

No. 34333

**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA**

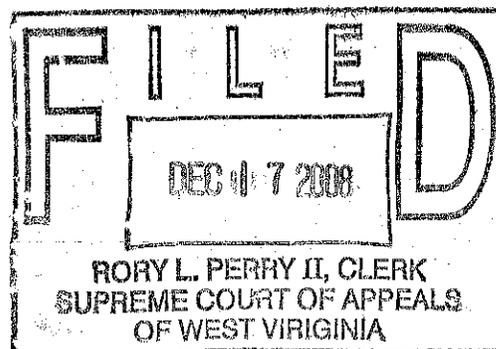
LENORA PERRINE, et al.

Appellants,

v.

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

Appellee.



---

**APPELLANTS' REPLY BRIEF**

---

R. Edison Hill, WVSB #1734  
Hill, Peterson, Carper, Bee & Deitzler, P.L.L.C.  
NorthGate Business Park  
500 Tracy Way  
Charleston, WV 25311-1261  
(304) 345-5667

Gary W. Rich, WVSB #3078  
Law Office of Gary W. Rich, L.C.  
212 High Street, Suite 223  
Morgantown, WV 26505  
(304) 292-1215

Michael Papantonio  
Levin, Papantonio, Thomas, Mitchell,  
Eschsner & Proctor, P.A.  
316 South Baylen Street, Suite 400  
(850) 435-7074

Perry B. Jones, WVSB #9683  
Jerald E. Jones, WVSB #1920  
West & Jones  
360 Washington Avenue  
Clarksburg, WV 26302  
(304) 624-5501

J. Farrest Taylor  
Cochran, Cherry, Givens, Smith, Lane,  
& Taylor, PC  
163 West Main Street  
Dothan, AL 36301  
(334) 793-1555

Robert F. Kennedy, Jr.  
Kennedy & Madonna, LLP  
48 Dewitt Mills Road  
Hurley, NY 12443  
(845) 331-7514

**Counsel for Lenora Perrine, et al.**

## TABLE OF CONTENTS

TABLE OF AUTHORITIES .....	ii
APPELLANTS' REPLY TO APPELLEE DUPONT'S BRIEF .....	1
I.    A release purporting to bar "all claims" or "all liability" is insufficient to bar property claims arising from wanton or reckless conduct .....	2
II.   When human health and the environment are at risk, the Court may invalidate an exculpatory agreement excusing wanton, reckless or grossly negligent conduct .....	5
III.  Appellants/Plaintiffs presented ample evidence of DuPont's wanton and reckless operation of the smelter .....	7
CONCLUSION .....	14

## TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page(s)</u>
<i>Albahary v. City of Bristol</i> 276 Conn. 426, 886 A.2d 802 (2005) .....	6
<i>FCA Associates v. Texaco, Inc.</i> , 2005 WL 735959 (W.D.N.Y) .....	6-7
<i>Murphy v. North American River Runners, Inc</i> 186 W. Va. 310, 412 S.E.2d 504 (1991).....	2-3, 5
<i>Stamp v. Windsor Power House Coal Company</i> 154 W. Va. 578, 177 S.E.2d 146 (1970).....	4
<i>Tudor v. Charleston Area Medical Center, Inc.</i> , 203 W. Va. 111, 506 S.E.2d 554 (1997).....	3-4

## APPELLANTS' REPLY TO APPELLEE DUPONT'S BRIEF

Appellants appeal the trial court's grant of summary judgment finding that the easements contained in the Grasselli deeds immunize DuPont against any claims for environmental contamination regardless of the type of conduct alleged. The general release language fails to expressly absolve DuPont from intentional, reckless or grossly negligent conduct. Alternatively, to the extent the deeds may protect DuPont from claims arising from intentional, reckless or grossly negligent conduct, such anticipatory waivers—particularly where human health and environmental welfare are concerned—violate public policy and should be invalidated.

Contending that the releases use “magic words,” DuPont argues that the releases are sufficiently specific to protect against claims of willfulness, recklessness or gross negligence. DuPont also insists that invalidating releases purporting to shield wanton or reckless conduct will irrevocably undermine contract and property law. DuPont's arguments are unsupported by West Virginia law and are contrary to sound public policy. The releases fail to comply with West Virginia's requirements that exculpatory provisions implicating wanton or reckless conduct be expressly stated. Furthermore, West Virginia law has long prioritized issues of public health and welfare over unfettered contractual rights.

