated, "Massachusetts law **mandates** application of the 'time-on-the-risk' approach by pro rata allocation." (Pa0205-06) (emphasis added). The court's statement is an inaccurate statement of Massachusetts law, and the actual "mandate" is for use of a fact-based allocation. Under *Boston Gas*, the time-on-the-risk method is a "fallback" method that is only appropriate if it is not possible to make a more accurate fact-based estimation of the damage during each triggered period. *Bos. Gas*, 910 N.E.2d at 316. Despite this clear mandate for a "fact-based" allocation approach under Massachusetts law, the trial court provided no analysis of the evidence and made no findings concerning whether the evidence allowed for a fact-based allocation of BASF's damages. (Pa0205-08).

Instead, the lower court pointed to the nature of the EPA-approved CVOC **remediation** process employed by BASF, which was based on the flushing of

DNAPL solvent trapped in the soil and bedrock into groundwater for a "pump and treat" process (the lower court characterized this remediation process as "continuing contamination" even though the CVOC plume stabilized in 1986 and that operational releases of CVOCs had ceased by this same time). Based on this CVOC **removal** process, Judge LeBlon concluded, on reconsideration, that it was not possible to estimate the quantum of property damage that occurred during U.S. Fire's policy period. (Pa0208). Under *Boston Gas*, the key inquiry is how much property damage took place during any given period. *Bos. Gas*, 910 N.E.2d at 312. Whether or not groundwater is "continuing" to be "damaged" in 2023 - through remediation efforts - is irrelevant to a determination of how much property damage occurred during the 1970s, when U.S. Fire's policy was in effect. This "continuing contamination" is a misnomer and fails to consider the actual facts at the site. The only contamination occurring is a result of the operation of the GSM. The GSM relies on the flow of groundwater from Turnpike Lake to remove the CVOCs trapped in the soil and bedrock. (Pa0313-15). As the water passes under the Site, it flushes the trapped CVOCs and is then captured, treated, and discharged. *(Id)*. No new CVOCs are being added to the groundwater, and the GSM operations actually **reduce** the total CVOCs at the Site. (Pa0314).

Although in *Boston Gas*, the District Court ultimately applied a time-on-the-risk allocation method, using the date of trial as the end date for the

allocation period, *Bos. Gas Co. v. Century Indem. Co.*, 793 F. Supp. 2d 511, 519 (D. Mass. 2011), the court reached that conclusion because the "verdict was not specific enough to constitute a fact-based allocation of property damage to Century's policy period." *Id.,* 793 F. Supp. 2d at 517. This case is different and has a fully developed detailed factual record.

As discussed in the following section, the evidence of record and Judge Stroumtsos's factual findings in the Jan. 31, 2011, Opinion and Order make a fact-based allocation of BASF's damages, as described in *Boston Gas*, possible, and therefore mandated. *Bos. Gas*, 910 N.E.2d at 312. Consequently, the court erred by allocating BASF's damages based on a superficial time-on-the-risk analysis.

II. The Evidence of Record Supports a Fact-Based Allocation of BASF's Damages

In his RAR, the SAM found that the evidence allowed for an accurate estimation of the property damage that occurred during each period. The SAM properly applied Massachusetts law discussed above to allocate BASF's damages. The SAM reached his conclusion in reliance on Judge Stroumtsos's Jan. 31, 2011, Opinion and Order and Dr. Powell's extensive and detailed factual testimony during the hearing. (Pa0148).

Dr. Powell's allocation model first calculated BASF's damages on an AOC-by-AOC basis by developing a weighting factor for each AOC and then

multiplying that factor by BASF's covered damages. (Pa0290-99). Dr. Powell then pro-rated the damages for each AOC over it period of operations, as found by the trial court.

Although the *Boston Gas* Court did not specifically address how the fact-based allocation should be performed, *see Bos. Gas*, 910 N.E.2d at 312-316, the pro ration of damages over the period of operations, as described by Dr. Powell and adopted by Special Allocation Master Dreier, is supported by the decision of the Massachusetts Superior Court in *Maestranzi Bros., Inc. v. Am. Employers' Ins. Co.*, No. 2005-1856 B, 2010 Mass. Super LEXIS 65 (Mass. Super. Apr. 9, 2010) (Pa0500-06).

In *Maestranzi*, the Massachusetts Superior Court applied *Boston Gas* in an environmental liability case. The *Maestranzi* court discussed various possibilities for an end date of the allocation period. *Id.* at *13-14. First, the court considered the date "when the pollution ends," but rejected that because it was "future date is impossible to even estimate." *Id.* Next, the court considered the date of the jury verdict, but rejected that because it "is plainly a random date that does nothing to ensure predictability or fairness." *Id.* at *14. Finally, the court considered the date of the "Potentially Responsible Party" letter from the EPA and the notice letter to the insurance company, but rejected those dates

because they were "equally random as they have nothing to do with the triggered period or the time of damage/risk." *Id.*

Ultimately, the court concluded that the allocation period should end when *Maestranzi* stopped adding waste oil to the site in 1992, explaining:

> This approach best approximates the *Boston Gas* case which assumed that the triggered period of years ended when Boston Gas sold or abandoned the polluted site. Likewise, it best approximates the "fact-based allocation" praised in *Boston Gas*. In this case, one knows that the insured did nothing to further pollution of the site after the last shipment in 1992.

Id.

In this case, Dr. Powell testified based on the extensive investigations conducted at the site, that after the period of operations of each AOC, nothing further was done to add to the contamination originating from that AOC. (Pa0284). The evidence of record established that (1) the remediation being conducted is to address property damage caused by releases that occurred during each AOC's period of operations; (2) any CVOCs released at the Site would have reached and damaged the groundwater almost immediately; and (3) after the period of operation of each AOC, there were no further discharges of CVOCs to that AOC. (Pa0263-88).

In *Peabody Essex Museum, Inc. v. United States Fire Ins. Co.*, No. 06-cv-11209-NMG, 2011 U.S. Dist. LEXIS 94792 (D. Mass. Aug. 24, 2011) (Pa0507-

10), the court applied *Boston Gas* and adopted a fact-based allocation based on similar evidence as was presented in this case. In that case, the museum's expert witnesses estimated the extent of contamination that occurred during U.S. Fire's policy period and the costs to remediate that contamination. *Id.* at *3-4. The District Court found this evidence credible and accurate and held that it was sufficient to support a fact-based allocation of the museum's damages pursuant *Boston Gas*. *Id.* at *4. Because a fact-based allocation of damages was possible, the court concluded that "the 'time-on-the-risk' default method does not apply." *Id.* at *4. On appeal, the First Circuit affirmed, in part, because "fact-based allocation aligned closer to the evidence and the equities" of that case. *Peabody Essex Museum, Inc. v. United States Fire Ins. Co.*, 802 F.3d 39, 52 (1st Cir. 2015).

In this case, based on the evidence, a fact-based allocation was possible. However, when the trial court overruled the SAM, who was the finder of fact on the allocation of BASF's damages, and who based his rulings in part on an assessment of credibility, it essentially granted U.S. Fire a judgment n.o.v. The well-known standard for granting such a judgment is as follows:

> In the case of motions for involuntary dismissal, the test is, as set forth in *R.* 4:37-2(b) and equally applicable to motions for judgment, whether "the evidence, together with the legitimate inferences therefrom, could sustain a judgment in * * * favor" of the party opposing the motion, *i.e.*, if, accepting as true all the evidence which

> supports the position of the party defending against the motion and according him the benefit of all inferences which can reasonably and legitimately be deduced therefrom, reasonable minds could differ, the motion must be denied. The point is that the judicial function here is quite a mechanical one. The trial court is not concerned with the worth, nature or extent (beyond a scintilla) of the evidence, but only with its existence, viewed most favorably to the party opposing the motion.

Dolson v. Anastasia, 55 N.J. 2, 5-6 (1969) (citations omitted).

The trial court's Opinion and Order granting U.S. Fire's Motion for Reconsideration ignored and failed to consider any of the evidence presented, other than the evidence that property damage is continuing to occur as part of BASF's remediation efforts. (Pa205-07). The sum total of the court's analysis of the evidence was:

> Dr. Powell says the contamination is continuing and has not stopped, indicating there is no definitive end period. In his report, the SAM acknowledged that there was no definitive end date. Accordingly, the Court finds that Plaintiff is not able to do a fact-based analysis.

(Pa. 0207).

Under *Boston Gas*, the first inquiry is how much property damage occurred during the relevant policy period. *Bos. Gas*, 910 N.E.2d at 312. The trial court completely failed to address this critical question or any of the other evidence presented during seven days of allocation hearings. (Pa0205-08). The

court erred when it granted reconsideration of its adoption of the RAR. *See D'Atria*, 242 N.J. Super. at 401.

POINT II

THE TRIAL COURT ERRED BY ADOPTING THE DATE OF THE 2010 LIABILITY TRIAL DECISION AS THE END DATE FOR THE ALLOCATION PERIOD (Pa0211)

Even if time-on-the-risk were deemed to be the proper method to allocate BASF's damages, the trial court erred in its application by adopting the arbitrary date of the decision in the 2010 Liability Trial, January 31, 2011, as the end date for the allocation period. The date of the court's decision following the 2010 Liability Trial is a wholly random date that has no relationship to either the language of the policies or the facts relating to the property damage. Use of the date of the trial court's liability decision eliminates the benefits of the time-on-the-risk method and also violates the public policy of both New Jersey and Massachusetts. If the time-on-the-risk method is used, an appropriate end date is either September 1986, when the property damage was discovered and the CVOC plume stabilized, or 1993, at the latest, when all operations at the Site ended.

I. Use of the Date of the Liability Trial Decision as the End Date of the Allocation Period is Contrary to the Expressed Objectives of the Time on the Risk Method

In *Boston Gas*, the court explained that the benefit of the time on the risk allocation method is that "its inherent simplicity promotes predictability,

reduces incentives to litigate, and ultimately reduces premium rates." *Bos. Gas Co.*, 910 N.E.2d at 314. *See also Arco Indus. Corp. v. Am. Motorists Ins. Co.*, 594 N.W.2d 61, 70 (Mich. Ct. App. 1998); *United States Fid. & Guar. Co. v. Treadwell Corp.*, 58 F. Supp. 2d 77, 105 (S.D.N.Y. 1999) (adopting the time-on-the-risk allocation method because it is "predictable, administrable, fundamentally fair, and provides potential insureds with incentives to purchase insurance or rationally self-insure"). Here, the trial court's use of the date of the liability trial decision defeats these benefits.

The date of the 2010 Liability Trial decision is wholly arbitrary and completely unrelated to the language of the U.S. Fire Policy or any facts relating to the property damage at the Site. This lack of any relation to policy language or material facts eliminates the predictability that courts identify as a benefit of the time-on-the-risk method. In *Maestranzi Bros.,* 2010 Mass. Super LEXIS 65, at *14, the Massachusetts Superior Court specifically rejected the date of the jury verdict as the end date of the allocation period because it "is plainly a random date that does nothing to ensure predictability or fairness."

This case was filed in 2005 and because of the extensive discovery taken by the defendants, liability was not decided until almost six years later. (Pa0091-137). If the trial and decision had occurred a year earlier, the allocation period would be a year shorter, and U.S. Fire's allocated share of BASF's

damages would be greater. Conversely, if the trial and decision had been a year later, U.S. Fire's allocation, for the same loss, would be less. None of this would be predictable.

Use of the date of the 2010 Liability Trial decision also violates the public policy of both New Jersey and Massachusetts. State statutes and regulations declare and define public policy. *Lindsey v. Normet*, 405 U.S. 56, 70 n.18 (1972); *Pickett v. Lloyd's,* 131 N.J. 457, 468 (1993) (the Unfair Claims Settlement Practices Act "declare[s] state policy"). Both Massachusetts and New Jersey have passed a version of the UCSPA, which specifically requires the prompt investigation and resolution of insurance claims. Mass. Gen. Laws ch. 176(d), §§3 (b), (c), (f), (m) and (n); N.J.S.A. §17:29B-4(9) (b), (c), (f), (m) and (n). Such public policy requirements are at the heart of Justice O'Hern's landmark allocation decision in *Owens-Illinois*, in which he wrote: "Insurers whose policies are triggered by an injury during a policy period must respond to any claims presented to them and, if they deny full coverage, ***must*** initiate proceedings to determine the portion allocable for defense and indemnity costs." *Owens-Illinois, Inc. v. United Ins. Co.*, 138 N.J. 437, 479 (1994) (emphasis added).

The trial court's adoption of the date of the Jan. 31, 2011, Opinion and Order is contrary to the expressed policies of both Massachusetts and New

Jersey because it incentivizes insurance companies to delay resolution of even valid claims just as has happened here. The longer an insurance company can postpone the day of reckoning, the lower its potential exposure will be.

In this case, that is exactly what happened. The insurance companies were able to delay the resolution of BASF's valid claim for decades, first by ignoring BASF's 1986 notice until BASF was forced to file this lawsuit. Then, once the lawsuit was filed, some of the insurance companies were able to prolong this case for 18 years. Such conduct should not be rewarded.

II. The Appropriate End Date of the Allocation Period Is No Later Than September 8, 1986, When The CVOC Damage To Groundwater At The Site Plateaued And Was Discovered By BASF.

Although the *Boston Gas* Court adopted a time-on-the-risk allocation as a "fallback" to the fact-based allocation, it did not specifically address how the end date of a time-on-the-risk allocation period should be determined. *Bos. Gas*, 910 N.E.2d at 312-316. However, the Court did provide some guidance, stating that when the time-on-the-risk method is applied, damages are allocated in proportion to an insurance company's number of years on the risk divided by "the total number of years of **triggered** coverage." *Id*. at 313 (emphasis added). *See also Maestranzi Bros., Inc. v. Am. Employers' Ins. Co.*, No. 2005-1856 B, 2010 Mass. Super LEXIS 65, at *2 (Mass. Super. Apr. 9, 2010) (explaining that

Boston Gas requires the time-on-the-risk allocation to be calculated by dividing the "time on the risk" by the number of years in the "triggered period").

"Trigger of coverage" is a term of art that describes what must happen during the policy period for coverage to apply under a particular policy. *Bos. Gas,* 910 N.E.2d at 300. Courts have adopted four approaches to the trigger of coverage question: "(1) manifestation; (2) injury-in-fact or actual damage; (3) exposure; and (4) continuous." *Id.* Under the manifestation trigger, the policies triggered are those in effect "when property damage or actual damage is discovered, becomes known to the insured or a third party, or should have reasonably been discovered" *Bos. Gas, 910* N.E.2d at 300 n.21. The injury-in-fact trigger "implicates all of the policy periods during which the insured proves some injury or damage." *Id*. The exposure trigger results in "all insurance contracts in effect when property was exposed to hazardous waste" being triggered. *Id*. Finally, the continuous trigger posits that "any policy on the risk at any time during the continuing loss is triggered . . . from the date of initial exposure through manifestation." *Id*

Massachusetts has rejected the manifestation trigger in the context of environmental property damage, *Trustees of Tufts Univ. v. Commercial Union Ins. Co.*, 616 N.E.2d 68 (Mass. 1993), but has not yet adopted one of the other trigger theories. *Bos. Gas*, 910 N.E.2d at 301. Because there is no conflict

between Massachusetts law and well-settled New Jersey law on this issue, New Jersey law should apply. *See Rowe v. Hoffman-La Roche, Inc.*, 189 N.J. 615, 621 (2007) ("If there is no actual conflict, then the choice-of-law question is inconsequential, and the forum state applies its own law to resolve the disputed issue").

In *Owens-Illinois, Inc. v. United Ins. Co.*, 138 N.J. 437, 455 (1994), the New Jersey Supreme Court adopted the continuous trigger theory in an asbestos bodily injury case. In *Carter-Wallace, Inc. v. Admiral Insurance Co.*, 154 N.J. 312, 321 (1998), the Court applied the continuous trigger theory in an environmental property damage case. Under the continuous trigger theory, the years between the date of the first exposure to the injurious condition and the date the property damage manifests, or is discovered, are "triggered years." *See Owens-Illinois, Inc.*, 138 N.J. at 450. The date that property damage manifests is the last date of the triggered period. *Id.*

In this case, the date of first exposure to harmful conditions at the Site was 1958. (Pa0211). It is undisputed that the property damage was discovered, and BASF notified its insurance companies in 1986. (Pa0336-52). Dr. Powell also confirmed that the CVOC plume stabilized in 1986. (Pa0260). Because 1986 was when the property damage manifested and the CVOC plume

stabilized, 1986 is the last triggered year and should be the last year of a time-on-the-risk allocation period.

III. Alternatively, The End Date of the Allocation Period Is No Later Than 1993 When BASF Ceased Operations At The Site

The reasoning of *Maestranzi Brothers, supra,* 2010 Mass. Super LEXIS 65, also supports an alternative end date for the allocation period of 1993. Again, in *Maestranzi Brothers*, the Massachusetts Superior Court concluded that the allocation period should end when *Maestranzi* stopped adding waste oil to the site in 1992, because after that, it "did nothing to further pollution of the site." *Maestranzi Brothers*, 2010 Mass. Super. LEXIS 65, at *14-15.

In this case, it is undisputed that all operations at the Site ended in 1993. (Pa0092). Because BASF could not have contributed to any further CVOC pollution of the soil and groundwater after it ceased its manufacturing operations at the Site, the latest the end date for the time-on-the-risk allocation period could be is 1993.

CONCLUSION

When the court denied U.S. Fire's Motion for Reconsideration of the Jan. 31, 2011, Opinion and Order, it stated that granting the Motion "would be acting as an appellate court without the benefit of reviewing the entire record." Yet that is exactly what the court did when it later granted U.S. Fire's Motion for Reconsideration of the June 29, 2018, Order. The June 29, 2018, Order affirmed

the factual findings of Judge Dreier, which followed an extensive evidentiary hearing that involved an assessment of credibility of the testifying witnesses. There was no legitimate basis upon which to overturn those findings. The Trial Court's ruling reversing its own Order approving Judge Dreier's Report and Recommendations should be reversed; the June 29, 2018, Order should be reinstated with respect to allocation, and the case should be remanded to the Trial Court for further proceedings consistent with the June 29, 2018, Order.

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Respectfully submitted,

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BASF CATALYSTS, LLC (F/K/A ENGELHARD CORPORATION)

Plaintiff-Appellant,

v.

ALLSTATE INSURANCE COMPANY, (AS SUCCESSOR-IN-INTEREST TO NORTHBROOK EXCESS & SURPLUS LINES INSURANCE COMPANY); CONTINENTAL INSURANCE COMPANY; EVEREST REINSURANCE COMPANY (AS SUCCESSOR-IN-INTEREST TO PRUDENTIAL REINSURANCE COMPANY); FEDERAL INSURANCE COMPANY, GREAT NORTHERN INSURANCE COMPANY; HARTFORD ACCIDENT & INDEMNITY COMPANY; LEXINGTON INSURANCE COMPANY; NEW JERSEY MANUFACTURERS INSURANCE COMPANY (AS SUCCESSOR-IN-INTEREST TO NEW JERSEY MANUFACTURERS CASUALTY COMPANY); NEWARK INSURANCE COMPANY; ONEBEACON AMERICA INSURANCE COMPANY (AS SUCCESSOR-IN-INTEREST TO COMMERCIAL UNION INSURANCE COMPANY AND EMPLOYERS LIABILITY ASSURANCE CORPORATION); ROYAL INDEMNITY COMPANY; ROYAL INSURANCE COMPANY

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

DOCKET NO.: A-003029-22 TEAM 2

Civil Action

ON APPEAL FROM:
SUPERIOR COURT, LAW DIVISION,
MIDDLESEX COUNTY
DOCKET NO.: MID-L-2061-05

SAT BELOW:
HON. THOMAS D. McCLOSKEY,
J.S.C.

OF AMERICA (AS SUCCESSOR-IN-INTEREST TO ROYAL INSURANCE COMPANY AND ROYAL GLOBE INSURANCE COMPANY); TRAVELERS CASUALTY & SURETY COMPANY (AS SUCCESSOR-IN-INTEREST TO AETNA CASUALTY & SURETY COMPANY); UNITED STATES FIRE INSURANCE COMPANY; CERTAIN UNDERWRITERS AT LLOYD'S AND BRITISH COMPANIES; AND JOHN DOES 1-2

Defendants and, as to United States Fire Insurance Company, Respondent and Cross-Appellant.

BRIEF OF DEFENDANT-RESPONDENT AND CROSS-APPELLANT UNITED STATES FIRE INSURANCE COMPANY

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PRELIMINARY STATEMENT

Engelhard Minerals and Chemicals, Inc. (later acquired by BASF Catalysts LLC) ("Engelhard" or "BASF") operated a manufacturing facility in Plainville, Massachusetts from 1958 to 1993 ("Plainville Site" or "Site"). The operations at the Site caused soil and groundwater contamination that is still being cleaned up to this day. The cleanup will continue for at least the next 20 years.

United States Fire Insurance Company ("US Fire"), along with a host of other insurers, issued liability policies to Engelhard from the 1950s to 1985. Engelhard commenced this lawsuit in 2005, seeking declaratory judgment that those insurers were obligated to provide coverage for the costs incurred by Engelhard to clean up the contamination at the Site.

US Fire is the sole insurer left in this case. All but three insurers were dismissed from the case in 2010 following the trial court's ruling that Massachusetts law applied to this case, and that the "sudden and accidental" pollution exclusions in those insurers' policies barred coverage for Engelhard's claims. The remaining three insurers went to trial in 2010, which resulted in a ruling that $6 million of Engelhard's nearly $19 million damages claim was not covered. The trial court also ruled that at least some "property damage" had taken place during the US Fire policy period, and the court determined the "start dates" of the contamination at different locations at the Site.

The allocation phase of this case followed, and was tried before a Special Allocation Master ("SAM"). The SAM issued a Report and Recommendation, which the trial court later found to be "palpably incorrect". The trial court found, by applying the record facts to binding Massachusetts law, that the damages incurred by Engelhard to clean up the contamination – the "property damage" claimed by Engelhard – must be allocated pro-rata across the entire period of contamination from 1958 through the trial court's decision in 2011. That decision by Judge LeBlon was correct; it is fully supported by the facts, comports with Massachusetts law, and it should be upheld on this appeal.

The result of that decision, which is the subject of BASF's appeal, equates to an almost total rejection of BASF's claims for coverage. Of the approximately $19 million in damages initially sought by BASF in this case, US Fire owes BASF approximately $900,000. Looking at it a different way, BASF sought approximately 27% of its costs from US Fire; as a result of Judge LeBlon's decision, US Fire's share of costs is approximately 6%.

This result is not a success for BASF in any meaningful way; in fact, BASF lost at every critical point in this case and on virtually every substantive issue that it brought before the trial court. And yet BASF asserts that it is a "successful claimant". The trial court incorrectly agreed with BASF's self-assessment, and US Fire hereby appeals the court's erroneous determination that, in the face of

overwhelming evidence to the contrary, BASF was a "successful claimant" entitled to an award of attorneys' fees.

Finally, US Fire also appeals the trial court's rulings awarding BASF over a million dollars in attorneys' fees and prejudgment interest. The attorneys' fees calculations performed by the trial court disregard clear precedent of this Court addressing the appropriate methods for such calculations. The interest calculations contain blatant mathematical errors and rely upon unverified proposed calculations that were not property submitted into the record before the trial court in the first instance.

PROCEDURAL HISTORY

BASF filed its complaint on March 17, 2005, seeking coverage in connection with an Environmental Protection Agency ("EPA") action that began in 1986, and resulted in an Administrative Order on Consent in 1993. (Pa0001.) BASF's complaint alleged it was entitled to liability insurance coverage in connection with the purported continuous release of pollutants at the Site from 1958 to 1993. (Pa0008.)

This case originally involved 15 defendant insurers. (Pa0001.) In or about 2010, 12 of the defendant insurers (the "Pollution Exclusion Insurers")[1] moved for

[1] The Pollution Exclusion Insurers are Allstate Insurance Company, Continental Insurance Company, Everest Reinsurance Company, Federal Insurance Company, Great Northern Insurance Company, Hartford Accident & Indemnity Company, Lexington Insurance Company,

summary judgment on the issues of choice of law and application of the pollution exclusion. (Pa0087.) The Pollution Exclusion Insurers argued that Massachusetts law was applicable to this action, and that under Massachusetts law, pollution exclusions in their policies applied to preclude coverage. (Pa0065.) BASF opposed the Pollution Exclusion Insurers' motions and filed a motion seeking the application of New Jersey law. (Pa0089.) US Fire did not take a position on choice of law and did not have a pollution exclusion in its policy. (Pa0087.) By Order dated April 7, 2010, the Pollution Exclusion Insurers' motions were granted and BASF's motion was denied. (Pa0087.) The Pollution Exclusion Insurers were subsequently dismissed from the case, or reached settlements with BASF prior to the decision. (Pa0087.)

