IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

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NUCOR CORPORATION, Plaintiff/Appellant/ Cross-Appellee, v. EMPLOYERS INSURANCE COMPANY OF WAUSAU, Defendant/Appellee/ Cross-Appellant, and HARTFORD ACCIDENT AND INDEMNITY COMPANY, Defendant/Appellant/ Cross-Appellee.	1 CA-CV 10-0174 1 CA-CV 10-0454 (Consolidated) **MEMORANDUM DECISION** (Not for Publication - Rule 28, Arizona Rules of Civil Appellate Procedure)
NUCOR CORPORATION, Plaintiff/Appellant, v. EMPLOYERS INSURANCE COMPANY OF WAUSAU, Defendant/Appellee.	

Appeal from the Superior Court in Maricopa County

Cause No. CV 1997-008308

The Honorable Kenneth L. Fields, Judge (Retired)

AFFIRMED IN PART; REVERSED IN PART; VACATED IN PART; REMANDED

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P O R T L E Y, Judge

¶1 Nucor Corporation (“Nucor”), Hartford Accident and Indemnity Company (“Hartford”) and the Employers Insurance Company of Wausau (“Wausau”) challenge rulings that resolved the dispute between Nucor and its insurance carriers over payment of

indemnity and defense costs. For the reasons set forth in our companion opinion and as follows,[1] we affirm in part, reverse in part, vacate in part, and remand for further proceedings.

FACTS AND PROCEDURAL BACKGROUND

¶2 After the City of Phoenix discovered trichloroethylene (TCE) in its public wells in 1982, the Arizona Department of Environmental Quality ("ADEQ") began an investigation that resulted in the determination that Nucor had contributed to the groundwater contamination because it had used TCE as a cleaning solvent when it owned an electronics manufacturing plant. ADEQ sent Nucor a letter in 1989 identifying it as a potentially responsible party and directing it to prepare a remedial investigation and feasibility study. Nucor subsequently settled with ADEQ.

¶3 While the parties were seeking court approval of the settlement, Nucor was sued in a class action lawsuit in February 1992.[2] A year later, Nucor was sued in a different class action lawsuit,[3] and the lawsuits were consolidated. The consolidated lawsuits resulted in three classes of plaintiffs: (1) those who sought expenses for future medical monitoring because of TCE

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[1] In a separate opinion filed contemporaneously with this memorandum decision, we address other challenges to the summary judgment rulings and the Phase II issues.

[2] *Baker v. Motorola*, Maricopa County Superior Court Cause No. CV 1992-002603 ("*Baker*").

[3] *Lofgren v. Motorola*, Maricopa County Superior Court Cause No. CV 1993-005322 ("*Lofgren*").

exposure ("medical monitoring claims"); (2) those who sought damages for the diminution in the value of their property because of the stigma of being located above groundwater containing TCE ("stigma claims"); and (3) those who suffered personal injuries or death allegedly caused by the contamination. The class action litigation subsequently settled in January 2003 for $21 million.[4]

¶4 Nucor filed this lawsuit in 1997 against Hartford and another insurer for declaratory relief and damages for breach of contract and breach of the covenant of good faith and fair dealing because they refused to defend Nucor or provide indemnity for the ADEQ action or the class action litigation. Nucor amended the complaint a year later to add additional claims and carriers, including Wausau, American Mutual,[5] and Travelers. Wausau was the only carrier that reserved its rights in the ADEQ action, and it provided a defense in the class action litigation under a reservation of rights.

¶5 Travelers and Wausau filed a successful motion for partial summary judgment and the trial court dismissed Nucor's claim that the carriers had to pay indemnity for the portion of the class action settlement attributed to the stigma claims.

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[4] The settlement was allocated as follows: stigma damages, 71.5%; personal injury damages, 23.5%; and medical monitoring damages, 5%.

[5] American Mutual was insolvent.

Nucor subsequently filed motions for summary judgment but settled with Hartford, Travelers, Twin City, and First State before any ruling. The court then granted Nucor partial summary judgment for Wausau's failure to defend the ADEQ proceeding and denied Wausau's motion for partial summary judgment that it did not have to pay indemnity for the class action settlement attributed to the medical monitoring claim because of genuine issues of material fact.

¶6 Wausau filed a cross-complaint against Hartford and Travelers seeking declaratory relief, equitable indemnity and equitable contribution for any costs it would have to pay related to the ADEQ proceeding and class action litigation. Nucor unsuccessfully requested to be substituted as the indemnitor because Travelers had, in its earlier settlement, assigned its contribution rights and liabilities to Nucor, and Nucor had agreed to defend and hold Hartford harmless concerning equitable claims brought by co-insurers. The court, however, allowed Nucor to intervene.

¶7 The court then divided the remaining issues into four phases. Phase I focused on Nucor's reasonable and necessary defense costs. Phase II focused on the percentage of defense costs owed by the primary insurers, Travelers, Hartford, Wausau, and American Mutual. Phase III concentrated on the allocation of Hartford's settlement to defense and indemnity costs.

Finally, Phase IV addressed Traveler's contribution and indemnity claims against Wausau that Nucor pursued as Traveler's assignee.

¶8 Phase I was resolved by a bench trial. Nucor sought nearly $22 million in defense costs for work performed by multiple law firms, including Piper Marbury, arising from the environmental contamination litigation. In its findings of fact and conclusions of law, the court deducted: (1) all the fees billed by Piper Marbury after determining those fees were not reasonable or necessary; (2) the defense costs associated with the stigma claim ruling, which resulted in a nine percent deduction; and (3) another sum of nearly $319,000 after adjusting the rates for Phoenix area counsel. The court found that the total reasonable and necessary defense costs were $15,770,141.31.

¶9 The court then considered reimbursements paid by Wausau and Travelers of $10,310,029 and $5,506,810, respectively, as offsets, and determined that Nucor was entitled to recover $726,837.13 in damages for defending the ADEQ proceeding, plus prejudgment interest. The court also found that Nucor was entitled to prejudgment interest on the principal amount of Nucor's loss related to the ADEQ defense costs of $1,031.645.50. The court, moreover, found that Wausau was entitled to recover $46,698.36 it overpaid for Nucor's defense

costs in the class action litigation, plus prejudgment interest from April 22, 2003, the date of Wausau's final payment in that litigation. After considering the offsets, the court found that Wausau owed Nucor $1,699,496.27 as of December 6, 2005.

