NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3877-12T2

212 MARIN BOULEVARD, LLC;
247 MANILA AVENUE, LLC;
280 ERIE STREET, LLC;
317 JERSEY AVENUE, LLC;
354 COLE STREET, LLC;
389 MONMOUTH STREET, LLC;
415 BRUNSWICK STREET, LLC; and
446 NEWARK AVENUE, LLC,

Plaintiffs-Respondents/
Cross-Appellants,

v.

CHICAGO TITLE INSURANCE COMPANY,

Defendant-Appellant/
Cross-Respondent.

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CHICAGO TITLE INSURANCE COMPANY,

Third-Party Plaintiff,

v.

VESTED TITLE INC.; SUSAN KRUGER;
and CONSOLIDATED RAIL CORP.,

Third-Party Defendants.

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Argued October 21, 2014 – Decided May 20, 2015

Before Judges Fisher, Accurso and Manahan.

On appeal from the Superior Court of New Jersey, Law Division, Hudson County, Docket No. L-5801-09.

Arthur G. Jakoby argued the cause for appellant/cross-respondent (Herrick Feinstein, L.L.P., attorneys; Paul H. Schafhauser, Mr. Jakoby and K. Heather Robinson, on the briefs).

Lynda A. Bennett argued the cause for respondents/cross-appellants (Ms. Bennett and Frank T.M. Catalina, on the briefs).

PER CURIAM

In this appeal, we examine orders, which were certified by the motion judge as final, that summarily determined a title insurer's duty to defend its insureds when questions about the insureds' property rights were then and continue to be litigated in other forums. This appeal, filed by defendant Chicago Title Insurance Company, and the cross-appeal filed by plaintiffs also raise numerous questions regarding the insureds' request for counsel fees for having to defend their title. We conclude that the motion judge properly determined that Chicago Title had a duty to defend plaintiffs' title and that plaintiffs were entitled to counsel fees and expenses. But we also conclude that the judge erred with respect to the issues raised in plaintiffs' cross-appeal, specifically his determination that plaintiffs were not entitled to either a fee award for prosecuting this declaratory judgment action or prejudgment

interest, and we remand for further proceedings on those aspects.

The record reveals that, on June 24, 2003, Consolidated Rail Corporation (Conrail) and SLH Holding Corporation (SLH) entered into a contract whereby Conrail agreed to sell SLH approximately 6.2 acres of real property, eight parcels in total, located on Sixth Street in Jersey City. SLH assigned its rights to plaintiffs, eight limited liability companies[1] with the same sole member, Victoria Peslak Hyman, a Florida resident.

The property included a former railroad facility called the Sixth Street embankment, which was created in the early 1900's, and which consists of a series of elevated structures made of earth-filled stone retaining walls connected by bridges. Conrail had used part of the embankment as a turnaround space for trains until 1994. By 1997, all tracks and bridges on the embankment had been removed, the embankment was no longer used as a railway, and the facility was dismantled.

Prior to entering into the contract, Conrail sought and obtained the agreement of the New Jersey Department of Transportation to waive regulatory filings and publication

[1]Namely, 212 Marin Boulevard, L.L.C., 247 Manila Avenue, L.L.C., 280 Erie Street, L.L.C., 317 Jersey Avenue, L.L.C., 354 Cole Street, L.L.C., 389 Monmouth Street, L.L.C., 415 Brunswick Street, L.L.C., and 446 Newark Avenue, L.L.C.

requirements. Prior to closing, plaintiffs advised Chicago Title's agent, Vested Title, of the railway issues, and inquired whether Vested Title anticipated any problems with closing. Vested Title requested more information.

On July 11, 2005, Conrail advised plaintiffs that: the embankment was a "spur track"; in light of 49 U.S.C.A. § 10906, the Surface Transportation Board (STB) had no authority over it; and, consequently, no formal abandonment of the property needed to be filed.[2] Plaintiffs provided this information to Vested Title.

On July 12, 2005, Conrail delivered eight quitclaim deeds to plaintiffs for the eight parcels in exchange for $3 million. Vested Title then issued eight policies, one for each parcel, effective July 18, 2005, that provided indemnity coverage of $3 million dollars with unlimited defense coverage. Specifically, the policies obligated Chicago Title to defend plaintiffs in any litigation in which a third-party asserted a claim adverse to plaintiffs' title. The specific, relevant terms of the policy are discussed at greater detail later in this opinion.

