Mid-Monmouth Realty Assocs. v. Metallurgical Indus., Inc.

Decided Apr 21, 2017

DOCKET NO. A-0237-14T2

04-21-2017

MID-MONMOUTH REALTY ASSOCIATES, a New Jersey General Partnership, Plaintiff-Respondent/Cross-Appellant, v. METALLURGICAL INDUSTRIES, INC., a New Jersey Corporation; METALLURGICAL INTERNATIONAL, INC., a New Jersey Corporation; BRIA COMMUNICATIONS CORPORATION, a New Jersey Corporation; IRA L. FRIEDMAN; LAWRENCE FRIEDMAN; PHILADELPHIA MANUFACTURERS' MUTUAL INSURANCE COMPANY; AFFILIATED F.M. INSURANCE COMPANY; CONSOLIDATED MUTUAL INSURANCE COMPANY; FACTORY INSURANCE ASSOCIATION; INDUSTRIAL RISK INSURERS; AETNA CASUALTY & SURETY COMPANY; KEMPER INSURANCE; and CNA INSURANCE, Defendants, and GREATER NEW YORK INSURANCE GROUP; GREATER NEW YORK MUTUAL INSURANCE COMPANY, Defendants-Appellants/Cross-Respondents.

Michael J. Marotte and Sandra Calvert Nathans argued the cause for appellants/cross-respondents (Schenck Price Smith & King, LLP, attorneys; Mr. Marotte, of counsel and on the briefs; Ms. Nathans and Thomas J. Cotton, on the briefs). Jodi Lee Alper and Richard L. Zucker argued the cause for respondent/cross-appellant (Lasser Hochman, LLC, attorneys; Ms. Alper and Mr. Zucker, on the briefs).

PER CURIAM

NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE APPELLATE DIVISION

This opinion shall not "constitute precedent or be binding upon any court." Although it is posted on the internet, this opinion is binding only on the parties in the case and its use in other cases is limited. R.1:36-3. *2 Before Judges Fuentes, Simonelli and Gooden Brown. On appeal from the Superior Court of New Jersey, Law Division, Monmouth County, Docket No. L-2422-00. Michael J. Marotte and Sandra Calvert Nathans argued the cause for appellants/cross-respondents (Schenck Price Smith & King, LLP, attorneys; Mr. Marotte, of counsel and on the briefs; Ms. Nathans and Thomas J. Cotton, on the briefs). Jodi Lee Alper and Richard L. Zucker argued the cause for respondent/cross-appellant (Lasser Hochman, LLC, attorneys; Ms. Alper and Mr. Zucker, on the briefs). PER CURIAM

In this insurance coverage case, plaintiff Mid-Monmouth Realty Associates sought indemnification from defendant Greater New York Mutual Insurance Group (GNY) for the cost of remediating environmental contamination on property located in Tinton Falls (the property). The matter was tried in three phases before a special master. GNY appeals, and plaintiff cross-appeals from several decisions of the special master and orders of the trial court. For the following reasons, we affirm on the appeal and cross-appeal.

I.

History of Environmental Contamination at the Property

Center Shore Corporation (Center Shore) owned the property *3 through mid-1986, at which time Mid-Monmouth Industrial Park became the successor by merger to Center Shore, and ownership of the property was transferred to plaintiff. The property contains wetlands, and the Wampum Brook runs adjacent to it, flowing northeast and depositing into the Shrewsbury River approximately four miles away.

Defendant Metallurgical Industries, Inc. (Metallurgical) leased the property from 1967 to 1993. Metallurgical was in the business of recycling and remanufacturing specialty metals. Its operations involved chemically and physically heating and cooling scrap metals in order to separate and extract marketable metals, such as tantalum, tungsten, cobalt, and carbide. For use in its operations, Metallurgical maintained underground and above-ground storage tanks containing various substances, including sodium hydroxide, nitric acid, muriatic acid, sulfuric acid, argon, nitrogen, and ammonia.

There were reports of environmental problems at the property as early as 1968, when the property utilized a septic system. Metallurgical's operations produced a large amount of industrial wastewater, which Metallurgical was suspected of discharging into the septic system, causing the system to overflow. In May 1969, the Borough of New Shrewsbury (Borough) inspected the property and reported to the property management company, Sudler Construction *4 Corporation (Sudler), that sanitary sewage effluent often overflowed the holding tank and spilled into the adjacent Wampum Brook. The Borough believed that Metallurgical's improper disposal of chemical waste had resulted in fish kills, and ordered Metallurgical to discontinue disposing any part of its chemical waste into any stream water in the area of the building where it conducted its operations.

In 1977, the Monmouth County Regional Health Commission (Commission) received a complaint about the property and performed an inspection, which revealed there was refuse consisting of wood, old rubber tires, slag, and metal fifty-five gallon drums, buried alongside a running tributary of the Wampum Brook. The Commission ordered Metallurgical to correct these conditions.

Also in 1977, the Environmental Protection Agency (EPA) inspected the property in connection with cooling water discharge to the Wampum Brook. After that inspection, Metallurgical advised the EPA that it would remove a discharge pipe running to a settling pond and either patch or replace the liner as necessary to avoid any possible future leaks.

In 1981, the New Jersey Department of Environmental Protection (DEP) began an investigation of the property. In a May 6, 1981 memorandum, David Kaplan, a DEP employee, described the location and topography of the property and Metallurgical's *5 business, and stated that the company neutralized acids with lime and ammonia and discharged them "into a swamp south of the plant daily at a rate of about 1500 GPD[, with] no NPDES Permit[.]" Kaplan also stated that the property was inspected on March 20, 1981, and

> [a] green liquid was observed flowing from a hose on the site into the swamp south of the plant. This green liquid covered several acres. According to Mr. Vic Columbo, [Metallurgical's] Plant Manager, this liquid is the "neutralized" acid described above. The company was in the process of covering this area with "inert" slag from its furnace during the visit. The green liquid was sampled by Pete Patterson, Region III Enforcement, on March 17, 1981.

Kaplan concluded that Metallurgical

> ha[d] been discharging a green liquid of unknown chemical composition into a swamp adjacent to its property at a rate of 1500 GPD for approximately 14 years. It is highly likely that ground water degradation has occurred. And since the swamp appears to drain into Wampum Brook, that stream is almost certainly being adversely affected as well.

He recommended that Metallurgical "should be ordered to cease its illegal discharge into the swamp and should cease filling in the swamp with the 'inert' slag."

In a December 16, 1981 memorandum, Kaplan summarized information from the DEP's investigation of the property, and set forth conclusions and recommendations as to how to proceed. In particular, Kaplan stated: *6

> 1. Metallurgical . . . has manufactured metal powders, stainless steel pipes, and nickel, cobalt, and tungsten alloys on this 10-acre site for 15 years. In the process, acids (nitric, sulfuric, and hydrochloric) are used to clean the metals. The acids are neutralized with lime and ammonia and, until May 5, 1981, were discharged into a swamp south of the plant daily, at a rate of about 1500 GPD. On that date the company was ordered to cease the discharge by DEP.
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> . . . .
>
> 4. An inspection was made on March 20, 1981. A green liquid was observed flowing from a hose in the plant onto the swamp to the south. The green liquid covered several acres. According to [Metallurgical's] plant manager, this liquid is the "neutralized" acid described above.

Kaplan then described the installation of three monitoring wells and samples taken on September 24, 1981, and provided the test results, which revealed certain contaminants in excess of DEP groundwater standards. Kaplan concluded as follows:

> Water sample results indicate gross contamination of the ground water. Monitor Well #1, west of the discharge area and upgradient, is relatively clean. High ammonia, iron, and manganese numbers are probably background levels. Both monitor wells #2 and #3 exceed Ground-Water Standards i. 12 and 9 parameters, respectively. Levels in well #2 (in the middle of the swamp) are generally higher than those in #3 (downgradient to the east, near Wampum Brook). This indicates that as the water flows through the swamp, natural attenuation may be taking place before the ground water enters the brook.

*7 Kaplan recommended as follows:

> Metallurgical . . . must immediately remove all obviously contaminated soil (green colored) from the swamp behind its plant. This material must be disposed of in a manner acceptable to this Division and the Solid Waste Administration.
>
> Once this source of ground water contamination has been completely removed, a ground water sampling program should [be] set up to monitor . . . trends in ground water quality. The three wells should be sampled quarterly for the previously measured parameters (with the exception of VO) for a period of one year.
>
> At the end of one year the sample results should be analyzed to determine what further action will be necessary i.e. reduction of sampling schedule, installation of ground-water recovery system, etc.

The DEP continued its involvement with the property through the late-1980's, periodically sampling the soil, groundwater, and surface water. The DEP found that Metallurgical discharged wastewater onto the property, and through 1985, Metallurgical discharged non-contact cooling water directly into the Wampum Brook. The DEP identified numerous hazardous substances Metallurgical used in its operations, and found that Metallurgical's wastewater contained high concentrations of heavy metals and other chemicals, as well as trichloroethylene (TCE), which is a chlorinated volatile organic compound (CVOC).

The DEP also evaluated migration pathways to determine if groundwater, surface water, sediments, and soils were affected by *8 the contaminated wastewaters, and concluded they were. The DEP's data from samples taken in 1981, 1982, 1985, and 1986, indicated that groundwater, surface water, and soil were contaminated with various metals and chemicals, with some contaminants in excess of applicable groundwater standards. The DEP did some additional sampling in 1987, and some soil was excavated. In 1989, the DEP worked with Metallurgical to install a pretreatment system for the wastewater.

In 1993, Metallurgical ceased operations and notified the DEP pursuant to the Industrial Site Recovery Act (ISRA), N.J.S.A. 13:1K-6 to -14. The DEP required cleanup of the property. On July 22, 1993, Metallurgical filed a claim for coverage under commercial general liability (CGL) policies issued by GNY, which GNY denied on August 30, 1993. Because Metallurgical could not afford the cleanup costs, plaintiff took over cleanup responsibilities. In 1994, plaintiff demolished the building where Metallurgical conducted its operations in the hope of redevelopment.

Plaintiff retained numerous firms to assist in the cleanup efforts, with the primary being Environmental Waste Management Associates (EWMA), an environmental consulting firm. Plaintiff also retained the Alman Group, and its successor, Stuart Environmental Associates, to act as a liaison between it, EWMA, *9 and the DEP, for example, to negotiate more cost-effective methods of remediation. Douglas Stuart headed Stuart Environmental Associates, and testified as plaintiff's expert in environmental site investigation and remediation, and the identification, source, and timing of contamination.

Steven Spinweber, Sudler's executive vice president of real estate since February 1996, was responsible for overseeing the remediation. He testified before the special master that his "understanding from all the correspondence and from all the lab results [was] that the discharge got into the dirt, which got into the groundwater[,]" so the methodology for remediation was "to cut off the source" by removing the contaminated soil.

