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MORRISTOWN ASSOCIATES, Plaintiff-Petitioner, v. GRANT OIL COMPANY, ABLE ENERGY, PARSIPPANY FUEL OIL, EDWARD HIS and AMY HIS and SPARTAN OIL COMPANY, PETRO INC., JOHNSON OIL, MEETNAN OIL COMPANY d/b/a REGIONAL OIL COMPANY, et. al. Defendant-Respondents	SUPREME COURT OF NEW JERSEY Docket No. 073248 APPELLATE DIVISION Docket No. A-0313-11T3

BRIEF OF *AMICUS CURIAE* NEW JERSEY STATE BAR ASSOCIATION

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PRELIMINARY STATEMENT

In its decision below, the Appellate Division created an unworkable quagmire in its retroactive application of a six (6) year statute of limitations and employment of the discovery rule to a right of contribution under the New Jersey Spill Compensation and Control Act, N.J.S.A. 58:10-23.11f(a)(2)("Spill Act"). Based on one published and one unpublished Appellate Division decision, going back to 1994, New Jersey environmental practitioners have long understood that New Jersey courts will not apply a statute of limitations to a claim for contribution under the Spill Act. In crafting a retroactive statute of limitations onto a Spill Act right of contribution, and making the right of contribution subject to the discovery rule, the Appellate Division has created potentially serious and far-reaching implications for many members of the New Jersey bar, particularly those practicing in the area of environmental law.

Additionally, the decision of the Appellate Division will force attorneys to file lawsuits seeking Spill Act contribution prematurely or file claims that may never have been filed, solely to protect their clients' rights and themselves from claims of malpractice. This will create an unwanted and unnecessary additional burden on the courts.

It must be noted that the New Jersey State Bar Association ("NJSBA") believes the interpretation of the Spill Act in New

Jersey State courts for these last twenty (20) years that there is no statute of limitations for Spill Act contribution claims has worked without problem. If this Court, however, does see fit to impose a statute of limitation, what is of greatest import to the NJSBA is clarity and certainty in this area of the law. That is, if this Court finds a statute of limitations applies, it should be applied prospectively only. It would be inequitable to bar Spill Act contribution claimants from asserting their rights when they have deferred litigation based on the language of the Spill Act limiting defenses and two long-standing Appellate Division decisions.

Moreover, if this Court decides to apply a statute of limitations, a Spill Act right of contribution cannot be based upon the discovery rule, or even when contamination is discovered. To do so would run counter to when the right to contribution statutorily ripens under the Spill Act, being when a party has incurred "cleanup and removal costs," as such term is defined under the Spill Act. To be consistent with the language of the Spill Act, the statute of limitations should begin to run under a scenario comparable to that set forth under the Comprehensive Environmental Responsibility and Liability Act, 42 U.S.C. § 9601 et seq. ("CERCLA"), where the running of the limitations period is based upon the date of a judgment or an administrative order or judicially approved settlement. To

base the commencement of the statute of limitations on when the contamination was discovered or "should have been discovered" is simply not workable in the area of environmental remediation.

Furthermore, for the reasons set forth herein and for the different perspective the NJSBA brings to the issue before the Court, the NJSBA respectfully requests that its motion seeking leave to appear as *amicus curiae* be granted.

ARGUMENT

POINT I

IF THE COURT FINDS A STATUTE OF LIMITATIONS APPLIES TO A SPILL ACT CLAIM FOR CONTRIBUTION IT MUST BE APPLIED PROSPECTIVELY SO AS NOT TO INEQUITABLY DENY DESERVING CLAIMANTS THEIR DAY IN COURT

The NJSBA takes no interest in the underlying dispute among Plaintiff and Defendants. Rather, the NJSBA's concern in this matter is the legal issue of the retroactive application of the six (6) year statute of limitations and the discovery rule.

As noted above, the NJSBA believes the interpretation of the Spill Act in New Jersey State courts for these last twenty (20) years that there is no statute of limitations for Spill Act contribution claims has worked without problem. If the Court does change the law and impose a statute of limitations, however, the concern of the NJSBA is that the Appellate Division, in a published decision, applied the statute of limitations retroactively instead of prospectively.