DuPont also argues that Appellants' appeal must fail because they proffered no evidence at trial that DuPont's plant operations were wanton and reckless, and the jury made no such finding. As set out below, Appellants admitted ample evidence reflecting DuPont's wanton, reckless and grossly negligent operation of the smelter, and the jury did find that DuPont acted intentionally, wantonly or recklessly with respect to the smelter. The evidence and jury's finding notwithstanding, the proper determination in this appeal is not whether the jury ultimately

concluded that DuPont acted recklessly or wantonly, but rather whether the trial court properly determined as a matter of law that the releases precluded any claims of wanton or reckless conduct.

**I. A release purporting to bar “all claims” or “all liability” is insufficient to bar property claims arising from wanton or reckless conduct.**

Unquestionably, the Grasselli releases contain broad language related to the deposit of substances on its neighbors' lands. The issue is whether that language is sufficiently explicit to also insulate the smelter from claims arising from intentional, reckless or wanton conduct. Nothing within the releases indicates an intent by the property owners to excuse the smelter from a minimum standard of conduct. To the extent that DuPont (through Grasselli) sought to remove even a minimum standard of conduct and immunize itself from intentional, reckless or wanton conduct, DuPont was required to expressly state the same.

West Virginia law provides that where a release purports to release a party from “all claims,” such language is sufficiently clear to waive a common law negligence action—even though the words “negligence” or “negligent acts” are not expressly stated. This is not, however, the law for exculpatory provisions attempting to bar claims arising from wanton or reckless conduct. This Court has consistently held that broad releases generally seeking to exclude “all claims” will not be construed to include the loss or damage resulting from intentional misconduct, reckless misconduct or gross negligence.

For example, in *Murphy v. North American River Runners, Inc.*, the exculpatory provision released the defendant from “any and all liability, actions, causes of actions, claims, expenses, and damages on account of injury to [] person or property, even injury resulting in death.” 186 W. Va. 310, 314, 412 S.E.2d 504, 508 (1991). The release also expressly stated it

was "intended to be as broad and inclusive as permitted by the law of the State of West Virginia." *Id.* The court found that even though the exculpatory language did not expressly include the words "negligence" or "negligent acts," the language was sufficiently clear to waive a common law negligence action. *Id.* at 317, 511

The *Murphy* court also found, however, that such broad language is insufficient to bar claims arising from wanton, reckless, or grossly negligent conduct. Even though the release itself provided that it was to be construed as broadly as possible, the court found that such broad language and even precatory words of interpretation still do not encompass wanton and reckless conduct:

As stated previously, a general clause in a pre-injury exculpatory agreement or anticipatory release purporting to exempt a defendant from all liability for any future loss or damage will not be construed to include the loss or damage resulting from the defendant's intentional or reckless misconduct or gross negligence, unless the circumstances clearly indicated that such was the plaintiff's intention.

*Id.* at 318, 512. Where parol evidence reflecting the circumstances is not in conflict, then the trial court may construe the writing and determine the breadth of the exculpatory provision. *Id.* at 319, 513.

The court reaffirmed this principle in *Tudor v. Charleston Area Medical Center, Inc.*, where once again an exculpatory release included language releasing the defendant from "all liability or responsibility." 203 W. Va. 111, 126, 506 S.E.2d 554, 569 (1997). Invoking *Murphy*, the court observed that "[i]t is well established in this jurisdiction that when a person gives another entity a release, the release does not absolve a party from liability for the party's intentional, reckless or grossly negligent conduct." *Id.* Thus, despite the use of the word "all"

in the release, the *Tudor* court concluded that such broad language did not give the defendant “*carte blanche*” authorization to act intentionally, wantonly or grossly negligent. *Id.*