EWMA's work began in 1993, and continued through the time of trial in 2012. EWMA investigated areas of the property; installed groundwater monitoring wells in addition to those the DEP has installed; tested soil and groundwater for contaminants, of which it found many; proposed solutions; and performed remediation, all under the DEP's guidance and direction. Over the years, EWMA found many contaminants in the groundwater in excess of DEP groundwater standards, such as polychlorinated biphenyls (PCBs), CVOCs, including TCE and perchloroethylene (PCE), ammonia, arsenic, beryllium, cadmium, chromium, cobalt, copper, lead, mercury, nickel, silver, thallium, and zinc. *10

EWMA made several proposals that would avoid active groundwater remediation on portions of the property; however, the DEP rejected each proposal. The DEP was concerned about the impact of the soil contaminants to the

groundwater, and required additional testing and remediation. For example, in a 1997 letter, the DEP stated as follows:

> It appears that the inorganic soil contaminants at this site have had a significant impact on ground water and are continuing to impact ground water quality on and off site. Due to the impact that soil contaminants are having on ground water quality, there is a potential need to remediate this source.

In a notice of deficiency issued in 2008, the DEP remarked that plaintiff's goal appeared to be natural attenuation of the groundwater, but the DEP was concerned about the timing and overall remedial strategy.

In terms of remediation, with the DEP's approval, EWMA excavated and removed soil identified as the source of the groundwater contaminants, and performed "dewatering," meaning pumping out groundwater from areas that were excavated and disposing of it as hazardous waste. Nevertheless, at the time of trial, ten out of fifteen groundwater monitoring wells continued to show contaminants above DEP groundwater standards. There was a downward trend with respect to some areas of the property but not others, and with respect to some contaminants but not others. *11

Additional soil removal was anticipated, as was a water injection process to address the continued contamination of groundwater with CVOCs. Moreover, the DEP had approved EWMA's proposal of biannual groundwater monitoring for the next forty years.

Stuart was involved in the remediation, and in that capacity he reviewed all available documentation regarding the property. Based upon his document review and knowledge of the environmental work done at the property, Stuart testified that as a result of Metallurgical's discharges of industrial wastewater and other waste materials, the property's surface water, groundwater, soil, and sediments had been contaminated with metals, chlorinated solvents, ammonia, and acids.

In support of his opinion, Stuart relied on DEP records from the 1980's, which documented Metallurgical's discharges of wastewater directly onto the property and included groundwater sampling data that established the resulting groundwater contamination. Stuart relied on historical governmental and business records that documented Metallurgical's mishandling of its industrial wastewater, which resulted in overflows of the septic system and malfunctioning of the waste treatment plant due to the excessive metals content. Stuart also relied on documents indicating that Metallurgical had buried some waste materials on *12 the property in an area where PCBs were later found in the soil and groundwater. He opined that wastewater generated by reclamation of tantalum from capacitators by Metallurgical, which were well-known to contain PCBs, was the source of the PCB contamination. He testified there are several means of groundwater remediation, including: (1) a pump-and-treat procedure; (2) a chemical injection procedure; (3) pumping and removing affected groundwater; and (4) removing contaminated soil that is the source of the groundwater contamination, with natural dilution or attenuation once the contaminated soil has been removed.

Kenneth Goldstein, GNY's expert in environmental site review and environmental site remediation, agreed that soil and groundwater at the property had been contaminated as a result of Metallurgical's discharge of contaminated wastewater and burial and dumping of waste materials throughout the period of the company's operations. He opined, however, that the DEP never ordered active groundwater remediation at the site. Rather, EWMA proposed, and the DEP approved, only passive groundwater remediation, which he defined as "allowing the remediation to be completed with natural processes such as biodegradation or fixation, for example, of metals

to the soil, but without any equipment, without any additives, without any input from man, . . . just allowing nature to take its course." Unlike plaintiff's *13 experts, Goldstein did not consider soil removal to be a groundwater remediation technique; he considered it a soil remediation technique, even where the soil was removed to comply with the impact-to-groundwater soil remediation standard.

Goldstein acknowledged that EWMA had proposed active groundwater remediation in the form of chemical injection, to address CVOCs that were first revealed in testing conducted in 1985, and spiked in testing conducted in 2004. Goldstein testified, however, that this process was limited to a small area of the property, and the DEP did not require groundwater remediation there. Moreover, Goldstein found it odd that the CVOC spike occurred so many years after Metallurgical terminated its operations. He believed that the higher CVOC levels were caused by some type of disturbance of the soil and groundwater conditions at that location due to either the demolition of the building in 1994, or the demolition of the settling basin by EWMA, which caused a spike of PCE to enter the groundwater at that time. Nevertheless, he admitted that demolition of the building made it more efficient to investigate subsurface conditions.

Lastly, Goldstein disagreed with two recommendations made by plaintiff's environmental professionals. First, he did not believe it was necessary to monitor the groundwater at the property for the next forty years, as EWMA had recommended. He believed *14 that groundwater testing could cease two years after soil removal had been completed, provided the aquifer had responded in the way he would expect. Second, he did not believe it was necessary to install a vapor barrier for any building constructed on the property in the future. While he agreed that vapor intrusion, meaning the migration of gases from the subsurface into a building, would be an issue for the property's future development, he believed construction of a sub-slab depressurization system would be a more cost-effective solution.

Matt Mulhall, GNY's expert in environmental site remediation, hydrogeology, and stratigraphy, disagreed with Stuart's opinion about the source of the PCB contamination. Mulhall believed that the PCBs, which were not found on the property until 2005, came from fill materials placed on the property in the 1960's, when the building was being constructed. Mulhall relied on the fact that PCBs are strongly absorbed into soils and do not migrate very easily, meaning "[t]hey tend to stay in place where they're disposed or discharged[.]" On the property, however, most of the PCBs were found at great depths, anywhere from eight-and-one-half to fifteen or sixteen feet below ground surface. Mulhall concluded, therefore, that the buried drums were not likely the source of the PCBs, because the PCBs were found below that area, nor could a discharge at or near the surface have caused the PCB *15 contamination.

Moreover, Mulhall found it unlikely that PCBs were contained in Metallurgical's waste. He noted that Metallurgical did not use PCBs in its operations, and he disagreed with Stuart's opinion that the tantalum capacitators Metallurgical recycled contained PCBs. On cross-examination, however, he was presented with evidence which suggested that virtually all capacitators manufactured prior to 1978 contained PCBs. Finally, in terms of remediation, Mulhall agreed with EWMA's recommendation for a classification exception for the area in which PCBs were found. However, he conceded that the DEP did not approve that proposal, so remediation would entail excavating the soils and sediments that contained PCBs.

GNY Insurance Policies and Periods of Coverage

Metallurgical had obtained CGL insurance policies from GNY, which included coverage for property damage and named Center Shore as an

additional insured. The policies defined "occurrence" as "an accident, including continuous or repeated exposure to conditions, which results in . . . property damage neither expected nor intended from the standpoint of the insured[.]" The policies defined "property damage" as

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> (1) physical injury to or destruction of tangible property which occurs during the policy period, including the loss of use thereof at any time resulting therefrom, or

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> (2) loss of use of tangible property which has not been physically injured or destroyed provided such loss of use is caused by an occurrence during the policy period.

However, under the "owned property exclusion," coverage did not apply to damage to "property owned or occupied by or rented to the insured[.]"

Douglas Talley, plaintiff's insurance policy reconstruction expert, testified from documentary evidence and the parties' stipulations that Metallurgical purchased the following CGL policies from GNY:

POLICY	POLICY PERIOD	COVERAGE
GNY 5266	February 9, 1971 —February 9, 1972	$250,000 per occurrenceand in aggregate
GNY 25310	Three policies betweenFebruary 9, 1972 —February 9, 1975	$250,000 per occurrenceand in aggregate
GNY 7017	February 9, 1976 —February 9, 1977	$250,000 per occurrenceand in aggregate
GNY 7017	Four policies betweenFebruary 9, 1977 —April 15, 1981	$300,000 per occurrenceand in aggregate
GNY 8726	Four policies betweenApril 15, 1982 —June 24, 1985	$100,000 per occurrenceand in aggregate

Talley also testified that based on custom and practice, GNY policy *17 25310 continued through February 9, 1976.

GNY's insurance expert, John Klagholz, testified that the reduction in coverage in 1982/1983 suggested that Metallurgical had purchased an excess liability policy or umbrella policy. Talley also testified there was likely an umbrella policy in place when the primary layer of coverage was written at a reduced amount of $100,000 per occurrence; however, he had insufficient documentation to reconstruct the umbrella coverage.

Klagholz also testified that Metallurgical was uninsured or underinsured during some parts of the exposure period of 1967 through 1993. He opined that Center Shore was aware of Metallurgical's dangerous activities and should have obtained its own insurance policy in addition to any policies purchased by Metallurgical. Talley disagreed with that opinion.

The Special Master's and Trial Court's Decisions

Phase I of the trial before the special master addressed whether there were GNY policies applicable to plaintiff's property damage claims during the period February 9, 1971 through April 15, 1981, and April 15, 1982 through April 15, 1986. Phase I also addressed whether there were periods of no insurance or underinsurance.

In a July 23, 2012 written decision, the special master found that GNY insured Metallurgical and plaintiff under CGL policies *18 issued from February 9, 1971 to February 9, 1975; February 9, 1976 to April 15, 1981; and April 15, 1982 to June 24, 1985. The special master also found there were periods of underinsurance from November 10, 1967 to March 8, 1968, and April 15, 1982 to June

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24, 1985, and that plaintiff must bear its aliquot share of indemnification and defense expenses during those periods.

Plaintiff filed a motion with the trial court objecting to the special master's Phase I decision. In an October 2, 2012 written opinion, the court denied the motion, finding there was sufficient credible evidence in the record supporting the decision.

Phase II of the trial addressed insurance coverage, damages, the "owned property exclusion," the known loss and loss in progress doctrines, and plaintiff's entitlement to payment from GNY for funds it had expended. Phase II also addressed coverage for future costs to investigate and remediate contaminated groundwater at the property.

In a May 23, 2013 written decision, the special master determined plaintiff had proven that environmental contamination occurred during each of the GNY policy periods, and thus, plaintiff was entitled to recover past and future costs related to investigation, monitoring, cleanup, and remediation of the environmental contamination, as well as legal fees associated *19 therewith. The special master found the evidence clearly indicated "that environmental contamination of the groundwater (property damage) occurred at the [p]roperty during the time periods in which GNY provided [CGL] policies to [plaintiff's] predecessor."

The special master found that beginning in 1967, Metallurgical caused environmental contamination to the soil and groundwater at the property due to its manufacturing and remanufacturing processes of metal powders, stainless steel pipes, nickel, cobalt, tungsten alloys, tantalum products, and tantalum minerals from capacitors. The special master also found that Metallurgical used various acids to clean the metals and the wastewater from those metals was deposited into the Wampum Brook near the property. The special master determined that plaintiff proved the wastewaters contained high concentrations of heavy metals, such as iron, chromium, copper, nickel, and zinc, which caused contamination of the soil and groundwater at the property.

