Circuit Court for Wicomico County
Case No. C-22-CV-23-000134

UNREPORTED*

IN THE APPELLATE COURT

OF MARYLAND

No. 0037

September Term, 2024

EDWARD T. HUGHES, JR.

v.

APU CONSOLIDATED, INC., ET AL.

Beachley,
Ripken,
Robinson, Jr., Dennis M.
(Specially Assigned),

JJ.

Opinion by Ripken, J.

Filed: May 15, 2025

*This is an unreported opinion. This opinion may not be cited as precedent within the rule of stare decisis. It may be cited for its persuasive value only if the citation conforms to Rule 1-104(a)(2)(B).

This appeal involves a challenge by appellant, Edward T. Hughes ("Hughes"), to the Circuit Court for Wicomico County's grant of summary judgment in favor of Appellees, Consolidated Rail Corporation ("Conrail") and APU Consolidated, Inc. ("APU"). In 1998, Hughes was a plaintiff in a Federal Employers' Liability Act ("FELA")[1] mass action for negligence resulting from exposure to asbestos and other toxic substances, from which he was diagnosed with asbestosis and other pulmonary issues. In 2003, Hughes signed a voluntary Release Agreement ("the Release"), which released Appellees from liability for all claims or actions relating to exposure to asbestos and other toxic substances. In 2022, following a diagnosis of bladder cancer, Hughes sued Appellees again under FELA, asserting that his exposure to diesel and exhaust fumes was the cause of the cancer. Appellees moved for summary judgment on the ground that the Release barred the 2022 claim from proceeding. The circuit court granted summary judgment in favor of Appellees. Hughes then filed this timely appeal.

ISSUES PRESENTED FOR REVIEW

Hughes presents the following issues for our review:[2]

I. Whether the circuit court erred in granting summary judgment in favor of Appellees on the grounds that there was no genuine dispute of material fact that Hughes was aware that cancer was a known risk when he executed the Release.

[1] *See* 45 U.S.C.A. §§ 51 *et seq*.

[2] Rephrased and expanded from:

> Did the circuit court err by granting summary judgment in favor of Appellees on the ground that Appellant's FELA claim for bladder cancer was barred by a prior release when whether Appellant intended to waive his bladder cancer claim in that prior release was a disputed question of fact properly for the jury to decide?

II. Whether the circuit court erred in determining that the Release was valid.

For the reasons to follow, we shall affirm the judgment of the circuit court.

FACTUAL AND PROCEDURAL BACKGROUND

Hughes had a long career in the railroad industry. Hughes began working for APU[3] in December of 1964 as a clerk, before he eventually transitioned from an office role to working in various mechanical roles, i.e., brakeman, trainman, crew dispatcher, and conductor. In January of 1966, still employed by APU, Hughes began working as a brakeman. He worked for APU until 1976. Then from 1976 through 1978, Hughes was employed by Conrail as a brakeman, trainman, and conductor. From 1978 through 1985 he was employed by the National Rail Passenger Corporation ("Amtrak") as a conductor. Finally, from 1986 through 1993, he returned to Conrail as a conductor. In 1998, Hughes joined a mass action lawsuit comprised of 636 plaintiffs in the Circuit Court of Brooke County, West Virginia against two of his former employers, Conrail and APU.

[3] APU is the successor-in-liability to the Penn Central Transportation Company ("Penn Central") and the Pennsylvania Railroad. Penn Central was formed in 1968. In 1970, Penn Central declared bankruptcy; it ceased operations in 1976. In March of 1976, Penn Central's assets were transferred to Conrail. At the conclusion of the bankruptcy proceedings, a new company, Penn Central Corporation ("PCC") emerged, having been conveyed assets and liabilities from the bankrupt entities. In 1994, PCC changed its name to American Premier Underwriters, Inc.; during the pendency of this litigation, APU changed its name to APU Consolidated, Inc. For consistency, all references to any of these companies throughout the opinion will be addressed as APU.

The Mass Action and Settlement

The mass action raised claims of negligence under FELA and the Safety Appliance Act.[4] Hughes and the other plaintiffs sued the defendants for exposure to, and forced inhalation of, "asbestos fibers, free silica, diesel fumes, solvent fumes, gasoline fumes, fibrogenic materials, carcinogenic materials[,] and other substances deleterious to the respiratory system." The complaint alleged that Hughes and the other plaintiffs suffered from occupationally-related lung diseases including, "asbestosis, asbestos related pleural disease, silicosis, mixed dust pneumoconiosis, chronic obstructive pulmonary disease, occupational asthma, occupational bronchitis, cancer, an increased risk of cancer, and other serious and severe pulmonary diseases." The complaint further alleged that Hughes and the other plaintiffs also suffered from a greatly increased risk of developing "mesothelioma, bronchogenic carcinoma, or other cancerous conditions," and breathing difficulties. The complaint alleged that Hughes and the other plaintiffs had been damaged in numerous ways, to include: pain and suffering; anxiety and emotional tension as a result of their injuries, including a fear of death or disability resulting from the aforementioned diseases; "a significantly greater risk than otherwise would have been present of developing cancerous diseases"; financial loss resulting from work absences; impairment of earning capacity; substantial fees in medical bills; and an impairment to their general health, strength, and vitality.

[4] *See* 49 U.S.C.A. §§ 20101 *et seq.*

As the mass action proceeded to trial, many plaintiffs, including Hughes, settled. Hughes received $12,500.00 as consideration for the Release and settlement. In March of 2003, Hughes executed the Release with APU, Conrail, and other rail and transportation companies, releasing the companies from liability for all claims or actions relating to his exposure to asbestos and other toxic substances. The pertinent provisions of the Release are as follows:

> **E.T. Hughes** . . . does hereby RELEASE AND FOREVER DISCHARGE . . . [Conrail, APU, and other rail and transportation companies] . . . (hereinafter collectively referred to as "RELEASEE"), of and from all liability for all claims or actions for all known and unknown, manifested and unmanifested, suspected and unanticipated pulmonary-respiratory diseases, and/or injuries including but not limited to medical and hospital expenses, pain and suffering, loss of income, *increased risk of cancer, fear of cancer, and any and all forms of cancer, including mesothelioma and silicosis*, arising in any manner whatsoever, either directly or indirectly, in whole or in part, out of exposure to any and all toxic substances, including asbestos, silica, sand, diesel fumes, welding fumes, chemicals, solvents, toxic and other pathogenic particulate matters, coal dust, and all other dusts, fibers, fumes, vapors, mists, liquids, solids, or gases, during [Hughes'] employment with RELEASEE. The parties agree that a portion of the consideration paid for this [Release] is for risk, fear, and/or possible future manifestation of the injuries or diseases described in this paragraph.
>
> ***
>
> It is the intent of [Hughes] to release any and all claims described herein against RELEASEE for all injuries and diseases, sustained by [Hughes], however incurred, which might form the basis of any action under [FELA] . . . . Such claims are by this understanding and agreement expressly released.
>
> In entering into this [Release], [Hughes] declares that . . . [his] present condition is permanent and may be progressive and recovery therefrom uncertain and indefinite, so that consequences may not now be fully known and could be more numerous and serious than now believed and that consequences not now anticipated may result.

> ***
>
> [Hughes] hereby declares that he has executed this [Release] on the advice and approval of his counsel; that he knows and understand the contents hereof and signs the same as his own free act with full knowledge that the effect hereof shall be such so as to extinguish and he hereby declares extinguished, now and forever, any and all claims described in this [Release].
>
> ***
>
> **[HUGHES] HEREBY ACKNOWLEDGES THAT HE HAS READ THIS ENTIRE RELEASE AND UNDERSTANDS ITS TERMS, AND THAT BY SIGNING THIS RELEASE HAS RELEASED HIS RIGHTS REFERENCED HEREIN AGAINST RELEASEE AND ITS INSURERS.**

(bolding in original, italics added). On the last page, directly below the bolded and capitalized language, Hughes signed the Release. The last page of the Release also contains Hughes' attorney's signature below this language: "I hereby certify that on the day and year above specified, I explained the foregoing [Release] to **E.T. HUGHES;** that I explained to him the legal consequences of the execution and delivery of said [Release] and that he executed the same voluntarily and appeared to have full knowledge thereof." (emphasis in original).