This retroactive application may lead courts in New Jersey to dismiss numerous pending Spill Act claims for contribution on a statute of limitations basis, as well as to bar claims not yet filed. In most, if not all, of these cases, the parties assumed they had valid claims predicated on two (2) prior Appellate Division decisions. Based on these decisions, New Jersey attorneys, particularly members of the environmental bar, believed that a claim for contribution under the Spill Act in the courts of New Jersey was not subject to a statute of limitations. As such, in many instances, members of the New Jersey bar waited until the remediation was complete and approved by the State of New Jersey Department of Environmental Protection ("NJDEP") before asserting such claims, often years after the newly imposed six (6) year statute of limitations expired. Unquestionably, retroactive application would lead to an inequitable result for both deserving claimants, who rightfully relied upon decisions of the state courts when deciding whether to bring their claims, and diligent attorneys, who may face malpractice claims despite relying in good faith upon two (2) prior Appellate Division decisions to defer filing a Complaint.

N.J.S.A. 58:10-23.11f(a)(2), the Spill Act section addressing claims for contribution, limits the defenses to such claims:

> Whenever one or more dischargers or persons cleans up and removes a discharge of a hazardous substance, those dischargers and persons shall have a right of contribution against all other dischargers and persons in any way responsible for a discharged hazardous substance or other persons who are liable for the cost of the cleanup and removal of that discharge of a hazardous substance. In an action for contribution, the contribution plaintiffs need prove only that a discharge occurred for which the contribution defendant or defendants are liable pursuant to the provisions of subsection c. of section 8 of P.L.1976, c.141 (C.58:10-23.11g), and the contribution defendant shall have only the defenses to liability available to parties pursuant to subsection d. of section 8 of P.L.1976, c.141 (C.58:10-23.11g). In resolving contribution claims, a court may allocate the costs of cleanup and removal among liable parties using such equitable factors as the court determines are appropriate. Nothing in this subsection shall affect the right of any party to seek contribution pursuant to any other statute or under common law.

As shown, the Spill Act specifically limits the defenses available to a claim for contribution, and a statute of limitations is not a listed defense. It is the above language of the Spill Act that led the Appellate Division on two separate occasions, in Pitney Bowes, Inc. v. Baker Industries, Inc., 277 N.J. Super. 484 (App. Div. 1994), and in Mason v. Mobil Oil Corporation, A-885-98T1 (June 8, 1999), to refuse to bar a Spill Act claim for contribution based on either the statute of repose or a statute of limitations.

Even though Pitney Bowes involved the statute of repose, not a statute of limitations, the language of both decisions undeniably led members of the New Jersey bar to litigate Spill

Act contribution claims predicated on the lack of a statute of limitations.

In Pitney Bowes, the Appellate Division found that the purpose of the Spill Act would be compromised if a limitations period was imposed:

> Consideration of both the text and the policy of the two apparently conflicting statutes persuade us that the legislative scheme and purpose in enacting the Spill Act contribution provisions would be significantly and unjustifiably compromised if the statute of repose were read as exempting from liability a class of persons patently intended to be included by *N.J.S.A. 58:10-23.11f*. To begin with, it is clear that the Legislative purpose in enacting the contribution provisions was to encourage prompt and effective remediation by any responsible party who might otherwise be disinclined to do so because of the risk and burden of bearing the entire cost despite the responsibility of others for the creation and continuation of the problem...
>
> In order to accomplish a fair and equitable ultimate sharing of the remediation burden among all responsible parties and thereby to promote contamination cleanup, *N.J.S.A. 58:10.23.11f(a)(2)* casts a broad net encompassing "all other dischargers and persons in any way responsible for a discharged hazardous substance..." That section further provides the contribution plaintiff "need prove only that a discharge occurred for which a contribution defendant or defendants are liable" pursuant to *N.J.S.A 58:10-23.11.g.1*. And finally, that section strictly limits the defenses available to the contribution defendant to those set forth by *N.J.S.A. 58:10-23.11g(d)*, namely, "[a]n act or omission caused solely by war, sabotage, or God, or a combination thereof..." **There is no provision of any defense available either to a direct or a contribution defendant based on the passage of time. The Spill Act treats all parties the same in this respect, whether they are directly responsible to the appropriate government agency under 23.11g or responsible by way of contribution**

> **obligations under 23.11f.** It is therefore self-evident that the statutory purpose and policy would be defeated by excluding from contribution liability the primarily responsible party because of the general and prior enacted statute of repose. [277 N.J. Super. at 487-488] [emphasis added].