BASF and the three remaining insurers, US Fire, OneBeacon America Insurance Company, n/k/a Lamorak ("Lamorak"), and Certain Underwriters at Lloyd's London ("Underwriters") then proceeded to a bench trial that commenced on October 19, 2010, and concluded on January 6, 2011. (Pa0091.) On January 31, 2011, the trial court entered a Letter Opinion and Order with its findings of fact and conclusions of law. (Pa0091.) The court held that certain exclusions in the US Fire, Lamorak, and Underwriters' policies applied to partially preclude coverage.

New Jersey Manufacturers Insurance Company, Newark Insurance Company, Royal Indemnity Company, Royal Insurance Company of America, and Travelers Casualty & Surety Company.

(Pa0104-Pa0105; Pa0113-Pa0116.) Of the approximately $19 million in damages sought by BASF at the trial, the court determined that BASF's covered costs (i.e., costs not subject to any exclusion) were approximately $12 million. (Pa0136.)

The court also identified the dates that contamination purportedly began based on operations at a number of different locations on the Site. But, the court did not determine the end-date of that contamination, which is critical to allocating BASF's damages across the full time period implicated by the contamination.

Thus, in order to calculate the allocation of damages, an end-date to the allocation period had to be established. The process of allocating these costs across the period when "property damage" occurred was bifurcated for a separate allocation phase of the case. (Pa0137.)

After a period of discovery, a seven-day long allocation trial took place before the SAM from March 18, 2015, to April 24, 2015. (Pa0144.) On August 3, 2015, the SAM issued his Report & Recommendation ("R&R"). (Pa0144.) In the R&R, the SAM incorrectly held that approximately 27% of the contamination had occurred during the three-year long US Fire policy period. (Pa0158.)

All parties filed objections to the R&R. Almost three years later, in an Opinion and accompanying Order dated June 29, 2018, the trial court adopted the SAM's R&R in full. (Pa0162.)

US Fire moved for reconsideration of the Court's June 29, 2018, Order on July 19, 2018. Argument on the motion for reconsideration was held on October 22, 2018. The motion was granted on July 30, 2020, with the trial court stating that the SAM's decision was "palpably incorrect". (Pa0199-Pa0209.)

On July 17, 2020, BASF filed its original motion seeking final judgment, attorneys' fees, costs, and pre-judgment interest. (Da0001-Da0029.) BASF filed an amended motion for final judgment, attorneys' fees, costs, and pre-judgment interest on March 5, 2021. (Pa0212.)

The trial court granted BASF's March 2021 Motion in an Order and Opinion dated February 10, 2023. (Pa0041-Pa0060.) With respect to US Fire, the trial court improperly awarded BASF $511,005 in attorneys' fees, $88,827 in court costs, and $1,068,835.87 in prejudgment interest. (Pa0043.)

US Fire sought reconsideration of the Final Judgment Order in a motion for reconsideration filed on March 2, 2023. The trial court denied US Fire's motion for reconsideration in an Order dated May 24, 2023. (Pa0215.)

STATEMENT OF FACTS

A. Plainville Site History and Operations.

Between 1957 and 1962, work at the Plainville Site primarily involved rolling and fabricating steel and titanium, and fabricating uranium fuel elements under a license with the Atomic Energy Commission ("AEC"). Nuclear

manufacturing ceased in 1962. (Pa0093.) After 1963, the Site was expanded to eventually include 12 buildings where gold and silver wire and stock for the jewelry and electronics industry were manufactured. (Pa0008; Pa0093.) Operations at the Plainville Site ceased in 1993. (Pa0008.)

B. Contamination at the Plainville Site

Engelhard's nuclear and non-nuclear operations resulted in environmental contamination at the Plainville Site. (Pa0008.) In 1986, Engelhard received an EPA Request for Information pursuant to Section 3007(a) of RCRA, 42 U.S.C. § 9604(e), which requested information regarding any releases of hazardous materials and Engelhard's waste handling activities with respect to the Site. (Pa0093.) In response to the EPA's Request for Information, in 1986, Engelhard engaged Environ Corporation ("Environ") and Dr. Robert Powell, its eventual expert at the liability and allocation trials, to conduct an investigation at the Plainville Site to ascertain the full scope of the contamination. (Pa0093.)

Environ provided a Preliminary Report on Initial Sampling regarding Phase I investigation to Engelhard on November 6, 1987, advising that chlorinated volatile organic compounds ("CVOCs") were detected in elevated levels in groundwater. (Pa0093.) No remedy was outlined and the report indicated that additional study would be required in additional phases of the investigation. Environ subsequently engaged in Phase II and Phase III investigations. Environ

also engaged in sampling of soil and groundwater, sediments, surface water, fish tissue and soil gas. (Pa0093.)

After further investigation and subsequent negotiations, Engelhard and the EPA entered into an Administrative Order on Consent, RCRA Docket No. I-92-1051 ("the Consent Order") in September 1993. The Consent Order required that Engelhard conduct further investigation on twenty of the original forty-six Areas of Concern ("AOCs"), some of which were reclassified or consolidated, resulting in a total of fifteen AOCs requiring further investigation. (Pa0365.)

The investigations ultimately revealed that the constituents of concern at the Site include CVOCs, radionuclides, cadmium and PCBs. The CVOCs had contaminated the groundwater and moved offsite, and the other contaminants appear in concentrations of environmental concern only in soils and sediments. The predominant constituents of the CVOC plume are PCE ("perc") and TCA, and TCE also is present in the groundwater as a degradation product of perc. (Pa0094.)

A range of dates when ***operations*** occurred at the various AOCs is known and detailed below. However, the actual and precise timing of CVOC ***releases*** is not known, and will never be known. (Pa0264-0265.) As BASF has conceded through its expert, Dr. Powell:

> there isn't in this data record a specific information on how much solvent was released at any one location at any point in time. It's not as if we have detailed manifests that say on a certain day we disposed of ten

> gallons of solvent into AOC 5. We know from company records and from our examination where the releases occurred, but we don't know the specific quantities that were – that occurred, and we don't know within the boundaries of the time that that AOC operated which days or weeks, or what have you, that the releases actually occurred.

(Pa0264-0265.)

However, it is known and undisputed that the contamination resulting from those unspecified releases is continuing in nature, and new "property damage" continues to take place to this day. (Pa0148.) BASF's own expert, Dr. Powell, concedes as much and is quoted throughout this brief.

C. The US Fire Policy

US Fire issued an umbrella insurance policy to Engelhard effective February 26, 1970, to February 26, 1973 (the "US Fire Policy"), with a per occurrence limit of liability of $25,000,000. (Pa0318.) The primary policies underlying the US Fire Policy provide for total underlying limits of $200,000. (Pa0155-Pa0157.)

D. BASF's Communications with US Fire

BASF was aware of its liability for contamination of the Site by 1986, when it received the EPA Request for Information. (Pa0093.) BASF was aware that substantial costs would be incurred in connection with remediating the Site by 1993, at the latest, when it entered into the Consent Order. (Pa0092-Pa0093.)

BASF steadily incurred investigation costs for over a decade in preparing the RFIs. (Pa0008 at ¶¶ 42, 43.)

At no point in time prior to the filing of this lawsuit in 2005 did BASF make a demand for payment to US Fire. BASF only noticed the claim to US Fire, and then provided infrequent claim updates. (Pa0353-Pa0362; Pa0435-Pa0463.) BASF never stated that the policy limits underlying the US Fire policy were exhausted, and the primary limits underlying the US Fire policy were never paid, which is a prerequisite to any coverage obligations of US Fire. (Pa0155-0156.) US Fire did not disclaim coverage upon receipt of notice from Engelhard; rather, US Fire reserved its rights in connection with this claim. (Pa0368-Pa0379.) US Fire never disclaimed coverage prior to being sued by Engelhard.

E. The Declaratory Judgment Action.

BASF commenced this litigation in 2005. This case initially involved 15 insurers that issued policies to Engelhard from 1958 through 1985. (Pa0001.)

Choice of law was the pivotal issue early in the case because BASF was primarily based in New Jersey while the Plainville Site is in Massachusetts. Insurance policies commencing after the expiration of the US Fire Policy contained "sudden and accidental" pollution exclusions, which were unenforceable under New Jersey law but were enforceable under Massachusetts law. (Pa0066.)

On or about March 23, 2010, the trial court rejected BASF's choice of law arguments and held that Massachusetts law applied to the claims and that the "sudden and accidental" pollution exclusion barred coverage under Massachusetts law. (Pa0061-Pa0090.) As a result, all but three insurers were dismissed from the case either through summary judgment or settlement. The three remaining insurers, including US Fire, whose policies did not contain pollution exclusions, remained in the case.

1. The Liability Trial.

The case proceeded to a bench trial in October 2010 ("Liability Trial"). Engelhard agreed prior to trial that the three remaining insurer defendants, including US Fire, had no duty to defend it in connection with the claim at issue. (Pa0091.) The only issue before the court was whether the costs incurred by BASF in remediating the Site were covered under the policies at issue, including the US Fire Policy. (Pa0091-Pa0137.) To establish entitlement to coverage, BASF sought to prove that environmental contamination – "property damage" – took place during the insurers' policy periods, and that coverage was not otherwise excluded.

BASF failed on a number of issues at the Liability Trial. The trial court found that the "Nuclear Exclusion" precluded coverage for radionuclide contamination, and that the "Owned Property Exclusion" precluded coverage for clean-up of the contamination in the Site's soils and sediments. (Pa0104-Pa0105;

Pa0113-Pa0116.) The only "property damage" even potentially covered under the remaining policies was groundwater contamination from CVOCs.

With regard to that contamination, the trial court analyzed the various AOCs and determined that Engelhard had met its burden of proving "property damage" associated with 5 AOCs. But, the trial court held that BASF had failed to prove "property damage" associated with six AOCs: AOC 6, AOC 7, AOC 13, AOC 14, AOC B-3, and AOC B-35. (Pa0123; Pa0125-Pa0126; Pa0129-Pa0130.)

The trial court found that the total value of unexcluded property damage as of December 31, 2009, was $12,827,154.42. BASF's original claim was for approximately $19 million.

The Liability Trial also identified the "timing of releases" of CVOCs into the groundwater at the Site by equating the dates of operations at each AOC to also be the release dates for the contaminants. Thus, the court concluded that the beginning of operations at each AOC was the date when contamination first began from each AOC, as follows:

AOC	Start Date of Operations
16	1958
5	1966
22	1965/66
26	1966
30	1966

Thus, the result reached in the Liability Trial was only that some amount of "property damage" occurred during the relevant policy periods from the above

AOCs, and that that contamination began on the dates in the chart above. What was not established was an end date for the contamination, which is necessary to identify the allocation period over which the damages could be allocated. The end date, and the proper allocation of damages over the allocation period, was left for the allocation phase of the case. (Pa0136-Pa0137.)

Although the trial court focused on an AOC-by-AOC analysis to determine the timing of contaminant ***releases***, groundwater contamination – the "***property damage***" – is not restricted to specific AOCs. Rather, "[t]his is one site-wide groundwater problem[.]" (Pa0285.) The entire aquifer underlying the Site has been contaminated with the CVOCs released at each AOC. (Pa0257-0258.)

Moreover, it is undisputed that all of the groundwater contamination at the Site did not occur simultaneously with CVOC releases. Instead,

> active dumping of these pollutants in various areas of the site and at different times and volumes caused the collection and concentration of DNAPL (Dense Non-Aqueous Phase Liquid, a condensed form of DCE, which itself is degraded PERC) ***which continues to this day passively contaminating the groundwater that flows over it.*** [The DNAPL] is lodged in the bedrock and only gradually dissipates.

(Pa0148.) (emphasis added.) Groundwater contamination will continue to occur at the Site for decades, as the DNAPL dissolves into the clean groundwater flowing over it, and BASF has estimated it will continue to incur cleanup costs for "another twenty years or more[.]" (Pa0148; Pb20.)

To summarize, the Liability Trial did not determine how damages should be allocated between the insurers and BASF. To do that would have required a finding of the "start date" of contamination, which ***was determined***, and the "end date", which ***was not***. Combined, the "start date" and the "end date" define the allocation period. Both dates are necessary because the "property damage" is ongoing in nature, occurring over many years and implicating multiple policy periods. Both the "end date", and how covered costs would be allocated, was left for the allocation phase of the case. (Pa0136-Pa0137.)

2. The Allocation Trial and BASF's Allocation Theory.

Trial on the allocation issues ("Allocation Trial") proceeded before the SAM in 2015, following a period of allocation-specific discovery. (Pa0256; 1T.) The issues before the SAM were straightforward – to determine an "end date" for the allocation period and to allocate throughout that period consistent with binding Massachusetts law in Boston Gas Co. v. Century Indem. Co., 454 Mass. 337, 373 (2009) ("Boston Gas"). While Boston Gas is discussed in detail in the Argument portion of this brief, the basics of its holding are necessary to provide context for the factual discussion here.

The Boston Gas court held that Massachusetts law requires pro-rata, time-on-the-risk allocation of damages resulting from progressive indivisible environmental contamination. In rendering this ruling, the Supreme Judicial Court

expressly rejected all other allocation methodologies, except for limited circumstances where a "fact-based" allocation would be feasible. The Boston Gas court defined what a "fact-based" analysis would be:

> We do not foreclose the possibility that in some cases the facts may permit a more ***accurate estimation*** of ***how much property damage took place in each period***. If the evidence permits an ***accurate estimation*** of the ***quantum of property damage in each policy period*** then proration by time on the risk may be inappropriate.

The situations in which fact-based allocation is appropriate are limited to those where the insured can establish, ***with accuracy,*** the amount of property damage that ***"in fact"*** took place during each policy period. 454 Mass. 337, 373.

During the Allocation Trial, BASF advocated for a "fact based" approach and looked to its environmental expert, Dr. Powell, to support this methodology. Yet, during the course of the allocation trial, Dr. Powell testified that the timing and amount of CVOC releases was impossible to determine with any precision. (Pa0264-0265; 1T179:1-7.) Dr. Powell also testified that his calculations of "property damage" allocation were not based on the concept of allocating property damage to insurance policy periods. (1T403:6-8) ("No, I was not trying to do an allocation to individual policies. That was beyond the scope of what I was doing".)

Dr. Powell instead performed a weighted analysis that attempts to identify how much contamination can be attributed to each AOC – in other words, X% at AOC1, Y% at AOC2, etc. He did not, however, determine that X% of the contamination took place during any particular policy period – he did not say, for example, that 30% of the contamination took place in 1970. (Pa0487-0490.) He also did not say that any particular volume of releases and contamination took place on any particular day or at any particular time. (Pa0491.) Dr. Powell's "weighted by AOC" analysis is nowhere to be found in Boston Gas.

Moreover, the "end dates" incorporated into Dr. Powell's calculations were not based on his professional opinion. (1T404:12-24.) Rather, the "end dates" were suggested by BASF's counsel to Dr. Powell and they run contrary to the actual facts. (Pa0204.) In truth, the Allocation Trial testimony by both defense and plaintiff experts was unanimous – the "property damage" at the Site continues to present day. (1T398:5-20; 1T732:11-739:8.)

Dr. Powell undoubtedly had experience at the Site. He had worked there with Environ since 1986. Backed by this experience, Dr. Powell readily admitted:

> there isn't in this data record a specific information on how much solvent was released at any one location at any point in time. It's not as if we have detailed manifests that say on a certain day we disposed of ten gallons of solvent into AOC 5. We know from company records and from our examination where the releases occurred, but we don't know the specific quantities that were – that occurred, and we don't know within the

> boundaries of the time that that AOC operated which days or weeks, or what have you, that the releases actually occurred.

(Pa0264-0265.)

There was nothing in the record that allowed Dr. Powell to provide an accurate estimate of the amount of "property damage" that took place during any time period. He could provide no testimony as to the precise amount of contamination that took place at any time or at any particular AOC. (Pa0491) (stating a factor considered by Dr. Powell was a "Lack of data regarding specific timing, amount and/or location of CVOC releases."). Dr. Powell's allocation percentages are also provided on an AOC by AOC basis, (Pb25), despite his own admission that, "[t]his is one site-wide groundwater problem [.]" (Pa0285.)

3. The Special Allocation Master's Report & Recommendation.

The SAM issued his R&R on August 3, 2015, after the conclusion of the Allocation Trial. (Pa0144-Pa0161.) The SAM described the nature of the damage at issue in this case, stating that "[i]ntense active dumping[2]" of CVOCs "in various areas of the Site and at different times and volumes" caused the collection and concentration of DNAPL, which continues to slowly contaminate the groundwater to present day. (Pa0148.) The SAM continued by stating that contaminants were

[2] The SAM used the term "dumping" to refer to the release of pollutants at the Site. This was another issue on which the SAM erred. Pollutants were released over time from operations at the Site; they were not "dumped".

released at the Site "in two time frames, one from 1958 through 1964 only in AOC 16, and the balance, from 1966 through 1993 at many AOCs[.]" (Pa0148.)

The SAM further recognized that these "release[s] of hazardous material into the soil and groundwater" at the Site constituted the "occurrence" in this case, but that the "continuous migration of the contamination" into the groundwater constituted the "property damage" that he was charged with allocating across an allocation period. (Pa0151; Pa0157.)

To start, the SAM attempted to define an "allocation period" across which the damages sought by BASF could be allocated. The SAM determined that the relevant allocation period would be January 1, 1958, to December 31, 2009. (Pa0146.) As detailed below, the SAM did not actually allocate through December 31, 2009. Also, that date had nothing to do with allocation; rather, it was the date through which Engelhard had submitted invoices related to its incurred costs.

The SAM then provided a short, one paragraph holding assigning percentages against Lamorak (not a party to this appeal due to liquidation) and US Fire, without citation to any testimony, case law, or facts:

> Applying the figures in the aforementioned reports, the $12,827,154.42 contamination damages for the pre-2010 period determined by Judge Stroumtsos attributable to OneBeacon are **$4,859,569.62 (37.89%)**, and the damages attributable to US Fire are **$3,314,840.83 (25.84%)**. The remaining damages of **$4,652,743.96 (36.27%)** are to be absorbed by Engelhard. These figures fall well within the policy limits for both insurers.

(Pa0158.)

To illustrate the disproportionate nature of this holding, it is important to understand the time period each party was "on the risk" and responsible for property damage taking place during that time period, and the resulting difference in the amounts allocated to each year depending on which party is "responsible" for that year.

Party	% Responsibility	Time "on the risk"	Damages per year
Lamorak	37.89%	6 years, 4 months	$777,531.10
US Fire	25.84%	3 years	$1,104,947.00
BASF	36.27%	30 years[3]	$155,091.50

The SAM cited no law, fact, or testimony in holding that these disproportionate figures represented an appropriate and accurate allocation of damages in this case. (Pa0158.) The SAM held that almost ten times more property damage had occurred per year in the US Fire policy period, than in the BASF period, without providing any basis for this holding.

In reaching this determination, the SAM departed from his initial, correct statement that fact-based allocation should only be applied when "possible," and instead stated – incorrectly – that "fact-based allocation [is] required by

[3] The BASF Period represents the policy periods of insurers with whom BASF settled prior to the issuance of the R&R (Pa0149), as well as the periods of time in which BASF failed to obtain pollution liability coverage in the marketplace. (Pb27 at fn. 15).

Massachusetts law." (Pa0158.) But, as there were no facts to base his conclusions on, his determinations were not even "fact-based".

Instead, to achieve the allocation percentages stated in the R&R, the SAM adopted the "practical estimates" provided by Dr. Powell, (Pa0148 at fn. 1), without considering any alternatives. Dr. Powell's "practical estimates" are unrelated to when property damage took place, and at no point did the SAM describe Dr. Powell's "estimates" as accurate.

The SAM also, without citing any testimony or facts, departed from the findings in the Liability Trial and determined that contamination at AOCs 6 and 14 had caused "property damage" during the US Fire and Lamorak policy periods. (Pa0148-Pa0149.) (Pa0158 (adopting Dr. Powell's allocation estimates which include his finding of "property damage" during the US Fire and Lamorak policy periods stemming from AOCs 6 and 14.))

This finding directly contradicted the holdings of the trial court during the Liability Trial in this case, which unambiguously found that "property damage" had not occurred during the relevant policy periods at either of those AOCs. (Pa0123; Pa0125-Pa0126; Pa0129-Pa0130.) This finding was not only factually incorrect, but was also beyond the authority of the SAM. (Pa0149).

4. Allocation Proceedings After the R&R.

US Fire filed objections to the R&R on August 20, 2015. Argument on US Fire's objections was held on June 8, 2016. (2T.)

More than two years later, in an Opinion dated June 29, 2018, the trial court adopted the SAM's R&R and expanded the SAM's mandate. (Pa0162.) The June 29, 2018 Opinion reiterates the facts, arguments, and procedural history in the case, and then adopts the finding of the SAM without any meaningful discussion of the R&R. (Pa0162-Pa0187); (Pa0205) (court's July 30, 2020 ruling on US Fire's motion for reconsideration, stating the June 29, 2018 Opinion "addresses the procedural history, the facts and the law but never truly analyzes the law and appl[ies] it to the facts.")

US Fire moved for reconsideration of the Court's June 29, 2018, Order on July 19, 2018. Argument on the motion for reconsideration was held on October 22, 2018. (3T.) The motion was granted on July 30, 2020. (Pa0199-Pa0209.)

BASF asserts the trial court's reasons for granting the motion for reconsideration were never fully explained, and that the ruling represented a sudden about-face. (Pb11.) This is false. In a telephone conference held on July 30, 2020 (4T), Judge LeBlon explained his reasons for reversing his prior holding, including the personal issues that curtailed his ability to devote significant attention

to this case at the time he entered his incorrect June 29, 2018, Opinion. (4T5:20-8:4).

Further, in granting the motion for reconsideration, the trial court correctly held that its prior decision accepting the R&R was "palpably incorrect"[.] (Pa0199.) Of course, this necessarily rendered the R&R "palpably incorrect".

The trial court explained that under Boston Gas, a "pro rata time on the risk method for allocating liability . . . is appropriate absent evidence approximating actual distribution of property damage." (Pa0202.) The trial court then cited the evidence which makes "approximating actual distribution of property damage[,]" impossible in this case:

> Dr. Powell, testified that the property damage was ongoing as of the end of the liability trial. Evidence presented at the allocation trial indicated that the damage continues. Dr. Powell indicated he used dates suggested by BASF counsel to represent the end of operations in the various AOC's as end dates for the allocation of property damage. Dr. Powell acknowledged these dates do not represent the end of property damage, and that it was a single plume of groundwater contamination, and impossible to determine the timing of the contamination from any one AOC and the relation to the property damage.

(Pa0204.)

Based on this evidence, and the continuing nature of property damage at the Site, the trial court held that the "time-on-risk approach from Boston Gas" should be applied in this case. (Pa0206-Pa0207.) Finally, the trial court held that in this

case, as in Boston Gas, groundwater contamination had continued to present day and would continue into the future. (Pa0208.) Accordingly, noting the Boston Gas court had held the allocation "end date" was the "end date" of the trial in that case, the trial court held the end date of the allocation period in this case would be the final date of the liability stage of this case, January 31, 2011. (Pa0207-Pa0208.)

The trial court's holding reduced US Fire's allocated share of covered costs from approximately 27.5% to approximately 6.4%. Lamorak has been allocated approximately 8.96% of covered costs. BASF, who was either uncovered or settled with insurers covering the remaining years of the allocation period, has been allocated approximately 85% of covered costs.[4] (Pa0213-Pa0214.)

5. The Fee And Interest Phase Of This Case.

While US Fire's motion for reconsideration on allocation was pending, on July 17, 2020, BASF filed its original motion seeking final judgment, attorneys' fees, costs, and pre-judgment interest (the "Original Motion"). (Da0001-Da0029.)

BASF's Original Motion sought over $4.8 million in covered costs, over $4.4 million in interest, approximately $300,000 in litigation costs, and over $1.6 million in attorneys' fees from US Fire. (Da0027.) BASF's Original Motion

[4] It is important to consider that BASF has already been compensated for some portion of the 85% allocated to it. BASF made a business decision to settle with and recover amounts from various insurers who may have been responsible for property damage taking place during their policy periods.

argued for application of the "relative culpability" approach to apportioning attorneys' fees among the parties – as opposed to the "time necessary to litigate" approach also recognized by this Court. (Da0017-Da0020.)[5]

In addition, BASF's Original Motion included an expert report from its accountant, June Toth, which purported to calculate interest. (Da0030-Da0045.) Ms. Toth's report was the second report served by BASF calculating interest. BASF had previously served an expert report calculating prejudgment interest composed by Kerry Ruoff, CPA, CFF, on or about December 17, 2014 (the "Ruoff Report"). (Da0046.)