The Instant Litigation

In October of 2018, Hughes was diagnosed with bladder cancer. After his diagnosis, Hughes learned that his bladder cancer was caused, or contributed to, by his frequent exposure to asbestos, diesel and exhaust fumes, and potentially other toxic chemicals while he worked for APU, Conrail, and Amtrak. In August of 2021, Hughes brought suit against APU, Conrail, and Amtrak in the Court of Common Pleas of Philadelphia County, raising

claims of negligence under FELA and strict liability under the Locomotive Inspection Act ("LIA").[5] Conrail moved to dismiss the action due to *forum non conveniens*. On June 3, 2022, the Court of Common Pleas of Philadelphia County granted Conrail's motion via an order and dismissed the action without prejudice. The order also provided Hughes with ninety days to refile the action "in an appropriate forum in Maryland, Delaware, or any other appropriate jurisdiction[.]"[6]

On September 7, 2022, Hughes brought suit in the Circuit Court for Baltimore City against APU, Conrail, and Amtrak for negligence under FELA and strict liability under LIA. Hughes alleged that while employed by APU, Conrail, and Amtrak as a crew dispatcher, trainman, brakeman, and conductor, he was exposed to excessive amounts of: "diesel exhaust/fumes, asbestos and second hand smoke"; "diesel exhaust/fumes, that were produced and expelled by running diesel locomotives on the road and in the yards"; and "excessive amounts of asbestos that were found on the diesel locomotives and pipe coverings on insulated pipes in buildings and facilities." Hughes also alleged that his exposures were "cumulative and occurred throughout all locations" where he was assigned to work. Additionally, Hughes asserted that his exposure to the aforementioned substances was due to the negligence of APU, Conrail, and Amtrak, and "in whole or in part, caused or contributed to his development of bladder cancer."

[5] 49 U.S.C.A. § 20701.

[6] The Court of Common Pleas of Philadelphia County indicated that it was providing Hughes with ninety days to refile the complaint in the appropriate forum to preserve Hughes' initial filing date of August 30, 2021, for statute of limitations purposes. FELA carries a three-year statute of limitations. *See* 45 U.S.C.A. § 56.

In March of 2023, Conrail—and later APU by joining and supporting Conrail's motion—again moved to transfer venue due to *forum non conveniens*.[7] In April of 2023, pursuant to a joint stipulation entered into by the parties, the Circuit Court for Baltimore City entered an order transferring the matter to the Circuit Court for Wicomico County. The parties then proceeded with discovery.

In October of 2023, APU, Conrail, and Amtrak deposed Hughes. In addition to developing a timeline of Hughes' work history for each rail company, Hughes also testified regarding the initial suit in 1998 and the Release he signed in 2003. Hughes testified that in the 1998 case, he was represented by the Peirce law firm; was deposed; settled the suit; and received payment from his former employers. Hughes also confirmed that the signature on the Release was his; that the date he signed the Release was March 31, 2003; that he recalled signing the Release; and that his attorney also signed the Release. Regarding his understanding of the Release, Hughes testified:

> [APU'S COUNSEL]: Now, [Hughes], did you review the [R]elease before you signed it in 2003?
>
> [HUGHES]: Not really.
>
> [APU'S COUNSEL]: Okay. But you agree with me that you had the opportunity to do so, correct?
>
> [HUGHES]: I understood – I'm sorry. I understood that this [R]elease was pertaining to the asbestos alone. I had signed other releases, and I made it very clear that that was all that I was signing. And one of Mr. Peirce's [associates] agreed, said, "That's fine. Your paperwork will be for that asbestos only." And I understood that's the way it would be.

[7] *See* Md. Rule 2-327(c).

Counsel for APU then continued, reading pertinent provisions of the Release into the record, particularly, that Hughes released his previous employers for "[a]ll claims or actions for all known and unknown, manifested and unmanifested, suspected and unanticipated pulmonary/respiratory diseases and/or injuries, including, but not limited to, medical and hospital expenses, pain and suffering, loss of income, increased risk of cancer, fear of cancer, and any and all forms of cancer." The parties then continued:

> [APU'S COUNSEL]: Okay. Now, you would agree with me, Mr. Hughes, that the disease that you are alleging in this case that we are here on today is that your work on the railroad caused your bladder cancer, correct?
>
> [HUGHES]: Yes.
>
> [APU'S COUNSEL]: And bladder cancer is obviously a type of cancer, correct?
>
> [HUGHES]: Yes.
>
> [APU'S COUNSEL]: And this release includes language that says, "any and all forms of cancer," does it not?
>
> [HUGHES]: Yes.

Finally, at the end of the deposition, Hughes testified on cross-examination:

> [HUGHES' COUNSEL]: Did Mr. Peirce, your attorney in that case, ever tell you that when you settled this asbestos claim you were also giving up a future bladder cancer claim?
>
> [HUGHES]: No, he did not.
>
> [HUGHES' COUNSEL]: So did you have any idea that you were giving up a future bladder cancer claim when you signed this [R]elease in 2003?
>
> [HUGHES]: I had no idea.
>
> [HUGHES' COUNSEL]: And was it your intention to give up a future bladder cancer claim when you signed this [R]elease in 2003?

[HUGHES]: No, [it] was not.

[HUGHES' COUNSEL]: Okay. And did any of the railroads that you worked for at a safety meeting discuss either asbestos or diesel exhaust being harmful to your health?

[HUGHES]: It was not a discussion that I can remember, no.

[HUGHES' COUNSEL]: Okay. And did any of the railroads that you worked at ever tell you that asbestos or diesel exhaust were . . . carcinogens?

[HUGHES]: I – I don't recall.

In November of 2023, the parties jointly stipulated to dismissing Amtrak with prejudice from the matter, leaving only APU and Conrail (hereinafter, when together, "Appellees") as defendants.

Summary Judgment Motions and Proceedings

In December of 2023, Appellees moved for summary judgment and requested a hearing. APU moved for summary judgment on the ground that Hughes had waived his current FELA claim when he signed the Release in 2003. APU alleged that there was no dispute of material fact regarding Hughes' awareness that cancer was a known risk of exposure to asbestos and other toxic substances, because the Release discharged APU and its predecessors from "all liability for claims or actions . . . including but not limited to . . . [an] increased risk of cancer, fear of cancer, and *any and all forms of cancer*[.]" (emphasis added). Conrail filed a "joinder" motion, joining, adopting, and incorporating by reference, APU's motion for summary judgment.[8]

[8] Conrail moved for summary judgment on the grounds that Hughes' claim was time-barred by the statute of limitations. APU also filed a "joinder" motion, joining, adopting, and

Hughes opposed the motion, arguing that the FELA claim was not waived by the Release. Hughes asserted that summary judgment was not proper because there was a genuine dispute as to a material fact. Hughes asserted that there were two material facts in dispute: whether the Release was valid or void under FELA, and pointing to his deposition testimony, whether Hughes intended to release any and all future claims against Appellees. In January of 2024, APU filed a reply memorandum reasserting its argument that there was no genuine dispute of material fact that Hughes' FELA claim was barred pursuant to the Release.

In February of 2024, the circuit court conducted a hearing on the matter.[9] Attorneys for APU and for Hughes presented arguments. The court recessed to consider the parties' arguments, then granted summary judgment in favor of Appellees. The circuit court found that there were no material facts in dispute, and that accordingly, Appellees were entitled to judgment as a matter of law. The court held that the Release "included fear of cancer, any and all forms of cancer[,]" and that the Release was clear and unambiguous. When

incorporating by reference, Conrail's motion for summary judgment. Hughes opposed this motion as well. In Hughes' opposition to summary judgment regarding the statute of limitations, Hughes explained his belief that he did comply with the three-year statutory limit. After Hughes filed the opposition, in January of 2024, APU submitted a line withdrawing its joinder in Conrail's motion and accompanying memorandum for summary judgment as to the statute of limitations. At the summary judgment hearing in February of 2024, the parties did not raise the issue of the statute of limitations. Thus, this issue is not before us, and we decline to address it further.

