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No. 34333

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

LENORA PERRINE, et al., Plaintiffs Below, Appellants,

v.

E.I. DU PONT DE NEMOURS AND COMPANY, et al., Defendants Below,

E.I. DU PONT DE NEMOURS AND COMPANY, Appellee.

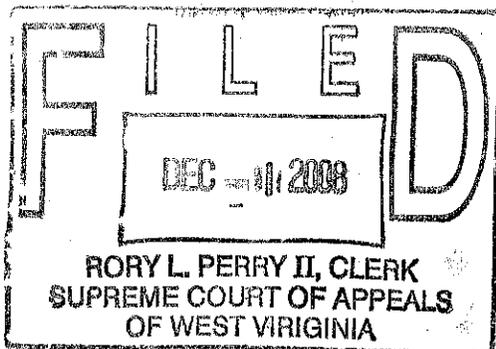
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Honorable Judge Thomas A. Bedell  
Circuit Court of Harrison County  
Civil Action No. 04-C-296-2

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**APPELLEE'S BRIEF**

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## INTRODUCTION

Dozens of Circuit Court rulings favoring Plaintiffs-Appellants paved the way to their record-setting judgments in this case. Appellants now seek reversal of one narrow, summary judgment ruling that did not go their way.

The Circuit Court dismissed the property-damage claims of those class members whose chain of title contained releases of (and perpetual easements to) Defendant-Appellee E.I. du Pont de Nemours and Company ("DuPont"), through its predecessor in interest. These releases and easements expressly preclude any property claims premised on the release of substances from the zinc plant onto the subject properties.

The Circuit Court's ruling did not preclude any of the affected property owners from asserting medical-monitoring claims or from seeking punitive damages in connection with those claims. According to Appellants' estimate, the court's ruling extended only to 265 of the thousands of structures in the class area.

Appellants assign two errors. They argue: (1) the releases and easements should not be interpreted to cover wanton or reckless conduct; and (2) if the releases and easements do cover wanton or reckless conduct, then they are void as a matter of public policy.

Both assigned errors share the same fundamental flaw: they incorrectly presume that DuPont's operation of the smelter from 1928 to 1950 was wanton or reckless. The jury made no such finding. Nor could it have: the evidence does not show that DuPont's historical plant operations were wanton or reckless. To the contrary, DuPont not only operated the smelter in accordance with industry standards, but also implemented a state-of-the-art industrial process that made the facility a cleaner operation.

The Circuit Court's ruling was based on the broad, unambiguous language of the releases and easements. West Virginia law and sound public policy support enforcing these arms-length settlement agreements. This Court should affirm the Circuit Court's summary judgment ruling.

### STATEMENT OF FACTS

Grasselli Chemical Company built the Spelter zinc smelter in 1911 and operated it until 1928. (Binder 41, 9/20/07 Tr. 2736; Binder 42, 9/24/07 Tr. 2923.)<sup>1</sup> From 1919 through the 1920s, nearby residents filed dozens of lawsuits against Grasselli for alleged property damage due to plant emissions. (Binder 41, 9/20/07 Tr. 2786; *Lyon v. Grasselli Chem. Co.*, 106 W. Va. 518, 520, 146 S.E. 57, 58 (1928).) The property owners, who were represented by counsel, sued Grasselli for "injury to the agricultural, residential and market values" of their property "by reason of chemical deposits upon it from fumes, gases, and dust emitted from [Grasselli's] furnaces and carried over the land by air currents, or spreading over it through the air." *Bartlett v. Grasselli Chem. Co.*, 92 W. Va. 445, 446-47, 115 S.E. 451, 451 (1922). Plaintiffs alleged not only nuisance, *see, e.g., id.*, but also willful continuation of a nuisance, *see, e.g., Lyon*, 106 W. Va. 518, 146 S.E. 57. They sought punitive damages. *Lyon*, 106 W. Va. 518, 146 S.E. 57.

Grasselli hired two scientists, Firman Bear and Francis Morgan, to investigate the effects of plant emissions on local crops and livestock. In 1919, Bear and Morgan memorialized their findings in a report titled *Meadowbrook Investigations 1919*. (PX 15083.) A year later, the landowners in the Grasselli litigation moved to compel production of the report, but the Circuit Court of Harrison County denied their motion. *Bartlett v. Grasselli Chem. Co.* (Cir. Ct. Harrison Cty. 1920) (attached as Ex. B to DuPont's Resp. to Pet. (4/7/08)). As DuPont has previously

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<sup>1</sup> DuPont cites the Circuit Court Clerk's trial record index, where available. Index cites are in the following format: "Binder \_\_\_, p. \_\_\_."

explained, the facts do not support Appellants' insinuation that this report bears on the enforceability of the Deeds at issue in this appeal. (*See* DuPont's Resp. to Pet. 14-15.)