Disregarding well-established law, DuPont argues that the use of “all” is a “magic word” in the context of deeds and, therefore, the broad language should be sufficient to bar any claims arising from its intentional, wanton or reckless conduct. See DuPont’s Resp. at 12. As its basis for this argument, DuPont relies on *Stamp v. Windsor Power House Coal Company*, where the court did, in fact, describe “all” as a “magic word.” 154 W. Va. 578, 584, 177 S.E.2d 146, 149 (1970). The *Stamp* court, however, was specifically referring to the doctrine of express waiver of subjacent support and considering only claims of negligence. Moreover, even though the plaintiffs had not brought any claims of willful or wanton conduct, the *Stamp* court indicated an inclination to except willful or wanton acts from such waivers of subjacent support. *Id.* at 585, 150 (“This Court, as presently constituted, does not necessarily approve the holding in the Griffin case that a surface owner could not recover for a willful or wanton act of those who were producing coal which they owned beneath the surface of the plaintiff’s. *We are merely holding that the language of the instant deed precludes recovery for negligence.*”)(emphasis added).

DuPont is unable to offer any evidence demonstrating the original landowners intended to give the smelter *carte blanche* control over their property. DuPont concedes “there is no evidence to suggest” that it (through Grasselli) would have agreed to a release that did not exclude such claims. Having brought forward this affirmative defense and motion for summary judgment, it is DuPont’s burden to present evidence clearly indicating that the plaintiffs’ predecessors, not DuPont, intended to insulate DuPont from the particular claims arising from

intentional, reckless or grossly negligent conduct—something DuPont has not and cannot prove.<sup>1</sup>

**II. When human health and the environment are at risk, the Court may invalidate an exculpatory agreement excusing wanton, reckless or grossly negligent conduct.**

West Virginia has long recognized that the right to contract freely does not trump the health and welfare of the public. The *Murphy* court, for example, cautioned that agreements expressly releasing reckless conduct may still be invalid if they interfere with the public interest. 186 W. Va. at 315, 412 S.E.2d at 509. In the instant action, the public health and welfare are at stake. By excepting a subset of the property class from remediation, the health of the class as a whole will continue to be threatened.

Assuming *arguendo* that the landowners intended to release the smelter from wanton, reckless or grossly negligent conduct, such an agreement should not be enforced at the expense of the public welfare. In the instant action, the jury found that the class area should be remediated, mandating removal of the smelter's toxic and carcinogenic materials that have been accumulating on surrounding property for decades. Without this remediation, the class members will continue to be exposed to carcinogens on their properties and, therefore, suffer an additional risk of developing life-threatening disease. The property affected by the Grasselli releases comprises nearly 40% of the actual geographic class area. Dupont's Memorandum of Law in Opposition to Class Certification at 10 (Binder 9, p. 4020-4027, 04/03/06). Moreover, much of

---

<sup>1</sup> The historical context indicates that even as the Grasselli litigation was winding down, DuPont (through Grasselli) continued to conceal the scope and anticipated impact of its smelter operation. The undisputed evidence shows that DuPont actively sought and was successful in withholding the Bear & Morgan Report that detailed the scope, effects, and expected ramifications of the smelter's continued operation. Given this suppression of relevant information, the landowners could not have knowingly agreed to accept a risk of harm arising from DuPont's particular reckless conduct.

the property subject to the Grasselli releases was the property closest in proximity to the smelter, meaning it is the most heavily contaminated. Failure to clean up such a substantial portion of the class area will cause continued migration of dangerous heavy metals to nearby remediated property, ultimately rendering any clean-up ineffective and necessitating extended medical monitoring as class members continue to be exposed to the constituents of concern.

Citing two cases, DuPont argues that “[c]ourts around the country” routinely enforce easements and releases at the expense of public exposure to pollutants or contaminants. See DuPont’s Response at 17-18. The two cases cited by DuPont, however, reflect just the opposite. The easement at issue in *Albahary v. City of Bristol* was created by a special act of the Connecticut legislature and was intended to protect the public from contaminated water. 276 Conn. 426, 430-431, 886 A.2d 802, 804-805 (2005). A city-owned landfill had contaminated the drinking water of surrounding properties. In an effort to assist the landfill in cleaning-up the contamination, the legislature granted an easement, for a thirty-one year period, allowing the defendant “to access the property to withdraw groundwater, to collect environmental data and to pump and treat groundwater so as to remediate the existing contamination.” *Id.* at 430-431, 805. In the meantime, the city was required to provide potable water to the surrounding properties. Importantly, however, the *Albahary* court did not enforce the easement against future claims of property devaluation at the expense of the public welfare but, rather, as a means of protecting human health and the environment.