[9] At the outset of the hearing on the motions for summary judgment, the circuit court referenced Appellees' "joinder" motions and noted Conrail's "agreement with [APU's] argument." The court further noted for the record that Conrail would be adopting APU's arguments at the hearing as well.

explaining the reasoning that summary judgment in favor of Appellees was proper, the court reviewed the Release, noting that

> it was signed and notarized by [Hughes] and then his counsel. Consideration was paid unto [Hughes] by [Appellees] to procure this [R]elease. The consideration contemplated release for future manifestations of disease, including cancer. The [R]elease contained conspicuous language that would have drawn [Hughes'] attention to the solemn and serious nature of what he was doing by accepting money in consideration for his [R]elease, . . . including bold type[font]. The risk that is contemplated in the [R]elease is a risk and harm that was claimed in the 1998 lawsuit that preceded the subject [R]elease.

The circuit court then discussed the applicable case law, explained how such law supported its finding that the Release was ostensibly valid and enforceable, and explained that the Release did not run afoul of FELA. Subsequently, the court ordered that judgment be entered against Hughes and in favor of the Appellees as a matter of law. Hughes filed a timely notice of appeal.

STANDARD OF REVIEW

A railroad employee has the choice of raising a FELA claim in either state or federal court. 45 U.S.C.A. § 56. When a plaintiff initiates a FELA action in state court, procedurally, the action is subject to state rules, while substantively, the action is subject to federal law. *St. Louis Sw. Ry. Co. v. Dickerson*, 470 U.S. 409, 411 (1985). Thus, the "validity of a release in a FELA action is governed by federal rather than state law." *Blackwell v. CSX Transp., Inc.*, 220 Md. App. 113, 120–21 (2014) (citing *Maynard v. Durham & S. Ry. Co.*, 365 U.S. 160, 161 (1961)). Accordingly, we apply Maryland law when discussing summary judgment, and federal law to Hughes' FELA claim.

"Maryland law is well settled regarding the appellate standards to be applied in reviewing a grant of summary judgment." *Hill v. Cross Country Settlements, LLC*, 402 Md. 281, 294 (2007). Summary judgment is appropriate when "there is no genuine dispute as to any material fact"; thus, "the party in whose favor judgment is entered is entitled to judgment as a matter of law." Md. Rule 2-501(f). "In granting or denying a motion for summary judgment, a judge makes no findings of fact." *King v. Bankerd*, 303 Md. 98, 111 (1985).

"We review the grant of a motion for summary judgment *de novo*." *Shutter v. CSX Transp., Inc.*, 226 Md. App. 623, 634 (2016). Thus, our analysis begins with an independent review of the record to determine whether a genuine dispute of material fact exists. *Blackwell*, 220 Md. App. at 119–20 (internal citations and quotation marks omitted). "A material fact is one that will alter the outcome of the case, depending upon how the fact-finder resolves the dispute. Mere general allegations of conclusory assertions will not suffice." *Id.* at 120 (internal citations and quotation marks omitted). "We review the record in the light most favorable to the nonmoving party and construe any reasonable inferences that may be drawn from the facts against the moving party." *Shutter*, 226 Md. App. at 634 (quoting *Myers v. Kayhoe*, 391 Md. 188, 203 (2006)). Only if we determine that there is no dispute of material fact "will we review questions of law." *Blackwell*, 220 Md. App. at 119 (internal citations and quotation marks omitted). Thus, we will first review whether there was a genuine dispute of material fact regarding Hughes' intentions when he signed the Release. Because, as will be discussed *infra*, we determine that there was no genuine

dispute of material fact, we will review a question of law, that is whether the Release was void under FELA.

DISCUSSION

I. THERE WAS NO GENUINE DISPUTE OF MATERIAL FACT.

A. Party Contentions

Hughes contends that the circuit court erred when it granted Appellees' motion for summary judgment. Hughes asserts that whether the Release bars him from bringing a subsequent FELA claim is a disputed question of fact that was not capable of resolution on summary judgment. Hughes bases this contention on his deposition testimony, during which he acknowledged that he signed the Release, but also testified that he was unaware that he was waiving any and all forms of cancer; that he did not intend to release Appellees from cancer claims; and that he thought the Release only pertained to his pulmonary claims regarding his exposure to asbestos. Hughes argues that his deposition testimony is competent evidence of his intent at the time he executed the Release, and that when the circuit court granted summary judgment in favor of Appellees, the court ignored this evidence.

Appellees assert that the circuit court did not err and that there is no dispute as to a material fact because Hughes' claim is barred by the Release. Appellees contend that despite what Hughes stated during his deposition, he was aware that he was waiving potential FELA claims because at the time Hughes executed the Release, he was represented by counsel. Appellees further contend that the fact that Hughes was represented by counsel, in combination with the language of the Release, makes plain that he was aware

of those potential adverse health consequences and thus he understood that which he was waiving. Appellees assert that "Hughes' bald assertions made during his deposition as to his understanding of the scope of the Release are not, by themselves, enough to defeat summary judgment when contravened by the clear language of the Release he signed."

B. Background Law on FELA and FELA Releases

FELA "creates a cause of action for railroad employees injured on the job due to the negligence of their employers." *Blackwell*, 220 Md. App. at 120; *see* 45 U.S.C.A. § 51.[10] FELA also provides, regarding settlements, that "[a]ny contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from *any* liability created by this chapter, shall to that extent be void[.]" 45 U.S.C.A. § 55 ("Section 5")[11] (emphasis added). Despite the "sweeping language" of Section 5—which seemingly precludes any form of settlement, release or waiver—"in certain circumstances, litigation releases are not voided" by Section 5. *See Blackwell*, 220 Md. App. at 121.

[10] Section 51 states:

> Every common carrier by railroad while engaging in commerce between any of the several States . . . shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce . . . for such injury . . . resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

[11] Section 55 is frequently referred to as "Section 5" throughout federal and Maryland case law. *See, e.g.*, *Wicker v. Consol. Rail Corp.*, 142 F.3d 690, 700 (3d Cir. 1998); *Shutter*, 226 Md. App. at 638. This is because section 55 was originally codified as Section 5. *See* 149 U.S.C. § 5 (1908). For consistency, we will continue that pattern and use "Section 5" when discussing what is now Section 55 of FELA.

i. When Releases are Permissible under Section 5

In *Callen v. Pennsylvania Railroad Company*, the Supreme Court of the United States interpreted Section 5. 332 U.S. 625, 630–31. In *Callen*, a railroad employee brought a FELA action after injuring his back at work. *Id.* at 626. The plaintiff executed a general release "of all claims and demands" against his employer and received $250.00 as consideration. *Id.* The parties later discovered that the plaintiff's injury was more serious than he initially knew; when he signed the release, he was not diagnosed with a permanent injury. *Id.* at 627. The plaintiff then attempted to sue his employer again for damages relating to his original back injury, asserting that the release he previously signed was void under the plain language of Section 5. *Id.* at 630–31. The Supreme Court rejected this argument, explicating that where a release is "not a device to exempt [the employer] from liability but is a means of compromising a claimed liability[,]" it is permissible. *Id.* at 631. This is because Congress has not prohibited parties from settling their claims without litigation. *Id.* at 631. Although in *Callen* the Court did not establish the bounds of "what will qualify as a 'compromis[e] [of] a claimed liability,'" the Court affirmatively stated that parties can settle a FELA claim "[w]here controversies exist as to whether there is liability, and if so for how much." *Wicker v. Consol. Rail Corp.*, 142 F.3d 690, 697 (3d Cir.), *cert. denied*, 525 U.S. 1012 (1998) (quoting *Callen*, 332 U.S. at 631). Thus, FELA releases are not "*per se* invalid." *Id.*

Since *Callen*, the United States Supreme Court has examined the scope of Section 5 in a variety of contexts, yet the Court still has not expressly addressed "when a litigation release acts as a full compromise of a claimed liability." *Blackwell*, 220 Md. App. at 123.

Moreover, neither the Fourth Circuit nor the District Court for the District of Maryland have opined in a FELA case regarding the validity of a release under Section 5, and thus neither have formally adopted an approach. *See Blackwell*, 220 Md. App. at 123 n.5 ("We note that there is also an absence of any persuasive authority from the Fourth Circuit on this issue."); *see also Shutter*, 226 Md. App. at 638 n.11. Therefore, disputes continue to arise as to whether a release is valid under *Callen* and its application of Section 5.