DuPont purchased Grasselli in 1928. (Binder 42, 9/24/07 Tr. 2923.) Aware of the community's complaints about smelter emissions, DuPont modernized the plant's operations by implementing a state-of-the-art industrial process. (*Id.*) Plaintiffs' expert admitted that DuPont's improvements made the facility a "cleaner operation." (Binder 40, 9/13/07 Tr. 1165.)

DuPont also settled the residents' lawsuits against Grasselli. (Binder 42, 9/24/07 Tr. 2924.) As part of the settlements, many of the property owners signed broad releases and granted easements that were memorialized in deeds ("Grasselli Deeds") that ran with the land and were recorded in the Office of the Clerk of the County Commission of Harrison County. (App. Br. 1; Ex. A at DPZ0030775.) As Appellants recognize, the language of the Grasselli Deeds is substantially the same. (App. Br. 5; *see also* DX 5000 (collecting the Grasselli Deeds).) DuPont attaches to this brief (as Exhibit A) a representative Grasselli Deed.

The Grasselli Deeds released Grasselli, as well as its successors and assigns (such as DuPont) from the property claims of the individual Plaintiffs who are successors in title to the grantors of those deeds. (Ex. A at DPZ0030775.)

The Grasselli Deeds released plant owners from all past, present, and future claims that the property owners may have for injuries to their land resulting from the existence or operation of the zinc plant or from any substance that the plant produces in the zinc-smelting process.

Specifically, the deeds provide that all plant owners are released from

**all actions, causes of action, suits, liabilities, damages, claims, debts and/or demands, in law or equity, which said [property owners], or any of them, ever had or now have, or which they, or any of them, or the heirs, personal representatives or assigns of them, or any of them, hereafter can, shall, or may have against said [plant owner and operator] or either of them, or the successors**

and assigns of them or either of them, **for or by reason of any and all injuries, damages and/or losses of every kind whatsoever, to [their] land, . . . the productivity and/or products of said land, and/or any property or thing, real, personal or mixed, therein or thereon, . . . which** have been caused, arisen or resulted, or are caused, arise or result or **hereafter may or shall be caused**, arise or result from, by reason or out of said plant or **the past, present or future existence . . . or operation of said plant, or any substance or substances in the past, present or future produced**, discharged, emanating, cast, precipitated or escaping therefrom . . . **The substance or substances** hereinbefore and elsewhere in this deed mentioned do and **shall include** and extend to **any and all solids, liquids, smokes, dust, precipitates, gases, fumes, vapors and other matters and things which have been, are or hereafter may or shall be produced**, discharged, emanated, cast or precipitated, or did, do or shall escape, **by or from said plant** in, about or by reason of the manufacture, smelting, extraction or production of zinc or any product thereof or any composition of matter or other article consisting or partly consisting of the same, or anything used or acquired for use in, about, or for said manufacturing, smelting, extraction and/or production.

(*Id.* at DPZ0030774 (emphases added).)

The Grasselli Deeds also grant perpetual easements to the plant owners and operators that allow for the discharge of the specified substances from the plant over and onto the property owners' land:

And for the consideration aforesaid, said [property owners] do hereby grant and convey to [the plant owner] and its successors and assigns forever, the **full, free and perpetual right . . . to produce, discharge, emanate, cast, precipitate and cause or permit to escape the aforesaid substance or substances therefrom and over, on and/or onto said land of [the property owners] or any property or thing, real, personal or mixed, therein or thereon, without any compensation** except the above recited consideration already received as aforesaid, and free, acquit and released from any and all actions, causes of action, suits, liabilities, damages, claims, debts and/or demands of or by said [property owners], or any of them, or the heirs, personal representatives or assigns of them or any of them, said [property owners], for themselves, and each of them, and the heirs, personal representatives and assigns of them and each of them, hereby releasing any and all such actions, causes of action, suits, liabilities, damages, claims, debts and/or demands.

(*Id.* at DPZ0030774-75 (emphases added).)