¶10 Phase II was also resolved by a bench trial. The trial focused on: (1) the percentage of Nucor's defense costs that each primary insurer should pay; (2) whether other insurers were liable to Wausau for prejudgment interest on their respective shares; and (3) whether Nucor should pay the share otherwise allocated to American Mutual, the insolvent insurer.[6]

¶11 The court adopted a time-on-the-risk allocation among the insurers and required Travelers and Hartford to reimburse Wausau for prejudgment interest to the extent that the two carriers had not paid their fair shares of Nucor's defense costs. The court also determined that the equitable contribution percentages between the insurers would be as follows: Travelers - 64.7%; Hartford – 13%; Wausau - 17.3%; and Nucor/American Mutual – 5%. In setting the percentages, the court refused to apply the terms of the interim May 1992 defense agreement between Nucor and Wausau in the class action litigation — which would have required Wausau to pay 3.55% of

[6] Hartford did not participate in the Phase II proceedings. Hartford advised the court that it remained a party only because Wausau had opposed Nucor's motion to substitute and stated that any position Nucor took was for Nucor alone unless Hartford explicitly joined.

the defense costs — because the agreement was not intended to bind Wausau in any action against other primary insurers. The court subsequently entered an order that Hartford had to pay Wausau $2,006,131.99 plus prejudgment interest starting on or before April 22, 2003, the last date Wausau paid for defense costs.

¶12 The Phase III issue — whether Wausau breached its insurance contract with Nucor — was resolved by a jury trial. The jury concluded that Wausau had breached its contract with Nucor and that Wausau owed Nucor $887,150 for the unpaid portion of Nucor's indemnity claim. The court denied Wausau's post-trial motion for judgment as a matter of law seeking a full offset of Hartford's $4.9 million settlement payment, but reduced the damages to $374,365.00 because Nucor had not timely disclosed certain settlement amounts. The court awarded attorneys' fees and costs to Nucor and against Wausau for 17.3% of the total fees and costs incurred in the action against the insurers pursuant to Arizona Revised Statutes ("A.R.S.") section 12-341.01(A) (West 2012). The court also awarded attorneys' fees to Wausau for its equitable contribution claim against Hartford, First State, Twin City, and Travelers.

¶13 The court entered its amended final judgment incorporating rulings from Phases I, II, and III in January 2010 pursuant to Arizona Rule of Civil Procedure ("Rule") 54(b).

Nucor, along with Hartford, Twin City, and First State filed appeals and Wausau filed a cross-appeal.

¶14 Before the final resolution of the earlier phases, the court turned to Phase IV to decide whether Nucor, as the assignee of Travelers, could recover the $4.3 million Travelers paid to Nucor for its contribution and indemnity claims against Wausau. The court noted that factual issues remained regarding "[t]he pro rata amount payable by each primary insurer for the loss on the same risk." After briefing, the court found that:

- Travelers had a right to pursue equitable contribution;
- Nucor had a right to stand in Travelers' shoes to pursue equitable contribution;
- Travelers could obtain contribution only "against other primary insurers who are liable for the same loss on the same risk" under *Fireman's Fund Insurance Co. v. Maryland Casualty Co.*, 77 Cal. Rptr. 2d 296 (App. 1998);
- The equitable contribution must be based on a pro rata basis and the 23-year coverage period would be used to determine each insurer's share;
- Nucor would bear the share allocated to the insolvent insurer, American Mutual.

¶15 The parties filed cross-motions for summary judgment on the definition of the "same risk." Despite Nucor's contentions that (1) some or all of the policies did not cover

the same risk, (2) they did not cover the actual loss, and (3) Travelers had paid more than its fair share of Nucor's costs in settling the underlying action, the court ruled that a 23-year coverage period applied and Travelers had not paid more than its fair share. After the entry of final judgment, the denial of Nucor's motion for a new trial and motion to alter and amend the judgment, Nucor filed its appeal. The appeals were subsequently consolidated.

DISCUSSION

I. Pre-Trial Rulings

A. The Medical Monitoring Claim

¶16 Wausau challenges the denial of its motion for summary judgment on the medical monitoring claims. The court declined to hold as a matter of law that there was no indemnity coverage for the class action medical monitoring claim and damages.

¶17 Generally, the denial of a motion for summary judgment is neither appealable nor subject to review after judgment. *Martin v. Schroeder*, 209 Ariz. 531, 533, ¶ 5, 105 P.3d 577, 579 (App. 2005); *see also O'Day v. George Arakelian Farms, Inc.*, 24 Ariz. App. 578, 582, 540 P.2d 197, 201 (1975) (explaining that a denied summary judgment motion becomes "moot as a legal issue when the case [is] presented at trial"); *Safeway Stores, Inc. v. Maricopa Cnty. Super. Ct. (Lurie)*, 19 Ariz. App. 210, 212, 505 P.2d 1383, 1385 (1973) ("The denial of a motion for summary

judgment is not appealable, . . . nor is it even reviewable upon appeal from the final judgment, except under very unusual circumstances.").

¶18 A party may preserve a summary judgment issue by reasserting it in a motion for judgment as a matter of law. *John C. Lincoln Hosp. & Health Corp. v. Maricopa County*, 208 Ariz. 532, 539, ¶ 19, 96 P.3d 530, 537 (App. 2004). Although Wausau cites to the denial of its motion for judgment notwithstanding the verdict following the Phase III trial, the medical monitoring ruling was not raised within the motion. Accordingly, the issue was not preserved and we will not address it.

II. Phase One

A. The Trial Court Properly Reduced the *Baker* Litigation Defense Costs by Nine Percent

¶19 Nucor challenges the court's determination that it incurred nine percent of its defense costs after the *Baker* court dismissed the nuisance and trespass negligence claims and that the trial court was simply wrong in denying reimbursement for those defense costs. A factual finding is entitled to deference unless clearly erroneous. Ariz. R. Civ. P. 52(a); *Ariz. Bd. of Regents v. Phoenix Newspapers, Inc.*, 167 Ariz. 254, 257, 806 P.2d 348, 351 (1991).