Currently, there are two competing approaches for evaluating the validity of a release under Section 5. *Compare Babbitt v. Norfolk & W. Ry. Co.*, 104 F.3d 89 (6th Cir. 1997), *with Wicker v. Consol. Rail Corp.*, 142 F.3d 690 (3d Cir. 1998).[12] We review both, briefly *Babbitt* and more extensively *Wicker*.

ii. The Circuit Split

In *Babbitt v. Norfolk & Western Railway Company*, the United States Court of Appeals for the Sixth Circuit interpreted Section 5 and created a bright-line rule regarding the validity of releases. 104 F.3d at 93. The Sixth Circuit held that "to be valid, a release must reflect a bargained-for settlement of a *known claim for a specific injury*, as contrasted with an attempt to extinguish potential future claims the employee might have arising from injuries known or unknown by him." *Id.* at 93 (emphasis added). Summarily, this means that when settling a FELA claim under *Babbitt*, a release must be limited to those *specific injuries known* to the employee at the time the release was executed. *See id.* This has

[12] In *Blackwell v. CSX Transportation, Inc.*, as discussed further *infra*, we expressly rejected the Sixth Circuit's approach and adopted the Third Circuit's approach. 220 Md. App. at 123–32, *cert. denied*, 442 Md. 194 (2015).

become known as the "known claim" test. *See Blackwell*, 220 Md. App. at 129–30.

One year later, in *Wicker v. Consolidated Rail Corp.*, the United States Court of Appeals for the Third Circuit took a different approach, rejecting the Sixth Circuit's bright-line rule. 142 F.3d at 701. The Third Circuit explained that although the bright line rule carries the benefit of predictability, it could also prevent both the employee and employer from settling controversies. *Id.* at 700–01. The Third Circuit expounded:

> Yet, it is entirely conceivable that both employee and employer could fully comprehend future risks and potential liabilities and, for different reasons, want an immediate and permanent settlement. The employer may desire to quantify and limit its future liabilities and the employee may desire an immediate settlement rather than waiting to see if injuries develop in the future. To put it another way, the parties may want to settle controversies about potential liability and damages related to *known risks* even if there is no present manifestation of injury.

Id. (emphasis added). The Third Circuit held "that a release does not violate [Section] 5 provided it is executed for valid consideration as part of a settlement, and the scope of the release is limited to those *risks which are known to the parties at the time the release is signed*." *Id.* at 701 (emphasis added). Further, claims "relating to unknown risks do not constitute 'controversies,' and may not be waived under [Section] 5 of FELA." *Id.* (citing *Callen*, 332 U.S. at 631). This approach became the "known risk" test. *See Blackwell*, 220 Md. App. at 123–29.

iii. Maryland Adopted Wicker and the "Known Risk" Test

As previously noted, *see supra* n.12, in *Blackwell v. CSX Transportation, Inc.*, this Court joined other state courts[13] and adopted *Wicker* and the "known risk" test. 220 Md. App. at 126, *cert. denied*, 442 Md. 194 (2015).

In *Blackwell*, the plaintiff "developed knee injuries caused by repetitive stress and cumulative trauma" from having to walk on a ballast while working for the defendant. *Id.* at 122. The plaintiff sued the defendant for his injuries under FELA. *Id.* at 117. In 2009, the plaintiff settled his claim and executed a release. *Id.* Prior to executing the release, the plaintiff had an opportunity to consult with his attorney. *Id.* Upon consultation with his attorney and following his attorney's advice, the plaintiff signed the release and initialed each page, "indicating that he had reviewed and understood that page's contents." *Id.* at 118. The release that the plaintiff signed "release[d] and forever discharge[d]" the defendant from any liability arising from claims resulting from exposure to "repetitive stress and cumulative trauma [that] allegedly caused [him] to suffer knee injuries and other injuries, disorders, or diseases of the lower extremities." *Id.* at 117 (internal quotations omitted).

In 2013, the plaintiff learned that he had also developed plantar fasciitis as result of the same ballast-related repetitive stress, and filed a second lawsuit against the defendant

[13] *See Loyal v. Norfolk S. Corp.*, 507 S.E.2d 499, 502 (Ga. Ct. App. 1998); *Oliverio v. Consol. Rail Corp.*, 822 N.Y.S.2d 699, 702–03 (Sup. Ct., Erie County 2006); *Jaqua v. Canadian Nat'l R.R., Inc.*, 734 N.W.2d 228, 236 (Mich. Ct. App. 2007); *Cole v. Norfolk S. Ry. Co.*, 803 S.E.2d 346, 352 (Va. 2017); *Jarrett v. Consol. Rail Corp.*, 185 A.3d 374, 378–79 (Pa. Super. Ct. 2018); *Ward v. Ill. Cent. R.R. Co.*, 271 So.3d 466, 470–72 (Miss. 2019).

under FELA. *Id.* at 122. The defendant moved for summary judgment on the ground that the 2009 release barred the plaintiff's 2013 claim. *Id.* at 118. In opposing summary judgment, the plaintiff took an identical approach to the plaintiff in *Callen*—he argued that his 2009 release was void for violating Section 5 after discovering that his injury was more severe than he had initially estimated. *Id.* Further, the plaintiff argued that the release should be void regardless of whether this Court adopted the "known injury" approach from *Babbitt* or the "known risk" approach from *Wicker*. *Id.* The circuit court granted the defendant's motion for summary judgment and the plaintiff appealed. *Id.* at 118–19.

Prior to reaching the merits of the plaintiff's claim, this Court reviewed both *Babbitt* and *Wicker*, and concluded that *Wicker* was the correct approach because the "known risk" test "is consistent with the language of Section 5 . . . in light of the Supreme Court's decision in *Callen*." *Id.* at 126. The Court, in concert with *Callen* and *Wicker*, distinguished "'a full compromise enabling the parties to settle their dispute without litigation' from 'a device which obstructs the right of the [FELA] plaintiff to secure the maximum recovery if he should elect judicial trial of his cause.'" *Id.* at 123 (quoting *Boyd v. Grand Trunk W. R.R. Co.*, 338 U.S. 263, 266 (1949) (per curiam)). The Court, in concert with *Wicker*, reiterated that the "former is valid . . . while the latter is void" under Section 5. *Id.* The Court also noted that it was adopting the "known risk" approach because it "allows employers to estimate, and potentially cap, their liability with respect to employee FELA claims while simultaneously preventing employees from unknowingly waiving future, unrelated FELA claims that may arise during the course of their employment." *Id.* at 125–26. This Court underscored that adopting the "known risk" test would enable employees to

"compromise and release those claims regarding future injuries that *are directly related* to risks presently known to both parties." *Id.* at 126 (emphasis in original).

Then, reaching the merits, this Court applied the "known risk" test from *Wicker* and held that there was no genuine dispute of material fact, because the plaintiff's 2009 release precluded him from raising his present claim. *Id.* at 126–27, 132. The Court affirmed the circuit court's grant of summary judgment in favor of the defendant-employer. *Id.* The Court held that the 2009 release regarding the "repetitive stress and cumulative trauma" to the plaintiff's knees encompassed his 2013 claim for plantar fasciitis because the release covered "the development of any new or additional repetitive stress or cumulative trauma injury either presently existing or that may arise in the future to the lower extremities or other body parts." *Id.* at 128.

In 2016, this Court again visited the issue of the validity of Section 5 releases in *Shutter v. CSX Transportation, Inc*. 226 Md. App. at 627–28. In *Shutter*, the plaintiff suffered lower back and spine injuries from working as a carman where she had been exposed to "excessive and harmful repetitive motion, strain, vibration of any type or intensity and/or cumulative trauma due to the equipment and methods with which [ ]she performed [ ]her work." *Id.* at 627–28 (internal quotations omitted). The plaintiff sustained injuries at the L4–L5 and L5–S1 levels of her lumbar spine. *Id.* at 628. In early 2003, the plaintiff underwent a spinal fusion surgery "to fuse her vertebrae" together at the injured levels of her spine. *Id.* Thereafter, the plaintiff signed a release, and then returned to work in 2004. *Id.* at 628–29. In the release, the plaintiff acknowledged that she was releasing the defendant from any claims related to her repetitive strain injury, that her injury "may be

permanent," or may progress wherein she could become permanently disabled, and that recovery from said injury was "uncertain." *Id.*

In 2011, the plaintiff began experiencing increasing levels of severe lower back pain, and "new symptoms, including radiating leg pain and numbness in her lower extremities." *Id.* at 629–30. The plaintiff was then diagnosed with adjacent disc disease, which resulted in spinal stenosis. *Id.* at 632. The plaintiff subsequently filed a second lawsuit against her employer in 2013 under FELA for these injuries. *Id.* at 630. The defendant-employer moved for summary judgment, arguing that the plaintiff's claims were barred by the release. *Id.* at 633. The circuit court granted the defendant's motion for summary judgment. *Id.* at 633–34. The plaintiff appealed. *Id.* at 634.