After the trial court granted US Fire's Motion for Reconsideration, BASF filed a new motion for final judgment, attorneys' fees, costs, and pre-judgment interest, on March 5, 2021 (the "March 2021 Motion"). (Pa0212.) The March 2021 Motion substantially departed from the arguments made by BASF in the Original Motion. Specifically, BASF reversed course and argued for application of the "time necessary to litigate approach," instead of the "relative culpability approach" argued in the Original Motion.

[5] The "relative culpability" approach calculates compensable fees based on a party's allocated share of fault (in this case, US Fire's 6.4% share of property damage). The "time necessary to litigate approach" requires the party seeking fees to meet its burden of identifying compensable legal fees incurred because of a specific party and issue. Empower Our Neighborhoods v. Guadagno, 453 N.J. Super. 565, 583 (App. Div. 2018).

The March 2021 Motion also included yet another calculation of prejudgment interest by Ms. Toth. This was the third different expert report served by BASF on the issue of prejudgment interest, with no new facts that needed to be considered. (Da47-Da54.)

In addition, the March 2021 Motion attached thousands of pages of legal invoices for services rendered across the 15-year history of this case. Many of these invoices contained "block billing" entries which did not appear to be divisible pursuant to the "time necessary to litigate approach" adopted by BASF. (E.g., Da55-Da178.) In particular, BASF relied on the Certification of Andrew Noble, Esq., – BASF's counsel – to support its claim for fees based on the "time necessary to litigate" approach. Mr. Noble claimed to have performed the following tasks in order to isolate compensable legal fees:

- Each of BASF's bills were reviewed by its counsel on a line-by-line basis. Where a specific task identified in one of the billing entries related to a specific insurance company other than Lamorak or US Fire, the fees incurred for that task were deducted from the monthly total on the bill.

- Similarly, where a specific task identified in one of the billing entries related to an issue on which BASF did not succeed, the fees incurred for that task were deducted from the monthly total.

- After all deductions were made, the remainder of BASF's legal fees for any given month were treated as if they all related equally to all insurance company defendants and were divided by the number of

> insurance company defendants that were parties to the case during that month.

(Da0183 at ¶ ¶ 25-27.)

The issue with the application of this method is that the 15 years of legal invoices produced by BASF are replete with instances of block billing, such that actually identifying those deductible time values assigned to unsuccessful issues and other insurer defendants is impossible. (E.g., Da55-Da178.)

US Fire was granted a period of discovery on the issues of attorneys' fees and interest. During this phase, US Fire deposed BASF counsel Andrew Noble. (Da183; Da185-Da228.) US Fire also deposed BASF's accounting expert, June Toth, who provided testimony which indicated the interest calculations she had provided were unreliable. (Da229-Da258.)

US Fire's opposition to the March 2021 Motion argued that BASF was not a "successful claimant" entitled to attorneys' fees, that BASF was not a "prevailing party" entitled to costs, and that prejudgment interest should be calculated from 2005, the date of the filing of this lawsuit, using the method to calculate interest provided in the Ruoff Report. (Da259.) US Fire's interest calculations also sought to toll the running of interest based on the unusual court delays that had occurred after the SAM issued the R&R. (Da259.) US Fire further argued that to the extent the trial court did award attorneys' fees and costs, the amounts awarded should be

calculated using the "relative culpability approach", and that costs for expert fees were not compensable as court costs.

In reply, BASF abandoned the interest calculations provided by June Toth, and provided a completely new set of interest calculations composed by BASF counsel. (Da260-Da261.) Those new calculations were the fourth different set of interest calculations provided by BASF in the course of this litigation. Notably, the new interest calculations increased BASF's claimed interest by more than $300,000 over the amount originally requested in the March 2021 Motion papers – with no new evidence. (Cf. Pa213; Da261.)

The trial court granted BASF's March 2021 Motion in an Order and Opinion dated February 10, 2023 (the "Final Judgment Order"). (Pa0041-Pa0060.) With respect to US Fire, the trial court awarded BASF $511,005 in attorneys' fees, $88,827 in costs, and $1,068,835.87 in prejudgment interest. (Pa0043.) The interest awarded exceeded the amount sought in BASF's March 2021 Motion. (Pa213.) The costs awarded were stated to be "[a]t 6.4% and undisputed". (Pa0043). Both of these statements were incorrect. US Fire had opposed costs and BASF had calculated 6.4% of its costs at $55,670. (Da262.)

The Final Judgment Order held that BASF was a "successful claimant" entitled to attorneys' fees. (Pa0050-Pa0052.) However, the trial court's holding

disregarded BASF's numerous failures, including on choice of law (which resulted in dismissal of 12 insurers) and on allocation. (Pa0052.)

In calculating attorneys' fees, the trial court did not adopt the "relative culpability approach" or the "time necessary to litigate approach." Instead, the trial court fashioned a new method to calculate fees. The trial court adopted the amount of fees calculated by BASF under the "time necessary to litigate approach" ($1,193,281), multiplied that figure by the erroneous allocation percentage originally entered against BASF (36.4), and then divided that figure by the allocation percentage ultimately entered against BASF (85). (Pa0054.)

In reaching this calculation, the trial court rejected the argument that deductions should be made for issues on which BASF was unsuccessful, like choice of law and allocation. (Pa0053-Pa0055.) The trial court also did not appear to review a single legal invoice in reaching its ultimate calculation of fees.

With respect to costs, the trial court reiterated its holding that BASF was successful in this case. The trial court then held, based on a single Law Division opinion, that expert fees were recoverable as court costs. (Pa0056.)

In addition, the trial court fully accepted BASF's interest calculations, which had been submitted by BASF for the first time in its reply brief. (Pa0056-Pa0059.)

The trial court held that interest provided by these calculations would start running in 1989. (Pa0057.)[6]

Finally, the trial court applied a 2% enhancement to New Jersey's prejudgment interest rates, claiming that "the equities" demanded the entry of additional prejudgment interest against US Fire. (Pa0058.) The trial court reached this conclusion based on its unsupported statement that US Fire had delayed this case for "17 years". The trial court's statement in this regard did not consider that five years had been spent by the trial court reaching a final decision on allocation. Further, the trial court did not cite any specific conduct on the part of US Fire which delayed this matter. Instead, the court stated without citation that "[b]ecause of the insurers' conduct, discovery took over five (5) years." (Pa0058). That statement is without any factual basis; it is flat out wrong.

US Fire sought reconsideration of the Final Judgment Order by motion for reconsideration filed March 2, 2023. Argument was held on May 23, 2023. (5T). In argument on the motion, the trial court repeatedly stressed its "discretion" (5T46), stated "so what" in response to an argument made by US Fire regarding the fact that fees had been improperly awarded for choice of law (5T10), and

[6] As set forth below, the 1989 start date represents the trial court's incorrect holding that the limits underlying the US Fire policy would have exhausted by 1989. (Pa0057.) However, since only 6.4% of the covered costs claimed by BASF can be allocated to the US Fire Policy Period, the limits underlying the US Fire Policy would not have exhausted until 1996. (Pa0057.)

incorrectly stated US Fire had not raised a 2005 start date for the running of interest in its opposition to the original motion. (5T18).

The trial court denied US Fire's motion for reconsideration of the Final Judgment Order in an Order and Opinion dated May 24, 2023. (Pa0215).

ARGUMENT – RESPONDENT

I. STANDARD OF REVIEW

A. The Trial Court's July 30, 2020, Opinion is Entitled to Deference.

A trial court's factual findings premised upon evidence admitted in a bench trial are generally entitled to deference and "are binding on appeal when supported by adequate, substantial, credible evidence." Cesare v. Cesare, 154 N.J. 394, 411–12 (1998) (citing Rova Farms Resort, Inc. v. Investors Ins. Co. of Am., 65 N.J. 474, 484 (1974)); see also Potomac Ins. Co. of Illinois ex rel. OneBeacon Ins. Co. v. Pennsylvania Mfrs.' Ass'n Ins. Co., 215 N.J. 409, 421 (2013).

The decision on appeal before this Court is the trial court's correct holding that, under Boston Gas, the record facts did not allow for BASF's purported "fact-based" allocation. (Pa0199.) The trial court's decision on US Fire's motion for reconsideration[7] was a well-reasoned opinion that cited and discussed the

[7] To the extent BASF relies on the motion for reconsideration standard (Pb31-32), it misstates the applicable standard. US Fire's July 19, 2018, motion for reconsideration was directed to an interlocutory order, not a final judgment. As such, the more lenient standard under R. 4:43-2 was applicable. See Lawson v. Dewar, 468 N.J. Super. 128 (App. Div. 2021).

testimony and evidence provided in the Allocation Trial, and that analysis is what led the trial court to conclude that the R&R was "palpably incorrect". (Pa0199; Pa0204.) The trial court correctly applied the facts to the law, and that ruling is entitled to deference.

There is no dispute here that the Boston Gas decision is the applicable law and that it calls for pro-rata allocation; the chief dispute here is whether there are facts that, when applied to the law established by Boston Gas, allow for a departure from pro-rata allocation.

Of note, when reviewing on appeal whether "fact-based" allocation can be applied, the First Circuit, in Boston Gas, deferred to the district court's ruling below that fact-based allocation was not possible. See Bos. Gas Co. v. Century Indem. Co., 708 F.3d 254, 258 (1st Cir. 2013).[8]

B. BASF's Assertion that the R&R is Entitled to Deference is Without Basis.

BASF asserts that the SAM was the "finder of fact" and that the trial court was required to defer to his holdings. (Pb37-38). BASF's argument ignores the record before this Court and the applicable standard of review.

The holdings of a special master are only entitled to deference "to the extent they are supported by substantial credible evidence in the record." Little v. Kia

[8] The standard of review applicable to the trial court's determinations concerning fees and interest is discussed separately below.

Motors Am., Inc., 242 N.J. 557, 593 (2020). Here, the holdings in the R&R are not supported by ***any*** evidence in the record. (Pa0158.) For example, the R&R:

- Held that the end date of the allocation period was December 31, 2009, but then failed to allocate damages through this date. (Pa0146.)
- Held that "property damage" had occurred as a result of operations at AOCs 6 and 14. This holding contradicted the findings of the trial court after the Liability Trial and was beyond the authority of the SAM. (Pa0149.)
- Held that ten times more property damage had occurred per year in the US Fire policy period than in the period BASF is responsible for, without citing any testimony or facts to support this holding. (Pa0158.)

The SAM disregarded the extent of his authority and failed to cite any evidence supporting the allocation percentages he arrived at. In no way is the R&R supported by "substantial credible evidence". Little, 242 N.J. 557, 593. Judge LeBlon found that the R&R was substantively wrong in many ways, both legally and factually, and he detailed his findings in his Opinion. "Deference" does not mean "rubber stamp"; here, the trial court found that adopting the R&R, and therefore the R&R itself, was "palpably incorrect". Deference cannot withstand or trump such manifest error.

The trial court therefore was correct to reject the holdings of the SAM it appointed, and to conduct its own independent and substantive review of the evidence. It is the trial court's holding after that review – not the SAM's "palpably incorrect" R&R – that is entitled to deference before this Court.

II. THE TRIAL COURT PROPERLY GRANTED US FIRE's MOTION FOR RECONSIDERATIOIN TO HOLD THAT BINDING MASSACHUSETTS PRECEDENT REQUIRES PRO-RATA, TIME ON THE RISK ALLOCATION IN THIS CASE

Because this is an insurance coverage action, US Fire's obligations in this case are governed by the terms of the policy of insurance it issued to Engelhard, and by the law. It is undisputed that the US Fire policy, as interpreted under Massachusetts law, only provides coverage for "ultimate net loss" in excess of the $200,000 limits underlying the US Fire Policy, for "property damage" that occurred during the policy period. (Pa0333.)

In this case, "property damage" is the CVOC groundwater contamination at the Plainville Site. The Supreme Judicial Court of Massachusetts has expressly concluded that the contamination of groundwater with hazardous materials is the "property damage" that is insurable under a liability policy. Hazen Paper Co. v. United States Fidelity and Guar. Co., 407 Mass. 689 (1990).

Where, such as here, the "property damage" cannot readily be attributed solely to one policy period, allocation becomes necessary to attribute such "property damage" across all of the years during which "property damage" took place. As the Supreme Judicial of Massachusetts explained:

> the most reasonable reading of these provisions[9] is that the [relevant] policies provide coverage for the portion of Boston Gas's liability attributable to the quantum of property damage occurring during a given policy period.

Boston Gas, 454 Mass. at 359.

Here, there is absolutely no evidence in the record regarding how much "property damage" took place at any one time, or in any one year of the operations at the Site, or in any one year after the operations at the Site ceased, or in any specific location, or in any identifiable quantity. Instead, the record shows that the "property damage" began when operations began in the 1950s, continued throughout the operations from multiple locations on the site, that it has been ongoing for decades, and that it is continuing at the Site to this day. The record shows that the release of "pollutants in various areas of the Site and at different times and volumes caused the collection and concentration of DNAPL . . . which continues to this day passively contaminating the groundwater that flows over it. It is lodged in the bedrock and only gradually dissipates." (Pa0148.)

Mr. Thomas Francoeur, U.S. Fire's expert, explained:

> It is my opinion the groundwater contamination found by the Court in its Letter Opinion to exist at or originate from AOCs 5, 16, 22, 26 and 30 is still taking place at and near the Plainville site. On or about June 3, 2011, the GSM began operating substantially as designed which substantially reduced the migration of

[9] Referring to the "property damage" and "occurrence" requirements of the insuring agreement similar to the ones contained in the U.S. Fire Policy.

> contaminated groundwater off-site by reversing the hydraulic gradient in the area of the GSM. Up to today, however, additional CVOCs have been introduced into groundwater, and additional migration of CVOC constituents in groundwater has taken place.

(Da0275.)

BASF's expert, Dr. Powell, also testified that contamination at the Site is ongoing. On August 29, 2014, Dr. Powell provided the following testimony:

> Q: Do you agree that the releases of CVOCs into the ground water from the DNAPL continues to this day?
>
> A: Yes. I think that would be true.
>
> Q: So the dates that are listed as the end usage release dates are the dates which for the purpose of this allocation proceeding Engelhard says discharges from the plant into the environment ended; is that right?
>
> * * *
>
> A: Yes, Engelhard is not aware of discharges from the facility into the environment at these AOCs beyond these end dates.
>
> Q: But Engelhard acknowledges that the process of environmental contamination from CVOCs extends beyond the dates that are listed as the end usage release dates, correct?
>
> A: Yes, the discharges that occurred in the past during these operating periods created a legacy contamination that continues today.

(Da288-289.)

During his expert deposition, in January 2015, Dr. Powell elaborated:

> Q: And additional groundwater is being contaminated by, I think what you call, the legacy contamination at the Plainville site; is that correct?
>
> A: As groundwater continues to move through the site; starts in the lake, comes through the site, goes into wetland. As it continues to move through the site, it continues to be contaminated by the legacy contamination from those AOCs during their operating periods.
>
> Q: Let me make sure I understand this. Is it correct then that there's new groundwater coming through the site continuously, is that correct?
>
> A: Yes.
>
> Q: Okay. And that new groundwater is being impacted by the CVOC contaminants from historical operations at the Plainville plant; is that correct?
>
> A: That's right.

(Da290-292.)

In sum, clean water enters the Site, becomes contaminated, and is then captured by the on-site treatment system and remediated. That process happens every day, it is happening today, and it will continue to happen for years to come.

In Boston Gas, the Supreme Judicial Court of Massachusetts applied a pro rata, time on the risk allocation method to a nearly identical fact pattern involving long term, indivisible environmental contamination:

> Under this allocation method, each triggered policy bears a share of the total damages up to its policy limit

> proportionate to the number of years it was on the risk [the numerator], relative to the total number of years of triggered coverage [the denominator]. Apportioning costs among all triggered years is compatible with having determined that some injury or damage resulted in all of those years. Consistent with the contract language, an insurer pays its percentage of loss attributed to its policy period. The time-on-the-risk method offers several policy advantages, including spreading the risk to the maximum number of carriers, easily identifying each insurer's liability through a relatively simple calculation, an' reducing the necessity for subsequent indemnification actions between and among the insurers.

Boston Gas, 454 Mass. 337, 367–68 (internal citations and quotations omitted; alterations in original).

The trial court applied this exact allocation methodology after carefully reviewing the record evidence, including expert testimony at the Allocation Trial, and after analyzing and applying Massachusetts law, which is the Boston Gas case quoted above. The trial court found, correctly, that pro rata allocation is the only allocation method that is possible in light of the facts of this case. (Pa0199.)

The Boston Gas court did discuss (but did not apply) an alternative method of allocation – "fact-based" allocation. However, the Boston Gas court cautioned that this allocation methodology should only be applied when it is possible to ***"determine precisely what injury or damage took place during each contract period or uninsured period and allocate the loss accordingly".*** Id. at 367 (emphasis added). (See also Pb30.) Here, as recognized by the trial court, the

evidence provided in the allocation phase of this case established that fact-based allocation was impossible to apply to the facts at issue. (Pa0204.)

The Boston Gas court was unequivocal in describing the impossibility of allocating "property damage" across prolonged periods in environmental contamination cases:

> In most of these cases, "**it is both scientifically and administratively impossible to allocate to each policy the liability for injuries occurring only within its policy period**." Comment, Allocating Progressive Injury Liability Among Successive Insurance Policies, 64 U. Chi. L.Rev. 257, 257–258 (1997). See 15 G. Couch, Insurance § 220:25, at 220–26 (3d ed. 2005) (**with respect to "environmental damage and toxic exposure cases ... it is virtually impossible to allocate to each policy the liability for injuries occurring only within its policy period**"). "When it is impossible to determine the proportion of damage that occurred within each period, the law must allocate damages among the policies." Comment, supra at 258.

Boston Gas, 454 Mass. at 350–51, 910 N.E.2d at 301 (emphasis added).

There is absolutely nothing in the record from the Allocation Trial, or anywhere else, that permits a court to "***determine precisely what injury or damage took place during each contract period or uninsured period and allocate the loss accordingly".*** That is why Judge LeBlon's ruling is correct and should be upheld.

BASF incorrectly contends that this case is a scientific anomaly, and that the evidence in the record of this case (of which BAF's appeal cites only a fraction), permits "fact-based" allocation. This assertion is contradicted by the nature of

"property damage" at issue, the content of the R&R, and the testimony and opinions of BASF's own expert. And the applicable law.

III. "FACT-BASED" ALLOCATION CANNOT BE PROPERLY APPLIED BASED ON RECORD EVIDENCE AND THE TRIAL COURT CORRECTLY REJECTED BASF's EFFORTS TO DO SO.

In concluding its opinion in Boston Gas, the court defined what a "fact-based" analysis would be:

> We do not foreclose the possibility that in some cases the facts may permit a more ***accurate estimation of how much property damage took place in each period***. If the evidence permits an ***accurate estimation of the quantum of property damage in each policy period*** then proration by time on the risk may be inappropriate. Given the factual complexities of cases of this sort, we defer to trial judges in the first instance to determine whether losses can be allocated based on the amount of property damage that ***in fact occurred during each policy period***, or must instead be allocated on the basis of each insurer's time on the risk.

Boston Gas, 454 Mass. at 373 (emphasis added).

The situations in which fact-based allocation is appropriate are limited to those where the insured can ***accurately*** establish the amount of property damage that ***"in fact"*** took place during each policy period.

Dr. Powell's work does not even attempt to accomplish a "fact-based" analysis as defined by Boston Gas. Not one word in his reports or testimony is directed to quantifying the amount of property damage during any particular policy

period. In fact, Dr. Powell expressly testified that he "was not trying to do an allocation to individual policies. That was beyond the scope of what I was doing." (1T403:6-8.)

The critical distinction that must be appreciated is that Dr. Powell performed a weighted analysis that supposedly identifies how much contamination can be attributed to each AOC. In other words, X% at AOC1, Y% at AOC2, etc. This analysis is pure speculation. Dr. Powell has no idea how much contamination can be attributed to any particular AOC, because there is no factual record for him to rely on. He does not know, for example:

- which operations used more or less of a contaminant;
- if the amount of contaminants used changed over time;
- the quantity of contaminants that were released;
- the dates contaminants were released;
- if the quantity of contaminants released changed over time;
- whether there were any unusual weather events affecting how contaminants moved through the Site; and
- whether the volume of groundwater flowing through the Site changed over time.

And he certainly did not, because he could not, determine that X% of the total property damage continuously taking place from 1958 - 2011 took place during any particular policy period. Dr. Powell's analysis is not the fact-based analysis permitted by Boston Gas.

To the contrary, Dr. Powell's own testimony establishes that fact-based allocation cannot be applied in this case:

> [T]here isn't in this data record a specific information on how much solvent was released at any one location at any point in time. It's not as if we have detailed manifests that say on a certain day we disposed of ten gallons of solvent into AOC 5. We know from company records and from our examination where the releases occurred, but we don't know the specific quantities that were – that occurred, and we don't know within the boundaries of the time that that AOC operated which days or weeks, or what have you, that the releases actually occurred.

(Pa0264-0265). In fact, one of the factors cited by Dr. Powell in support of his flawed allocation methodology is a "[l]ack of data regarding specific timing, amount and/or location of CVOC releases." (Pa0491.)

The arguments made by BASF in an attempt to support Dr. Powell's "weighted by AOC" calculations are baseless. For instance, BASF contends "Judge Stroumtsos's detailed factual findings" in the Liability Trial provide support for the allocation percentages stated in the R&R. (Pb12.)

However, the "fact-based" allocation percentages stated in the R&R contradict the Liability Trial opinion. The Liability Trial found that no insurable property damage had occurred as a result of operations at AOCs 6 and 14 (Pa0123; Pa0125-Pa0126; Pa0129-Pa0130).[10] Dr. Powell's "weighted by AOC" allocation method contradicts the findings of the Liability Trial and includes a finding of

[10] Of course, allocating property damage by AOC makes no sense in the first instance. Damages are not divisible by AOC. As Dr. Powell testified, "[t]his is one site-wide groundwater problem[.]" (Pa0285.)

property damage at these AOCs 6 and 14. This alone establishes the fallacy of "fact-based" allocation in this case. (Pa0148-Pa0149; Pa158; Pb25-26.) See Boston Gas, 454 Mass. 337, 367 ("fact based" allocation should only be applied when the court can "precisely" determine the amount of property damage in a policy period).

BASF's "weighted by AOC" allocation model ignores the nature of the "property damage" present in this case, which is essentially identical to the "property damage" that was at issue in Boston Gas – long-tail, indivisible, ground water contamination. Cf. Boston Gas, 454 Mass. 337, 340. "Weighting" property damage "by AOC" is especially inappropriate in this case. Dr. Powell admitted the property damage present here is not divisible by AOC, but rather "[t]his is one site-wide groundwater problem[.]" (Pa0285.)

As correctly recognized by the trial court in granting US Fire's motion for reconsideration:

> Dr. Powell indicated he used dates suggested by BASF counsel to represent the end of operations in the various AOC's as end dates for the allocation of property damage. Dr. Powell acknowledged these dates do not represent the end of property damage, and that it was a single plume of groundwater contamination, and impossible to determine the timing of the contamination from any one AOC and the relation to the property damage.

(Pa0204.) The court correctly recognized that Dr. Powell's analysis was not a fact-based analysis as defined in Boston Gas.

In sum, BASF has ignored the actual "fact-based" analysis defined in Boston Gas and directed Dr. Powell to invent a new method that is inconsistent with Boston Gas and still does not provide a factual basis for his conclusions, because as he admitted, there is no data to support them. Dr. Powell purported to determine how much contamination is attributable to each AOC, and BASF calls that analysis a "fact-based" allocation. But, it is not the Boston Gas fact-based analysis, because Dr. Powell did not determine "precisely" how much property damage definitively took place during any particular policy period.

The situation presented by this case is identical to Boston Gas – a period of releases over more than thirty years resulting in groundwater contamination that continues to the present day is "scientifically and administratively impossible to allocate to each policy[.]" Boston Gas, 454 Mass. 337, 350–51. Clearly, the trial court was correct to reject "fact-based" allocation, as, according to Boston Gas, it is inapplicable under this factual scenario. A faithful application of Boston Gas required the trial court to apply a time on risk, pro rata allocation. The trial court's decision to employ the pro rata, time on risk method must be affirmed because it correctly recognized that the evidence in this case does not permit any other method of allocation. (Pa0204.)

IV. THE CASE LAW RELIED UPON BY BASF DOES NOT SUPPORT FACT-BASED ALLOCATION ON THE RECORD HERE.

The primary decision cited by BASF for the application of fact-based allocation is an unreported trial court decision in Maestranzi Bros. v. American Employers' Insurance Company, 2010 WL 1427352 (Mass. Super. Apr. 9, 2010). Maestranzi is entirely distinguishable on the facts. Further, the allocation calculation applied in Maestranzi bears no similarity to the "weighted by AOC" calculation invented by Dr. Powell in this case. (Pb25-26.)

