Superior Court of New Jersey

Appellate Division

Docket No. A-003914-23

MICHAEL HATTY and SUSAN HATTY (h/w),	:	CIVIL ACTION
Plaintiffs-Appellants,	:	ON APPEAL FROM THE FINAL ORDERS OF THE SUPERIOR COURT OF NEW JERSEY, LAW DIVISION, CAMDEN COUNTY
vs.	:	
WESTERN INDUSTRIES-NORTH, LLC, GLOUCESTER TERMINALS, LLC and PRODUCE SERVICES OF AMERICA, INC.,	:	Docket No. CAM-L-001685-19
	:	Sat Below:
	:	HON. MICHAEL J. KASSEL, J.S.C.
Defendants-Respondents.	:	

BRIEF ON BEHALF OF PLAINTIFFS-APPELLANTS

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TABLE OF CONTENTS

Page

Table of Judgments, Orders and Rulings being Appealed

TABLE OF AUTHORITIES

Page(s)

Cases:

Statutes & Other Authorities:

TABLE OF TRANSCRIPTS

Page

PROCEDURAL HISTORY

This is an appeal of four orders. On June 23, 2023, the trial court entered an order granting summary judgment in favor of defendant Gloucester Terminal, LLC ("Gloucester")[1]. (Pa12). On July 6, 2023, the trial court granted partial summary judgment in favor of Western Industries North, LLC ("Western") against Plaintiffs' claim for punitive damages.[2] (Pa10). The trial court denied Plaintiffs' motion for reconsideration of summary judgment in favor of Gloucester on September 8, 2023[3]. (Pa7). On July 6, 2023, the trial court dismissed as moot Plaintiffs' claim for punitive damages against Gloucester. (Pa9). On September 11, 2023, the trial court granted summary judgment in favor Western. (Pa5).

[1] 1T refers to Transcript of Motion, dated June 23, 2023.
[2] 2T refers to Transcript of Motion, dated July 6, 2023.
[3] 3T refers to Transcript of Motion, dated September 8, 2023.

STATEMENT OF FACTS

Plaintiff Michael Hatty worked for various fruit importers at the Gloucester Marine Terminal (Pa338 – Pa339), a facility that handles the import and export of a wide variety of produce and fruit internationally. (Pa952 – Pa953). This terminal facility is owned and controlled by Defendant, Gloucester. Mr. Hatty worked as a fruit expediter at this terminal facility. (Pa338 – Pa339). Defendant Western performed the fumigation activities. (Pa1298).

1. Fumigation Process

By operation of federal law, certain fruits, mainly grapes imported from South America, need to be fumigated once they are taken off the transport vessel. The fumigant used at the Gloucester Marine Terminal is called methyl bromide. (Pa1206). Methyl bromide is a very toxic fumigant gas used exclusively as a fumigant for controlling pests. (Pa1783). It has been classified as a "Restricted Use Pesticide" by the US Environmental Protection Agency (EPA), meaning that it may be purchased and used only by certified applicators or persons under their direct supervision. Id. It has caused severe poisonings and death during application due to inadvertent exposure, including premature entry into fumigated spaces, indicating the need for continuous monitoring in and around fumigation activities and sites as an integral part of good fumigation practices. Id.

Throughout the day, the fruit is offloaded into stacks located in Pier 8 and Pier 9 of the terminal. This offload area has been referred to throughout the course of this litigation as the "shed area". (Pa1244 – Pa1255). This subject transit shed area - the first sorting stop for fruit and commodities taken off delivering vessels - is located in the Gloucester Terminal pier area. The fumigation process is initiated in this offload shed area. This fumigation process occurs overnight. (Pa1210). This overnight fumigation process was performed by lowering tarps over the fruit and introducing the fumigation gas - methyl bromide - into the tarps. (Pa956).

After the methyl bromide was introduced to the fruit, the transit shed area needed to be "cleared" before Gloucester Terminal workers were allowed in to begin their work. (Pa1210 – Pa1211). Western was tasked with this duty. Id. Before the commodity was moved from the recently fumigated transit shed area, Western would take measurements for methyl bromide, and "clear" this shed area. Id. Western would deem the shed area "cleared" when air sampling measurements, taken immediately after fumigation in the shed area, showed a methyl bromide air level of lower than 5 parts per million (ppm).

These allowable methyl bromide air levels for the initial shed area (5 ppm) were established in the *Delaware River Region Best Management Practices* (Pa108 – Pa143), which was a set of worker safety standards and fumigant

exposure mitigation procedures established by Gloucester Terminals and other similar marine terminals. This guideline, in part, provided that an area that contained fumigated pallets of fruit, such as this transit shed, could be cleared once methyl bromide air levels reached a level less than 5 ppm; measurements above 5 ppm require manager notification. Id.

Next, after Western deemed the shed area "cleared," Western would inform Gloucester that the area was safe to be entered, and Gloucester workers would enter the shed area and then physically move the fruit from the shed to the warehouse "cooler" area. (Pa1245 – Pa1246). The separate coolers or "cold storage areas" were separated rooms, but all under one warehouse roof. Id. The "cold storage area" is a large refrigerator.

After the fruit was moved to the cold storage areas, Western would then take another methyl bromide air measurement in this cooler area, usually between the hours of 4:00 a.m. to 6:00 a.m., and before additional Gloucester employees entered to work in the cold storage areas and warehouse. (Pa959). These methyl bromide level measurements were recorded in documents called "Western Fumigation Cold Storage Facility Sampling Log." (Pa1230).

In addition to the *Best Management Practices* described above, Gloucester and Western used a written policy called "Fumigation Air Sampling Standard Operating Procedures" also known as "FASSOP." (Pa1465) The FASSOP

specifically guided morning (usually between 4:00 a.m. to 6:00 a.m.) methyl bromide measurement procedures for cold storage rooms. Id. Western developed these guidelines in conjunction with Gloucester. (Pa1344; Pa1358). The FASSOP and the *Best Management Practices*, together, guided the Terminal and Western Defendants as to permissible methyl bromide measurements in the terminal areas. (Pa1344).

The FASSOP is essentially the "standard operating procedures" of measuring methyl bromide levels in the air in cold storage areas. The FASSOP technically only applied to Western measurements taken in the morning hours, because Western would only take afternoon cold storage area measurements by request. (Pa1329). Additional afternoon measurements that would take place after the recently fumigated fruit *continued to sit in the cold storage area for the entire mornings*, would only be performed if explicitly requested. (Pa1327).

The subject FASSOP was created on February 12, 2012 (Pa1465) and directed Western and Gloucester how to safely proceed with morning measurements of the methyl bromide air levels in the cold storage areas. The FASSOP delineated two crucial methyl bromide levels that required immediate action on the part of both Western and Gloucester:

> If readings are above 5 ppm GLT will be notified, and they shall begin their mitigation procedure (as outlined in their BMP document)

> If readings are 10 ppm or above GLT will be notified. Access to area will be stopped and mitigation procedure implemented by GLT (as outlined in their BMP document).

Id.

5 ppm and 10 ppm of methyl bromide were essentially the "magic numbers" for methyl bromide measurement and treatment within the cold storage areas. The FASSOP is clear that during morning cold storage room measurements, prior to Gloucester worker interaction with the area, if Western found measurements above 5 ppm, then Western would immediately contact Gloucester, and mitigation measures must be taken. Id. At 10 ppm, that same notification is needed, mitigation measures begin, workers must be evacuated from the area, and further access to the terminal area is disallowed. Id.

Western taking afternoon measurements in the terminal's cold storage rooms was *not* a regular practice. The afternoon measurements had only started in or around March of 2017. (Pa1097 – Pa1098).

Guided by both *Best Management Practices* and the FASSOP, Gloucester and Western had specific protocols and required mitigation measures for when methyl bromide levels reached certain benchmarks, at least as it related to morning cold storage area measurements. (Pa1351 – Pa1352). Western would *sometimes* measure methyl bromide levels in the afternoons in the cold storage areas. Afternoon measurements were not required by the standard operating

procedures (the FASSOP and *Best Management Practices*). (Pa1356). The 5 ppm methyl bromide air level that would trigger mitigation measures was in fact an even stricter guideline than the one OSHA provided to similar fumigation processes. (Pa1419). In other words, Gloucester and Western Defendants voluntarily undertook stricter and safer air sampling measurements and methods than required by OSHA.

2. The concept of off-gassing

The fumigation concept called "off-gassing" is critical to understanding the factual basis of Plaintiffs' claims. It is also important that both the Western and Gloucester *knew* about off-gassing prior to 2017, with some relevant individuals being aware of this concept as early as 2012. (Pa1519).

After a commodity is fumigated with methyl bromide, that commodity will still release amounts of methyl bromide gas into the surrounding air, even after the initial post-fumigation aeration process was completed. Gloucester and Western knew that methyl bromide continues to off-gas from fruit and fruit packaging, not only initially immediately following fumigation, but continually for up to 72 hours following fumigation. (Pa.1466 – Pa1478; Pa1068). In other words, throughout the day and the following day, the fumigated commodities stored in cold storage areas continue to release methyl bromide into the

surrounding cooler and cold storage areas, where workers performed work every day.

LEGAL ARGUMENT

Point I

Standard of Review

Plaintiffs are appealing summary judgment orders. A request for summary judgment**,** should be granted only if "the pleadings, depositions, answers to interrogatories and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law." *R.* 4:46-2. Summary judgment must be denied if "the competent evidential materials presented, when viewed in the light most favorable to the non-moving party in consideration of the applicable evidentiary standard, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party." Ibid. This court reviews a grant of summary judgment de novo, using the same standard applied by the trial court. Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 536, 666 A.2d 146 (1995); Turner v. Wong, 363 N.J. Super. 186, 198-99, 832 A.2d 340 (App. Div. 2003).

Point II

THE COURT ERRED IN GRANTING SUMMARY JUDGMENT IN FAVOR OF GLOUCESTER TERMINALS, LLC BY FINDING THAT A GENERAL RELEASE SIGNED BY PLAINTIFF IN 2004 FOR AN ORTHOPEDIC ACHILLES TENDON INJURY SUFFERED WHILE WORKING AT GLOUCESTER MARINE TERMINALS PRECLUDED PLAINTIFF'S OCCUPATIONAL-EXPOSURE TOXIC TORTS CLAIMS FOR METHYL BROMIDE EXPOSURE WHICH WAS NOT KNOWN UNTIL MAY OF 2017. (Pa12; Pa7)

The trial court erred in granting Gloucester's motion for summary judgment finding that a general release that was executed on September 14, 2004, for an orthopedic injury – unrelated to present claim of methyl bromide toxicity – barred Plaintiff from asserting an occupational-exposure, toxic tort claim not known until May of 2017.

Appellants signed a general release, approximately twenty (20) years ago, when they settled a claim for an injury to Michael Hatty's left Achilles tendon that occurred in a slip and fall accident. (Pa572 – Pa574). Thus, the injury that was the subject of this twenty-year-old federal court case was limited to an ankle orthopedic injury and had nothing to do with his methyl bromide exposure. The trial court erred when it found that the language of the release barred unrelated claims such as methyl bromide exposure including future unrelated toxic tort exposure. None of the parties contend that the methyl bromide exposure is related to and/or arises out of the Achilles injury sustained by Mr. Hatty that is the subject of the release.

1. The general release does not bar Plaintiffs' unrelated claims.

The trial court erred by finding that the toxic tort injury Plaintiffs are now asserting are related to the orthopedic injury covered in the release. (Pa575 – Pa578). There is no dispute that a general release bars all known and unknown injuries **stemming from the same injury that is being released**. Consideration is being paid by the defendant to "buy their piece of mind" in the future. For example, if a plaintiff settles a case for a broken arm and enters into a general release for all known and unknown injuries related to that broken arm, the plaintiff would be barred from bringing a claim for posttraumatic arthritis developed in that arm that did not exist nor was known by the Plaintiff at the time they entered into the release. No one, including Plaintiff, disputes that. Another example showing the limited scope of a general release is if Plaintiff is rear ended by defendant driver and sustains a broken leg and signs a general release, and Plaintiff is rear ended by that same defendant driver 20 years later and sustains a broken neck, that general release would not bar Plaintiff from bringing a lawsuit to seek damages for that broken neck.

The trial court erroneously does not agree. However, and where the trial court erred, is the condition precedent for the general release to bar claims for the new injury is that the new injury needs to stem from the injury that was released in that general release. The trial court never performed that analysis;

nor does it have to. No one, including the defendants, have causally related the methyl bromide toxicity to the Achilles injury.

The release clearly states that it is releasing claims stemming from the "United States District Court for The District of New Jersey, Civil Action No.: 03-3530." (Pa575 – Pa578). That claim was for the Achilles injury. The trial court agreed that the subject release does not cover toxic tort, yet still erroneously ruled in favor of Gloucester:

> It was a release for an Achilles tendon tear, okay? The reason why I'm denying the motion for reconsideration for all the other reasons that were stated two months ago or a month and a half ago is that I am interpreting the release in the way that every release is interpreted. If that results in something unjust that an Appellate Division panel wants to undo, fair enough. But I'm trying to apply the law as I understand it even though it may lead -- I want to emphasize the word "may". I'll do it twice. I'm emphasizing the word "may". **It may be leading to an unjust result in this case because it leads to a result where there is a releasing for exposure to a toxic chemical by somebody who got this at the workforce when there was zero intent in my judgment to include that in 2004, an Achilles tendon tear**.

3T 31 6-21(Emphasis added). Therefore, all claims, known and unknown are barred that stem from the Achilles injury. Plaintiffs' claims are not an orthopedic injury that arise from the Achilles injury.

The case Isetts v. Borough of Roseland, 835 A.2d 330, 364 N.J.Super. 247 (N.J.Super.A.D.,2003) is instructive. This case shows that the language of the

subject release clearly indicates that Mr. Hatty intended to release his then existing claims against Gloucester, not those which were unrelated to his Achilles injury and had not yet accrued. While the main issue in Isetts regarded whether discovery in a subsequent suit was barred by a settlement agreement and release, the Isetts court nonetheless used language to explain that in releasing "any and all" rights and claims, a party release their *then existing* claim.

In Isetts, Plaintiff was a retired police officer, having formerly been employed by the Borough of Roseland Police Department. Isetts, 835 A.2d at 332. On January 24, 2000, plaintiff filed his first suit against defendants, alleging that because he objected to unlawful acts committed by various Roseland officials, he was subjected to retaliation and harassment in violation of CEPA. Id. The parties eventually resolved their differences and executed a settlement agreement on March 5, 2001, where Plaintiff received $650,000, accepted a paid leave of absence, and agreed to retire on September 1, 2001. Id.

Plaintiff also provided defendants with a general release which states, in relevant part:

> Plaintiff ... releases and gives up any and all claims, rights, actions and causes of action of any kind, both at law and equity, which he has, had or may have against the [non-settling defendants]. This General Release by plaintiff of all claims includes those of which he is not aware and those which are not specifically mentioned in this General Release. This Release applies to all claims resulting

> from anything that has happened up to the date of its execution by plaintiff. Plaintiff specifically releases these defendants from any and all claims, rights, actions and causes of action that were asserted or could have been asserted ...

Id. at 251.

The language in the release in Isetts was restrictive, like the orthopedic release Gloucester relies on. The court then addressed an argument that Gloucester has set forth, regarding settlements being in the interest of public policy:

> In seeking a broad interpretation of the release, defendants urge, first, that the settlement agreement is enforceable and that this State's public policy greatly favors settlements. This is true, but not relevant.
>
> That the settlement of litigation "ranks high in our public policy," only places this particular dispute in its setting. It does not mean that courts will rewrite or unduly expand settlement agreements in order to deem settled or waived things not legitimately encompassed. The settlement of lawsuits is favored not because of the salutary consequence of relieving "our overtaxed judicial and administrative calendars"—a benefit which seems to inform defendants' erroneous view of this agreement—but because of the notion that the parties to a dispute are in the best position to determine how to resolve a contested matter in a way which is least disadvantageous to everyone. In recognition of this principle, courts will strain to give effect to the terms of a settlement wherever possible. It follows that any action which would have the effect of vitiating the provisions of a particular settlement agreement and the concomitant effect of undermining public confidence in the settlement process in general, should not be countenanced.

Id. at 254.

The court continued: "[w]hile defendants contend that this approach requires a broad interpretation of the settlement agreement and release, in fact the policy in favor of settlement suggests only that the court should view the release with an assumption that the parties intended to terminate the then existing lawsuit." Id. at 254-255.

The jurisprudence advanced by Gloucester and incorrectly adopted by the trial court are all distinguishable. Gloucester relied on Panaccione v. Holowiak, 2008 WL 4876577 (N.J. Super. Ct. App. Div. Nov. 12, 2008), because it has similar language to the Hatty release. However, the subsequent claim or "injury" that occurred in Panaccione *was related to the first claim, and arose from, the first set of facts that occurred* (the transfer of the property), which is not what happened here.

In Panaccione, the defendant owned a 6.835-acre tract of residentially-zoned property on East Greystone Road in Old Bridge, and lived in a home situated in the middle of the property. Id. at *1. The property was protected by the New Jersey Freshwater Wetlands Protection Act. Id. In November 1999, defendant submitted a land development application (to create additional building plots) to Old Bridge Township seeking subdivision of the undivided property into three separate lots. Id. The township and the NJ Department of Environmental Protection approved the application. Id.

After obtaining subdivision approval in 2002, defendant decided to sell his residence. Id. Plaintiffs agreed to purchase Lot 60.12 from defendant for $935,000, and on August 3, 2005, the parties entered into a contract for sale. Id. At the October 28, 2005 closing, Defendant conveyed the property to plaintiffs via a bargain and sale deed. Id. At closing the parties executed a release stating:

> I release and give up any and all claims and rights which I may have against you. This releases all claims, including those of which I am not aware and those not mentioned in this Release. This Release applies to claims resulting from anything which has happened up to now. I specifically release the following claims:
>
> Any and all claims arising out of the transfer of title of premises known as 317 East Greystone Road, Old Bridge, New Jersey between the parties.

Panaccione at *6.

After closing, the parties got into a dispute about the contract *for the transfer of that original property, and about aspects of the original property:*

> Plaintiffs filed a multi-count complaint against defendant, NSS, the Township and the Board, alleging common law and statutory consumer fraud, nuisance, and tortious interference with their enjoyment of the property. In addition, or as an alternative to damages, plaintiffs' sought to void the Board's July 2, 2002 subdivision approval, which they contended was without knowledge of defendant's wetlands violations, and ultimately to enjoin defendant from developing the two parcels he still owned adjacent to their property.

Id. at *2.

The second "injury" that occurred after the release was signed was directly related to the property transfer – it was a fraud claim about the property transfer and property itself. Because the parties disputed the property boundaries of Lot 60.12 at time of closing, plaintiffs argued that the release should be limited to claims involving that dispute and that they could not have waived claims of which they were unaware. Id. at *6. The motion judge rejected this argument.

"Consequently, the judge dismissed plaintiffs' fraud-related claims in part because the broad language of the release prohibited them from seeking any relief from a lawsuit based on their contract." Id. The Superior Court found no fault with that reasoning. The court noted: "[a] general release, not restricted by its terms to particular claims or demands, ordinarily covers all claims and demands due at the time of its execution and within the contemplation of the parties." Moreover, when a release's language refers to "any and all" claims, as here, courts generally do not permit exceptions. Thus, the fact that plaintiffs may have been unaware of defendant's intentions *as to Lots 60.11 and 60.13*, in and of itself, does not entitle them to avoid the effect of the broad provisions of the general release. Id.