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[2]Pursuant to the Interstate Commerce Commission Termination Act, 49 U.S.C.A. §§ 10101-11917, in particular § 10501, a railroad carrier is required to seek approval from the STB before abandoning railroad lines. 49 U.S.C.A. § 10903(a). Railroad carriers do not need approval for the abandonment of spur tracks. 49 U.S.C.A. § 10906.

Before long, plaintiffs became embroiled in disputes and lawsuits concerning the property. After the 2005 closing, one of the plaintiffs applied to the Jersey City Planning Board for subdivision approval. The Planning Board denied the application because Conrail had failed to receive STB approval to abandon the railway.

In September 2005, plaintiffs filed an action in lieu of prerogative writs,[3] claiming the Planning Board improperly denied its subdivision application through a mistaken contention that plaintiff's title was either defective or invalid due to the STB's failure to approve the abandonment of the embankment. In its counterclaim, Jersey City asserted the conveyances from Conrail and SLH were void ab initio because Jersey City was not given notice of the sale pursuant to its alleged right of first refusal existing pursuant to N.J.S.A. 48:12-125.1.[4]

Jersey City also pursued these theories by way of a collateral attack. In January 2006, Jersey City petitioned the STB for an order declaring that Conrail was required to obtain

[3] 212 Marin Boulevard, L.L.C. v. City of Jersey City, Docket No. HUD-L-4908-05.

[4] Presumably, the parties' use of the phrase "the right of first refusal" in the record and briefs refers to the entire procedure embodied in N.J.S.A. 48:12-125.1, which gives the government the right to purchase, and in some circumstances the right of first refusal to purchase, the properties in a railway transaction in which STB abandonment authority had been properly pursued.

STB authorization to abandon the embankment. Plaintiffs intervened, arguing the embankment was a spur track that did not require STB authorization for abandonment. In August 2007, the STB held the property in question was not a spur track but a rail line subject to the STB's jurisdiction until abandonment was authorized.

Conrail and plaintiffs sought review of the STB's decision in the United States Court of Appeals for the District of Columbia. On June 26, 2009, the court held that the STB lacked jurisdiction to consider Jersey City's petition and that both the STB decision and the STB order were void. Consol. Rail Corp. v. Surface Transp. Bd., 571 F.3d 13, 18-20 (D.C. Cir. 2009). The court of appeals determined that the federal district court had exclusive jurisdiction to determine the nature of the track in question and any abandonment requirements. Id. at 20.

On October 7, 2009, Jersey City filed an action in the United States District Court for the District of Columbia seeking a determination that the STB had jurisdiction to determine the status of the embankment or that the embankment was a railway — as opposed to a spur track — subjecting it to STB jurisdiction. Jersey City also argued that any property authorized for abandonment by the STB must first be offered to

the government for acquisition pursuant to N.J.S.A. 48:12-125.1. Plaintiffs intervened.

On September 28, 2010, the district court granted summary judgment and dismissed Jersey City's complaint based on its lack of standing. On appeal, the court of appeals determined that Jersey City did have standing and, consequently, reinstated the district court action, City of Jersey City v. Consol. Rail Corp., 668 F.3d 741, 745-46 (D.C. Cir. 2012), where the matter is still pending. On July 10, 2012, plaintiffs and Jersey City stipulated that the railway located on the property in question was subject to the jurisdiction of the STB, including the STB's abandonment requirements.

Back in February 2006, plaintiffs demanded that Chicago Title pay the attorneys' fees and costs incurred by them in these state and federal actions (hereafter "the rail use cases"). On October 25, 2007, Chicago Title denied plaintiffs' request for a defense and for indemnification under the policies, citing multiple policy exclusions. Nevertheless, Chicago Title advised plaintiffs to file a federal lawsuit to establish they were the title owners of the properties notwithstanding the STB's position.

On November 17, 2009, plaintiffs commenced the present action, seeking a declaration that the title policies in

question imposed on Chicago Title a duty to defend plaintiffs' title. As a result of motions filed between August 2010 and April 2011, the trial judge entered an order on April 29, 2011, holding that Chicago Title had a duty to defend plaintiffs in the rail use cases because plaintiffs' titles were therein attacked.