On appeal, this Court applied *Wicker* and *Blackwell* to affirm the circuit court's grant of summary judgment in favor of the defendant-employer. *Id.* at 637–40. The Court noted that there was no genuine dispute as to a material fact because "adjacent disc disease is a known risk of spinal fusion surgery." *Id.* at 635. In considering the grounds to affirm the circuit court's grant of summary judgment, the Court was also persuaded that the release in *Shutter* was narrower than the release in *Blackwell*. *Id.* at 640. Finally, the court determined that like in *Blackwell*, the release in *Shutter* specified that the plaintiff "bargained for—and received consideration for—the release of future potential claims arising from the progression of her injury or the development of new conditions caused by it." *Id.* at 640. Thus, the release did not violate *Callen*. *Id.* at 640–41.

iv. Combining Wicker, Blackwell, and Shutter: How to Determine Whether an Injury was a Known Risk

Whether a release is valid or void under *Wicker*'s approach to Section 5 turns on whether a risk is known to both the employer and the employee at the time they executed the release. *See Wicker*, 142 F.3d at 701. The scope of the release must be limited to only known risks. *Blackwell*, 220 Md. App. at 125. Under *Wicker* and its Maryland progeny, the process of discerning the parties' knowledge of risks is not limited, as "what is involved is a fact-intensive process." *Wicker*, 142 F.3d at 701. However, *Wicker*, *Blackwell*, and *Shutter* provide guiderails for reviewing courts to use when discerning whether a risk was known to the parties at the time they executed a release. *Wicker*, 142 F.3d at 701–02; *Blackwell*, 220 Md. App. at 123–29; *Shutter*, 226 Md. App. at 634–41.

First, courts must review the plain language of the release. *See Wicker*, 142 F.3d at 701. This is because when a release "spells out the quantity, location, and duration of potential risks to which the employee has been exposed," the release allows the employee to make a "reasoned decision whether to release the employer from liability for future injuries of specifically known risks." *Id.* Courts find the plain language of the release more persuasive that risks were known if the risks provided in the release avoid detailing a "laundry list" of diseases and hazards. *See Blackwell*, 220 Md. App. at 125–26; *Shutter*, 226 Md. App. at 639. Additionally, *Shutter* applied "ordinary contract principles" to the evaluation of the plain language of the release. 226 Md. App. at 635 (internal quotation marks and citation omitted). The Court in *Shutter* found that like a contract, a release "is to be construed according to the intent of the parties and the object and purpose of the

instrument, and that intent will control and limit its operation[,]" but can be found ambiguous "if it reasonably can be understood to have two different meanings." *Id.* (internal citation and quotation marks omitted).

Although our analysis must start with the language of the release, we cannot rely on the writing alone, "because of the ease in writing boiler plate agreements[.]" *Wicker*, 142 F.3d at 701 ("[T]he written release should not be conclusive."). The Third Circuit observed that releases may contain "an extensive catalog of every chemical and hazard known to railroad employment." *Id.* Accordingly, "a release may be strong, but not conclusive, evidence of the parties' intent" and *Wicker* directs courts to engage in a "fact-intensive process" of examining other indicia to determine whether something is a known risk. *Id.* Both *Blackwell* and *Shutter* have adopted this reasoning. *Blackwell*, 220 Md. App. at 124–25; *Shutter*, 226 Md. App. at 639–40.

Second, after examining the plain language of the release, we must look to other indicia that demonstrate the parties' knowledge of potential risks and that demonstrate the employee's intent to release the employer of said risks. *Wicker*, 142 F.3d at 701. The Third Circuit in *Wicker* provided indicia for discerning whether a risk was known, including: whether the release indicated that the parties negotiated any part of the release other than the settlement amounts; whether the release was boiler plate; and whether the release attempted to cover all liabilities versus specific risks that the employee faced during the course of their employment. *Id.* at 701–02. This Court in *Blackwell* considered the same indicia that *Wicker* considered, but also examined whether the plaintiff was represented by counsel and the frequency and location of the plaintiff's signature on the release. *Blackwell*,

220 Md. App. at 127–28 (finding persuasive that the plaintiff initialed each page of his release to "indicate that he had read and understood the contents of each page."). This Court in *Shutter* considered the same indicia from *Wicker* and *Blackwell*, and also considered the fact that the plaintiff did not aver, nor make representations, that she was induced or coerced into entering the release. *Shutter*, 226 Md. App. at 640–41. Rather, in entering into the release, the plaintiff "was relying only upon her judgment and knowledge of the nature and extent of [her] injuries[.]" *Id.* (internal quotation marks omitted).

C. Analysis: An Application of the "Known Risk" Test

We return to the case at bar and note that this is the first time this Court is addressing a Section 5 claim relating to exposure to asbestos and other toxic substances under FELA.[14] Here, after conducting an independent review of the record, we discern that no genuine dispute of material fact exists. *See Blackwell*, 220 Md. App. at 119–20. This is not to say

[14] The two reported FELA cases in Maryland did not address these types of injuries. *See Blackwell*, 220 Md. App. at 128–29 (FELA claim concerning an initial knee injury and subsequent plantar fasciitis); *see also Shutter*, 226 Md. App. at 636–37 (FELA claim concerning an initial injury to L4–L5 and L5–S1 of the lower back and subsequent disc herniation at the L3–L4 level of the spine). Regardless, *Blackwell* and *Shutter* remain applicable, as they were decided on the same procedural posture as this case. In *Blackwell* and *Shutter*, the employees: suffered injuries due to the negligence of the employers; sued their employers, CSX, under FELA; settled their FELA claims by signing releases that released CSX of all such claims under a limited scope; suffered subsequent injuries that were either related to, or stemmed from, the initial injury; and sued CSX again under FELA. *See Blackwell*, 220 Md. App. at 118–19; *see also Shutter*, 226 Md. App. at 627–34. Additionally, in both *Blackwell* and *Shutter*—citing the releases—CSX moved for summary judgment, the circuit court granted summary judgment in favor of CSX, and the employees appealed. *See Blackwell*, 220 Md. App. at 118–19; *see also Shutter*, 226 Md. App. at 627–34. Because the procedural posture of *Blackwell* and *Shutter* mirror the posture of Hughes' case, they are directly comparable. In addition to applying *Blackwell* and *Shutter*, we also turn to several out-of-state decisions that do address exposure to asbestos and other toxic substances.

that Hughes is raising "general allegations" or "conclusory assertions." *See id.* at 120. To be sure, Hughes' knowledge of potential risks is a material fact, as whether Hughes knew that cancer was a risk of exposure to asbestos and other toxic substances at the time he signed the Release alters the outcome of this case. *See id.* Nevertheless, applying the "known risk" test, the circuit court was correct in holding that Hughes knew that cancer was a known risk of his exposure to asbestos and other toxic substances.

