IN RE ALLEGED ENVIRONMENTAL CONTAMINATION OF POMPTON LAKES	SUPERIOR COURT OF NEW JERSEY LAW DIVISION BERGEN COUNTY Case No. 290

FILED
AUG 08 2012
BRIAN R. MARTINOTTI
J.S.C.

THIS ORDER APPLIES TO:

Bruno, et al. v. E.I. DuPont de Nemours and Co., Docket No. BER-L-6510-11-CM

Gorman v. E.I. DuPont de Nemours and Co., Docket No. BER-L-10797-10-CM

ORDER

THIS MATTER having come before the Court on defendant E.I. DuPont De Numours & Company's Motion for Summary Judgment on Claims of Louis Bruno, Josephine Bruno, and Ann Marie Gorman (collectively referred to as "Plaintiffs"); the Court having considered the parties' moving papers; and the court having heard oral argument on July 24, 2012;

For the reasons set forth in the attached opinion;

IT IS on this 8th day of August 2012;

ORDERED,

1. Defendant's Motion for Summary Judgment on Claims of Louis Bruno, Josephine Bruno, and Ann Marie Gorman is GRANTED.

BRIAN R. MARTINOTTI, J.S.C.

NOT TO BE PUBLISHED WITHOUT

THE APPROVAL OF THE COMMITTEE ON OPINIONS

IN RE: ALLEGED ENVIRONMENTAL CONTAMINATION OF POMPTON LAKES

SUPERIOR COURT OF NEW JERSEY

LAW DIVISION

BERGEN COUNTY

CASE NO. 290

CIVIL ACTION

Argued: July 24, 2012
Decided: August 8, 2012

ARGUED BY:

For Plaintiffs: Donald A. Soutar, Esq. (Weitz & Luxenberg, PC)

For Defendants: Martha M. Pacold, Esq. (Bartlit, Beck, Herman, Palenchar & Scott, LLP)

ALSO APPEARING:

For Plaintiffs: Ashley Hintz, Esq. (Weitz & Luxenberg, PC)

For Defendants: John P. Dwyer, Esq. (McElroy, Deutsch, Mulvaney & Carpenter, LLP); John S. Phillips, Esq. (Bartlit, Beck, Herman, Palenchar & Scott, LLP)

MARTINOTTI, J.S.C.

Before this Court is defendant E.I. du Pont de Nemours and Company's ("DuPont") Motion for Summary Judgment as to All Claims Asserted by plaintiffs Louis

Bruno and Josephine Bruno (Docket No. BER-L-6510-11) and Ann Marie Gorman (Docket No. BER-L-10797-10). Plaintiffs have opposed this Motion.

I. OVERVIEW

The *Armona* Lawsuit:

In 1993, 438 current or former residents of Pompton Lakes filed claims against DuPont in a prior law suit related to DuPont's manufacturing facility known as the Pompton Lakes Works Plant ("PLW"). *See Armona, et al. v. E.I. du Pont de Nemours and Co., et al.*, Civil Action No. L-5116-93 (N.J. Super. Ct. Law Div. Middlesex County). Among those residents who brought suit in *Armona* were Louis Bruno, Josephine Bruno and Ann Marie Gorman, who are plaintiffs in the above-captioned matter. In *Armona*, plaintiffs sought compensatory and punitive damages, asserting claims for property damage, personal injury, and medical monitoring based on alleged contamination from PLW based on allegations that DuPont's operation of PLW contaminated the air, soil, and groundwater in areas of the community. Specifically, plaintiffs alleged that DuPont contaminated "the town's surface and subsurface area" and plaintiffs' properties, including the "underlying groundwater," with volatile organic compounds ("VOCs") and other substances. The *Armona* plaintiffs also sued for, *inter alia*, "extreme emotional distress" due to the alleged contamination.

Throughout the *Armona* litigation and settlement negotiations, plaintiffs were represented by experienced counsel. DuPont and the *Armona* plaintiffs entered into a Settlement and Release Agreement ("the Agreement") dated January 30, 1997. Under the terms of the Agreement, DuPont agreed to pay plaintiffs a total cash "Settlement Sum" of $38.5 million. Mediator Kenneth R. Feinberg allocated the Settlement Sum among all

plaintiffs. (*See* Exhibit A to Settlement Agreement). Mediator Feinberg's allocation of DuPont's cash payment was plaintiff-specific and also specified the components of the total cash settlement amount for each plaintiff – that is, how much of the total cash Settlement Sum each plaintiff received for a particular type of claim.