During its 22-year tenure, DuPont operated the smelter in accordance with industry standards. (Binder 42, 9/24/07 Tr. 2923-26.) In 1950, DuPont sold the Spelter plant to Matthiessen & Hegeler, then one of the world's largest zinc manufacturers. DuPont never again operated the smelter. There were no lawsuits about plant emissions after DuPont updated the technology in 1930, until after the plant closed in 2001. (*Id.* 2924-26.)

In 2004, more than 50 years after DuPont sold the plant, Plaintiffs filed their class-action complaint against DuPont and three former owners of the smelter. They alleged negligence, negligence per se, public and private nuisance, trespass, strict liability, and unjust enrichment based on alleged exposure to arsenic, cadmium, and lead emitted from the smelter. Plaintiffs did not allege that the smelter had caused any personal injury to any putative class member. They instead sought medical monitoring, property damages, and punitive damages.

The Circuit Court certified two classes: a medical-monitoring class of persons who resided in a five-by-seven-mile area surrounding the plant for certain minimum time periods within the last 40 years, and a class of property owners within the class area.

Prior to trial, the Circuit Court held that the "release and easement provisions of the Grasselli Deeds are binding and enforceable upon the individual Plaintiffs in this action who are successors in title to the grantors of the Grasselli Deeds." (Binder 40, p. 18374, Order Granting in Part & Den. in Part DuPont's Mot. for Summ. J. at 8 (9/14/07) ("Order").) The Circuit Court therefore dismissed the "property damage claims," but not the medical-monitoring claims, "of those Plaintiffs who are the successors in title to the Grasselli Deeds." (*Id.*; *see also id.* at 2 n.1.) Appellants say that the releases and easements cover 265 structures (Pet. 1), a small fraction of

the 2,821 structures that their expert Dr. Brown identified to be remediated in the class area (Binder 46, 10/12/07 Tr. 4975-76).<sup>2</sup>

The Circuit Court conducted the trial in four phases: general liability (Phase I); medical monitoring (Phase II); property damages (Phase III); and punitive damages (Phase IV). The jury found DuPont liable in Phase I for negligence, nuisance, trespass, and strict liability. In Phases II and III, the jury awarded medical monitoring to the medical-monitoring class and \$55 million in remediation damages to the property class. Finally, in Phase IV, the jury awarded \$196.2 million in punitive damages for “wanton, willful, or reckless conduct with respect to the Spelter plant.” (Binder 50, p. 23195, Phase IV verdict form (10/19/07).)

## ARGUMENT

### **I. The Grasselli Deeds Explicitly Release the Conduct that is the Basis for the Property-Class Members’ Claims**

The Grasselli Deeds’ clear language bars the property-damage claims of plaintiffs who are successors in title to the grantors of the deeds. The deeds expressly preclude any property-damage claims premised on the release of substances from the plant onto properties subject to the deeds.

“Where the intent of the parties is clearly expressed in definite and unambiguous language on the face of the deed itself, the court is required to give effect to such language and, ordinarily, will not resort to parol[] or extrinsic evidence.” *Pocahontas Land Corp. v. Evans*, 175 W. Va. 304, 308, 332 S.E.2d 604, 609 (1985); *see also McDonough Co. v. E.I. DuPont DeNemours & Co.*, 167 W. Va. 611, 613, 280 S.E.2d 246, 247 (1981) (“Deed words that are not ambiguous should not be construed. . . . Parties are bound by general and ordinary meanings of

<sup>2</sup> Appellants’ Petition for Appeal asserted that “[a]pproximately, 40% of the class area . . . was covered by the releases.” (Pet. 1.) Appellants’ Brief does not reiterate this claim, which is incorrect and unsupported by any citation to the record.

words used.”). In other words, a “valid written instrument which expresses the intent of the parties in plain and unambiguous language is not subject to judicial construction or interpretation.” Syl. Pt. 1, *Wellington Power Corp. v. CNA Sur. Corp.*, 217 W. Va. 33, 614 S.E.2d 680 (2005).

The Grasselli Deeds contain “definite and unambiguous language.” *Pocahontas*, 175 W. Va. at 308, 332 S.E.2d at 609. They expressly (a) release past, present, and future claims arising out of either the operation of the plant or the discharge of substances from the plant, and (b) grant a perpetual easement in favor of the plant owner to operate the plant and to discharge substances from the plant over and onto the property owners’ land.