In Panaccione, the subsequent injury was related to the property that was dealt with in the original release. Here, Mr. Hatty's Achilles injury was entirely unrelated to the methyl bromide poisoning, which occurred years after.

In sum, the record is void of any medical connection between the orthopedic injury and Mr. Hatty's methyl bromide toxicity (defendants do not even argue that it does). As New Jersey law is clear, general releases are interpreted to cover future injuries stemming from the injury that is being released, the trial court erred in granting Gloucester Terminal's motion for summary judgment. That ruling should be reversed.

Point III

THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT IN FAVOR OF GLOUCESTER TERMINALS, LLC BY IGNORING THE EVIDENCE OF RECORD AND APPLYING THE WRONG MEDICAL CAUSATION STANDARD FOR PLAINTIFF TO PROVE HIS OCCUPATIONAL-EXPOSURE, TOXIC TORT INJURIES. (Pa12; Pa7)

Because the trial court erred in finding the release barred Plaintiff's methyl bromide toxicity, the court then engaged in a causation analysis. The court was trying to determine if Plaintiff could demonstrate causation based on exposure before the date of the release compared to after the signed release. This analysis is unnecessary since the release did not bar the claim. Therefore, Plaintiff does not have to demonstrate causation pre/post release. All plaintiff must show, is "frequency, regularity and proximity" to the subject chemical based on the toxic tort causation standard in Sholtis v. American Cyanamid Co. and its progeny. The record, viewed in a light most favorable to Plaintiff, shows that through the opinions of Dr. Richard Lynch, an industrial hygienist (Pa1466

– Pa1478; Pa1703 – Pa1706) and Dr. Robert Laumbauch, a board-certified medical doctor specializing in occupational exposures (Pa1772 – Pa1786), Plaintiff was exposed to methyl bromide with frequency, regularity and proximity and therefore can satisfy his causation burden.

However, should this Honorable Court find, that plaintiff must demonstrate pre/post release causation, the below briefing shows that this burden has also been satisfied. The trial court applied the wrong causation standard – which it did not have to do in the first place.

1. The trial court did not apply the "frequency, regularity and proximity" test.

The trial court underwent a simple negligence analysis of causation to see if Plaintiff can satisfy pre/post release causation. This is the wrong causation analysis to undertake and whether the exposure occurred pre/post the general release is not relevant.

There is no dispute that this is an occupational exposure, toxic tort case. In the toxic-tort field, the modern trend has been to relax or broaden the standard of determining medical causation. Vassallo v. American Coding & Marking Ink. Co., 784 A.2d 734, 739, 345 N.J.Super. 207, 214 (N.J.Super.A.D., 2001). This is because, in the toxic-tort context, "proof that a defendant's conduct caused decedent's injuries is more subtle and sophisticated than proof in cases concerned with more traditional torts." Id. citing Landrigan v. Celotex Corp.,

127 N.J. 404, 413, 605 A.2d 1079 (1992). "A less traditional standard is essential because, unlike the typical personal injury action, the toxic-tort case often involves: (1) exposure of long duration, chronic and repeated; (2) exposure to multiple toxins; and (3) harm normally resulting from biochemical disruption or acute toxic substance as opposed to physical trauma." Id. (emphasis added).

"Thus, in workplace toxic exposure cases, we have adopted the 'frequency, regularity and proximity' test first pronounced in Sholtis v. American Cyanamid Co., 238 N.J.Super. 8, 28–29, 568 A.2d 1196 (App.Div.1989), in determining whether plaintiff has made a prima facie case of medical causation." Id. Using that test, "Plaintiff must "prove 'an exposure of sufficient frequency, with a regularity of contact, and with the product in close proximity' to the plaintiff." Id.

In Vassallo, Plaintiff Margaret Vassallo alleged that, while working as a sewing worker at the State of New Jersey's Woodbine Development Center, she was exposed to a product called Resisto marking ink. Vassallo, 345 N.J. Super 207 at 210. The trial court granted defendants summary judgment, concluding that plaintiff's experts' reports failed to present a causation nexus between plaintiff's exposure to the product and her conditions. Id.

In granting summary judgment to defendants, the trial court found that the expert reports submitted by plaintiffs did not address what "needed to be

addressed," that is, the effect of the toxic substances in the ink, and how exposures to those toxic substances were causally related to plaintiff's medical condition." Id. at 213. The court observed that the reports in fact focused predominately on plaintiff's exposure to the pesticide Dursban in 1988, and that "[n]one of the reports indicate that the present symptoms that [plaintiff] has ... were directly related in any way or caused by the ink as opposed to other causative forces." Id. Plaintiffs moved for reconsideration. In support of the motion, they submitted a second report from a doctor who noted that he had examined Resisto's MSDS and twenty-one medical reports and records of plaintiff's treatment. He noted that plaintiff "came in frequent contact with the use of Resisto Marking Ink." He concluded that the exposure "aggravated a preexisting situation and was a major contributing factor for her persistent neurological and pulmonary problems. Both diethylaminoethanol and formaldehyde can affect the pulmonary system and the central nervous system." Id. In denying the motion for reconsideration the Vassallo trial court stood by its view that plaintiff had not provided "causation reports."

The Appellate Division overturned the ruling of the Vassallo trial court by explaining that in workplace toxic exposure cases, we have adopted the "frequency, regularity and proximity" test, which is a relaxed causation standard. Id. The court then explained:

> Here, if we credit plaintiff's proofs, we have direct and circumstantial evidence that she was regularly and frequently exposed to Resisto marking ink during her employment with the State during 1990 through 1995. She worked at the Skillman facility from 7:30 a.m. to 3:30 p.m., five days per week, during which she marked clothing labels with the use of a heat seal machine and an ink marking device. The marking device consisted of a wheel, pressed into an ink pad. Plaintiff "re-inked" the pad on a frequent basis. When the ink was applied to the material, a heat sealing machine was applied. Plaintiff spent approximately twenty-five percent of her time marking clothing. Often the air was poorly ventilated. During this time, she experienced dizzy spells, chest pains, and eye irritation. On some occasions, the ink marking machine malfunctioned causing ink to run onto her hands. In our view, plaintiffs make a prima facie showing that plaintiff was frequently and regularly in close proximity to defendant's product.
>
> **The critical issue here is whether, indulgently read, the medical reports submitted by plaintiffs were sufficient to overcome defendants' claim that they failed to demonstrate medical causation. On a motion for summary judgment in a toxic-tort case, the narrow issue is whether reasonable jurors could infer, based on the expert testimony, a nexus between plaintiff's exposure to the offending product and her condition**.
>
> In that regard, we have noted that summary judgment "is an extraordinary measure to be taken only with extreme caution, especially when a cause of action rests upon expert testimony." "[T]he preferred course is to deny summary judgment and permit the matter to proceed, so that the expert's opinion can be fleshed out."

Id. at 216 (emphasis added).

The New Jersey Supreme Court also addressed the difficulties posed to Plaintiffs in toxic-tort cases as it relates to causation in the case of James v. Bessemer Processing Co., Inc. (155 N.J. 279) (1998):

> Under that [frequency, regularity, and proximity] test, in order to prove that exposure to a specific defendant's product was a substantial factor in causing or exacerbating the plaintiff's disease, the plaintiff is required to prove "an exposure of sufficient frequency, with a regularity of contact, and with the product in close proximity" to the plaintiff. The court reemphasized that its adoption of such a standard was required by the **unique difficulties faced by a plaintiff attempting to establish causation in the toxic-tort context**: "Since proof of direct contact is almost always lacking ... courts must rely upon circumstantial proof of sufficiently intense exposure to warrant liability."

Id. at 301 (emphasis added).

> By far the most difficult problem for plaintiffs to overcome in toxic tort litigation is the burden of proving causation. In the typical tort case, the plaintiff must prove tortious conduct, injury and proximate cause. Ordinarily, proof of causation requires the establishment of a sufficient nexus between the defendant's conduct and the plaintiff's injury. In toxic tort cases, the task of proving causation is invariably made more complex because of the long latency period of illnesses caused by carcinogens or other toxic chemicals. The fact that ten or twenty years or more may intervene between the exposure and the manifestation of disease highlights the practical difficulties encountered in the effort to prove causation.

Id. at 300 (citing Ayers v. Jackson Township, 106 N.J. 557, 585–87, 525 A.2d 287 (1987).

The James Court analyzed another situation analogous to the facts of this case, where the Defendants' failure to keep full records of the exact amount of exposure also existed:

> Representatives of those petroleum defendants that plaintiff had the opportunity to depose indicated that they kept no records of the precise residues contained in the drums that were provided to Kingsland for reconditioning. Even the MSDSs provided by

> defendants that, crediting plaintiff's proofs, were supplied only toward the very end of James's employment with Bessemer, did not indicate how many drums containing residues of any particular product were provided to Bessemer. Those recordkeeping failures cannot be viewed as defeating plaintiff's failure-to-warn claim; they are more reasonably viewed as indicative of an unfortunate lack of care and responsibility on the part of those defendants with regard to the hazards posed by intense exposure to petroleum products containing benzene and PAH.

Id. at 307.

In concluding, the James Court used the frequency, proximity, and regularity test, and held that Plaintiffs provided sufficient proofs and expert opinions such that summary judgment was not warranted. "We hold that plaintiff's proofs provided sufficient product identification with regard to the petroleum defendants to survive summary judgment." Id. at 308. "A rational factfinder also could conclude from the co-workers' testimony that James was frequently, regularly and proximately exposed to products of each of the petroleum defendants containing those known carcinogens, and thus could conclude that James's exposure to the petroleum products of each defendant was a substantial factor in causing or exacerbating his disease." Id.

As established in Vassallo and James, Plaintiffs need only show that reasonable jurors could infer, based on the expert testimony, a nexus between plaintiff's exposure to the offending chemical and his condition. Contrary to the trial court's finding, Plaintiffs' expert reports clearly meet this burden.

Dr. Lynch specifically and extensively explained that Michael Hatty was exposed to unsafe levels of methyl bromide during his time at Gloucester Terminals from 2006 to 2017 with an exposure of sufficient frequency, with a regularity of contact, and in close proximity to Mr. Hatty:

> This report outlines my professional opinions that Mr. Hatty was chronically exposed to significant airborne levels of methyl bromide during his work tenure as expediter at the Gloucester Terminal over the course of his employment between 2006 and 2017. (Pa1466)
>
> Lynch Professional Opinion #7 - Based upon all of the above, as Mr. Hatty's job duties required him to locate fruit pallets (which according to his deposition, were taller than he was), his proximity and position relative to fumigated fruit would result in higher peak and average exposures than those recorded by Wisser from the remote sampling system observed at only 2 locations within the approximate 50,000 square foot cold box. (Pa1475 – Pa1476)
>
> Based upon all of the above, I estimate that Mr. Hatty's exposure during the approximate 11 years of his employment at Gloucester terminal conservatively ranged between 2 to 20 parts per million for several hours of each typical workday within the cold box. (Pa1478)

Dr. Lynch further described how and why Mr. Hatty was so frequently and regularly exposed to methyl bromide, at many points in his report:

> Lynch Professional Opinion #3 - The absence of any local exhaust or rooftop mounted exhaust fans, combined with the presence of additional cold boxes on either side of the box 20 site, lead me to conclude within a reasonable degree of scientific certainty, Gloucester Terminal and Western knew or should have known, that methyl bromide gas which is normally released from the surface and inter- fruit airspaces and packaging at 20 to 200 parts per million would accumulate within the cold boxes normally as methyl bromide off-gasses from fumigated fruit within the cold boxes. This

> would result in a build-up of methyl bromide gas within the cold box exceeding levels measured at the beginning of the shift when fruit is initially moved from the shed. (Pa1471 – Pa1472)
>
> Lynch Professional Opinion #4 – The absence of ceiling or wall-mounted exhaust fans within the cold box indicates that there were no engineering controls in place for routine or emergency removal of methyl bromide from fruit when airborne methyl bromide levels exceed those levels outlined in the BMP. (Pa1472)

Importantly, both of Plaintiffs' medical experts, Dr. Olga Katz, Plaintiff's treating neurologist (Pa1812 – Pa1815) and Dr. Laumbach, in conjunction with the expert opinions of Dr. Lynch, clearly draw the necessary nexus between Mr. Hatty's neurological injuries and symptoms to his chronic overexposure to unsafe levels of methyl bromide during his time working as an expediter at Gloucester Terminals:

> Moreover, it is highly likely that he had chronic overexposure to methyl bromide given the conditions under which he worked, which were described and analyzed in detail by Dr. Lynch in his expert report. To a reasonable degree of medical probability, all of Mr. Hatty's peripheral and central nervous system pathologies with onset at the time of, and in the several years preceding, the discover of his poisoning with methyl bromide, were caused by his occupational exposure to methyl bromide while working as an expediter for PSA and Del Monte. (Pa1786)
>
> * * * * *
>
> It is my professional opinion within reasonable degree of medical certainty that Mr. Hatty is totally and permanently disabled for gainful employment as a direct result of the exposure to the highly toxic chemical, methyl bromide. (Pa1815)

Under the applicable 'frequency, regularity, proximity' test that is used in New Jersey toxic-tort work-place cases, it is clear that reasonable jurors could infer, based on the expert testimony, a nexus between Michael Hatty's exposure to methyl bromide and his injuries.

Point IV

THE COURT ERRED IN GRANTING SUMMARY JUDGMENT IN FAVOR OF WESTERN BY IGNORING THE EVIDENCE OF RECORD AND APPLYING THE WRONG MEDICAL CAUSATION STANDARD FOR PLAINTIFF TO PROVE HIS OCCUPATIONAL-EXPOSURE, TOXIC TORT INJURIES. (Pa5)

The trial court also granted summary judgment to Western because it applied the same incorrect causation standard. The above cited experts, Drs. Lynch and Laumbach's opinions were against both defendants and were identical. Therefore, the argument asserted in Point II is the same argument for why the trial court erred in granting summary judgment in favor of Western.

POINT V

THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT IN FAVOR OF WESTERN IN REGARD TO PLAINTIFFS' CLAIMS FOR PUNITIVE DAMAGES. (Pa10)

The trial court erred in not allowing a claim for punitive damages to proceed against Western. A review of the transcript of oral argument shows that the trial court, first, did not understand the fumigation process which did not allow it to weigh and measure Western's mental state in their actions and

inactions; and second, took a hard stance that punitive damages could not be assessed when a company violates their own internal standards, even if those standards are more stringent than governmental regulations.

When determining if punitive damages are warranted, the conduct is examined based on the knowledge the defendant possess. Whether there is a minimum threshold established by a government entity is irrelevant for purposes of determining if one's conduct is egregious or reckless. The appropriate analysis is what information is possessed by the defendant and whether their conduct accounts for the harm that they know their conduct is causing. As in this case, the record shows that Western knew that exposure to methyl bromide was dangerous; they set a permissible limit because they knew exposure was dangerous; they knew that the concept of off-gassing existed and they did not test later in the afternoon, knowing full well what levels they would find (higher than their safe and permissible limits). This conduct is reckless, and the jury should be able to determine if punitive damages are warranted.

1. Standard for Punitive Damages

New Jersey's Punitive Damages Act, N.J.S.A. 2A:15-5.12, et seq., allows for an award of punitive damages where a plaintiff "proves, by clear and convincing evidence, that the harm suffered, was the result of the defendant's acts or omissions, and such acts or omissions were actuated by actual malice or

accompanied by a wanton and willful disregard of persons who foreseeably might be harmed by those acts or omissions."

In 1995, our legislature enacted the Punitive Damages Act (Act), *N.J.S.A.* 2A:15–5.9 to –5.17, which became effective October 27, 1995. The Legislature's purpose in enacting the Act was to establish more restrictive standards with regard to the awarding of punitive damages. *See* *N.J.S.A.* 2A:15–5.9; Assembly Insurance Committee Statement, Senate, No. 1496–L.1995, c. 142 (stating the restrictions imposed on the awarding of punitive damages).

"For example, the Act requires an award of compensatory damages as a statutory precedent for an award of punitive damages and disallows nominal damages as a basis for punitive damages claim." Pavlova v. Mint Management Corp., 868 A.2d 322, 325, 375 N.J.Super. 397, 403 (N.J.Super.A.D.,2005).

"The standard can be established if the defendant knew or had reason to know of circumstances which would bring home to the ordinary reasonable person the highly dangerous character of his or her conduct." Dong v. Alape, 824 A.2d 251, 257, 361 N.J.Super. 106, 116–17 (N.J.Super.A.D.,2003).

[T]o warrant the imposition of punitive damages:

> the defendant's conduct must have been wantonly reckless or malicious. There must be an intentional wrongdoing in the sense of an "evil-minded act" or an act accompanied by a wanton and willful disregard of the rights of another.... The key to the right to punitive damages is the wrongfulness of the intentional act.

Id. (citing Nappe v. Anschelewitz, Barr, Ansell & Bonello, 97 N.J. 37, 49, 477 A.2d 1224 (1984)).

"Actual malice" is "an intentional wrongdoing in the sense of an evil-minded act." *N.J.S.A.* 2A:15–5.10. "Wanton and willful disregard" is defined as "a deliberate act or omission with knowledge of a high degree of probability of harm to another and reckless indifference to the consequences of such act or omission." Id.

Moreover, the Act provides a non-exclusive list of factors that the factfinder must consider in determining whether to award punitive damages should the Plaintiffs' punitive damage claims go to the jury:

> (1) The likelihood, at the relevant time, that serious harm would arise from the defendant's conduct;
>
> (2) The defendant's awareness or reckless disregard of the likelihood that the serious harm at issue would arise from the defendant's conduct;
>
> (3) The conduct of the defendant upon learning that its initial conduct would likely cause harm; and
>
> (4) The duration of the conduct or any concealment of it by the defendant.

[*N.J.S.A.* 2A:15–5.12.]

"To be sure, the standard signifies something less than an intention to hurt." Pavlova at 405. And unlike an intentional tort, "wanton or willful misconduct does not require the establishment of a positive intent to injure."

Tabor v. O'Grady, 61 N.J.Super. 446, 451, 161 *A.*2d 267 (App.Div.1960). The standard is thus an accepted intermediary position between simple negligence and the intentional infliction of harm. Foldi v. Jeffries, 461 A.2d 1145, 1154, 93 N.J. 533, 549–50 (N.J.,1983). "It must appear that the defendant with knowledge of existing conditions, and conscious from such knowledge that injury will likely or probably result from his conduct, and with reckless indifference to the consequences, consciously and intentionally does some wrongful act or omits to discharge some duty which produces the injurious result." Id.

2. Ignoring off-gassing is reckless and warrants punitive damages.

The record is clear that both the Western and Gloucester *knew* about off-gassing prior to 2017, with some relevant individuals being aware of this concept as early as 2012.

Western Service Supervisor Michael Wisser explained this important methyl bromide fumigation concept called "off-gassing":

> Q: Are you familiar with the concept of **off-gassing,** sir?
>
> A: Yes.
>
> Q: Can you tell me what your understanding of off-gassing is?

A: So a commodity's fumigated, like the fresh fruit. Sometimes you will have off-gassing because of the bags that it's packaged in.

Q: Meaning the additional gas would be let out – let out into the air, correct?

A: It could be, correct.