¶20 Relying on *Western Casualty & Surety Co. v. International Spas of Arizona, Inc.*, 130 Ariz. 76, 634 P.2d 3 (App. 1981), Nucor contends that Wausau had a duty to defend the claim regardless of its merits and is liable for the entirety of Nucor's defense costs. In *Western Casualty*, we examined whether a carrier had an obligation to defend its insured in a lawsuit filed by the insured's lessee. *Id*. at 77, 634 P.2d at 4. After determining that the policy generally covered claims made in the lessee's lawsuit, we noted that the carrier had to provide a defense "even though some of the allegations in the complaint are groundless as far as the insurer is concerned." *Id.* at 80, 634 P.2d at 7. We then clearly stated that we "express no opinion, however, as to the insurer's duty to continue the defense if the litigation should reach a point at which it is impossible for [the lessee] to recover on any claim covered by the policy." *Id.* As a result, we agree with the court that *Western Casualty* does not support Nucor's argument.

¶21 When facts "take the case outside policy coverage, there is no duty to defend." *Transamerica Ins. Grp. v. Meere*, 143 Ariz. 351, 360, 694 P.2d 181, 190 (1984). An insurer who paid defense costs, like Wausau, may seek reimbursement for the paid defense costs that were allocated to claims not even potentially covered and for which there was no obligation to defend. *See Buss v. Superior Court*, 65 Cal. Rptr. 2d 366, 376

(1997). Here, the court determined that 96 of the 105 months *Baker* was pending fell within the scope of Wausau's duty to defend. In other words, coverage existed for 91% of the time the case was pending.

¶22 Although Nucor concedes that 9% of the underlying litigation occurred after the dismissal of the non-stigma claims, Nucor also contends that even if the stigma claims are uncovered, it is still entitled to recover the entire settlement as indemnity. We conclude that such a result is improper. As the Fifth Circuit stated:

> [W]e cannot allow an insured to settle allegations against it (some of which might be covered by its insurance, some of which might not) . . . and then seek full indemnification from its insurer when some of that settled liability may be for acts clearly excluded by that policy.

Enserch Corp. v. Shand Morahan & Co., 952 F.2d 1485, 1494 (5th Cir. 1992). We agree and find no error.

B. The Trial Court Did Not Abuse Its Discretion by Reducing Nucor's Recoverable Defense Costs

¶23 Nucor challenges the $4,088,487.21 reduction in attorneys' fees attributable to Piper Marbury. Nucor claims that the court erroneously reduced its defense costs by misapplying *Schweiger v. China Doll Restaurant, Inc.*, 138 Ariz. 183, 673 P.2d 927 (App. 1983). We review the court's determination of reasonable and necessary defense costs for

abuse of discretion. *Orfaly v. Tucson Symphony Soc'y*, 209 Ariz. 260, 265, ¶ 18, 99 P.3d 1030, 1035 (App. 2004).

¶24 In assessing a fee application, *China Doll* requires that the court determine (1) a reasonable billing rate, and (2) the number of hours reasonably expended. 138 Ariz. at 187-88, 673 P.2d at 931-32. The party seeking fees must submit evidence of the type of service provided, the date of service, the attorney providing the service, and the amount of time spent, *id.*, and show that the time expended was reasonable and necessary. *See Woerth v. City of Flagstaff*, 167 Ariz. 412, 419, 808 P.2d 297, 304 (App. 1990) (holding that the party seeking fees under A.R.S. § 12-341.01(A) has the burden to prove its entitlement to the award); Arizona Attorneys' Fee Manual § 1.6.3, at 1-7 (Bruce E. Meyerson & Patricia K. Norris, eds., 5th ed. 2010) [hereinafter "Fee Manual"]. The burden of proof never shifts, even if the burden of production may shift. *Woerth*, 167 Ariz. at 419-20, 808 P.2d at 304-05. Additionally, "[j]ust as the agreed upon billing rate between the parties may be considered unreasonable, likewise, the amount of hours claimed may also be unreasonable." *China Doll*, 138 Ariz. at 188, 673 P.2d at 932.

¶25 As a result of the litigation, Nucor was confronting substantial exposure; the class action plaintiffs were seeking damages of approximately $470 million and demanding a $100

million settlement in 1997. Because Nucor hired several law firms, the "simultaneous representation" entailed "substantial risks," including "task padding, over-conferencing, attorney stacking (multiple attendance by attorneys at the same court functions), and excessive research." *Donahue v. Donahue*, 105 Cal. Rptr. 3d 723, 732 (Ct. App. 2010). In cases involving teams of lawyers, the fee applicant "should explain the distinct contributions made by each lawyer to the case and the end result of those contributions." Fee Manual § 1.6.5, at 1-8; *see Gay Officers Action League v. Puerto Rico*, 247 F.3d 288, 297-98 (1st Cir. 2001) (affirming fees awarded to four attorneys because their documentation to the district court persuasively described the division of responsibility and the need for teamwork). Nucor's litigation manager, Betty Compton, hired Piper Marbury in June 1997 to replace another firm and to generally manage the litigation and monitor the work of the other firms even though Nucor's other lawyers had distinct litigation duties. She did not, however, set any guidelines about the number of lawyers who could work on the case or set a budget for the firm.

¶26 As a result, fourteen or more Piper Marbury lawyers were working on the case in the first month even though there was "no trial in sight." Piper Marbury billed a substantial number of hours and conceded there was "unjustified redundancy." The record also indicates that the Piper Marbury bill was

inflated by its "turf fights" with other Nucor attorneys. Consequently, the evidence supports the court's determination that the fees for Piper Marbury were not reasonable or necessary, and we find no abuse of discretion in the trial court's decision on this issue.

III. Phase III Issues

A. The Court Erred by Supplanting the Jury's Verdict Concerning the Amount of Hartford's Indemnity Payments

¶27 The Phase III jury was convened in May 2007. After the evidence was presented, the court instructed the jury that Nucor was entitled to receive $7,278,859 from primary insurers for indemnity, and it had to determine (1) what Nucor had already received in indemnification, and (2) what amount of indemnification Nucor was entitled to receive from Wausau under its policy. After deliberating, the jury determined that Wausau had breached its insurance contract and that Nucor's damages were $887,150.00.