In June 2012, plaintiffs filed their first fee application, seeking approximately $5.5 million in connection with the rail use cases and ten others as well (the non-rail use cases). The trial judge denied plaintiffs' application and held plaintiffs were only entitled to fees in the rail use cases.

On September 26, 2012, plaintiffs filed a second fee application for approximately $1.7 million expended in the rail use cases. Chicago Title cross-moved for additional discovery. On January 8, 2013, the trial judge denied the latter and granted the former, ordering Chicago Title to pay $1,655,691.57 in attorneys' fees to plaintiffs regarding their participation in the rail use cases. In denying Chicago Title's motion for reconsideration, on March 14, 2013, the judge also certified as final the April 29, 2011, and January 8, 2013 orders.

Chicago Title filed a notice of appeal, seeking our review of the three certified orders. Plaintiffs cross-appeal from the March 14, 2013 order insofar as it denied both their application

for fees incurred in pursuing coverage by way of this suit and their application for an award of prejudgment interest.

We pause to observe that all issues as to all parties have not been resolved in the trial court and the parties are only here because the trial judge certified the orders as final, thereby ostensibly permitting this appeal and cross-appeal as a matter of right. At oral argument, we inquired whether Rule 4:42-2 permitted certification by the trial judge of the finality of any or all of these orders. In fact, we then directed the parties to file supplemental briefs on this subject. We have considered their arguments in support of the propriety of the judge's certifying as final these orders and conclude the efficient administration of justice is not hampered by permitting interlocutory review at this time, despite the fact that the better practice would have been for the parties to seek this court's permission for leave to pursue an interlocutory appeal.[5]

Consequently, we turn to the merits of these appeals, and consider: (1) whether application of the policy provisions or exclusions imposes or negates a duty to defend the rail use cases; (2) whether the judge erred in awarding fees and expenses

[5]In other words, we overlook the mistaken certification of these orders as final because, had leave to appeal been sought, as it should have, we would likely have granted the application.

in favor of plaintiffs in light of Chicago Title's contentions that the judge misapplied the appropriate standards, should have first permitted discovery, and awarded fees for matters unrelated to the defense of title in the rail use cases; and (3) whether, as plaintiffs argue in their cross-appeal, the judge erred by denying fees incurred in bringing this suit to vindicate their rights under the policy and in denying prejudgment interest.

I

In considering the judge's rulings regarding the application of the title policies, we separately consider (a) whether the rail use cases triggered a duty to defend and then, (b) whether the duty to defend is negated by exclusions contained in the policies. We answer both these questions in plaintiffs' favor.

A

As a general matter, an insurer of a title policy has three duties: a duty to indemnify; a duty to cure defects to title; and a duty to defend the insured if there is a judicial challenge to title. Enright v. Lubow, 202 N.J. Super. 58, 73 (App. Div. 1985), certif. denied, 104 N.J. 376 (1986). As a general matter, the duty to defend is determined by a side-by-

side comparison of the policy and the complaint, Sears Roebuck & Co. v. Nat'l Union Fire Ins. Co., 340 N.J. Super. 223, 241-42 (App. Div.), certif. denied, 169 N.J. 608 (2001), and is triggered when that comparison demonstrates that if the complaint's allegations were sustained, an insurer would be required to pay the judgment, id. at 241; see also Danek v. Hommer, 28 N.J. Super. 68, 77 (App. Div. 1953), aff'd, 15 N.J. 573 (1954). As a result, the duty to defend extends to complaints which are groundless, false, or even fraudulent. Sears Roebuck & Co., supra, 340 N.J. Super. at 241-42.