Each of the three plaintiffs who are the subject of the instant Motion agreed to and participated in the *Armona* settlement with DuPont.[1] Louis Bruno received $136,000 in the *Armona* settlement, including $85,000 to settle his personal injury claim. (Dwyer Cert., Ex. 2). Louis Bruno has now brought a claim in this case for "adverse brain and neurological effects that caused him to develop learning disabilities, which have plagued him for most of his life." (*Id.*, Ex. 6). However, Mr. Bruno's Plaintiff Fact Sheet ("PFS") shows that his learning disabilities were diagnosed by 1974, 23 years before he participated in the *Armona* settlement. Josephine Bruno, Louis Bruno's mother, received a total of $206,175 in the *Armona* settlement, including $150,000 to settle her personal injury claim. (*Id.*, Ex. 2). Ms. Bruno now brings a claim for "kidney disease." (*Id.*, Ex. 6).[2] Ann Marie Gorman received $51,000 in the *Armona* settlement, including $14,000 for "emotional distress/fear of cancer." (*Id.*, Ex. 2). Ms. Gorman's Third Amended Complaint asserts claim(s) for "severe emotional distress." (April 26, 2012 letter brief

[1] Plaintiffs' counsel has acknowledged in writing, and at oral argument, that each of these three plaintiffs agreed to and participated in the *Armona* settlement, signed an *Armona* Release, and received the payments made by DuPont pursuant to the Settlement Agreement (Dwyer Cert. Ex. 3). Ms. Gorman has produced a copy of the *Armona* Release that she signed. (*Id.*, Ex. 4). Although the parties have been unable to locate a signed copy of the Releases that Josephine Bruno and Louis Bruno signed, there is no dispute that they signed Releases and received DuPont's settlement payments (*Id.*, Ex. 3). As discussed, *supra*, plaintiffs contest whether these Agreements are properly before this Court.

[2] In *Armona*, Ms. Bruno submitted an expert report addressing her personal claim, and offering the opinions that PCE causes "[t]ransient ...renal dysfunction," TCE causes "renal failure," and "renal toxicity of the metals and solvents contaminating the soil and water at least exacerbated Ms. Bruno's hypertension." (Dwyer Cert., Ex. 7 at p. 5-6).

from Donald A. Soutar, Esq., at p. 2). DuPont now moves for summary judgment as to each of these plaintiffs.

The Releases:

The Releases that each of these three plaintiffs would have signed in *Armona* were substantially identical to each other. The Releases provided that each plaintiff "does hereby release and give up any and all claims and rights of whatever kind or description, (unless excluded below in paragraph #8), including those claims resulting from exposure to any conditions, chemicals, or materials originating on or from property now or heretofore owned, leased or possessed by E.I. DuPont de Nemours and Company in Pompton Lakes, New Jersey." (Dwyer Cert., Ex. 2). Each Release further confirms that "[t]his release includes all claims which have been made, which could have been made, or which could in the future be made (unless excluded below in paragraph #8) against [DuPont] arising out of the facts set forth in the [*Armona*] case...." (*Id.*, Ex. C-1). In addition, the Releases state that they are "in complete satisfaction of all claims for pecuniary injuries suffered by Releasor and Releasor's survivors, including, but not limited to, claims for medical surveillance costs, claims for loss of or damage to quality of life, claims for diminution of property value, claims for emotional distress, claims for fear of cancer or other disease, claims for loss of wages, prospective earnings, companionship, consortium, funeral expenses and punitive damages, as well as claims for wrongful death (unless excluded below in paragraph #8)." (*Id.* at ¶3). The Releases also confirm that the Releasor has "read this release and the terms thereof and that Releasor

has discussed this release with Releasor's counsel who has fully apprised Releasor of its meaning." (*Id.* at ¶10).

In particular, Release "C" – the version alleged to have been executed by the Brunos and other *Armona* plaintiffs who received DuPont's settlement payments for personal injury claims other than cancer – provides the following exception to the broad release of future claims: "notwithstanding any other provision of this release, this release does not include any future claims for damages based upon a presently unmanifested malignancy not now known or knowable to Releasor." (*Id.* at ¶8).[3] Release "D" was signed by Ms. Gorman and other *Armona* plaintiffs who did not receive settlement proceeds for personal injury, and included a different description: "notwithstanding any other provision of this release, this release does not include any future claim for damages based upon presently unmanifested bodily injury or illness not now known or knowable to Releasor." (*Id.*, Ex. D-1 at ¶8).