In *FCA Associates v. Texaco, Inc.*, a gas station contaminated the surrounding land and water with gasoline. 2005 WL 735959 (W.D.N.Y). In a series of transactions related to the remediation of the property, various parties had executed releases or indemnification agreements.

Ultimately, the court ruled that Texaco, who had owned the site for 20 years, could not look to certain parties for contribution. Notwithstanding the dismissal of Texaco's contribution claims, the court assured Texaco that the law would not require Texaco to pay more than its equitable share of clean-up costs. *Id.* at \* 6. Importantly, however, the release and indemnification agreements at issue did not affect the remediation of the contaminated property. Neither the public health and welfare nor the environment was jeopardized by the enforcement of the release and indemnification agreement.

Just as DuPont's cited cases reflect, the public welfare is paramount. The instant action involves grave issues of contamination threatening human health and the environment. An exculpatory provision that excuses a defendant from a minimum standard of conduct and *prevents* a complete remediation of the contaminated area must be treated as invalid if the public interest is to be protected.

**III. Appellants/Plaintiffs presented ample evidence of DuPont's wanton and reckless operation of the smelter.**

This is an appeal of the trial court's finding that the Grasselli releases, as a matter of law, barred property-damage claims of property-class members who are successors in title to the Grasselli deeds. Whether Appellants presented sufficient evidence at trial to demonstrate that DuPont operated the smelter wantonly or recklessly or whether the jury's determination that DuPont acted wantonly extends to DuPont's actual operation of the plant is irrelevant to this Court's review of the trial court's summary judgment determination. Nevertheless, since DuPont has raised the issue, Appellants set out below the abundance of evidence at trial reflecting DuPont's wanton and reckless operation of the smelter.

Contrary to DuPont's bald assertions, Appellants/Plaintiffs presented ample evidence throughout the trial that DuPont's operation of the smelter from 1928 to 1950 was reckless and wanton. Plaintiffs presented evidence that DuPont was aware of the health and environmental risks its operation of the plant caused and disregarded those risks. Instead of implementing available technology to reduce emissions and removing and/or reducing the enormous on-site waste pile, DuPont simply continued producing more zinc than ever and creating an even bigger waste pile. Finally, when DuPont realized that the plant was causing uncontrolled amounts of pollution and violating emerging air standards and that the cost to renovate the plant would be substantial, DuPont decided to cut and run, leaving the plant in desperate need of updating and modernization.

Plaintiffs introduced, among other things, the following evidence:

- DuPont had two methods for dealing with the enormous amount toxic waste from the smelter: emit it into the air, which would then spread into the surrounding communities (Binder 40, 09/14/07, Tr. 1405-16) or store it on-site, which provided a reservoir of hazardous waste that would be an ongoing source of contamination. (Binder 40, 09/14/07, Tr. 1416) (Binder 40, 09/13/07, Tr. 1078-79, 1158).
- DuPont was aware of the Bear & Morgan study commissioned by the Grasselli Chemical Company which documented in detail the harmful effects of the smelter on the agriculture, plants and farm animals. (Binder 41, 09/20/07 Tr. 2776). The report provided unequivocal proof that after only eight years of operation the smelter was causing substantial environmental harm. Emissions from the retorts contained 2.6% (26,000 parts per million) lead. (Binder 41, 09/20/07 Tr. 2769). Livestock that grazed on

pastures covered with dust from the smelter experienced dramatic weight loss and infertility. Large areas of barren land around the smelter were shown to have high levels of zinc, indicating that smelter pollution was the culprit. Using zinc as a marker, Grasselli's own scientists found that the effects of the smelter extended for miles from the smelter. (Plaintiffs' Trial Exhibit 15083, *Meadowbrook Investigations 1919 Report*).