In addition, the duty to defend is not always limited to the allegations of the complaint, Hartford Accident & Indem. Co. v. Aetna Life & Cas. Ins. Co., 98 N.J. 18, 22 (1984); Polarome Int'l, Inc. v. Greenwich Ins. Co., 404 N.J. Super. 241, 274 (App. Div. 2008), certif. denied, 199 N.J. 133 (2009), and may extend to actions other than those brought directly against an insured, McMinn v. Damurjian, 105 N.J. Super. 132, 141-42 (Ch. Div. 1969). In fact, the duty to defend an insured's title may often require participation in an offensive posture in litigation. Ibid.; Rosario v. Haywood, 351 N.J. Super. 521, 534 (App. Div. 2002). With these considerations in mind, we consider the propriety of the summary judgment in question by comparing the claims in the rail use cases with the promises

made by Chicago Title in its title policies.[6]

Chicago Title broadly promised plaintiffs that it would insure "against loss or damage . . . sustained or incurred by the insured by reason of":

> 1. Title to the estate or interest described in Schedule A being vested other than as stated therein;
>
> 2. Any defect in or lien or encumbrance on the title;
>
> 3. Unmarketability of the title; [or]
>
> 4. Lack of a right of access to and from the land.

The policies also state:

> The Company will also pay the costs, attorneys' fees and expenses incurred in defense of the title, as insured, but only to the extent provided in the Conditions and Stipulations.
>
> . . . .
>
> Upon written request by the insured and subject to the options contained in Section 6 of these Conditions and Stipulations, the Company, at its own cost and without unreasonable delay, shall provide for the defense of an insured in litigation in which any third party asserts a claim adverse to the title or interest as insured, but only

[6]The judge's determination that Chicago Title had a duty to defend was decided at the summary judgment stage. His conclusions and interpretation of the record are not entitled to deference; we apply the same standard the judge applied in ruling on summary judgment. W.J.A. v. D.A., 210 N.J. 229, 237 (2012).

> as to those stated causes of action alleging a defect, lien or encumbrance or other matter insured against by this policy.

Although much of what Chicago Title argues relates to the application of certain exclusions in the policy, we nevertheless are required to focus first on whether the insuring clauses are impacted by the underlying actions and, therefore, impose on Chicago Title a duty to defend plaintiffs' title in those actions.

This determination does not require an in-depth analysis of everything that has or could be argued in the rail use cases. It is sufficient to look to the essence of those actions in determining whether Chicago Title's promise to defend has been triggered. In Jersey City's counterclaim in the Hudson County action, it claims a right of first refusal, that it was not given notice of the proposed conveyance of the property to plaintiffs and that, as a result, the conveyances to plaintiffs were "void." Similar allegations were asserted in the federal action Jersey City commenced in the District of Columbia. In these proceedings, Chicago Title has described the nature of Jersey City's claims as seeking a determination that the transfers from Conrail to plaintiffs are "void."

These claims fall within the insuring clauses of the policies in question, and the trial judge correctly drew that

same conclusion by way of summary judgment.

B

Chicago Title, however, further contends that its obligation to defend is negated by clear and unambiguous exclusions contained in the policies.

To begin, there is no question the exclusions were presented in an open and obvious way to the insureds.[7] Chicago Title is, therefore, entitled to rely on and obtain enforcement of any applicable exclusion so long as it can be said the exclusion is "specific, plain, clear, prominent, and not contrary to public policy." Flomerfelt v. Cardiello, 202 N.J. 432, 441 (2010) (internal quotation marks omitted). Chicago Title argues that any one or more of three particular exclusions, which it refers to as the "use," "character," and "police power" exclusions, negated its obligation to defend.

The use exclusion. This so-called use exclusion negates Chicago Title's duty to defend or indemnify for losses that "arise by reason of . . . [a]ny law, ordinance or governmental regulation . . . restricting, regulating, prohibiting or relating to . . . the occupancy, use, or enjoyment of the land."

[7]That is, in bold type, the insuring clause is prefaced with the following: "SUBJECT TO THE EXCLUSIONS FROM COVERAGE, THE EXCEPTIONS FROM COVERAGE CONTAINED IN SCHEDULE B AND THE CONDITIONS AND STIPULATIONS."

Chicago Title argues that this exclusion is designed to vindicate the concept that "a title search involves only a search of public records involving title" and, therefore, the insurer neither offers coverage, nor does the insured have a reasonable expectation of coverage, for damages caused by the use to which the property is put to the extent the use is not reflected in the public records. See, e.g., Bear Fritz Land Co. v. Kachemak Bay Title Agency, Inc., 920 P.2d 759, 761 (Alaska 1996) (recognizing that title insurance does not guarantee "'the new owner will be able to develop the property without restriction'").