(Pa1519)

Nearly every Terminal and Western deponent stated that they knew about off-gassing and knew what off-gassing meant for methyl bromide air levels throughout the day; those levels would rise. Gloucester Terminals Operations Manager McNellis stated:

Q: Are you familiar with the concept of off-gassing?

A: Yes.

Q: And what is your understanding of the concept of off-gassing?

A: Off-gassing the – when they fumigate, the gas is getting into the coolers into the – into the boxes, most of them are in a big plastic bag with little holes wrapped in tissue So during the course of the day over the next whatever days it is or hours, there is gas escaping from some of these boxes.paper.

Q: Were you aware of this concept prior to January of 2017?

A: Yes.

(Pa1219 – Pa1220)

Like McNellis, other Terminal and Western employees also explained that they knew what methyl bromide related off-gassing was, and that they knew that off-gassing meant that fumigated fruit would release methyl bromide into the surrounding air throughout the day. Western Fumigation Director Kurt Reichert stated:

> Q: Are you familiar with the concept of off-gassing with respect to methyl bromide?
>
> A: Vaguely, yes.
>
> Q: And what's your understanding of that concept?
>
> A: That after a commodity is fumigated with methyl bromide, an unknown amount could be absorbed by packaging or the product itself, and after the aeration process is completed, you might have minute amounts of gas liberating from the packaging or the products.
>
> Q: Well, when you -- when you use the phrase "minute amounts," what amounts are you -- are you using?
>
> A: In the parts per million level. So one part of methyl bromide per million parts of air. Very small amount.

(Pa1329 – Pa1330)

> Q: During your time as service manager, or as fumigation director, did you have an understanding that once the product had been fumigated by Western Fumigation and moved back into the coolers at Pier 8 and Pier 9, that that product could continue to off-gas methyl bromide for a period of up to 72 hours?
>
> A: We knew of the process of off-gassing, but did not really know the specifics of a timeline.

(Pa1331)

Peter Inskeep, Gloucester's Manager of Operations, also explained that he knew what off-gassing was:

> Q: All right. Do you understand the concept of off-gassing with respect to commodities that have undergone methyl bromide fumigation?
>
> A: So I -- I do believe that there is information out there that a product can absorb fumigants for longer -- for a period of time, **and that as those products settle, that it can still release residual methyl bromide, or any fumigant, for that matter**.

(Pa1965)

> Q: Did you understand, from 2012 to the present, that commodities,such as grapes, that have been fumigated with methyl bromide, could off-gas for a period of up to 72 hours after they've been fumigated?
>
> A: I know that they can off-gas, correct.

Id.

Michael Quigley, Gloucester's Director of Safety and Loss Control, revealed that he also knew about off-gassing:

> Q: Okay. And at some point in time you, in Gloucester Terminals, became aware of the fact that the pallets of fruit could off-gas for a period of up to 72 hours after they were removed from the Pier 8 and Pier 9 sheds, correct?
>
> A: I think that I really discovered that in 2011 or thereabouts when I joined that task force.

(Pa1071 – Pa1072)

The record clearly shows that both Gloucester and Western were aware that off-gassing occurred with methyl bromide treated commodities such as grapes. Both set of Defendants were aware of this concept as early as 2011 and 2012, and certainly before 2017.

Because of this understanding of off-gassing, both defendants, in 2011, working in conjunction, developed a program to measure the air in the cooler in the morning before workers entered it. (Pa1072). To be clear, this early morning measurement was in response to the knowledge that the fruit was off-gassing and was simply sitting in a cold storage unit – a refrigerator – that is designed to keep fresh air out. This action was put in the *Best Management Practices*, the purpose of which was to "manage and mitigate" the exposure of methyl bromide to the workers. (Pa1081). The problem is, armed with the knowledge that off- gassing continued for up to 72 hours, no additional measurements were taken throughout the day to ensure that the levels were safe for workers to enter. Stated another way, Western knew about off-gassing, chose to test in the morning because they knew the methyl bromide was still present, but did not do any additional testing throughout the day – knowing that the fruit was off-gassing. This is reckless.

While Gloucester and Western did not have explicit afternoon cold storage area measuring policies, they did on some occasions take afternoon measurements. These measurements ***revealed exactly why they should have had an afternoon methyl bromide measuring internal policy.*** As could have been predicted, afternoon methyl bromide levels skyrocketed due to off-gassing. The inconsistent afternoon measurements that did occur only served to prove the off-gassing concerns to be correct.

Michael Wisser, a Western service technician, testified that not only the afternoon levels were high, but the action also taken by Western did not comport with the *Best Management Practices* and FASSOP they helped develop. On March 27, 2017, the afternoon measurement was of a level that required mitigation action pursuant to *Best Management Practices* and the FAASOP, 5 ppm, yet nothing was done:

> Q. And earlier when we started this deposition, we talked about that the number needed to be less than 5 parts per million. So when you record something that says 5 parts per million, what did you do?
>
> A: So as soon as I got a high reading, I would call the terminal manager, and then he would take care of what needed to be done to get that down to a safe level.
>
> Q. Who is the terminal manager that you called?
>
> A. That would be Tim McNellis.
>
> Q. And is it documented anywhere that you

called Mr. McNellis to report this high reading?

A. No.

Q. Do you document when you call Mr. McNellis to report high readings?

A: No.

Q. When you called Mr. McNellis to report a high reading such as what we see in Exhibit 23, what does Mr. McNellis tell you to do about it?

A: So once I called him, I told him what kind of a reading I got in that certain area, and then he would take -- he would bring fans to that area and make it a safe level, 5 parts or below 5 parts per million. Make it down to a safe part per million in that area.

Q. Do you do anything or does Western do anything to bring that area down to a safe, permissible level?

A. No.

Q. And do you -- do you follow up with Mr. McNellis to, in fact, see that he or someone brought that area down to a safe, permissible level?

A. No.

Q. Is there a reason you don't do that?

A. At that time I was given the orders to just sample them, let Tim McNellis know, and then I had different jobs that they sent me on.

Q. When you say "at that time," did something change?

A. No.

Q. Did you stay -- after you reported this to Mr. McNellis, did you stay on the premises to see that Mr. McNellis did anything to bring that area down to a safe, permissible level?

A. No.

Q. Did you leave -- did you ever leave before ensuring that the levels were down to a safe level?

A. Once I told Tim McNellis what I had gotten, then he took over, and that's when I was done for that job and then on to another job.

Q. And then, to be clear, you never took any measurements after you reported to Mr. McNellis to lower -- that the area needed to be lowered to ensure that the air quality was, in fact, lowered to a safe level, correct?

A. Correct.

(Pa1517)

This was not the only incident of high afternoon readings. On March 27, 2017, this specific date, the A.M. cold storage facility log showed that the levels were permissible. But as employees worked in these cold storage areas throughout the day, methyl bromide levels began to rise to 5 ppm. (Pa1518). The record shows that Western did nothing to initiate mitigation processes and did nothing to confirm that Gloucester would start mitigation, even though the methyl bromide was at a level that triggered mitigation pursuant to Defendant's own policies and procedures.

March 28, 2017, a similar methyl bromide level increase occurred. Yet Western did nothing to mitigate the levels pursuant to the Best Practices and FAASOP. Further, Western admitted that the levels were rising due to off-gassing. (Pa1520).

Elevated levels of methyl bromide, levels that required mitigation, were recorded on March 29, 2017 (Pa1521), April 5, 2017 (Pa1522 – Pa1523), April 21, 2017 (Pa1523 – Pa1524), April 25, 2017 (Pa1524 – Pa1525), April 26, 2017 (Pa1526), and April 27, 2017 (Pa1526 – Pa1527). Further, on April 4, 2017 (Pa1527 – Pa1528), a level of 10 ppm which required complete closure and evacuation of the facility pursuant to *Best Management Practices* and FAASOP. Yet, this was never done:

> Q. What is the procedure when you record a 10 part per million measurement?
>
> A: Yeah, it's let Tim McNellis know what I found.
>
> Q. Does a -- do you know that a 10 parts per million requires immediate evacuation of the building?
>
> A: It's -- it's not a good reading.
>
> Q. Did you know that, though, sir?
>
> A: No.
>
> Q. When you -- did you document anywhere that you let Mr. McNellis know that you recorded 8, 9, and 10 parts per million readings on April 4th, 2017?

A. It was a phone call to him, and I didn't have any documentation on the phone call.

Q. And did you stay there to observe what Mr. McNellis did after being informed of the 8, 9, and 10 parts per million?

A: I did not. I had other duties my bosses wanted me to do.

(Pa1527 – Pa1528)

The Terminal and Western Defendants, specifically guided by both the FASSOP and *Best Management Practices*, had a written procedure to follow when methyl bromide readings reached 10 ppm or higher. That policy was to immediately evacuate the building and disallow access to the area. Wisser explained that he did not follow this procedure, and never informed McNellis that the area was supposed to be immediately evacuated:

Q. Did you advise Mr. McNellis of the 10 part per million reading as being a significant concern to you based on its level?

A: I did. Correct.

Q. When you -- did -- what did you say to him?

A. I let him know my findings and said that was a pretty high reading.

Q. And did you do -- did you leave before ensuring that the levels were down to a safe level?

A. I did. My bosses had other duties for me to do.

> Q. Okay. And did you stay and take another measurement to confirm that Mr. McNellis adequately brought the air level down?
>
> A: No.
>
> Q. Did you request or make a request of Mr. McNellis that he immediately evacuate the building when you recorded a 10 parts per million measurement?
>
> A: I did not.

(Pa1528)

The measurements taken on April 4, 2017, indicate that Gloucester and Western not only should have immediately instituted mitigation measures, but they also should have evacuated the entire area and ceased all access to the area. The Defendants did no such thing; the violation of their own safety policy was reckless.

Western knew about methyl bromide exposure, methyl bromide air levels increasing, and the potential harm to workers from these phenomena and despite knowing these facts, Western still did not develop or codify a policy to measure cold storage areas in the afternoon. (Pa1334)

The record creates the following factual and evidentiary conclusions, when viewed in a light most favorable to the non-moving party:

> The FASSOP and *Best Management Practices* created benchmark levels for methyl bromide air level measurements, that would require <u>immediate action</u> on the part of both Western and Gloucester

> Western only measured methyl bromide air levels in these cold storage areas pursuant to the FASSOP and Best Management Practices specifically during the morning; other readings during the day were not standard operating procedure. Further, these morning measurements took place between 4:00 a.m. to 6:00 a.m., which was hours before Plaintiff even arrived on site. Thus, the off-gassing clock began ticking before Plaintiff even got to work.
>
> Western was aware that "off-gassing" could cause fumigated commodities to release methyl bromide into the cold storage areas' air throughout a day from morning to afternoon;
>
> Despite knowing this, Western never codified or put into standard operating procedures a policy for measuring cold storage facility methyl bromide levels, beyond the once daily codified morning measurement;
>
> When Western finally observed impermissibly high methyl bromide levels of 5-10 ppm (pursuant to the Terminal's explicit request), Western would inform Gloucester, then Western would leave without starting mitigation measures, without ensuring that Gloucester did so either, and without re-measuring once the Gloucester purportedly took initial mitigation steps, and although fans usually started to ventilate the area, re-measuring to ensure levels actually decreased was never performed

Taken as a whole, Western acted with a wanton and willful disregard for the safety rights of Mr. Hatty. Western had knowledge about the possibility of off-gassing compounded with actual ***proof*** that off-gassing was occurring. Still, no policies were created to continuously measure methyl bromide levels throughout the length of workdays at the terminal. And still, workers were sent into the cold storage areas during afternoon hours, despite this compounded proof and knowledge.

Western never confirmed whether cold storage facility methyl bromide measurements during afternoons were properly lowered after impermissibly high methyl bromide air levels were found. Instead of confirming safe levels, Western (who would just leave the warehouse) simply allowed workers into the area as if nothing had happened, *despite specific proof of elevated methyl bromide levels*.

A jury could find that circumstances of aggravation and outrage are present here; at the least, Plaintiffs have shown genuine issues of fact exist as to circumstances of aggravation and punitive damages. Their conduct should be measured against their knowledge of the hazard, regardless of whether their standards are less than that of government regulations.

This is where the trial court erred. The creation of the *Best Management Practices* and the FAASOP is an express acknowledgement of the dangers of exposure to methyl bromide and the danger that off-gassing posed. It is the recognition of this danger and the actions/conduct of Western as it relates to this recognition that is the measurement to assess punitive conduct. The fact that Western chose to make a more stringent standard than that of OSHA does not shield them from punitive damages if the levels measured do not exceed OSHA permissible levels; the measured numbers exceeded the Defendants permissible levels. The analysis is what the Defendants knew and what they appreciated as

it relates to the risks and their failure to act. Nothing in the case law stands for the proposition that governmental standards are the measuring stick for punitive conduct. Therefore, summary judgment should have been denied.

POINT VI

THE TRIAL COURT ERRED IN FINDING THAT GLOUCESTER'S MOTION FOR SUMMARY JUDGMENT WAS MOOT (Pa9)

The trial court never ruled on Gloucester's motion for summary judgment because it was found moot based on the granting of summary judgment in favor of Gloucester as it relates to the release. Since the ruling on the release was in error, Gloucester should be brought back into this litigation. At that point Gloucester's conduct should be measured against their knowledge; just like Western's. As discussed above, the record shows that Gloucester knew about off-gassing, set up minimum exposure levels, and did not test for afternoon levels, knowing full well that they would be above permissible limits as set by Gloucester. This is reckless conduct, and punitive damages are warranted.

CONCLUSION

For the foregoing reasons, the trial court's June 23, 2023, July 6, 2023, July 7, 2023 and September 11, 2023 Orders should be reversed and this case should be scheduled for a jury trial.

LAFFEY BUCCI D'ANDREA REICH & RYAN

/s/ Samuel I. Reich
Samuel I. Reich, Esq.

Dated:

MICHAEL HATTY and SUSAN HATTY (h/w) *Plaintiffs-Appellants*,	:	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO. A-003914-23
v.	:	CIVIL ACTION
WESTERN INDUSTRIES-NORTH, LLC, GLOUCESTER TERMINALS, LLC and PRODUCE SERVICES OF AMERICA, INC., *Defendants-Respondents*.	:	ON APPEAL FROM THE FINAL ORDERS OF THE SUPERIOR COURT OF NEW JERSEY, LAW DIVISION, CAMDEN COUNTY
	:	SAT BELOW: HON. MICHAEL J. KASSEL, J.S.C.
	:	DOCKET NO. BELOW: CAM-L-001685-19 SUBMITTED: January 10, 2025

BRIEF ON BEHALF OF DEFENDANT-RESPONDENT GLOUCESTER TERMINALS, LLC

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TABLE OF CONTENTS

Page(s)

TABLE OF JUDGMENTS, ORDERS AND RULINGS BEING APPEALED BY APPELLANT

Page(s)

TABLE OF AUTHORITIES

Page(s)

Cases

Other Authorities

I. PRELIMINARY STATEMENT

On September 14, 2004, in connection with an alleged Achilles injury while working at Gloucester Terminals, Plaintiffs Michael Hatty ("Hatty") and his wife Susan Hatty ("Hattys" or "Plaintiffs") executed a broad Settlement Release (the "Release"), accepting a cash payment in exchange for a release of all present and future claims against Defendant Gloucester Terminals LLC ("Gloucester Terminals") arising from anything which had occurred during Hatty's work at Gloucester Terminals (the "Terminal") prior to the date of execution of the Release. When the Hattys brought their second personal injury claim against Gloucester Terminals, this time for exposure to methyl bromide, the trial court below correctly found that the claims were barred by the terms of the Release as Hatty was indisputably exposed to methyl bromide during his work at the Terminal prior to September 14, 2004. The Court correctly concluded that to withstand summary judgment, Plaintiffs needed expert evidence to establish that Hatty's exposure to methyl bromide after the execution of the Release was independently sufficient to cause his injuries. No such evidence exists. Accordingly, the trial court properly granted Gloucester Terminals' motion for summary judgment.

The trial court's ruling is consistent with the long-established principle in New Jersey that a settlement release must be interpreted according to its plain language and courts may not make a better contract for either of the parties. Here, Plaintiffs

executed a broad general release which expressly applies to "any and all past, present or future claims . . . of any nature whatsoever" including those of which Plaintiffs were "not aware," which had not yet accrued, and "those not identified in this release." The Release expressly provides that it is not limited to claims that could have been brought in the Hattys' prior lawsuit. The language of the Release is unambiguous – Plaintiffs released all claims against Gloucester Terminals for any injuries arising from anything that occurred prior to execution of the Release, which necessarily includes exposure to methyl bromide.

Plaintiffs center their appeal on the contention that the trial court should have interpreted the Release in a manner contrary to its plain language and found that the Release only bars claims related to Hatty's Achilles injury. Plaintiffs provide no support for their position, nor can they, as it is contrary to law. Plaintiffs then take their unsupported position one step further and argue that because the Release applies only to claims related to Hatty's Achilles injury, they did not have to demonstrate that Hatty's post-Release exposure alone could have caused his injuries. Plaintiffs have never been able to support this position; despite numerous direct requests from the trial court, Plaintiffs have never identified a single case in which any court in any jurisdiction found a claim was not barred by the terms of a general release where the plaintiff's injury resulted from conduct which occurred both before and after execution of the release.

Rather, in light of the Release, for their claims to withstand summary judgment, Plaintiffs needed to present expert evidence that, at the very least, Hatty's post-Release exposure to methyl bromide was independently sufficient to cause his injuries. Plaintiffs failed to do so. Plaintiffs' industrial hygienist expert, Dr. Lynch, did not and could not opine based on his area of expertise as to the cause of Hatty's injuries. Plaintiffs' sole causation expert, Dr. Laumbach, opined to a reasonable degree of medical probability that combined exposure to methyl bromide *both before and after* execution of the Release caused Hatty's injuries, the exact opposite of what Plaintiffs needed to establish to defeat summary judgment.

Plaintiffs argue the trial court should have evaluated their expert evidence under the *Sholtis* standard, described by them as a "relaxed" medical causation standard. The *Sholtis* standard, however, is intended to address product-identification issues in strict liability cases against manufacturers involving exposure to numerous different products – it is not a standard applicable in single-substance negligence cases such as this one. Further, even if the *Sholtis* standard did apply – which it does not – expert evidence demonstrating the causal nexus between Hatty's post-Release exposure and his injury is still required. *Sholtis* did not relax this requirement. Plaintiffs failed to provide any such evidence and accordingly, the trial court properly granted Gloucester Terminals' motion for summary judgment.

II. COUNTERSTATEMENT OF FACTS

A. Background Facts.

From 1998 until some time in 2004, Hatty was seasonally employed by Del Monte Fresh Produce N.A. ("Del Monte") as an "expediter" at three Delaware River ports where fruit arrives in the United States – the Port of Wilmington ("Wilmington"), Tioga Marine Terminal ("Tioga"), and the Terminal, which is operated by Gloucester Terminals. (Pa713-21). His job required him from time to time to enter large cold storage rooms, generally called "boxes," where fruit which had been fumigated as required by federal law was stored, and identify which pallets of product needed to be moved into waiting delivery trucks. (Pa1776). Hatty testified that during his employment with Del Monte at Wilmington, Tioga, and the Terminal, Del Monte fumigated produce most nights during the busy season. (Pa1776; Pa713-21; Pa934-35).