¶28 Nucor disputes the characterization that prior payments received were just for indemnification. Nucor highlights the fact that: (1) Hartford allocated $2,808,290.43 of its settlement to defense costs and interest; (2) Hartford, Travelers, and the excess insurers released all future site-related claims; and (3) the settlement agreements required Nucor to defend/indemnify Hartford and Travelers in subsequent and/or

ancillary litigation. Hartford similarly disputes the finding that it paid nothing toward indemnification.[7]

¶29 The record reveals there was conflicting evidence about whether Hartford paid defense costs. Nucor, for example, had told the court more than once that Hartford had not paid any defense costs, but presented its settlement agreement with Hartford that stated "Hartford has not paid more than 9.7% of Nucor's alleged defense costs incurred in the underlying actions" without defining whether Hartford had paid any defense costs. Hartford claimed that it spent more than $2 million in defense costs. Wausau, however, presented the testimony of Harold Moore, its Environmental Claim Unit manager, who challenged the claim that Hartford had paid any defense costs.

¶30 Despite the contradictory evidence, sufficient evidence supports the jury's verdict.[8] Although there was no special verdict and the general verdict form did not provide for an allocation of Hartford's settlement payment, it is undisputed that the court advised the jury how Hartford internally

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[7] We disagree with Wausau that Hartford waived its right to appeal the issue. We can review the sufficiency of the evidence on appeal even in the absence of a prior objection. *T.W.M. Custom Framing v. Indus. Comm'n*, 198 Ariz. 41, 44, ¶ 4, 6 P.3d 745, 748 (App. 2000).

[8] Wausau maintains that the court's allocation of zero defense cost to Hartford is justified by Hartford's failure to disclose "information about Hartford's allocation of its settlement payment" in response to interrogatories. Because we are remanding the issue to the trial court, we will allow the court to consider the argument on remand.

allocated defense costs. Moreover, the verdict is consistent with a $2,808,290 allocation for defense costs according to the following formula:

$9,543,750	All settlements received
-383,750	Settlements received from excess insurers
$9,160,000	
-2,808,290	Hartford's allocated defense and interest
$6,391,709	Total indemnity received from insurers[9]

¶31 Because the verdict is consistent with a $2,808,290 payment by Hartford for defense costs and interest notwithstanding the conflicting evidence, we reverse the subsequent contribution order because it was based on a finding that Hartford paid no defense costs.[10] On remand, the court shall enter a judgment for Hartford that is consistent with the verdict. The reallocation will necessarily affect the characterization of the amount Hartford paid for

[9] The jury then determined that Wausau owed Nucor $887,150 as damages for unpaid indemnity, which is the difference between Nucor's maximum covered settlement payments ($7,278,859) and the total indemnity Nucor received ($6,391,709). After adding prejudgment interest to the numerator and the denominator, the trial court found that Wausau's final liability was $374,365.80.

[10] There is no support for the contention that the verdict was merely "advisory" and all issues were then to be decided by the court. The court instructed the jury to "determine how much Nucor has received from its insurance carriers to date for indemnification and what monies, if any, is [sic] owed by Wausau to Nucor as a part of its duty to indemnify." The court expressly accepted the jury's finding after denying Wausau's motions for judgment as a matter of law.

Nor do we agree that the issue was a matter of law for the trial court. The damages amount is one of fact for resolution by a jury. *Harris Cattle Co. v. Paradise Motors, Inc.*, 104 Ariz. 66, 69, 448 P.2d 866, 869 (1968).

indemnification, which no longer covers its entire $4.9 million payment. In turn, the amount of indemnity Wausau owes to Nucor will need to be adjusted. Additionally, the court will need to recalculate the equitable contribution to account for Hartford's payment of defense costs.[11]

B. The Trial Court Did Not Abuse Its Discretion in Refusing Nucor's Requested Jury Instruction, but Did Abuse Its Discretion in Calculating Prejudgment Interest for Wausau's Payments

1. The Trial Court Properly Instructed the Jury Based Upon the Law

¶32 Nucor argues that the trial court erred by rejecting its proposed instruction on the calculation of indemnity payments and providing its own instruction to the jury. We review jury instructions for abuse of discretion. *A Tumbling-T Ranches v. Flood Control Dist. of Maricopa Cnty.*, 222 Ariz. 515, 533, ¶ 50, 217 P.3d 1220, 1238 (App. 2009). Whether a jury instruction correctly states the law is a matter of law that we review de novo. *Id.*

¶33 Reversal may be warranted where an instruction supports a resolution that is both "harmful to the complaining party and contrary to law." *AMERCO v. Shoen*, 184 Ariz. 150,

[11] We will not resolve Wausau's argument that Hartford improperly responded to Wausau's interrogatories seeking Hartford's contentions on how defense costs should be shared among the insurers. Wausau suffered no prejudice because the court chose Wausau's allocation methodology.

159, 907 P.2d 536, 545 (App. 1995). We will not overturn a jury verdict on the basis of an improper instruction unless there is "substantial doubt whether the jury was properly guided in its deliberations." *Barnes v. Outlaw*, 188 Ariz. 401, 405, 937 P.2d 323, 327 (App. 1996), *aff'd in part and vacated in part on other grounds*, 192 Ariz. 283, 964 P.2d 484 (1998).

¶34 The court provided the following instruction to the jury on calculating the indemnity payments due to Nucor:

> Nucor is entitled to receive $7,278,859.00 from its primary insurance carriers as a part of their duty to indemnify Nucor. You must determine how much Nucor has received from its insurance carriers to date for indemnification and what monies, if any, is [sic] owed by Wausau to Nucor as a part of its duty to indemnify.

According to Nucor, the trial court should have given Nucor's proposed instruction:

> In determining the offset, if any, to which Wausau is entitled, you may apply payments by insurers under their bodily injury coverage only to amounts paid by Nucor for bodily injury claims and may apply payments by insurers under their property damage coverage only to amounts paid by Nucor for property damage claims. You may not apply payments made by insurers under their bodily injury coverage to amounts paid by Nucor for property damage claims and may not apply amounts paid by insurers under their property damage coverage to amounts paid by Nucor for bodily injury claims.

¶35 Although Nucor argues the court's instruction was wrong, it has not provided any authority that the instruction

the court gave misstates the law. Moreover, the court explained why it rejected the proposed instruction, as follows:

> **THE COURT:** [Y]ou can't structure your settlements post ruling in order to influence a party's rights that didn't settle out. They have certain rights and they have a right to have it called what it may be in terms of reality, not what the parties that settle it want to call it. I mean whatever buckets you got out of, that's fine. It's not relevant to this lawsuit.
>
> **MR. DEVRIES:** With that, if I'm following the court, the parties to the agreement can't characterize what it is.
>
> **THE COURT:** And bind the court and the nonsettling parties.