II. THE PARTIES' ARGUMENTS

DEFENDANT'S ARGUMENT

DuPont argues that Plaintiffs' current claims are barred by the plain terms of the Agreements executed in the *Armona* settlement. As the Agreements Plaintiffs signed are broad and clear, DuPont submits the express terms of the Agreements prohibit Plaintiffs' current personal injury suits.

[3] There were three variations of Release "C" (C-1, C-2, and C-3), depending on whether plaintiff was signing on plaintiff's own behalf, as guardian for a minor plaintiff, or as executor of the estate of a plaintiff. These variations are immaterial here.

A. Louis Bruno

As to Mr. Bruno, DuPont argues that his current personal injury claim for "adverse brain and neurological effects that caused him to develop learning disabilities" is barred for two independent reasons. First, DuPont argues that Mr. Bruno's sworn answers on his PFS, Mr. Bruno's current claimed injury was diagnosed in 1974, 23 years before the *Armona* settlement for personal injuries. Thus, DuPont submits that summary judgment should be granted for this reason alone. Second, even if Mr. Bruno's current claimed injury had not yet manifested at the time of the *Armona* settlement, Mr. Bruno released any future claim except for unmanifested "malignancy." As the term "malignancy" refers to cancerous cells only, and the structure of the *Armona* settlement agreement and releases intended "malignancy" to refer to cancer-related claims, Mr. Bruno's claim of learning disabilities cannot qualify for the limited release exception for "malignancy."[4]

B. Josephine Bruno

DuPont submits that, similar to the claims brought by her son, Ms. Bruno's current claim for "Kidney Disease" fails to qualify for the narrow exception in Paragraph of Release "C" for two reasons: First, Ms. Bruno's claimed kidney disease had already manifested at the time she entered into the Agreement with Dupont, or it was known or knowable. This, according to DuPont, is demonstrated by the expert report she submitted in *Armona* from Dr. Bidanset, which included opinions that PCE causes "[t]ransient ... renal dysfunction," TCE causes "renal failure," and "renal toxicity of the metals and

[4] As discussed, *supra*, plaintiff contends that "malignancy" can, and should, be defined more broadly; *i.e.* to include claims other than just "cancer." In fact, at oral argument, plaintiff's counsel argued that comparing the term "malignancy" to "malignant" reveals that the former is more encompassing than the latter and should be defined as "very dangerous." (*See* Pbr. at 9).

solvents contaminating the soil and water at least exacerbated Ms. Bruno's hypertension." (Dwyer Cert., Ex. 7 at 5-6). Second, Ms. Bruno's claim is also barred for the reason that kidney disease – whenever manifested – does not qualify for the carve-out exception for "malignancy," which was intended, and in fact does, refer only to cancer-related claims. Thus, DuPont submits that summary judgment is appropriate on Ms. Bruno's claims.

C. Ann Marie Gorman

DuPont submits that the terms of the Agreement make clear that the parties considered emotional distress claims distinct from bodily injury claims. Among the potential components of the settlement amount that a particular plaintiff could receive, emotional distress and personal injury were separate components. (Dwyer Cert., Ex. 2). In addition, the Agreement provided that plaintiffs who received payments for personal injury claims would sign "B" or "C" release forms, and plaintiffs who did not receive payments for personal injury claims would sign a "D" release form. Ms. Gorman received a specific payment for emotional distress (*id.*, Ex. A at 6) and signed a "D" Release – the release for plaintiffs not receiving personal injury payments. As the parties and mediator viewed emotional distress claims as distinct from personal injury claims, the carve-out preserving bodily injury claims does not preserve her claims for emotional distress. Accordingly, DuPont argues summary judgment should be granted in its favor.

PLAINTIFFS' OPPOSITION

As an initial matter, plaintiffs contend that the Agreements at issue are inadmissible hearsay because neither Mr. Dwyer nor his firm was a signatory to the Agreement(s) and Mr. Dwyer has not demonstrated his personal knowledge of the authenticity of the Agreement. (Pbr. 7; Dwyer Cert, Ex. 2 at 6).

Assuming the propriety of the release agreements as evidence, Plaintiffs submit that each release proposed to them in the *Armona* litigation contained a "carve-out" clause outlining which types of claims plaintiffs retained against DuPont. Plaintiffs argue that, as to Mr. and Ms. Bruno, the carve-out clause preserves their personal injury claims and, in any event, is ambiguous and should be construed in their favor. As to Ms. Gorman, Plaintiff asserts that her current claim for extreme emotional distress is separate and distinct from the generic claim she asserted in the *Armona* litigation, and is not barred by the terms of the Agreement.

Plaintiffs further submit that the Court cannot construe the language of the release because the language of the carve-out clause is ambiguous and, thus, creates a genuine issue of material fact as to its meaning. More specifically, Plaintiffs argue that the Court should deny DuPont's motion because the term "malignancy," upon which DuPont so heavily relies, is ambiguous, and its interpretation presents an issue as to a material fact that should be presented to a jury.

Plaintiffs argue that the term(s) "malignant" or "malignancy" has several definitions separate and apart from just "cancer" or "cancer-related." According to plaintiffs, other definitions of malignancy indicate that the term does not refer exclusively to cancer and neither Ms. Bruno nor Mr. Bruno understood that "malignancy" referred

only to cancer. Plaintiffs cite to various dictionary definitions for the proposition the term "malignancy" as used in the *Armona* release is, at the very least, ambiguous and, thus, constitutes a genuine issue of material fact.

Plaintiffs further argue that DuPont's actions demonstrate that DuPont itself found the term to be ambiguous, as DuPont edited similar releases used in later litigations. The Agreements in *Armona* were executed in 1997. In 2003 and 2004, in a different litigation concerning environmental contamination at DuPont's Pompton Lakes site, DuPont executed Settlement and Release Agreements containing similar language to those in *Armona*, only this time DuPont added "cancer" to the language, as follows: "Releasor does not release any future claim for compensatory damages for *malignant cancer* manifested in the future." *See Naftali, et al. v. E.I. DuPont de Nemours and Co., et al.*, Case No. PAS-L-364-98 (N.J. Super. Ct. Law Div., Passaic County); *Agnes et al. v. E.I. DuPont de Nemours and Co., et al.*, Case No. PAS-L-9405-97 (N.J. Super. Ct. Law Div., Passaic County) (emphases added). Plaintiffs argue that "malignancy" must have a meaning separate and distinct from "cancer," or the drafting attorneys would not have included "cancer" in the later releases.

Thus, Plaintiffs submit that the terms "malignant" and "malignancy" are ambiguous. Where, as here, the terms of a settlement agreement are ambiguous, New Jersey courts do not, and should not, enforce them. Having "established" that the Agreements are ambiguous and the terms at issue should be submitted to a jury, plaintiffs next argue that their injuries are not barred by the terms of the Agreement.

Plaintiff Josephine Bruno submits that her kidney disease did not manifest prior to signing the Agreement and is clearly a "malignancy." Ms. Bruno's kidney disease was

diagnosed in or around 2003, six years after signing the Agreement, and her condition has worsened to a point where her kidneys were no longer adequately functioning and required a transplant.

As to Louis Bruno, Plaintiff concedes that his injuries manifested in 1974. However, Mr. Bruno asserts that he had no reason to know that DuPont's toxic vapors caused his current personal injury claims until approximately 2008, and because his claims constitute a "malignancy," as used in the carve-out clause of the Agreement, Mr. Bruno should be permitted to pursue his claims against DuPont.

Lastly, as to Ann Marie Gorman, Plaintiff concedes that she released an emotional distress/fear of cancer claim as to the issues involved in *Armona*. However, Plaintiff now argues that her current claim for severe emotional distress is separate and distinct from the claims she released in 1997 in connection with *Armona* because of added stress and distress in her life due to the vapor intrusion issues and contamination caused by DuPont. Ms. Gorman alleges not to have become aware, and thus did not begin to suffer, from this distress until approximately 2008.[5] Specifically, Plaintiff argues that because of the vapor intrusion the value of her house has dropped precipitously and she now feels "trapped in a home that needs repairs with no prospect of being able to make them and no prospect of being able to move. These factors and others cause her daily stress and anxiety, and have caused Ms. Gorman to take medications to treat the symptoms of her extreme emotional distress." (Pbr. At 17).

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[5] At oral argument, Mr. Soutar used the example of a trip and fall in an attempt to differentiate between those claims which were settled and those which were not. He argued that bringing the instant lawsuit is akin to a shop patron who sued a storeowner for injuries suffered as a result of a trip and fall at the store and settled her claims. Three years later, if the same patron suffers a similar slip and fall in the same store and sues for injuries sustained, that suit would not be barred because the patron never settled her claims for that later, different injury.

DEFENDANT'S REPLY

Defendant first notes that the Agreement is not inadmissible hearsay, as asserted by plaintiffs, but is instead a statement by a party opponent under N.J.R.E. 803(b). Having established the admissibility of the Agreement, Defendants further note New Jersey's strong public policy in favor of enforcing settlements. Thus, plaintiffs' contention that enforcement of the Agreements here would immunize a "continuing tort" and somehow violate public policy was previously rejected in *Agnes*,[6] and should be rejected by this Court as well.

DuPont further submits that the plain and ordinary meaning of the term "malignancy," especially in the context of the Agreement can only mean "cancerous." Nevertheless, DuPont submits that the structure of the Agreement confirms that "malignancy" in the context of the *Armona* litigation means "cancer," and that "malignancy" in the Agreement is not reasonably susceptible to another interpretation. In this case, if "malignancy" just means "very dangerous" or "very harmful," as plaintiffs suggest, that would render superfluous a key aspect of the Agreement: the distinction between two groups of settling plaintiffs; those with cancer claims and those with other personal injury claims (other than a presently unmanifested malignancy).[7]

As to Mr. Bruno's claims, DuPont notes that "[p]laintiffs admit that 'DuPont is correct that the injury for which Mr. Bruno is asserting his claims had manifested in approximately 1974, long before the *Armona* settlement' [and t]hat admitted fact compels

[6] Here, plaintiffs rely on the same authorities and arguments asserted by the *Agnes* plaintiffs.

[7] Read in this context, DuPont submits that "malignancy" can only mean "cancer" because those plaintiffs who received a settlement payment for cancer claims were barred from any future claim of any kind, while plaintiffs who received a settlement payment for bodily injury other than cancer were barred from any future claim except for cancer claims and those plaintiffs who had not received a settlement payment for bodily injury were barred from any future claim except for bodily injury. Plaintiffs reading would nullify any distinction between these groups of settling plaintiffs.

dismissal of his claims." (Dbr. At 8). Moreover, although DuPont disagrees with plaintiffs' characterization of Mr. Bruno's learning disability as a "malignancy," the careve-out at issue does not preserve claims for all malignancies, but only for "presently unmanifested" malignancies. As it is undisputed that Mr. Bruno's learning disabilities had manifested at the time he entered into the Agreement, DuPont submits that his claim is barred.

Moreover, as to Ms. Bruno, DuPont submits that her kidney disease is part of the same disease progression that had already begun at the time she entered into the Agreement with DuPont. Thus, even if the term "malignancy" in the Agreement could refer to conditions other than cancer, the "malignancy" had already manifested (and was known and knowable) when Ms. Bruno signed the *Armona* release. In fact, Ms. Bruno's own medical records show that her hypertension led to her kidney disease and Ms. Bruno's expert in *Armona*, Dr. Bidanset, said in 1996 that kidney disease was a possible toxicological effect of chlorinated hydrocarbons to which Ms. Bruno allegedly had been exposed. Accordingly, DuPont submits that the Court need not address whether "malignancy" in the Agreement means "cancer" because Ms. Bruno's kidney disease was part of the same disease process that had already begun at the time she signed that Agreement.

Lastly, as to Ms. Gorman, DuPont submits that her current emotional distress claim does not actually differ from the emotional distress claim she asserted in *Armona* and, even if it were different, the Release she executed does not preserve any emotional distress claim whatsoever. In particular, Ms. Gorman alleged emotional distress based on property value decline and loss of quality of life in *Armona* and her current claim is based

on similar allegations. However, even if Ms. Gorman's current emotional distress claim differed substantially from the emotional distress claim that she released in *Armona*, the carve-out clause in the Agreement she signed does not preserve any emotional distress claims at all. The Agreement treated emotional distress claims separately from bodily injury claims, and Ms. Gorman's release preserved only the latter.

III. DECISION

In this case, DuPont has moved for summary judgment on the plaintiffs' claims asserting that they are barred by the terms of the Settlement and Release Agreements ("the Agreement") signed in connection with the *Armona* litigation. As there is more than one Agreement at issue here, a review of those Agreements is necessary.

Summary Judgment:

Under the developed governing standard, a summary judgment motion continues to require "searching review" of the record on the part of the trial court to ascertain whether there is a genuine issue of material fact. *Brill v. The Guardian Life Insurance Co. of America*, 142 N.J. 520, 541 (1995). As such, the Court must "consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational fact finder to resolve the alleged disputed issue in favor of the non-moving party." *Id.* at 540. Summary judgment must be granted when the evidence "'is so one-sided that one party must prevail as a matter of law.'" *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986). This means that summary judgment cannot be defeated if the non-moving party does not "offer any

concrete evidence from which a reasonable juror could return a verdict in his favor." *Id.* at 256. The non-movant has the "burden of producing in turn evidence that would support a jury verdict," and must "set forth specific facts showing that there is a genuine issue for trial." *Id.* The inquiry is "'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.'" *Liberty Surplus Ins. Corp. v. Nowell Amoroso, P.A.*, 189 N.J. 436, 445-46 (2007) (quoting *Brill*, 142 N.J. at 536); *see also Jolley v. Marquess*, 393 N.J. Super. 255, 267 (App. Div. 2007).

"At this stage of the proceedings, the competent evidential materials must be viewed in the light most favorable to plaintiff, the non-moving party, and he is entitled to the benefit of all favorable inferences in support of his claim." *Bagnana v. Wolfinger*, 385 N.J. Super. 1, 8 (App. Div. 2006) (citing *R.* 4:46-2(c); *Brill*, 142 N.J. at 540). Plaintiff, however, cannot rely on "conclusory and self-serving assertions" in certifications without explanatory or supporting facts to defeat a meritorious motion for summary judgment. *Puder v. Buechel*, 183 N.J. 428, 440 (2005) (citing *Martin v. Rutgers Cas. Ins. Co.*, 346 N.J. Super. 320, 323 (App. Div. 2002); *Brae Asset Fund, L.P. v. Newman*, 327 N.J. Super. 129, 134 (App. Div. 1999)). Competent opposition requires "competent evidential material" beyond mere "speculation" and "fanciful arguments." *Merchs. Express Money Order Co. v. Sun Nat'l Bank*, 374 N.J. Super. 556, 563 (App. Div.), *certif. granted*, 183 N.J. 592 (2005); *O'Loughlin v. Nat'l Cmty. Bank*, 338 N.J. Super. 592, 606-07 (App. Div.) (opponent must do more than establish abstract doubt regarding material facts), *certif. denied*, 169 N.J. 606 (2001). *See also James Talcott, Inc. v. Shulman*, 82 N.J. Super. 438, 443 (App. Div. 1964) (noting that "[m]ere sworn

conclusions of ultimate facts, without material basis or supporting affidavits by persons having actual knowledge of the facts, are insufficient to withstand a motion for summary judgment").

Admissibility of The Agreements:

The Court finds the Agreements are properly before the Court and may be considered on a motion for summary judgment. There are a number of "theories" under which the Agreements may be considered by this Court; *e.g.* statement by a party opponent (N.J.R.E. 803(b)), statement against interest (N.J.R.E. 803(c)) self-authenticating documents (N.J.R.E. 902(h), notarized documents). Moreover, the language of the Agreement itself contemplates its use in court: "[t]his Release may be pleaded as a full and complete defense to, and may be used as the basis for an injunction against, any action, suit or other proceeding which may be instituted, prosecuted or attempted in breach of this Release." (Release at ¶12). Accordingly, the Court will consider the Agreements for purposes of the instant Motion.

Settlement Agreements:

New Jersey courts favor the enforcement of settlement agreements as a matter of public policy. *Brundage v. Estate of Carambio*, 195 N.J. 575, 601 (2008) ("Our strong policy of enforcing settlements is based upon 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."); *Jannarone v. W.T. Co.*, 65 N.J. Super. 472 (App. Div.) *certif. denied*, 35 N.J. 61 (1961). A settlement agreement between parties to a lawsuit is

a contract. *Pascarella v. Bruck*, 190 N.J. Super. 118, 124 (App. Div.), *certif. denied*, 94 N.J. 600 (1983). Like other contracts, when a settlement is obtained by fraud, the injured party may seek rescission. When there is a breach of a material term of an agreement, the non-breaching party is relieved of its obligations under the agreement. *Stamato & Co. v. Borough of Lodi*, 4 N.J. 14 (1950).

"It is the general rule that where a party affixes his signature to a written instrument, such as a release, a conclusive presumption that he read, understood and assented to its terms and he will not be heard to complain that he did not comprehend the effect of his act in signing. A notable exception to this rule, however, is when the signature is obtained by fraud or imposition in the execution of the instrument." *Kero,* 6 N.J. 361 (1951) (citing *Christie v. Lalor*, 116 N.J.L. 23, 25 (Sup. Ct. 1935); *Kearney v. Nat'l Grain Yeast Corp.*, 126 N.J.L. (E. & A. 1940)). Thus, a settlement will not be vacated unless it is "achieved through coercion, deception, fraud, undue pressure, or unseemly conduct, or if one party was not competent to voluntarily consent to the agreement." *Brundage*, 195 N.J. at 601. In order to prove equitable fraud, a plaintiff must demonstrate a material misrepresentation made with intent that it be relied on, coupled with actual detrimental reliance. *Jewish Center of Sussex County v. Whale*, 86 N.J. 619, 625 (1981). Likewise, a settlement will not be vacated unless it is "achieved through coercion, deception, fraud, undue pressure, or unseemly conduct, or if one party was not competent to voluntarily consent to the agreement." *Brundage*, 195 N.J. at 601.

In general, settlement agreements will be honored "absent a demonstration of 'fraud or other compelling circumstances.'" *Pascarella*, 190 N.J. Super. at 125 (quoting *Honeywell v. Bubb*, 130 N.J. Super. 130, 136 (App. Div. 1974)). Before vacating a

settlement agreement, our courts require "clear and convincing proof" that the agreement should be vacated. *DeCaro v. DeCaro*, 13 N.J. 36 (1953). Consequently, our courts have refused to vacate final settlements absent compelling circumstances.

The Releases:

The Release Agreements at issue differ materially in only one respect: their exception of certain future claims from the broad release provisions.

Release "C" is the Release that Defendant contends was signed by the Brunos and other Armona plaintiffs who received DuPont's settlement payments for personal injury claims other than cancer.[8] That Release provided the following exception to the broad release of future claims: "notwithstanding any other provision of this release, this release does not include any future claim for damages based upon a presently unmanifested malignancy not now known or knowable to Releasor." (Ex. C-1 at ¶8).

Release "D" is the version signed by Ms. Gorman and other *Armona* plaintiffs who did not receive settlement proceeds for personal injury. That Release included a different exception: "notwithstanding any other provision of this release, this release does not include any future claim for damages based upon presently unmanifested bodily injury not now known or knowable to Releasor." (Ex. D-1 at ¶8; Dwyer Cert., Ex. 4).

The Releases confirmed that each Releasor "has read this Release and the terms thereof and that Releasor had discussed this Release with Releasor's counsel who had fully explained to Releasor of its meaning." (¶13). Each Releasor "expressly

[8] Plaintiffs allocated proceeds "for cancer claims" executed Release "B", while those plaintiffs who were allocated proceeds for "any other personal injury claims" executed Release "C". (See Dwyer Cert, Ex. 2). As previously mentioned, there were three (3) variations of Release "C" but those variations are immaterial here.

represent[ed] that Releasor signed this Release willingly and voluntarily." (¶14). Each Release was signed by plaintiff(s) and plaintiffs' counsel and notarized.

The crux of plaintiffs' argument, that these aforementioned Releases do not bar their present suits, is that the Releases are ambiguous in that the term "malignancy" as referenced therein means something other than "cancer." The Court disagrees with plaintiffs. Rather, this Court finds that the language of the Releases is clear, and unambiguous, and must, therefore, enforce the terms as written. *Impink ex. Rel. Baldi*, 396 N.J. Super. at 560. Defendants argue that "malignancy" refers exclusively to "cancer-related claims." Plaintiffs dispute this definition on the grounds that "malignancy" has several definitions, and that DuPont's own actions show the ambiguity of the term as used in the *Armona* Releases. Clearly, "malignancy" is a defined/definable term that is not subject to interpretation. The National Institutes of Health defines "malignancy" as: "refer[ing] to cancerous cells that have the ability to spread to other sites in the body or to invade and destroy tissues..." *http://www.nlm.nih.gov/medlineplus/ency/article/00253.htm* (accessed July 29, 2012). Similarly, the National Cancer Institute defines the term as "diseases in which abnormal cells divide without control and can invade nearby tissue...Also called cancer." *http://www.cancer.gov/dictionary?cdrid=45771* (accessed July 29, 2012). Likewise, Encyclopedia Brittanica defines "malignancy" as: "malignancy implies a process that, if left alone, will result in fatal illness. Cancer is the general term for all malignant tumors." *http://www.brittanica.com/EBchecked/topic/360146/ malignancy* (accessed July 29, 2012). The plain meaning of the term "malignancy" refers to "cancer." Moreover, the intention of the parties and the context in which the term "malignancy" is used in

these Releases only belies that definition.[9] See *Celanese Ltd. v. Essex City Improvement Auth.*, 404 N.J. Super. 514, 528 (2009) ("In interpreting a contract, a court must try to ascertain the intention of the parties as revealed by the language used, the situation of the parties, the attendant circumstances, and the objects the parties were striving to attain.") Although plaintiffs have directed the Court to various alternate definitions of the term "malignancy," each dictionary to which plaintiffs cite show the typical meaning of "malignant" is "cancerous." The terms of a contract "must be given their plain and ordinary meaning." *Nester v. O'Donnell*, 301 N.J. Super. 198, 210 (App. Div. 1997). The plain and ordinary terms of contracts plaintiffs entered into with DuPont (the Settlement and Release Agreements) bar plaintiffs' claims before this Court.

The Individual Plaintiffs:

1. Louis Bruno

With regard to Mr. Bruno, the Court need not reach the definition of "malignancy" because the language "presently unmanifested," which appears immediately prior, is fatal to plaintiff's claims. Mr. Bruno's learning disabilities were diagnosed in 1974, 23 years prior to entering into the Agreement with DuPont. His disability was clearly known or knowable at the time he signed the Agreement. So too should have any possible connection to exposure chemicals flowing from DuPont's PLW,

[9] To read the Releases as plaintiffs propose would nullify any distinction between the different groups of settling plaintiffs. In fact, if "malignancy" means "very dangerous," as plaintiffs urge, then the Releases are entirely vitiated. It would be illogical for the carve-out to preserve claims for "very dangerous" injuries when the very purpose of the Agreements was for plaintiffs to settle and release claims for "very dangerous" and "serious" injuries.

which was the subject of the Agreement.[10] Moreover, under the plain meaning of the term "malignancy" his claims do not qualify for the limited carve-out exception contained in the Agreement. The plain terms of the Agreement clearly bar Mr. Bruno's claims.

2. Josephine Bruno

Kidney disease was part of Ms. Bruno's pre-existing condition and, in any event, she knew or should have known about a possible connection between her injuries and DuPont's actions at PLW at the time she executed the Agreement with DuPont. Ms. Bruno's hypertension was diagnosed in 1984. It was determined that her hypertension was caused by her exposure to VOCs stemming from PLW. Moreover, Ms. Bruno's own expert opined about the connection between hypertension and kidney disease. Therefore, at the time she entered into the Agreement, Ms. Bruno knew or should have known of the potential for kidney disease as a consequence of her hypertension. Ms. Bruno released the right to pursue bodily injury claims resulting from the same operative facts of *Armona*. Thus, her claims are barred.

3. Ann Marie Gorman

The Agreement that Ms. Gorman signed in *Armona* clearly contemplates "emotional distress," extreme or otherwise, and "bodily injury" to mean two separate and distinct claims. *Compare* Agr. at P. 8, *with* Agr. at P.3. Thus, while New Jersey law may

[10] In fact, at oral argument, plaintiffs' counsel stated: "vapor intrusion was well-known in the 1990s."

recognize a separate personal injury claim for extreme emotional distress,[11] the Release that Ms. Gorman signed clearly waived any right to pursue such a claim. Where, as here, a plaintiff has released any and all future claims for "emotional distress" and "dimunition of property value," she cannot now bring a "new" personal injury claim resulting from the emotional distress created by the dimunition of her property value. This is not a new claim, but a "future claim stemming from the same operative facts" as those previously released in *Armona*. The Agreement that Ms. Gorman signed did not preserve claims for emotional distress and, in any event, she settled and released those claims for valuable consideration. Her claim is barred.

CONCLUSION

For the reasons stated herein, Defendant's Motion for Summary Judgment is GRANTED.

[11] *See, e.g, Buckley v. Trenton Sav. Fund Soc'y*, 111 N.J. 355-365-68 (1988); *Hume v. Bayer*, 178 N.J. Super. 310 (App. Div. 1981).