In 2001, Del Monte moved most of its operations from Wilmington to the Terminal. (Pa719). On February 11, 2003, Hatty allegedly tripped and fell on a loading dock while working for Del Monte at the Terminal and injured his Achilles tendon. (Pa819). On July 25, 2003, the Hattys filed a complaint in New Jersey federal court, Civil Action No. 03-3530, alleging negligence against Gloucester Terminals. (Pa572-74). The lawsuit settled, and on September 14, 2004, the Hattys and Gloucester Terminals executed a settlement Release. (Pa575-78). Pursuant to

the Release, the Hattys received $80,000 in exchange for which Gloucester Terminals received a release of all claims relating to the Achilles injury along with any and all existing and potential future claims based upon events occurring before the date of the Release. (Pa575-78).

The Release specifically provides:

- "This releases all claims, including those of which I am not aware and those not identified in this release." (Pa575 ¶ 1(a)).
- "I specifically release the following claims: [a]ny and all past, present or future claims . . . of any nature whatsoever based upon a tort, contract or other theory of recovery . . . I now have, or which may hereafter accrue or otherwise be acquired, against [Gloucester Terminals] either directly or indirectly, including by way of example and not limitation, those which may be or could have been the subject matter of a lawsuit instituted in the United States District Court for the District of New Jersey, Civil Action No. 03-3530." (Pa575 ¶ 1(a)).
- "This release is for compensation of any and all injuries I have sustained, known, unknown, or unknowable, and in full compensation for any and all personal injuries, past present or future . . . now or in the future . . . ." (Pa575 ¶ 1(b)).
- "It is expressly understood that this Release is for the settlement, release, discharge and elimination of any and all claims. I hereby acknowledge that by executing this Release and accepting the monies paid hereunder, I and those who otherwise might be entitled to make such a claim or claims in the future have received fair, just and adequate compensation for all such claims in exchange for which all such claims, past, present and future, are forever released and discharged." (Pa575 ¶ 1(b)).
- "Even if additional facts become known which were not known at the time this Release was executed, I waive my right to bring a lawsuit against [Gloucester Terminals]." (Pa575 ¶ 1(b)).

- "I have been paid a total of Eighty Thousand ($80,000.00) Dollars in full payment for agreeing to and executing this release. I agree that I will not seek anything further including any other payment from [Gloucester Terminals]." (Pa576 ¶ 5).

The Release provides that it bars "claims resulting from anything which has occurred to date" and affirms that the Hattys consulted with counsel prior to signing the Release. (Pa575, 577).

Following his injury, Hatty worked for Del Monte for a brief time and then did not work at all for some period of time. (Pa738-39). In December 2006, Hatty sought and obtained new employment at the Terminal where he had previously been injured, this time with Produce Services of America Inc. ("PSA"). (Pa749-758). Hatty again worked seasonally as an "expediter" and his job duties were principally the same for PSA as they were when he worked for Del Monte. (Pa758-59). He continued working seasonally as an expediter for PSA at the Terminal[1] from 2007 until he quit in 2017, allegedly due to injuries he sustained as a result of exposure to the fumigant methyl bromide. (Pa712, 1776).

The Hattys filed their latest personal injury lawsuit, the current action, on February 7, 2019, naming Gloucester Terminals, among others, as a defendant, notwithstanding the earlier Release. (Pa55-76). Plaintiffs allege that as a result of

[1] When employed by PSA, Hatty also continued to occasionally work at Tioga. (Pa720-21; Pa763-64).

his exposure to methyl bromide, Hatty has suffered from a variety of medical conditions. (Pa56-76).

B. Plaintiffs' causation expert opines that Hatty's pre-Release exposure caused his injuries.

On July 25, 2022, Plaintiffs served on Defendants an expert report from Richard Lynch, an industrial hygienist who opined on one issue and one issue alone: that Hatty was exposed to significant levels of methyl bromide from 2006 through 2017. (Pa1466-78). Dr. Lynch is not a medical expert and thus did not and could not opine regarding the cause of Hatty's injuries, whether pre- or post-Release or otherwise. (Pa1466-78).

Plaintiffs also served an expert report from Robert J. Laumbach, M.D., M.P.H., C.I.H., Plaintiffs' only expert who opined as to the cause of Hatty's injuries. (Pa1772-86). Dr. Laumbach described his assignment as reviewing documents and other materials "in order to provide [his] opinions as to whether or not Mr. Michael Hatty sustained personal injuries due to exposure to methyl bromide (methyl bromide) while employed at Produce Services of America Inc. as an expediter from about 2007 to 2017, **and as a loader/expediter for Del Monte from about 1998 to about 2007**." (Pa1772) (emphasis added). Dr. Laumbach's report discusses at length Hatty's job duties and exposure to methyl bromide while he was working for Del Monte prior to execution of the Release and concludes that exposure to methyl bromide while working for Del Monte was a cause of Hatty's alleged injuries.

(Pa1775-86). Dr. Laumbach specifically concludes "[t]o a reasonable degree of medical probability, **all** of Mr. Hatty's peripheral and central nervous system pathologies . . . were caused by his occupational exposure to methyl bromide while working as an expediter for PSA **and Del Monte**." (Pa1786) (emphases added).

III. PROCEDURAL HISTORY

A. The Court grants summary judgment in favor of Gloucester Terminals.

On May 12, 2023, Gloucester Terminals moved for summary judgment, arguing that Plaintiffs' experts found that Hatty's exposure to methyl bromide before the Release was executed was a cause of his alleged injuries, and therefore Plaintiffs' claims against Gloucester Terminals were barred by the Release. Plaintiffs filed an opposition contending that the Release only barred claims arising from Hatty's Achilles injury and that they were not making injury claims from the period before 2004. As Gloucester Terminals argued, however, Plaintiffs' own experts attributed Hatty's injuries to his methyl bromide exposure while working both for Del Monte prior to execution of the Release and PSA after execution of the release.

On June 23, 2023, the Court heard oral argument on the summary judgment motion. The Court held that the Release barred Plaintiffs from bringing claims against Gloucester Terminals for injuries arising from exposure to methyl bromide

which occurred prior to the date the Release was executed. (*See generally*, 1T).[2] Although Plaintiffs had ample opportunity to present evidence in their written opposition to the summary judgment motion, the Court gave the Plaintiffs another opportunity during an adjournment in the argument to proffer any evidence to show that Hatty's exposure to methyl bromide after the Release was sufficient to have independently caused his injuries. (1T at 18:12-20:25; 24:22-26:9). Plaintiffs identified only the reports of Dr. Lynch and Dr. Laumbach, arguing that Dr. Lynch found that Hatty was exposed to substantial amounts of methyl bromide after the Release was executed, and Dr. Laumbach relied on Dr. Lynch's report in finding that methyl bromide caused Hatty's injuries. (1T at 28:19-33:12). The Court reviewed both reports and correctly concluded that neither expert addressed whether Hatty's post-Release methyl bromide exposure was independently the cause of his injuries. (1T at 28:19-33:12). Accordingly, the Court granted Gloucester Terminal's motion for summary judgment. (Pa12).

At oral argument, the Court advised Plaintiffs that it was granting the motion based on the well-established principle that courts must interpret a settlement release in accordance with its plain language. (1T at 8:13-10:2, 43:21-25). Because the Release bars claims arising from any conduct which occurred prior to execution of

[2] 1T refers to Transcript of Motion, dated June 23, 2023. 2T refers to Transcript of Motion, dated July 6, 2023. 3T refers to Transcript of Motion, dated September 8, 2023.

the Release, Plaintiffs' claims for injuries caused by exposure to methyl bromide were barred absent expert evidence that the post-Release exposure was sufficient to cause Hatty's injuries. (1T at 30:13-33:12; 39:1-41:16). The court advised Plaintiffs that if they could identify any case in which a court in any state or federal jurisdiction made an exception and declined to apply this principle to an injury resulting from conduct which occurred both before and after execution of a general release, or could identify expert testimony demonstrating that Hatty's post-Release exposure was sufficient to cause his injuries, the court would consider granting a motion for reconsideration. (1T 42:5-43:25).

B. <u>The Court Denies Plaintiffs' Motion for Reconsideration.</u>

On July 12, 2023, Plaintiffs filed a Motion for Reconsideration. Despite the court's directive, Plaintiffs were unable to identify either any expert testimony establishing that Hatty's injures were independently caused by his exposure to methyl bromide after executing the Release, or any case in which a court found that a general release does not bar a claim for an injury caused by exposure to a substance both before and after execution of a general release. (3T at 9:7-14; 28:25-29:15). Instead, Plaintiffs pointed to the exact same expert evidence the court had already considered and argued once again, contrary to the actual opinions, that it sufficiently demonstrated post-Release causation. (3T at 18:12-20:4). Plaintiffs also argued that the trial court should have applied a more relaxed medical causation standard, the

Sholtis test, which they incorrectly contended required only that Hatty was frequently, regularly and proximately exposed to methyl bromide after the date of the Release to establish medical causation. (3T at 14:13-15:8).

Gloucester Terminals opposed Plaintiffs' reconsideration motion because the trial court had in the first instance correctly interpreted the Release pursuant to New Jersey law. Because the plain language of the Release barred any and all claims arising from conduct which occurred prior to execution of the Release and Plaintiffs failed to provide expert testimony of post-Release independent causation, the trial court properly granted summary judgment. Gloucester Terminals further argued that Plaintiffs' assertion that the court should have applied the more relaxed *Sholtis* causation standard was entirely irrelevant because Plaintiffs failed to provide any evidence that Hatty's exposure to methyl bromide after the Release was executed was independently sufficient to cause his alleged injuries. Thus, Plaintiffs failed to meet their burden of proof under any causation standard.

At oral argument the trial court reaffirmed its finding that, based on the language of the Release, Plaintiffs were barred from bringing claims resulting from any conduct which occurred prior to execution of the Release, not merely claims related to Hatty's Achilles injury. (3T at 6:17-20, 16:23-25). The court explained that its decision was consistent with New Jersey law governing interpretation of settlement releases and it was not a close call. (3T at 6:17-20, 31:7-11). As to the

sufficiency of Plaintiffs' expert testimony, the court again found that Plaintiffs failed to provide any expert evidence addressing whether Hatty's post-Release exposure was independently sufficient to cause his injuries. (3T at 22:16-27:18, 32:8-11). Therefore, regardless of the causation standard applied, Plaintiffs failed to meet their burden of proof. Accordingly, the trial court denied Plaintiffs' motion for reconsideration. (Pa7). The trial court agreed with Gloucester Terminals' argument that what Plaintiffs were seeking was an exception to the well-established New Jersey law regarding the scope of a general release, an exception that has no support in any case in New Jersey or for that matter, from any other jurisdiction.

On November 11, 2024, after all claims by and against all parties in the underlying suit were resolved, Plaintiffs filed the instant appeal, making the same arguments they made before the trial court nearly verbatim.

IV. LEGAL ARGUMENT

Plaintiffs signed a Release expressly releasing "any and all" claims including "past present or future claims," "known or unknown," "resulting from anything which occurred" prior to execution of the Release. (Pa575). The Release states that it is not limited to claims which could have been brought in Plaintiffs' prior federal action or claims related solely to the injury which was the subject of the then-pending litigation. (Pa575). Interpreting the Release according to its plain language as New Jersey law requires, the trial court correctly found that the Release bars Plaintiffs

from bringing any claims arising from anything which occurred prior to execution of the Release, including exposure to methyl bromide.

Therefore, to withstand summary judgment Plaintiffs had to demonstrate via expert evidence – under *Sholtis* or otherwise – that Hatty's post-Release exposure was independently sufficient to cause his injuries. No such evidence exists. Accordingly, the trial court properly granted Gloucester Terminals' motion for summary judgment and the decision should be affirmed.

A. Standard of Review

An appellate court reviews the grant of a motion for summary judgment *de novo*. Rule 4:46-2(c) provides that summary judgment is appropriate where the record shows that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law. *Brill v. Guardian Life Ins. Co. of Am.*, 142 N.J. 520, 540 (1995). To decide whether there is a genuine issue of material fact, the court must determine "whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party." *Id*.

As to the trial court's denial of Plaintiffs' motion for reconsideration, the standard of review is abuse of discretion. "Motions for reconsideration are governed by Rule 4:49-2, which provides that the decision to grant or deny a motion for

reconsideration rests within the sound discretion of the trial court." *Hoover v. Wetzler*, 472 N.J. Super. 230, 235 (App. Div. 2022). Motions for reconsideration are rarely granted, as "[r]econsideration should be utilized only for those cases [that] fall into the narrow corridor in which either 1) the [c]ourt has expressed its decision based upon a palpably incorrect or irrational basis, or 2) it is obvious that the [c]ourt either did not consider, or failed to appreciate the significance of probative, competent evidence." *Cummings v. Bahr*, 295 N.J. Super. 374, 383 (App. Div. 1996). The Appellate Court will not disturb a judge's denial of a motion for reconsideration absent abuse of discretion, which occurs only "when a decision is made without a rational explanation, inexplicably departed from established policies, or rested on an impermissible basis." *U.S. Bank Nat. Ass'n v. Guillaume*, 209 N.J. 449, 467-68 (2012).

B. General Releases Bar Claims Arising from Pre-Release Conduct Regardless of Whether those Claims are Related to the Initial Injury. (Pa 12; Pa7)

New Jersey courts favor the enforcement of settlements as a matter of public policy and "a releasor will be held to the terms of the bargain he willingly and knowingly entered." *Raroha v. Earle Fin. Corp.* , 47 N.J. 229, 234 (1996). The law is clear that a settlement release is considered "a form of contract and the general rules that apply to contract interpretation apply to releases." *Domanske v. Rapid-Am. Corp.*, 330 N.J. Super. 241, 246 (App. Div. 2000). "Generally, the terms of an

agreement are to be given their plain and ordinary meaning." *M.J. Paquet v. N.J. DOT*, 171 N.J. 378, 396 (2002). It follows that "[i]n attempting to discern the meaning of a provision in a . . . contract, the plain language is ordinarily the most direct route. If the language is clear, that is the end of the inquiry." *Chubb Custom Ins. Co. v. Prudential Ins. Co. of Am.*, 195 N.J. 231, 238 (2008); *see also, Manahawkin Convalescent v. O'Neill*, 217 N.J. 99, 118 (2014) (holding when "the language of a contract is plain and capable of legal construction, the language alone must determine the agreement's force and effect."). "When the terms of a . . . contract are clear, it is the function of a court to enforce it as written and not to make a better contract for either of the parties." *Cypress Point Condo. Ass'n v. Adria Towers, L.L.C.*, 226 N.J. 403, 415 (2016).

Here, after consulting with counsel and in exchange for compensation, the Hattys released Gloucester Terminals from "**all claims, including those of which I am not aware and those not identified in this Release**." (Pa575) (emphasis added). The Hattys specifically released Gloucester Terminals from "**any and all . . . future claims**, demands, obligations, actions, causes of action, rights, damages, costs, loss of service, expenses and compensation of any nature whatsoever based upon a tort . . . **which I now have, or which may hereafter accrue or otherwise be acquired** . . . ." (Pa575 ¶ 1(a)) (emphasis added). The Release specifically includes claims arising from "any and all injuries I have sustained, **known,**

unknown, or unknowable," **"[e]ven if additional facts become known which were not known at this time this Release was executed."** (Pa575 ¶ 1(b)) (emphasis added). While Plaintiffs argue that the "release clearly states that it is releasing [only] claims stemming from the United States District Court for The District of New Jersey, Civil Action No.: 03-3530," the exact opposite is true. (Pb11). The Release expressly provides that it is not limited to claims which could have been brought in Plaintiffs' prior federal court action, instead releasing "any and all past, present or future claims . . **. including by way of example *and not limitation*,** those which may be or could have been the subject matter of a lawsuit instituted in the United States District Court for The District of New Jersey, Civil Action No.: 03-3530." (Pa575 ¶ 1(a)) (emphases added).

These terms are not unusual. Rather, as the trial court noted, the Release contains "very conventional language" that is routinely utilized when settling personal injury cases in New Jersey. (1T at 5:9-22) (stating the Release "contained language that is seen probably in 100,000 releases every year in this country for settlements of personal injury cases."); (1T at 11:18-22) (stating the court has seen the language in the Release thousands of times before and it is "all very conventional"); *see also, Fisher Dev. Co. v. Boise Cascade Corp*., 37 F.3d 104, 108 (3d Cir. 1994) (applying state law and enforcing "general release[] of the kind regularly utilized in New Jersey" to bar future claims, holding language releasing

claims occurring up to date of execution and incorporating future claims meant "the parties wished to release not only those claims of which they were currently aware, but also those they might subsequently discover based on their relationship prior to the execution of the release.").

The language of the Release plainly bars claims for injuries caused by anything which occurred prior to execution of the Release, necessarily including exposure to methyl bromide. In fact, Plaintiffs conceded at oral argument that the Release barred claims for injuries resulting from Hatty's pre-Release methyl bromide exposure. (1T at 7:22-8:3; 10:3-14; 29:13-17).

Now, contrary to the above concession, Plaintiffs once again argue that the Release only bars claims related to the Achilles injury which was the subject of Plaintiffs' prior federal lawsuit. Plaintiffs cite only one case purportedly supporting their argument, and that case is completely inapposite. (Pb11-14). In *Isetts v. Borough of Roseland*, plaintiff filed suit in January 2000 against his employer alleging that he was the victim of harassment and retaliation. 364 N.J. Super. 247, 250 (App. Div. 2003). The case was settled in 2001, at which time the plaintiff signed a general release releasing "all claims from anything that has happened up to the date of its execution by plaintiff" including all claims "that were asserted or could have been asserted." *Id*. at 251. Following execution of the settlement agreement, plaintiff was subject to new incidents of retaliation and harassment. *Id*. There was

no dispute that the general release did not bar the subsequent action as the claims arose entirely from post-release conduct – the issue before the court was only whether plaintiff was entitled to discovery regarding the initial incidents of harassment. As the court explained, "plaintiff acknowledge[d] that all claims existing at the time of settlement have been extinguished by way of the release. Plaintiff seeks only to pursue a cause of action which arose after the settlement[.]" *Id*. at 254. In fact, the *Isetts* court specifically "agree[d] that the phrase 'any and all' allowed for no exception[.]" *Id*. at 256. Here, it is undisputed that Hatty was exposed to methyl bromide prior to execution of the Release and that, according to Plaintiffs' own expert testimony, pre-Release exposure was a cause of the injuries alleged in the pending litigation. Accordingly, *Isetts* has no relevance to the instant matter. If anything, *Isetts* supports Gloucester Terminals' position that a general release extinguishes any claim arising from conduct occurring prior to execution.

Thus Plaintiffs have provided no support for their position that a general release only bars claims related to the dispute which was the subject of the initial release. This is because no such support exists – rather, New Jersey courts interpret general releases consistent with their plain language and accordingly find that any claim arising from conduct which occurred prior to execution of a general release is barred regardless of whether the claim is related to the dispute which was the subject of the release.

In *Panaccione v. Holowiak* for example, defendant owned a 6.835-acre tract of property which he subdivided into three lots. No. MID-L-10236-06, 2008 WL 4876577 (App. Div. Nov. 12, 2008) (unpublished opinion, Pa597-605). Three years later defendant sold the one lot zoned as residential to plaintiffs. Prior to closing there was a dispute regarding the boundaries of the lot and the parties entered into a general release at the time of sale stating: "I release and give up any and all claims and rights which I may have against you. This releases all claims, including those of which I am not aware and those not mentioned in this Release. This Release applies to claims resulting from anything which has happened up to now." *Id*. at *6. One year later, plaintiffs discovered that defendant intended to develop the adjacent lots and brought suit alleging fraud and seeking to enjoin the development. Defendant moved for summary judgment arguing the release barred the suit, and plaintiffs argued that because the general release was executed to resolve the dispute regarding the boundaries of the lot plaintiffs purchased, "the release should be limited to claims involving that dispute and [] they could not have waived claims of which they were unaware." *Id*.