In seeking application of this exclusion, Chicago Title argues that Jersey City's claim in the federal litigation is based on the theory that Conrail could not abandon the rail line without the STB's approval, thereby implicating the use to which the property could be put; Chicago Title further argues that without STB approval the property remains burdened by Conrail's right of way and, consequently, the underlying claim constitutes a claim "affecting the [p]roperty's use." This tangled description of the nature of the underlying claims does not support the argument that this exclusion applies here. Jersey City has asserted in the rail use cases that the sale of the embankment is void – admittedly because of the nature of the use

to which the property had been dedicated. This contention goes directly to the conveyance of title to plaintiffs and does not trigger this exclusion. The circumstances are a far cry from what the exclusion was meant to address — claims that a property owner intended to put property to a particular use eventually determined to be precluded.

The question in the rail use actions concerns Conrail's ability to convey the title for which plaintiffs contracted, not whether plaintiffs will be able to use the property for the purposes inherent in the title conveyed. In short, the underlying actions do not concern whether plaintiffs may — or must — operate a rail line on the property. Only if we were to give this use exclusion a tortured reading or interpret it in a very broad and sweeping way would it be remotely implicated. The law, however, requires the opposite; we read and enforce exclusions narrowly. See Voorhees v. Preferred Mut. Ins. Co., 128 N.J. 165, 176 (1992); Morrone v. Harleysville Mut. Ins. Co., 283 N.J. Super. 411, 420 (App. Div. 1995). We, thus, reject Chicago Title's argument regarding the so-called use exclusion.

The character exclusion. The second exclusion urged by Chicago Title excludes coverage for losses resulting from "[a]ny law, ordinance or governmental regulation . . . restricting, regulating, prohibiting or relating to . . . the character,

dimensions or location of any improvement now or hereafter erected on the land" (emphasis added). Again, the claims asserted against plaintiffs in the rail use cases reveal that it is not the character of the land that is under attack. At best from Chicago Title's point of view, the questions posed in the rail use cases constitute an attack on the conveyance because of the character of the property, i.e., Conrail could not convey this railroad embankment without STB approval. That is not the same as there being a prohibition on plaintiffs' use of the property as something other than a railroad facility.

The police power exclusion. The third exclusion relied upon by Chicago Title excludes coverage for loss resulting from "[a]ny governmental police power not excluded by [the section that includes the first two exclusions considered above] except to the extent that a notice of the exercise thereof or a notice of a defect, lien or encumbrance resulting from a violation or alleged violation affecting the land has been recorded in the public records at Date of Policy." In essence, the intent of this exclusion was to preclude coverage when governmental police power has been exercised or threatened with regard to the property or its structures; it places the burden on the recipient of title to investigate the effect of local ordinances and land resolutions on the property. See Aldrich v. Hawrylo,

281 N.J. Super. 201, 210-11 (App. Div. 1995), appeal dismissed, 146 N.J. 493 (1996). Again, Chicago Title's invocation of this exclusion misses the point. Jersey City claims the conveyances to plaintiffs were void; it is not seeking or attempting to exercise its police power regarding plaintiffs' anticipated use of the property.

There being no exclusion applicable to the underlying matters, we affirm the summary judgment entered in favor of plaintiffs regarding Chicago Title's duty to defend. With that we turn to the disputes concerning plaintiffs' fee application.

II

Chicago Title contends the award to plaintiffs for their defense costs, fees, and expenses, in the total amount of $1,655,691.57, was erroneous.

We start by recognizing that appellate courts will review a fee award and intervene only when there has been an abuse of discretion, Rendine v. Pantzer, 141 N.J. 292, 317 (1995), which results when a decision is made "'without a rational explanation, inexplicably departed from established policies, or rested on an impermissible basis,'" Flagg v. Essex Cnty. Prosecutor, 171 N.J. 561, 571 (2002); Masone v. Levine, 382 N.J. Super. 181, 193 (App. Div. 2005).

Chicago Title first argues the judge awarded fees without

taking into consideration the language of the policies, citing section 4(a), which states:

> [t]he Company shall have the right to select counsel of its choice (subject to the right of the insured to object for reasonable cause) to represent the insured as to those stated causes of action and shall not be liable for and will not pay the fees of any other counsel. The Company will not pay any fees, costs or expenses incurred by the insured in the defense of those causes of action which allege matters not insured against by this policy.