The court also rejected Nucor's instruction out of concern that the jury might award more than the total amount of indemnification to which Nucor was entitled:

> **THE COURT:** But again, I've got to pull the outside limit on this. In this lawsuit, all the parties were only obligated to pay 7.25, 7.28, whatever it is, million for indemnification. Period. Now, what have you paid? And that's what I'm –
>
> **MR. DEVRIES:** (Undecipherable.)
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> **THE COURT:** Right, for indemnification, yeah. I mean, you want to recover in excess of that and that's a good effort, but you're not entitled to recover in excess of that in this lawsuit and so by you putting a label on it after the fact, after this lawsuit has been initiated, I don't think that's a matter for the jury to determine.

¶36 We agree with the trial court's reasoning and find that the court did not abuse its discretion by refusing to give Nucor's proposed instruction. *See Emerald Bay Cmty. Ass'n v. Golden Eagle Ins. Corp.*, 31 Cal. Rptr. 3d 43, 53 (Ct. App. 2005) (holding that an insured's right of recovery is restricted to the actual amount of the loss).

2. Hartford Waived the Argument that the Trial Court Erroneously Calculated Prejudgment Interest

¶37 Hartford challenges the award of prejudgment interest to Wausau dating from April 22, 2003, the date when Wausau last paid for defense costs. Under Arizona law, "prejudgment interest on a liquidated claim is a matter of right." *Gemstar Ltd. v. Ernst & Young*, 185 Ariz. 493, 508, 917 P.2d 222, 237 (1996). Prejudgment interest begins to accrue when the creditor provides the debtor with "sufficient information and supporting data so as to enable the debtor to ascertain the amount owed." *Homes & Son Constr. Co., Inc. v. Bolo Corp.*, 22 Ariz. App. 303, 306, 526 P.2d 1258, 1261 (1974). The trial court, however, has discretion to determine when prejudgment interest begins, *see Trus Joist Corp. v. Safeco Ins. Co. of Am.*, 153 Ariz. 95, 110, 735 P.2d 125, 140 (App. 1986), especially where a sum may not become liquidated until determined by the court. *See Pueblo Santa Fe Townhomes Owners' Ass'n v. Transcontinental Ins. Co.*, 218 Ariz. 13, 24-25, ¶¶ 50-51, 178 P.3d 485, 496-97 (App. 2008);

In re Weinberg, 410 B.R. 19, 38 (9th Cir. B.A.P. 2009) (holding that the non-dischargeable claim could not be determined with exactness until the bankruptcy court fixed the amount owed).

¶38 Hartford, however, never challenged the trial court's award of prejudgment interest to Wausau. Hartford did not object to Wausau's interest calculation. Hartford has, as a result, waived the issue, and we will not consider it for the first time on appeal. *McDowell Mountain Ranch Land Coal. v. Vizcaino,* 190 Ariz. 1, 5, 945 P.2d 312, 316 (1997).

C. The Trial Court Did Not Err in Calculating the Fees Due to Wausau on Its Equitable Contribution Claim

1. A.R.S. § 12-341.01 Applies

¶39 Hartford, First State, and Twin City, joined by Nucor, challenge the award of attorneys' fees to Wausau under A.R.S. § 12-341.01. They argue the statute does not apply because Wausau's equitable contribution claim did not arise out of contract. Hartford attributes the error to the court's analysis of *California Casualty Insurance Co. v. American Family Mutual Insurance Co.*, 208 Ariz. 416, 94 P.3d 616 (App. 2004). The application of A.R.S. § 12-341.01(A) to a claim is a legal question we review de novo. *Hampton v. Glendale Union High Sch. Dist.*, 172 Ariz. 431, 433, 837 P.2d 1166, 1168 (App. 1992).

¶40 In *California Casualty*, we held that whether a party is entitled to equitable contribution is determined by the terms of the insurance contracts between the insured and its insurers. 208 Ariz. at 422, ¶ 24, 94 P.3d at 622. As we previously explained in our simultaneously filed opinion, equitable contribution is appropriate when the insurers insure the same risk, the risk insured against causes the loss sustained, and neither insurer is the primary insurer. *Id.* (*citing Mut. Ins. Co. v. Am. Cas. Co.*, 189 Ariz. 22, 25, 938 P.2d 71, 74 (App. 1996), *superseded by statute on other grounds*, *Jangula v. Ariz. Prop. & Cas. Ins. Guar. Fund*, 207 Ariz. 468, 470, ¶ 11, 88 P.3d 182, 184 (App. 2004)). In such situations, the contract is not peripheral to the issue between the parties. *Id.* (citation omitted); s*ee also W. Agr. Ins. Co. v. Indus. Indem. Ins. Co.*, 172 Ariz. 592, 597, 838 P.2d 1353, 1358 (App. 1992) (awarding attorneys' fees in an equitable contribution action between insurers).

¶41 Because Wausau was required to prove that Hartford and other insurers insured the same risk that it insured, the claim arises out of contract. *See id.*; *cf. A.H. v. Ariz. Prop. & Cas. Ins. Guar. Fund*, 190 Ariz. 526, 530, 950 P.2d 1147, 1151 (1997) (explaining that A.R.S. § 12-341.01(A) is applicable to the policy coverage dispute because the obligation is determined under the existing contract notwithstanding the application of a

statutory offset); *John Deere Ins. Co. v. W. Am. Ins. Grp.*, 175 Ariz. 215, 218-19, 854 P.2d 1201, 1204-05 (App. 1993) (awarding A.R.S. § 12-341.01(A) attorneys' fees to an insurer in a declaratory judgment action to determine which insurer provided primary coverage).

¶42 Hartford, First State, and Twin City attempt to distinguish *California Casualty* by arguing that it required resolution of a dispute between insurers about an exclusionary clause. In this case, they contend, the only "contested" action was between Nucor and Wausau.

¶43 Hartford overlooks the fact that it asserted seventeen affirmative defenses in response to Wausau's cross-claim on the basis that the underlying claims were barred under the Hartford policy's terms and conditions. Resolution of such claims requires construction of an insurance contract. Thereafter, Hartford did not raise defenses at trial and chose not to participate. In briefing the fee issue, Hartford did not contest Wausau's entitlement to fees, but argued that the maximum award should only be $67,440.52.

¶44 On this record, we cannot determine that Hartford never contested Wausau's claim and that the dispute, albeit limited in duration, did not arise out of a contract. Accordingly, we affirm the award of fees to Wausau on its equitable contribution claim.

2. The Trial Court Erred by Calculating Wausau's Fee Liability Based Upon the Defense Cost Allocation Formula

¶45 Nucor challenges the trial court's employment of the time-on-the-risk formula in determining Wausau's fee liability. We review the calculation of the amount of fees for abuse of discretion. *Orfaly*, 209 Ariz. at 266, ¶ 21, 99 P.3d at 1036.

¶46 The court did not order Wausau to pay all $7,785,485.87 in attorneys' fees and $133,112.05 in costs. Nucor contends that the amount reflected a deduction for fees incurred with respect to Wausau's cross-complaint, Hartford's bad faith claim, and "any work that was not related to the prosecution of its duty to defend and duty to indemnify claims or work that ultimately reduced Wausau's liability."

¶47 Nucor complains that a 17.5% fee allocation is inappropriate because Wausau continued to litigate after other insurers settled and consequently forced Nucor to incur far more fees. Wausau counters that Nucor litigated with dozens of insurers, not just Wausau, and Nucor incurred fees from bad faith claims, none of which were brought against Wausau.

¶48 We can affirm a fee award if it has any reasonable basis. *See Radkowsky v. Provident Life & Acc. Ins. Co.*, 196 Ariz. 110, 113, ¶ 18, 993 P.2d 1074, 1077 (App. 1999). We, however, find no authority supporting use of the time-on-the-risk formula for allocating attorneys' fees, as opposed to

defense costs in the underlying action. Moreover, we agree that the 17.3% allocation approach is particularly inappropriate because all Nucor's post-January 2005 fee liabilities were attributable only to its prosecution of claims against Wausau. The formula is also inconsistent with the court's limitation of Wausau's fee recovery from Hartford to the time it spent litigating its contribution claim against Wausau. Accordingly, we vacate the fee award and remand this case for reassessment in accordance with the principles of *China Doll*.[12]

V. Phase IV

¶49 During the final trial phase, the court ruled on claims Nucor had brought in its capacity as Travelers' assignee. Nucor/Travelers and Wausau filed cross-motions for partial summary judgment on whether Travelers and Wausau's policies insured the same risk notwithstanding pollution exclusion provisions, and whether post-1971 policies could be considered in the equitable contribution analysis. Ultimately, the court granted partial summary judgment to Wausau on Nucor's claim for equitable contribution as Travelers' assignee.

[12] Nucor also argues that it is entitled to prejudgment interest on its attorneys' fees and costs award from May 12, 2008, the date of the award. Because we are remanding the fee award, we will allow the court to address the issue on remand.

¶50 On appeal, Nucor/Travelers challenges the Phase IV rulings to the extent they: (1) declined to hear evidence as to which policies covered the loss and based the equitable contribution action on twenty-three years of coverage; (2) reaffirmed the court's previous allocation of a contribution share to post-1970 exclusion policies; and (3) held that those policies cannot be eliminated from the contribution analysis because they cover the same risk.

A. The Trial Court Properly Rejected Nucor/Traveler's Request for Fact Finding When an Actual Injury Occurred.

¶51 Travelers insured Nucor between 1961 and 1966 and 1975 and 1984. During Phase IV, but prior to the filing of the cross-motions for summary judgment, Nucor/Travelers raised factual issues as to whether the injuries in fact occurred prior to 1968. The court declined to engage in fact finding in December 2008.

¶52 According to Nucor, the evidence showed that it did not cause contamination or exposure until some or all of Travelers' policies had expired, and consequently Travelers should have had no coverage obligation for injuries incurred in the 1960s. As a result, Nucor argues that Nucor/Travelers should be able to introduce evidence reducing the coverage period to eliminate the 1961 to 1968 payments, along with its share of indemnity. We disagree.

¶53 As assignee, Nucor/Travelers would generally bear the burden of establishing coverage under a CGL policy,[13] including such issues as when the insured actually sustained damage. *Associated Aviation Underwriters v. Wood*, 209 Ariz. 137, 160, ¶ 71, 98 P.3d 572, 595 (App. 2004), *cert. denied by Global Aerospace, Inc. v. Wood*, 546 U.S. 877 (2005). Here, the trial court was not writing on a blank slate. Nucor had steadily maintained for years that it was entitled to indemnity under each of Travelers' policies and, on summary judgment, failed to dispute that it was alleging that contamination "began in 1958 and continued throughout all the relevant policy periods, i.e., through 1985." Nucor persuaded the court that all of the policies provided coverage under a "continuous trigger theory."

¶54 As an assignee in Phase IV, however, Nucor attempted to disclaim arguments on which it had previously recovered and its admissions as to the date of injury by arguing that Travelers owned no indemnity coverage under its 1961-1966 policies. The trial court was not persuaded because it was mindful that a party having benefitted from a position it had taken in a proceeding should not be allowed to take an inconsistent position in a later proceeding to avoid the "risk

[13] Prior to 1986 "CGL" stood for "comprehensive general liability" but now stands for "commercial general liability." *Desert Mountain Props. Ltd. P'ship v. Liberty Mut. Fire Ins. Co.*, 225 Ariz. 194, 198 n.2, ¶ 4, 236 P.3d 421, 425 (App. 2010) (citations omitted).

of inconsistent results and the perceived unseemliness of the litigant's conduct." *See* Wright & Miller, *Federal Practice & Procedure*, § 4477 at 781 (2d ed. 1986). The court was also mindful that the principle applied in the assignee context. *See Peterson v. Am. Family Mut. Ins. Co.*, 160 N.W.2d 541, 545 (Minn. 1968) (holding that because the insured had testified to his knowledge of the hazards and his motives, purposes, and reasons for his action, "neither he nor his assignee may now be heard to contradict or impeach that testimony"); *see generally INS Investigations Bureau, Inc. v. Lee*, 709 N.E.2d 736, 741 (Ind. Ct. App. 1999) (explaining that an assignment by an insurer to an insured may undermine public policy when the insured takes inconsistent positions in the same litigation when pursuing the assigned claim, but identifying no such circumstance in that case). Because Travelers relied on coverage to settle with and indemnify Nucor for introducing TCE into the environment, the trial court correctly determined there was no factual dispute to resolve.