The releases and easements that the original property owners granted were, on their face, intended to cover property claims like the ones Plaintiffs brought in this case. Plaintiffs’ claims stem from alleged emissions or discharges from DuPont’s operation of the zinc smelter. (*See, e.g., Second Am. Compl.* ¶ 3 (8/31/05) (“The real properties of Plaintiffs and other area residents have been contaminated with hazardous substances contained within dust, smoke, and/or other releases from the Spelter Smelter facility.”).) Although DuPont denies this allegation, the unequivocal language of the Grasselli Deeds expressly permitted any such emissions and discharges onto any property for which there is a Grasselli Deed in the chain of title.

The deeds’ language speaks definitively. The Grasselli Deeds released Grasselli and its successors and assigns “from all actions, causes of action, suits, liabilities, damages, claims, debts and/or demands . . . which said [property owners] . . . hereafter can, shall, or may have against said [plant owner and operator].” (Ex. A at DPZ0030774.) The deeds describe those past, present, and future lawsuits as including claims “for or by reason of any and all injuries, damages and/or losses of every kind whatsoever, to [property owners’] land, . . . which have

been caused, . . . or hereafter may or shall be caused, . . . by . . . the past, present or future existence . . . or operation of said plant, or any substance or substances in the past, present or future produced . . . therefrom.” (*Id.*) These “substances” “include . . . any and all solids, liquids, smokes, dust, precipitates, gases, fumes, vapors and other matters and things which have been, are or hereafter may or shall be produced . . . by or from [the zinc] plant.” (*Id.*)

The property owners also granted Grasselli and its successors and assigns an easement giving them “forever, the full, free and perpetual right . . . to produce, discharge, emanate, cast, precipitate and cause or permit to escape” “any and all” substances generated through the “manufacture, smelting, extraction, or production of zinc or any product thereof.” (*Id.* at DPZ0030774-75.)

It is well established that “an affirmative easement entitles the owner thereof to use the land subject to the easement by doing acts which, were it not for the easement, he would not be privileged to do.” *Quintain Dev., LLC v. Columbia Nat. Res., Inc.*, 210 W. Va. 128, 135, 556 S.E.2d 95, 102 (2001). “[A]n easement allows a person to engage in activities on another’s land that, in the absence of the easement, would be a nuisance.” *Id.* “In circumstances where . . . an easement authorizes activity to be engaged in *upon* the servient property, it is generally considered that the easement authorizes a trespass.” *Id.*

The unambiguous language of the Grasselli Deeds expressly allows for the release of substances from the plant onto the properties of Plaintiffs who are successors in title to the grantors of the deeds. The Circuit Court correctly dismissed these Plaintiffs’ property claims, which are based on the release of substances from the plant onto their properties.

## II. Appellants' Arguments Fail Because There Has Been No Finding that DuPont's Operation of the Smelter Was Wanton or Reckless

Appellants assign two errors in their attempt to overcome the broad, unambiguous language of the Grasselli Deeds. First, they say that the Grasselli Deeds do not bar claims for wanton or reckless conduct. Second, they claim that if the releases do cover wanton or reckless conduct, then this Court should declare the releases void as a matter of public policy. Both of Appellants' arguments ignore that there has been no finding that DuPont operated the smelter in a wanton or reckless way.

The Circuit Court found that the Grasselli Deeds bar property-damage claims (but not medical-monitoring claims) of property-class members who are successors in title to the Grasselli Deeds. (Binder 40, p. 18374, Order at 8 (9/14/07).) Appellants' assignments of error are based on an unstated premise: that DuPont emitted or discharged materials onto Plaintiffs' properties wantonly or recklessly. But this premise fails. There was no evidence that DuPont's plant operations were wanton and reckless, and the jury made no such finding.

During the punitive-damages phase of trial the jury was asked to make a general finding as to whether DuPont "engaged in wanton, willful, or reckless conduct with respect to the Spelter plant." (Binder 50, p. 23195, Phase IV verdict form (10/19/07).) Over DuPont's objection and at Plaintiffs' insistence, the court did not ask the jury to make any findings specific to DuPont's 1928 to 1950 operations. (Binder 50, p. 23140, DuPont's Objs. to Phase IV Instrs. & Verdict Form (10/18/07).) As DuPont explained at the time, the verdict form's reference to "conduct with respect to the Spelter plant" . . . incorrectly broadens the DuPont conduct that the jury considers far beyond the period of DuPont's operation of the former smelter site." (*Id.*)

The evidence Plaintiffs presented in the punitive-damages phase of the trial did not focus on DuPont's operation of the smelter. Instead, Plaintiffs argued that DuPont had acted wantonly

and recklessly in its cleanup of the plant site, which started in the 1990s. Plaintiffs contended that punitive damages should be awarded because (1) DuPont misled the community during the recent site remediation; (2) DuPont manipulated state regulators; and (3) DuPont's conduct at its Parkersburg plant warranted punishment.<sup>3</sup> Plaintiffs did not argue that DuPont had wantonly or recklessly discharged material onto Plaintiffs' properties—they did not even mention DuPont's operation of the plant in their Phase IV opening or closing statements. (Binder 50, 10/16/07 Tr. 5199-244; Binder 50, 10/18/07 Tr. 5680-724, 5773-96.)