The plain language of the Release—which is "strong evidence" of Hughes' and Appellees' knowledge of the risks—spells out the quantity, location, and duration of potential risks to which Hughes was exposed. *Wicker*, 142 F.3d at 701. The Release identifies the known risks as injuries arising out of exposure to toxic substances, particularly, "pulmonary-respiratory diseases," "any and all forms of cancer, including mesothelioma and silicosis," "increased risk of cancer, fear of cancer," "medical and hospital expenses, pain and suffering, [and] loss of income[.]" The Release also identifies the toxic substances that Hughes was exposed to, "either directly or indirectly, in whole or in part, . . . including, asbestos, silica, sand, diesel fumes, welding fumes, chemicals, solvents, toxic and other pathogenic particulate matters, coal dust, and all other dusts, fibers, fumes, vapors, mists, liquids, solids, or gases[.]" Further, nothing in the Release is ambiguous, nor has Hughes asserted such a claim. *But see Shutter*, 226 Md. App. at 635–36 (holding that a release was not ambiguous under ordinary contract principles after the plaintiff asserted such a claim). Just as in *Blackwell* and *Shutter* where this Court held that releases precluded subsequent FELA claims due to the plain language of the releases, here too, the Release precludes Hughes' subsequent FELA claim because his injury, cancer, was

stated as a known risk in the Release. *See Blackwell*, 220 Md. App. at 128; *Shutter*, 226 Md. App. at 635. That Hughes' initial injury was due to exposure to asbestos and his subsequent injury was due to exposure to diesel and exhaust fumes is immaterial because the language of the Release covers those toxic substances and more. The plain language of the Release demonstrates that any and all forms of cancer, which plainly includes bladder cancer, were known risks of Hughes' exposure to asbestos and other toxic substances at the time that he signed the Release.

As directed by *Wicker*, *Blackwell*, and *Shutter*, however, the plain language of the Release is not conclusive. *Wicker*, 142 F.3d at 701; *Blackwell*, 220 Md. App. at 127–28; *Shutter*, 226 Md. App. at 639–40. Still, when examining the other indicia of what may constitute a known risk, we discern that Hughes had knowledge that cancer was a known risk for multiple reasons. First, the Release does not appear to be an attempt to cover all liabilities, as it was executed by Hughes in settlement of his FELA claim for pulmonary issues and "any and all forms of cancer" related to exposure to asbestos and other toxic substances.[15] *Accord Blackwell*, 220 Md. App. at 127 (finding that "the [r]elease was executed by [the plaintiff] in settlement of his then extant FELA claim for repetitive stress and cumulative trauma injuries to his 'knees and surrounding body structures[]'" was an indication that the plaintiff had knowledge that he was releasing the defendant of liability for further physical injuries of the lower extremities, which encompassed plantar fasciitis).

[15] Hughes received $12,500.00 as consideration for releasing all future FELA claims related to pulmonary-respiratory diseases and any and all cancer; this demonstrates that the Release complies with *Callen*, because the Release only pertains to a claimed liability, and does not release Appellees from *any* liability. *See Callen*, 332 U.S. at 631.

The scope of the Release is expressly limited to releasing Hughes' potential FELA claims against the Appellees for injuries stemming from exposure to asbestos and other toxic substances; no other types of injuries are listed. *See id.* ("Moreover, the scope of the [r]elease is expressly limited to releasing [plaintiff's] potential FELA claims against [defendant] for the risk of 'any repetitive stress and/or cumulative trauma injury either presently existing or that may arise in the future to the lower extremities.'").[16]

Next, as a further indicator that Hughes had knowledge that cancer was a known risk is Hughes' representation by counsel at the time he executed the Release. In *Blackwell*, this Court held that where the plaintiff was represented by counsel and counsel signed the release, the attorney certified that he explained to the plaintiff "the legal consequences of the execution and delivery of the . . . [r]elease and that [the plaintiff] appeared to have full knowledge of its contents." *Blackwell*, 220 Md. App. at 128 (internal quotation marks omitted). Here, Hughes was represented by counsel. One clause of the Release provides that Hughes "declare[d] that he . . . executed this [Release] on the advice and approval of his counsel[.]" Hughes' counsel signed the Release next to this statement: "I hereby certify that on the day and year above specified, I explained the foregoing [Release] to **E.T. HUGHES;** that I explained to him the legal consequences of the execution and delivery of said [Release] and that he executed the same voluntarily and appeared to have full

[16] As discussed *supra*, *Wicker* also provided two other indicia regarding whether an injury was a known risk, i.e., whether the release indicated that the parties negotiated any part of the release other than the settlement amounts, and whether the release was blanket. *Wicker*, 142 F.3d at 701–02. Here, there was no evidence presented, from Hughes or the Appellees, regarding these indicia. Thus, we cannot consider these indicia in reaching our decision.

knowledge thereof." (emphasis in original). Thus, like in *Blackwell*, Hughes' counsel's signature next to the above statement is persuasive to us that Hughes had knowledge that cancer was stated as a known risk in the Release. *Id.*

Further, although not as extensive as the plaintiff in *Blackwell*, who initialed the bottom of every page of his release, we find Hughes' signature next to a statement[17]—that he had read the entire Release and understood its terms—persuasive as to Hughes' awareness that cancer was a known risk of exposure to asbestos and other toxic substances. *See* 220 Md. App. at 128. Finally, like the plaintiff in *Shutter*, Hughes did not present evidence that he was induced or coerced into entering into the Release. *See* 226 Md. App. at 641. There was a clause in the Release which provided that Hughes was competent to understand and enter into the Release, that Hughes was "not under any restraint or duress," and that, just as in *Shutter*, he was relying "wholly upon [his] own judgment." *Id.* Thus, there is no dispute of material fact. Hughes had knowledge that "any and all forms of cancer" were a potential risk from which he was releasing Appellees of liability.

Hughes argues that his deposition testimony, juxtaposed against the language of the Release, creates a genuine dispute of material fact, that is, whether Hughes had knowledge that he was releasing Appellees from any subsequent FELA claims regarding cancer. It is true that Hughes testified that he thought the Release was specific to "asbestos only"; that

[17] The statement, as it appears in the Release provides: "**[HUGHES] HEREBY ACKNOWLEDGES THAT HE HAS READ THIS ENTIRE RELEASE AND UNDERSTANDS ITS TERMS, AND THAT BY SIGNING THIS RELEASE HAS RELEASED HIS RIGHTS REFERENCED HEREIN AGAINST RELEASEE** . . ." (emphasis in original).

his attorney, Mr. Peirce, never hold him that he was "giving up a future bladder cancer claim"; that he did not know that he was "giving up a future bladder cancer claim"; and that it was not his intention to "give up a future bladder cancer claim." However, this testimony is not competent evidence to create a genuine dispute of material fact when evaluated against the other indicia of Hughes' knowledge of risks as discussed *supra*. We find the facts here to be akin to those in *Shutter* where we concluded those same facts were not persuasive. *See Shutter*, 226 Md. App. at 631, 641.

In *Shutter*, the plaintiff, after filing a second FELA claim, was deposed. *Id.* at 631. In her deposition, the plaintiff testified that a claims representative from the defendant-employer told her that the release only covered the levels of her spine at which she had her surgery. *Id.* The plaintiff asserted that her deposition testimony created a genuine dispute of material fact, that is whether the parties agreed under the release that further injury to her spine, post-spinal fusion surgery, was a known risk. *Id.* at 631–33. Despite the plaintiff's argument that her deposition created a genuine dispute of material fact, this Court held that no genuine dispute of material fact existed because "adjacent disk disease is a known risk of spinal fusion surgery," and the release covered further injuries stemming from the spinal fusion surgery. *Id.* at 635.

The same holds true here. Cancer is a known risk of exposure to asbestos and other toxic substances. Moreover, Hughes did not testify in his deposition that he was unaware that cancer was a known risk of exposure to asbestos and other toxic substances. Rather, he testified that he did not know the Release contained the language regarding cancer, and that it was not his intent to release Appellees from liability for cancer. *See Jarrett v. Consol.*

Rail Corp., 185 A.3d 374, 380 (Pa. Super. Ct. 2018) (affirming the grant of summary judgment in favor of the defendant-employer where the plaintiff "presented no evidence that the [d]ecedent was unaware that cancer was a risk of asbestos exposure at the time he executed the release . . . . [because] it would be implausible to conclude [that the d]ecedent did not know of his exposure to asbestos when he settled his prior asbestos-related case."). Failure to read a release is not a defense to its enforcement. *See Meeks v. Dashiell*, 166 Md. App. 415, 430 (2006) ("The principle that a party to a contract is bound by his signature even if he neglects to read the contract is a point of contract law that precludes one party to a contract from denying that the terms of the contract are binding."). Thus, despite Hughes' deposition testimony, there is no genuine dispute of material fact, because the plain language of the Release and other indicia demonstrate that Hughes was aware that cancer was a known risk of his exposure to asbestos and other toxic substances.