The court in Maestranzi was faced with determining the appropriate method of allocation in the context of a site that had received waste from many different parties for approximately 100 years, an insured that had only released waste for ten years, and under the legislative mandate of CERCLA, pursuant to which "any generator of waste to a Superfund site is theoretically liable for the entire pollution at the site." Id. at *1.

The Maestranzi court had to determine how to allocate costs for a site where multiple entities, including the insured, had dumped waste. The site had started receiving waste in 1924, but the insured did not even exist as an entity until the 1960s, and had only shipped waste from 1982-1992. Id. at *2. In this unique fact pattern, the court elected to limit the insured's allocation period to the years where it had actively dumped waste at the polluted Superfund site. Id. at *4.

The Maestranzi court did not "weight" additional damages to specific policy periods. The Maestranzi court did not, for instance, attempt to identify the specific volume of contaminants released in a specific year, and then look to shift additional costs to those years with a higher volume of releases. Instead, the Maestranzi court used the facts before it to define a finite allocation period in the unique context of the Superfund site at issue, the insured's limited operations at that site, and the joint and several liability scheme mandated by CERCLA. Maestranzi, 2010 WL 1427352, at *1; *4.

Once this allocation period was established based on the facts before the court, the Maestranzi court went on to apply a pure, pro rata, time on risk allocation across this period. Thus, the carrier in Maestranzi, who had eight years "on the risk" of a ten-year period of releases, was allocated 80% of the loss. Id. at *3-5. This was a calculation the court found suitable based on the unique facts present in the case.

The Maestranzi court absolutely did not do what Dr. Powell did here, which is to miraculously calculate that ten times more property damage occurred in each year that US Fire was on the risk, as compared to each year that BASF was on the risk. (Pa0158.) Moreover, even though Maestranzi is cited to support BASF's "fact-based" argument, it should not be lost on this Court that the Maestranzi court applied pro rata, time on the risk allocation – not "fact-based".

The First Circuit's decision in Peabody Essex Museum, Inc. v. U.S. Fire Ins. Co., 802 F.3d 39 (1st Cir. 2015), another case relied on by BASF, is even more distinguishable than Maestranzi. In Peabody, "fact-based" allocation was only applied because the insurance carrier was subject to a unique burden shifting procedure under Massachusetts law. Peabody, 802 F.3d at 43 ("[A]n insurer that wrongfully declines to defend a claim [must bear] the burden of proving that the claim was not within its policy's coverage.") (citing Polaroid Corp. v. Travelers Indem. Co., 414 Mass. 747, 610 N.E.2d 912, 922 at n. 22 (1993)).

This burden shifting procedure was the sole basis cited by the First Circuit in affirming fact-based allocation. In fact, the First Circuit referred to the fact-based allocation chosen in Peabody as "make believe," but nonetheless affirmed the trial court's judgment based solely on its holding that fact-based allocation maximized the carrier's "indemnity exposure in line with its burden under Polaroid". Peabody, 802 F.3d at 51. There is no Polaroid burden shifting procedure in this case. In fact, there is not even a denial of coverage. (Pa0368-Pa0379).

This case is not comparable to the facts in Maestranzi or the burden shifting procedure at issue in Peabody. Rather, Boston Gas is on all fours. BASF has not cited a single case applying "fact-based" allocation under facts similar to those here. Because no such case exists. The trial court was bound to, and did, correctly reject this approach.

V. THE TRIAL COURT SELECTED THE APPROPRIATE END DATE TO THE ALLOCATION PERIOD.

BASF contends that, in the event this Court correctly applies pro rata allocation, this Court should reject the "end date" of the allocation period established by the trial court. This argument fails because it ignores the holding of Boston Gas that where contamination continues past the period of operation and through present day, the trial date operates as the end date of the allocation period.

To fully illustrate the correlation between the Boston Gas decision and this case, a bit of procedural history is important. Boston Gas stemmed from a 2007 jury trial, during which the parties presented arguments to the jury concerning both liability and allocation, including the end date for an allocation period. Bos. Gas Co. v. Century Indem. Co., 793 F. Supp. 2d 511, 517 (D. Mass. 2011), aff'd and remanded, 708 F.3d 254 (1st Cir. 2013). During that trial, Boston Gas, the insured, presented testimony that soil, groundwater and sediment contamination at the site was continuous from the beginning of operations through the time of the jury trial. Id. at 519. Evidence also was presented regarding remediation continuing through the date of trial. Boston Gas, 708 F.3d at 258-59. The jury rendered its verdict in favor of the insured under an "all sums" allocation methodology, however, judgment was not immediately entered. Boston Gas, 793 F. Supp. 2d 511, 514. In the interim, the Supreme Judicial Court of Massachusetts accepted Certification

and rendered a decision rejecting "all sums" and holding that pro-rata allocation is the law of Massachusetts.

In the wake of that decision, the parties again appeared before the district court, seeking entry of judgment consistent with pro-rata allocation. No new evidence of continuing contamination and/or remediation was presented during this portion of the proceedings; this was not an "allocation phase" of the type that was before the SAM in this case. The allocation phase had already taken place in 2007, along with the liability phase. Rather, the district court (and then the First Circuit on appeal) were tasked with applying pro-rata allocation principles to an allocation period, including an end-date, that had already been determined. In fact, the district court expressly held, and the First Circuit confirmed, that Boston Gas was estopped from presenting any evidence to contradict its prior position that contamination was continuous. Boston Gas, 793 F. Supp. 2d at 519; Boston Gas, 708 F.3d at 264.

Thus, the latest evidence available to the district court and the First Circuit regarding continuing contamination and remediation at the site was also the date of the jury trial – 2007. On that basis, the district court held, and the First Circuit affirmed, application of pro-rata, time on the risk allocation for the entirety of the allocation period determined at trial. The First Circuit said it as plainly as possible:

> [W]e affirm its entry of judgment allocating damages evenly across the 121–year span from the time of plant operations to trial.

Boston Gas, 708 F.3d at 264.

Massachusetts law could not be clearer on this point. When "property damage" continues to present day, the end date of a coverage trial (in this case, January 31, 2011, when the liability judgment was entered), is the "end date" of an allocation period.

BASF advocates for two different allocation period "end dates" – September 8, 1986, or 1993. (Pb39-45.) Neither "end date" is consistent with the property damage in this case, the procedural history of this matter, or binding Massachusetts law.

As an initial matter, a September 8, 1986, "end date" was not raised below by BASF in its objections to the SAM's R&R. The SAM considered several different "end dates" for an allocation period, but September 8, 1986 was never considered in the R&R, or in the proceedings that followed the allocation trial. (Pa0146.) Because this issue was not raised below, it is not properly before this court. "An issue not raised below will not be considered for the first time on appeal." N. Haledon Fire Co. No. 1 v. Borough of N. Haledon, 425 N.J. Super. 615, 631 (App. Div. 2012). See also Brock v. Pub. Serv. Elec. & Gas Co., 149 N.J.

378, 391, (1997). Soc'y Hill Condo. Ass'n v. Soc'y Hill Assocs., 347 N.J.Super. 163, 177–78 (App. Div. 2002).

In any event, neither a 1986 end date nor a 1993 end date reflects the nature of property damage at issue here. Again, it is undisputed that groundwater contamination will continue to occur at the Site for decades, and BASF has estimated that it will continue to incur remediation costs for "another twenty years or more[.]" (Pa0148; Pb20.)

BASF asserts a January 31, 2011, end date is arbitrary. (Pb40.) It is not. January 31, 2011, is the date when the trial court decided liability in this case, and provided its ruling on what remediation costs incurred by BASF were covered and not covered. (Pa0091-Pa0137.) Before January 31, 2011, allocation would have been impossible because the parties had no indication as to what costs were covered, and thus subject to allocation in the first place.

The only case cited by BASF in support of a 1993 end date is Maestranzi, the unreported trial court decision discussed above. Maestranzi is (1) inapplicable on its facts and (2) not binding. Boston Gas, decided by the Supreme Judicial Court of Massachusetts and the First Circuit Court of Appeals, is the binding authority here. Boston Gas could not be clearer that the end date of the liability phase controls as an allocation end date. Boston Gas, 708 F.3d at 264. BASF's

appeal to the holding of a clearly distinguishable, unreported trial court opinion should be rejected as inconsistent with binding Massachusetts authority.

As a last gasp at arguing for an earlier end date, BASF asserts US Fire should have filed a lawsuit against it prior to 2005. (Pb41-42.) This is a confusing position in light of the fact that US Fire never denied coverage, and was never presented with a demand for payment from BASF. (Pa0368-Pa0379.) This distinguishes the present case from Owens-Illinois, Inc. v. United Ins. Co., 138 N.J. 437 (1994),[11] which involved dozens of asbestos lawsuits that had been tendered to insurers for defense and indemnification. Further, US Fire is an excess insurer with a 1970-1973 policy period. This policy period ended over a full decade prior to EPA action at the Site, and well before the 1980 and 1984 discharges that Engelhard reported to the EPA. (Pa0091-93.) There is no evidence before the Court that establishes US Fire had reason to know its layer of coverage had been reached, or that its policy period would be implicated, by the 1986 or 1993 start dates suggested by BASF. In fact, as discussed below, the layer below the US Fire Policy, when accounting for allocation, was not exhausted until 1996.

[11] In citing to Owens-Illinois, BASF claims that Massachusetts law has not adopted a "trigger" theory, and that the Court should apply New Jersey law. (Pb43-44). However, the governing law for establishing an allocation period (i.e., a "trigger" period) is Boston Gas. Again, Boston Gas could not be clearer that the Liability Trial end date is the proper end date for the allocation period in this case.

Based on the foregoing, the trial court's allocation ruling should be affirmed. Pursuant to binding authority in Boston Gas, the trial court correctly interpreted the evidence before it, applied pro rata time on risk allocation, and identified an appropriate allocation period end date.

ARGUMENT – CROSS-APPEAL[12]

Turning to US Fire's cross-appeal, BASF is not entitled to the fees, costs and interest awarded by the trial court in the Final Judgment Order. (Pa0041.) The trial court's holdings on these issues were in error and must be vacated.

I. BASF IS NOT A "SUCCESSFUL CLAIMANT" UNDER THE TEXT OF RULE 4:42-9(A)(6) (Pa0043; Pa0050-52; Pa0220).

Only a "successful claimant" is entitled to recover attorneys' fees under R. 4:42-9(a)(6). "Successful claimant" means a party that "obtains a favorable adjudication on the merits on a coverage question as a result of the expenditure of counsel fees." Occhifinto v. Olivo Constr. Co., LLC, 221 N.J. 443, 450 (2015). Moreover, a successful claimant must achieve the "benefit the parties sought in bringing suit." Id.

BASF is not a "successful claimant" in that BASF did not prevail at virtually every important stage of the litigation. E.g., Passaic Valley Sewerage Comm'rs v.

[12] US Fire had originally noticed a Cross-Appeal that appealed the trial court's April 7, 2010 choice of law Order (Pa0087), and the trial court's January 31, 2011 judgment at the conclusion of the Liability Trial. (Pa0091). US Fire respectfully withdraws its cross-appeal on these issues.

St. Paul Fire & Marine Ins. Co., 206 N.J. 596, 616 (2011) (court refused to award counsel fees when insured was only successful in establishing insurer's duty to defend on three counts of a complaint).

Furthermore, it is disingenuous to claim that BASF achieved the "benefit [it] sought in bringing suit." US Fire never denied coverage, and BASF lost with respect to the key issue facing the US Fire policy – allocation. BASF's own counsel stated it most succinctly: "I lost." (4T5:16.)

The trial court erred in not considering BASF's lack of success on critical choice of law and allocation issues – among others – and when properly considered, BASF's lack of success in this litigation wholly undermines its attorneys' fee claim. The trial court's interpretation of what it means to be a "successful claimant" should be rejected. Otherwise, it sets the dangerous precedent that a claimant, who is precluded from recovering approximately 85% of the damages that it sought in filing the lawsuit, has been "successful", and is entitled to endlessly litigate its claims without regard to the measure of damages ultimately recovered.

A. A De Novo Standard Of Review Applies To The Successful Claimant Issue (Not Raised Below).

The trial court's ruling as to whether BASF is a "successful claimant" is not entitled to deference and must be reviewed *de novo*. The Appellate Division has held that a trial court's interpretation of the New Jersey Court Rules is subject to *de*

novo review. Cadre v. Proassurance Cas. Co., 468 N.J. Super. 246, 257 (App. Div. 2021), cert. denied, 249 N.J. 338 (2021), reconsideration denied, 250 N.J. 99 (2022) ("We owe no deference to the motion judge's legal analysis or interpretation of a statute. Similarly, we review legal determinations based on an interpretation of our court rules de novo.")

Thus, much like a trial court's interpretation of a statute, the trial court's interpretation of the Court Rules and other similar legal standards is not entitled to deference. Occhifinto, 221 N.J. 443, 453 ("[a]s an interpretation of law the trial court's judgment is not entitled to deference; we review legal determinations based on an interpretation of our court rules de novo").

Here, the trial court accepted BASF's argument that it is a "successful claimant" despite the fact that BASF did not prevail on virtually every substantive issue it raised before the trial court. In doing so, the trial court interpreted the "successful claimant" requirement under R. 4:42-9(a)(6) to require that a party only nominally succeed on the merits of its claim, despite its failure to obtain the benefit it sought when filing the litigation. Cf. Occhifinto, 221 N.J. 443, 450. This Court should reject the trial court's interpretation of what it means to be a "successful claimant", especially in light of the unique facts present in this case.

B. BASF Was Unsuccessful On Key, Dispositive Issues (Pa0052; Pa0054; Pa0220).

Before discussing all of the substantive issues on which BASF was not successful, US Fire highlights two particularly disastrous categories of losses suffered by BASF.

1. Choice of Law (Pa0054; Pa0220)

BASF's primary objective in the liability phase of this case was the application of New Jersey law. Under New Jersey law, BASF's insurers would have been estopped from enforcing the "sudden and accidental" pollution exclusions contained in many of the policies at issue. Morton International Inc. v. General Accident Insurance Company of America, 134 N.J. 1 (1993). This would have ensured that the majority of BASF's damages would be covered.

BASF lost on this pivotal issue, and Massachusetts law was applied to this case. As a result, all but three insurers were dismissed from this litigation. (Pa0087.)

The importance of this issue cannot be understated, and that significance is borne out by BASF's own "choice of law" billing entries. Through June of 2011 (i.e., the approximate date when liability stopped being at issue in the case), there are at least 430 billing entries submitted by BASF's counsel that include the term "choice of law." The value for these entries is in the millions of dollars. (Da293-526).

There was no legal basis for the trial court to permit BASF to recover fees associated with the choice of law issue, because R. 4:42-9(a)(6) only permits a "successful claimant" to recover. Without substantively addressing choice of law in its Opinion, the trial court merely indicated in a footnote that it rejected US Fire's argument that fees should be reduced for BASF's loss on choice of law. (Pa0054.)

Further, the trial court held that subtracting for such an issue "would fail to account for the time BASF had to spend securing coverage from insurers that insisted upon a 'no coverage' position through motions and extensive discovery." This statement is wholly irrelevant to whether BASF was "successful", and it is inaccurate, ***especially in light of the fact that US Fire took no position on the choice of law issue and did not disclaim coverage to BASF***. (Pa0368-Pa0379.) Further, this statement does not explain why the trial court believed that BASF satisfied its burden to establish that it is legally entitled to fees under R. 4:42-9(a)(6). (Pa0055.)

BASF indisputably failed on choice of law, the pivotal issue in the liability phase of this case. Despite this fact, the trial court held BASF was a "successful claimant", and awarded BASF fees associated with the choice of law decision. Further, US Fire, a party that neither took a choice of law position nor forced

BASF to take one, has now been put to task of paying a portion of that award. This holding was clearly in error.

2. Losses Related to Amounts Recoverable by BASF (Pa0050-55; Pa0220)

During the liability phase of this case, BASF sought to recover nearly $19 million from Underwriters, Lamorak, and US Fire. The trial court, after the Liability Trial, held that only two-thirds of that amount was even potentially recoverable, because the court found that the "owned property exclusion" and the "nuclear exclusion" barred coverage for a significant portion of BASF's claim. (Pa0105; Pa0113-Pa0115.)

Also during the Liability Trial, BASF failed to prove that "property damage" had taken place during the US Fire policy period for a majority of the AOCs at issue. (Pa0123; Pa0125-Pa0126; Pa0129-Pa0130.) Thus, BASF lost – *it was unsuccessful* - as to $6 million of its claim.

The allocation phase came next, and as discussed above, the culmination of that phase was the trial court granting US Fire's motion for reconsideration and rejecting all of BASF's arguments on the issues of allocation. The impact to BASF was that US Fire's allocated share of BASF's damages went from about 27% to about 6%. BASF was, to say the least, not successful. In fact, immediately after learning of the trial court's grant of US Fire's motion for reconsideration, BASF's counsel stated on the record "I lost." (4T5:16.)

C. BASF Was Unsuccessful On The Majority Of The Substantive Issues In This Case (Pa0050-55; Pa0220).

The discussion above makes clear that BASF was an ***unsuccessful claimant*** on the two most significant issues in this case – choice of law, and the amounts it was awarded and allocated. But, it is important here to catalog the full spread of issues that BASF lost on in the trial court. BASF has failed on the following issues, resulting in it being forced to bear an overwhelming percentage of all of the damages it sought to collect from the insurers.

- BASF did not prevail on choice of law.
- BASF did not prevail on the applicability of the pollution exclusion, which, in conjunction with its loss on the choice of law issue, resulted in the Pollution Exclusion Insurers (more than $1 billion in policy limits) being dismissed from the case. (Pa0087.)
- BASF did not prevail on the applicability of the "nuclear exclusion" at the Liability Trial. (Pa0105; Pa0113-Pa0115.)
- BASF did not prevail on the applicability of the "owned property exclusion" at the Liability Trial. (Pa0105; Pa0113-Pa0115.)
- Losing on those two exclusions resulted in $6 million, approximately 1/3 of BASF's claim at the time, being uncovered and therefore not recoverable from US Fire and the other insurers.
- At the Liability trial, BASF failed to prove that "property damage" had taken place during the policy period of the US Fire policies as to the majority of the AOCs. (Pa0123; Pa0125-Pa0126; Pa0129-Pa0130.)
- At the Allocation Trial, BASF did not prevail on its argument that it did not have responsibility to pay the $200,000 in limits underlying the US Fire Policy, which resulted in BASF needing to exhaust $200,000 before the US Fire Policy could be implicated. (Pa0152-0157.)

- Based on the trial court's ruling granting US Fire's motion for reconsideration, BASF lost on all of its arguments as to how its damages should be allocated to the US Fire Policy.
- The combination of the losses identified above resulted in BASF being allocated approximately 85% of the damages that it alleged were covered by insurance, and US Fire being allocated approximately 6%. (Pa0199.)

The record is clear that BASF cannot point to *any* "significant issue in litigation" on which it has achieved success. Occhifinto, 221 N.J. 443, 450. Even the most notable issue on which BASF had some limited success – that the Liability Trial resulted in a finding of "property damage" during the US Fire policy period – came with a number of losses and was inextricably tied to the allocation dispute, on which it was unsuccessful.

D. The Honeywell Decision Is Directly On Point and Explains Why BASF Cannot be a Successful Claimant (Pa0050-51).

This Court has addressed the "successful claimant" issue in a context that is very similar to this case. In Continental Insurance Company v. Honeywell International, Inc., 2016 WL 3909530 (App. Div. July 20, 2016), aff'd, 234 N.J. 23 (2018), this Court affirmed the trial court's complete denial of fees because, as is the case here, "[the insured] was successful on certain issues and [the insurance carriers] were successful on other issues." Id. at *22. Honeywell, like the present case, was a complex insurance case with a lengthy procedural history, multiple substantive rulings, and a variety of novel legal issues that had not yet been addressed by New Jersey's courts. The court found that the insured's varying level

of success on the numerous issues presented in the case did not render it a successful claimant entitled to fees. Id. at *21-22.

The trial court in this case concluded that this case is distinguishable from Honeywell, despite the fact that Honeywell is entirely on point with the facts of this case. The trial court found Honeywell to be distinguishable on the basis that Honeywell principally involved an allocation dispute from the beginning of the litigation, whereas the present dispute only became an allocation dispute after a dispute as to liability. This conclusion fails to give full consideration to the facts of Honeywell and the purpose of allocation.

Honeywell, like this case, focused primarily on what amount of damages could be allocated to a specific policy period. Specifically, in Honeywell, the court rejected claims from two excess insurers that the "unavailability" exception did not apply, and allocated additional damages to the policy periods of those carriers. Id. at *10-13. The court still rejected the policyholder's claim for attorneys' fees, because the case was "about nothing more than allocation." Id. at *21.

Here, similarly, the heart of the parties' dispute was whether any significant amount of BASF's claimed damages could be allocated to US Fire's policy period. While BASF succeeded at the liability trial in establishing that some "property damage" occurred during the US Fire policy period, it ultimately failed in the key dispute in any environmental contamination coverage case – establishing that a

significant portion of damages could be allocated to the US Fire policy period. See New England Insulation Co. v. Liberty Mut. Ins. Co., 83 Mass. App. Ct. 631, 636 (Mass. App. Ct. 2013) (quoting Boston Gas, 454 Mass. 337, 358-59 (reasoning that "because the policies in question specif[y] that coverage would apply to injury or damage occurring 'during the policy period,' they should be read to cover only that portion of the insured's liability 'attributable to the quantum of property damage occurring during a given policy period.'"). Thus, like Honeywell, this case boiled down to allocation, and BASF's failure to establish an allocation methodology supporting a significant allocation to the US Fire policy period renders it unsuccessful under R. 4:42-9(a)(6).

To recap, BASF brought this case seeking to recover 100% of the costs it incurred in connection with remediating the environmental contamination at the Plainville site. As of the Liability Trial, those damages totaled approximately $19 million. The result of the Liability Trial was that BASF proved that some "property damage" had taken place during the US Fire policy periods. However, $6 million of BASF's damages were disallowed based on the application of certain exclusions. And, although BASF proved that "property damage" took place during US Fire's policy period, it was not entitled to collect a single dollar from US Fire because the allocation issue was yet to be decided.

BASF sought over $3 million from US Fire based on an allocation to US Fire of 27% of its costs. However, following the trial court's ruling on allocation, US Fire is obligated to pay only 6.4% of those costs, or about $900,000.

On the other hand, as a result of being unsuccessful on choice of law, the pollution exclusion, and allocation, BASF bears responsibility for more than 85% of the costs it sought in this action, or about $16 million.

The trial court incorrectly interpreted Honeywell; in fact, it refused to apply its reasoning. In the same vein, it failed to apply other New Jersey case law that reaches the same result.[13] If the Honeywell reasoning is properly applied in this matter, there can only be one conclusion: BASF was not a successful claimant.

II. THE TRIAL COURT ABUSED ITS DISCRETION IN CALCULATING COMPENSABLE ATTORNEYS' FEES (Pa0050-55; Pa0220).

Both BASF and US Fire agreed, and so stated in their briefing to the trial court, that there are only two permissible methods for calculating attorneys' fees under New Jersey law: (1) the relative culpability approach, or (2) the time necessary to litigate approach. See Empower, 453 N.J. Super. 565, 583.[14] Despite

[13] E.g., Passaic Valley, 206 N.J. 596, 616 (court refused to award counsel fees when insured was only successful in establishing insurer's duty to defend on three counts of a complaint).

[14] When BASF filed its Original Motion in July 2020, BASF, like US Fire, agreed that the best method for allocating fees and costs is the "relative culpability" approach. (Da21-23.) This method is the only approach that makes sense in this case. Going back and reviewing over a decade of block billing invoices (Da55-178) to verify the amount claimed by BASF under the "time necessary to litigate" approach is truly unworkable. However, BASF then abandoned the

clear Appellate Division precedent establishing only two methods for allocating fees, the trial court followed neither of these approaches and, thus, abused its discretion in calculating the fees recoverable by BASF.

In the Final Judgment Order, the trial court cited to the Empower decision and indicated that it was applying a "time necessary to litigate" approach, but the court did not actually employ that approach. Application of the "time necessary to litigate" approach would have required a line-by-line analysis of the thousands of pages of invoices submitted to determine what entries were actually related to US Fire, and to the issues on which BASF was "successful". E.g., Universal-Rundle Corp. v. Com. Union Ins. Co., 319 N.J. Super. 223, 247 (App. Div. 1999) (holding "the trial judge mistakenly exercised his discretion in the award of counsel fees" by failing to make deductions for fees related to other insurers).