There is no evidence that DuPont operated the plant in a wanton or reckless manner. After acquiring the plant from Grasselli in 1928, DuPont modernized the plant's operations. (Binder 42, 9/24/07 Tr. 2923.) DuPont implemented a state-of-the-art industrial process, replacing the smelter's 8,400 horizontal retorts with 20 vertical retorts by 1930. (*Id.* 2923-24.) Plaintiffs' own expert admitted that DuPont's upgrades made the facility a "cleaner operation." (Binder 40, 9/13/07 Tr. 1165.) DuPont also settled the residents' lawsuits against Grasselli. (Binder 42, 9/24/07 Tr. 2924.) There were no lawsuits about plant emissions between the time DuPont updated the technology in 1930 and the time that the plant closed in 2001. (*Id.* 2924-26.)

During Phase I of the trial, Plaintiffs' allegation that DuPont's plant operations did not meet the standard of care rested entirely on the testimony of Steven Amter, a hydrogeologist. Amter identified only one step that DuPont might have taken to lessen the plant's environmental impact. He claimed that DuPont could have installed a "bag house" to control plant emissions. (Binder 41, 9/20/07 Tr. 2762-63.) But Amter admitted that he was unaware of any vertical retort zinc smelter in the world that used a bag house before 1950. (Binder 42, 9/24/07 Tr. 2926-27.)

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<sup>3</sup> For the reasons stated in DuPont's Appellant's Brief in Nos. 34334 & 34335, the evidence does not support the award of punitive damages.

Failure to adopt a pollution control device that no other smelter was using does not amount to negligence, much less wanton or reckless conduct.

Both of Appellants' assignments of error require them to show that DuPont acted wantonly or recklessly in emitting or discharging materials onto Plaintiffs' properties—the conduct that is the subject of the Grasselli Deeds. Because they have not met and cannot meet this burden, the Circuit Court's summary judgment ruling should be affirmed.

### **III. The Grasselli Deeds are Broad Enough to Release Claims for Wanton and Reckless Conduct**

Even if Appellants could demonstrate that DuPont's operation of the smelter was wanton or reckless, the Circuit Court's summary judgment ruling should still be affirmed. The Grasselli Deeds release DuPont from "all" property claims arising out of the operation of the smelter, not merely from claims alleging negligence. Public policy considerations weigh in favor of, not against, enforcing the Grasselli Deeds as to claims of wanton or reckless conduct.

#### **A. The Grasselli Deeds Release All Property Claims Arising from the Smelter, Not Only Claims for Negligence**

Appellants argue that the language in the Grasselli Deeds is insufficient to show that the parties intended to release Grasselli and its successors from claims alleging wanton or reckless conduct. Appellants rely on two cases, neither of which involved easements. These cases hold that "a general clause in an exculpatory agreement or anticipatory release exempting the defendant from all liability for any future negligence will not be construed to include intentional or reckless misconduct or gross negligence, *unless such intention clearly appears from the circumstances.*" *Murphy v. N. Am. River Runners, Inc.*, 186 W. Va. 310, 316, 412 S.E.2d 504, 510 (1991) (emphasis added); *see also id.* at 318, 412 S.E.2d at 512; *Tudor v. Charleston Area Med. Ctr., Inc.*, 203 W. Va. 111, 126, 506 S.E.2d 554, 569 (1997).

Assuming the principle articulated in *Murphy* and *Tudor* applies to easements, Appellants' argument ignores that the best evidence of the parties' contemplation is the text of their agreements. This is especially so where, as here, the asserted "contemplation" occurred roughly 70 years ago. To determine the parties' intent, courts look first to the text of the release and, only if the text is ambiguous, to extrinsic evidence. *Pocahontas*, 175 W. Va. at 308, 332 S.E.2d at 609; *Murphy*, 186 W. Va. at 318, 412 S.E.2d at 512.