The trial court rejected plaintiffs' argument and found the general release barred the second action. The court in *Panaccione* rejected the same argument Plaintiffs make here that a general release should be limited to claims related to the initial dispute, instead interpreting the release according to its plain language and

holding the release was "very broad [] and it releases any and all claims. And to the extent there was any dispute … as to acreage, that could have been put in there . . . . This is about as broad a release as you can get releasing any and all claims. I can't read in what plaintiffs' counsel wants me to read into the release." *Id*. The appellate division affirmed, finding plaintiffs could not "avoid the effect of the broad provisions of the general release." *Id.*; *see also, Selective Cas. Ins. Co. v. Exclusive Auto Collision Ctr., Inc*., No. A-0568-17T1, 2018 WL 3892740 at *4 (N.J. Super. Ct. App. Div. Aug. 16, 2018) (unpublished opinion, Pa1689-92) (finding general release barred subsequent action regarding damage to car which was unknown at time release was executed, rejecting plaintiff's argument that "the parties only intended to settle the unrelated prior litigation," finding "the express language of the release broadly encompasses any and all claims Selective may have had with Exclusive."); *Daruwala v. Merchant*, No. A-1310-13T3, 2015 WL 6829646 at *11-12 (N.J. Super. Ct. App. Div. Nov. 9, 2015) (unpublished opinion, Da10) (finding general release entered into to resolve property agreement in divorce proceeding barred subsequent defamation claim arising from conduct occurring prior to execution of the release).

In accordance with courts in New Jersey, other courts across the country have consistently found that a general release is not limited to claims related to the injury which was the subject of the initial action. *See, e.g., Memorial Med. Ctr. of E. Tex.*

v. Keszler, 943 S.W.2d 433, 435 (Tex. 1997) (holding where doctor signed general release resolving claims against hospital related to corrective action taken against him for tampering with government documents, general release barred plaintiff's subsequent claim for injuries caused by exposure to ethylene dioxide at the hospital prior to execution of release); *Gracia v. City of N.Y.*, 16-CV-7329, 2017 WL 4286319 at *2 (S.D.N.Y. 2017) (finding general release entered into as a result of slip and fall barred subsequent discrimination action, holding the general release clearly applied to all claims "even if those claims are unrelated to the slip and fall and even if she was not aware of such claims or had not yet pursued them."); *Werner v. 1281 King Assoc., LLC*, No. 1725 MDA 2023, 2024 WL 4759151 (Pa. Super. Ct. Nov. 13, 2024) (finding based on "the ordinary meaning of the words of the document" that general release resolving termination of distributor agreement between parties barred subsequent claim based on personal injury which occurred prior to execution of release); *Eck v. Godbout*, 444 Mass. 724, 728 (2005) ("As is often the case, a release may be prompted by the settlement of a specific dispute or resolution of a specific issue, but broad wording in the release operates to settle all other, unrelated matters, even if they were not specifically in the parties' minds at the time the release was executed."); *Abdella v. Seibold Plumbing & Heating, Inc*., No. 11–P–1530, 2012 WL 4867375 at *1, n.3 (Mass. App. 2012) (unpublished opinion, Da1) (enforcing general release which "employs broad wording that

operates to settle all other unrelated matters, even though the release was prompted by the settlement of a specific dispute. Such broad releases have long been held valid and enforceable."), *Bean Little Investments, LLC v. Melson Properties LLC*, No. 331855, 2017 WL 3442447 at *2 (Mich. App. 2017) (unpublished opinion, Da7) (rejecting argument that general release was not intended to bar unknown claims that were unrelated to the dispute, finding general release barred subsequent action where release stated it applied to all claims of "[w]hatever nature … which to date were raised or which could have been raised"); *Hampton v. Nat. Life Ins. Co*., 706 So.2d 1196, 1198 (Ala. App. 1996) (rejecting argument that general release barred only claims relating to insurance policy at issue in settlement where release stated that defendant "is discharged for all claims arising prior to the date of the release"); *Boyd v. Martinez*, No. 3:22-cv-00227, 2022 WL 12029152 at *9 (M.D. Tenn. Oct. 20, 2022) (rejecting argument that general release did not bar unrelated claims because language was generic, holding "[m]aybe it did not occur to the defendants that their rights to sue [] for malpractice were among the rights they were releasing, but that subjective lack of foresight does not change the fact that those rights were, by any reasonable reading of the Settlement Agreement, released.").

Here, the Release bars all claims arising from anything which occurred prior to execution, necessarily including pre-Release exposure to methyl bromide. To the extent Plaintiffs sought to limit the Release to claims arising from Hatty's Achilles

injury, that limitation "could have been put in there." *Panaccione,* 2008 WL 4876577 at *6. Instead, Plaintiffs executed a broad, general Release applying to any and all claims, known or unknown, expressly *not* limited to claims which could have been asserted in the prior federal action. As in *Panaccione*, the trial court properly enforced the Release according to its plain language and correctly declined to "read in what plaintiffs' counsel wants [the court] to read into the release." *Id*. Consistent with New Jersey law, Plaintiffs must "be held to the terms of the bargain [they] willingly and knowingly entered." *Raroha*, 47 N.J. at 234. The trial court correctly found that the Release bars claims for injuries resulting from pre-Release methyl bromide exposure.

C. The Trial Court Properly Granted Summary Judgment Because Plaintiffs Failed to Present Any Expert Evidence Demonstrating that Hatty's Post-Release Methyl Bromide Exposure was Sufficient to Cause his Injuries. (Pa12; Pa7)

1. Plaintiffs' expert evidence fails to establish that Hatty's post-Release exposure was independently sufficient to cause his injuries.

As the Release bars Plaintiffs from bringing claims for injuries resulting from exposure to methyl bromide prior to execution of the Release, it follows that Plaintiffs cannot maintain a cause of action against Gloucester Terminals unless they provide expert evidence establishing that Hatty's post-Release exposure to methyl bromide was alone sufficient to cause his injuries. Despite being given numerous opportunities by the trial court, Plaintiffs have been unable to provide any evidence

that such exposure was even sufficient to do so, much less that it actually caused the alleged injuries. (1T at 19:15-20:15; 30:20-33:12; 3T at 18:11-20:1). Accordingly, Plaintiffs cannot meet their burden of proving causation and the trial court properly granted summary judgment.

To establish a claim for negligence, a plaintiff must prove: (1) a duty of care; (2) a breach of that duty; (3) proximate causation; and (4) injury. *Steele v. Aramark Corp*. 535 Fed. Appx. 137, 142 (3d Cir. 2013). "In a toxic-tort action . . . a plaintiff must prove what is known as 'medical causation'—that the plaintiff's injuries were proximately caused by exposure to the defendant's product." *James v. Bessemer Processing Co., Inc.*, 155 N.J. 279, 299 (1998). There is no dispute that Plaintiffs carry the burden of proving causation. (1T at 30:17-20; 37:10-14) (conceding that Plaintiffs carry the burden of proving causation in this action); *see also Khan v. Singh,* 200 N.J. 82, 91 (2009) ("[I]t is ordinarily a plaintiff's burden to prove negligence, and ... it is never presumed.").

Plaintiffs argue that they met their burden of proof by demonstrating that Hatty was regularly exposed to methyl bromide and claim that they "do[] not have to demonstrate causation pre/post release." (Pb17). As the trial court demonstrated at oral argument, however, Plaintiffs' contention cannot be correct. The trial court considered the following hypothetical – suppose that instead of injuring his Achilles tendon in 2004, Hatty had been injured by methyl bromide exposure and executed

the instant Release resolving his claims. (3T at 9:15-12:13). Suppose then that Hatty was exposed to methyl bromide again several years later and brought a second lawsuit. (3T at 9:15—12:13). There can be no doubt that under these facts, Plaintiffs' claims would be barred by the terms of the general release unless they could prove that Hatty's injuries as alleged in the second lawsuit were caused solely by post-release exposure to methyl bromide. (3T at 9:15-12:13). As discussed in Section IV.B *supra*, the Release bars Plaintiffs from bringing any claims arising from pre-Release exposure to methyl bromide as surely as if the original claim arose from methyl bromide exposure. Accordingly, Plaintiffs' claims alleging injuries caused by post-Release exposure to methyl bromide are similarly barred unless Plaintiffs proved that Hatty's post-Release methyl bromide exposure alone was sufficient to cause his injuries.

As the trial court correctly found, no such evidence exists. Plaintiffs primarily point to the report of Dr. Lynch, an industrial hygienist who opined that Hatty was exposed to significant levels of methyl bromide from 2006 through 2017. (1T at 27:23-29:6; 31:15-32:19). Dr. Lynch is not a medical expert, however, and did not and could not opine regarding the cause of Hatty's injuries, whether pre- or post-Release or otherwise.[3] (Pa1466-1478). Nevertheless, Plaintiffs argue that because

[3] Additionally, as the Court noted during oral argument, Dr. Lynch did not analyze how much methyl bromide Hatty might have been exposed to while working for Del Monte as opposed to PSA, which in fact may have been more given that different

their medical causation expert Dr. Laumbach relied in part on Dr. Lynch's report in rendering his opinion that Hatty's injuries were caused by methyl bromide exposure, Dr. Laumbach drew "the necessary nexus between Mr. Hatty's neurological injuries and symptoms to his chronic overexposure" to methyl bromide while working at Gloucester Terminals. (1T at 28:19-29:12). Yet that argument still evades the critical issue because the proffered expert evidence did not address whether Hatty's post-Release exposure **alone** was sufficient to cause his injuries. (1T at 31:15-33:12). Indeed, Dr. Laumbach's opinion on medical causation directly contradicts Plaintiffs' inference. Dr. Laumbach's report is expressly **not** limited to the "post-Release" exposure period. Dr. Laumbach examined "whether or not Mr. Michael Hatty sustained personal injuries due to exposure to methyl bromide while employed at Produce Services of America Inc. as an expediter from about 2007 to 2017, **and**

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practices and procedures related to fumigation were implemented at the Terminal during the time period that Hatty worked for PSA. (*See* Pa1466-78). Further, while working at Wilmington prior to Del Monte moving its operations to the Terminal in 2001, the cold boxes were not ventilated, potentially causing increased levels of methyl bromide exposure. (Pa343-44). And none of Plaintiffs' experts even attempt to determine the amount of Hatty's exposure while working at the Terminal relative to Hatty's exposure while working at Tioga or Wilmington. The trial court granted summary judgment to Western on this basis, *i.e*., because Western had no connection to fumigation at the ports at Wilmington and Tioga, and Plaintiffs' experts failed opine as to the relative amount of methyl bromide Hatty was exposed to at these locations. (Pa5; 3T at 33:17-36:2). As is true with Western, Gloucester has no ownership or operational interest in the Wilmington or Tioga ports. Therefore, even if Hatty had not executed the Release, summary judgment would properly have been granted in favor of Gloucester Terminals on the same basis as it was granted to Western.

as a loader/expediter for Del Monte from about 1998 to about 2007." (Pa1772). (emphasis added). In doing so, Dr. Laumbach relied not only on Dr. Lynch's report, but on numerous other sources including Hatty's deposition testimony, in particular his work for Del Monte during the "pre-Release" time period. (Pa1773, 1775-76). Dr. Laumbach's report, for example, states that while Hatty was working for Del Monte—which was prior to September 14, 2004—fumigation was performed 90% of the nights during the busy season and performed once or twice per week during the less-busy season. (Pa1776). Based on this and other information, Dr. Laumbach ultimately concluded "[t]o a reasonable degree of medical probability, **all** of Mr. Hatty's peripheral and central nervous system pathologies . . . were caused by his occupational exposure to methyl bromide while working as an expediter for PSA **and Del Monte**." (Pa1786) (emphasis added). Thus, Dr. Laumbach expressly did not conclude that Hatty's post-Release exposure alone caused his injuries, and Plaintiffs have no other evidence demonstrating that Hatty's post-Release exposure to methyl bromide was even sufficient to cause his injuries.[4]

[4] While Plaintiffs state in their appeal brief that "both of Plaintiffs' medical experts, Dr. Olga Katz, Plaintiff's treating neurologist [] and Dr. Laumbach, in conjunction with the expert opinions of Dr. Lynch, clearly draw the necessary nexus between" Hatty's injuries and his methyl bromide exposure, Plaintiffs make no other mention of Dr. Katz anywhere in their brief. (Pb25). Dr. Katz did not opine as to whether Hatty's post-Release exposure was sufficient in and of itself to have caused his injuries. (Pa1812-15). Rather, Dr. Katz concludes "within a reasonable degree of medical certainty" that Hatty's injuries were caused by "exposure to the highly toxic chemical, methyl bromide," and bases this conclusion on her finding that Hatty

Contrary to Plaintiffs' claim that the trial court "ignor[ed] the evidence of record," the record shows that the trial court carefully considered Plaintiffs' evidence in detail on multiple occasions. (Pb17). During oral argument on Gloucester Terminals' motion for summary judgment, the court considered Plaintiffs' expert testimony and even read Dr. Laumbach's report aloud into the record. (1T at 30:20 – 33:12). The trial court found that none of Plaintiffs' experts had opined that Hatty's post-Release exposure was sufficient to cause his injuries, but gave Plaintiffs another opportunity to provide such evidence, advising that if they could address this deficiency the trial court would consider granting a motion for reconsideration. (1T at 40:10-42:6). At oral argument on Plaintiffs' motion for reconsideration, Plaintiffs pointed to the same exact evidence and the court considered it a second time. The trial court correctly concluded once again that none of Plaintiffs' experts opined as to whether Hatty's post-Release exposure alone could have caused his injuries. (3T at 22:16-23:13; 32:8-13) (recognizing that "none of the plaintiffs experts even attempted to indicate that exposure post-release was a substantial factor[.]"). Accordingly, Plaintiffs failed to establish that Hatty's post-Release exposure was independently sufficient to cause his injuries.

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experienced "long-term exposure to methyl bromide [] while working." (Pa1815). Dr. Katz did not address whether Hatty's post-Release exposure was sufficient to cause his injuries, instead finding that "the long-term chronic exposure to [methyl bromide] lead to the development of slowly progressive long-term degenerative processes in the peripheral nervous system[.]" (Pa1814).

2. Plaintiffs fail to meet their burden of proof under any standard of causation and regardless, *Sholtis* is not the applicable causation standard in this negligence case.

Unable to meet their burden of proof, Plaintiffs argue the court should have applied what they characterize as a more relaxed medical causation standard, the *Sholtis* test, under which Plaintiffs claim they only needed to prove that Hatty was "frequently, regularly and in close proximity" exposed to methyl bromide to demonstrate causation. (Pb17-25); *see also Sholtis v. American Cyanamid Co.,* 238 N.J. Super. 8, 26 (App. Div. 1989). Not only this this not the proper standard in this single-product negligence case, but Plaintiffs completely mischaracterize the holding of *Sholtis*. *Sholtis* requires not only evidence of exposure to establish causation, but also expert evidence demonstrating a causal link between the exposure for which the defendant is liable and the injury. It is the second prong of the *Sholtis* test where Plaintiffs' evidence falls short. As Plaintiffs failed to provide expert evidence demonstrating that Hatty's post-Release exposure to methyl bromide was sufficient to cause his injuries, summary judgment is proper under any causation standard.

Plaintiffs' brief focuses on the first prong of the *Sholtis* test, contending that because Plaintiffs established that Hatty was "exposed to methyl bromide with frequency, regularity, and proximity [he] therefore can satisfy his causation burden." (Pb17-25). Plaintiffs' contention is contrary to both law and common sense. It

cannot be correct that proof by itself that a plaintiff was exposed to a particular substance sufficiently proves that the exposure was the cause of the plaintiff's injury. Something more must be required. Indeed, the cases Plaintiffs rely on – *Sholtis* and its progeny – each clearly held that Plaintiffs must demonstrate not only regular, frequent and proximate exposure to a substance to establish causation, but must also provide "medical and/or scientific proof of a nexus between the exposure and the plaintiff's condition." *James*, 155 N.J. at 304.

In *Sholtis*, plaintiffs alleged they had suffered injuries caused by exposure to numerous asbestos products over four decades of employment at various buildings throughout the complex where they worked. 238 N.J. Super. at 14. Plaintiffs provided evidence clearly demonstrating that each defendant's asbestos products were present at the complex, but plaintiffs were unable to pinpoint with specificity where they may have been exposed to each specific defendant's product. *Id*. Defendants moved for summary judgment, arguing plaintiffs had failed to establish causation as to any individual defendant. *Id*. at 19. Recognizing the difficulties facing plaintiffs in asbestos cases attempting to prove exposure to a particular defendant's product, the court established a two-part causation test, holding that to survive summary judgment plaintiffs were required to provide evidence that they were "exposed to a defendant's friable asbestos frequently and on a regular basis, while they were in close proximity to it[]; **and if competent evidence, usually**

supplied by expert proof, establishes a nexus between the exposure and plaintiff's condition." *Id.* at 31 (emphasis added).

The issue before the court in *Sholtis* was limited to determining whether plaintiffs had met the first prong of the test, *i.e.*, whether plaintiffs had provided evidence sufficient to demonstrate that they had been exposed to each defendant's product. The opinion is clear throughout that it was limited to addressing only the first prong of the analysis:

- "In most asbestos cases, where exposure is cumulative over many years and there is a late manifestation of disease, it is difficult to prove plaintiff's exposure to a particular defendant's product." *Id*. at 14.
- "[T]he proper inquiry was whether there is sufficient direct or circumstantial evidence from which a jury could infer that each plaintiff was probably exposed to friable asbestos emanating from a defendant's product during the course of his employment history." *Id*. at 19.
- "[T]he requirement that a plaintiff prove an exposure of sufficient frequency, with a regularity of contact, and with the product in close proximity; and that such factors should be balanced for a jury to find liability." *Id*. at 28.
- "We recognize an unfairness in our here establishing a standard of exposure, and then, post facto, finding definitively that a particular defendant falls within or outside of the standard." *Id*. at 29-30.

While the *Sholtis* test arguably relaxed the standard for plaintiffs seeking to prove they were exposed to a particular product in multi-product, multi-defendant cases, the *Sholtis* court did not relax or even address the standard for the second prong of the test, which requires "**competent evidence, usually supplied by expert proof, establish[ing] a nexus between the exposure and plaintiff's condition**."

Sholtis, 238 N.J. Super at 31 (emphasis added); *see also, James*, 155 N.J. at 304 (stating a plaintiff can demonstrate medical causation under *Sholtis* by establishing: "(1) factual proof of the plaintiff's frequent, regular and proximate exposure to a defendant's products; **and (2) medical and/or scientific proof of a nexus between the exposure and the plaintiff's condition**.") (emphasis added).