Such an analysis would have been the only way to properly apply the "time necessary to litigate" approach because BASF failed to carry its burden to isolate compensable legal services. Ricci v. Corp. Express of The East, Inc., 344 N.J. Super. 39, 48 (App. Div. 2001). BASF's counsel admitted in deposition that

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"relative culpability" approach in a naked attempt to inflate its fee claim after the insurers' "relative culpability" was drastically reduced when the court granted US Fire's motion for reconsideration and lowered US Fire's allocated share of costs. This bait-and-switch – which is improper in the first instance – left the Court with the need to determine which approach to utilize.

BASF's method of isolating compensable legal services was based on nothing more than "estimates" and "educated guesses". (Da0205; Da0222.)

Instead of actually reviewing BASF's invoices in a manner consistent with the "time necessary to litigate" approach, the court employed a calculation entirely distinct from either the "time necessary to litigate" or "relative culpability" approach, creating the following conglomeration:

> The Court determines BASF is entitled to $511,005 in counsel fees from US Fire. The Court reaches this figure by holding US Fire responsible for every dollar BASF incurred in litigating against US Fire from 2005 to 2015, but subtracting from the total fee share for BASF's ultimate failure on the allocation issue. The total fee – $1,193,281 – is multiplied by 36.4 (BASF's initial allocation for remediation costs) and then divided by 85 (BASF's ultimate allocation for remediation costs).

(Pa0054.) Utilizing this calculation was in error because it is not supported by New Jersey law; it is not one of the approaches for calculating fees recognized by our courts. Empower, 453 N.J. Super. 565, 583.

Additionally, the approach adopted by the trial court is illogical and unrelated to the facts of the case. The "multiplier" in the calculation represents a percentage of "property damage" initially allocated to BASF that was reversed by Judge LeBlon in 2020 as being "palpably incorrect." (Pa0199). It should not have been considered for any purpose in determining compensable legal fees. Further, the 85 "divider" applied by the trial court bears no relation to the 6.4% of costs

allocated to US Fire. Indeed, nowhere is US Fire's actual involvement in the case (liability or litigation activity) considered by the court.

The trial court further erroneously rejected the "relative culpability" approach as one that would only work if each party was allocated a relatively even share. The court held that limiting BASF to 6.4% of its fees would penalize BASF, "despite [BASF] largely succeeding in establishing coverage under the policies." (Pa0055). This analysis of the relative culpability approach is inconsistent with the law and facts.

The purpose of a "relative culpability" approach is to award fees based on the "level of responsibility of each entity [.]" Empower, 453 N.J. Super. 565, 584. BASF's level of responsibility in this case is for 85% of covered costs. It neither "largely succeeded" nor prevailed as a party that can properly shift the vast majority of its legal costs to its adversary under established New Jersey law. The trial court erred in disregarding the purpose and proper application of the "relative culpability" approach.

US Fire recognizes that Empower held a "combination" of the "relative culpability" approach and the "time necessary to litigate" approaches can be used. Empower, 453 N.J. Super. 565, 584. While this combination approach could have been the trial court's intention, the calculation actually employed by the court was, respectfully, "arbitrary" and "capricious," and considered neither US Fire's actual

culpability nor time spent actually litigating issues relevant to the US Fire policy. Id. The court uncritically accepted BASF's calculations and did not evaluate BASF's invoices to reduce the award for BASF's lack of success, or to reduce the award for time spent in litigation on matters unrelated to US Fire. Id. at 288. The court also did not employ any figures relevant to "the level of responsibility of each entity." Id. at 287.

Accordingly, US Fire respectfully submits that the trial court's Final Judgment Order must be vacated with respect to the award of fees to BASF. If any award of fees is to be made, the "relative culpability" approach must be applied to calculating BASF's claimed fees. It is the only approach that is consistent with precedent and that it is practically feasible to implement in this context of this case.

III. THE TRIAL COURT INCORRECTLY HELD COSTS WERE "UNDISPUTED" (Pa0043; Pa0056; Pa0220).

The trial court further abused its discretion in awarding costs in the Final Judgment Order because it erroneously believed BASF's calculation of costs was "undisputed." Most basically, US Fire's opposition disputed BASF's claim for costs; those costs were not, as the Court stated, "undisputed." (Pa0043 at fn. 2).

Of course, BASF should not be entitled to recover costs at all since it was not a "prevailing party." R. 4:42-8. US Fire respectfully submits that if the Court holds BASF was not a "successful claimant," it was not a "prevailing party" either, and no court costs should be awarded to BASF. See Velli v. Rutgers Cas. Ins. Co.,

257 N.J. Super. 308, 310 (App. Div. 1992); Helton v. Prudential Prop. & Cas. Ins. Co., 205 N.J. Super. 196, 201 (App. Div. 1985) (applying similar analyses to the term "successful claimant" under R. 4:42-9(a)(6) and the term "prevailing party" under R. 4:42-8.) This argument was properly brought before the trial court.

Further, US Fire identified controlling Appellate Division precedent holding that the majority of costs sought by BASF – for expert fees and depositions – are not recoverable under New Jersey's Court Rules. See Velli, 257 N.J. Super. 308, 312 ("It has been clear since 1985 that the controlling cases permitted counsel fees but barred recovery of expert witness fees [.]"); Helton, 205 N.J. Super. 196, 201 (App. Div. 1985) ("We do not regard expert witness fees as part of the attorney's out-of-pocket expenses", court stated recoverable costs are limited to "reasonable photocopying, paralegal expenses, and travel and telephone costs. . . . As a general rule, witness expenses have been held not to fall within that category.")

The court did not consider those Appellate Division cases, and instead followed a single Law Division case, Bung's Bar & Grille, Inc. v. Twp. Council of Florence Twp., 206 N.J. Super. 432 (Law. Div. 1985). (Pa0056). Bung's predates both the Appellate Division cases cited above.

By following Bung's instead of controlling authority from the Appellate Division, and, by finding the issue of costs "undisputed," the Court clearly abused

its discretion. Because the vast majority of costs sought by BASF are for experts and depositions, it should not be allowed recovery of costs under R. 4:42-8.

IV. THE TRIAL COURT ABUSED ITS DISCRETION IN CALCULATING INTEREST (Pa0056-60; Pa0219).

On the issue of interest, the trial court incorrectly considered interest calculations submitted for the first time by BASF in its reply brief, applied an incorrect start date for the running of interest, and applied a 2% enhancement to applicable interest rates based on an incomplete review of the record. The trial court's holdings on interest were an abuse of discretion and must be reversed.

A. The Trial Court Incorrectly Considered Unvetted Interest Calculations Submitted By Reply (Da0260).

BASF's initial interest calculations in its March 2021 Motion were so off-base and inaccurate that it abandoned those initial calculations and, in its reply brief, submitted entirely new calculations. (Da47-54; Da260-261). The trial court then accepted and applied those interest calculations provided by BASF for the first time by way of reply submission. This was incorrect as a matter of law.

It was improper to raise an issue for the first time in a reply brief because neither the court nor opposing counsel can properly address the new issue. Borough of Berlin v. Remington & Vernick Engineers, 337 N.J. Super. 590, 596 (App. Div. 2001); see also Bouie v. New Jersey Dept. of Comm. Affairs, 407 N.J. Super. 518 (App. Div. 2009); Goldsmith v. Camden Cnty Surrogate's Office, 408

N.J. Super. 376, 388 (App. Div. 2009); Alpert, Goldberg, Butler, Norton & Weiss, P.C. v. Quinn, 410 N.J. Super. 510 (App. Div. 2009).

This principle is particularly true here, where the court's decision on interest actually awarded more interest to BASF than it originally sought in its moving papers. Cf. (Pa0213) (BASF sought $873,286.46 in prejudgment interest in its moving papers); (Pa0043) (Court awarded BASF $1,068,835.87 in prejudgment interest).

Moreover, the interest calculations submitted with BASF's reply brief ***were the fourth different set of interest calculations*** provided by BASF in the case. BASF started with the interest calculations in the Ruoff Report; US Fire relied on the figures and methodology in that report for its interest calculations. (Da46; Da259.) BASF then switched to interest calculations provided by June Toth in its Original Motion. These calculations improperly reconciled the covered costs by year amounts stated in the Ruoff Report and applied incorrect interest rates. For instance, Ms. Toth applied a 12% interest rate to certain years. The 12% interest rate does not apply to contract actions. (Da30-45.)

In the March 2021 Motion, BASF served entirely new calculations from Ms. Toth. (Da47-Da54.) These calculations, bizarrely, changed the amount of covered costs incurred in specific years – ***despite the fact these costs were incurred decades ago***. Of course, these new calculations just happened to place more costs

in years with higher interest rates. For instance, Ms. Toth decided that 1997, a year with a 7.5% interest rate, now had more than $2,000,000 in costs. (Da0053.) Ms. Toth could not explain these calculations in deposition. (Da229-258.)

Finally, the calculations submitted on reply were BASF's highest interest calculations yet, claiming that BASF had occurred $200,000 more in prejudgment interest than originally sought in its March 2021 Motion. (Da260-261.)

The trial court's decision to rely on interest calculations submitted by way of reply brief – the fourth different set of interest calculations provided by BASF – was incorrect and deprived US Fire of the chance to properly oppose Plaintiff's revised interest calculations. This plainly meets the abuse of discretion standard and requires reversal by this Court.

B. The Trial Court Applied An Incorrect Start Date For The Running Of Interest (Pa0056-60; Pa0219).

The appropriate start date for the running of interest is 2005, when BASF filed this action. See Taddei v. State Farm Indem. Co., 401 N.J. Super. 449, 466–67 (App. Div. 2008) (holding interest should run from date complaint was filed in insurance coverage dispute); George H. Swatek, Inc. v. N. Star Graphics, Inc., 246 N.J. Super. 281, 288 (App. Div. 1991) (awarding prejudgment interest in contract action for time that "elapsed between the filing of the complaint and the entry of judgment [.]")

That date accounts for the nearly 20 years of delay between when BASF first received notice of EPA action at the Site, and when it finally filed suit. See

Goodyear Tire & Rubber Co. v. Kin Properties, Inc., 276 N.J. Super. 96, 103 (App. Div. 1994) ("equity aids the vigilant, not those who sleep on their rights."). While the trial court made clear that it accepted BASF's position that it was "forced" to litigate this coverage dispute for over a decade (Pa0058), it appears that the trial court did not consider the pre-suit circumstances.

BASF was the only one armed with information necessary to determine whether US Fire's coverage obligation was actually triggered at any time before suit was filed – and it did not share this information with US Fire until after the Complaint in this action was filed in 2005. Indeed, BASF did not even demand payment from US Fire until *after* suit was filed.

US Fire was an excess carrier without information indicating the limits underlying the US Fire policy had been, or ever would be, exhausted. BASF did not make a demand for payment to US Fire; it could not because there was no proof of exhaustion of the limits underlying the US Fire Policy. BASF only noticed the claim to US Fire and then provided claim updates on a sporadic and infrequent basis. (Pa0353-Pa0362; Pa0435-Pa0463). In point of fact, US Fire *did not deny coverage pre-suit*; US Fire only reserved its rights in connection with this claim. (Pa0368-Pa0379).

At this point, in order to trigger coverage, it was BASF's obligation to supply information regarding the status of remediation, costs incurred, and

exhaustion of primary layer policies to US Fire. That information was not forthcoming.

To be clear BASF, and BASF alone, had the information enabling it to identify its remediation costs, and the insurers it needed to contact and seek coverage for those costs. Yet, it did not share that information, did not demand payment from US Fire, and waited 20 years to initiate litigation. BASF sat on its hands for 20 years, and now the trial court has permitted BASF to recover interest (at an inflated rate) for those 20 years. BASF should not be rewarded for its dilatory conduct by allowing interest to run prior to the filing of this case.

Instead of adopting 2005 as the starting point for interest calculations, the trial court held that interest incepted in 1989, when the court believed the limits underlying the US Fire Policy were exhausted. (Pa0057.) In so holding, the trial court overlooked that only 6.4% of covered costs can be applied to the limits underlying the US Fire Policy.

To explain, while the trial court is correct that "BASF's damages had exceeded $200,000 by 1989," (Pa0057) only 6.4% of this amount was applicable to the US Fire policy period, and the policies underlying the US Fire Policy during this period.[15] Properly allocating BASF's covered costs leads to the conclusion that

[15] Specifically, by 1989 BASF had incurred $558,368.49 in covered costs. The amount of these covered costs that could be allocated to the policies underlying the US Fire Policy was $35,735.58. (Pa261.)

the policy limits underlying the US Fire Policy were not exhausted until 1996. By 1996, BASF had incurred approximately $4,785,465.88 in covered costs. The 6.4% share of these covered costs allocated to the US Fire period is $306,269.82, thus eroding the limits of the policies underlying the US Fire Policy by 1996. Accordingly, commencing the running of interest at the point in time which the limits underlying the US Fire policy would be exhausted, while incorrect, calls for interest beginning to run from 1996, at the earliest.

In sum, there is no basis for rewarding BASF's 20-year delay in filing suit with 20 years of prejudgment interest. Interest can only begin to properly run from 2005, when this suit was filed. Further, the trial court's application of a 1989 start date was inconsistent with the facts and a clear abuse of the trial court's discretion.

C. There Is No Basis For A 2% Enhancement (Pa0056-60; Pa0219).

Finally with respect to interest, the trial court improperly found the equities favored BASF to allow for an enhancement to the statutory interest rates.

The trial court held that a 2% enhancement to interest rates could be applied if "the equites" demanded this result. (Pa0058.) The trial court found the equities demanded a 2% enhancement, even though there is nothing in the record that supports a finding of inequitable conduct on the part of US Fire.

For instance, the trial court concluded that "[b]ecause of the insurers' conduct, discovery took over five (5) years." (Pa0058). However, proceedings

before the SAM were by consent of the parties, and it was BASF, not US Fire, that pursued a position in allocation (fact based allocation) that required extensive discovery, even though it was meritless from the outset. (Pa0199-210.) After the SAM was appointed, BASF took an allocation position contrary to binding precedent that dragged this case on for a decade. Moreover, further delays occurred because of an unusually long decision making process by the court.[16] The trial court repeatedly faulted US Fire for delays it had no hand in causing.

In holding that the equities favor BASF, the trial court also failed to address the realities of BASF's conduct. BASF is the world's largest manufacturer of chemicals. It is a sophisticated corporation which polluted a Massachusetts town for decades. It is not the common policyholder overwhelmed by litigation against its insurers.

Indeed, it is BASF which has employed inequitable litigation tactics in this case. For instance, BASF has used four different interest calculations by two different experts (and one of its attorneys) in an attempt to inflate its interest claim, ultimately abandoning the first three in favor of one submitted to the trial court in a reply brief. The last calculation was manipulated to be the highest one yet, though nothing about the remediation costs on which interest was being calculated

[16] US Fire respectfully disagrees with the trial court's conclusion that interest should not be tolled for the five years it took the court to reach the ultimate decision on allocation.

changed. (Da30-45; Da46; Da47-54; Da260-261.) Moreover, as discussed above, BASF sat on its rights for 20 years before filing this action.

"[O]ne who seeks equity, must do equity." Apaporis, LLC v. Amy Yueh, 2008 WL 509819, at *6 (N.J. Super. Ct. Ch. Div. Feb. 25, 2008). BASF's conduct pre- and post- commencement of litigation should have precluded any finding that the equities somehow favor BASF. The trial court's decision to apply the 2% enhancement because the "equities" favor BASF is without basis. US Fire respectfully submits that this Court should vacate the trial court's holding as to interest.

CONCLUSION

For the foregoing reasons, U.S. Fire respectfully requests that this Court affirm the trial court's ruling on allocation, vacate the trial court's Order of fees, costs, and interest, and remand this matter for further proceedings before the trial court consistent with the results of this appeal.

Respectfully submitted,

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Dated: January 29, 2024

BASF CATALYSTS, LLC (F/K/A ENGELHARD CORPORATION),

Plaintiff-Appellant,

V.

ALLSTATE INS. CO.; CONTINENTAL INS. CO.; EVEREST REINSRUANCE CO.; FEDERAL INS. CO., GREAT NORTHERN INS. CO.; HARTFORD ACCIDENT & INDEMNITY CO.; LEXINGTON INS. CO.; NEW JERSEY MANUFACTURERS INS. CO.; NEWARK INSURANCE COMPANY; ONEBEACON AMERICA INS. CO.; ROYAL INDEMNITY CO.; ROYAL INS. CO. OF AMERICA; TRAVELERS CASUALTY & SURETY CO.; UNITED STATES FIRE INS. CO.; CERTAIN UNDERWRITERS AT LLOYD'S AND BRITISH COMPANIES,

Defendants and, as to United States Fire Insurance Company, Appellee and Cross-Appellant.

SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION
DOCKET NO: A-003029-22 TEAM 2

CIVIL ACTION

ON APPEAL FROM:
SUPERIOR COURT, LAW DIVISION
MIDDLESEX COUNTY
DOCKET No. MID-L-2061-05

SAT BELOW:
HON. THOMAS D. McCLOSKEY, J.S.C.

REPLY AND RESPONSE BRIEF OF PLAINTIFF-APPELLANT/CROSS-APPELLEE, BASF CATALYSTS, LLC (F/K/A ENGELHARD CORP.)

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INTRODUCTION

In its current Brief, BASF Catalysts, LLC ("BASF") separately addresses, first, the cross-appeal filed by United States Fire Insurance Company's (U.S. Fire"), and second, U.S. Fire's response to BASF's appeal. The two cross-appeals stand in stark contrast. The appeal by BASF centers on a legal issue – namely, the proper application of Massachusetts law concerning allocation of insurance coverage. BASF respectfully submits that the trial court "got it right" initially and, nearly two years later, incorrectly reconsidered its initial decision and created a hybrid allocation model that is contrary to controlling case law in Massachusetts.

In the U.S. Fire appeal, U.S. Fire has finally, after more than two decades, conceded that it owes insurance coverage to BASF. In contrast, on the first day of the liability trial in this case, counsel for U.S. Fire concluded his opening remarks by stating: "There are no facts, there's no scientific data, and there's absolutely no support that they can rely on to help them meet that burden. ***There is no coverage for these claims***, judge. That's the case." (Pra 3) (emphasis added). Having finally retreated from this position U.S. Fire now wants to limit its financial exposure by challenging factual determinations made by the trial court – determinations that were properly made in the discretion of the trial court. BASF's response to U.S. Fire's cross-appeal is addressed first below.

PROCEDURAL BACKGROUND

The lengthy procedural background of this case is set forth in the Brief of the Plaintiff-Appellant/Cross-Respondent. (Pb, pp. 3-15). BASF incorporates that background here.

FACTUAL BACKGROUND

The factual background of this case is set forth in the Brief of the Plaintiff-Appellant/Cross-Respondent. (Pb, pp. 15-25). BASF incorporates that factual background here.

ARGUMENT - PLAINTIFF/CROSS-APPELLEE'S RESPONSE

U.S. Fire's cross-appeal does not challenge the trial court's determination that it owes insurance coverage to BASF for property damage that occurred at its former operating facility located in Plainville, Massachusetts (the "Plainville Facility"). The covered property damage relates to the release of chlorinated volatile organic compounds ("CVOCs") to the groundwater during the operations of the Plainville Facility from 1958 through 1993. (Pa 91-92). After nearly twenty years of litigation, that question is finally resolved in favor of BASF. It is only now that U.S. Fire has surrendered its long-standing challenges to liability, and U.S. Fire's newly manufactured position, in its Brief, that U.S. Fire has not continually denied coverage is false and completely unsupported by the record in this case. Again, U.S. Fire, at the beginning of the hearing in this matter, counsel for U.S. Fire asserted:

"***There is no coverage for these claims***, judge. That's the case." (Pra 3) (emphasis added). Now, U.S. Fire attempts to argue, notwithstanding the trial court's determination that it owes coverage, that BASF was not a successful claimant entitled to an award of attorneys' fees under R. 4:42-9(a)(6). BASF is a successful claimant because it succeeded on the first, and critical, issue in the case – whether U.S. Fire owed coverage for the Plainville Claim.

U.S. Fire also attempts to challenge certain discretionary aspects of the trial court's calculation of damages. Specifically, U.S. Fire claims that the trial court erred in its calculation and allocation of BASF's recoverable attorneys' fees, its award of costs and its calculation of prejudgment interest. As explained below, each of these issues is a matter left to the discretion of the trial court, that this Court reviews for an abuse of that discretion. In reaching its decisions, the trial court considered all relevant materials, including all material evidence and the briefs and argument of counsel, and the trial court properly interpreted and applied relevant case law in determining that BASF was and is a successful claimant and in apportioning legal fees and costs, together with interest, to BASF. In doing so, the trial court did not simply adopt the position of BASF, and, on Feb. 10, 2023, the Trial Court (Hon. Thomas D. McCloskey, J.S.C.) entered Judgment against U.S. Fire in the amount of $2,587,561.87, which was broken down as follows: (i) $918,894

for investigation and remediation costs incurred prior to December 31, 2018;[1] (ii) $511,005 for attorneys' fees; (iii) $88,827 for costs; and (iv) $1,068,835.87 for interest. This judgment also declared that U.S. Fire is liable to BASF for 6.4% of covered costs incurred after 2018. (Pa 43).[2]

The trial court did not abuse its discretion on any of the issues raised in U.S. Fire's cross-appeal. Moreover, Judge McCloskey properly denied U.S. Fire's most recent motion for reconsideration on these same issues, properly agreeing with BASF that:

> U.S. Fire's latest motion is not merely an effort to take a second bite at the apple. That is because, in 18 years, U.S. Fire has already consumed the entire apple several times over. It is time for U.S. Fire's long fight against BASF's insurance claim to end. Each of the issues about which U.S. Fire complains is a matter left to the sound discretion of this Court. The Feb. 10, 2023 Order was a reasonable exercise of that discretion. There is nothing in the Feb. 10, 2023 Order or this court's reasoning that is arbitrary, capricious, or unreasonable.

(Pa 221).[3]

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[1] U.S. Fire's appeal does not challenge that portion of the trial court's judgment that determined that U.S. Fire owes BASF insurance coverage for the Plainville claim.

[2] In the event that BASF's own appeal is granted, the underlying bases for the trial court's allocation of legal fees and costs and interest will be altered, and this matter should be remanded to the trial court for reevaluation of these determination.

[3] Several judges have handled this case during the 19 years since it was first filed. For purposes of clarity, we have indicated which judge issued which order(s) throughout this brief.

I. BASF WAS A SUCCESSFUL CLAIMANT FOR PURPOSES OF R. 4:42-9(A)(6)

Leaving prevailing party attorneys' fees to one side, BASF obtained a judgment against U.S. Fire for over $2 million in this proceeding. Despite its repeated suggestions to the contrary, U.S. Fire flatly and unequivocally denied BASF's claim for coverage, necessitating this protracted legal battle. (Pa 9-14, 27-30). Only in the world of U.S. Fire could a $2 million judgment be deemed a failure.

U.S. Fire first argues that BASF is not entitled to an award of attorneys' fees under R. 4:42-9(a)(6) because BASF was not a "successful claimant." The New Jersey Supreme Court broadly defines a successful claimant "as a party that 'succeed[s] on ***any*** significant issue in litigation which achieves ***some*** benefit the parties sought in bringing suit.'" *Occhifinto v. Olivo Constr. Co.*, 221 N.J. 443, 450-51, 114 A.3d 333 (2015) (emphasis added). U.S. Fire includes a portion of this quote in its brief and in doing so, misrepresents the Supreme Court's holding. U.S. Fire's brief states "a successful claimant must achieve ***the*** 'benefit the parties sought in bringing suit.'" (Db, p. 52). The Supreme Court held that a successful claimant must achieve "some benefit," not "the benefit." *Occhifinto,* 221 N.J. 443, 450-51. In any event, however, BASF did achieve the benefit that it sought in filing suit – it obtained a judicial determination of insurance coverage in its favor, and it is only now that U.S. Fire is **not** challenging this determination.

"A party who 'obtain[s] a favorable adjudication on the merits on a coverage question as the result of the expenditure of [counsel] fees,' is a successful claimant under Rule 4:42-9(a)(6)." *Id.* at 451. *See also Mason v. City of Hoboken*, 196 N.J. 51, 72, 951 A.2d 1017 (2008) (The phrase "prevailing party" under New Jersey law is "a legal term of art that refers to a 'party in whose favor a judgment is rendered'"). Contrary to the arguments of U.S. Fire, complete success on all claims is **not** a prerequisite to being considered a successful claimant for an award of fees. *See Litton Indus. v. IMO Indus., Inc.*, 200 N.J. 372 (2008).

A. BASF Obtained a Favorable Adjudication on the Merits of a Significant Coverage Question.

In this case, the benefit that BASF sought when it filed its Complaint in this matter was insurance coverage for costs incurred to investigate and remediate property damage at the Plainville Facility and a declaration that the insurance company defendants are obligated to provide insurance coverage under their policies. (Pa 9-13). BASF succeeded on both of those issues.

After thirty trial days, during which the court heard testimony from seven live witnesses, and received "extensive exhibits, deposition testimony and written submissions," the Honorable Nicholas J. Stroumtsos of the trial court rejected U.S. Fire's denial of responsibility and found that BASF is entitled to insurance coverage for its claim. (Pa 91-137). Indeed, despite taking the position at the beginning of

the liability trial that "there is no coverage for these claims," U.S. Fire finally concedes now that it "owes BASF approximately $900,000" as partial indemnification for its losses, plus 6.4% of all covered costs incurred after December 31, 2018. (Db, p. 2, Pa 41-60).

As Judge Stroumtsos correctly noted in his discussion of whether BASF was a successful claimant, "the issue of indemnity was a significant issue in this litigation." (Pa 50). BASF filed its Complaint on March 17, 2005. (Pa 1). The insurance company defendants then took years of extensive discovery seeking evidence to defeat BASF's claim that it was entitled to indemnification for its losses.[4] After five years of discovery, a three-month trial was held during which U.S. Fire and the other remaining insurance companies tried to convince the trial court that BASF was not entitled to any coverage for its losses. (*see generally* Pa 91-137).

Throughout its pleadings and the trial, U.S. Fire contended that BASF was not entitled to any coverage for the Plainville claim. (Pa 9-14, 25-30, Pra 3). Through its expenditure of counsel fees, BASF proved U.S. Fire wrong and established that

[4] During the initial phase of discovery in this case, the insurance company defendants served more than 20 separate sets of interrogatories, BASF reviewed and produced more than half a million pages of documents, and the insurance company defendants deposed more than 100 current and former BASF employees and consultants. (Da 180-181).

U.S. Fire owes insurance coverage for property damage at the Plainville Facility. (Pa 41-60). Accordingly, BASF is a successful claimant for purposes of R. 4:42-9(A)(6). *See Occhifinto,* 221 N.J. at 450-51.

B. Complete Success on All Issues Is Not a Prerequisite to an Award of Attorneys' Fees.

U.S. Fire argues that BASF cannot be considered a successful claimant because it did not succeed on certain "key issues." In particular, U.S. Fire identifies one of the key issues as choice of law. BASF and certain insurance companies advocated for the application of New Jersey law, while other insurance companies advocated for the adoption of Massachusetts law. (Pa 88-89). The trial court (J. Stroumtsos) held that Massachusetts law applies to the interpretation of the sudden and accidental pollution exclusion and the allocation of BASF's covered damages. (Pa 88).

Importantly, the choice of law was an important issue that required research, briefing and argument as a practical matter. Further, this issue was not case dispositive as to a majority of insurance companies. Indeed, U.S. Fire took no position on choice of law (the U.S. Fire insurance policy does not contain a sudden

and accidental pollution exclusion), and, therefore, it did not "succeed" through the ruling and nor did BASF "lose" to U.S. Fire on this issue. (Db, p. 4). [5]

U.S. Fire also exaggerates in arguing "there are at least 430 billing entries submitted by BASF's counsel the include the term 'choice of law.' The values of these entries is in the millions of dollars." In support of this statement, U.S. Fire cites 234 pages in its appendix, without identifying any single specific page or entry or otherwise providing any basis for its calculation that the billing entries represent "millions of dollars" in fees. Simply, the suggestion that BASF incurred "millions of dollars" in attorneys' fees for choice of law briefing is absurd.

Leaving aside U.S. Fire's misrepresentations, the fact that BASF did not succeed on its choice of law position, or any other single issue does not prevent the court from finding that BASF was a successful claimant. In *Litton Indus., Inc. v. IMO Indus., Inc.*, 200 N.J. 372 (2009), the Supreme Court held that complete success on all issues is not a requirement for an award of fees. *Litton*, 200 N.J. at 387. Rather

[5] In its Brief, U.S. Fire states that as a result of the trial court's choice of law ruling "all but three insurers were dismissed from the litigation." (Rb p. 55). Initially, the citation provided by U.S. Fire does not support the fact for which it is cited. But more importantly, the fact for which it is cited is simply inaccurate. While certain insurance companies named as defendants were dismissed based on the application of Massachusetts law to the interpretation of the sudden and accidental pollution exclusion, several others were dismissed because they agreed to settlements with BASF, including insurance companies who provided coverage both before and after the exclusion became part of applicable insurance policies. (Pa 0091). U.S. Fire is the only original defendant that has done neither.

when an ultimately successful claimant succeeds on certain issues but not on others, the trial court may reduce the fees requested to account for the limited or partial success.[6] *Id.* As discussed below, in this case, the trial court did, in fact, reduce the fees requested to account for BASF's lack of success on certain issues.[7] (Pa 53-54).

Despite the fact that it did not succeed on certain issues, BASF did succeed on the ultimate issue – whether U.S. Fire owes it insurance coverage. BASF's lack of success on certain issues does not make BASF an unsuccessful claimant so as to negate a fee award; instead, "success" may be considered when calculating the fees to be awarded. *See Litton*, 200 N.J. at 387.

C. The Unreported *Honeywell* Decision Is Inapplicable

As it did in the trial court, U.S. Fire relies on the Appellate Division's unreported opinion in *Continental Ins. Co. v. Honeywell Internat'l, Inc.*, *Cont'l Ins. Co. v. Honeywell Int'l, Inc.*, Nos. A-1071-13T1, A-1100-13T1, 2016 N.J. Super. Unpub. LEXIS 1685 (App. Div. July 20, 2016), to support its argument that BASF

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[6] A trial court may also choose not to reduce the fees requested to account for partial success "if the same evidence adduced to support a successful claim was also offered on an unsuccessful claim." *Id.* As detailed further below in the "Reply" portion of this Brief, the application of Massachusetts to the issue of allocation of coverage was initially found to support the BASF position on a "fact-based allocation."

[7] Notably, the amount requested by BASF already reflected reductions to the fees incurred to account for BASF's lack of success on certain issues, including the application of the owned property exclusion and the nuclear exclusion. (Da 188). The trial court's reduction was in addition to the reductions already calculated by BASF.

is not a successful claimant.[8] The *Honeywell* decision is distinguishable and wholly inapplicable in this case.

In *Honeywell*, the trial court denied an award of attorneys' fees to the policyholder because "[o]verwhelmingly this is a case about nothing more than allocation. ***This is not a case about denial of coverage***." *Honeywell*, 2016 N.J. Super. Unpub. LEXIS 1685, at *55 (emphasis added). U.S. Fire relies on this language to argue that BASF is not entitled to fees because "the heart of the parties' dispute was whether a significant amount of BASF's claimed damages could be allocated to U.S. Fire's policy period." (Db, p. 60). In doing so, U.S. Fire mischaracterizes not only this dispute, but also the Appellate Division's *Honeywell* decision.

U.S. Fire states that the Appellate Division affirmed the trial court's denial of attorneys' fees because, "as is the case here, '[the insured] was successful on certain issues and [the insurance carriers] were successful on other issues.'" (Db, p. 59). The reasoning cited by U.S. Fire was the trial court's, not that of the Appellate Division. *See Honeywell*, 2016 N.J. Super. Unpub. LEXIS 1685, at *56. Although

[8] A copy of the *Honeywell* decision is included in the Defendant's Appendix at Da 527.

the Appellate Division affirmed the trial court's denial of attorneys' fees, it did so for different reasons.

Specifically, the Appellate Division noted that R. 4:42-9(a)(6) was intended to allow an award of attorneys' fees "where an insurer refuses to indemnify or defend in respect of its insured's third-party liability to another." *Honeywell*, 2016 N.J. Super. Unpub. LEXIS 1685, at *56-57. The Appellate Division then concluded that because its allocation ruling did not require the insurance companies to provide coverage, the insurance companies never failed to honor their coverage obligations. *Id.* at *56.

In this case, unlike in *Honeywell*, U.S. Fire flatly denied coverage the trial court's ruling obligates U.S. Fire to indemnify BASF for its past and future losses. (Pa 25-37). The trial court's judgment (J. McCloskey) establishes that U.S. Fire owes BASF $918,894 in indemnity for its losses incurred before December 31, 2018, plus 6.4% of all covered costs incurred after December 31, 2018. (Pa 43). U.S. Fire's cross-appeal does not challenge either of those portions of the trial court's judgment.

The liability determination and judgment by Judge Stroumtsos that U.S. Fire owes coverage to BASF was only obtained after a five-year period of discovery and motions practice, which was followed by a three-month long liability trial. Contrary to U.S. Fire's assertion that the "heart of the dispute" was the allocation of BASF's

claimed damages, during the time up to and including the liability trial, the actual issue was whether U.S. Fire and the other insurance companies owed coverage to BASF. (*see generally* Pa 91-137).

U.S. Fire's efforts to shoehorn the facts of this case into the holding of *Honeywell* is an exercise in revisionist history. To say that this case was about nothing more than allocation is disingenuous, at best. BASF incurred substantial attorneys' fees to prove that U.S. Fire owed coverage for the Plainville claim under the insurance policies BASF purchased and paid for. After hearing and rejecting the counterarguments by U.S. Fire, Judge Stroumtsos held that BASF is entitled to coverage. Consequently, BASF is a successful claimant and is entitled to an award of attorneys' fees pursuant to R. 4:42-9(a)(6).

II. THE TRIAL COURT PROPERLY AWARDED AND ALLOCATED BASF'S RECOVERABLE ATTORNEYS' FEES

A. An Award of Attorneys' Fees May Only Be Overturned for a Clear Abuse of Discretion, Which Did Not Happen Here.

A trial court has wide discretion to award attorneys' fees to a successful claimant. *Empower Our Neighborhoods v. Guadagno*, 453 N.J. Super. 565, 579 (App. Div. 2018). "Fee determinations by trial courts will be disturbed only on the rarest of occasions, and then only because of a clear abuse of discretion." *Packard-Bamberger & Co. v. Collier*, 167 N.J. 427, 444 (2001). An abuse of discretion is

defined as "relying on an impermissible basis, by relying upon irrelevant or inappropriate factors, by failing to consider all relevant factors, or by making a clear error in judgment." *State v. D.F.W.*, 468 N.J. Super. 422, 438 (App. Div. 2021).

B. The Trial Court Properly Exercised its Discretion in Calculating and Allocating BASF's Recoverable Attorneys' Fees.

U.S. Fire claims that the trial court (J. McCloskey) abused its discretion because it did not strictly follow one of two allocation methods described in *Empower Our Neighborhoods v. Guadagno*, 453 N.J. Super 565, 583, 183 A.3d 275, 286 (App. Div. 2017). First, U.S. Fire states that BASF agrees with U.S. Fire that *Empower our Neighborhoods* holds that there are only two "permissible methods" to allocate attorneys' fees among multiple defendants. (Db, p. 62). BASF has never stated that there are only two permissible ways to allocate attorneys' fees and, importantly, *Empower our Neighborhoods* does not so hold.

In *Empower our Neighborhoods*, this Court first held "there is no doubt that trial courts have 'wide discretion on how to divide liability.'" *Empower Our Neighborhoods*, 453 N.J. Super. at 583. Then, noting the absence of New Jersey authority on the issue, this Court described two allocation approaches based on federal precedent. "There are two approaches to this issue in the federal courts. Fees can be divided according to the relative culpability of the defendants, or based on the amount of time necessary to litigate as to each." *Id.* The Court also noted that

"depending on the circumstances of the individual case, a combination of these methods can be appropriate." *Id.*

Among the federal precedent the *Empower our Neighborhoods* Court relied upon was *Council for Periodical Distribs. Assos. v. Evans*, 827 F.2d 1483, 1487 (11th Cir. 1987). *See Empower our Neighborhoods*, 453 N.J. Super. at 583. In *Council*, the court addressed, among other things, the apportionment of attorneys' fees among multiple wrongdoers. Preliminarily, the court held "in addition to having discretion on when to apportion fees, district courts also have wide discretion on how to divide liability for fees." *Council for Periodical Distribs. Assos. v. Evans*, 827 F.2d 1483, 1487 (11th Cir. 1987). The court then stated, "there are many possible methods and theories with which to apportion fees." *Id.* at 1488. The court proceeded to describe six different methods, concluding its description with "finally, a district court may decide that it is appropriate to combine two or more of these methods, depending on the facts and nature of the case." *Id.* at 1488.

"The apportionment of counsel fees is never a precise calculation, never the result of a 'universal' method." *Empower Our Neighborhoods*, 453 N.J. Super. at 584. The goal of the apportionment of fees should be to combine the level of responsibility of each defendant and the time invested in the case to reach an equitable outcome. *See Id.* at 584. *See also Herbst v. Ryan*, 90 F.3d 1300, 1305 (7th

Cir. 1996) ("the district court should make every effort to achieve the most fair and sensible solution that is possible").

In this case, after first determining that BASF was a successful claimant entitled to recover attorneys' fees, the trial court turned to its determination of the amount of the fees that BASF was entitled to recover. (Pa 52). The court began its calculation of BASF's recoverable attorneys' fees with a discussion of the principles enunciated in *Empower our Neighborhoods.* (Pa 53). The court concluded its discussion stating, "notwithstanding these principles, the Court is given wide discretion to apportion fees in an equitable manner." (*Id*.)

Judge McCloskey ultimately concluded that BASF was entitled to recover $511,005 in attorneys' fees from U.S. Fire. (Pa 54). The court reached this number by starting with BASF's costs to litigate against U.S. Fire, which was $1,193,281. (Pa 54). The trial court then reduced the amount requested by BASF to account for BASF's partial success during the allocation phase of the case. (*Id*). The court calculated this deduction by multiplying the fees requested by 36.4 (BASF's allocation of damages before reconsideration) and then dividing by 85 (BASF's allocation of damages after reconsideration).

Although U.S. Fire criticizes Judge McCloskey for his method of calculating BASF's recoverable fees, Judge McCloskey disagreed stating, "the Court believes

this calculation fairly accounts for the time BASF had to litigate to seek coverage from U.S. Fire while crediting U.S. Fire for its ultimate success on allocation." (Pa 54). Through the long history of this litigation, until the end of 2020, BASF had incurred $6,422,560 in attorneys' fees to secure the insurance coverage to which it is entitled. (Pra 5, 7). Thus, the trial court assessment of attorneys' fees against U.S. Fire was 7.9% of BASF's total fees. U.S. Fire's currently allocates share of BASF indemnify costs is 6.4%. (Pa 42). U.S. Fire was one of only two remaining defendants between 2015 and 2021 and has been the sole remaining defendant since then. Considering this, the slightly higher allocation of attorneys' fees to U.S. Fire, when compared to the allocation of indemnity costs, is more than equitable.

U.S. Fire's argument is correct on one point – Judge McCloskey did not strictly follow one of the two allocation methods described in *Empower our Neighborhoods*. However, the trial court has broad discretion to apportion recoverable attorneys' fees to reach an equitable result. In this case, the trial court "fastidiously examined and applied the controlling authority and decisions pertinent to the resolution achieved and did not overlook any matters that had been raised by the Defendant." (Pa 220). The trial court's award of attorneys' fees in this case was a proper exercise of its discretion.

III. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN AWARDING COSTS

The award of litigation costs is a matter left to the discretion of the trial court. *In re Caruso*, 18 N.J. 26, 36 (1955). This Court reviews a trial court's award of litigation costs for an abuse of discretion. *Id.* U.S. Fire next argues that Judge McCloskey committed error by awarding BASF $88,827 for litigation costs.

Specifically, U.S. Fire contends that the trial court abused its discretion by awarding expert and transcript costs and failing to follow what U.S. Fire characterizes as "controlling Appellate Division authority." (U.S. Fire Br., p. 67).[9] The so-called "controlling authority" relied on by U.S. Fire is *Velli v. Rutgers Cas. Ins. Co.*, 257 N.J. Super. 308 (App. Div. 1992) and *Helton v. Prudential Prop. & Cas. Ins. Co.*, 205 N.J. Super. 196 (App. Div. 1985).

Both *Velli* and *Helton* involved claims made under the personal injury protection ("PIP") section of the New Jersey No-Fault Law, N.J. Stat. § 39:6A-1., *et seq*. *Velli*, 257 N.J. Super. at 309 *Helton*, 205 N.J. Super. at 199. In both cases, the court noted that a PIP claim is a creature of statute and that under the circumstances of each case, the applicable statute, i.e. the New Jersey No-Fault Law, did not allow

[9] U.S. Fire also claims that BASF is not entitled to recover any costs because it was not a "prevailing party." (U.S. Fire Br., p. 66). U.S. Fire relies on the same invalid argument it made that BASF is not a "successful claimant." *See* § I, *supra*.

for recovery of expert fees by the prevailing party. *Velli*, 257 N.J. Super. at 310; *Helton*, 205 N.J. Super. at 202. The PIP statute is not applicable in this case and, therefore (and contrary to U.S. Fire's argument), neither *Velli* nor *Helton* is controlling.

The trial court, recognizing that neither *Velli* nor *Helton* was controlling, relied instead on *Bung's Bar & Grille, Inc. v. Twp. Council of Florence*, 206 N.J. Super. 432 (Super. Ct. 1985). In that case, after an exhaustive review and analysis of New Jersey and federal rules and precedent, the court concluded that "where expert opinion evidence is essential to be resolution of the issue, a reasonable allowance for the service is includable in the taxed costs." *Id.* at 479-84, 502 A.2d at 1226-29. *Bung's Bar & Grille* also supports an award of deposition costs, with the court holding that it had discretion to award deposition costs. *Bung's Bar & Grille, Inc.*, N.J. Super. at 480, 502 A.2d at 1226 (*Citing Finch, Pruyn & Co. v. Martinelli*, 108 N.J. Super. 156 (Super. Ct. 1969) and *Huber v. Zoning Bd. of Adjustment*, 124 N.J. Super. 26 (Super. Ct. 1973)).

U.S. Fire claims it was an abuse of discretion for the trial court to rely on *Bung's Bar & Grille* because it predates both *Velli* and *Helton*. However, the Appellate Division cited and did not overturn *Bung's Bar & Grille* in *Velli* or *Helton*.

Velli, 257 N.J. Super. at 310 n1; *Helton*, 205 N.J. Super. at 203-04. In *Helton*, this Court recognized the distinction between *Bung's Bar & Grille* and that case:

> We have no occasion here to determine whether *Bung's Bar & Grille Inc. et al., supra*, was correctly decided. We merely note that an action to recover PIP benefits is properly characterized as statutory.

Helton, 205 N.J. Super. at 204 (App. Div. 1985).

Under *Bung's Bar & Grille*, the court held that expert fees are recoverable when expert opinion evidence is essential to the resolution of the issue, and a reasonable allowance for the service is includable in the taxed costs." *Bung's Bar & Grille*, 206 N.J. Super. at 481. The court reached this conclusion relying on *In re Caruso*, 18 N.J. 26, 35 (1955). In *Caruso*, the Court allowed the reasonable cost of producing an expert witness to be awarded to the prevailing party. The Court reasoned, "Costs are said to be in the nature of incidental damages allowed to indemnify the successful party against the expense of vindicating a right invaded by the adverse party." *In re Caruso*, 18 N.J. at 38. The Court went on to hold that "where expert opinion evidence is essential to the resolution of the issue, a reasonable allowance for the service is includable in the taxed costs." *Id.* at 39-40.

In this case, there can be no dispute that expert testimony was essential to a resolution of the issues. In his January 31, 2011 Opinion and Order Judge Stroumtsos relied extensively on the testimony of BASF's environmental expert, Dr.

Robert Powell. (Pa 91-137). Among other things, Judge Stroumtsos relied on Dr. Powell's testimony to make its findings concerning the nature, extent, and timing of the environmental damages at the Plainville facility. (Id., pp. 27-40). Similarly, the Special Allocation Master ("SAM") – the Hon. William A. Dreier - relied extensively on Dr. Powell's testimony to allocate the damages among the parties. (Pa 152) (noting that "the SAM has relied principally on Dr. Powell's reports and his allocations.").

The applicable authority allows for taxation of expert fees when necessary to a resolution of the issues. In this case, expert testimony was absolutely necessary. That same authority allows for the taxation of deposition expenses. Consequently, it was not an abuse of discretion for the trial court to tax them against U.S. Fire.

IV. THE TRIAL COURT'S AWARD AND CALCULATION OF INTEREST WAS A PROPER EXERCISE OF ITS DISCRETION AND IS SUPPORTED BY THE LAW AND THE FACTS

New Jersey courts allow recovery of prejudgment interest in non-tort actions at the equitable discretion of the trial court. *County of Essex v. First Union Nat'l Bank*, 186 N.J. 46, 61 (2006). "Similarly, the rate at which prejudgment interest is calculated is within the discretion of the court." *Litton Indus., Inc. v. IMO Indus., Inc.*, 200 N.J. 372, 390 (2009) (citation omitted). "Unless the award 'represents a manifest denial of justice,' an appellate court should not interfere." *County of Essex*, 186

N.J. 61 (*citing Musto v. Vidas*, 333 N.J. Super. 52, 74, 754 A.2d 586 (App. Div.), *certif. denied*, 165 N.J. 607, 762 A.2d 221 (2000)).

A. BASF Did Not Improperly Raise a New Issue in a Reply Brief and the Trial Court Properly Considered All Relevant Materials in Calculating Interest.

U.S. Fire's first argues that Judge McCloskey abused his discretion by considering interest calculations submitted by BASF in its Reply Brief in Support of its Motion for Entry of Judgment. (Db, p. 68). According to U.S. Fire, it is improper to raise an issue for the first time in a reply brief. However, none of the cases U.S. Fire cites support its position, and BASF did not raise a "new" issue.

In *Borough of Berlin v. Remington & Vernick Eng'rs*, 337 N.J. Super. 590 (App. Div. 2001), this Court held that the applicability of statue could not be raised for first time in an appellate reply brief. *Id.* at 595-96. Similarly, in *Bouie v. N.J. Dep't of Cmty. Affairs*, 407 N.J. Super. 518 (App. Div. 2009), this Court held that the issue of whether a claim under 42 U.S.C.A. § 1983 was preserved in the trial court could not be raised for first time in appellate reply brief. *Id.* at 525 n.1. In *Goldsmith v. Camden Cty. Surrogate's Office*, 408 N.J. Super. 376 (App. Div. 2009), this Court held that the issue of whether the statute of limitations should be relaxed "in the interest of justice" cannot be raised for first time in appellate reply brief. *Id.* at 387.

This case is not even close to comparable with the cases U.S. Fire cites. The issue of the award and calculation of interest was not raised for the first time in BASF's Reply Brief. In its initial Brief in Support of its Motion for Judgment, BASF provided an interest calculation. (Pra 9-11). U.S. Fire filed a Response in which it criticized BASF's calculations, in part because it claimed BASF used incorrect annual damage figures. (Pra 13). In its Reply brief, BASF addressed U.S. Fire's criticisms by performing a calculation using the same method as in its initial brief but applying the annual damage figures that U.S. Fire claimed it should have used initially. (Pra 15-16). BASF did not raise a "new issue" in its reply. The only thing that changed from the calculation of interest in BASF's initial brief and its Reply Brief was the annual damages figures, and those were the annual damages advocated for by U.S. Fire in its opposition.

Importantly, Judge McCloskey did not adopt the interest calculations in BASF's reply brief. BASF's calculation of interest in its reply brief was $1,198,348. (Pra 16). The trial court awarded $1,068,835 in interest. (Pa 43). Obviously, the trial court did not blindly adopt the calculations in BASF's reply brief. To reach the number included in the Judgment, Judge McCloskey performed his own calculations using U.S. Fire's annual damages figures and a start date for

the running of interest that was different from and later in time than what BASF proposed. (Pa. 56).

The calculation of interest in based on a simple mathematical formula. The real disputes were over the inputs, including the annual damage figures, that go into that formula. The trial court resolved those disputes by considering all relevant information. The trial court did not abuse its discretion with its calculation of interest.

B. The Trial Court Selected an Appropriate Start Date for the Beginning of its Interest Calculation

Next, U.S. Fire argues that Judge McCloskey abused his discretion by calculating prejudgment interest beginning in 1989 instead of 2005. U.S. Fire claims the trial court should have used 2005 as the start date for its interest calculations because that is when BASF filed its complaint commencing this litigation. (Db, p. 70). Judge McCloskey commented when he rejected U.S. Fire's position that U.S. Fire "identifies no case requiring the court to start the interest calculation at the date of the filing of the complaint." (Pa 56). In its brief to this Court, U.S. Fire again fails to identify any such case law.

Not only does U.S. Fire fail to identify any case law requiring the use of the date of the complaint as the start date for an interest calculation, but it also fails to address the case law specifically rejecting that position. For example, in *County of*

Essex, supra, the trial court calculated prejudgment interest beginning at the date of each transaction the defendant obtained through fraud. *County of Essex*, 186 N.J. at 61-62. The Appellate Division reversed, holding that interest should have been calculated beginning on the date of the filing of the complaint. *Id.* at 54. The Supreme Court then reversed the Appellate Division holding that the date when prejudgment interest begins to run in a contract case is "within the sound discretion of the court, based on equitable principles." *County of Essex*, 186 N.J. at 61. The Supreme Court further held that "unless the award 'represents a manifest denial of justice,' an appellate court should not interfere." *Id.* (*citing Musto v. Vidas*, 333 N.J. Super. 52, 74, 754 A.2d 586 (App. Div.), *certif. denied,* 165 N.J. 607, 762 A.2d 221 (2000)). The Supreme Court concluded that the trial court's calculation of prejudgment interest from the date of each transaction was not "manifest denial of justice." *County of Essex*, 186 N.J. at 61.

The primary consideration in awarding prejudgment interest is that:

> the defendant has had the use, and the plaintiff has not, of the amount in question; and the interest factor simply covers the value of the sum awarded for the prejudgment period during which the defendant had the benefit of monies to which the plaintiff is found to have been earlier entitled.

Litton Indus., 200 N.J. at 390 (citing *Rova Farms Resort, Inc. v. Investors Ins. Co.*, 65 N.J. 474, 506, 323 A.2d 495 (1974)).

In well-known case of *Rova Farms,* the plaintiff, an operator of a recreational resort, was sued by a guest after the guest suffered serious injuries at the resort. *Rova Farms Resort, Inc. v. Investors Ins. Co.*, 65 N.J. 474, 479 (1974). Rova Farm's insurance company, Investors Insurance Company, provided a defense to Rova in the underlying action. *Id.* at 480. Investors offered only a portion of its policy limits to settle the underlying action, which the plaintiff rejected. *Id.* at 481. Ultimately, the underlying action was tried to a jury and a verdict was rendered for the injured guest in an amount substantially in excess of Investors' policy limits. *Id.* Investors paid its policy limits to the injured guest and Rova paid the amount of the judgment in excess of the policy limits. *Id.* at 482.

Rova subsequently commenced an action against Investors alleging bad faith for the insurance company's failure to attempt in good faith to settle the underlying action. *Rova Farms,* 65 N.J. at 482. The trial court entered judgment for Rova in the amount of the excess judgment that Rova paid in the underlying action, plus attorneys' fees, but denied Rova's request for an award of interest. *Id.* at 483. On appeal, the Supreme Court reversed the trial court's judgment as it related to interest and held that Rova was entitled to interest calculated from the date it paid the excess judgment, because that was when "the insured was deprived of these monies,

whereas the carrier, having refused to pay the excess itself, thereby had the use of the sum." *Rova Farms,* 65 N.J. at 504.

In this case, the trial court relied on *Rova Farms* and found that BASF had incurred damages exceeding the limits underlying U.S. Fire's policy by 1989. (Pa 57). Accordingly, that was when BASF was deprived of the money to which it was entitled. (Id.)

U.S. Fire's final argument that only 6.4% of BASF's damages are allocated to its policy period and its criticism of BASF's alleged "dilatory conduct" do not alter this outcome. As Justice O'Hern made clear in *Owens-Illinois, Inc. v. United Ins. Co*., 138 N.J. 437, 479 (1994), the public policy of New Jersey mandates that insurance companies faced with long-tail claims address them responsibly, or, if they choose to engage in litigation and are unsuccessful, reimburse the policyholder for fees incurred in enforcing coverage: "Insurers whose policies are triggered by an injury during a policy period must respond to any claims presented to them and, if they deny full coverage, must initiate proceedings to determine the portion allocable for defense and indemnity costs. For failure to provide coverage, a policyholder may recover costs incurred under the provisions of Rule 4:42-9(a)(6)." Here, U.S. Fire did not even respond to BASF's 1986 notice letter until nearly ten years later when its sent a letter reserving its rights to deny coverage. (Pa 368-79).

The trial court considered all materials and information relevant to the determination of the start date for its interest calculations. Its decision to use 1989 as the start date for the running of interest was not a "manifest denial of justice." *See County of Essex*, 186 N.J. at 61.

C. The Trial Court Properly Exercised its Discretion by Applying the 2% Enhancement to the Interest Rate.

As is the case with every other aspect of the court's calculation of interest, "the rate at which prejudgment interest is calculated is within the discretion of the court." *Litton Indus.,* 200 N.J. at 390. Generally, absent unusual circumstances, New Jersey courts do not abuse their discretion by awarding prejudgment interest in contract actions by using the rate applicable to tort actions, and many courts adhere to that measure absent unusual circumstances. *See, e.g., Litton Indus.*, 200 N.J. at 390-91. Pursuant to R. 4:42-11(a)(i), the annual rate of interest applicable to this case would be the average rate of return, to the nearest whole or one-half percent, of the State of New Jersey Cash Management Fund. N.J. Ct. R. 4:42-11(a)(i). Rule 4:42-11(a)(iii) permits the trial court to apply a two percent enhancement to the rate stated in (a)(i), in its equitable discretion. N.J. Ct. R. 4:42-11(a)(iii); *DialAmerica Mktg., Inc. v. KeySpan Energy Corp.*, 374 N.J. Super. 502, 511 (App. Div. 2005).

In this case, Judge McCloskey found that the equities favored application of the two percent enhancement. (Pa 58). The court first noted that "U.S. Fire has

enjoyed the benefit of premiums paid to it by BASF for over 17 years, while BASF has been forced to litigate for the payment of these funds." (*Id.*).

Next, the trial court stated:

> U.S. Fire significantly delayed resolution of this matter by pursuing extensive discovery against BASF in both the coverage and allocation phase. This case was assigned to Track IV, which provides a discovery period of 450 days. Because of the insurers' conduct, discovery took over five (5) years.

(Pa 58).

In its brief, U.S. Fire cites this last sentence and attempts to cast blame on BASF for the extensive discovery referred to by the trial court. (Db, pp, 73-74). However, the five years of discovery that the trial court is referring to are the five years between the filing of the complaint in 2005 and the initial liability trial, five years later, in 2010. During that time, U.S. Fire and the other insurance companies engaged in a scorched earth discovery campaign that included countless interrogatories, voluminous document productions and more than 100 depositions of current and former BASF employees and consultants. (Da 180-81).

U.S. Fire also attempts to lay blame for delays at BASF's feet based on BASF's position taken during the allocation phase of the case, describing it as "meritless from the outset" and "contrary to binding precedent." (Db, p. 74).

BASF's position is anything but meritless. Importantly, Judge McCloskey of agreed, writing as follows:

> The *Boston Gas* court observed that the "fact based" method was the ideal method of allocation, but that in cases where a "fact based" inquiry is not feasible, a "time-on-the-risk" method should be used. Id. at 312-14. BASF had a good faith belief that it could argue for application of the "fact based" method left available by the *Boston Gas* decision.

(Pa 52)[10]. Indeed, Judge McCloskey correctly noted that "simply put, if *Boston Gas* was as controlling as U.S. Fire purports it to be, then the allocation phase of this case should not have happened at all, much less have taken 10 years." (Id.)

In the end, U.S. Fire denied for decades BASF's rights to insurance coverage. U.S. Fire is the only one of the originally named defendants that continues to fight BASF's efforts to secure the insurance coverage to which it is unquestionably entitled. It is also U.S. Fire that had the use, for decades, of the money should rightfully be paid to BASF. It was not an abuse of discretion for the trial court to apply the two percent enhancement.

[10] In his initial adoption of the SAM's Report and Recommendation on allocation, Judge LeBlon similarly agreed that a fact-based allocation could be conducted pursuant to *Boston Gas*. (Pa 187).

ARGUMENT - PLAINTIFF/APPELLANT'S REPLY

I. THE TRIAL COURT'S JULY 30, 2020 ORDER IS NOT ENTITLED TO ANY DEFERENCE

U.S. Fire argues that "a trial court's factual findings premised upon evidence admitted in a bench trial are generally entitled to deference and 'are binding on appeal when supported by adequate, substantial, credible evidence.'" (Db, p. 30). It further argues Judge LeBlon's July 30, 2020 Order, which concluded that it was not possible to apply the fact-based allocation preferred under controlling Massachusetts law, is entitled to deference by this Court. The problem with this argument is that the trial court's conclusion was not supported by "adequate, substantial, credible evidence." The trial court made only one factual finding of fact in its July 30, 2020 Order. Previously, in his June 29, 2018 Letter Opinion overruling the objections of U.S. Fire and adopting the Report and Recommendation of SAM Dreier in its entirety, Judge LeBlon described the SAM's Report and Recommendation as "well-reasoned," and finding that the Judge Dreier's conclusions were not "clearly erroneous, contrary to the law or an abuse of discretion." (Pa 186-87).

In the July 30, 2020 Order, Judge LeBlon reversed his earlier adoption of the Judge Dreier's Report and Recommendation noting only that property damage is continuing at the Plainville Facility. (Pa 205-06). Notably, this "continuing" damage was not a new issue or fact. Indeed, Judge LeBlon, in his Letter Opinion

adopting the Judge Dreier's Report and Recommendation, noted that both U.S. Fire and the other remaining insurance company at that time, OneBeacon America Insurance Company, objected to the Report and Recommendation because it did not address "continuing" passive property damage after operations at Plainville ceased. (Pa 180, 182-83).[11]

Based only on the finding the property damage is continuing, the trial court determined that it was not possible to determine how much property damage took place during any period in the past. The trial court did not cite or discuss any of the other evidence presented to Judge Dreier during the Allocation Hearing. In his Report and Recommendation, Judge Dreier stated that the written materials, including "motions, exhibits, and transcripts" encompassed "four linear feet of materials." (Pa 145). However, there is no indication in the July 30, 2020 Order that the trial court reviewed any of that evidence in making its decision.

Judge LeBlon's conclusion, in his July 30, 2020 Order, that it is not possible to perform a fact-based allocation in this case is not supported by any evidence

[11] The Letter Opinion specifically notes, in discussing the SAM"s Report and Recommendation that: "The SAM recommended that continued active release of hazardous material into the soil and groundwater constituted the 'occurrence' under the OneBeacon and U.S. Fire insurance policies" and that the "SAM relied on the analysis in Boston Gas, supra, 454 Mass. 337, which required a pro rata analysis and notably indicated that ideally this would be fact based, or based on a time-on-the-risk." (Pa 171). As such, Judge LeBlon specifically considered the "continuing contamination" argument in initially adopting the SAM's Report and Recommendation.

because the so-called "continuing contamination" does not result from any new releases of CVOCs. As explained in BASF's initial Brief, the so-called continuing property damage is the result of the CVOC remediation process being overseen by the EPA and other governmental agencies. (Pb, pp. 34-35). Accordingly, the trial court's Order is not entitled to deference from this Court. *See State v. Nieves*, 476 N.J. Super. 405, 424 (App. Div. 2023) (holding that an appellate court owes "no deference to a court's fact findings that 'are not supported by sufficient credible evidence in the record.'"

II. A FACT-BASED ALLOCATION IS APPROPRIATE IN THIS CASE

Under *Boston Gas*, the "ideal method" for allocating insurance coverage for long-tail claims is the fact-based method. *Bos. Gas Co. v. Century Indem. Co.*, 910 N.E.2d 290, 312 (Mass. 2009). Only where it is not possible to make a fact-based allocation should coverage be allocated using the pro-rata time-on-the-risk method adopted by the trial court in this case. *See id.* at 316.

In granting reconsideration of the SAM's Report and Recommendation, the trial court concluded that it was not possible to do a fact-based allocation of BASF's covered damages. However, the trial court failed to consider any of the available evidence. Consequently, its July 30, 2020 Order is not entitled to any deference in this Court.

A. U.S. Fire's Response Improperly Relies on Materials That are Not Part of the Trial Court Record.

R. 2:5-4 states that the "record on appeal shall consist of all papers on file in the court or courts or agencies below, with all entries as to matters made on the records of such courts and agencies, the stenographic transcript or statement of the proceedings therein, and all papers filed with or entries made on the records of the appellate court." R. 2:5-4. This Court should not consider materials that were not presented to the trial court and that were submitted for the first time on appeal. *Townsend v. Pierre*, 221 N.J. 36, 45 n.2 (2015).

Here, U.S. Fire's argument, on pages 34-36 of its brief, that groundwater contamination is continuing to occur is based entirely on an expert report and excerpts of deposition testimony that was not submitted to the trial court. (Db, pp. 34-36). U.S. Fire offers no evidence of record that property damage at the Plainville Facility is continuing. This Court's review is based on the record as it existed in the trial court. *Davis v. Devereux Found.*, 209 N.J. 269, 296 n.8 (2012). This Court should not consider the evidence outside the record cited by U.S. Fire, or the arguments based on the evidence. See *Townsend,* 221 N.J. at 45 n.2.

B. The Trial Court Misinterpreted and Misapplied *Boston Gas*

U.S. Fire argues that the trial court applied the "exact allocation methodology" of *Boston Gas* "after carefully reviewing the record evidence, including expert

testimony at the Allocation Trial." (Db, p. 37). However, there is no indication in the trial court's July 20, 2020 Order that it analyzed any evidence from the Allocation Hearing.

The only evidence that Judge LeBlon mentioned to support of his July 30, 2020 Order was partial testimony by BASF's expert, Dr. Robert Powell, that the property damage at the Plainville Facility is continuing to occur through the remediation process (not new CVOC operational releases).[12] (Pa 208). The trial court then made the illogical jump from this single piece of information to a conclusion that it is not possible to determine the amount of property damage that occurred from operational releases and during any period in the past – operational releases that Judge Stroumtsos specifically identified by start and stop dates at numerous operational locations.

Under *Boston Gas*, the initial factual inquiry that must be decided is whether "the evidence permits an accurate estimation of the quantum of property damage in each policy period." *Boston Gas*, 910 N.E.2d at 316. When **all** the evidence is considered, and as discussed below, an accurate estimation of the property damage occurring during each policy period is very much possible. Judge LeBlon's July 30,

[12] Again, the so-called continuing property damage results only from the government directed remediation, whereby CVOCS are pulled from bedrock and into groundwater for treatment. (Pb, pp. 34-35).

2020 Order does not address this factual inquiry and, instead, Judge LeBlon strays from *Boston Gas* completely by using Judge Dreier's recommendations as to "fact-based" start dates at different operational locations at the Plainville facility, as well as the quantity of CVOC releases at these locations during these same periods, but then applying a singular and arbitrary "end" date.[13] As such, the allocation period adopted by Judge LeBlon is neither fish nor fowl. It is not a true fact-based allocation, although significant operational and contaminant release facts are adopted in large part. It also is not a pro-rata allocation under *Boston Gas* because such an allocation has a singular start date and a singular end date.

C. The Evidence of Record Allows for an Accurate Estimation of the Property Damage During Each Policy Period.

Boston Gas holds that use of the time-on-the-risk allocation method is inappropriate "if the evidence allows for an accurate estimation of the quantum of property damage in each policy period." *Boston Gas,* 910 N.E.2d at 316. U.S. Fire contends that a fact-based allocation is only appropriate when a policyholder "can accurately establish the amount of property damage that 'in fact' took place during each policy period." (Db, p. 39). Contrary to U.S. Fire's position, *Boston Gas* does

[13] U.S. Fire has not challenged the portions of Judge LeBlon's July 30, 2020 Order that are fact-based, and U.S. Fire is likewise engaging in its selective use of both allocation models in *Boston Gas*.

not require scientific precision before a fact-based allocation can be applied. *Boston Gas* requires an "accurate estimation," not precision. *Id.* In this case, the evidence, including the specific fact findings by Judge Stroumtsos as to the periods of operations of various Areas of Concern ("AOCs") at the Plainville site and the analysis and calculations by Dr. Powell, discussed in BASF initial appellate brief, allows for such an accurate estimation. (Pb, p. 36).[14]

In the face of this evidence, U.S. Fire first attempts to discredit Dr. Powell's by arguing that "not one word in his reports or testimony is directed to quantifying the amount of property damage during any particular policy period." (Db, pp. 39-40). Then, to support this wholly inaccurate statement, U.S. Fire partially quotes Dr. Powell's testimony during the allocation hearing completely out of context. U.S. Fire quotes Dr. Powell as testifying that he "was not trying to do an allocation to individual policies." That is true. The complete record of the allocation hearing demonstrates that Dr. Powell did, in fact, calculate how much property damage occurred during each period of time, leaving it to the court to determine, as a legal matter, how the policies applied:

> This is not an allocation to an individual carrier, your Honor, or to an individual policy. That's really beyond the scope of what I was doing. It is more focusing on -- if we

[14] Judge Dreier described Dr. Powell as "one of the most knowledgeable and articulate expert witnesses the SAM has had appear before him over the last 42 years." (Pa 0148).

> look, for example, at the period when OneBeacon, for lack of better example, was providing insurance, ***how would we allocate the costs that they have incurred dealing with the site-wide groundwater problem to that policy period.*** How that ultimately then flows down to individual policies really is up to the Court and others to determine. That wasn't the scope of what I was trying to do.

(Pa 290-91) (emphasis added). Contrary to U.S. Fire's argument, while Dr. Powell did not allocate BASF's damages to individual policies, he did allocate damages to policy periods –.

Next, U.S. Fire attempts to criticize Dr. Powell's calculations by asserting claims as to information that he purportedly did not know.[15] (Db, p. 40). U.S. Fire, however, fails to provide any citation to the record for its laundry list of missing information. It is a party's responsibility to refer this Court to specific parts of the record to support their argument. *State v. Mauti*, 448 N.J. Super. 275, 315 n.17 (App. Div. 2017). Where a party fails to refer to specific parts of the record to support an argument, this Court in not required "to search through the record ourselves." *Spinks v. Twp. of Clinton*, 402 N.J. Super. 465, 474-75 (App. Div. 2008).

[15] U.S. Fire's brief also fails to explain why any of the information identified as missing from Dr. Powell's knowledge is material.

Again, the full record tells a different story. When the initial investigation began at the Plainville Facility in the mid-1980s, Dr. Powell was in responsible for overseeing that investigation. (Pa 0259). Dr. Powell testified:

> Well, we have been studying the site for almost 30 years, and from that, we gained a great deal of knowledge as to the types of liquids that were released, whether they were DNAPLs or simply aqueous solutions that had solvents in them, and we know that with specificity with regard to each AOC.

(Pra 18). Dr. Powell also testified:

> We know quite a lot about the nature of each CVOC release that occurred, or the releases that occurred in individual AOCs. We know, for example, which AOCs likely received DNAPLs and which received aqueous solutions that would have been less persistent in their ability to contaminate the groundwater over the long term.
>
> We know which AOCs were degreaser pits where no liquid was released, but just slow seepage from the pits into the soil around it.
>
> That tells us quite a bit about the relative importance of the individual AOCs as sources of the contamination, and that was information that I think should be layered into the allocation analysis.

(Pra 19).

At the time of his testimony at the allocation hearing, Dr. Powell had been involved with the investigation and remediation at the Plainville Facility for more than thirty years. As a result of that extensive experience, he has "gained a great

deal of knowledge" regarding the facility and its historical operations. Not only is U.S. Fire's argument that he lacks certain information unsupported, but it is also wrong.

U.S. Fire next criticizes Dr. Powell's calculations because the calculations included damages allocated to AOCs 6 and 14, where the trial court found in its January 31, 2011 Opinion and Order (J. Stroumtsos) that no insured property damage occurred. (Db, pp. 41-42). Again, U.S. Fire tells only half the story. Dr. Powell's inclusion of AOCs 6 and 14 in his calculations was based on evidence discovered through investigations that occurred after the 2010 liability trial. (Pra 20-22). The trial court specifically granted the SAM the authority to consider "newly discovered contamination evidence from 2009 to present to determine the additional cleanup cost and future allocation." (Pa 187).

U.S. Fire then asserts, without explanation, that "this alone establishes the fallacy of the 'fact-based' allocation in this case." In reality, this newly discovery contamination evidence – and the Court's recognition of same - establishes just the opposite; namely, that Dr. Powell's analysis and calculation was based on actual facts relating to the actual property damage at the Plainville Facility.

III. IF THE TIME-ON-THE-RISK METHOD APPLIES, THE APPROPRIATE END DATE FOR THE ALLOCATION PERIOD IS 1986, OR, AT THE VERY LATEST, 1993.

In its initial brief, BASF explained why either 1986 or 1993 is a more appropriate end date for the allocation period than 2011. (Pb, pp. 44-47). U.S. Fire's first response was that *Boston Gas* established binding precedent that when property damage "continues past the date of operation and through the present day, the trial date operates as the end date for the allocation period." (Db, p. 47). This was not the holding of *Boston Gas*.

Although the *Boston Gas* Court adopted a pro rata allocation based on the policies that were at issue in that case, the Court **did not** address when the allocation period ends. *Boston Gas*, 910 N.E.2d at 312-316. Since the Massachusetts Supreme Court decided *Boston Gas*, no Massachusetts appellate court has addressed the end date of the allocation period of long-tail claims.

Although *Boston Gas* does not address the end date of the allocation period, it does provide guidance on how it should be determined. Under *Boston Gas*, damages are to be allocated among "triggered coverage." *Boston Gas*, 910 N.E.2d at 313. In its initial Brief, BASF explained why the continuous trigger of coverage applies in this case. (Pb, pp. 45-47). U.S. Fire's brief does not dispute that argument. Under the continuous trigger theory, the date damage is discovered is the last date

of triggered coverage. *Owens-Illinois, Inc. v. United Ins. Co.*, 138 N.J. 437, 450 (1994). September 8, 1986, was the date BASF notified the EPA of the property damage and the latest that the property damage at the Plainville site could have been discovered. (Pa 93). Thus, September 8, 1986, is the last date of "triggered coverage" and, pursuant to *Boston Gas*, should be the end date for the allocation period. *See Boston Gas*, 910 N.E.2d at 313.

U.S. Fire also argues that neither 1986 nor 1993 "reflects the nature of the property damage at issue here." To the contrary, both 1986 and 1993 have far more relation to the property damage than the date selected by the trial court, 2011. In 1986, BASF discovered, began investigating and reported the property damage to the EPA. (Pa 0336-52). Dr. Powell also confirmed that the CVOC plume in the groundwater had stabilized stopped expanding in 1986. (Pa 0260). In 1993, BASF ceased all operations at the Plainville Facility. (Pa 92). Thus, 1993 is the latest date that BASF could have done anything to further to contribute to the property damage. The only relation 2011 has to the property damage at the site is that is that date that the trial court determined that BASF's insurance companies were obligated to reimburse BASF for its past investigation and remediation costs and provide coverage for future costs.

Finally, U.S. Fire argues this Court should not consider 1986 as an end date for the allocation period because it "was not raised below by BASF in objections to the SAM's R&R." (Db, p. 49). Of course it was not. The SAM's Report and Recommendations applied the fact-based allocation method for which BASF had advocated. (*See generally* Pa 144-61). The Report and Recommendation did not establish an end date for a pro-rata time-on-the-risk allocation method. (Id.). Consequently, BASF had no occasion to object to the Report and Recommendation on that ground.

However, BASF did raise September 8, 1986, as a potential end date for the allocation period if the time-on-the-risk method were to be applied in the trial court. (Pra 24-28). In its Pre-Hearing Brief filed before the 2015 Allocation Hearing, BASF argued that if the time-on-the-risk allocation method applied, the "appropriate end date is no later than September 8, 1986." (Id.). The argument made then was the same as the argument made now.

To the extent that U.S. Fire contends that *Boston Gas* somehow mandates an end date of 2011, that interpretation of Massachusetts law contravenes the strong public policy of the State of New Jersey and therefore cannot be followed by this Court. "[I]it is a well-known principle of conflict of laws that courts will never

enforce a claim against the public policy of their forum." *Stone v. William Steinen Mfg. Co.*, 7 N.J. Super. 321, 332, 70 A.2d 803, 809 (Law Div. 1949).

New Jersey's Unfair Claims Settlement Practices Act ("UCSPA"), N.J.S.A. §17:29B-4(9), mandates that insurance companies resolve claims as promptly as reasonably possible. N.J.S.A. §17:29B-4(9)(f), for example, requires insurance companies such as U.S. Fire to attempt "in good faith to effectuate prompt, fair and equitable settlements of claims in which liability has become reasonably clear." Similarly, N.J.S.A. §17:29B-4(9)(n) requires insurance companies "to promptly provide a reasonable explanation of the basis in the insurance policy in relation to the facts or applicable law for denial of a claim or for the offer of a compromise settlement." The New Jersey Supreme Court has specifically held that UCSPA "declare[s] state policy." *Pickett v. Lloyd's*, 131 N.J. 457, 468, 621 A.2d 445, 451 (1993).Allowing U.S. Fire to use an arbitrary trial date as the end of an allocation period encourages insurance companies to engage in protracted litigation, to lengthen the period and thereby shrink their exposure; in other words, to convert insurance coverage cases such as this one, which unbelievably has been pending

since 2005, into *Jarndyce v. Jarndyce*.[16] Such an interpretation violates the strong public policy expressed in UCSPA.