The Circuit Court correctly looked no further than the text of the Grasselli Deeds to conclude that these agreements barred the property-damage claims of Plaintiffs whose chain of title contained releases. As discussed above in Part I, the Grasselli Deeds unambiguously release "all" past, present, and future property claims arising out of the operation of the plant and grant a perpetual easement to operate the plant and to allow the future discharge of substances from the plant. The releases contain no qualification that would limit their applicability solely to charges that plant owners behaved negligently.

This Court has explained that "all" is a "magic word" in the context of deeds. *Stamp v. Windsor Power House Coal Co.*, 154 W. Va. 578, 584, 177 S.E.2d 146, 149 (1970). The word "all" connotes the desire to "waive or exclude the benefit of a rule of law" that would otherwise apply, even when plaintiffs seek "damages to their property caused by the defendant's gross negligence." *Id.* at 581-84, 177 S.E.2d at 148-49 (internal quotation marks omitted); *see also Holmes v. Ala. Title Co.*, 507 So. 2d 922, 923, 925 (Ala. 1987) (holding that a deed providing "[n]o right of action for damages on account of injuries to the land" and conveying land "subject to all such injuries" released a party from claims alleging "willful and wanton" conduct).

Under West Virginia law, the plain language of the Grasselli Deeds shows that the parties intended to release plant owners from all claims, including claims for property damage arising

out of wanton or reckless operation of the plant. The deeds not only release “all” future lawsuits, but also describe those lawsuits as including claims for “any and all injuries, damages and/or losses of every kind whatsoever, to [property owners’] land,” which may be caused by the “future existence . . . or operation of said plant, or any substance or substances in the past, present or future produced . . . therefrom.” (Ex. A at DPZ0030774.)

Appellants argue that the Grasselli Deeds could have been more clear, apparently taking the position that only the explicit use of the words “wanton or reckless” in the Grasselli Deeds would shield such conduct from liability. (App. Br. 12.) Appellants cite no West Virginia case supporting such a super-clear-statement rule. Appellants instead rely on *Ratti v. Wheeling Pittsburgh Steel Corp.*, a Superior Court of Pennsylvania case. 758 A.2d 695 (Pa. Super. Ct. 2000). After considering both Pennsylvania and West Virginia law, the Pennsylvania court held that it would not interpret an indemnification provision that referred to “negligence” to cover claims for “gross negligence.” *Id.* at 705. The Grasselli Deeds, however, are much broader than the indemnity provision at issue in *Ratti*.

The contract in *Ratti* was limited to negligence claims; the Grasselli Deeds, in contrast, release “all claims” for “any and all injuries, damages and/or losses of every kind whatsoever, to [property owners’] land,” arising out of “any” substances produced from the smelter. (Ex. A at DPZ0030774.) Nothing in West Virginia law requires more detailed language to bar the property-damage claims of Plaintiffs with releases in their chain of title. *Cf. Krazek v. Mountain River Tours*, 884 F.2d 163, 166 (4th Cir. 1989) (applying West Virginia law and holding that a contract that released defendant from “any and all liability” released defendant from a negligence

claim even though the release did not use “specific ‘magic words’” like “negligence” or “negligence acts”).<sup>4</sup>

The historical context of the releases confirms that the parties intended to release more than negligent conduct. The Grasselli litigation from the 1920s included claims of “willful continuation” of the plant’s operation and sought to recover punitive, or “exemplary,” damages. *Lyon*, 106 W. Va. at 518, 146 S.E. at 58-59 (emphasis added). To collect such damages, plaintiffs would have been required to show “gross fraud, malice, oppression, or wanton, willful, or reckless conduct or criminal indifference to civil obligations affecting the rights of others,” the prevailing standard for punitive damages then and now. Syl. Pt. 4, *Mayer v. Frobe*, 40 W. Va. 246, 22 S.E. 58 (1895); *Gen. Motors Acceptance Corp. v. D.C. Wrecker Serv.*, 220 W. Va. 425, 431, 647 S.E.2d 861, 867 (2007).

More than 40 of these lawsuits were filed against Grasselli during its tenure as the plant’s owner. The release language at issue was borne of the parties’ efforts to terminate that litigation. It is inconceivable, and there is no evidence to suggest, that when the opportunity arose to settle these lawsuits, DuPont (through Grasselli) agreed to a release that would leave it vulnerable to ongoing claims of wanton and reckless conduct. At the very least, the parties intended to release the claims that were the subject of the Grasselli litigation, an intention that is confirmed through the expansive language of the Grasselli Deeds and easements.