The two other cases Plaintiffs rely on demonstrate that, consistent with *Sholtis,* to establish causation a plaintiff must provide expert evidence demonstrating a causal nexus between exposure for which a defendant is liable and his or her injury, not just proof of frequent, regular and proximate exposure. In *James*, where the plaintiff developed cancer as a result of prolonged exposure to various petroleum and chemical products, the court evaluated not only whether the plaintiff had sufficiently proved frequent, regular and proximate exposure to the carcinogens at issue, but also whether plaintiff had provided expert evidence sufficient to demonstrate a causal nexus between the substances at issue and the plaintiff's injuries. 155 N.J. at 304. In *Vassallo v. American Coding & Marking Ink. Co.*, the plaintiff was exposed to both pesticides and marking ink during the course of her employment. 345 N.J. Super. 207, 216 (App. Div. 2001). Plaintiff brought a products liability action against the manufacturer of the ink, claiming exposure to the ink had caused her injuries. Applying *Sholtis*, the court found that plaintiff had provided evidence sufficient to withstand summary judgment because she provided

evidence of regular, frequent and proximate exposure to ink and, applying the second prong of *Sholtis*, provided expert evidence sufficiently demonstrating a nexus between plaintiff's exposure to the ink "alone" and her injuries. *Id*. at 216.

It is precisely this second showing that Plaintiffs here failed to make. Plaintiffs executed a general Release barring any claims arising from exposure to methyl bromide prior to execution of the Release. Because the Release barred Plaintiffs from bringing any claims arising from pre-Release exposure to methyl bromide, *Sholtis* requires Plaintiffs to provide **proof of a causal nexus between Hatty's *post-Release exposure only* and his injuries** to survive summary judgment. The trial court explained this to Plaintiffs at oral argument, stating "nobody[] is arguing that you don't have proof that there was exposure that postdated September 2004. That's not your problem. The problem is that [no] expert specifically state[s] . . . that the post September 2004 exposure [] in and of itself would have caused the problem." (1T at 20:2-13).

As discussed herein, Plaintiffs failed to provide expert evidence demonstrating that Hatty's exposure to methyl bromide after the Release was executed was independently sufficient to cause his injuries. Plaintiffs' sole causation expert Dr. Laumbach concluded that Hatty's exposure to methyl bromide was sufficient to cause his injuries based on his **combined exposure to methyl bromide both pre- and post-Release**. (Pa1786). The trial court correctly found that

Plaintiffs' evidence was insufficient to establish causation even under the *Sholtis* standard. (3T 23:11-27:19) (explaining by analogy that had the plaintiff smoked one brand of cigarettes for years then switched to another brand of cigarettes and brought suit against the second cigarette manufacturer, expert evidence opining that smoking in general caused the injury is "not enough" to survive summary judgment under *Sholtis* because it fails to establish the causal nexus between the second product and the injury). To survive summary judgment, *Sholtis* requires Plaintiffs to provide evidence not only of frequent, regular and proximate exposure to methyl bromide after execution of the Release, but also "expert proof [of] a nexus between the exposure and the plaintiff's condition." Plaintiffs failed to provide expert evidence establishing that Hatty's post-Release exposure to methyl bromide was sufficient to cause his injuries, and Plaintiffs therefore fail to meet their burden of establishing causation, whether under *Sholtis* or otherwise.

Further, even if Plaintiffs could establish causation under *Sholtis* – which they cannot – *Sholtis* is not the appropriate standard in this single-substance negligence case. The *Sholtis* standard was intended to address product-identification difficulties facing plaintiffs in strict liability cases where their injury was caused by exposure to multiple products manufactured by multiple defendants. *James*, 155 N.J. at 300-01 (discussing need for more relaxed causation standard where "a plaintiff has been exposed to multiple products of multiple defendants"); *Steele,* 535 Fed. Appx. at 142

(stating *Sholtis* was intended to address product identification difficulties in cases involving "many defendants who manufactured many different products, all of which contributed" to the injury, not cases involving "only a single product and a single source."). The two cases cited by Plaintiffs, *James* and *Vassallo*, are both product liability actions in which the plaintiff was exposed to multiple products manufactured by multiple defendants. *See James,* 155 N.J. at 300-04 (applying *Sholtis* where plaintiff was injured by exposure to "a wide array of" petroleum products over twenty-six years and could not "precisely identify . . . the exact petroleum products to which [he] was exposed"); *Vassallo*, 345 N.J. at 216 (applying *Sholtis* standard where plaintiff was exposed to toxic ink and pesticide products, holding the standard is applicable "where there has been exposure to multiple products over an extended period of time."). *Sholtis* is not the proper standard in single-product negligence cases such as this one. *See Baker v. Peoples*, 2012 WL 360283 at *4 (N.J. Super. Ct. App. Div. Feb. 6, 2012) (unpublished opinion, at Da3) (holding where plaintiff alleged injuries caused by ingestion of lead paint in two different apartment buildings, "[w]e decline to extend the holdings in *Sholtis* and *James* to this negligence case against [] a residential landlord" because "[i]n both *Sholtis* and *James*, unlike here, the plaintiffs were exposed to multiple products of multiple defendants over an extended period of time."); *Steele v. Aramark Corp*. 535 Fed. Appx. at 142 (refusing to apply *Sholtis* standard where plaintiff alleged he was

injured by exposure to a single substance over years of employment, finding New Jersey had not applied *Sholtis* in any "single-product" case and "reject[ing the] assertion that *Sholtis* applies across the board in occupational-exposure, toxic-tort cases.").

In sum, the trial court properly granted summary judgment because by failing to provide any expert evidence demonstrating that Hatty's post-Release exposure was sufficient to cause his injuries, Plaintiffs failed to meet their burden of proof to establish causation, whether under *Sholtis* or otherwise. While Plaintiffs argue that by requiring proof that Hatty's post-Release exposure was sufficient to cause his injuries the trial court created an exception to the *Sholtis* standard, it is Plaintiffs who are seeking an exception to well-settled law. Not only is *Sholtis* not the applicable standard in this case, but it has long been established that a general release bars claims arising from any conduct which occurred prior to execution of the Release. Consistent with this principle, because the Hattys released all claims arising from pre-Release exposure to methyl bromide, Plaintiffs were required to demonstrate that Hatty's post-Release exposure was sufficient to cause his injuries. *Sholtis* did not relax this requirement. Plaintiffs failed to do so, thus their claims are barred

under any causation standard and the trial court properly granted summary judgment.[5]

V. CONCLUSION

Consistent with well-settled law, the trial court correctly applied the Release according to its plain language and found that Plaintiffs are barred from bringing claims resulting from anything that occurred prior to execution of the Release, including exposure to methyl bromide. Because Plaintiffs failed to provide expert evidence demonstrating that Hatty's post-Release exposure was independently sufficient to cause his injuries, the trial court properly granted Gloucester Terminals' motion for summary judgment and the decision should be affirmed.

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[5] In a single paragraph of their brief, Plaintiffs also argue that because Gloucester Terminals should not have been dismissed from the case, the trial court erred in finding that Gloucester Terminals' motion for summary judgment with regard to punitive damages was moot. (Pb43). Had Gloucester Terminals not been dismissed, however, its summary judgment motion as to punitive damages would properly have been granted for the same reasons the court granted Western's motion – *i.e.,* because the alleged failure to comply with voluntary measures above and beyond OSHA standards does not entitle a plaintiff to punitive damages. (Pa10; 2T at 65:15-67:24; 41:10-42:18). Regardless, the trial court never reached the merits of Gloucester Terminals' punitive damages motion. In the event that this Court overturns the ruling on Gloucester Terminals' summary judgment motion, the trial court would then have to consider and render a decision on Gloucester Terminals' motion on punitive damages.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO: A-003914-23
Date Filed: February 10, 2025

MICHAEL HATTY and SUSAN HATTY (h/w), Plaintiffs-Appellants v. WESTERN INDUSTRIES-NORTH, LLC, GLOUCESTER TERMINALS, LLC and PRODUCE SERVICES OF AMERICA, INC. Defendant-Respondents.	On Appeal From: Superior Court of New Jersey, Law Division, Camden County Docket No.: CAM-L-1685-19 Sat Below: Hon. Michael J. Kassel, J.S.C.

BRIEF OF WESTERN INDUSTRIES-NORTH, LLC

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Table of Contents

Appendix

Table of Authorities

Cases

Statutes

Court Rules

Table of Transcripts

Preliminary Statement

Plaintiff Michael Hatty filed suit alleged damages from exposure to a fumigant called methyl bromide during his employment with Produce Services of America, Inc. ("PSA") from 2007 to 2017. Among the Defendants Plaintiff sued was Western Industries-North, LLC, ("Western") the company that was hired by PSA to perform the fumigation of recently imported fruit.

Plaintiff had previously performed the same job functions working for a different employer—Del Monte, who is not a party to this action—from 1998 to 2006 and was also exposed to methyl bromide during that employment. However, Western did not perform fumigations for Del Monte.

Thus, to establish causation against Western, Plaintiff had to demonstrate that his injuries were caused by his exposure to methyl bromide ***while a PSA employee***. However, Plaintiff's experts only opined that his alleged injuries were caused by his occupational exposure to methyl bromide while employed with ***both*** Del Monte and PSA, with no attempt to demonstrate that the exposure while an employee of PSA was sufficient to cause his damages.

The opinions provide no basis upon which a jury could determine whether Plaintiff's alleged exposure at PSA, alone, had any causal role in his claimed injuries, nor did they seek to demonstrate that Plaintiff's exposure to

methyl bromide during his employment at Del Monte was inconsequential to his injuries. Thus, Plaintiff asked the jury to speculate as to whether Western's alleged negligence proximately caused Plaintiff's alleged injuries.

The trial judge properly granted summary judgment for that reason.

Plaintiff also seeks to reverse the dismissal of his punitive damages claims. Because a claim for punitive damages is not a stand-alone claim, this issue is only relevant if there was error in dismissing the negligence claim.

In any event, the record does not justify an award of punitive damages under New Jersey law. Plaintiff seeks punitive damages because, he alleges, Western failed to abide by its own, voluntary, internal standards designed to minimize workers' exposure to methyl bromide.

However, Western's standards were significantly more restrictive than those required by the Occupational Safety and Health Administration, ("OSHA"). Further, testing revealed no methyl bromide level that was even half of the amount permitted by the more-restrictive standards of OSHA. As such, even if it is true that Western failed to abide by its own standards, that does not establish the level of culpability required—the evil-minded motive—necessary to impose punitive damages under New Jersey law. There was no error in dismissing the punitive damages claim.

Statement of Procedural History

On February 6, 2019, Plaintiff filed suit in Middlesex County, at Docket No. MID-L-001243-19 against several Defendants, including Western Industries-North, LLC, The Industrial Fumigant Company, LLC, Rollins, Inc., and Western Exterminating Company of Pennsylvania, Inc. (collectively "the Western Defendants"); Holt Logistics Corp.; PSA; and GMT Reality, LLC. (Pa56-76) On March 18, 2019, the Western Defendant filed their answer and filed a motion to transfer the case to Camden County. (DWa1-16)[1] On April 26, 2019, the Honorable Alberto Rivas, J.S.C., granted the motion to transfer the case and ordered the case transferred to Camden County. (DWa17-18) The matter was then docketed at Docket CAM-L-001685-19.

On October 25, 2019, the Honorable Michael J. Kassel, J.S.C. granted PSA's unopposed motion for summary judgment, dismissing it from the case completely. (Da19) On February 14, 2020, the court ordered Western Exterminating Co. of Pennsylvania dismissed without prejudice of for lack of prosecution. (Da20) On February 16, 2023, the parties stipulated to the dismissal of crossclaims against PSA. (Da21-22)

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[1] Pa = Appendix of Plaintiff
DWa = Appendix of Western Industries-North, LLC

On May 12, 2023, the Western Defendants filed their motion for summary judgment regarding Plaintiff's punitive damages claim. (Pa40-180) On that same date, Rollins Inc. and Industrial Fumigant Company LLC filed their motion for summary judgment on the grounds that neither company had any involvement in this matter. (Pa181-233) On July 6, 2023, Judge Kassel issued his order granting the dismissal of Rollins Inc. and Industrial Fumigant Company LLC. (Pa10-11) On July 21, 2023, Judge Kassel issued an order dismissing the punitive damages claims against the Western Defendants. (Pa8-9)

On May 12, 2023, Gloucester Terminals, LLC also filed a motion for summary judgment, seeking dismissal of the claims against it pursuant to a release issued by Plaintiff. (Pa533-610) On June 23, 2023, Judge Kassel issued his order granting that summary judgment motion. (Pa12-13)

On July 28, 2023, the remaining Western Defendants filed their motion for summary judgment under somewhat related reasoning employed by Judge Kassel employed to dismiss Gloucester Terminals, LLC. (Pa1707-1751) On September 8, 2023, Judge Kassel considered a motion for reconsideration of the order dismissing Gloucester Terminals, LLC as well as the Western Defendants' motion for summary judgment. (3T4:1-40:5) He denied the

reconsideration motion and granted the Western Defendants' motion for summary judgment. (Pa5-6; Pa7)

On July 19, 2024, a stipulation of the dismissal of the remaining claims was filed, and Judge Kassel ordered the case dismissed on July 22, 2024. (Pa1-4) Plaintiff's notice of appeal was filed on August 13, 2024. (Pa14-18)

Statement of Facts

Plaintiffs Michael and Susan Hatty[2] filed suit alleging personal injuries suffered by Plaintiff during his employment with PSA. PSA is an importer of fruit and operates out of a marine terminal located in Gloucester City, New Jersey, known as the Gloucester Marine Terminal (occasionally, "the Terminal"). (Pa56-76) Plaintiff worked for PSA from approximately 2007 to 2017. (Pa346) Plaintiff alleged that during that time, he was exposed to the fumigant methyl bromide and suffered personal injuries as a result. (Pa56-76)

Plaintiff sued the owners and operators of the Gloucester Marine Terminal: GMT Realty, LLC, Gloucester Terminals, LLC, and Holt Logistics (hereinafter collectively, "the Terminal Entities"). (Id.) He also sued entities

[2] While there are two Plaintiffs, because Susan Hatty's claim is a derivative, *per quod* claim for lack of consortium, and for the convenience of this Court, the singular "Plaintiff" will be used in this brief.

he believed responsible for performing the fumigations during Plaintiff's period of employment with PSA, namely the Western Defendants. (Id.)

Western Exterminating Company of Pennsylvania, Inc., was dismissed for lack of prosecution on February 14, 2020, and Rollins, Inc., and The Industrial Fumigant Company were dismissed by order dated July 6, 2023. (Pa10-11) Those dismissals are not subject to this appeal, and Western Industries-North, LLC (hereinafter, "Western") is the sole remaining Western Defendant.

The Terminal consists of a large building located along the Delaware River, where cargo ships dock to be off-loaded. (Pa61) The building is separated into two sections: Pier 8 and Pier 9. (Pa99-100) Each Pier has its own warehouse, consisting of a large open area where the fumigation is performed, known as "the shed," and several large, refrigerated units, known as "cold storage boxes." (Id.) The Central Warehouse was where Plaintiff worked while employed by PSA. (Pa561)

PLAINTIFF'S EMPLOYMENT

Plaintiff worked seasonally as an "expediter," assisting forklift drivers locating the correct pallets of fruit from within the cold storage boxes. (Pa555) The work season typically ran from November through June. (Pa566)

Prior to working for PSA, Plaintiff worked seasonally for another fruit-importing company, Del Monte. Starting in 1998, Plaintiff worked for Del Monte at the Port of Wilmington, a marine terminal in Wilmington, Delaware. (Pa558) Del Monte moved its business operations to the Gloucester Marine Terminal in 2001 and Plaintiff worked for Del Monte out of a building at the Gloucester Marine Terminal, known as Building 42. (Pa558; Pa561) Plaintiff's employment with Del Monte lasted until 2006, as he was not rehired after the 2005-2006 season. (Pa558) He started working for PSA beginning with the 2007-2008 season. (Pa562) Plaintiff worked seasonally for PSA until 2017, when he quit allegedly due to injuries he sustained because of exposure to methyl bromide. (Pa553)

Even though Plaintiff worked at a different facility and in a different building while working for Del Monte, he testified that his job duties were "basically the same" during both employments. (Pa346)

WESTERN'S RESPONSIBILITIES AND THE FUMIGATION PROCESS

Western was hired by PSA to fumigate certain imported fruit, as required by United States Department of Agriculture ("USDA") regulations to control pests and other invasive species. (2T23:11-21) No evidence was produced showing that Western ever performed fumigations in either Building

42 or the Port of Wilmington, nor at any time when Plaintiff worked at those facilities.

Workers unloaded the cargo ships docked at either Pier 8 or 9 and brought pallets containing imported fruits into the Central Warehouse. (Pa90) Fruit that was not going to be fumigated was taken directly into the cold storage boxes or loaded directly on trucks for shipping. (Pa147)

Before the fumigation began, tarps were lowered from the ceiling to cover the fruit being fumigated. (Id.) Methyl bromide would then be introduced through atomization devices and sprayed directly under the tarps and onto the fruit. (Id.; Pa88-89) After a set amount of time, to allow the fumigant to work, ventilation fans connected to outside air stacks were turned on, evacuating the fumigant from under the tarps and disbursing it outside of the building. (Id.)

When the area under the tarps was sufficiently ventilated, confirmatory air samples were collected from under the tarps to ensure that all methyl bromide was evacuated, at which point the tarps were removed. (Id.) Methyl bromide levels were then sampled again from various areas within the shed to confirm that the area was safe for entry. (Id.)

Fumigation was only performed in the overnight hours. (Pa83-86) During the fumigation process, only employees of Western and representatives

of the USDA were allowed in the building. (Id.) Only after the area is cleared were Terminal personnel allowed to enter the building and begin their shifts. (Id.) The whole process of fumigating the fruit and clearing the area after fumigation generally ended before 6:00 a.m. (Id.) Any non-Western employees who arrived on-site prior to the area being cleared by the USDA were refused entry to the building until after the area was cleared. (Id.)

Plaintiff testified that he was never in the building when fumigations were occurring. (Pa81)

THE OSHA LIMIT OF 20 PPM

The Occupational Safety and Health Administration ("OSHA"), pursuant to authority granted by the Occupational Safety and Health Act of 1970, set a permissible exposure limit (occasionally "PEL") for methyl bromide of twenty parts per million ("20 ppm"). *See* 29 CFR 1910.1000 Table Z-1[3]. This means that workers may not be exposed to ambient levels of airborne methyl bromide while working which exceed 20 ppm at any time. *See* 29 CFR 1910.1000.

[3] Available at https://www.osha.gov/laws-regs/regulations/standardnumber/1910/1910.1000TABLEZ1

FUMIGATION AIR SAMPLING STANDARD OPERATING PROCEDURES

Beginning in approximately 2011 or 2012, Western developed a set of standard operating procedures to monitor the levels of methyl bromide inside the cold storage boxes. (Pa101) The concern was that minute quantities of methyl bromide could become trapped in the product packaging and slowly release over time, a process known as "off-gassing." (Pa98) Since some of the fumigated fruit was temporarily stored in the cold storage boxes prior to being shipped off-site, Western and the Terminal sought to ensure that methyl bromide did not accumulate to unsafe levels inside those cold storage boxes. (Pa101; Pa105-106)

Thus, Western voluntarily developed a set of practices—known as Fumigation Air Sampling Standard Operating Procedures ("FASSOPs")—to ensure worker safety inside the cold storage boxes. (Pa101; Pa105-106) Under the FASSOPs, air sampling was done daily inside each of the cold storage boxes in the early morning hours, prior to anyone entering the cold storage boxes. (Pa1465) Two readings from each of the cold storage boxes were taken every day and recorded on sampling log sheets. (Id.)