- Having devoted people specifically to areas like emission control, occupational medicine, and toxicology, DuPont had technical expertise in the 1930s to understand its own manufacturing process and what that process would emit in terms of waste<sup>2</sup> and air emissions and what the effects of those emissions would be on the environment, on humans, on animals and on the surrounding areas. (Binder 41, 09/20/07 Tr. 2734).
- Arsenic, cadmium and lead, among others, were known byproducts of the zinc ore manufacturing process. (Binder 41, 09/20/07 Tr. 2741-42). Unquestionably, DuPont was aware that it was using cadmium and lead in the manufacturing process. (Binder 41, 09/20/07 Tr. 2741). Litigation in the 1920s revealed that black dust from the smelter contained almost 1% of "white arsenic." (Binder 41, 09/20/07 Tr. 2781-82). The dangerous nature of these heavy metals were well-documented by the time DuPont purchased the smelter. As early as 1820, arsenic was known to be carcinogenic. (Binder 41, 09/20/07 Tr. 2747). By 1927, cadmium, even in very small quantities, was known to be fatal to animals and highly toxic to human beings. (Binder 41, 09/20/07 Tr. 2748-50).

The toxicity of lead was so well-documented by the turn of the 20<sup>th</sup> century that the first

---

<sup>2</sup> Grasselli had previously conducted a study addressing what metals were released in the manufacturing process and what could be done to conserve the metals lost in the manufacturing process. (Binder 41, 09/20/07, Tr. 2760-61).

regulations were created to protect workers from lead fumes. (Binder 41, 09/20/07 Tr. 2751).

- At a minimum, DuPont was well acquainted with the toxic nature of arsenic and lead. DuPont was the leading manufacturer of pesticides containing arsenic. As the sole producer of a leaded anti-knock additive for gasoline compound, DuPont had extensively studied the health effects of lead. (Binder 41, 09/20/07 Tr. 2751-52).
- DuPont was aware of the transport pathways that allowed metals to be transported through the air and settle on surrounding property, in turn causing injury to vegetation, livestock and potentially human health. (Binder 41, 09/20/07 Tr. 2778-79).
- By 1919, the Cotrell Electrical Process was the leading technology to control emissions of fume and dust and metallurgical smoke from smelting and other metal industries. (Binder 41, 09/20/07 Tr. 2752-53, 2789). Although Grasselli and DuPont knew this process was a viable means of controlling emissions, neither company utilized this technology. (Binder 41, 09/20/07 Tr. 2788-92). Similarly, although bag houses were used extensively in the first half of the 20th century to control emissions, neither Grasselli nor DuPont utilized a bag house. (Binder 41, 09/20/07 Tr. 2761-62).<sup>3</sup> As a result of the companies' refusal to implement existing technology to control emissions,

---

<sup>3</sup> Grasselli did install an experimental bag house and collected fumes which revealed "a lot of metal, 2.6 percent lead. That's 26,000 parts per million lead." Grasselli did not install a permanent bag house because it did not seem profitable. (Binder 41, 09/20/07 Tr. 2770).

fumes continuously migrated to people and properties surrounding the site, just as the Bear & Morgan report predicted.<sup>4</sup>

- After DuPont merged with Grasselli, DuPont abandoned the horizontal retorts for the more modern vertical retorts, which dramatically increased production. Although DuPont attempts to convince this Court that its installation of vertical retorts modernized the plant and reduced pollution, there is no evidence that the vertical retorts diminished the smelter's environmental impact. In fact, the vertical retorts had the opposite effect. Although Dr. Flowers testified that vertical retorts "are a better operation" than horizontal retorts, he also pointed out that the vertical retorts allowed for a mechanized conveyor belt and 24/7 production. (Binder 40, 09/13/07 Tr. 1165, 1069). Because they were able to operate continuously, the vertical retorts increased, rather than reduced, emissions and waste. With more production came more waste, which DuPont continued to store on-site, piling it higher and higher around the smelter until it reached the bank of the West Fork River.
- In addition to refusing to implement existing technology to capture fumes from the retorts, DuPont also continued Grasselli's practice of dumping smoldering waste from the retorts on-site, which eventually grew into a literal mountain of toxic waste. DuPont's choice to continuing storing its waste on-site stands in marked contrast to another smelter in nearby Clarksburg which elected to remove its waste by rail car to be burned as fuel

---

<sup>4</sup> Importantly, when DuPont purchased Grasselli in 1928, it retained the same management and employees that had been managing the smelter under Grasselli. (Binder 41, 09/20/07 Tr. 2798-2800). Thus DuPont acquired all of the institutional knowledge that Grasselli had accumulated regarding the content and pathways of the fumes as well as the means of reducing emissions.