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<sup>4</sup> If the court in *Ratti* had read the indemnification provision to cover gross negligence, it would have run afoul of the “well recognized and long established principle of interpretation of written instruments that the express mention of one thing implies the exclusion of another.” *Bischoff v. Francesa*, 133 W. Va. 474, 488, 56 S.E.2d 865, 873 (1949) (quoting *Harbert v. County Court of Harrison County*, 129 W. Va. 54, 64, 39 S.E.2d 177, 186 (1946), to describe the doctrine of *expressio unius est exclusio alterius*). It would also have run afoul of the principle that indemnification contracts “must clearly and definitely show an intention to indemnify against a certain loss or liability.” *Sellers v. Owens-Illinois Glass Co.*, 156 W. Va. 87, 92, 191 S.E.2d 166, 169 (1972).

**B. Public Policy Favors Enforcing the Grasselli Deeds**

**1. Accepting Appellants' public policy argument would radically alter the law of easements in West Virginia**

Appellants ask this Court to adopt for the first time a rule that would make unenforceable any contractual provision that releases a party from liability for its willful, wanton, or reckless behavior. (App. Br. 13-18.) Although such a rule may be appropriate in the context of personal injury or wrongful death claims (none of the cases Appellants cite to support their argument involve property remediation), the rule makes little sense where, as here, Appellants seek property remediation and challenge the enforceability of an easement. Easements, by their very nature, are contracts that allow one party to engage in intentional conduct that would otherwise give rise to liability. The rule Appellants propose would not only invalidate broad, unambiguous, anticipatory releases, but also threaten to unravel easements across the State.

West Virginia defines an easement “as the right one person has to use the lands of another for a specific purpose.” *Farley v. Farley*, 215 W. Va. 465, 468, 600 S.E.2d 177, 180 (2004); *see also* Restatement (Third) of Property § 1.2(1) (2000) (“[a]n easement creates a nonpossessory right to enter and use land in the possession of another and obligates the possessor not to interfere with the uses authorized by the easement”). Easements contained in deeds may release a party from liability for intentional torts, including “willful and wanton” ones. *Holmes*, 507 So. 2d at 925. Easements allow their owners to trespass on another’s land or to create a nuisance there without incurring liability. *See supra* p. 8. Both trespass and nuisance are torts that can be committed intentionally or recklessly. *See, e.g.*, Syl. Pt. 1, *Bailey v. S. J. Groves & Sons Co.*, 159 W. Va. 864, 230 S.E.2d 267 (1976) (“Liability for trespass to real property exists only where there is an intentional intrusion, negligence, or some extrahazardous activity on the part of the alleged wrongdoer.”); *Hendricks v. Stalnaker*, 181 W. Va. 31, 33-34, 380 S.E.2d 198,

200 (1989) (“The definition of private nuisance includes conduct that is intentional and unreasonable, negligent or reckless, or that results in [] abnormally dangerous conditions or activities in an inappropriate place.”).

At present, the validity of an easement in West Virginia is almost entirely a question of whether the conveyance was “expressed in certain and definite language,” Syl. Pt. 1, *Highway Props. v. Dollar Sav. Bank*, 189 W. Va. 301, 431 S.E.2d 95 (1993) (internal quotation marks omitted), as opposed to a question of the state of mind of the party seeking to enforce the easement.

Appellants’ proposed rule would mark a major shift in West Virginia law. Before an easement could be enforced, a court would first have to determine whether the party seeking to enforce the easement was acting in a “reckless” or “wanton” manner. If the answer was “yes,” then the easement would be void regardless of whether the parties agreed to allow the conduct at issue. The Court should reject such a dramatic change in the law of easements, which would upset the expectations of parties across the State.

## **2. Public policy favors settlements and the freedom to contract**

Long-standing public policy considerations favor enforcing settlements and releases as a means of encouraging parties to resolve contested litigation and to settle their claims. *See, e.g., Sanders v. Roselawn Mem’l Gardens, Inc.*, 152 W. Va. 91, 104, 159 S.E.2d 784, 792 (1968); *Horkulic v. Galloway*, 222 W. Va. 450, 450, 665 S.E.2d 284, 293 (2008). A decision voiding the Grasselli Deeds would undermine those policy objectives and potentially lead to the undoing of other settlements decades after their formation. At a minimum, it would discourage any future settlement efforts by parties wary of what new standards this Court might later adopt.