Under the FASSOPs, If the levels inside any of the cold storage boxes were above 10 ppm, Western implemented certain mitigation measures aimed at ventilating the cold storage boxes, and no one was allowed inside the cold

storage box until subsequent sampling showed that the levels dropped below 10 ppm. (Id.)

The mitigation measures were set forth in a separate document prepared by the Terminal known as the "Best Management Practices" ("BMPs"). (Pa107-143) Under the mitigation measures, if the level of methyl bromide inside any of the cold storage boxes was between 5 ppm and 10 ppm, mitigation measures would be implemented, but warehouse employees would be allowed inside the cold storage boxes so long as the levels remained under 10 ppm. (Pa1465) Once the mitigation measures had begun, the FASSOPs required additional air sampling until two samples taken at 15-minute intervals showed the levels dropping to below 5 ppm. (Id.) The FASSOPs required Western personnel to notify the Terminal in the event of a reading over 5 ppm, so mitigation measures could be implemented. (Id.) The mitigation measures entailed, among other things, opening the doors to the cold storage boxes, and placing large fans inside the doorways to ventilate the boxes and bring fresh air in. (Pa119-124)

Western's former Director of Fumigation testified that although the permissible exposure limit under OSHA was 20 ppm, the FASSOPs set more conservative action limits of 5 ppm and 10 ppm, to err on the side of caution regarding the off-gassing issue. (Pa102-104)

THE COLD STORAGE MONITORING SYSTEM

To implement the FASSOPs and BMPs, Western installed a system inside the cold storage boxes, to allow the requisite air samples to be collected. (Pa97) The cold storage monitoring system consisted of sampling tubes that ran into each of six cold storage boxes. (Pa91-96) Two intakes were situated in each cold storage box, one on the east side, and one on the west side. (Id.) The intakes were in the "breathing zone," which is between four and seven feet above ground level. (Id.) The other end of each tube was routed to one of two manifold boxes located outside the cold storage boxes, near the loading dock. (Id.)

Western employees would collect samples from each of the manifold boxes using a device known as a Draeger tube and record the levels on the sampling log sheet. (Id.) If any of the levels were above the action level limits of 5 ppm or 10 ppm, Western would notify the Terminal and would proceed according to the procedure set forth in the FASSOPs. (Pa1465)

THE SAMPLING RESULTS

In discovery, Western provided sampling logs for a total of 544 days, from January 7, 2013 to May 12, 2017. (Pa50; 145-180) Western's industrial hygiene expert, Bernard D. Silverstein, MS, CIH, FAIHA, reviewed all the sampling data and found no exposures above the OSHA standard of 20 ppm.

(Pa145-180; Pa463-498) Mr. Silverstein concluded that there was no evidence that Plaintiff was exposed to methyl bromide in concentrations at or above the 20 ppm PEL set by OSHA. (Pa151)

PLAINTIFF'S EXPERTS

On July 25, 2022, Plaintiffs' counsel served expert reports Robert J. Laumbach, M.D., and from Olga Katz, M.D. (Pa595-596; 1812-1815) In Dr. Laumbach's report, he reviewed documents and other materials, "in order to provide my opinions as to whether or not Mr. Michael Hatty sustained personal injuries due to exposure to methyl bromide (methyl bromide) while employed at Produce Services of America Inc. as an expediter from about 2007 to 2017, ***and as a loader/expediter for Del Monte from about 1998 to about 2007***." (Pa596, emphasis added.)

In his report, Dr. Laumbach concluded that Plaintiff's alleged injuries were caused by methyl bromide exposure including while working for Del Monte:

> To a reasonable degree of medical probability, all of Mr. Hatty's peripheral and central nervous system pathologies with onset at the time of, and in the several years preceding, the discover [sic] of his poisoning with methyl bromide, were caused by his occupational exposure to methyl bromide while working as an expediter for PSA ***and Del Monte***.
>
> (Pa596, emphasis added)

Dr. Laumbach treats Plaintiff's exposure while at PSA and at Del Monte in the aggregate and does not differentiate the exposure allegedly encountered by Plaintiff while working for PSA from that encountered while working for Del Monte, nor does Dr. Laumbach indicate that Plaintiff's alleged exposure to methyl bromide during the course of his employment with PSA would, alone, be sufficient to have cause his current alleged injuries. (Pa595-596) Further, Dr. Laumbach does not attempt to allocate responsibility for Plaintiff's injuries based on his employment with PSA versus his prior employment with Del Monte. (Id.)

Similarly, Dr. Katz's opinion is devoid of any opinion regarding the extent of injuries Plaintiff sustained during his employment with Del Monte versus PSA. (Pa1812-1815) Dr. Katz concluded, "It is my professional opinion within reasonable degree of medical certainty that Mr. Hatty is totally and permanently disabled for gainful employment as a direct result of the exposure to the highly toxic chemical, methyl bromide" (Pa1815)

THE SUMMARY JUDGMENT MOTIONS.

On May 12, 2023, counsel for co-defendant, Gloucester Terminals, LLC, filed a Motion for Summary Judgment, which was based on a release signed by Plaintiff in 2004, which related to an Achilles tendon injury Plaintiff allegedly sustained while working at the Terminal for Del Monte. (Pa533-610)

Judge Kassel granted Gloucester Terminals' Motion on June 23, 2023. (Pa12-13) Gloucester Terminals argued that the release signed by Plaintiff released all then-existing claims against Gloucester Terminals, potential or actual, known or unknown, which would include any potential claim Plaintiff may have had due to exposure to methyl bromide up to the date of the release. (1T4:1-46:24; Pa533-610)

Thus, Gloucester Terminals argued, for Plaintiff to assert a viable cause of action against Gloucester Terminals in light of that 2004 release, Plaintiff's experts had to have opined that his post-2004 expert, by itself, was sufficient to have caused his injuries, because any injury caused by pre-2004 exposure was barred by the release. (Id.) Because Plaintiffs' experts concluded Plaintiff's injuries were due to his exposure to methyl bromide generally, and did not seek to differentiate between the exposure he allegedly received before the release's 2004 date from the exposure he allegedly received after that date, Plaintiff could not meet his burden on causation. (Id.)

Judge Kassel agreed with Gloucester Terminal's reasoning. In granting summary judgment, Judge Kassel correctly recognized that the experts did not opine that Plaintiff's post-2004 exposure was sufficient to cause the alleged damages. (1T19:5-22). He detailed, by analogy, why that fact was dispositive:

> Suppose in this particular case the plaintiff quit and moved to Hawaii on September the 16, 2004. He was

> exposed for one day that postdated the release after say five years before. He went -- he asked the jury to speculate as to whether or not in the light of five years of exposure to methyl bromide whether or not one day would have done -- would have had the same, would have had the same effect. And you can make the argument in regard to asbestos or any other exposure to toxic chemical.
>
> I think you need an expert to say that the post September 2004 exposure in and of itself again to a reasonable degree of medical probability that was enough to probably cause the problem. Because absent that, I don't think you get to the jury and ask the jury speculate that whatever exposure the plaintiff had to those chemicals after September 2014 in and of itself was sufficient to cause their problems.
>
> (1T19:5-22).

The court concluded, "If you agree that your experts haven't done it, I think that forecloses the issue." (1T19:23-24).

Because Judge Kassel granted summary judgment to Gloucester Terminals for lack of causation, Western filed its own summary judgment motion on the same general theory. (Pa1707-1749) Western's motion was slightly different, because it did not have the advantage of a signed release. (Id.) However, because Plaintiff's employment with PSA only began in 2007, and because Western provided no fumigation services to Del Monte while Del Monte employed Plaintiff, Plaintiff's employment history provided the same

kind of bright-line demarcation point to Western that the release provided for Gloucester Terminal. (Id.)

In other words, just as Plaintiff's claim against Gloucester Terminals was only viable if he could prove that the post-release exposure caused his injury because any injury before that date was barred by the release, the Plaintiff's claim against Western was only viable if he could prove that the exposure while employed by PSA and not by Del Monte caused his injury because any injury caused from exposure during his Del Monte employment could not be attributable to Western, as it provided no services to Del Monte. (Id.)

Thus, Plaintiff could only establish a viable claim against Western if his experts opining that the exposure for which Western might be liable—the exposure during Plaintiff's employment with PSA and excluding his exposure during his employment with Del Monte—was sufficient to have caused his alleged injuries. (Id.) Because the experts expressed no such opinion, Judge Kassel granted summary judgment in Western's favor. (3T6:21-7:7; 3T17:7-17:21; 3T33:17-36:2; Pa12-13)

THE PUNITIVE DAMAGES CLAIM

Western sought summary judgment on the punitive damages claim, reasoning that punitive damages were improper, as a matter of law, given all

the steps Western took in creating and implementing the FASSOPs and BMPs.

(Pa40-180) These steps included:

- Prohibiting entry into the building by Terminal employees during the fumigation process;
- Checking methyl bromide levels under the tarps used during fumigation to ensure that all residual methyl bromide had been fully evacuated from the fumigated commodities prior to removal of the tarps;
- Performing post-fumigation air sampling in the area where the fumigations occurred after fumigation to ensure that the levels inside the building were safe prior to allowing entry into the building by Terminal workers;
- Voluntarily establishing a set of standard operating procedures to ensure worker safety inside the cold storage boxes;
- Voluntarily installing the cold storage monitoring system inside the cold storage boxes;
- Voluntarily performing daily air-sampling inside the cold storage boxes via the cold storage monitoring system to ensure safe levels of methyl bromide inside the cold storage boxes and prevent any issues related to off-gassing;
- Recording sampling results on daily sampling log sheets on to preserve data and ensure compliance with the voluntary FASSOPs and BMPs;
- Using the more conservative action limits of 5 ppm and 10 ppm for purposes of cold storage sampling, rather than the required limit of 20 ppm set by OSHA;
- Voluntarily working with the Terminal to implement the FASSOPs and BMPs and ensure that mitigation measures were implemented according to the FASSOPs and BMPs to prevent workers exposure to unsafe levels of methyl bromide; and

- Working with CMI to conduct routine audits of the Terminal on voluntary basis to ensure that the process and procedures being implemented were in continued compliance with the FASSOPs and BMPs.

  (Id.)

Plaintiff has argued that Western failed to fully comply with the FASSOPs and BMPs. (2T3:2-67:24; Pb37-43) He has also argued that that alleged failure to fully comply with Western's own standards was a sufficient basis for jury to impose punitive damages, even though there is no evidence that the methyl bromide level in this case never reached even half the permissible exposure limit of 20 ppm set by OSHA. (2T41:10-25)

Judge Kassel granted partial summary judgment on the basis that because it was undisputed that the level did not exceed that permitted by OSHA, Western's action, even if they did not fully comply with the FASSOPs and BMPs, could not reach the level necessary for the imposition of punitive damages as a matter of law. (2T65:15-67:24; Pa8-9) He therefore granted summary judgment on the punitive damages claim. (Pa8-9)

Legal Argument.

ISSUE I: SUMMARY JUDGMENT STANDARD.

A court hearing an appeal from the grant of summary judgment reviews the order de novo, employing the same standard as is applicable to in the Law Division. State v. Anderson, 248 N.J. 53, 67 (2021).

Rule 4:46-2 of the New Jersey Court Rules provides that summary judgment shall be rendered if the "pleadings, depositions, answers to interrogatories and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law." In Brill v. Guardian Life Ins. Co. of America, 142 N.J. 520 (1995), the New Jersey Supreme Court detailed a new standard for courts to apply in determining whether or not an alleged disputed fact should be considered genuine under R. 4:46-2. A non-moving party cannot defeat a Motion for Summary Judgment merely by pointing to any fact in dispute. Brill, 142 N.J. at 529. Rather, the motion judge is to consider whether the evidence presents a sufficient disagreement to require submission to a jury, or whether it is so one-sided that one party must prevail as a matter of law. Id. at 533 citing Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252 (1986).

Determining whether a genuine issue of material fact exists "requires the motion judge to consider whether the competent, evidential materials presented are viewed in the light most favorable to the non-moving party, or sufficient to promote a rational fact finder to resolve the alleged disputed issue in favor of the non-moving party." Brill, 142 N.J. at 540. Bare conclusions without factual support cannot defeat summary judgment; instead, evidence

submitted in support of the motion must be admissible, competent, non-hearsay evidence. Brae Asset Fund, L.P. v. Newman, 327 N.J. Super. 129, 134 (App. Div. 1999); Jeter v. Stevenson, 284 N.J. Super. 229, 233(App. Div. 1995).

The court must "consider whether the competent evidential materials presented, when viewed in a light most favorable to the non-moving party in consideration of applicable evidentiary standards, are sufficient to permit a rational fact finder to resolve the allegedly disputed issue in favor of the non-moving party." Brill, 142 N.J. at 521. On motion for summary judgment, the court must engage in an analytical process essentially the same as that necessary to rule on a motion for directed verdict, namely, "whether evidence presents sufficient disagreement to require submission to a jury or whether it is so one-sided that a party must prevail as a matter of law." Id. at 533 quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 251-52 (1986). "That weighing process requires the court to be guided by the same evidentiary standard of proof - by preponderance of evidence or clear and convincing evidence - that would apply at trial when deciding whether there exists a 'genuine' issue of material fact." Brill 142 N.J. at 533, 34.

ISSUE II: WESTERN'S MOTION FOR SUMMARY JUDGMENT WAS PROPERLY GRANTED BECAUSE PLAINTIFF

COULD NOT MEET HIS BURDEN OF PROOF AS TO CAUSATION, AS A MATTER OF LAW.

First, Plaintiff argues that Judge Kassel erred by granting summary judgment to Western.[4]

Plaintiff's theory of liability against Western sounds in negligence stemming from his alleged exposure to methyl bromide while employed as an expediter for PSA at the Gloucester Marine Terminal from 2007 to 2017. (Pa56-76) In order to establish a claim of negligence, a plaintiff must demonstrate: (1) a duty of care, (2) breach of that duty, (3) proximate causation, and (4) injury. Weinberg v. Dinger, 106 N.J. 469, 484 (1987) (citation omitted). A question cannot go to the jury if a finding in plaintiff's favor could be reached only by speculation. See, e.g., Battaglia v. United Parcel Serv., Inc., 214 N.J. 518, 554-55 (2013) (certain jury charges improperly permitted a jury verdict based on speculation); Rempfer v. Deerfield Packing Corp., 4 N.J. 135, 145 (1950) ("The jury cannot indulge in mere speculation and surmise...."); Brindley v. Firemen's Ins. Co. of Newark, 35 N.J. Super. 1, 9 (App. Div. 1955) ("The jury must not be left to mere conjecture or speculation...."). Speculation is also insufficient to defeat

[4] Plaintiff's arguments in Counts II and III of his brief addresses his claims against Gloucester Terminals, which will not be addressed in this brief.

summary judgment. Merchs. Express Money Ord. Co. v. Sun Nat'l Bank, 374 N.J. Super. 556, 563 (App. Div. 2005). Furthermore, "a jury should not be allowed to speculate without the aid of expert testimony in any area where laypersons could not be expected to have sufficient knowledge or experience." Kelly v. Berlin, 300 N.J. Super. 256, 268 (App. Div. 1997).

In this case, a lay jury is simply incapable of knowing, without expert assistance, whether methyl bromide exposure could have caused Plaintiff's alleged injuries, the level of exposure necessary to cause such injuries, and whether the methyl bromide to which Plaintiff was allegedly exposed while an employee of PSA was sufficient to cause the alleged injuries.

In this case, Plaintiff failed to meet his burden to prove that Western's negligence proximately caused Plaintiff's alleged injuries. To meet this burden, Plaintiff had to show that the exposure to methyl bromide ***while employed at PSA*** "was a substantial factor in causing or exacerbating [his] disease." Sholtis v. Am. Cyanamid Co., 238 N.J. Super. 8, 31 (App. Div. 1989). Merely demonstrating that he developed a condition caused by methyl bromide and that he experienced some methyl bromide exposure while employed at PSA would not be sufficient to establish causation, because Western can only be found liable if the exposure for which it is responsible could have caused the injuries and it is undisputed that Western played no part

in the exposure Plaintiff may have suffered as a Del Monte employee. Absent evidence that the PSA exposure was sufficient to cause Plaintiff's injury, the jury is being asked to speculate on causation.

"[M]erely establishing that a defendant's negligent conduct had some effect in producing the harm does not automatically satisfy the burden of proving it was a substantial factor." Verdicchio v. Ricca, 179 N.J. 1, 25 (2004). "Some other event which is a contributing factor in producing the harm may have such a predominant effect in bringing it about as to make the effect of the actor's negligence insignificant and, therefore, to prevent it from being a substantial factor." Id. (quoting Restatement (Second) of Torts §433 (comment d)).

It is important that Plaintiff does not dispute working for Del Monte from 1998 to 2006, first at the Port of Wilmington then at Gloucester Marine Terminal. (Pa338) It is also not disputed that Plaintiff was exposed to methyl bromide while working as an expediter at Del Monte. Plaintiffs' expert, Dr. Laumbach, concluded that Mr. Hatty's alleged injuries were "caused by his occupational exposure to methyl bromide while working as an expediter for PSA ***and Del Monte***." (Pa596, emphasis added.). Dr. Katz concluded that "[i]t is my professional opinion within reasonable degree of medical certainty that Mr. Hatty is totally and permanently disabled for gainful employment as a

direct result of the exposure to the highly toxic chemical, methyl bromide." (Pa1815)

Neither Dr. Laumbach nor Dr. Katz opined that Plaintiff's alleged exposure during his employment with PSA was sufficient, standing alone, to cause his current injuries, or that his exposure during his employment with PSA was a "substantial factor" in causing his current injuries. Neither of these experts discuss the nature of Plaintiff's exposure to methyl bromide at Del Monte versus his alleged exposure at PSA. They do not discuss, for example, the safety practices used at Del Monte versus the safety practices implemented during Mr. Hatty's employment with PSA.

In Townsend v. Pierre, 221 N.J. 36 (2015), the Supreme Court held that summary judgment was properly granted when the non-moving party failed to put forward any competent evidence to prove proximate cause. Id., at 61. Because Plaintiff's experts provide no basis upon which a jury might possibly determine that Western's actions while Plaintiff was employed by PSA resulted in exposure to methyl bromide sufficient to cause of his alleged injuries, he could not meet his burden to prove proximate cause. In the absence of competent expert testimony on this issue, a jury can only speculate as to whether Western's conduct was a substantial factor in causing Plaintiff's alleged injuries.

As such, summary judgment was properly granted to Western.

Plaintiff argues that Judge Kassel erred because a more relaxed causation standard applies to toxic tort cases, and that under this lower standard they have met their burden of proof as to medical causation.

Specifically, Plaintiff argues that the "frequency, regularity and proximity" test of Sholtis, supra, and Vassallo v. American Coding & Marking Ink Co., 345 N.J. Super. 207 (App. Div. 2001) applies and that Plaintiff's evidence is sufficient to meet that standard.

However, the issue in Sholtis and Vassallo concerned whether there was causal nexus between the exposure and the medical condition. Sholtis, 238 N.J. Super. at 25 ("[F]or a defendant to be held liable, the exposure to the products of such defendant... must have been a proximate cause of, i.e., a substantial factor in bringing about, plaintiffs' injuries."); Vassallo, 345 N.J. Super. at 214 (noting that the Law Division focused on the "lack of medical proofs establishing a nexus between plaintiff's exposure to the product and her medical condition.")