B. As a Matter of Law, the Trial Court Properly Held that the Post-1971 Policies Covered the Same Risk and the TCE Release Qualified as "Sudden and Accidental"

¶55 During Phase IV, after Nucor had settled for $4.3 million with Travelers, it reversed its position and argued Travelers owed nothing under the policies after 1971 based on a

pollution exclusion. Nucor/Travelers further claimed it was entitled via its contribution claim to recover Travelers' overpayment because the court had previously misapplied the equitable contribution rules. Under this newly-urged approach, the 1975-1984 Travelers policies and the 1972-1975 Hartford policies would not apply to the indemnity allocation, thereby inflating Wausau's pro rata share. The court rejected the argument in resolving the parties' cross-motions for summary judgment, a ruling we review de novo. *Hamill*, 225 Ariz. at 387, ¶ 5, 238 P.3d at 655.

1. As a Matter of Law, the Trial Court Must Consider All of the Policies for Equitable Contribution Purposes Notwithstanding the "Sudden and Accidental" Pollution Exclusion

¶56 Nucor challenges the trial court's inclusion of all policies in the equitable contribution analysis, including those with or without a pollution exclusion. Although some variations exist, all of the relevant insurance policies generally provided that the insurers would pay "all sums which the insured shall become legally obligated to pay as damages because of bodily injury or property damage to which this insurance applies, caused by an occurrence." Beginning on June 1, 1971, all of Nucor's policies contained a pollution exclusion, providing in relevant part that:

> This insurance shall not apply: to bodily injury or property damage arising out of the discharge, dispersal, release or escape of smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, liquids or gases, waste materials or other irritants, contaminants or pollutants into or upon land, the atmosphere or any water course or body of water; but this exclusion does not apply if such discharge, dispersal, release or escape is sudden and accidental.

Based on the distinction created by the new exclusion, Nucor/Travelers contends that the court erred because (1) the post-1971 policies excluded coverage for intentional releases even when the harm was unexpected and unintended, and (2) the policies insured different risks and could not be included in the equitable contribution allocation.

¶57 The argument fails to acknowledge that Nucor previously persuaded the trial court in 2005 that coverage existed under both pre- and post-exclusion policies. Nucor successfully argued then that the "sudden and accidental" phrase referred to expected releases. Similarly, Arizona law holds that the "sudden and accidental" exception "connotes a temporal quality." *Smith v. Hughes Aircraft Co.*, 22 F.3d 1432, 1437 (9th Cir. 1993).

¶58 On appeal, Nucor now asserts that the 2005 pollution exclusion ruling addressed "[t]he purely legal question" of "the meaning of 'sudden and accidental.'" The analysis, Nucor

contends, entailed no fact finding or application of the law to the facts. The record belies this argument.

¶59 The court explained its 2005 ruling in a Phase IV minute entry by stating that its "prior ruling interpreting those policies containing a 'sudden and accidental pollution exclusion' was that the TCE discharge to which Nucor admitted in its prior pleadings was within the coverage of these policies so long as Nucor did not intend or expect to pollute the environment when it released TCE." Contrary to Nucor's current argument, the court did interpret "a sudden and accidental" pollution exclusion and applied the interpretation to the relevant policies in making its ruling.

¶60 Nucor/Travelers, however, later maintained in 2009 that its adversaries had been correct that the pollution exclusion provisions excluded coverage, and Nucor "has never set forth any evidence that the releases were sudden and accidental." We disagree. For example, Nucor told the court in its 2004 summary judgment briefing that since "Nucor intended and expected for the waste to volatize into the atmosphere, the downward movement of TCE was necessarily accidental." Regarding occasional spills of TCE, as when beakers broke, Nucor stated: "This did not happen routinely or even every day, but instead on occasion. In short accidents occurred, for which Nucor is entitled to the insurance it paid for." Nucor also told the

court that evidence existed of sudden and accidental releases of TCE. As a result, the pollution exclusion cited by Wausau and other insurers in the cross-motion for summary judgment did not preclude coverage for the environmental claims Nucor had tendered. The trial court entered judgment for Nucor, and we decline to revisit the determination for Nucor/Travelers.

¶61 More fundamentally, Nucor's approach is at odds with basic equitable principles. We have previously disapproved a similar litigation tactic:

> Were we to accept the appellant's position, plaintiffs in lawsuits could well be placed in the anomalous position of winning by losing in trials to settled-out defendants. Such mock issues as might be developed in a case could impose unduly on the court and bring distortion into the judicial process.

Riexinger v. Ashton Co., 9 Ariz. App. 406, 409, 453 P.2d 235, 238 (1969) (holding that the first of two joint tortfeasors was entitled to credit on an adverse judgment for an amount paid by the second tortfeasor in settlement, even though the settling tortfeasor was later exonerated by a jury verdict). Equity looks to "substance rather than the form," *Kennedy v. Morrow*, 77 Ariz. 152, 155, 268 P.2d 326, 329 (1954), and precludes Nucor/Travelers from obtaining a fact-finding proceeding.[14]

[14] *Johnson v. County of Fresno* does not hold otherwise. 4 Cal Rptr. 3d 475 (Ct. App. 2003). Nucor is not merely using an assignment to its advantage; it is attempting to prevail on a

2. As a Matter of Law, the Post-1971 and Pre-1971 Policies Insured the Same Risk

¶62 Nucor alternatively contends that the equitable contribution analysis was flawed because, in light of the pollution exclusion provision, Travelers' and Hartford's post-1971 policies did not cover the same risk as Wausau's 1968-1972 policies. As previously discussed, equitable contribution applies when the policies insure the same risk. *See Granite State*, 125 Ariz. at 278, 609 P.2d at 93. According to Nucor, these post-1971 policies exclude liability and consequently relieve Travelers and Hartford of the obligation to pay indemnification costs for post-1971 risks. The net result would be that only Wausau is liable to Nucor/Travelers because Hartford and Travelers are relieved of coverage.

¶63 The absence of potential coverage is an affirmative defense to equitable contribution. *Safeco Ins. Co. of Am. v. Superior Court*, 44 Cal. Rptr. 3d 841, 846 (Ct. App. 2006); *accord Monticello Ins. Co. v. Essex Ins. Co.*, 76 Cal. Rptr. 3d 848, 856 (Ct. App. 2008) (defense costs). As the party seeking to establish the exclusion, Nucor/Travelers had the burden of proof. *See Keggi v. Northbrook Prop. & Cas. Ins. Co.*, 199 Ariz. 43, 46, ¶ 13, 13 P.3d 785, 788 (App. 2000).

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new claim on a basis factually and legally inconsistent with its prior statements or positions in the case.

¶64 The Washington Supreme Court had to construe "sudden" in a boiler and machinery policy and stated that: "It seems to us that the risk to the insurer would be the same, whether a break was instantaneous or began with a crack which developed over a period of time until the final cleavage occurred, as long as its progress was undetectable." *Anderson & Middleton Lumber Co. v. Lumbermen's Mut. Cas. Co.*, 333 P.2d 938, 940 (Wash. 1959); *accord Morton Int'l, Inc. v. Gen. Acc. Ins. Co. of Am.*, 629 A.2d 831, 865 (N.J. 1993) ("[T]he absence of 'suddenness' is a poor proxy for fault . . . ."), *cert. denied*, 512 U.S. 1245 (1994). Likewise, we find no difference in the "risk" covered by the pre-1971 and post-1971 policies. All policies covered potential bodily injury and/or property damage to third parties. The pollution exclusions reflected an attempt to distinguish how these injuries were initiated, and were not, in our view, intended to limit the nature of the risk.

¶65 Nucor relies upon *Home Insurance Co. v. Cincinnati Insurance Co.* as support for its disparate risk argument. 821 N.E.2d 269 (Ill. 2004). There, the Illinois Supreme Court found a discrepancy in the type of risk insured because one insurer supplied primary coverage and the other provided excess coverage. *Id.* at 276; *accord Signal Cos. v. Harbor Ins. Co.*, 165 Cal. Rptr. 799, 805-06 (1980). Because both Travelers and

Hartford supplied primary insurance to Nucor, *Home Insurance* is inapplicable.[15]

¶66 Moreover, even under Nucor's own analysis the risks covered are the same. Nucor argued in a successful 2004 summary judgment motion that the pollution exclusion in insurance policies issued from June 1971 through 1985 did not bar coverage. Nucor spent years arguing that the post-pollution exclusion releases are inapplicable because Nucor's pollutant releases were "sudden and accidental," and Nucor's own evidence confirmed that finding. In light of the record, we agree that all policies, whether issued before or after 1971, cover the same risk. *See Intel Corp. v. Hartford Acc. & Indem. Co.*, 952 F.2d 1551, 1561-62 (9th Cir. 1991) (applying California law and affirming the grant of summary judgment because the undisputed facts established that the pollution occurrences were unintended and unexpected and the exclusion therefore did not apply).

VI. Trial Phase Attorneys' Fee Awards

¶67 Finally, Wausau challenges the court's determination that Nucor was the overall prevailing party. "The decision as to who is the successful party for purposes of awarding

[15] Equally unavailing are Nucor/Traveler's arguments based upon coverage issues in *California Casualty*, 208 Ariz. at 416, 94 P.3d at 616. In that case, a homeowner's policy covered a dog bite claim at the covered residence, but the renter's policy covering a different location did not. *Id.* at 418-22, ¶¶ 6-21, 94 P.3d at 618-22.

attorneys' fees is within the sole discretion of the trial court, and will not be disturbed on appeal if any reasonable basis exists for it." *Maleki v. Desert Palms Prof'l Props., L.L.C.*, 222 Ariz. 327, 334, ¶ 35, 214 P.3d 415, 422 (App. 2009) (quoting *Sanborn v. Brooker & Wake Prop. Mgmt., Inc.*, 178 Ariz. 425, 430, 874 P.2d 982, 987 (App. 1994)). In making that determination, we view the record in the light most favorable to upholding the trial court's decision. *Rowland v. Great States Ins. Co.*, 199 Ariz. 577, 587, ¶ 31, 20 P.3d 1158, 1168 (App. 2001).

¶68 The successful party is the "ultimate prevailing party in the litigation," and can be a party who "does not recover the full measure of relief" requested. *Desert Mountain*, 225 Ariz. at 213, ¶ 81, 236 P.3d at 440 (citation omitted). The court may use a "percentage of success factor" or a "totality of the litigation test" to determine the successful party. *Schwartz v. Farmers Ins. Co. of Ariz.*, 166 Ariz. 33, 38, 800 P.2d 20, 25 (App. 1990) (finding that the defendant was the successful party even when the plaintiff obtained a money judgment on one count "[i]n light of the substantial disparity in the relief requested on each count"); *see generally* Fee Manual § 2.6.1, at 2-17.

¶69 Although we find no abuse of discretion in the court's determination, we vacate the award to Nucor as the overall prevailing party of Phases I, II, and III because of our decision reversing the court's ruling in Phase III and remanding the matter for further proceedings. Once the court resolves the remaining issues, the court can again address the issue.

CONCLUSION

¶70 Based on the foregoing, we reverse the trial court's determination that Hartford paid no defense costs in light of the implicit jury finding that Hartford paid $2,808,290 in defense costs, and remand to allow the trial court to determine Wausau's indemnity.

¶71 We affirm the trial court's determination to deny Nucor attorneys' fees for Piper Marbury. We, however, vacate the fee award to Wausau based upon a time-on-the-risk calculation, along with any fees Wausau may have been awarded in prevailing on the insolvent insurer share issue and the fees awarded to Nucor as the overall prevailing party and remand the determination of those fees to the trial court. The trial court's rulings on the remaining issues are affirmed in all respects.

¶72 Wausau and Nucor have requested attorneys' fees and costs incurred in this appeal pursuant to A.R.S. § 12-341.01 and 12-341. Neither has prevailed on all issues. In the exercise

of our discretion, we deny all requests for attorneys' fees on appeal. Each party will also bear its own costs.

/s/
_____
MAURICE PORTLEY, Presiding Judge

CONCURRING:

/s/
_____
LAWRENCE F. WINTHROP, Judge

/s/
_____
ANN A. SCOTT TIMMER, Judge