The special master emphasized that the DEP and other regulatory authorities inspected the property numerous times and concluded that environmental contamination in the soil and to the groundwater had occurred. The special master also emphasized that DEP conducted sampling of soil, groundwater, surface water, and discharges, and concluded that various metals were detected in the groundwater at concentrations above DEP standards. The special *20 master determined that the "owned property exclusion" in the GNY policies did not preclude coverage, as groundwater is not considered property owned by the insured, and the exclusion does not apply where, as here, the DEP found there was groundwater contamination at levels that required remediation.

The special master also rejected the known loss and loss in progress doctrines, as well as GNY's rescission defense, finding they were not included in the consent case management order that governed the scope of legal issues to be presented during the Phase II trial, and were not raised during the Phase II trial. Nevertheless, the special master found that the known loss and loss in progress doctrines did not preclude coverage because there was no evidence of any intent to defraud GNY, and no evidence that GNY would not have issued the policies if it had received additional information. The special master concluded that there remained uncertainty regarding both the environmental contamination at the property and any imposition of liability at the time the policies were written.

Phase III of the trial addressed allocation of damages and defense costs. In a December 11, 2013 written decision, the special master found, in pertinent part, that plaintiff would be considered a co-insurer for any periods it was underinsured, with defense and indemnification costs allocated

21 on a pro rata basis. *21 The special master also rejected plaintiff's request for prejudgment interest prior to filing the complaint; denied plaintiff's request for prejudgment interest on attorneys' fees; and ruled that the special master's fees would not be re-allocated, such that the parties would be responsible for their previously agreed upon shares.

Ultimately, the special master determined that plaintiff was entitled $1,134,173.24 for reasonable counsel fees and costs, and $1,258,011.87 for remediation/insured costs, plus interest. Thereafter, on February 7, 2014, the parties entered into a consent recommendation regarding "the manner in which allocation of future remediation costs and defense costs will be paid in the event of the exhaustion of the 1984-1985 GNY policy." However, the parties reserved their right to appeal any allocation issues.

Both parties filed motions with the court objecting to the special master's Phase II and Phase III decisions. In a June 12, 2014 written opinion, the court affirmed the special master's Phase II decision, concluding the evidence supported the special master's factual findings and legal determinations. The court also affirmed the special master's Phase III decision, except it reduced the attorney's fee award by $143,764.24, and awarded plaintiff additional attorney's fees and interest for the time period since the special master's decision.
22 The court entered *22 final judgment on June 12, 2014.

On July 2, 2014, and August 8, 2014, the court entered amended final judgments following the parties' motions and other applications for adjustment of various awarded amounts. In the August 8, 2014, amended final judgment, the court awarded plaintiff $2,547,693.02, plus costs of suit.

On September 12, 2014, GNY filed a notice of appeal, and on September 25, 2014, plaintiff filed a notice of cross-appeal. However, the appeal and cross-appeal were interlocutory, as there were outstanding attorney's fee issues to be resolved by the court. Thus, we remanded for resolution of those issues, while retaining jurisdiction. On February 27, 2015, the court entered two orders, which resolved the outstanding fee issues. On March 16, 2015, defendant filed an amended notice of appeal to include that order.

II.

On appeal, GNY contends in Point I that the special master and court erred by requiring GNY to provide coverage for the soil remediation costs. GNY argues that since the DEP never required, and plaintiff never proposed, groundwater remediation, the "owned property exclusion" precluded coverage for costs associated with removal of contaminated soil. GNY posits that our holding in Muralo Company, Inc. v. Employers Insurance of Wausau, 334 N.J. Super. 282, 290-91
23 (App. Div. 2000), certif. denied, 167 N.J. 632 *23 (2001) compels the opposite conclusion the special master and court reached in this case. We disagree.

Rule 4:41-5(b) governs review of a special master's findings:

> In an action to be tried without a jury the court shall accept the [special] master's findings of fact unless contrary to the weight of the evidence. Within [ten] days after being served with notice of the filing of the report any party may serve written objections thereto upon the other parties and may move the court for action upon the report and the objections thereto. The court after hearing on the motion may adopt the report, modify or reject it in whole or in part, receive further evidence, or recommit it with instructions.

The court generally defers to a special master's credibility findings regarding the testimony of experts. State v. Henderson, 208 N.J. 208, 247 (2011) (citation omitted). The court

> evaluate[s] a special master's factual findings 'in the same manner as [it] would the findings and conclusions of a judge sitting as a finder of fact. [The court] therefore accept[s] the fact findings to the extent that they are supported by substantial credible evidence in the record, but [the court] owe[s] no particular deference to the legal conclusions of the special master.
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> [Ibid. (quoting State v. Chun, 194 N.J. 54, 93, cert. denied, 555 U.S. 825, 129 S. Ct. 158, 172 L. Ed. 2d 41 (2008)).]

In an action for insurance coverage, "[t]he burden is on the insured to bring the claim within the basic terms of the policy. The carrier . . . bears the burden of establishing that any matter falls within the exclusionary provisions of the policy." Reliance *24 Ins. Co. v. Armstrong World Indus., Inc., 292 N.J. Super. 365, 377 (App. Div. 1996) (citations omitted).

Under the law, groundwater is not considered property owned by the insured. Morrone v. Harleysville Mut. Ins. Co., 283 N.J. Super. 411, 420 (App. Div. 1995). Therefore, groundwater contamination is not excluded under the owned property exclusion, Kentopp v. Franklin Mutual Insurance Co., 293 N.J. Super. 66, 77 (App. Div. 1996), and groundwater remediation costs are considered property damage. Morton Int'l v. General Accident Ins. Co. of Am., 134 N.J. 1, 27 (1993), cert. denied, 512 U.S. 1245, 114 S. Ct. 2764, 129 L. Ed. 2d 878 (1994); Reliance, supra, 292 N.J. Super. at 377-78. On the other hand, a mere threat of future groundwater contamination is insufficient to establish property damage. State, Dep't of Envtl. Prot. v. Signo Trading Int'l, 130 N.J. 51, 63-64 (1992).

The special master found that plaintiff had proven property damage in the form of groundwater contamination, citing several documents from the voluminous record dating back to the 1960's, which evidenced Metallurgical's discharge of wastewater onto the property, and the DEP's finding in the 1980's of groundwater contamination caused by those discharges. Thus, the special master properly concluded that plaintiff had proven an occurrence of environmental contamination at the property during GNY policy *25 periods, and since groundwater contamination had been proven and the DEP required remediation, the owned property exclusion did not apply. In this regard, the special master explicitly accepted plaintiff's position that soil removal was a necessary part of the DEP's mandated groundwater remediation. Reviewing the special master's decision under Rule 4:41-5(b), the court adopted his finding that plaintiff proved Metallurgical's wastewater discharges had caused third-party property/groundwater contamination, for which the DEP required remediation in the form of soil removal. The record amply supports both decisions.

Muralo does not compel the opposite conclusion. In Muralo, we held that: (1) the DEP's standards are the applicable standards when considering whether there has been property damage in the form of groundwater contamination; and (2) where the alleged groundwater contamination falls below DEP's standards for remediation, there is no insurance coverage. We stated:

The issue . . . is whether they . . . came within the now well-settled exception to [the owned property] exclusion, namely liability of the owner based on contamination of the groundwater beneath the owned property. We acknowledge that the discovery materials showed that there was low-level contamination, that is, contamination below the minimum level set by DEP for water remediation. But since it is clear that no untreated groundwater is ever entirely pure, we are satisfied that DEP standards are the most reliable guide for determining whether contamination causing damage and therefore triggering coverage has

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occurred. If DEP determines that the level of contamination is so low that there is no need for water remediation, we are persuaded, absent any contrary evidence, that no damage to groundwater within the coverage has taken place. To be sure, the extent of the soil contamination on the owned parcels posed a threat of future contamination to the groundwater if not remediated. But the Supreme Court has made it clear that at least in respect of environmental risk insurance, the threat of harm, however imminent, does not constitute harm within the coverage. Thus in order to prove the groundwater exception, we are satisfied that while the insured need not prove that a third party has already been actually damaged by contaminated water, he must nevertheless prove at least that the water is actually contaminated to the point where it is likely to do so if not remediated. If DEP finds that no groundwater remediation is required as a matter of environmental protection, then the insured has necessarily failed to prove that he comes within the groundwater exception to the [owned property] exclusion. We are aware that removal of contaminated soil may be a step in the process of groundwater remediation, but removal of contaminated soil only as remediation of soil contamination does not constitute groundwater remediation even if that soil removal will eliminate a threat of groundwater contamination.

[Muralo, supra, 334 N.J. Super. at 291 (emphasis added) (citations omitted).]

Muralo is easily distinguishable from the present case. Here, the evidence established there was groundwater contamination above DEP standards, and the DEP required remediation of the groundwater through removal of the soil that was

the source of the contamination. That is the clear import of the DEP documents, as *27 supported by the testimony from plaintiff's expert witnesses.

Contrary to GNY's argument, Muralo did not establish a standard requiring the DEP to order "active" groundwater remediation, i.e., remediation other than soil removal. Consistent with Muralo, if the DEP compels soil removal in order to remediate existing groundwater contamination above DEP standards, there has been a showing of property damage, and the owned property exclusion does not apply. Such is the case here.

Furthermore, the evidence established that soil removal proved insufficient to address the groundwater contamination with CVOCs, which remained above DEP standards. Therefore, in addition to the soil removal that the DEP already compelled in order to address the ongoing CVOC contamination, EWMA proposed "active" groundwater remediation in the form of a chemical injection process. Accordingly, we discern no error in the special master's or court's decisions requiring GNY to provide coverage for the soil remediation costs.

III.

GNY contends in Point II that the special master and the court erred in concluding that plaintiff proved an "occurrence" of property damage during each GNY policy period. GNY argues that in order to prove an occurrence in each policy period, plaintiff had to present testimony from a "timing" expert, who could opine *28 as to when the groundwater was contaminated with each of the contaminants of concern (metals, PVOCs, and PCBs), with each occurrence being a "discrete event."[1]

[1] GNY cites First Industrial, L.P. v. General Insurance Company of America, Docket No. A-1432-11 (App. Div. July 30, 2013), certif. denied, 217 N.J. 286 (2014) to support its argument. However, that opinion does not constitute precedent or bind us. R. 1:36-3; Trinity Cemetery Ass'n v. Twp. of Wall, 170 N.J. 39, 48 (2001).

Under the terms of the GNY policies, an "'occurrence' means an accident, including continuous or repeated exposure to conditions, which results in . . . property damage neither expected nor intended from the standpoint of the insured." To recover under each GNY policy, plaintiff had to prove an occurrence during each policy period. Reliance, supra, 292 N.J. Super. at 377.