Chicago Title argues the judge erred by awarding fees and costs related to plaintiffs' affirmative claims for money damages in the Hudson County action that it believes were not in relation to a defense of title.[8] For example, Chicago Title alludes to amounts billed for drafting plaintiffs' first amended complaint in the Hudson County action that included causes of action such as malicious prosecution and concert of action that Chicago Title contends were unrelated to the status of plaintiffs' title. We reject this and other similar contentions. Plaintiffs' efforts in the Hudson County action were designed to defend against Jersey City's attempts to interfere with their title to the properties.

Similarly, Chicago Title asserts the judge erred by

[8]The judge denied compensation for work done prior to tendering the defense to Chicago Title, reducing the fee application by nearly $93,000.

awarding fees outside the scope of the rail use cases. For example, Chicago Titles argues plaintiffs were billed by counsel for attending public meetings, lobbying efforts, tax issues, and other alleged unrelated events. We find no abuse in the judge's discretion to award fees for these activities. There is nothing about the policy language to suggest that the promise to pay costs incurred in the defense of title would be strictly limited to the particular confines of the underlying lawsuits and would not extend to other efforts to vindicate the title conveyed.

Chicago Title also argues that the judge erred by improperly evaluating plaintiffs' second fee application by incorrectly applying the standards set forth in RPC 1.5(a). We disagree.

The judge was presented with voluminous material concerning plaintiffs' fees and expenses, including plaintiffs' six attorney certifications with related attachments and the report of Chicago Title's expert. Ultimately, the judge concluded that plaintiffs adequately addressed the factors set forth in RPC 1.5(a). And although the judge did not separately address each of the factors, he analyzed the reasonableness of the billing charges in detail and confirmed that plaintiffs were not reimbursed for non-applicable actions, that there were no duplicative billing entries, that there were no unnecessary

billing events, and that no other discovery was needed for the court to fully assess the application.

Parties, of course, can contractually agree to pay attorneys' fees. N. Bergen Rex Transp., Inc. v. Trailer Leasing Co., 158 N.J. 561, 570 (1999). Here, the policies contained Chicago Title's promise to pay its insureds' costs, attorneys' fees, and expenses in the defense of title. In contract-based claims for attorneys' fees, Rule 4:42-9(b) incorporates RPC 1.5(a). City of Englewood v. Exxon Mobile Corp., 406 N.J. Super. 110, 123-25 (App. Div.), certif. denied, 199 N.J. 515 (2009).

Pursuant to RPC 1.5, eight factors to determine whether or not legal fees are reasonable must be applied:

> 1) the time and labor required, the novelty and difficulty of the questions involved, and 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;
>
> 8) whether the fee is fixed or contingent.

See also Furst v. Einstein Moomjy Inc., 182 N.J. 1, 22 (2004). The starting point in determining a proper fee award is the "lodestar," which is determined by the hours reasonably expended multiplied by a reasonable hourly rate. Rendine, supra, 141 N.J. at 337.

Chicago Title asserts that the judge improperly evaluated plaintiffs' second fee application and that the supporting certifications were conclusory. Chicago Title complains that the certifications did not explain the factual basis for why the fees were reasonable and necessary, and also that no special skill was required to perform various tasks. We find no abuse of discretion in the judge's resolution of these contentions. The certifications were highly detailed and appended a large number of exhibits suggesting the necessity of the billing entries. For example, the submission of Fritz R. Kahn, Esq., attached fifty-seven of the firm's invoices of nearly 200 pages, and he certified he had reviewed each to verify the charges were directly related to the rail use cases. The invoices contained significant detail about the attorney's precise actions and

contained charts and tables that summarized the fees, hours, and rates for the rail use cases. The judge culled though the submitted documents and, where he deemed appropriate, eliminated non-related fees.