elsewhere. (Binder 41, 09/20/07 Tr. 2843-45). As a result of DuPont's continued practice of storing its waste on-site, toxic fumes and waste continuously migrated to people and properties surrounding the site. DuPont admitted decades later that it was "clearly on the hook for cleanup, any state or federal claims, toxic tort and natural resource damage claims—*our material*" (emphasis added).<sup>5</sup>

- In 1938, DuPont adopted a company policy of pollution control, recognizing that controlling pollution should be a top priority of the company, just the same as safety and fire protection, and deserving of continuous attention and study. (Binder 41, 09/20/07 Tr. 2815-17). Despite this purported commitment to pollution control, DuPont did not implement any controls at the smelter.
- In 1949, the issue of pollution control at the local, state and federal levels began receiving increasing attention from legislators and enforcement agencies, with the public demanding the enactment of new and stronger laws and the active enforcement of existing laws. (Binder 41, 09/20/07 Tr. 2813-15). By 1950, the scientific community, of which DuPont was a part, recognized that "safety procedures should be introduced in all plants where carcinogenic agents are handled. They should include not only protection of the individual workers by enclosing the manufacturing process, but *also protection of the whole plant and of the community at large by preventing the escape of carcinogenic wastes into the atmosphere, water or the soil.*" (Binder 41, 09/20/07 Tr. 2834-36).
- In 1950, in response to increased public pressure for pollution control, DuPont performed a company-wide air pollution survey. (Binder 41, 09/20/07 Tr. 2819-23). Although

---

<sup>5</sup> Plaintiffs' Trial Exhibit 33162, Bedsole, *Subject: Previously Divested Site* (2002).

DuPont was unable to produce the survey itself, documents referencing the survey revealed that department heads were reluctant to request money to fund emissions controls for fear their departments would appear unprofitable. (Binder 41, 09/20/07 Tr. 2824). Documents also revealed that the zinc smelter would require an additional \$325,000 in funding to abate air pollution. (Binder 41, 09/20/07 Tr. 2828-30)(Plaintiffs' Trial Exhibit 76730, *Summary of Figure Data – Industrial Department Reports on Water and Air Pollution*). Although the smelter was not one of the bigger plants at DuPont, it had one of the biggest anticipated air pollution control expenditures. (Binder 41, 09/20/07 Tr. 2828-30). Indeed, by 1950, longstanding major source of emissions included the cokers in the vertical retorts, the zinc dust operation, and “the mountain of waste that smoked and fumed and put materials in the air.” (Binder 41, 09/20/07 Tr. 2838-41). Certainly a jury could infer from this enormous projected expense that the smelter was in abysmal condition and in need of substantial air pollution controls.

- One week after the memorandum indicating department heads' reluctance to request funds for pollution controls and the anticipated cost of bringing the smelter into compliance, DuPont read the handwriting on the wall. Deciding to cut its losses and run, DuPont sold the plant for \$1.1 million to Matthiesson & Hegeler. (Binder 41, 09/20/07 Tr. 2815-31). Finding the plant in desperate need of modernization, Matthiesson & Hegeler began the process of renovating the plant and install new cokers, which would in turn reduce dust and smoke emissions. (Binder 41, 09/20/07 Tr. 2842-43).

DuPont contends that it modernized the smelter and implemented a state of the art industrial process. What DuPont neglects to mention is that, despite its extensive knowledge of

the toxic byproducts emitted from the zinc production, its purported commitment to abatement of air pollution, and confirmation that the surrounding community was adversely affected by air emissions, DuPont failed to implement any available emissions controls at the plant. The "state of the art industrial process" served to increase production and, consequently, increase fumes, emissions and waste. DuPont even refused to follow the example of a nearby smelter and take the basic step of removing its waste from the site itself. Once public pressure began mounting and it was apparent that DuPont would need to make a substantial expenditure to address the air pollution issues at the plant, DuPont simply abandoned ship. Certainly, such conduct exceeds mere negligence.

### CONCLUSION

At DuPont's urging, the Circuit Court determined that the releases contained within the Grasselli deeds expressly barred claims arising from wanton or reckless conduct. This finding was inconsistent with West Virginia law. Even assuming for argument's sake that the releases were sufficiently explicit to bar claims of wantonness or recklessness, public policy demands the exculpatory provision be set aside in light of the grave public health issues at issue.