"As a general rule, the time of the occurrence of an accident within the meaning of an indemnity policy is not the time the wrongful act is committed but the time when the complaining party is actually damaged." Owens-Illinois, Inc. v. United Ins. Co., 138 N.J. 437, 452 (1994). In the context of environmental contamination, where the damage is gradually and progressively inflicted, the law recognizes a "continuous trigger" theory. Id. at 455 (stating that "[p]roperty-damage cases are analogous to the contraction of disease from exposure to toxic substances like asbestos. Like a person exposed to toxic elements, the environment *29 does not necessarily display the harmful effects until long after the initial exposure").

"The conceptual underpinning of the continuous-trigger theory . . . is that injury occurs during each phase of environmental contamination--exposure, exposure in residence (defined as further progression of injury even after exposure has ceased), and manifestation of [injury]." Id. at 451; see also Quincy Mut. Fire Ins. Co. v. Borough of Bellmawr, 172 N.J. 409, 417 (2002) (stating that under continuous trigger theory all policies in effect during trigger period, meaning period of exposure and injury in fact, are activated and may be called upon to respond to a loss); Gottlieb v. Newark Ins. Co., 238 N.J. Super. 531, 535 (App. Div. 1990) (stating that continuous trigger theory "holds that where an injury process is not a definite, discrete event, the date of the occurrence

should be the continuous period from exposure to manifestation of damage"). Thus, in the continuous trigger context, insurance policies covering the risk are triggered throughout the period of exposure, discovery, and remediation. Owens-Illinois, supra, 138 N.J. at 456.

In environmental contamination cases, the initial discharge of contaminants is an occurrence that triggers coverage. Quincy, supra, 172 N.J. at 430-34. There is no need to determine precisely when the groundwater became contaminated because, as our Supreme *30 Court stated, "[w]e prefer to adopt a rule that takes into consideration the impossibility under certain circumstances of establishing exactly when the groundwater contamination began[.]" Id. at 434.

The special master reviewed the historical record and found that plaintiff had proven an occurrence of environmental contamination during each of the GNY policy periods. The court agreed and adopted the special master's findings. The record amply supports these decisions. GNY provided relevant coverage to Metallurgical between 1971 and 1986. Plaintiff presented evidence showing that from the beginning of its operations in 1967, Metallurgical discharged wastewater and waste materials onto the property contaminated with heavy metals and other chemicals, and as early as 1981, the DEP found contaminated groundwater resulting from Metallurgical's operations. Thereafter, the DEP monitored the site and continued to find contaminated groundwater through the period of GNY's policies, and ultimately required remediation.

Notably, there was no dispute at trial that Metallurgical's operations caused the groundwater contamination, as the parties' experts agreed that the metals and CVOC contamination were the result of Metallurgical's operations. The parties disagreed only as to whether Metallurgical had caused the PCB contamination, and *31 whether soil removal constituted groundwater remediation. On these points, the court credited plaintiff's factual and expert evidence over GNY's experts, as it was permitted to do. City of Long Branch v. Jui Yung Liu, 203 N.J. 464, 491-92 (2010). There was no error in the special master's and court's conclusions that plaintiff proved an "occurrence" of property damage during each GNY policy period.

IV.

GNY contends in Point III that the special master abused his discretion in permitting Stuart to testify as an expert. GNY argues that Stuart lacked the necessary expertise and was not a licensed site remediation professional (LSRP). GNY also argues that Stuart did not render expert opinions; he merely acted as an evidence conduit by reading documents into the record.

A trial court's admission of expert testimony is entitled to deference absent a showing of an abuse of discretion. Townsend v. Pierre, 221 N.J. 36, 52-53 (2015). An "abuse of discretion only arises on demonstration of 'manifest error or injustice[,]'" Hisenaj v. Kuehner, 194 N.J. 6, 20 (2008) (quoting State v. Torres, 183 N.J. 554, 572 (2005)), and occurs when the trial judge's "decision is 'made without a rational explanation, inexplicably departed from established policies, or rested on an impermissible basis.'" Milne v. Goldenberg, 428 N.J. Super. 184, 197 (App. Div. *32 2012) (quoting Flagg v. Essex Cty. Prosecutor, 171 N.J. 561, 571 (2002)).

Under New Jersey Rules of Evidence 702, "[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise." N.J.R.E. 702

> has three well-known prerequisites: (1) the intended testimony must concern a subject matter that is beyond the ken of the average juror; (2) the field testified to must be at a state of the art such that an expert's testimony could be sufficiently reliable; and (3) the witness must have sufficient expertise to offer the intended testimony. The burden of proving that the testimony satisfies those threshold requirements rests with the party proffering the testimony.
>
> [Hisenaj, supra, 194 N.J. at 15 (citations omitted).]

The "requirements are construed liberally in light of Rule 702's tilt in favor of the admissibility of expert testimony." State v. Jenewicz, 193 N.J. 440, 454 (2008) (citation omitted). Thus, "[i]n respect of prong (3)—the individual's expertise to speak on a topic as an expert witness—our trial courts take a liberal approach when assessing a person's qualifications." Ibid.

> [C]ourts allow the thinness and other vulnerabilities in an expert's background to be explored in cross-examination and avoid

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> using such weaknesses as a reason to exclude a party's choice of expert witness to advance a claim or defense. That the strength of an individual's qualifications may be undermined through cross-examination is not a sound basis for precluding an expert from testifying as part of a defendant's defense, even if it likely will affect the weight that the jury will give the opinion. Rather, a court should simply be satisfied that the expert has a basis in knowledge, skill, education, training, or experience to be able to form an opinion that can aid the jury on a subject that is beyond its ken.
>
> [Id. at 455.]

The record reflects the following information about Stuart's education and experience. In 1979, Stuart earned a bachelor of science degree in environmental studies. To earn that degree, he studied ecology as relating to the interconnection between water, soils, and surface water, which involved casework in organic chemistry, physical chemistry, and environmental chemistry, and included the sampling of soils, surface water, and groundwater, and understanding the pathways of contamination. Since earning his degree, Stuart has taken many courses for technical training; however, he never pursued any additional degrees.

Upon his university graduation, Stuart was employed as a licensed sanitary inspector for the Gloucester County Health Department, inspecting septic tanks. In that position, he investigated complaints of contaminated groundwater, which included the testing of water samples. Thereafter, he was employed *34 by the DEP for ten years, where he handled close to 4000 investigations of groundwater contamination. His job included field work, collecting samples, analyzing sample results, performing site inspections, and issuing violations and orders for corrective action. He also reviewed the field work of others, reviewed remediation plans, and identified parties

responsible for environmental clean-up, which included identifying the source and timing of contamination. His highest position at the DEP was bureau chief of the ISRA program. While at the DEP, he also: served on the editorial review board for the Site Remediation News; chaired the Site Remediation Program's Technical Advisory Committee; and chaired the committee responsible for drafting the Declaration of Environmental Restrictions model document, for use at properties remediated to non-residential soil standards.

Since 1996, Stuart was self-employed by Stuart Environmental Associates, doing environmental consulting for individuals and commercial/industrial clients, including utilities, insurance companies, investment firms, and governmental agencies, mostly regarding contaminated properties. The work entailed reviewing property transactions relative to environmental provisions, reviewing remediation plans for known contaminated properties, organizing public meetings and reviewing land use permits for municipalities, reviewing sample results submitted to the DEP in *35 connection with land use permits, and providing litigation support. Through 1999, his firm also performed environmental contracting, including site work and sampling.

Stuart was "a speaker and instructor on issues arising from the passage of site remediation reform laws and accompanying technical and administrative rules." He also testified as an expert several times in Superior Court, and several times in land use cases. No court had ever rejected him as an expert.

GNY complains that Stuart lacked a site remediation professional license, but cites no requirement that Stuart had to hold such a license in order to testify as an expert. A site remediation license is a professional license based upon education, experience and the passing of a licensing exam, that allows qualified individuals to manage site remediation projects without direct DEP oversight. N.J.S.A. 58:10C-7. Such a license has existed since 2009, under the Site Remediation Reform Act, N.J.S.A. 58:10C-1 to -29, however, as GNY's expert agreed, it only became mandatory for site remediation professional in May 2012, just a few months before Stuart testified.

Stuart testified he was not required to possess such a license in order to perform his environmental consulting work; and he had a DEP license as a certified closure and subsurface evaluator for underground storage tanks, and an Occupational Safety and Health *36 Administration license for hazardous waste site operations. In addition, between 1982 and 2000, he was a registered environmental health specialist.

In any event, Stuart's lack of a license was a matter presented to the special master. Thus, the special master considered this fact when qualifying Stuart as an expert, and the special master could consider Stuart's lack of a site remediation professional license when assessing the persuasiveness of his testimony. See Hisenaj, supra, 194 N.J. at 16 ("It falls to the parties at trial, who are positioned best to gather and analyze the viability of an expert's proffered testimony, to highlight the strengths and shortcomings of the foundation for that testimony so that the trial court can reach an informed admissibility decision").

We discern no abuse of discretion in the special mater's evidentiary ruling. The record confirms that Stuart's education and experience qualified him to testify as an expert in the areas of environmental site investigation and remediation, and the identification, source, and timing of contamination.

We reject GNY's argument that Stuart did not render expert opinions, but merely acted as an evidence conduit by reading documents into the record. Stuart based his opinions regarding the source and timing of the contamination largely on his analysis *37 of the historical, documented record of contamination at the property. Therefore,

it was permissible for him to identify the documentary support for his opinions. Moreover, in so doing, Stuart provided his expertise in explaining DEP practices and procedures, and assisted the special master in understanding the complex subject matter addressed in the documents. See N.J.R.E. 703.

Significantly, this was not a jury trial. The special master clearly understood the reasons for Stuart's document review and that, as factfinder, he could evaluate the quality of Stuart's opinions based upon their foundation, and in reaching his conclusions he could rely only upon admissible evidence. Agha v. Feiner, 198 N.J. 50, 62-64 (2009).

Finally, we note that, notwithstanding GNY's attack on Stuart's credentials, Stuart's opinions regarding the source and timing of the contamination were largely uncontested. As discussed supra, GNY's expert agreed that the groundwater was contaminated as a result of Metallurgical's wastewater discharges. The only issues disputed were the source of the PCB contamination, and whether the soil removal mandated by the DEP constituted groundwater remediation. The court found GNY's expert's explanation for the PCB contamination unconvincing, and accepted Stuart's opinion, which was supported by evidence regarding *38 Metallurgical's operations. Likewise, Stuart, as well as plaintiff's fact witnesses, testified about whether soil removal was required to remediate groundwater contamination. There was no error in qualifying Stuart as an expert witness in this case.

V.

GNY contends in Point IV that the special master abused his discretion in relying on exhibits 301, 302, and 303. GNY argues that the exhibits did not qualify for the business-records exception under N.J.R.E. 803(c)(6). Alternatively, GNY argues that the exhibits contained inadmissible hearsay from Metallurgical's employees, which should have been redacted.[2] These arguments lack merit.

[2] We decline to address GNY's additional arguments that the documents did not satisfy the elements for expert-opinion admissibility; were net opinions; and were inappropriately relied upon as expert evidence, and GNY's argument that exhibit 301 was not prepared at or about the time of the information recorded, which is a prerequisite for admissibility under N.J.R.E. 803(c)(6). GNY did not raise these arguments before the special master or the court and they are not jurisdictional in nature nor do they substantially implicate the public interest. Zaman v. Felton, 219 N.J. 199, 226-27 (2014) (citation omitted). --------

Exhibit 301 is Kaplan's December 16, 1981 memorandum, and exhibit 302 is his May 6, 1981 memorandum. Exhibit 303 contains a chart captioned "NJDEP/DWR/ENFORCEMENT SAMPLING DATA," which sets forth sampling results from the three DEP groundwater monitoring wells that were sampled on September 24, 1981, December *39 10, 1981, August 10, 1982, April 2, 1985, and May 13, 1986, and compares those results to DEP groundwater standards. Stuart testified that the chart contained data identical to other DEP documents, confirming his opinion that these were all DEP documents reflecting the testing results from the monitoring wells the DEP installed on the property in 1981. Stuart testified as follows:

> Yes, [exhibit 303] was in my prior testimony today, when I was reading sample results in P-104 relating to the DEP's EPA Preliminary Assessment findings where they listed out sampling done in '81, '82, '85, '86. And in listing those results . . . I read from early today, they reference Table 1. That's the EWMA P-104 document, EWMA 01496.
>
> Also earlier testimony, today's date, I reviewed three series of well results from the property on a handwritten table for Monitor Wells 1, 2[,] and 3; these are also in P-104, Bates referenced EWMA 01563, 64, and 65. It's a qualification to the potential concern that those handwritten records didn't come from DEP. The DEP record of Table 1 has been provided to qualify.
>
> I did look at those data results from the handwritten to the table, and yes, they are the same data and the same dates that those wells were sampled and the same data that was entered into the typewritten table.

Thereafter, plaintiff's counsel questioned Goldstein, GNY's expert, about exhibits 301 and 302. Goldstein testified that he worked at the DEP with Kaplan, and Kaplan was a geologist in the DEP's Division of Water Resources. Goldstein had no reason to *40 doubt that Kaplan had authored exhibits 301 and 302, nor did he have any reason to doubt the information and conclusions set forth in the documents.

The three documents were marked for identification and presented to Stuart during his testimony. Over GNY's objection, the special master permitted the questioning, and Stuart testified that these were among the many DEP documents that he relied upon in rendering his opinions in this case.

After conclusion of the Phase II trial, GNY filed a motion before the special master to exclude exhibits 301, 302, and 303. In opposition, plaintiff submitted Kaplan's certification, wherein he confirmed he was employed by the DEP since 1978. He authenticated exhibits 301 and 302, stating that he prepared them within the scope of his regular duties at the DEP, and the documents contained information he gathered from his visit to the property on March 20, 1981, including information conveyed to him by Metallurgical's employees.

In a February 15, 2013 written decision, the special master found the documents were relevant; had been properly authenticated as DEP business records by Kaplan and Stuart; and were admissible under the business records exception to the rule against hearsay, N.J.R.E. 803(c)(6). The special master also found no need to redact the statements from Metallurgical's employees contained in *41 exhibits 301 and 302. The special master distinguished State v. Lungsford, 167 N.J. Super. 296, 309-10 (App. Div. 1979), noting that, unlike the witness quoted in the police report in that case, here, the Metallurgical employees "each had an obligation and duty to communicate his statements and observations truthfully[,]" as did Kaplan in drafting his memorandum.

In its motion to the trial court objecting to the special master's Phase II and III decisions, GNY raised the same arguments about the exhibits. The court found no abuse of discretion in the special master's evidentiary rulings.

A trial court's admission or exclusion of evidence is "entitled to deference absent a showing of an abuse of discretion, i.e., [that] there has been a clear error of judgment." Griffin v. City of East Orange, 225 N.J. 400, 413 (2016) (quoting State v. Brown, 170 N.J. 138, 147 (2001)). "Thus, we will reverse an evidentiary ruling only if it 'was so wide off the mark that a manifest denial of justice resulted.'" Ibid. (quoting Green v. N.J. Mfrs. Ins. Co., 160 N.J. 480, 492 (1999)).

GNY first argues that exhibits 301, 302, and 303 do not fit within the business records exception to the rule against hearsay, N.J.R.E. 803(c)(6), because there is no indication who made the observations or performed any of the testing referenced in the documents. However, GNY conceded before the special master that *42 exhibits 301 and 302 fit within the business records exception, but should be redacted, and argued only that exhibit 303 should be excluded in its entirety. A party conceding a material fact before the trial court may not argue the contrary on appeal. See First Am. Title Ins. Co. v. Vision Mortg. Co., 298 N.J. Super. 138, 143 (App. Div. 1997). In any event, GNY's argument is without merit.

Hearsay is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." N.J.R.E. 801(c). It is inadmissible unless it falls into one of the recognized exceptions. N.J.R.E. 802.

N.J.R.E. 803(c)(6) permits into evidence:

> A statement contained in a writing or other record of acts, events, conditions, and, subject to Rule 808, opinions or diagnoses, made at or near the time of observation by a person with actual knowledge or from information supplied by such a person, if the writing or other record was made in the regular course of business and it was the regular practice of that business to make it, unless the sources of information or the method, purpose or circumstances of preparation indicate that it is not trustworthy.

Businesses are defined to include governmental agencies. N.J.R.E. 801(d).

"To qualify as a business record under N.J.R.E. 803(c)(6), a *43 writing must meet three conditions: it must be made in the regular course of business, within a short time of the events described in it, and under circumstances that indicate its trustworthiness." State v. Kuropchak, 221 N.J. 368, 387-88 (2015) (citation omitted). The rationale for admitting business records is that records kept in the normal course of business possess a probability of trustworthiness. Id. at 388.

The governmental records exception is similar. N.J.R.E. 803(c)(8) permits into evidence:

> Subject to Rule 807, (A) a statement contained in a writing made by a public official of an act done by the official or an act, condition, or event observed by the official if it was within the scope of the official's duty either to perform the act reported or to observe the act, condition, or event reported and to make the written statement, or (B) statistical findings of a public official based upon a report of or an investigation of acts, conditions, or events, if it was within the scope of the official's duty to make such statistical findings, unless the sources of information or other circumstances indicate that such statistical findings are not trustworthy.

The rationale for the government records exception is based upon "the special trustworthiness of official written statements" based upon "the declarant's official duty and the high probability that the duty to make an accurate report has been performed," and "to avoid the necessity of compelling a public official to leave his daily functions to testify as to an event which he will most *44 likely not remember." Biunno, Weissbard & Zegas, Current N.J. Rules of Evidence, cmt. 1 on N.J.R.E. 803(c)(8) (2016); Villanueva v. Zimmer, 431 N.J. Super. 301, 314 (App. Div.), certif. denied, 216 N.J. 430 (2013).

Kaplan created exhibits 301 and 302 in the course of his duties with the DEP, within a short time of the events described and under circumstances indicating their trustworthiness. Therefore, as GNY conceded below, the exhibits constitute

business records of the DEP and fit within the hearsay exceptions set forth in N.J.R.E. 803(c)(6) and N.J.R.E. 803(c)(8).

Regarding exhibit 303, GNY does not argue on appeal, as it did before the special master and the court, that this document was not properly authenticated by Stuart as a DEP record of groundwater test results. See N.J.R.E. 901; N.J. Div. of Youth & Family Servs. v. J.T., 354 N.J. Super. 407, 413 (App. Div. 2002) (holding that "circumstantial evidence is acceptable for authentication of written material"), certif. denied, 175 N.J. 432 (2003). Moreover, we perceive no abuse of discretion in the court's ruling on that issue. Thus, exhibit 303 also constitutes a DEP business record and falls within the hearsay exceptions set forth in N.J.R.E. 803(c)(6) and N.J.R.E. 803(c)(8).

GNY also argues that exhibits 301 and 302 contain embedded hearsay from Metallurgical's employees to DEP employees who were *45 investigating contamination at the property that should have been redacted. Hearsay within hearsay is addressed under N.J.R.E. 805, which states:

> A statement within the scope of an exception to Rule 802 shall not be inadmissible on the ground that it includes a statement made by another declarant which is offered to prove the truth of its contents if the included statement itself meets the requirements of an exception to Rule 802.

See also Estate of Hanges v. Metropolitan Prop. & Cas. Ins. Co., 202 N.J. 369, 375 n.1; Konop v. Rosen, 425 N.J. Super. 391, 402 (App. Div. 2012). Thus, without violating the rule against hearsay, the special master could accept the documents merely as proof that the Metallurgical employees made the statements to the DEP. However, he could not accept the truth of the embedded statements unless they fit within a hearsay exception. See, e.g., Manata v. Pereira, 436 N.J. Super. 330, 345 (App. Div. 2014) ("A police report may be admissible to prove the fact that certain statements were made to an officer, but, absent another hearsay exception, not the truth of those statements").

The special master appears to have accepted the embedded hearsay statements merely for the fact that the statements were made to the DEP, and not for the truth of the statements. He cited exhibits 301 and 302 only with respect to the DEP's conclusions, which were based upon the statements of *46 Metallurgical's employee, but without mentioning those statements. Thus, we perceive no violation of the rule against hearsay, and do not address whether the statements were admissible for their truth.

VI.

Prior to the trial, GNY filed a motion with the court for summary judgment on plaintiff's breach of contract claim. GNY argued that since it denied plaintiff's claim for coverage in 1993, and plaintiff did not file its complaint until 2000, the claim was barred by the six-year statute of limitations. The court denied the motion, holding that the "no action" clause contained in GNY's policies prevented GNY from asserting the statute of limitations defense. The court determined that under the terms of the "no action" clause, and under Crest-Foam Corp. v. Aetna Insurance Co., 320 N.J. Super. 509 (App. Div. 1999), plaintiff's breach of contract claim had not accrued because damages had not been fixed by a final judgment after trial or a written settlement agreement.

Prior to the Phase II trial, GNY filed a motion with the special master to include the statute of limitations defense in the Phase II proceedings. The special master found no error in the court's denial of summary judgment, and denied the motion.

GNY then filed a motion with the court for an order rejecting *47 the special master's decision. The court treated GNY's application as a motion for reconsideration of the court's denial of

summary judgment, and found no error in either the court's or special master's decisions. The court agreed that the "no action" clause contained in GNY's policies prevented GNY from asserting the statute of limitations defense in the absence of a final judgment or written settlement agreement, and GNY presented no new evidence or authority to the contrary. GNY reiterates in Point V that it was entitled to summary judgment because plaintiff's breach of contract claim was time-barred.