We also reject Chicago Title's argument that the judge failed to take into consideration plaintiffs' unsuccessful claims in the rail use cases. For example, Chicago Title argues it should not be required to pay fees based on plaintiffs' theories about spur tracks, which proved unsuccessful.[9] Again, we find no abuse of discretion in this regard. An insured abandoned by an insurer, which had promised to defend its insured's title, should not necessarily be deprived of fees and expenses incurred in pursuing a theory that proved unsuccessful. The matter rested within the judge's discretion to determine the

[9]The federal action is not yet ended and any concessions made by plaintiffs in that action, such as the embankment's status as a railway and not a spur track, may or may not affect plaintiffs' titles to the properties. Also, there was evidence in the record to support the spur track theory. Chicago Title was well-apprised of potential issues with spur tracks and railways due to relevant underwriting knowledge and guidelines about railroad abandonment issues. Importantly, the spur track theory was proposed in the STB and district court proceedings, where plaintiffs needed to intervene to protect their rights related to the properties. Without acting and challenging Jersey City's allegations about the nature of the tracks, plaintiffs may have been barred or hindered from subsequently protecting their titles. Thus, when considering all of the surrounding circumstances, the judge did not abuse his discretion when he rejected Chicago Title's argument.

reasonableness of the insured's failed theory. See Packard-Bamberger & Co. v. Collier, 167 N.J. 427, 446-47 (2001); Singer v. State, 95 N.J. 487, 500 (1984).

Even though the judge did not address each of the factors embodied in RPC 1.5(a), a review of the record as a whole revealed the applicable standards were satisfied. For example, Chicago Title complained about the number of attorneys working on the cases, their respective levels of expertise, and their billing rates. Plaintiffs defended the number of attorneys assigned to the cases and the number of law firms involved by pointing out that different firms were hired due to various specialties — due to the complexities of the railway laws in question,[10] and explained that each firm played different roles in the cases. Having refused to participate in the defense, Chicago Title should not now be heard to quibble about the particular manner in which plaintiffs attempted to defend their title.

We also reject Chicago Title's contentions that the judge erred by awarding fees that were grossly exorbitant and unreasonable. Specifically, Chicago Title claims the judge

[10]The rail use cases implicated complex issues of constitutional law and arcane railway laws that required significant attention. See Tenafly Eruv Ass'n v. Borough of Tenafly, 195 Fed. App'x 93, 99 (3d Cir. 2006).

failed to thoroughly scrutinize the billing records, thereby allowing an award that contained excessive, redundant, and unreasonable charges. To the contrary, the record demonstrates that the judge thoroughly reviewed the billing entries and found that the fees sought were largely reasonable. For example, the judge found it was proper for counsel to "review" and "revise" documents, that plaintiffs' decision to change their legal theory as the rail use cases progressed had no effect on the fee award, and that plaintiffs were not required to submit an expert report for the fee application. Moreover, the judge held that all of the work was reasonably related to covered actions, that there were no duplicative billing entries, that the method of "block billing" counsel had used was not forbidden, and that the bills submitted by plaintiffs were reasonable and task-appropriate.

A trial judge has the discretion to determine if billing charges by attorneys are vague or improper. Rendine, supra, 141 N.J. at 337. Although billing entries should show how the hours were divided among counsel, in a fee application it is not always necessary to know the exact number of minutes devoted to each task, the precise details of an activity, or the achievements of each attorney working on the matter. The practice of law does not always work that way. It is sufficient

that a billing entry contains the hours spent on a general activity. Ibid. From such entries, a trial judge may ascertain the truth of what constitutes a reasonable amount of time for particular tasks based on his experience as both an attorney and judge and his feel of the case.

As mentioned, Chicago Title also complains of plaintiffs' counsel's use of block-billing. The entries to which Chicago Title cites, including numerous billing events identified in defendant's expert report, are not inappropriate. For example, Chicago Title claims that attorney activities such as reviewing emails and calling the client are unrelated to the underlying matter. Here, not only are the entries sufficiently detailed pursuant to Rendine, but they are directly related to the matters in which Chicago Title had a duty to defend plaintiffs' title. The entries provided sufficient information from which the trial judge could ascertain the reasonableness of the hours expended.

Chicago Title contends the judge erred by rejecting their discovery request as it would have provided them with a better opportunity to submit a more informative objection to plaintiffs' fee application. The judge concluded additional discovery was unnecessary because Chicago Title had already fully attacked plaintiffs' claims for fees in its responding

expert report[11] by identifying and analyzing problem areas in plaintiffs' submission. In addition, the judge reviewed numerous attorney certifications and exhibits about the billing statements and determined that the information available was "more than enough" to allow him to fully evaluate the fairness of the application. We find no abuse in this determination. See, e.g., Payton v. N.J. Tpk. Auth., 148 N.J. 524, 559 (1997); Medford v. Duggan, 323 N.J. Super. 127, 133 (App. Div. 1999).

Chicago Title also complains that the judge did not compel plaintiffs to disclose information pertaining to "settlement discussions" in the rail use cases, but required that it reimburse plaintiff for fees incurred in connection with those discussions. We find no merit in this argument. The content of the discussion was not necessary to a determination of whether it was reasonable for plaintiffs to have engaged in settlement negotiations.

To summarize, we find the judge did not abuse his discretion in ruling on plaintiffs' fee application or in fixing the compensable amount he deemed to be reasonable.

[11]The report of Steven A. Tasher, Esq., consisted of thirty pages, to which Tasher attached an additional eighteen-page chart. The report and chart effectively isolated the alleged problems with the fees while discussing the reasonableness of plaintiffs' application.

III

In their cross-appeal, plaintiffs contend the judge erred when he denied their supplemental application for fees and costs incurred in prosecuting this action and when the judge denied the request for prejudgment interest without explanation. We agree and reverse in both regards.

Specifically, plaintiffs argue the judge erred when he held the present suit was "akin to direct actions brought by an insured against the carrier to enforce coverage," and that Rule 4:42-9(a)(6) did not apply. The Rule allows for attorneys' fees in actions "upon a liability or indemnity policy of insurance, in favor of a successful claimant," R. 4:42-9(a)(6), and applies to the failure to defend "all such actions . . . in which the insurer or indemnitor is found therein to have failed to comply with its contractual undertakings," Pressler & Verniero, Current N.J. Court Rules, comment 2.6 on R. 4:42-9 (2015). The application of the Rule is discretionary, and it is not necessary that counsel fees be awarded "in every action upon a liability or indemnity policy." Iafelice v. Arpino, 319 N.J. Super. 581, 590-91 (App. Div. 1999). Plaintiffs concede the application of Rule 4:42-9(a)(6) is discretionary but argue the judge did not deny the request by exercising his discretion but because he determined the Rule did not apply in this

circumstance.

We agree with plaintiffs. Although the Rule has not been extended in favor of an insured who sues an insurer to enforce casualty or other forms of direct coverage, Auto Lenders Acceptance Corp. v. Gentilini Ford, Inc., 181 N.J. 245, 280 (2004); see also Walker Rogge, Inc. v. Chelsea Title & Guar. Co., 222 N.J. Super. 363, 376-77 (App. Div. 1988), rev'd in part on other grounds, 116 N.J. 517 (1989), fees may be awarded in favor of an insured and against a title carrier when the latter has failed to engage in litigation, causing the insured to defend title on its own, Sears Mortg. Corp. v. Rose, 134 N.J. 326, 356 (1993); Costagliola v. Lawyers Title Ins. Corp., 234 N.J. Super. 400, 407 (App. Div. 1988). Because the judge's decision on the supplemental fee application rested on the mistaken belief that Rule 4:42-9(a)(6) did not apply, we reverse. The judge should hereafter reconsider plaintiffs' application for these fees in conformity with these principles.

Plaintiffs also contend the judge erred when he denied plaintiffs' prejudgment interest request without providing a sound legal basis for his decision. That is, the judge only concluded that the request for prejudgment interest was a matter resting in his discretion and that equity dictated its denial. The judge did not further elaborate or explain.

To be sure, prejudgment interest is not a right and such an award rests within a court's discretion. See Benevenqa v. Digregorio, 325 N.J. Super. 27, 34 (App. Div. 1999), certif. denied, 163 N.J. 79 (2000). Nevertheless, a judge must explain how that discretion has been exercised; a mere assertion that a motion has been granted or denied by an unexplained reference to the judge's discretion is not sufficient. Masone, supra, 382 N.J. Super. at 193. Indeed, without an explanation of the judge's reasoning, we are unable to analyze whether the judge properly exercised his discretion. See R. 1:7-4. The judge should hereafter reconsider plaintiffs' application for interest in conformity with these principles.

Affirmed as to defendant's appeal; reversed and remanded as to plaintiffs' cross-appeal.