The reasoning set forth in Pitney Bowes would apply equally to a statute of limitations defense, given that both the statute of repose and statute of limitations are based on time, and, as accurately articulated by the Pitney Bowes court, none of the limited Spill Act defenses are "based on a passage of time."

And, what followed five (5) years later was the unpublished decision in Mason v. Mobil Oil Corporation, A-885-98T1 (June 8, 1999). That case confronted the statute of limitations head on. In Mason, the Appellate Division narrowly interpreted the defense provisions of the Spill Act to hold that there is no statute of limitations for a Spill Act contribution claim. After finding that plaintiffs were entitled to contribution pursuant to N.J.S.A. 58:10-23.11f(a)(2), the court held that defendants were entitled only to those defenses specifically provided by statute: "an act or omission caused solely by war, sabotage, or God, or a combination thereof....," stating: "[w]e are satisfied that our reasoning in *Pitney Bowes* applies in full force, if not *a fortiori* to a statute of limitations. We endorse *Pitney Bowes* and deem it dispositive here. We thus conclude that the running of the six-year statute of limitations

does not bar plaintiffs' claim for contribution under *N.J.S.A.* 58:10-23.11f." Thus, relying entirely upon its earlier decision in Pitney Bowes, the Appellate Division held that the effect of the contribution provisions of the Spill Act is to abrogate the statute of limitations defense against a statutory claim for contribution.

Based upon Pitney Bowes and Mason, it is reasonable that members of the New Jersey Bar, particularly environmental practitioners, believed and counseled their clients (until this most recent Appellate Division decision) that a claim for contribution was not subject to a statute of limitations defense in New Jersey courts.

It must be noted that the New Jersey federal district court has applied a six (6) year statute of limitations to Spill Act claims for contribution. See Reichhold, Inc. v. United States Metal Refining Company, 655 F.Supp. 2d 400, 447-448 (D.N.J. 2009); Kemp Indus., Inc. v. Safety Light Corp., Civ No. 92-0095, 1994 WL 532130 (D.N.J. Jan. 25, 1994); Champion Labs., Inc. v. Metex Corp., Civ. No. 02-5284, 2005 WL 1606921 (D.N.J. July 8, 2005). But, in the only published decision, the Reichhold court did not analyze the lack of a statute of limitations defense in the Spill Act, as did the state courts. Moreover, the District Court did not reference Pitney Bowes or Mason, the decisions that have guided practitioners in state court. The District

Court simply found that a six (6) year statute of limitations should apply to a Spill Act claim for contribution.

Regardless of the federal court holdings, New Jersey state courts have not applied a statute of limitations to Spill Act claims. Accordingly, the rule guiding New Jersey practitioners since 1994 is that New Jersey state courts would not apply a statute of limitations for Spill Act contribution claims. It would therefore be inequitable, after almost twenty (20) years, to apply a statute of limitations retroactively.

The issue here with respect to whether the statute of limitations should be applied prospectively rather than retroactively was addressed in Montells v. Haynes, 133 N.J. 282 (1993). In Montells, the Court, addressing a claim under the New Jersey Law Against Discrimination (LAD), found the LAD did not contain a statute of limitations, similar to the Spill Act. Even though the Court imposed a statute of limitations, it did so prospectively, rather than retroactively, stating as follows:

> We cannot conclude that when plaintiff filed her complaint, the period of limitations was either an issue that had been resolved by settled precedent or was one of first impression. Lower state and federal courts favored a six-year statute of limitations, but the United States Supreme Court inclined towards the two-year statute analogous to federal civil-rights claims. Given that conflict, to restrict plaintiff to the two-year statute would be unfair. Our tradition is to confine a decision to prospective application when fairness and justice require. The tradition is particularly appropriate when "a court renders a first-instance or clarifying decision in a murky or

> uncertain area of the law...," or when a member of the public could reasonably have "relied on a different conception of the state of the law." [Id. at 297-298] [citations omitted].