"[W]e review the trial court's grant of summary judgment de novo under the same standard as the trial court." Templo Fuente De Vida Corp. v. Nat'l Union Fire Ins. Co., 224 N.J. 189, 199 (2016) (citation omitted). Summary judgment shall be granted "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law." Ibid. (quoting R. 4:46-2(c)).

If there is no genuine issue of material fact, we must then "decide whether the trial court correctly interpreted the law." DepoLink Court Reporting & Litig. Support Servs. v. Rochman, 430 N.J. Super. 325, 333 (App. Div. 2013) (citation omitted). We 48 *48 review issues of law de novo and accord no deference to the trial judge's legal conclusions. Nicholas v. Mynster, 213 N.J. 463, 478 (2013). "[F]or mixed questions of law and fact, [an appellate court] give[s] deference . . . to the supported factual findings of the trial court, but review[s] de novo the lower court's application of any legal rules to such factual findings." State v. Pierre, 223 N.J. 560, 577 (2015) (citations omitted).

"Insurance policies are contracts of adhesion and, as such, are subject to special rules of interpretation." Gibson v. Callaghan, 158 N.J. 662, 669 (1999). The goal of the court is to determine the parties' intent from the policy language, "giving effect to all parts so as to give a reasonable meaning to the terms." Simonetti v. Selective Ins. Co., 372 N.J. Super. 421, 428 (App. Div. 2004). "When the terms of the contract are clear and unambiguous, the court must enforce the contract as it is written; the court cannot make a better contract for parties than the one that they themselves agreed to." Ibid. Ambiguities must be resolved against the insurer, however. Ibid. Thus, "[i]f the controlling language of the policy will support two meanings, one favorable to the insurer and one favorable to the insured, the interpretation supporting coverage will be applied." Ibid.

Breach of contract claims are governed by a six-year statute of limitations. N.J.S.A. 2A:14-1. 49 However, a no action clause *49 in an insurance policy may impact the statute of limitations. Addressing the purposes of no action clauses, we have stated as follows:

> The basic purposes of this language are (1) to avoid joinder of the insurance company by the injured person in the damage action against the insured, and (2) to prevent suit against the carrier by the injured person or the insured until the damages have been fixed by final judgment after trial of that action or by proper agreement.
>
> [Condenser Serv. & Eng'g Co. v. Am. Mut. Liab. Ins. Co., 45 N.J. Super. 31, 41 (App. Div.), certif. denied, 24 N.J. 547 (1957).]

See also Kielb v. Couch, 149 N.J. Super. 522, 528 (Law Div. 1977) ("One of the purposes of a 'no-action' clause is to prevent suit against the insurer by the insured until the damages have been ascertained by final judgment in a third-party proceeding against the insured").

Thus, in the context of insurance policies containing a no action clause, New Jersey courts have held:

> [a] cause of action for reimbursement of defense costs [does] not accrue until the termination of the third-party action brought against [the insured]" because it is "not until then that the totality of [the insured's] claim against [the insurance company] was ascertainable and [the insured's] right of action complete, and it was only then that [the insured] could successfully withstand a defense based upon the 'no-action' clause in the policy.
>
> [Kielb, supra, 149 N.J. Super. at 529.]

50 *50 Accordingly, in New Jersey, compliance with a no action clause "is a condition precedent to the maintenance of a suit by an insured to recover damages for a breach of the insurance contract, and noncompliance with this condition will, in the absence of waiver or estoppel, constitute a defense to the action." Id. at 528 (emphasis added).

On the other hand, a no action clause "may not be utilized as a bar to a declaratory judgment action instituted to adjudicate issues of coverage and defense." Ibid. In this regard, we have stated that a no action clause

> was never intended to serve nor can it be construed to serve, the purpose of avoiding a declaration of rights when the insurer allegedly has repudiated the contract and declined to furnish an agreed defense of a covered damage action. To attribute such a significance to the restriction would be to render sterile the Declaratory Judgments Act in a substantial area of the insurance contract field.
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> [Condenser, supra, 45 N.J. Super. at 41.]

We recently discussed a no action clause in Crest-Foam, supra, 320 N.J. Super. 509. There, the defendant insurance company moved to dismiss a declaratory judgment action seeking coverage for environmental clean-up costs because it was brought more than six years after the plaintiff had executed an administrative consent order (ACO) with the DEP, under which the plaintiff was required to evaluate and clean-up contamination at 51 its industrial site. *51 Id. at 512-13, 517.

The plaintiff countered that even if there was a known basis for coverage at the time of the ACO, its cause of action did not accrue until the defendant breached its contractual obligation to pay for clean-up costs. Id. at 517. The plaintiff also argued that the policy's no action clause extended the six-year statute of limitations because under the clause, it could not file suit until there was either a final judgment or a settlement. Ibid.

The defendant maintained that the no action clause was inapplicable in cases where there had been no formal legal proceedings that would result in a final adjudication of the insured's obligation. Id. at 518-19. According to the defendant, such was the case presented, where the insured's liability was established as a matter of law and the insured had agreed to a voluntary clean-up with the DEP and signed the ACO without the insurance company's consent. Ibid.

Considering these arguments, and citing Condenser, Kielb, and Bacon v. American Insurance Company, 131 N.J. Super. 450, 459 (Law Div. 1974), aff'd, 138 N.J. Super. 550 (App. Div. 1976), we upheld the denial of summary judgment, concluding that the action was not time-barred. Id. at 517-21. We found that, under the no action clause, the cause of action did not accrue until damages were fixed by final judgment or 52 settlement. Ibid. Thus, the plaintiff *52 could proceed with a declaratory judgment, and the no action clause prevented the defendant from asserting the statute of limitations as a defense to the claim for indemnification. Id. at 519-20. We concluded that "[i]n essence, the 'no action' clause may prevent or delay an action for indemnification, but it also prevents the assertion

of the statute of limitations defense to a declaratory judgment action before it is triggered and for six years thereafter." Id. at 520.

GNY attempts to distinguish Crest-Foam by arguing that there, unlike here, the insurance company had not formally denied a claim for coverage. Citing Federal Insurance Company By & Through Associated Aviation Underwriters v. Purex Industries, Inc., 972 F. Supp. 872 (D.N.J. 1997), GNY posits that, where an insurance claim has been made, the breach of contract claim should be deemed to accrue at the time the claim was denied. However, that case does not differ from the New Jersey cases discussed supra. Consistent with New Jersey case law, in Federal Insurance, the federal district court held that a claim by an insured against its insurer accrues when the underlying judgment becomes final and the insurer's liability is finally determined, and liability had not been finally determined at the point that the insured executed an ACO with the DEP. Id. at 879-80.

Only in dicta did the Federal Insurance court note that the *53 insured's claim would also "be timely under an alternative theory not mentioned by the parties -- that the declaratory claim accrues when the insured's claim for coverage is denied on the merits, in alleged breach of the contract of insurance." Id. at 880. As to this point, the court stated that "[s]uch a construction makes sense if the insurer is concerned about an indefinite length of future risk in a remediation process that may consume years before the full extent is known." Ibid.

Even this dicta is consistent with New Jersey case law, because under New Jersey case law either party could have pursued a declaratory judgment action regardless of the no action clause. Thus, while GNY posits that New Jersey's interpretation of the no action clause permits a private contract to trump the statute of limitations, it fails to recognize that: (1) it chose to include the no action clause in its policy while aware of New Jersey's interpretation of such clauses; and (2) if it had desired an earlier adjudication of the parties' rights and obligations under the policies, it could have sought a declaratory judgment notwithstanding the no action clause. Accordingly, we discern no error in the court's and special master's decisions regarding the statute of limitations.

VII.

GNY contends in Point VI that the court erred in rejecting *54 its defenses ground on the known loss and loss in progress doctrines. We disagree.

"The known loss doctrine is based on the fundamental principle that insurance is intended to cover risks which are not definitely known to the insured. The loss in progress doctrine, as differentiated from the known loss doctrine, provides that one cannot insure a loss that is already in progress." Continental Ins. Co. v. Beecham, Inc., 836 F. Supp. 1027, 1046 (D.N.J. 1993). Under these doctrines, "an insurer is protected from risks known to the insured prior to obtaining insurance and from a continuing loss that had begun before the inception date of the policy." Astro Pak Corp. v. Fireman's Fund Ins. Co., 284 N.J. Super. 491, 496-97 (App. Div.), certif. denied, 143 N.J. 323 (1995). "The doctrines have their roots in the prevention of fraud." Id. at 497. Thus, the loss allegedly known to the insured "must relate to a known occurrence that would trigger indemnification by the insurer." Id. at 498.

In other words, it is insufficient to prove knowledge of only potential liability. CPC Int'l., Inc. v. Hartford Accident & Indem. Co., 316 N.J. Super. 351, 378 (App. Div. 1998), certif. denied, 158 N.J. 73 (1999). Rather, the rule is that "where there is uncertainty about the imposition of liability and no legal obligation to pay yet established, there is an insurable risk for *55 which coverage may be sought under a third party policy." Ibid.

GNY argues that the known loss and loss in progress doctrines should bar liability coverage, since plaintiff was aware of Metallurgical's

improper waste management practices and knew of the potential liability for cleanup costs at least as early as 1981, when the DEP investigated the property and found contamination. The special master rejected this argument on procedural and substantive grounds, and the court agreed, finding it was improper for GNY to have raised the issue, since it had not been raised in the consent case management order or during the Phase II proceedings. The court also found that the special master properly rejected the doctrines because

> [g]iven the piecemeal record, and how GNY argues so fervently that there was no specific proof about contamination now, let alone during the periods when there had not yet been an all-encompassing review of the history of the situation, the Court is hard pressed to characterize the risk as "definitely known" at the time.

Finally, the court found the special master correctly concluded that there was no evidence of an intent to defraud GNY, or whether GNY would have issued the policies even if it had been provided with additional information.

Procedurally, a party waives all issues not raised in the pretrial order. R. 4:25-1(b)(4), (7); Royal Store Fixture Co. v. N.J. Butter Co., 114 N.J. Super. 263, 269 (App. Div. 1971). Also, *56 we generally do not address arguments that were not properly raised before the trial court. Zaman v. Fellman, 219 N.J. 199, 226-27 (2014). Nevertheless, the record clearly reflects that Center Shore was aware of Metallurgical's improper disposal of wastewaters, and of the DEP investigation of the property in the 1980s. However, that knowledge was not enough to establish a valid claim for insurance. As discussed supra, in order to establish a covered claim, plaintiff had to prove both that the DEP found groundwater contamination and required groundwater remediation. These were hotly contested issues even through the time of trial. Thus, the known loss and loss in progress doctrines were inapplicable.

The known loss and loss in progress doctrines were also unproven, as GNY presented no evidence that Metallurgical withheld relevant information from it, or that it would have rejected coverage had it been provided with such information. The appellate record contains a document suggesting that Metallurgical may have withheld information; however, that document was not entered into evidence at the trial. Rather, GNY included it as an exhibit in its post-trial motion to the court objecting to the special master's Phase II and III decisions.

Finally, there was no evidence that Center Shore, which was only an additional insured on the policies without a direct *57 relationship with GNY, ever withheld relevant information from GNY or was aware that Metallurgical may have done so. Accordingly, there was no error in the special master's or court's rejection of the known loss and loss in progress doctrines.

VIII.

Lastly, GNY contends in Point VII that the special master and the court erred in awarding attorney's fees under Rule 4:42-9(a)(6), as its disclaimer of insurance coverage was not groundless. Alternatively, GNY argues that the fees charged by plaintiff's counsel were unreasonable and the amount awarded should be reduced. GNY also argues that the special master erred in awarding future costs without requiring a reasonableness analysis.

We review an award of attorney's fees for abuse of discretion. Occhifinto v. Olivo Constr. Co., LLC, 221 N.J. 443, 453 (2015). We reverse a trial court's fee determination "only on the rarest occasions, and then only because of a clear abuse of discretion." Rendine v. Pantzer, 141 N.J. 292, 317 (1995).

Pursuant to Rule 4:42-9(a)(6), attorney's fees may be awarded in an action upon a liability or indemnity policy of insurance, in favor of a successful claimant. This rule "discourages insurance companies from attempting to avoid their contractual obligations and force their insureds to expend counsel fees to *58 establish the coverage for which they have already contracted." Occhifinto, supra, 221 N.J. at 450.

Under Rule 4:42-9(b), counsel must submit an affidavit of services addressing the factors in RPC 1.5(a) in support of a counsel fee application:

> The affidavit shall also include a recitation of other factors pertinent in the evaluation of the services rendered, the amount of the allowance applied for, and an itemization of disbursements for which reimbursement is sought. If the court is requested to consider the rendition of paraprofessional services in making a fee allowance, the affidavit shall include a detailed statement of the time spent and services rendered by paraprofessionals, a summary of the paraprofessionals' qualifications, and the attorney's billing rate for paraprofessional services to clients generally. No portion of any fee allowance claimed for attorneys' services shall duplicate in any way the fees claimed by the attorney for paraprofessional services rendered to the client. For purposes of this rule, "paraprofessional services" shall mean those services rendered by individuals who are qualified through education, work experience or training who perform specifically delegated tasks which are legal in nature under the direction and supervision of attorneys and which tasks an attorney would otherwise be obliged to perform.

RPC 1.5(a) provides that:

> A lawyer's fee shall be reasonable. The factors to be considered in determining the reasonableness of a fee include the following:
>
> (1) the time and labor required, the novelty and difficulty of the questions involved, and
>
> *59
>
> the skill requisite to perform the legal service properly;
>
> (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
>
> (3) the fee customarily charged in the locality for similar legal services;
>
> (4) the amount involved and the results obtained;
>
> (5) the time limitations imposed by the client or by the circumstances;
>
> (6) the nature and length of the professional relationship with the client;
>
> (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; [and]
>
> (8) whether the fee is fixed or contingent.

As part of the Phase III proceedings, the parties disputed whether plaintiff should receive an attorney's fee award, and in what amount. The special master ruled that plaintiff was entitled to an award of reasonable attorney's fees, allocated between and among the insurers. The special master further ruled that the attorney certification submitted by plaintiff complied with Rule 4:42-9, and the attorney's fees sought were reasonable, albeit with one modification to exclude an error in

timekeeping. The special master awarded attorney's fees and costs in the amount of $1,134,173.24. Finally, the special master held that GNY would *60 be allocated one hundred percent of plaintiff's reasonable attorney's fees and costs from July 1, 2013, until the conclusion of the litigation.

In its objections to the Phase II and III decisions, GNY challenged the award of attorney's fees. The court considered the governing law and the parties' arguments, and upheld the special master's ruling as a general matter. The court agreed with the special master's decision to disregard many of the recommendations on reasonableness made by GNY's consultant, Monroe Weiss. However, the court agreed with GNY "that a time entry with the single word 'Review,' or 'Telephone Conference' or 'Correspondence,' [was] an insufficient description of the work performed to enable the court to properly assess the reasonableness of the fee charged for such a service." Therefore, the court deducted $143,764.24 from the overall award. Finally, the court ordered GNY to pay "all of said plaintiff's reasonable litigation expenses, including reasonable attorneys' fees and expenses, until the final conclusion of this matter."

Thereafter, there was additional motion practice regarding attorney's fees. The net result of these motions were amendments to the final judgment, with the court awarding additional counsel fees in the amount of:

> (1) $166,472.93, for the time period between July 1, 2013, and February 28, 2014. For this

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> time period, the court subtracted $6300 from the fee request because the time entries included only one-word descriptions;
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> and
>
> (2) $8197, for the time period between March 1, 2014, and May 31, 2014. Plaintiff had requested $21,282, but the award was substantially less because the court accepted defendant's arguments as to reasonableness.

Finally, on remand from the first notices of appeal and cross-appeal, the court awarded attorney's fees in the amount of $29,489.27, for June through August 2014, which was $80 less than plaintiff had requested.

There was no abuse of discretion in the award of attorney's fees, as the criteria set forth in Rule 4:42-9(a)(6) were satisfied. Regarding the reasonableness of the fees awarded, the record reflects that the court accepted many of GNY's arguments and substantially reduced the amounts plaintiff requested. The court considered, and rejected, GNY's arguments for additional reductions, and there is no basis for second-guessing the court's judgment.

Finally, regarding the award of attorney's fees through "final conclusion of this matter," the parties do not cite any authority permitting or precluding an award of future counsel fees. Clearly, however, Rule 4:42-9(b) anticipates that attorney's fee requests will be for fees already incurred. See *62 Pressler & Verniero, Current N.J. Court Rules, cmt. 3 on R. 4:42-9 (2017) ("Clearly, the affidavit may include only actual, not contemplated, services").

While we discern no error with respect to the award of attorney's fees, we find the procedure utilized for the payment of such fees problematic. The record reflects that plaintiff's counsel was to submit bills directly to GNY, after which GNY

could challenge the reasonableness of the fees charged. However, a fee request must be supported by an affidavit addressing the RPC 1.5(a) factors, and the court must review any fee applications for reasonableness. See R. 4:42-9(b). Therefore, plaintiff must submit fee applications to the court for review, consistent with Rule 4:42-9(b), with an opportunity for GNY to object. Accordingly, we affirm the award of attorney's fees, but require plaintiff to submit future fee requests to the court rather than GNY.

IX.

On cross-appeal, plaintiff contends in Point IV that the court erred in its award of attorney's fees by reducing the amount requested. The court disallowed the following requested fees:

> $143,764.24 for unreasonable expenses from January 1, 1998, to June 30, 2013, because the time entries were inadequately detailed;

63 *63

> $6300 for unreasonable expenses from December 1, 2013, to February 28, 2014, because the time entries were inadequately detailed; and
>
> $13,085 for unreasonable expenses from March 1, 2014, to May 31, 2014, based upon GNY's arguments.

In order for the court to perform the required review of the attorney's fee request, and determine the number of hours reasonably expended, R.M. v. Supreme Court of New Jersey, 190 N.J. 1, 10 (2007), counsel's billing entries must be adequately detailed. R. 4:42-9(b); EnviroFinance Grp., LLC v. Envtl. Barrier Co., LLC, 440 N.J. Super. 325, 344 (App. Div. 2015). Thus, the court did not abuse its discretion in reducing the attorney's fees to eliminate charges that plaintiff inadequately explained.

Moreover, contrary to plaintiff's argument, the court's explanation for its reduction of the fee request from March 1, 2014 to May 31, 2014, was adequate for our review. Plaintiff had requested $21,282 for this time period, but the court awarded only $8197 because it accepted GNY's arguments that the number of hours expended for specific tasks was unreasonable. While it might have been better for the court to specifically note the arguments it had accepted, the record is clear as to the arguments GNY made, and during oral argument the court expressed that the amount requested in preparation for argument was excessive. We discern no reason to disturb the attorney's fee award. *64

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X.

Plaintiff contends in Point I, that the special master erred in concluding there was underinsurance for four months, between November 10, 1967, and March 8, 1968; and for a little over three years, between April 15, 1982, and June 24, 1985. This contention lacks merit.

The special master found that from November 10, 1967 to March 8, 1968, the lease required Metallurgical to maintain CGL coverage of $250,000; however, it only maintained $25,000 in coverage. The special master also found that between April 15, 1981 and April 15, 1982, Metallurgical failed to maintain any coverage when it should have maintained $300,000 in coverage; between April 15, 1982 and June 24, 1985, it reduced its coverage to only $100,000; and GNY's insurance expert opined that plaintiff was underinsured during these periods. As a result of these findings, the special master treated plaintiff as a co-insurer during those time periods, deemed plaintiff to have issued coverage in the amounts for which there was underinsurance, and determined that plaintiff must bear its aliquot share of indemnification and defense expenses.

Plaintiff objected to the special master's finding of underinsurance, and raises the same arguments made on appeal. The court rejected those

arguments and adopted the special master's findings, stating as follows: *65

> Plaintiff argues that the meaning of the word "underinsurance" is the liability exceeding a policyholder's insurance coverage. However, while [p]laintiff points to cases where underinsurance is so defined under the circumstances, [p]laintiff fails to demonstrate why "underinsurance" should be so defined in this instance or in all instances. Plaintiff fails to point to any provision in the insurance policy in question so defining the term "underinsurance." Plaintiff also fails to provide any statutory or case law defining the term "underinsurance" as a general matter. Thus, [p]laintiff has failed to meet the standard required to review the [s]pecial [m]aster's decision to interpret "underinsurance" as meaning the difference between the actual insurance coverage and the insurance coverage contracted for. As both parties to this action seem to be uncertain as to how the word "underinsurance" or "underinsured" is to be applied to this case, it would be appropriate for the [s]pecial [m]aster to address this issue in the future.

Notwithstanding the court's invitation to further consider the issue, plaintiff did not request reconsideration before the special master or the court.

Plaintiff maintains that, as a matter of law, the concept of underinsurance does not come into play until the policy limits have been exhausted. Therefore, it could not be deemed underinsured during the time periods at issue because it had not exhausted its policy limits for those periods.

The Court has applied a pro rata methodology for allocating insurance coverage responsibility in cases of progressive environmental injury. Farmers Mut. Fire Ins. Co. of Salem v. N.J. *66 Prop.-Liab. Ins. Guar. Ass'n, 215 N.J. 522, 537-38 (2013); Benjamin Moore & Co. v. Aetna Cas. & Sur. Co., 179 N.J. 87, 99 (2004). At the same time, the Court has stated that its "scheme is not totally one-sided. Policyholders who chose to 'go bare' or underinsure must sustain the burden of those choices. Likewise, policyholders are required to underwrite the risk of insurer insolvency or bankruptcy." Benjamin Moore, supra, 179 N.J. at 101 (emphasis added).

