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IN THE CIRCUIT COURT OF
HARRISON COUNTY, WEST VIRGINIA

LENORA PERRINE, CAROLYN HOLBERT, WAUNONA MESSINGER CROUSER, REBECCAH MORLOCK, ANTHONY BEEZEL, MARY MONTGOMERY, MARY LUZADER, TRUMAN R. DESIST, LARRY BEEZEL, and JOSEPH BRADSHAW, individuals residing in West Virginia, on behalf of themselves and all others similarly situated,

Plaintiffs,

vs. **Case No. 04-C-296-2**

(Honorable Thomas A. Bedell)

E.I. DU PONT DE NEMOURS AND COMPANY, a Delaware corporation doing business in West Virginia, MEADOWBROOK CORPORATION, a dissolved West Virginia corporation, MATTHIESSEN & HEGELER ZINC COMPANY, INC., a dissolved Illinois corporation formerly doing business in West Virginia, and T. L. DIAMOND & COMPANY, INC., a New York corporation doing business in West Virginia,

Defendants.

_____/

ORDER DENYING DUPONT'S MOTION FOR JUDGMENT AS A MATTER OF LAW, OR, IN THE ALTERNATIVE, TO DECERTIFY THE CLASS

The following pleadings are before the Court:

1. DuPont's Motion for Judgment as a Matter of Law, or, in the Alternative, to Decertify the Class;
2. Plaintiffs' Response to DuPont's Motion for Judgment as a Matter of Law, or, in the Alternative, to Decertify the Class; and,
3. DuPont's Reply to Plaintiffs' Response to DuPont's Motion for Judgment as a Matter of Law.

DuPont has moved the Court to enter judgment as a matter of law in favor of DuPont with respect to all of Plaintiffs' claims. Both DuPont and Plaintiffs have incorporated by reference each of its prior motions for judgment as a matter of law and responses, respectively. DuPont has alternatively moved the Court to decertify the class because Plaintiffs' claims and DuPont's defenses are individualized rather than common to the class.

Upon review of the above referenced pleadings, and after conducting a thorough examination of the pertinent legal authority, the Court finds, for the reasons set out below, that DuPont's Motion for Judgment as a Matter of Law and, alternatively, to Decertify the Class is due to be denied.

FINDINGS OF FACTS AND CONCLUSIONS OF LAW

DuPont raises few new issues in this most recent request for judgment as a matter of law and decertification. Accordingly, the Court incorporates by reference all previous Orders addressing these same issues. To the extent any new issues are raised, the Court will address them herein.

When the plaintiff's evidence, considered in a light most favorable to him, fails to establish a prima facie right to recovery, the trial court should direct a verdict in favor of the defendant. *See* Jones v. Patterson Contracting, Inc., 206 W. Va. 399, 524 S.E.2d 915 (1999). As set out below, the Court finds Plaintiffs have carried their burden of establishing a prima facie right to recovery.

1. **Off-site testing.** DuPont argues that pursuant to *Carter v. Monsanto Co.*, 212 W. Va. 732, 734-36, 575 S.E.2d 342, 343-46 (2002), it had no duty to perform off-site testing and therefore DuPont's failure to test off-site cannot be a basis for liability. DuPont's reliance on *Carter* is misplaced. In *Carter*, the plaintiffs brought an action for property monitoring, akin to a cause of action for medical monitoring. Plaintiffs do not seek property monitoring as a remedy in this action. Moreover, DuPont's refusal to remediate their property (including off-site testing)

is indicative of DuPont's negligent and reckless conduct. DuPont conducted extensive testing on its property to determine the degree of contamination. DuPont knew that the same contamination migrated off-site. These facts created a duty on DuPont to take some action to protect the surrounding communities from exposure. Rather than testing or warning, DuPont engaged in a plan to minimize or eliminate any concerns about off-site contamination.

2. **Continuing Duty**. DuPont contends that after it sold the smelter, it had no liability in negligence for the smelter's dangerous condition, and, therefore, Plaintiffs should not have been permitted to argue at trial that DuPont had some continuing legal duty after DuPont sold the site in 1950.

As matter of West Virginia law, DuPont, as a former landowner who created a dangerous condition, owed a duty to use reasonable care to protect visitors to the property from foreseeable risk of harm. *Strahin v. Cleavenger*, 216 W. Va. 175, 184, 603 S.E.2d 197, 205 (2004). Closely related to the concept of foreseeability is notice. "A duty to warn arises if" DuPont was "on notice of a dangerous condition brought about by its activities, or if it was reasonably foreseeable to" DuPont "that its activities would pose a foreseeable danger . . . ." *Bond v. Morton Buildings, Inc.*, 815 F. Supp. 944, 946 (S.D. W. Va. 1993). If DuPont challenges foreseeability or notice, then duty is conditioned upon a jury's evidentiary finding of the facts demonstrating foreseeability or notice. *Strahin v. Cleavenger*, 216 W. Va. 175, 184, 603 S.E.2d 197, 205 (2004).

Plaintiffs presented evidence showing that (1) in 1919, DuPont's predecessor knew that its operations were damaging the environment and threatening the health of families residing nearby; (2) in 1928, when DuPont purchased the property, it was aware that the operations were damaging the environment and threatening the health of families residing nearby; (3) when

DuPont sold this property in 1951, it knew that it was leaving behind a mountain of toxic waste containing heavy metals adjacent to residential properties; (4) DuPont, as a leader in industrial toxicology in the 1930s, knew of the dangers posed by heavy metals; (5) DuPont knew in the 1940s that industrial waste needed to be managed to protect workers and surrounding communities; (6) DuPont investigated the site as early as 1979 but failed to take any action even though its investigation demonstrated that people were at risk of being exposed to the toxic materials associated with the smelter; (7) Mathiessen and Hegeler did not have the resources, financial or otherwise, to address the pile left behind by DuPont; and (8) T. L. Diamond, as a secondary smelting company, did not have the financial and technological resources to deal with the pile. Based upon these facts, a reasonable jury could conclude that DuPont knew or should have at least foreseen the dangers (that the pile DuPont had helped create) would pose to the surrounding communities' residents.

3. **Causation**. DuPont also contends that Plaintiffs failed to present sufficient evidence demonstrating that DuPont caused the presence of arsenic, cadmium or lead throughout the class area at levels posing an unreasonable risk of harm. Plaintiffs presented evidence that the presence of arsenic, cadmium, and lead throughout the class area had significantly increased the class members' risk for several diseases. Plaintiffs also presented evidence that DuPont had created and/or contributed to the presence of arsenic, cadmium and lead throughout the class area. Therefore the issue of unreasonable risk of harm was properly submitted to the jury.

4. **Conclusory Allegations**. DuPont complains that Plaintiffs' experts presented conclusory allegations of the presence of arsenic, cadmium and lead on the Plaintiffs' properties and that such allegations are insufficient to meet Plaintiffs' evidentiary burden. The Court disagrees with DuPont's assessment of the experts' opinions. Plaintiffs presented the testimony

of experts who had extensively sampled the class area and who had developed computer models showing the contamination throughout the class area. Plaintiffs presented evidence demonstrating their expert witnesses' opinions were supported by their factual investigations, testing and sound methodology.

5. **Strict Liability**. DuPont contends that Plaintiffs' were unable to present evidence satisfying each of the required strict liability factors articulated in *Peneschi v. Nat'l Steel Corp.*, 295 S.E.2d 1, 10-11 (W. Va. 1982). Specifically, DuPont argues that because Plaintiffs offered evidence that DuPont could have taken steps to eliminate the risk of emissions from the plant and the residue pile, Plaintiff's strict liability claim must fail.

The Court finds Plaintiffs presented evidence of each of the elements compromising strict liability. The jury heard evidence that the smelter process created harmful pollution and that for decades the pile was an unabated source of heavy metal pollution. In response, DuPont argued that it had modernized the smelter and used current technology to prevent pollution while it owned the plant. Therefore, it was reasonable for the jury to infer from DuPont's defense that there were no means to eliminate the risk and DuPont engaged in an unreasonable dangerous activity.

6. **Medical Monitoring**. DuPont argues that Plaintiffs failed to present evidence satisfying each of the *Bower* requirements. The Court finds, however, that Plaintiffs satisfied all the *Bower* requirements. Plaintiffs provided testimony that the entire class area was significantly exposed to dangerous toxins from the smelter. Plaintiffs also presented testimony that because the class members are at an increased risk of contracting a serious latent disease, medical monitoring is reasonably necessary as a result of this exposure. This evidence was sufficient for Plaintiffs to carry their burden.

7. **Property Damage Claim**. DuPont also contends that Plaintiffs' remediation plan was based on untested, speculative assumptions and should be dismissed. Plaintiffs, through expert testimony, presented a highly detailed remediation plan. The steps in the remediation plan are generally accepted and the projected costs were derived from reliable sources generally relied upon by remediation experts. Notably, DuPont did not present any evidence in opposition to Plaintiffs' expert testimony and detailed remediation plan.

8. **Punitive Damages**. (DuPont's Paragraphs 11-16). With respect to the propriety of the punitive damage award, the Court incorporates by reference its conclusions of laws and findings fact contained in its Order Denying DuPont's Motion for New Trial and in its Order Denying DuPont's Motion to Vacate or Reduce Punitive Damages Award.

9. **Other facilities**. (DuPont's Paragraphs 17-19). With respect to the propriety of admitting evidence of other facilities, the Court incorporates by reference its conclusions of laws and findings fact contained in its Order Denying DuPont's Motion for New Trial and in its Order Denying DuPont's Motion to Vacate or Reduce Punitive Damages Award.

10. **Class certification**. (DuPont's Paragraphs 20 – 24). With respect to the propriety of certification, the Court incorporates by reference its conclusions of laws and findings fact contained in its Order Denying DuPont's Motion for New Trial and in its Order Denying DuPont's Motion to Vacate or Reduce Punitive Damages Award.

DuPont claims that Plaintiffs' withdrawal of its diminution in value claim was the only evidence that would have supported certification of the property damage class. The fact that Plaintiffs dropped their diminution in property value claim does not affect class certification. The Court has consistently treated remediation as a damage claim that was common for every property class member.

Based on consideration of the foregoing, it is ORDERED and ADJUDGED that DuPont's Motion for Judgment as a Matter of Law, or in the alternative, to decertify the class is DENIED.

Furthermore, the Court finds that DuPont's objections and exceptions as set forth in DuPont's Motion, Plaintiff's Response, DuPont's Reply and DuPont's arguments in the trial record are preserved.

Lastly, pursuant to W.Va. R. Civ. Rule 54(b), the Court directs the entry of this Order as to the claims above upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment.

The Clerk is directed to forward certified copes of this Order to J. Farrest Taylor, Esquire, Cochran, Cherry, Givens, Smith, Lane & Taylor, PC, 163 W. Main Street, Dothan, Alabama 36302, liaison counsel for Plaintiffs, and David B. Thomas, Esquire, Allen Guthrie McHugh & Thomas, PLLC, P.O. Box 3394, Charleston, West Virginia 25333-3394.

ENTERED this 25th day of February, 2008.

Thomas A. Bedell, Judge