None of the cases Appellants cite for their public policy argument involves a court invalidating an exculpatory clause drafted as part of a settlement agreement. One of the cases Appellants cite, *In re Cunningham*, upheld a settlement agreement that provided that plaintiffs, in exchange for the defendant assenting to a default judgment on negligence, agreed to waive “any future arguments that the resulting judgment against [defendant] is immune from discharge in bankruptcy by virtue of intentional tort.” 365 B.R. 352, 365 (Bankr. D. Mass. 2007).

In addition, courts have long recognized that the public policy favoring parties’ freedom to contract is no less important than the policy favoring the nullification of broad exculpatory agreements. As this Court has emphasized, “the freedom to contract is a substantial public policy that should not be lightly dismissed.” *Wellington Power Corp.*, 217 W. Va. at 38, 614 S.E.2d at 685. For that reason, “courts are not to extend arbitrarily those rules which say that a given contract is void as being against public policy.” *Id.* (internal quotation marks omitted). “[I]f there is one thing which more than [another public policy] requires it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts, when entered into freely and voluntarily, shall be held sacred, and shall be enforced by courts of justice. *Id.* (internal quotation marks omitted). It is, in short, well established in this State that “[i]f, by unambiguous language any specified right is granted or withheld, there is no public policy which defeats its enforcement, even though the public interest may seem to be adversely affected.” *Stamp*, 154 W. Va. at 584-85, 177 S.E.2d at 149-50 (quoting Hon. Robert T. Donley, *The Law of Coal, Oil and Gas in West Virginia and Virginia* at 213).

Courts around the country have enforced releases and easements even when those provisions cover substances considered “pollutants” or “contaminants.” *See, e.g., Albahary v. City of Bristol*, 276 Conn. 426, 431 n.2, 886 A.2d 802, 805 n.2 (2005) (recognizing

enforceability of easement providing the “right to discharge pollutants to the ground water” and allowing defendant to “release and deposit contaminants and pollution directly or indirectly, into, on or in the groundwaters and subsurface soils and formations”); *FCA Assocs. v. Texaco, Inc.*, 2005 U.S. Dist. LEXIS 6348 (W.D.N.Y. Mar. 31) (unpublished) (dismissing negligence claims after finding release from liability for environmental contamination claims valid and enforceable).

The Grasselli Deeds granted perpetual easements to plant owners and operators that allowed for the discharge of the specified substances from the plant over and onto the property owners’ land. There is no evidence that DuPont operated the smelter in a manner that was inconsistent with the parties’ expectations or intentions. This Court should not overturn those contracts.

### CONCLUSION

Appellants agree with DuPont that the scope and enforceability of the Grasselli Deeds is a question of law that this Court should decide. (App. Br. 18-19.) For the reasons discussed above, the Court should affirm the Circuit Court’s summary judgment ruling enforcing the Grasselli Deeds.<sup>5</sup>

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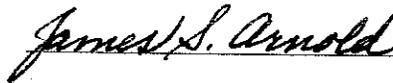
<sup>5</sup> Appellants say that if they prevail in their appeal then this Court can simply remand to the Circuit Court with instructions “to enter an order fixing an amount” of remediation damages for the released properties. (App. Br. 19.) They are wrong. If this Court rejects the Circuit Court’s interpretation of the Grasselli Deeds or finds the releases void, such a ruling does not automatically entitle the Grasselli plaintiffs to damages. Their property claims have never been presented to a jury. The Circuit Court instructed the jury that “there are no facts for you to decide” relating to the property claims of the plaintiffs who are successors in title to the Grasselli Deeds. (Binder 46, 10/12/07 Tr. 5011.) The jury made property-damages findings only with respect to the “non-released” properties. (Binder 46, p. 21209, Verdict Form—Phase III (10/15/07).) If Appellants prevail in this appeal, then the Grasselli plaintiffs must still show that DuPont harmed their properties and prove any remediation damages to a jury. A remand order that allows the Circuit Court to make these determinations on its own would violate due process and deprive DuPont of its constitutional right to a jury trial. U.S. Const. amend. VII; W. Va. Const. art. III, § 13.

Respectfully submitted,

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Dated: December 1, 2008

No. 34333

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

LENORA PERRINE, et al., Plaintiffs Below, Appellants,

v.

E.I. DU PONT DE NEMOURS AND COMPANY, et al., Defendants Below,

E.I. DU PONT DE NEMOURS AND COMPANY, Appellee.

**CERTIFICATE OF SERVICE**

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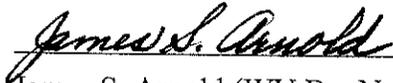
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**EXHIBITS**

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