No New Jersey court has explained what it means to be "underinsured" in the context of commercial general liability insurance. There are several definitions of "underinsurance" in legal dictionaries and insurance treatises, which could be used to support either party's position. For example, Black's Law Dictionary 1561 (9th ed. 2011) defines "underinsurance" as "[a]n agreement to indemnify against property damage up to a certain amount but for less than the property's full value." International Risk Management Institute, Inc., Glossary of Insurance and Risk Management Terms, at https://www.irmi.com/online/insurance-glossary/terms/u/ underinsurance.aspx, defines "underinsurance" as "[a] situation resulting from a failure to carry enough coverage on the value of a property, especially when there are coinsurance implications." Richard V. Rupp, Rupp's Insurance & Risk Management Glossary 334 (1991), defines "underinsurance" as "[t]he purchase *67 of insurance with limits inadequate to meet policy coinsurance requirements, or the failure to purchase insurance in amounts sufficient to cover the amount of a large loss."

Plaintiff cites no authority explaining the concept of underinsurance in the context of commercial general liability insurance. Plaintiff merely cites to N.J.S.A. 17:28-1.1(e)(1), which provides as follows:

> A motor vehicle is underinsured when the sum of the limits of liability under all bodily injury and property damage liability bonds and insurance policies available to a person against whom recovery is sought for bodily injury or property damage is, at the time of the accident, less than the applicable limits for underinsured motorist coverage afforded under the motor vehicle insurance policy held by the person seeking that recovery. A motor vehicle shall not be considered an underinsured motor vehicle under this section unless the limits of all bodily injury liability insurance or bonds applicable at the time of the accident have been exhausted by payment of settlements or judgments.

Plaintiff does not explain why this statutory definition should be adopted in the context of commercial general liability insurance, particularly where, as here, there is clear evidence of the amount of insurance coverage Metallurgical was required to maintain: $250,000 required under the lease, and $300,000 in coverage Metallurgical maintained prior to April 15, 1982. On this record, and in the absence of any authority requiring a contrary conclusion, we find no error in the special master's or *68 court's findings that plaintiff was underinsured during the relevant time periods and must bear its aliquot share of indemnification and defense expenses.

XI.

Plaintiff contends in Point II that the court erred by denying its motion to reallocate the special master's fees in light of the overwhelming result in its favor. We disagree.

The court appointed the special master over GNY's objection. The parties ultimately selected the special master, who advised them that his charges would be divided equally among the plaintiff, GNY, and another insurance carrier "subject to reallocation by the trial court."

In two case management orders, the court ordered that the case would be tried before the special master, which GNY did not oppose. In the second case management order, the court required the parties to "share in equal parts the payment to [the special master] and the stenographic service for their services during the proceedings without prejudice."

After the Phase II and III trials, plaintiff requested that the special master reallocate his fees, which the special master denied. Thereafter, plaintiff requested reallocation from the court. The court found it had discretion to reallocate, but reallocation was not required. The court concluded as follows: *69

> Though [p]laintiff prevailed in — to quote counsel — an "overwhelming success," the [c]ourt finds, and the papers evince, that the coverage issue was not a meritless defense but rather a genuine dispute that required a close review of the record. The [c]ourt does not find that equities require that the court reallocate the fees for an investigation to which all parties properly agreed.

Rule 4:41-1 provides as follows:

> The reference for the hearing of a matter by a judge of the Superior Court shall be made to a master only upon approval by the Assignment Judge, and then only when all parties consent or under extraordinary circumstances. The order of reference shall state whether the reference is consensual and, if not, shall recite the extraordinary circumstances justifying the reference.

In terms of the special master's compensation, Rule 4:41-2 provides that "[t]he master's compensation shall be fixed by the court and charged upon such of the parties or paid out of any fund or property as the court directs. The master is entitled to a writ of execution against a party failing to comply with an order for compensation."

Since the Rules grant the court the authority to determine whether to appoint a special master and how the special master will be compensated, Zehl v. City of Elizabeth Board of Education, 426 N.J. Super. 129, 136 (App. Div. 2012), our review is for an abuse of discretion. In re Estate of Hope, 390 N.J. Super. 533, 541 (App. Div.) (holding that "[a] trial court's rulings on *70 discretionary decisions are entitled to deference and will not be reversed on appeal absent a showing of an abuse of discretion involving a clear error in judgment"), certif. denied, 191 N.J. 316 (2007).

The Rules provide no guidance in determining how a special master's compensation shall be divided between the parties. However, there is authority suggesting that one consideration is the financial resources available to the parties, Zehl, supra, 426 N.J. Super. at 138-42, as is the case under federal law. Fed. R. Civ. P. 53(a)(3), (g)(3). Plaintiff also cites additional factors considered under federal law, specifically, Federal Rule of Civil Procedure 53(g)(3), which provides as follows:

> The court must allocate payment among the parties after considering the nature and amount of the controversy, the parties' means, and the extent to which any party is more responsible than other parties for the reference to a master. An interim allocation may be amended to reflect a decision on the merits.

We agree that these are reasonable factors for the court to consider in allocating the cost of a special master. However, contrary to plaintiff's argument, the court was not obligated to reallocate based upon the result obtained in the litigation. The court considered plaintiff's success, the factor plaintiff focuses on, but nevertheless declined to reallocate the fees due to the complexity of the case and a consideration of the equities. Thus, *71 there is no basis to conclude that the court abused its discretion in denying reallocation of the special master's fees. Flagg, supra, 171 N.J. at 571.

XII.

Plaintiff contends in Point III that the court erred in granting GNY's motion for summary judgment as to plaintiff's bad faith and punitive damages claims. The record does not support this contention.

Metallurgical notified GNY on July 22, 1993 that the DEP had advised it of "possible environmental contamination" of the property during 1980 and 1981. Metallurgical requested copies of GNY's policies from that time period in order to confirm the type of coverage and the limits of liability. On August 30, 1993, GNY denied Metallurgical's claim for coverage, and explained the basis for its denial.

The court found that GNY had promptly responded to Metallurgical's demand for coverage, and asserted a reasonable basis for the denial of coverage both with regard to the existence of the policies in the first instance, and the validity of the assignment of the policies to plaintiff. Moreover, the court found there was no evidence of actual malice or a wanton or willful disregard of persons who foreseeably might be harmed, such that punitive damages would be warranted. *72

In terms of an insurer's bad faith, the Court has held that

> an insurance company may be liable to a policyholder for bad faith in the context of paying benefits under a policy. The scope of that duty is not to be equated with simple negligence. In the case of denial of benefits, bad faith is established by showing that no debatable reasons existed for denial of the benefits. In the case of processing delay, bad faith is established by showing that no valid reasons existed to delay processing the claim and the insurance company knew or recklessly disregarded the fact that no valid reasons supported the delay.
>
> [Pickett v. Lloyd's, 131 N.J. 457, 481 (1993) (emphasis added).]

"Under the 'fairly debatable' standard, a claimant who could not have established as a matter of law a right to summary judgment on the substantive claim would not be entitled to assert a claim for an insurer's bad-faith refusal to pay the claim." Id. at 473. Accord Badiali v. N.J. Mfrs. Ins. Grp., 220 N.J. 544, 553-55 (2015); Wacker-Ciocco v. Gov't Emp. Ins. Co., 439 N.J. Super. 603, 611-13 (App. Div. 2015).

In terms of punitive damages, N.J.S.A. 2A:15-5.12 provides as follows, in pertinent part:

> a. Punitive damages may be awarded to the plaintiff only if the plaintiff proves, by clear and convincing evidence, that the harm suffered was the result of the defendant's acts or omissions, and such acts or omissions were actuated by actual malice or accompanied by a wanton and willful disregard of persons who foreseeably might be harmed by those acts or omissions. This burden of proof may not
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> 73 *73
>
> be satisfied by proof of any degree of negligence including gross negligence.
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> b. In determining whether punitive damages are to be awarded, the trier of fact shall consider all relevant evidence, including but not limited to, the following:
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> (1) The likelihood, at the relevant time, that serious harm would arise from the defendant's conduct;
>
> (2) The defendant's awareness of reckless disregard of the likelihood that the serious harm at issue would arise from the defendant's conduct;
>
> (3) The conduct of the defendant upon learning that its initial conduct would likely cause harm; and
>
> (4) The duration of the conduct or any concealment of it by the defendant.

The Court has held that "absent egregious circumstances, no right to recover for . . . punitive damages exists for an insurer's allegedly wrongful refusal to pay a first-party claim." Pickett, supra, 131 N.J. at 476.

On this record, there was a reasonable basis for GNY to deny Metallurgical's claim in 1993, particularly considering that the governing law was not as developed at that time as it is now. Moreover, there is no evidence to support a conclusion that GNY acted with malice or wanton disregard in denying Metallurgical's claim. Accordingly, the court's grant of of summary judgment dismissing plaintiff's claims of bad faith and for punitive damages 74 *74 was proper.

XIII.

Plaintiff argues in Point IV that the court erred in denying its request for prejudgment interest on all of its remediation/indemnity expenses from the date of payment through May 22, 2000. Plaintiff

also argues that the court erred in denying its request for prejudgment interest on all of its litigation costs and expenses from the date of payment, including its reasonable attorney's fees and expenses.

We review an award of prejudgment interest for an abuse of discretion. Litton Indus., Inc. v. IMO Indus., Inc., 200 N.J. 372, 390 (2009). We will not reverse an award of prejudgment interest absent a manifest denial of justice. Ibid.

Plaintiff requested prejudgment interest on each remediation cost from the date it incurred the cost, and prejudgment interest on counsel fees. The special master rejected these requests and awarded prejudgment interest only on remediation costs, and only from the date of the complaint. The court adopted those rulings as both equitable and appropriate.

Prejudgment interest is only permitted in tort actions. R. 4:42-11(b). In contract cases such as this, any award of prejudgment interest is discretionary and based upon equitable principles, although the court may look to Rule 4:42-11 as a guide. *75 Ibid. The equitable purpose of prejudgment interest is to compensate the plaintiff for the fact that the defendant has had use of money during a time when the plaintiff should have had it. Id. at 390.

The court did not abuse its discretion in allowing prejudgment interest only from the date of the complaint, which is consistent with Rule 4:42-11(b). Moreover, the court did not abuse its discretion in denying prejudgment interest on the counsel fee award absent a finding of a contractual or equitable basis for such an award. N. Bergen Rex Transp., Inc. v. Trailer Leasing Co., 158 N.J. 561, 575-76 (1999). The court's rulings were sound, and we discern no reason to reverse.

We affirm on the appeal and cross-appeal, except we reverse the court's order requiring plaintiff to submit any future applications for attorney's fees to GNY rather than the court. Plaintiff shall file all future applications for attorney's fees consistent with the approach sanctioned by the Supreme Court in Rule 4:42-9(b).

Affirmed as modified. We do not retain jurisdiction. I hereby certify that the foregoing is a true copy of the original on file in my office.

CLERK OF THE APPELLATE DIVISION

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