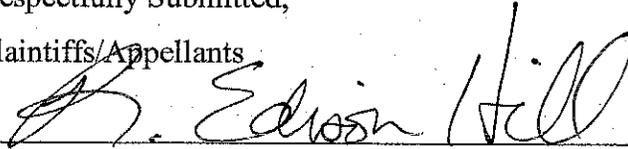
As described above, there is an abundance of evidence demonstrating DuPont's wanton and reckless operation of the smelter. In this case, the jury found that DuPont acted wantonly, willfully, or recklessly and determined the remediation cost depending on the location of the property. Plaintiffs ask this Court to remand this issue back to the Circuit Court for the determination of damages by the trial judge for the released properties pursuant to the jury's verdict. Alternatively, if this Court determines that this issue is one for the jury, Plaintiffs respectfully request that this issue be remanded back to the Circuit Court for a trial by jury to

determine whether the properties excluded under the Grasselli release are entitled to remediation, the amount of remediation, and the amount of punitives damages, if any.

Dated: December 17, 2008

Respectfully Submitted,

Plaintiffs/Appellants



R. Edison Hill (WVSB #1734)  
HILL, PETERSON, CARPER, BEE & DEITZLER, PLLC  
500 Tracy Way  
Charleston, WV 25311-1261  
(304) 345-5667

Perry B. Jones (WVSB# 9683)  
Gerald E. Jones (WVSB# 1920)  
West & Jones  
360 Washington Ave  
Clarksburg, WV 26302  
(304) 624-5501

Gary W. Rich (WVSB #3078)  
Law Office of Gary W. Rich, L.C.  
212 High Street, Suite 223  
Morgantown, WV 26505  
(304) 292-1215

J. Farrest Taylor  
Cochran, Cherry, Givens, Smith, Lane & Taylor, P.C.  
163 West Main Street  
Dothan, AL 36301  
(334) 793-1555

Michael Papantonio  
Levin, Papantonio, Thomas, Mitchell, Eschsner & Proctor, P.A.  
316 S. Baylen Street, Suite 400  
Pensacola, FL 32502  
(850) 435-7074

Robert F. Kennedy, Jr.  
Kennedy & Madonna, LLP  
48 Dewitt Mills Rd  
Hurley, NY 12443  
(845) 331-7514

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.,

Defendant Below/Appellee.

---

CERTIFICATE OF SERVICE

---

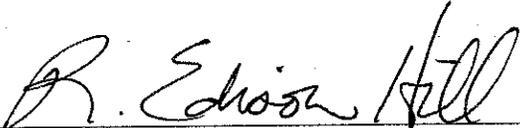
I, R. Edison Hill, counsel for Plaintiffs, hereby certify that I have served a true and exact copy of "APPELLANTS' REPLY TO APPELLEE DUPONT'S BRIEF" upon the following counsel via US Mail this 17<sup>th</sup> day of December 2008:

James S. Arnold, Esq.  
David B. Thomas, Esq.  
ALLEN GUTHRIE MCHUGH & THOMAS, PLLC  
PO Box 3394  
Charleston, WV 25333-3394  
*Counsel for E. I. du Pont de Nemours and Company*

Jeffrey A. Hall, Esq.  
BARTLIT BECK HERMAN PALENCHAR & SCOTT LLP  
Courthouse Place  
54 West Hubbard Street, Suite 300  
Chicago, IL 60610  
*Counsel for E. I. du Pont de Nemours and Company*

Frank E. Simmerman, Jr., Esq.  
SIMMERMAN LAW OFFICE, PLLC  
254 East Main Street  
Clarksburg, WV 26301-2170  
*Counsel for E. I. du Pont de Nemours  
and Company*

Richard W. Gallagher, Esq.  
ROBINSON & MCELWEE, PLLC  
140 West Main Street, Suite 300  
Clarksburg, WV 26301  
*Counsel for Defendant T. L. Diamond  
& Company, Inc.*

  
\_\_\_\_\_  
R. Edison Hill (WVSB #1734)  
HILL, PETERSON, CARPER, BEE & DEITZLER, P.L.L.C.  
NorthGate Business Park  
500 Tracy Way  
Charleston, WV 25311-1261  
304-345-5667