In this case, by contrast, the dispositive issue was whether the Plaintiff's experts provided any basis for the jury to determine whether the exposure allegedly endured by Plaintiff while an employee of PSA—that is to say, because of Western's actions—could support a causation conclusion. See,

Sholtis, 238 N.J. Super. at 29, (noting that in an asbestos case, the plaintiff must "produce evidence from which a factfinder, after assessing the proof of frequency and intensity of plaintiff's contacts with a particular manufacturer's friable asbestos, could reasonably infer toxic exposure.")

In this case, because Plaintiff's experts all treated Plaintiff's methyl bromide exposure in the aggregate—lumping together the exposure at PSA with the exposure at Del Monte—no reasonable conclusion of causation could be supported on that evidence, and Plaintiff's evidence merely invites speculation.

Plaintiff's proofs are completely devoid of anything a reasonable juror could rely on in determining whether his injuries could be based on his exposure with PSA as opposed to his exposure with Del Monte. Plaintiff failed to develop in discovery any evidence of Plaintiff's actual exposure levels while in Del Monte's employ. They provided no sampling data from Plaintiff's time with Del Monte, there was no evidence concerning the facilities where he worked, such as information regarding the buildings where he worked, the size or layout of the cold storage areas, the frequency of fumigations, the process and procedures used in dealing with fumigated commodities, the quantity of fruit fumigated, the amount of fumigant used, the type of fruit imported, the levels of methyl bromide within those facilities, any personal protective

equipment used by the employees, or the ventilation system installed within the facilities where Mr. Hatty worked.

As a result, as Judge Kassel recognized, it is easily possible that the levels Plaintiff was exposed to while working for Del Monte were orders of magnitude higher than any exposure that might have occurred while he worked for PSA. Without specific information about those facilities, it is possible that the levels of methyl bromide Plaintiff experienced at Del Monte was "five times worse, ten times worse, a hundred times worse," than they were during his employment with PSA. (1T33:21-34:12)

Based on the facts uncovered in discovery, Judge Kassel was almost certainly correct, and it is virtually certain that the levels of methyl bromide inside the facilities where Plaintiff worked while employed by Del Monte were significantly higher than anything he may have encountered while working for PSA. This is because the issue of off-gassing—which underlies Plaintiffs' entire theory of this case—was only brought to the attention of the industry in 2011. (Pa1749-1751) Thus, many of the safety practices implemented during Mr. Hatty's employment with PSA, such as the cold storage monitoring system, the BMPs, the FASSOPs, and the like, were not in use when Plaintiff worked for Del Monte.

Because Plaintiff produced no expert reports from which a reasonable juror could rely on to determine that the methyl bromide exposure Plaintiff may have experienced while an employee of PSA, Plaintiff did not meet his burden to demonstrate causation against Western. Thus, Western asks this Court to affirm the grant of summary judgment.

ISSUE III: SUMMARY JUDGMENT WAS PROPERLY GRANTED ON PLAINTIFF'S PUNITIVE DAMAGES CLAIMS.

Next, Plaintiff argues that Judge Kassel erred by granting summary judgment on Plaintiff's request for punitive damages. A claim for punitive damages is not a viable stand-alone cause of action, but, rather, is a species of damages. "[P]unitive damages cannot stand alone, separate and apart from any other cause of action." Klesh v. Coddington, 295 N.J. Super. 51, 65 (Law Div. 1996), aff'd and remanded, 295 N.J. Super. 1 (App. Div. 1996). See, also, Nappe v. Anschelewitz, Barr, Ansell & Bonello, 97 N.J. 37, 45 (1984) (noting that "punitive damages may lie provided there is a valid underlying cause of action.") As such, this Court need only address the claim for punitive damages if it finds that the grant of summary judgment for lack of causation was somehow reversible error.

Nevertheless, under the facts of this case, punitive damages were properly dismissed. New Jersey courts have determined that "punitive damages are only to be awarded in exceptional cases." Catalane v. Gilian Instrument

Corporation, 271 N.J. Super. 476, 500-01 (App. Div.), certif. denied, 136 N.J. 298 (1994); *see also*, Lehman v. Toys 'R' Us, Inc., 132 N.J. 587, 624-25 (1993) ("punitive damages are to be awarded when the wrongdoer's conduct is especially egregious"); Rendine v. Pantzer, 141 N.J. 292 (1995) (offending conduct must be "especially egregious").

It is well settled that plaintiffs may not recover punitive damages by "recasting merely negligent conduct as willful and wanton." Entwistle v. Draves, 102 N.J. 559, 562 (1986). To warrant punitive damages, the defendants' conduct must consist of "an ***intentional wrongdoing*** in the sense of an 'evil-minded act or an act accompanied by a wanton and willful disregard of the rights of another.'" Nappe, 97 N.J. at 49 (emphasis added). There must have been a "positive element of ***conscious wrongdoing***." Berg v. Reaction Motors Div., 37 N.J. 396, 414 (1962) (emphasis added).

Neither mere negligence nor gross negligence can support an award of punitive damages. LoRocco v. N.J. Mfrs. Ins. Co., 82 N.J. Super. 323, 327 (App. Div. 1964), certif. den., 42 N.J. 144 (1964). The underlying theory is to punish the offender for aggravating misconduct to deter the conduct in the future. Fischer v. Johns-Manville Corp., 103 N.J. 643, 662 (1986); Leimgruber v. Claridge Assocs., Ltd, 73 N.J. 450, 454 (1977).

Under New Jersey's Punitive Damages Act, N.J.S.A. 2A:15-5.9. *et seq*., punitive damages are only available in cases where the plaintiff proves by "clear and convincing evidence" that the acts complained of were "actuated by actual malice or accompanied by a wanton and willful disregard of persons who foreseeably might be harmed by those acts or omissions." N.J.S.A. 2A:15-5.12. This is an affirmative burden on the plaintiff to prove malice or willful and wanton conduct. Berg, 37 N.J. at 414 (1962).

In Pavlova v. Mint Mgmt. Corp., 375 N.J. Super. 397 (App. Div. 2005), this Court noted that the Punitive Damages Act was enacted to "establish ***more restrictive standards*** with regard to the awarding of punitive damages" than previously existed. Pavlova, 375 at 403 (emphasis added). The Pavlova Court also noted that, in other ways, the Act codified the common law, "which limited punitive damages to only 'exceptional cases' . . . as punishment of the defendant and as a deterrent to others from following his example." Id.

In this case, Plaintiff's argument in favor of permitting punitive damages rests, in essence, on the claim that Western did not follow the FOSSOP and BMPs. However, even if that were true, that would not demonstrate an entitlement to punitive damages because the level of methyl bromide never exceeded even half the amount permitted by OSHA. As such, the failure to

follow the FOSSOPs and BMPs would not, as a matter of law, constitute the kind of "evil-minded acts" required for punitive damages.

Western, working with the Terminal, ***voluntarily*** established a series of standard operating procedures specifically aimed at protecting the workers and ensuring that no one was ever exposed to methyl bromide in excess of the PEL set by OSHA of 20 ppm. As a result of these steps, there was indisputably no evidence in this case that Plaintiff, or anyone else working at the Terminal, was ever exposed to methyl bromide at levels anywhere near the 20 ppm PEL set by OSHA.

Sampling occurred on at least a daily basis from January 2013 to May 2017. In total, 567 sampling logs were produced by Western, with each sampling log containing results from two samples each from the six cold storage boxes. (See, Pa145-180; Pa463-498) That means a total of approximately 6,804 individual samples were collected. (Id.) Of those samples collected over the course of more than four years, ***not a single sample*** measured above the 20 ppm PEL set by OSHA. (Id.) In fact, ***only one*** ever reached as high as 10 ppm, and most were less than 3 ppm. (Id.)

Thus, of the thousands of samples collected by Western over many years, the highest level ever recorded was 10 ppm—half the level permitted by OSHA—and only three samples of the 6,528 total collected registered that

high. (Id.) That means that 99.9996 percent of the samples showed levels ***less than half*** of the PEL set by OSHA.

Plaintiff argues that Western acted willfully and wantonly by only measuring methyl bromide levels in the cold storage boxes once per day. This argument ignores the fact that afternoon sampling was done for a period of time between March 18, 2017, and May 4, 2017, and none of the afternoon samples showed methyl bromide levels increasing anywhere near the permissible exposure limit set by OSHA of 20 ppm. Afternoon samples were collected on a total of 23 days from March 18, 2017 to May 2, 2017. There were six cold storage boxes, and a total of two samples were collected from each box. Thus, a total of 276 samples were collected from the cold storage boxes in the afternoon. Of these 276 samples, ***not a single sample*** exceeded 10 ppm. Thus, there is no evidence to support Plaintiffs' theory that methyl bromide levels inside the cold storage boxes would reach dangerous levels in the afternoon due to off-gassing, and certainly there can be reason to impose punitive damages given these facts.

While Plaintiffs may argue about whether the measures taken by Western were sufficient, and whether the failure to adhere to its own FOSSOPs and BMPs might constitute negligent behavior, there is no basis to find that the failure to abide by voluntary standards which are more strict than required by

federal guidelines, and where there is no evidence that those federal guidelines were exceeded, constitutes the evil motive required.

Thus, under the standard set forth in Brill, summary judgment was properly granting dismissing Plaintiffs' claims for punitive damages.

Conclusion

For the foregoing reasons, this Court is asked to affirm the grant of summary judgment in favor of Western Industries-North, LLC.

Respectfully Submitted,
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Superior Court of New Jersey

Appellate Division

Docket No. A-003914-23

MICHAEL HATTY and SUSAN HATTY (h/w),	:	CIVIL ACTION
Plaintiffs-Appellants,	:	ON APPEAL FROM THE FINAL ORDERS OF THE SUPERIOR COURT OF NEW JERSEY, LAW DIVISION, CAMDEN COUNTY
vs.	:	
WESTERN INDUSTRIES-NORTH, LLC, GLOUCESTER TERMINALS, LLC and PRODUCE SERVICES OF AMERICA, INC.,	:	Docket No. CAM-L-001685-19
	:	Sat Below:
	:	HON. MICHAEL J. KASSEL, J.S.C.
Defendants-Respondents.	:	

REPLY BRIEF ON BEHALF OF PLAINTIFFS-APPELLANTS

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TABLE OF CONTENTS

Page

TABLE OF JUDGMENTS, ORDERS AND RULINGS BEING APPEALED

Page

TABLE OF AUTHORITIES

Page(s)

Cases:

PROCEDURAL HISTORY

Plaintiffs rely on their opening brief.

STATEMENT OF FACTS

Plaintiffs rely on their opening brief.

LEGAL ARGUMENT

Reply Argument Point I

GLOUCESTER IGNORES THE JURISPRUDENCE INTERPRETING SIMILAR RELEASES (Pa12; Pa7)

Gloucester misconstrues the holding of Isetts v. Borough of Roseland, 835 A.2d 330, 364 N.J.Super. 247 (N.J.Super.A.D.,2003), which is directly on point on how to interpret the subject release. The release language in Isetts was restrictive, the same as Mr. Hatty executed in his orthopedic injury lawsuit. The release in Isetts stated:

> Plaintiff ... releases and gives up any and all claims, rights, actions and causes of action of any kind, both at law and equity, which he has, had or may have against the [non-settling defendants]. This General Release by plaintiff of all claims includes those of which he is not aware and those which are not specifically mentioned in this General Release. This Release applies to all claims resulting from anything that has happened up to the date of its execution by plaintiff. Plaintiff specifically releases these defendants from any and all claims, rights, actions and causes of action that were asserted or could have been asserted ...

Id. at 251.

The Isetts Court, when interpreting the release, held that public policy dictated that the language of the release should be interpreted with the assumption that the parties intended to terminate the "then existing lawsuit." Id. at 254-255. Mr. Hatty certainly did not intend to extinguish his legal rights for a toxic tort claim when he signed the release for his orthopedic injury lawsuit. The condition precedent for the subject release (Pa619 – Pa622) to apply is that it has to be related to the underlying tort being released, as in Isetts.

Gloucester's reliance on Panaccione v. Holowiak, 2008 WL 4876577 (N.J. Super. Ct. App. Div. Nov. 12, 2008), is also misplaced. The reason for that is that the subsequent claim or "injury" that occurred in Panaccione *was related to the first claim, and arose from, the first set of facts that occurred* (the transfer of the property), which is not what happened here. Because the injury the Panaccione plaintiffs sought redress for directly arose out of the conduct that already was released, the release governed. Again, in the Hatty matter, the trial court did not perform the condition precedent analysis of whether the methyl bromide stemmed from the orthopedic injury Mr. Hatty suffered. There is no dispute that it did not, so the release does not bar the claim.

Reply Argument Point II

PLAINTIFFS' EXPERT WITNESSES PROVIDE CAUSATION (Pa12; Pa7; Pa5)

Both Gloucester and Western are incorrect that Sholtis is not the correct standard to be applied in this case. The New Jersey Supreme Cort uses the 'frequency, proximity and regularity' test on workplace occupational toxic tort cases, which this case is. Further, as Gloucester admits in its brief, Plaintiff has satisfied the first portion of the Sholtis test (that he has been routinely exposed to methyl bromide). As to the second prong, when viewing the record in a light most favorable to Plaintiff, there is competent medical evidence that shows causation between Mr. Hatty's exposure to methyl bromide and his current diagnosis and symptoms.

Dr. Lynch explained that Michael Hatty was exposed to unsafe levels of methyl bromide during his time at Gloucester Terminals from 2006 to 2017, and that that exposure was of sufficient frequency, with a regularity of contact, and in close proximity to Mr. Hatty:

> This report outlines my professional opinions that Mr. Hatty was chronically exposed to significant airborne levels of methyl bromide during his work tenure as expediter at the Gloucester Terminal over the course of his employment between 2006 and 2017. (Pa1510)
>
> Lynch Professional Opinion #7 - Based upon all of the above, as Mr. Hatty's job duties required him to locate fruit pallets (which according to his deposition, were taller than he was), his proximity

> and position relative to fumigated fruit would result in higher peak and average exposures than those recorded by Wisser from the remote sampling system observed at only 2 locations within the approximate 50,000 square foot cold box. (Pa1519 – Pa1520)
>
> Based upon all of the above, I estimate that Mr. Hatty's exposure during the approximate 11 years of his employment at Gloucester terminal conservatively ranged between 2 to 20 parts per million for several hours of each typical workday within the cold box. (Pa1522)

Dr. Lynch further described how and why Mr. Hatty was so frequently and regularly exposed to methyl bromide, at many points in his report:

> Lynch Professional Opinion #3 - The absence of any local exhaust or rooftop mounted exhaust fans, combined with the presence of additional cold boxes on either side of the box 20 site, lead me to conclude within a reasonable degree of scientific certainty, Gloucester Terminal and Western knew or should have known, that methyl bromide gas which is normally released from the surface and inter- fruit airspaces and packaging at 20 to 200 parts per million would accumulate within the cold boxes normally as methyl bromide off-gasses from fumigated fruit within the cold boxes. This would result in a build-up of methyl bromide gas within the cold box exceeding levels measured at the beginning of the shift when fruit is initially moved from the shed. (Pa1515 – Pa1516)
>
> Lynch Professional Opinion #4 – The absence of ceiling or wall-mounted exhaust fans within the cold box indicates that there were no engineering controls in place for routine or emergency removal of methyl bromide from fruit when airborne methyl bromide levels exceed those levels outlined in the BMP. (Pa1516)

Both of Plaintiffs' medical experts, Dr. Olga Katz, Plaintiff's treating neurologist (Pa1731 – Pa1734) and Dr. Laumbach, in conjunction with the expert opinions of Dr. Lynch, clearly draw the necessary nexus between Mr. Hatty's neurological injuries and symptoms to his chronic overexposure to

unsafe levels of methyl bromide during his time working as an expediter at Gloucester Terminals:

> Moreover, it is highly likely that he had chronic overexposure to methyl bromide given the conditions under which he worked, which were described and analyzed in detail by Dr. Lynch in his expert report. To a reasonable degree of medical probability, all of Mr. Hatty's peripheral and central nervous system pathologies with onset at the time of, and in the several years preceding, the discover of his poisoning with methyl bromide, were caused by his occupational exposure to methyl bromide while working as an expediter for PSA and Del Monte. (Pa1836)
>
> * * * * *
>
> It is my professional opinion within reasonable degree of medical certainty that Mr. Hatty is totally and permanently disabled for gainful employment as a direct result of the exposure to the highly toxic chemical, methyl bromide. (Pa1734)

The above quoted portions of Plaintiffs' expert witness reports show that the causation prong of Plaintiff's negligence claim has been satisfied. The jury can hear the evidence of Lynch, Katz, and Laumbach, see the nexus between the exposure and disease, and make the determination as to when it occurred (if this Honorable Court finds that the Release is applicable – which, respectfully, it is not). A time differential is not required. Further, Western does not have the benefit of the release argument since they were not a signatory of it (which they do not dispute). Accordingly, summary judgment should have been denied.

Reply Argument Point III

WESTERN'S VIOLATION OF THEIR OWN POLICIES IS RECKLESS (Pa10)

The record is clear that Western knowingly and willfully violated their own internal standards, which warrants the consideration of punitive damages. When determining if punitive damages are warranted, the conduct is examined based on the knowledge the defendant possesses. Whether there is a minimum threshold established by a government entity is irrelevant for purposes of determining if a defendant's conduct is egregious or reckless.

The record is clear that both the Western and Gloucester *knew* about off-gassing prior to 2017, with some relevant individuals being aware of this concept as early as 2012. As cited in Appellants' brief, the Western employees that were involved with the fumigation account at the Terminal, Michael Wisser (Pa1563) and Kurt Reichert (Pa1373 – Pa1375), were aware of the concept of off-gassing, and, more importantly, they were aware that the fumigated fruit was in fact off-gassing for up to 72-hours. However, Western did no additional testing throughout the day despite knowing that the fruit was off-gassing. A jury could consider this conduct to be reckless.

Western's reliance that the limits did not exceed OSHA's levels ignores the fact that the tested levels certainly violated their own thresholds, which were in fact created due to the recognition of the dangerousness of methyl bromide.

As cited in the brief, Michael Wisser, a Western service technician, testified that not only the afternoon levels were high, but the action also taken by Western did not comport with the *Best Management Practices* and FASSOP they helped develop (Pa1561 – Pa1572).

Taken as a whole, Western acted with a wanton and willful disregard for the safety rights of Mr. Hatty. Western had knowledge about the possibility of off-gassing, compounded with actual ***proof*** that off-gassing was occurring. Still, no policies were created to continuously measure methyl bromide levels throughout the length of workdays at the terminal. And still, workers were sent into the cold storage areas during afternoon hours, despite this compounded proof and knowledge. Their conduct should be measured against their knowledge of the hazard, regardless of whether their standards are less than that of government regulations. The creation of the *Best Management Practices* and the FAASOP is an express acknowledgement of the dangers of exposure to methyl bromide and the danger that off-gassing posed.

CONCLUSION

For the foregoing reasons, the trial court's June 23, 2023, July 6, 2023, July 7, 2023 and September 11, 2023 Orders should be reversed and this case should be scheduled for a jury trial.

LAFFEY BUCCI D'ANDREA REICH & RYAN

/s/ Samuel I. Reich

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Samuel I. Reich, Esq.