In this instance, as in Montells, members of the New Jersey bar and members of the public "could reasonably have 'relied on a different conception of the state of the law'," than was set forth by the Appellate Division below in finding Spill Act claims for contribution are subject to a six (6) year statute of limitations. At worst, the area of the law was "murky or uncertain."

Without a doubt, if a statute of limitations does apply to a Spill Act contribution claim, fairness and justice require a prospective application. It is therefore imperative that if this Court does find a statute of limitations applies for Spill Act contribution claims, that pending claims not be subject to such a limitation. To decide otherwise would deny deserving claimants of their day in court, allow parties responsible for contamination to avoid paying costs of a cleanup, and subject members of the New Jersey bar to claims of malpractice, simply because they reasonably relied on two prior Appellate Division decisions and the language of the Spill Act.

POINT II

THE APPLICATION OF THE DISCOVERY RULE TO A SPILL ACT CLAIM FOR CONTRIBUTION IS UNWORKABLE, DOES NOT PROVIDE MUCH NEEDED CERTAINTY, AND IS CONTRARY TO THE PLAIN LANGUAGE OF THE SPILL ACT

Equally important to this Court's review of the underlying decision is the Appellate Division's application of the "discovery rule" to a claim for contribution under the Spill Act. If this Court should find a statute of limitations does apply to Spill Act claims for contribution, it should not employ the "discovery rule." Doing so would have the effect of discouraging parties from voluntarily investigating and remediating contamination, and would cause parties to file lawsuits before they are ready, and often times unnecessarily.

First, the "discovery rule" is contrary to the plain language of the Spill Act and its requirement for the incurrence of "cleanup and removal costs" prior to allowing a person to sue for contribution. Such costs might not be incurred until long after the six (6) year statute of limitations begins to run according to the "discovery rule."[1] N.J.S.A. 58:10-23g(c)(1) states as follows:

> c. (1) Any person who has discharged a hazardous substance, or is in any way responsible for any

[1]This issue was not addressed by the trial court or Appellate Division and none of the parties to the appeal raised it in their briefs in support of and in opposition to the petition for certification.

> hazardous substance, **shall be strictly liable, jointly and severally, without regard to fault, for all cleanup and removal costs no matter by whom incurred.** Such person shall also be strictly liable, jointly and severally, without regard to fault, for all cleanup and removal costs incurred by the department or a local unit pursuant to subsection b. of section 7 of P.L.1976, c.141 (C.58:10-23.11f). [emphasis added].

Based on the above, a person who has discharged or is in any way responsible for a discharge of a hazardous substance is strictly liable for all "cleanup and removal costs." And, according to the section of the Spill Act that entitles a party to contribution, N.J.S.A. 58:10-23.11f(a)(2), contribution can only be sought from a person who is liable under N.J.S.A. 58:10-23.11g(c)(1), quoted above. Thus, contribution may be sought for all "cleanup and removal costs."

"Cleanup and removal costs" is a defined term under the Spill Act, stating in part as follows:

> "Cleanup and removal costs" means all costs associated with a discharge, incurred by the State or its political subdivisions or their agents or any person **with written approval from the department** in the: (1) removal or attempted removal of hazardous substances, or (2) taking of reasonable measures to prevent or mitigate damage to the public health, safety, or welfare, including but not limited to, public and private property, shorelines, beaches, surface waters, water columns and bottom sediments, soils and other affected property, including wildlife and other natural resources, and shall include costs incurred by the State for the indemnification and legal defense of contractors pursuant to sections 1 through 11 of P.L.1991, c.373 (C.58:10-23.11f8 et seq.)....[emphasis added].

Accordingly, based upon the foregoing, if a party incurs costs to clean up and remove contamination, but does so without written approval from the NJDEP, that party may not sue for contribution under the Spill Act, because those costs do not qualify as "cleanup and removal costs."