If this Court decides that a fact-based allocation is not feasible in this case, it must vacate the end date for the allocation period established by the trial court. The date selected, 2011, is completely arbitrary and has not relation to the actual property damage that U.S. Fire is obligated to cover. This Court should set 1986 as the end date for the allocation period, or, at the latest, 1993.

CONCLUSION

Turning first to U.S. Fire's cross-appeal, -BASF succeeded in establishing that it was entitled to insurance coverage for the Plainville claim despite over two decades of resistance from U.S. Fire. Accordingly, BASF was a successful claimant for purposes of R. 4:42-9(a)(6). Each of the other issues U.S. Fire raises in its cross-appeal relate to decisions that Judge McCloskey made relating to discretionary aspects of the court's calculation of the damages BASF incurred as a result of U.S. Fire's wrongful refusal to provide coverage. U.S. Fire has in no way demonstrated

[16] "The little plaintiff or defendant who was promised a new rocking-horse when Jarndyce and Jarndyce should be settled has grown up, possessed himself of a real horse, and trotted away into the other land. Fair wards of court have faded into mothers and grandmothers; a long procession of chancellors has come in and come out; the legion of bills in the suit have been transformed into mere bills of mortality …but Jarndyce and Jarndyce still drags its dreary length before the court, perennially hopeless." Charles Dickens, Bleak House (1852).

that this case is the "rarest of occasions" where a clear abuse of discretion occurred. More directly, the trial court did not abuse its discretion in making any of those decisions.

On BASF's own appeal, Judge LeBlon's July 30, 2020 Order failed to consider any, much less all, of the evidence available to the court. The finding that it is not possible to accurately estimate the property damage that occurred during any period is not supported by any evidence. When the full evidence of record in the allocation proceeding is considered, it is clear that an accurate estimate of the quantum of property damage occurring during any policy period can be performed. Accordingly, the Judge LeBlon erred when he partially applied the time-on-the-risk allocation method by hand-picking the factual start dates and contaminant release amounts recommended by Judge Dreier and otherwise selecting an arbitrary end date. *See Boston Gas*, 910 N.E.2d at 316. Judge LeBlon also erred when he selected the date of the liability trial decision as the end date for the allocation period for the time-on-the-risk. If the time-on-the-risk method applies, the end date for the allocation period should be 1986, or at the very latest, 1993.

As such, BASF respectfully requests that this Court grant BASF's appeal and deny the cross-appeal filed by U.S. Fire. In granting the BASF appeal, BASF further respectfully requests that this case be remanded to the trial court for further

proceedings consistent a grant of the BASF appeal – namely, a reevaluation of the covered damages allocated to U.S. fire in connection with past and future remediation at the Plainville facility and a corresponding reevaluation of allocated legal fees and costs, as well as interest.

Dated: April 12, 2024

Respectfully submitted,

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BASF CATALYSTS, LLC (F/K/A ENGELHARD CORPORATION)

Plaintiff-Appellant,

v.

ALLSTATE INSURANCE COMPANY, (AS SUCCESSOR-IN-INTEREST TO NORTHBROOK EXCESS & SURPLUS LINES INSURANCE COMPANY); CONTINENTAL INSURANCE COMPANY; EVEREST REINSURANCE COMPANY (AS SUCCESSOR-IN-INTEREST TO PRUDENTIAL REINSURANCE COMPANY); FEDERAL INSURANCE COMPANY, GREAT NORTHERN INSURANCE COMPANY; HARTFORD ACCIDENT & INDEMNITY COMPANY; LEXINGTON INSURANCE COMPANY; NEW JERSEY MANUFACTURERS INSURANCE COMPANY (AS SUCCESSOR-IN-INTEREST TO NEW JERSEY MANUFACTURERS CASUALTY COMPANY); NEWARK INSURANCE COMPANY; ONEBEACON AMERICA INSURANCE COMPANY (AS SUCCESSOR-IN-INTEREST TO COMMERCIAL UNION INSURANCE COMPANY AND EMPLOYERS LIABILITY ASSURANCE CORPORATION); ROYAL INDEMNITY COMPANY; ROYAL INSURANCE COMPANY

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

DOCKET NO.: A-003029-22 TEAM 2

Civil Action

ON APPEAL FROM:
SUPERIOR COURT, LAW DIVISION,
MIDDLESEX COUNTY
DOCKET NO.: MID-L-2061-05

SAT BELOW:
HON. THOMAS D. McCLOSKEY,
J.S.C.

OF AMERICA (AS SUCCESSOR-IN-INTEREST TO ROYAL INSURANCE COMPANY AND ROYAL GLOBE INSURANCE COMPANY); TRAVELERS CASUALTY & SURETY COMPANY (AS SUCCESSOR-IN-INTEREST TO AETNA CASUALTY & SURETY COMPANY); UNITED STATES FIRE INSURANCE COMPANY; CERTAIN UNDERWRITERS AT LLOYD'S AND BRITISH COMPANIES; AND JOHN DOES 1-2

Defendants and, as to United States Fire Insurance Company, Respondent and Cross-Appellant.

REPLY BRIEF OF DEFENDANT-RESPONDENT AND CROSS-APPELLANT UNITED STATES FIRE INSURANCE COMPANY

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PRELIMINARY STATEMENT

The numbers do not lie. And the numbers in this case are clear: BASF has been held liable for approximately 85% of the costs it sought in bringing this action, or approximately $15 million; US Fire, on the other hand, has been held liable for only 6% of BASF's covered costs, or approximately $900,000. And, in order to obtain this 6%/$900,000 liability ruling, BASF expended more than $6,000,000 in attorneys' fees and cost.

Given these numbers, BASF's "successful claimant" argument strains the imagination. At bottom, BASF did not achieve the benefit it sought in bringing suit. Rather, BASF brought suit against 15 different insurers seeking approximately $18 million in covered costs and now – after 20 years and spending over $6 million in attorneys' fees – BASF has recovered less than $1 million. In achieving that result, BASF failed at every turning point stage of this litigation; it now seeks to be rewarded for that failure. That cannot be what our Court Rules intended when they employed the phrase "successful claimant".

With respect to the trial court's calculation of attorneys' fees, costs, and interest, BASF continually hides behind the abuse of discretion standard, but it fails to explain how the trial court's calculations meet this standard. That is because they do not. The trial court calculated attorneys' fees using an unverified starting number and then invented a calculation involving a vacated allocation

figure. The trial court ignored US Fire's opposition on the issue of costs. The trial court then calculated interest using calculations submitted for the first time in BASF's reply brief, applied a starting date with no basis in the facts of this case, and then held the "equities" demanded a 2% enhancement without citing any "inequitable" conduct on the part of US Fire. The trial court's findings on these issues should be reversed pursuant to US Fire's cross-appeal.

ARGUMENT

I. BASF Was Not A Successful Claimant[1]

Because BASF was not successful on virtually every substantive issue presented in this case, BASF should not be considered a "successful claimant." E.g., Passaic Valley Sewerage Comm'rs v. St. Paul Fire & Marine Ins. Co., 206 N.J. 596, 616-19 (2011) (court refused to award counsel fees when insured only established insurer's duty to defend on three counts of a complaint); Enright v. Lubow, 215 N.J. Super. 306, 311 (App. Div. 1987) (no counsel fees awarded when insured recovered same amount as settlement previously offered by insurer).

The only case cited by BASF that interprets R. 4:42-9(a)(6) is Occhifinto v. Olivo Const. Co., LLC, 221 N.J. 443 (2015). (Prb5.) Occhifinto is inapposite. In that case, an insurer filed a declaratory judgment action seeking a finding of no

[1] BASF does not dispute that a de novo standard of review applies to the "successful claimant" issue. (Db 53-54.)

coverage. The trial court rejected the insurer's arguments, finding the carrier had a duty to defend and "to provide indemnification in the event that there is a finding of liability at trial." Id. at 447-48. After a finding of no liability in the underlying action the trial court denied fees, but the Supreme Court reversed. The Supreme Court held the "successful claimant" standard was met "because the trial court required [the insurer] to defend and, if necessary, indemnify[.]" Id. at 448.

In no way does Occhifinto support the position that an insured is "successful" when it must bear 85% of its costs. In fact, the majority of cases to consider the "successful claimant" standard in the context of such limited "success" have held that the standard is not met. See Felicetta v. Com. Union Ins. Co., 117 N.J. Super. 524, 526 (App. Div. 1971) (denying award of counsel fees when insured only established coverage under one of three policies); Miller v. New Jersey Ins. Underwriting Ass'n, 177 N.J. Super. 584, 587 (Law. Div. 1981) (denying award of counsel fees because insurer "was successful on motion for summary judgment, obtained a divided court in the Appellate Division and lost in the Supreme Court."). See also Passaic Valley, 206 N.J. 596, 616-19; Enright, 215 N.J. Super. 306, 311. There is not a single case holding the "successful claimant" standard is met under the facts present here.

The decision most similar to this case is Continental Insurance Company v. Honeywell International, Inc., 2016 WL 3909530 (N.J. Super. Ct. App. Div. July

20, 2016), aff'd, 234 N.J. 23 (2018). While BASF claims the decision in Honeywell is distinguishable (Prb 10-13), the case is directly on point.

In Honeywell, as in this case, there were many issues, "some [BASF] won, some [US Fire] won, [and] many were issues that have not been resolved before." Id. at *22. The court in Honeywell addressed unique allocation and choice of law issues, held the unavailability exception under New Jersey law was applicable, and allocated additional costs to the insurers' policy periods. Honeywell, 2016 WL 3909530 at *10-13. The court in Honeywell rejected an award of fees as inconsistent with the procedural history of the case and the complex nature of the coverage issues presented. The identical result should obtain here.

Because BASF's claim for fees has no support in Rule 4:42-9(a)(6), BASF cites to cases that do not address the "successful claimant" standard. For instance, BASF relies on the Supreme Court's decision in Litton Industries, Inc. v. IMO Industrial, Inc., 200 N.J. 372 (2009). (Prb 9.) But, Litton did not interpret the "successful claimant" requirement of R. 4:42-9(a)(6); it addressed a situation where "fee-shifting [was] controlled by a contractual provision[.]" Litton, 200 N.J. at 385. Litton has no relevance to this Court's interpretation of the Court Rules.

BASF also misrepresents the facts of this case, claiming it recovered $2 million from US Fire and that the issue of choice of law was not "dispositive." (Prb 5 and 8.) In reality, BASF has recovered approximately $900,000 in past

costs from US Fire (plus 6% of future costs) – while BASF is responsible for approximately $15 million of the past costs it sought in this action (plus 85% of future costs). Moreover, the reason there were only three insurers left in this case at trial is that the choice of law ruling was dispositive and eliminated 12 of the 15 insurers BASF originally sued. Again, that is not a "success".

BASF asks that it be rewarded after failing on the two key issues in this case – choice of law and allocation – and after being forced to bear the vast majority of the cleanup costs it sought from U.S. Fire and the other insurers, as well as more than 90% of the fees and costs it incurred in bringing this action. This cannot be what our Court Rules intended under the fee shifting provisions of Rule 4:42-9(a)(6). The Court's review of the "successful claimant" issue does not need to go any further than the numbers of this case: BASF has to pay 85% of its covered costs and more than $15 million; US Fire has to pay 6% of covered costs and approximately $900,000. No New Jersey court has applied the fee shifting mechanics of Rule 4:42-9(a)(6) in these circumstances, and this Court should not be the first.

II. The Trial Court Abused Its Discretion

BASF repeatedly relies on the "abuse of discretion" standard in an attempt to justify the inflated calculations reached by the trial court. However, even under this standard, the trial court's calculations do not pass muster.

> Although the ordinary abuse of discretion standard defies precise definition, it arises when a decision is made without a rational explanation, inexplicably departed from established policies, or rested on an impermissible basis. In other words, a functional approach to abuse of discretion examines whether there are good reasons for an appellate court to defer to the particular decision at issue. It may be an arbitrary, capricious, whimsical, or manifestly unreasonable judgment.

Flagg v. Essex Cnty. Prosecutor, 171 N.J. 561, 571 (2002) (internal quotations and citations omitted).

Here, there are no "good reasons" to defer to the trial court's calculations because they were made without rational explanation and rested on impermissible bases. Id. The trial court calculated fees based on a starting figure that it made no attempt to verify through New Jersey law governing review of a fee award. The trial court ignored US Fire's opposition on the issue of costs and then applied an incorrect "6.4%" figure to its calculation of costs. (Pa0043.) The trial court then accepted interest calculations provided on reply, applied an irrational starting date for the running of interest, and applied a 2% enhancement to New Jersey's interest rates, all without a basis in fact or the applicable law. The calculations provided by the trial court should be reversed by this Court.

A. Attorneys' Fees Were Calculated Incorrectly.

BASF claims the trial court correctly calculated attorneys' fees because it reduced the amount of fees originally sought by BASF. (Prb 15.) This argument

ignores the flaws in the amount sought by BASF in the first instance, and the bizarre calculation employed by the trial court.

The trial court began its calculation of attorneys' fees by starting with the initial amount of fees claimed by BASF - $1,193,281. (Pa54.)

This number was wrong to start. BASF claimed that it calculated this number by deducting from its total fees for issues unrelated to US Fire and for issues on which it was unsuccessful. (Da0183.) However, despite its present concession that US Fire did not take a position on choice of law (Prb 9)[2], and that it failed on the issues of choice of law and allocation, BASF took no deductions for those issues. (Da0189-190.) Thus, the trial court's starting figure for calculating attorneys' fees was inconsistent with BASF's own methodology.

The trial court also accepted this starting number without making any effort to scrutinize BASF's bills. The trial court did not address the rates charged, the amount recovered by BASF, or the factors required by RPC 1.5(a). (Pa0054.)

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[2] BASF faults US Fire for the 234 pages and 430 billing entries related to choice of law in US Fire's appendix. (Prb 9.) To be clear, BASF spent five years litigating choice of law and US Fire has identified 430 billing entries related to the issue. US Fire has calculated the value of these billing entries at $288,480.50 – a significant amount of money – and those are just the choice of law billing entries submitted by the Meyer, Unkovic & Scott firm that expressly use the phrase "choice of law." (Da0293-526.) That figure does not include amounts charged by the Killian Firm on the issue or billing entries related to choice of law that do not use the term "choice of law" in the billing narrative. BASF bore the burden of identifying compensable legal fees (Ricci v. Corp. Express of The East, Inc., 344 N.J. Super. 39, 48 (App. Div. 2001); Shuttleworth v. City of Camden, 258 N.J. Super. 573, 598 at n. 17 (App. Div. 1992)) and cannot now complain after it failed to do so by refusing to take deductions for choice of law.

The trial court's "method" in this regard stands in stark contrast to the process for analyzing fee awards required under New Jersey law. For instance, in Empower Our Neighborhoods v. Guadagno, 453 N.J. Super. 565 (App. Div. 2018), the trial court "set the lodestar, the number of hours reasonably expended multiplied by a reasonable hourly rate[,]" "adjusted the hourly rate downward," analyzed the complexity of the issues presented, and made deductions for issues where the fee claimant was unsuccessful. Id. at 586. The trial court here did not follow New Jersey law in calculating attorneys' fees; it accepted the starting number proposed by BASF without analysis.

Then, rather than properly analyzing BASF's bills in an attempt to adjust the fee award, the trial court invented a bizarre calculation using a formula completely divorced from the facts of the case. The trial court multiplied the fee award by a vacated allocation figure (36.4) and then divided the multiplied figure by the percentage of covered costs ultimately allocated to BASF (85). (Pa0054.) None of this makes sense. The "multiplier" in the calculation represents a percentage allocated to BASF that was vacated as being palpably incorrect – it should not have been considered for any purpose. Further, the 85 "divider" applied by the trial court bears no relation to the 6.4% of costs allocated to US Fire.

The trial court made no attempt to analyze the bills submitted by BASF and instead invented a calculation, using a figure that had been vacated when the trial

court granted U.S. Fire's motion for reconsideration. The trial court should have analyzed BASF's fee submission using the various factors recognized under New Jersey law, or should have applied the relative culpability approach recognized by New Jersey law. Empower, 453 N.J. Super. at 585-86. It did neither, and, as such, the calculations performed by the trial court should be reversed pursuant to US Fire's cross-appeal.

B. The Trial Court Ignored US Fire's Opposition On Costs.

The trial court arbitrarily disregarded US Fire's opposition to the costs sought by BASF and instead stated costs were "undisputed." (Pa0043.) The trial court also stated it was awarding costs "at 6.4%." But, the amount the trial court awarded in costs ($88,827) was different than the 6.4% of costs calculated by BASF ($55,670). (Da262.) The trial court's decision on costs was incorrect.

In an attempt to justify the trial court's award of costs, BASF claims that the majority of the costs awarded – for experts – are recoverable under New Jersey law. They are not. "Experts' fees are not ordinarily includable as taxed costs." Pressler & Verniero, Current N.J. Court Rules, cmt. on Rule 4:42-8.

BASF asserts that the holding that expert costs were not recoverable in Helton v. Prudential Prop. & Cas. Ins. Co., 205 N.J. Super. 196 (App. Div. 1985) and Velli v. Rutgers Cas. Ins. Co., 257 N.J. Super. 308 (App. Div. 1992) was restricted to PIP claims. (Prb 18.) This is incorrect; both Helton and Velli

addressed whether costs were recoverable under Rule 4:42-8, not under the PIP statute. See Helton, 205 N.J. Super. at 202; Velli, 257 N.J. Super. at 311.

In fact, almost every decision to address whether expert costs are recoverable under Rule 4:42-8 has held that expert costs are not recoverable. See Greenfeld v. Caesar's Atl. City Hotel/Casino, 334 N.J. Super. 149, 156 (Law. Div. 2000) (holding, in an action to confirm an arbitration award in a personal injury action, that "experts' fees are generally not permitted as taxed costs."); Buccinna v. Micheletti, 311 N.J. Super. 557, 565–66 (App. Div. 1998) (holding, in a CEPA action, that "[e]xpenses for either an expert preparing for trial or obtaining an expert's report are merely costs incident to trial preparation . . . they are part of the expenses that must be borne by every litigant in their own case.")

The only case cited by BASF in support of its claim for expert witness fees is Bung's Bar & Grille, Inc. v. Township Council of Florence Township, 206 N.J. Super. 432 (Law. Div. 1985). But, Bung's has no relevance here; the case dealt with "[t]he question of the allowance of expert witness fees as costs in a civil rights action[.]" Id. at 479. The court held that the award of expert fees was proper "for advancing the purposes of the federal Awards Act and the Civil Rights Act[.]" Id. at 485. The Bung's court noted that expert fees generally are not recoverable under New Jersey law but the fee shifting provisions of the federal statutes at issue warranted a recovery of expert fees. The court went so far as to note that expert

fees should be recoverable based on "more liberal federal rule[s]" regarding fee shifting. Id. at 486. Bung's is not only consistent with, but actually supports U.S. Fire's position that expert fees are not recoverable under New Jersey law.

The trial court ignored US Fire's opposition on the issue of costs, relied on a single inapplicable Law Division opinion to award expert costs, and calculated recoverable costs at a number inconsistent with the 6.4% number cited in its opinion. (Pa0043; Da262.) The trial court's award of costs should be reversed.

C. The Calculation Of Prejudgment Interest Was Wrong Procedurally And Without Factual Basis.

BASF's motion for final judgment sought $873,286.46 in prejudgment interest. (Pa0213.) The trial court, relying solely on calculations provided for the first time by BASF in its reply on that motion, awarded prejudgment interest in an amount that exceeded this figure by approximately $200,000. (Pa0043.) In doing so, it disregarded the facts of this matter and New Jersey procedure.

BASF first argues it was proper for the trial court to consider its revised interest calculations because it was not a new issue or argument. (Prb 22-24.) To be clear, BASF and US Fire engaged in extensive discovery and briefing regarding the interest calculations included in BASF's moving papers. BASF's accounting expert was deposed. (Da0229.) US Fire based its entire opposition to prejudgment interest on the calculations originally served in BASF's moving papers. BASF then changed tactics and submitted entirely different calculations on reply.

BASF's interest calculations on reply increased its claim for prejudgment interest by more than $300,000. (Da260-261.) Prejudgment interest then became the largest figure awarded by the trial court in its final judgment Order. (Pa0043.)

It is preposterous to assert – in a case where prejudgment interest is now the largest damages figure – that calculations submitted on reply that sought $300,000 more in interest than were originally sought are not a new argument or issue. The entire issue before the trial court on prejudgment interest was BASF's calculation of interest. It was improper for the trial court to consider BASF's reply interest calculations without providing US Fire with a chance to respond.

BASF next argues US Fire has not identified any case law supporting that interest should run from the date BASF's complaint was filed in 2005. (Prb 24.) Of course, this is incorrect. See Taddei v. State Farm Indem. Co., 401 N.J. Super. 449, 466–67 (App. Div. 2008) (holding interest should run from date complaint was filed in insurance coverage dispute); George H. Swatek, Inc. v. N. Star Graphics, Inc., 246 N.J. Super. 281, 288 (App. Div. 1991) (awarding prejudgment interest in contract action for time that "elapsed between the filing of the complaint and the entry of judgment [.]") (cited at Db 70.)

BASF similarly does not address the facts of this case which support a 2005 start date for the running of interest. US Fire is an excess carrier; it never was provided with notice that the limits underlying the US Fire policy had been

exhausted. It received only sporadic updates from BASF regarding polluted sites. (Pa0353-Pa0362; Pa0435-Pa0463.) US Fire did not deny coverage pre-suit and only reserved its rights, based in large part on the fact that BASF never provided proof of exhaustion of the policies underlying the US Fire policy. (Pa368.)

BASF's revisionist history that US Fire – a single excess carrier with three years in a thirty-year-plus coverage block – should have instituted this lawsuit, is nonsense. BASF was the only party with information regarding coverage and exhaustion of limits that could have filed this lawsuit. It should not be rewarded for its 20-year delay by receiving an exorbitant amount of prejudgment interest.

Even if 2005 were not the correct date for interest to begin to accrue (it is), the trial court's decision to use 1989 as the start date for interest calculations would also be incorrect. (Pa0057.) The covered costs incurred by BASF, when properly allocated, only reached the US Fire layer in 1996. (Pa261.) That is the year when US Fire's coverage would have been properly triggered had the primary insurer paid its limits, and it is only then that interest can begin to run on the basis that BASF was "deprived of the money to which it was entitled." (Prb 27.)

Finally, the trial court applied a 2% enhancement to interest rates, but did not cite any inequitable conduct or unusual circumstances caused by US fire that justified this enhancement. BASF concedes that prejudgment interest should generally be applied based on the interest rates set forth in R. 4:42-11(a)(i), and

that the 2% enhancement in R. 4:42-11(a)(iii) should only be applied in unusual circumstances and when required by the equities. (Prb 28.)

In support of a 2% enhancement, the trial court cited the period of discovery before the liability trial and asserted that US Fire pursued "extensive discovery" against BASF. (Prb 28; Pa58.) Yet, there is nothing in this record, and there was nothing in the record before the trial court, to support this assertion. The trial court did not cite any discovery pursued by US Fire in support of its assertion. BASF cites only to a self-serving certification in support of the assertion.

This case involved 15 different insurers and a sophisticated entity seeking millions of dollars in coverage for an extensively polluted site – discovery was not driven by US Fire alone. Moreover, there is no support for the position that discovery is "unusual" or somehow "inequitable" – discovery is necessary and required and permitted by our Court Rules.

The trial court also cited the length of this case in applying the 2% enhancement. (Pa58.) Yet, the first five years of this case focused on choice of law, an issue on which US Fire took no position. (Prb 9.) Further, the length of this case is largely attributable to prolonged decision making from the trial court, which left a motion for reconsideration pending for ***five years***. US Fire has been ordered to pay interest for that entire period at an inflated rate. Based on BASF's

calculations, more than $200,000 in interest accrued in the five year period US Fire's motion for reconsideration was pending. (Da0261.)

There is nothing inequitable or unusual about US Fire's conduct in this case. The only thing inequitable here is the trial court's award of interest. The trial court simply accepted BASF's reply interest calculations, which were the fourth different set of interest calculations served and the highest interest calculations provided yet. The trial court then entered an Order that awarded BASF over $1 million in prejudgment interest – an amount that exceeded the amount sought in BASF's moving papers by more than $200,000. Finally, the trial court ordered US Fire to pay interest from a start date without basis in the allocation of damages or the facts of this matter, and required US Fire to do so at an inflated rate. The trial court's punitive interest award is without basis and must be reversed.

CONCLUSION

For the foregoing reasons, and those stated in its initial brief, U.S. Fire respectfully requests that this Court vacate the trial court's Order of fees, costs, and interest.

Respectfully submitted,
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