II. THE RELEASE IS VALID AS A MATTER OF LAW.

A. Party Contentions

Hughes contends that the circuit court erred in finding that the Release was valid.[18] Hughes asserts that the validity of a prior release is a question of fact, which was subject to material dispute, and which the circuit court improperly usurped from the factfinder. Hughes also contends that the Release is void because it violated the requirements of *Wicker*. Hughes presents two reasons for this contention: (1) that the Release provides a laundry list of toxic substances to which Hughes was been exposed, and (2) that the Release

[18] While Hughes does not raise this as a separate question presented in his brief, he attacks the validity of the Release. Thus, we address it here.

is too broad, and not limited in scope. Regarding the first reason, Hughes takes issue with the language that releases Appellees from liability for "such broad categories as all 'liquids, solids, or gases'" and asserts that the Release listed "every single hazard and toxin imaginable." Regarding the second reason, Hughes takes issue with the language that releases Appellees from liability for "all known and unknown, manifested and unmanifested, suspected and unanticipated pulmonary-respiratory diseases . . . and any and all forms of cancer[.]"

Appellees contend that the Release is valid under FELA, *Wicker*, and the other applicable case law. Appellees argue that the Release compromises a controversy regarding the risks known to the parties, to end active litigation. Appellees contend that because the Release was limited in scope to the exposure to asbestos and other toxic substances, that the language is not "boilerplate" and does not provide a laundry list of substances.

B. How to Determine the Validity of a Release

Initially, we must note that the issue of a release's validity is a legal question, not a factual one. *Callen*, 332 U.S. at 627–29; *Shutter*, 226 Md. App. at 635 ("Whether a contract, including a release, is ambiguous, is question of law[.]"). This is because "[a] release is a contract subject to 'ordinary contract principles.'" *Shutter*, 226 Md. App. at 635 (quoting *Chi. Title Ins. Co. v. Lumbermen's Mut. Cas. Co.*, 120 Md. App. 538, 548 (1998)). Thus, a release "'is to be construed according to the intent of the parties and the object and purpose of the instrument, and that intent will control and limit its operation.'" *Id.* (quoting *Pantazes v. Pantazes*, 77 Md. App. 712, 719–20 (1989)).

A party may attack the validity of a FELA release even when, on its face, the release appears valid. *See Callen*, 332 U.S. at 629. The party who attacks the release "bears the burden of establishing the invalidity of the purported release." *Blackwell*, 220 Md. App. at 121 (citing *Id.*). For a party to successfully attack a release, the party must establish that the release is not limited enough in scope, or that the "release merely details a laundry list of diseases or hazards," making it boiler plate, and therefore that the release does not reflect the employee's intent. *Wicker*, 142 F.3d at 701. A release that "chronicles the scope and duration of the known risks" likely is not void, while a release that contains "an extensive catalog of every chemical and hazard known to railroad employment" may be void because an extensive catalog could not reflect one's actual intent. *Id.* The Third Circuit in *Wicker* noted that it was providing this method to challenge a release's validity because of "the Supreme Court's pro-employee construction of . . . FELA." *Id.* Both *Blackwell* and *Shutter* have adopted this reasoning. *Blackwell*, 220 Md. App. at 124–25; *Shutter*, 226 Md. App. at 639–40.

In *Wicker*, the Third Circuit found that the releases were too broad because they released the employer from liability for "all claims, demands, actions, and causes of action of every kind whatsoever" for all injuries. 142 F.3d at 694. The Third Circuit, in reversing the grant of summary judgment to the defendant-employer in favor of the plaintiffs, explicated that because the release pertained to all injuries, not just those that stemmed from or were categorically related to the initial injury, the release was void for failing to reflect the plaintiff's intent. *Id.* at 701. Contrastingly, in *Blackwell* and *Shutter*, this Court found that the releases were valid because the language of the releases did not contain

"laundry lists" and were sufficiently limited in scope to adequately reflect the parties' intents. *Blackwell*, 220 Md. App. at 127; *Shutter*, 226 Md. App. at 640.

C. Analysis: An Explanation of Why the Release is not Void

The Release is valid for two main reasons. First, the Release does not contain a "laundry list" or boilerplate language of toxic substances to which Hughes was exposed. The Release does provide a substantial amount of toxic substances to which Hughes was exposed, releasing Appellees from liability for Hughes' exposure to: "any and all toxic substances, including asbestos, silica, sand, diesel fumes, welding fumes, chemicals, solvents, toxic and other pathogenic particulate matters, coal dust, and all other dusts, fibers, fumes, vapors, mists, liquids, solids, or gases during [Hughes'] employment[.]" Yet, this is not a "laundry list" of substances.

Although we have yet to find a case that precisely delineates what is a "laundry list," we are assured that the Release does not contain such a list of "every single hazard and toxin imaginable," as Hughes asserts that it does, by comparing the language of the Release to other releases concerning exposure to toxic substances which have been upheld as valid. *See Collier v. CSX Transp., Inc.*, 673 F. App'x 192, 194 (3d Cir. 2016) (upholding a release as valid where defendant was released from liability of plaintiff's exposure to "any and all toxic substances, including but not limited to, sand, silica, diesel fumes, welding fumes, coal dust, chemicals, toxic and/or pathogenic particulate matters, liquids, solids, dusts, fumes, vapors mists or gases, and exposure to and ingestion of asbestos while employed by [CSX]."); *see also Ward v. Ill. Cent. R.R. Co.*, 271 So.3d 466, 468 (Miss. 2019) (upholding a release as valid where defendant was released from liability of plaintiff's

exposure to "asbestos, coal, coal dust, welding fumes, brass fumes, diesel fumes, dust, paint vapors, fuel fumes, methyl bromide, ammonia gas, sand, silica, Dow Clean, solvents, cleaners, degreasers, and other fumes, dusts, mists, gases, and vapors from any material, chemical, toxin or other agent."); *Jarrett*, 185 A.3d at 375 (upholding a release as valid where defendant was released from liability of plaintiff's exposure to "any and all toxic substances, including asbestos, silica, sand, diesel fumes, welding fumes, chemicals, solvents, toxic and other pathogenic particulate matters, coal dust, and all other dusts, fibers, fumes, vapors, mists, liquids, solids, or gases[.]"). The list of substances in Hughes' Release is nearly identical to the lists of substances in *Collier*, *Ward*, and *Jarrett*, all of which were permissible releases and upheld as valid on the same procedural posture as the case before us. Thus, Hughes' Release does not contain a "laundry list" of substances.[19]

Second, the Release is valid because it is limited in scope and because it is not "too broad." The Release does not release the Appellees for all injuries that Hughes could have incurred while employed by them; it only releases Appellees for injuries related to Hughes'

[19] Although not directly comparable—as they did not concern exposure to asbestos and other toxic substances—*Blackwell* and *Shutter* both contained similar lists, pertaining to the respective plaintiffs' injuries, and these lists were also upheld as valid. *See Blackwell*, 220 Md. App. at 127 n.8 ("The claims in the identified action allege that [Blackwell] was exposed to excessive and harmful repetitive motion and stress, exposure to force, awkward postures, lateral motion, vertical motion, horizontal motion, whole body vibration, temperature extremes, strain, vibration of any type or intensity, and cumulative trauma ('repetitive stress and cumulative trauma')[.]"); *see also Shutter*, 226 Md. App. at 628 (releasing the defendant from liability for the plaintiff's repetitive strain injury, "its progression and/or consequences, any future damages, general or special, . . . [incurred] in an attempt to alleviate or cure [her] alleged Repetitive Strain Injury, including surgery or surgeries, . . . correction of any conditions relating to [her] Repetitive Strain Injury, and any increased risk of contracting any physical disorder related thereto.").

exposure to toxic substances. *Contra Sinclair v. Burlington N. and Sante Fe Ry., Co.*, 200 P.3d 46, 56–60, (Mont. 2008) (finding that the grant of summary judgment in favor of the defendant-employer based on a FELA release was legal error where the release was for spine and brain injuries and the employee was later injured from manganese poisoning).

The Release does release Appellees from liability for "all known and unknown, manifested and unmanifested, suspected and unanticipated pulmonary-respiratory diseases . . . and any and all forms of cancer[.]" This language is not overly broad and is sufficiently limited in scope; we are assured of this by comparing the language of the Release to other releases which have been upheld as valid. *See Shutter*, 226 Md. App. at 628 (upholding a release as valid where defendant was released from injuries that were "known or unknown, foreseen or unforeseen[.]"); *see also Collier*, 673 F. App'x at 194 (upholding a release as valid where the plaintiff released the defendant from injuries that were "known and unknown, manifested and unmanifested, suspected and unanticipated diseases or injuries, including cancer[.]"); *Jarrett*, 185 A.3d at 375 (upholding a release as valid where the plaintiff released the defendant of "all claims or actions for all known and unknown, manifested and unmanifested, suspected and unanticipated pulmonary-respiratory diseases . . . increased risk of cancer, fear of cancer, and <u>*any and all forms of cancer*</u>, including mesothelioma and silicosis[.]" (emphasis in original)); *Cole v. Norfolk S. Ry. Co.*, 803 S.E.2d 346, 348 (Va. 2017) (upholding a release as valid where the plaintiff released the defendant "from all liability for all claims or actions for pulmonary-respiratory occupational diseases and . . . (d) increased risk of cancer, (e) fear of cancer, (f) any and all forms of cancer, including mesothelioma[.]"); *Ward*, 271 So.3d at 468 (upholding a

release as valid where the plaintiff released the defendant from "known or unknown conditions" including "asbestosis and silicosis, severe and permanent injuries to the lungs, respiratory system, nerves and/or nervous system, cancer, and any and all other conditions, diseases or injuries existing prior to the date of this" agreement). The language in Hughes' Release is substantially similar to the scope of the releases in *Shutter*, *Collier*, *Ward*, *Jarrett*, *Cole*, and *Ward*, all of which were permissible releases and upheld as valid on the same procedural posture as the case before us. Thus, Hughes' Release is sufficiently limited in scope, is valid, and is in concert with *Wicker*, *Blackwell*, and *Shutter*.

At oral argument, counsel for Hughes added an additional aspect regarding his argument as to the reason the Release is not sufficiently limited in scope and is thus void. Counsel for Hughes argued that we must compare the injuries that Hughes sued Appellees for in the complaint, against the claims relinquished in the Release. Further, that when exacting such a comparison, the Release is too broad because the initial complaint regarded the mass action, thus the Release contained injuries that pertained to the other plaintiffs and were not limited to Hughes. We find this contention to be without merit.

To the contrary, a comparison of a prior complaint to a release was not a method used by the Third Circuit in *Wicker* nor this Court in *Blackwell* or *Shutter*, to discern whether a list in a release is a "laundry list." A comparison of a subsequent complaint to a release does appear in *Blackwell*, however the comparison was used there to gauge the intent of the parties. *See Blackwell*, 220 Md. App. at 128–29 (explaining why there was no dispute of material fact that the intent of the parties under the release was to release the defendant from liability for "new or additional repetitive stress or cumulative trauma

injur[ies]" which includes bilateral plantar fasciitis); *see id.* at 128, n.9 ("Furthermore, [the plaintiff's] 2013 complaint alleges that [he] 'developed repetitive trauma related disorders, including injuries to his feet and surrounding body structures (bilateral plantar fasciitis),' thereby acknowledging that bilateral plantar fasciitis is a repetitive trauma related disorder. . . . [The plaintiff] has failed to present a genuine dispute of material fact concerning the scope of claims precluded by the 2009 Release.").[20]

Additionally, counsel for Hughes alleged that the Release should be determined void for being too broad because the language in the Release "is broader than *Wicker*," and similar to the language of a release which the Third Circuit held as void in *Wicker*. Counsel honed in on language from the release in *Wicker* which stated that two plaintiffs were releasing the defendant "from any and all losses, claims, liabilities, actions, causes of action . . . and demands of any kind whatsoever in nature . . . which [they had] or to which [they] claim to be entitled by reason of any injuries, known or unknown, foreseen or unforeseen[.]" 142 F.3d at 693. Counsel alleged that the above-quoted language is similar to this language from Hughes' Release, which released Appellees from liability "for all claims or actions for all known and unknown, manifested and unmanifested, suspected and

[20] Moreover, even if were to make such a comparison here, the language of the complaint tracks the language of the Release. *Compare* the 1998 complaint, which provides that the plaintiffs learned that they suffered from "occupationally related lung disease, including, without limitation, asbestosis, asbestos related pleural disease, silicosis, mixed dust pneumoconiosis, chronic obstructive pulmonary disease, occupational asthma, occupational bronchitis, *cancer, an increased risk of cancer*, and other serious and severe pulmonary diseases" *with* the Release, which provides that Hughes was relinquishing Appellees from liability for "pulmonary-respiratory diseases, . . . *increased risk of cancer, fear of cancer, and any and all forms of cancer*, including mesothelioma and silicosis[.]" (emphasis added).

unanticipated pulmonary-respiratory diseases, and/or injuries including but not limited to medical and hospital expenses, pain and suffering, loss of income, increased risk of cancer, fear of cancer, and any and all forms of cancer, including mesothelioma and silicosis[.]" Although the language of these two releases is similar, we note a key distinction between them. In *Wicker*, the release was for ***all injuries*** that arose out of two of the plaintiffs' exposure to toxic substances, whereas here, the Release released Appellees of liability only for pulmonary-respiratory diseases and any and all forms of cancer stemming from exposure to toxic substances. Thus, the release in *Wicker* is broader than the Release before us.

Finally, we address Hughes' interpretation of *Callen*. As Hughes reads *Callen*, the validity of a Release is factual matter, not a legal one. This is incorrect; we explain.

In *Callen*, the Supreme Court considered whether the trial court committed error when it instructed the jury that the release was binding as to the consideration, but not binding as applied to the plaintiff's permanent injuries because neither party was aware that the plaintiff was permanently injured. *Callen*, 332 U.S. at 627–28. The Supreme Court held that the trial court incorrectly assumed "a finding of permanency as a basis for" setting aside the release, and incorrectly assumed "that there was no dispute about the permanency of the injuries." *Id.* at 628–29 (referencing the Third Circuit opinion). The Court observed that this was a "palpable error" on the part of the trial court and affirmed the Third Circuit's decision to remand the case so that the parties could submit the question of whether the injury was permanent to the jury. *Id.* at 628.

The portion of *Callen* that Hughes cites to concerns a discussion wherein the Supreme Court affirmed the Third Circuit's grant of a new trial to the plaintiff because "the defendant was entitled to argue these contentions to the jury[.]" *Callen*, 332 U.S. at 68–29 ("The [Third Circuit], quite rightly we think, construed the charge of the District Judge as withdrawing the question of the validity of the release from the jury[.]"). Hughes is correct that the United States Supreme Court opined that "an issue still existed as to [the] validity of the release[.]" *Id.* at 628. However, Hughes takes this statement out of context. When read in the context of the entire paragraph,[21] the Supreme Court was stating that the plaintiff should have been able to take the issue of the validity of the release to the jury because neither party had been fully aware of the plaintiff's injuries, but not because the release violated Section 5. *Id.* at 628–29; *see also*, *Callen v. Pa. R.R. Co.*, 162 F.2d 832, 834 (3d Cir. 1947). Here, because the parties knew the extent of Hughes' injuries at the time they

[21] The entire paragraph reads:

> An examination of the record at the trial makes it clear that the issue was raised and sharply litigated as to whether the injury, if received by plaintiff in the manner alleged, was permanent in character. Only when and if this issue was resolved in favor of one party or the other could it be known whether there was a basis for finding a mutual mistake or any mistake of fact in executing the release. The court, however, resolved the issue of [permanence] of injury against the defendant, at least so far as the release was concerned, and on that basis withdrew consideration of that issue from the jury. Even if the issue of permanence were resolved against the defendant, an issue still existed as to validity of the release since the defendant insists that it did not act from mistake as to the nature and extent of the injuries but entered into the release for the small consideration involved because, upon the evidence in its hands at the time, no liability was indicated. We think the defendant was entitled to argue these contentions to the jury and to have them submitted under proper instructions.

Callen, 332 U.S. at 628–29.

executed the Release, the section of *Callen* that Hughes cites is inapplicable. Therefore, for the foregoing reasons, the Release is valid as a matter of law.

JUDGMENT OF THE CIRCUIT COURT FOR WICOMICO COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.