Rather, in order to sue for contribution under N.J.S.A. 58:10-23.11f(a)(2), a person must first receive written approval for the incurrence of those costs from the NJDEP, or now from a Licensed Site Remediation Professional ("LSRP"), the statutory agent of the NJDEP, in accordance with N.J.S.A. 58:10C-1 et seq. And, that is exactly why the "discovery rule" cannot be the starting point for the commencement of the running of the statute of limitations, because until "cleanup and removal costs" are incurred with the written approval of the NJDEP or the LSRP, the right to seek contribution under N.J.S.A. 58:10-23.11f(a)(2)has not yet ripened. Thus, the date of discovery of contamination or when contamination should have been discovered is irrelevant to when the right to contribution under the Spill Act accrues. Accordingly, the earliest date the statute of limitations should begin to run is when "cleanup and removal costs" as defined by the Spill Act are first incurred. At a minimum, this would provide certainty to parties seeking contribution, rather than a nebulous "discovery rule."

Nevertheless, starting the running of the statute of limitations from when contamination is discovered, or should have been discovered, is not, as a matter of good public policy, a sound option. The result would in all likelihood be a rush to court by parties before they are ready to sue, and in many instances where they may not have sued at all. Parties considering contribution often wait to sue until after the investigation and remediation is completed, at which point they know the full extent of the cost. The investigation will also allow a party to determine other parties potentially responsible for the contamination, who could not be identified prior to the performance of the investigation.

In fact, as this Court found in New Jersey Department of Environmental Protection v. Dimant, 212 N.J. 153 (2012), a party does not have a Spill Act claim unless and until that party can support a nexus between a discharge, the alleged discharger, and the response costs incurred. Thus, it may take a significant amount of time and investigation to determine who may be responsible for a discharge and against whom a Spill Act claim can be asserted. If a party asserts a claim prior to obtaining such knowledge, in all likelihood, the claim will be dismissed.

Additionally, if the cost of the investigation and remediation is not substantial, or not worth the risk of pursuing, a party may not sue at all, because attorney's fees

are not recoverable in a claim for contribution under the Spill Act.

Employing a date certain, such as when the remediation is complete as the lynchpin for the running of the statute of limitations, rather than the "discovery rule," or even when "cleanup and removal costs" are first incurred, will delay the rush to court, allow parties to determine who should be sued, and may even prevent commencement of suits that may never have been filed had the parties known the total cost.

In the analogous federal statute known as CERCLA, a party incurring cleanup and removal costs has an explicit three (3) year statute of limitations to bring a suit for contribution, and also has a certain date from which the statute of limitations begins to run. 42 U.S.C. §9613(g)(3) states as follows:

> (3) Contribution
>
> No action for contribution for any response costs or damages may be commenced more than 3 years after
>
> (A) the date of judgment in any action under this chapter for recovery of such costs or damages, or
>
> (B) the date of an administrative order under section 9622(g) of this title (relating to de minimis settlements) or 9622(h) of this title (relating to cost recovery settlements) or entry of a judicially approved settlement with respect to such costs or damages.

Thus, under CERCLA, there is a date certain for when the statute of limitations begins to run for a claim for contribution - three (3) years after the date of a judgment or an administrative order or judicially approved settlement. In none of these situations is the "discovery rule" relevant. This same kind of certainty is necessary for a Spill Act contribution claim.

This Court can provide certainty by finding that the running of the statute of limitations commences when the party performing the investigation and remediation receives a final remediation document, pursuant to N.J.A.C. 7:26C-6, from the LSRP or the NJDEP, whichever is applicable. In the past, an investigation and remediation could continue for years, if not decades. That all changed, however, with the adoption of the Site Remediation Reform Act, N.J.S.A. 58:10C-1 et seq. (SRRA), and related amendments to the Brownfield and Contaminated Site Remediation Act, N.J.S.A. 58:10B-1 et seq., the Spill Act, and the Industrial Site Recovery Act, N.J.S.A. 13:1K-6 et seq. As of May 7, 2012, with limited exceptions, all remediation conducted in the State of New Jersey, without regard to when remediation was initiated, is to proceed under the supervision of an LSRP, without NJDEP approval, following the nine requirements set forth at N.J.S.A. 58:10B-1.3b(1) through (9). The goal of SRRA is to increase the pace of remediation, thus helping to decrease

the threat of contamination to public health and safety and of the environment, and to quickly return underutilized properties to productive use.

In furtherance of that goal, SRRA required NJDEP to establish mandatory remediation timeframes for the completion of key phases of site remediation. These mandatory timeframes are codified at N.J.A.C. 7:26C-3.3. Therefore, it will not be years and decades before a remediation is complete. Rather, parties will conduct and finalize remediation on a set schedule, and at that time the parties will have certainty of the total costs involved, whether it is worth pursuing contribution, and the identity of potentially responsible parties. With the receipt of a final remediation document there will be certainty for the date of commencement of the running of the statute of limitations.

Besides the need for certainty, there are practical reasons not to use the "discovery rule" as the commencement date:

1. If a party learns of contamination on his property, but the statute of limitations has run because of the "discovery rule" as applied below, parties who become aware of contamination will now delay performing an investigation and remediation until forced to do so by the NJDEP. If a statute of limitations has run simply because a party knew of the existence of an underground storage tank on their property years ago, but

was unaware of contamination, there is no opportunity to recover costs through a Spill Act contribution claim, and the incentive for that party to voluntarily remediate their property is eliminated. If, however, the statute of limitations begins to run based on a date certain, such as when "cleanup and removal costs" are incurred, or after the completion of the investigation and remediation, parties will be more apt to voluntarily undertake the work, instead of waiting until the NJDEP comes after them, potentially many years later.

2. The "discovery rule" as applied by the trial court and Appellate Division in this case simply is not practical in the real world. Here, the property was a strip mall. But, what if the property at issue was ten acres, with numerous underground storage tanks located in various areas of the property? And, assume one underground storage tank leaks and it is located five acres away from another underground storage tank. What relevance is there to one leaking underground storage tank that is nowhere in the vicinity of the other underground storage tank? Yet, according to the Appellate Division, when the first underground storage tank leaks, the property owner now has the obligation to investigate every other potential source of contamination on its property, which means in many instances an intrusive investigation and the expenditure of significant funds. There is nothing in the Spill Act or its regulations

that require such a result. Yet, according to the Appellate Division, unless a party undertakes such an investigation each and every time there is an unrelated source of contamination the property owner will later be barred from bringing a claim for contribution. There simply is no equitable basis to force someone to perform an intrusive investigation of their entire property each and every time there is an unrelated source of contamination or otherwise be later barred from bringing suit because of the "discovery rule."

3. The utilization of the "discovery rule" as the basis for the commencement of the running of the statute of limitations would have the effect of releasing culpable parties from liability. For example, the tenant in the matter below was the owner of the underground storage tank from which there was a discharge, and the fuel oil companies were alleged to have spilled oil during deliveries. Yet, even though these parties are strictly liable under the Spill Act, because of the "discovery rule" they have been released from any liability for the contamination. It is therefore in the best interest of the culpable parties to refuse to perform a cleanup and let the property owner bear the full brunt of the costs, particularly if more than six (6) years has passed since the property owner learned of the existence of a source for contamination, such as an underground storage tank. There is nothing in the Spill Act,

however, which mandates this result. Furthermore, the purpose of the Spill Act, to have responsible parties strictly liable for cleaning up contamination, is lost.

CONCLUSION

The NJSBA believes the interpretation of the Spill Act in New Jersey State courts for these last twenty (20) years that there is no statute of limitations for Spill Act contribution claims has worked without problem. For the foregoing reasons, however, if the Court should apply a statute of limitations to a Spill Act claim for contribution, it must be applied prospectively. Moreover, the statute of limitations cannot be based upon the "discovery rule," but should be based upon either the incurrence of "cleanup and removal costs" at a minimum, or at best, when the written approval is received from the LSRP or NJDEP that the remediation is complete.

Furthermore, for the foregoing reasons and for the different perspective the NJSBA brings to the issue before the Court, the NJSBA respectfully requests that its motion seeking leave to appear as *amicus curiae* be granted in its entirety.

Respectfully submitted,

By: _____
Ralph J. Lamparello, Esq.
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Bar Association

DATED: