IN THE CIRCUIT COURT OF HARRISON COUNTY, WEST VIRGINIA

WAUNONA JEAN CROUSER

Civil Action No. 10-C-247-2
CONSOLIDATED
Thomas A. Bedell, Judge

REBECCA FAITH MORLOCK, (10-C-248-2)
DONALD LEE CROUSER, (10-C-259-2)
AMANDA JANE FINCH, (10-C-260-2)
JOSHUA PAUL FINCH, (10-C-261-2)
JOEL R. MORLOCK, JR., (10-C-265-2)
CHRISTINA MORLOCK, (10-C-266-2)
MATTHEW DAVID NICHOLSON, (10-C-270-2)
MICHAEL JOSEPH MORLOCK, (10-C-271-2)
MARY JUNE LEASURE SPROUT, (10-C-272-2)
KASANDRA FAITH FINCH, (10-C-277-2)
ELIZABETH R. MORLOCK, (10-C-278-2)
NICKOLE HOPE RILEY, (10-C-284-2)
MARSHA LYNN MORLOCK, in her capacity as Executrix of the Estate of JOEL R. MORLOCK, SR., (10-C-286-2)
MARSHA MORLOCK, (10-C-289-2)

Plaintiffs,

v.

E. I. DU PONT DE NEMOURS AND COMPANY, a Delaware corporation doing business in West Virginia, MEADOWBROOK CORPORATION, a dissolved West Virginia corporation, MATTHIESSEN & HEGLER ZINC COMPANY, INC., a dissolved Illinois corporation formerly doing business in West Virginia, NUZUM TRUCKING, INC., a West Virginia corporation, T.L. DIAMOND & COMPANY, INC., a New York corporation doing business in West Virginia, and JOSEPH PAUSHEL, an individual residing in West Virginia,

Defendants.

AND

LENORA PERRINE, et al., individuals residing in West Virginia, on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

Civil Action No. 04-C-296-2
Thomas A. Bedell, Judge

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

Defendants.

ORDER ALLOWING PARTICIPATION OF PRESENT PERSONAL INJURY PLAINTIFFS IN MEDICAL MONITORING REMEDIAL PROGRAM PROVIDED BY *LENORA PERRINE, ET AL. V. E. I. DU PONT DE NEMOURS AND COMPANY, ET AL.*, CIVIL ACTION NO. 04-C-296-2

Pending before this Court is the issue of whether or not the living *pro se* Plaintiffs in these consolidated cases are entitled to participate in the medical monitoring remedy provided by the settlement in *Perrine et al v. DuPont et al*, Civil Action No. 04-C-296-2 (hereinafter referred to as "Perrine / Dupont Settlement") while seeking damages for present personal injuries allegedly caused by exposure from the former zinc smelting facility.

Defendants DuPont and T.L. Diamond filed their *Submission in Connection with Precluding Medical Monitoring Program Participation for Present Personal Injury Plaintiffs who Already Allege a Multitude of Diseases and Illnesses* ("Defendants' Submission") on June 7, 2011. This Court received the *Submission of Class Counsel Regarding the Rights of Those "Present" Personal Injury Plaintiffs to Participate in the Medical Monitoring* on July 6, 2011. The guardian *ad litem* of the minors and

incompetents of both Plaintiff classes filed her *Response to Defendants Submission in Connection with Precluding Medical Monitoring Program Participation for Personal Injury Plaintiffs Who Currently Allege Multitude of Diseases & Illness* on that same day. Finally, the Defendants submitted their *Reply* to the above responses on July 20, 2011.

After a thorough review of those documents and all pertinent legal authority, this Court hereby **ORDERS** that current personal injury plaintiffs shall be allowed to participate in the medical monitoring program set forth pursuant to the DuPont / Perrine settlement for the foregoing reasons.

Relevant Factual and Procedural Backgrounds

1. This action was initially filed on June 15, 2004, against Defendants E.I. du Pont de Nemours and Company ("DuPont"), T. L. Diamond & Company, Inc., Meadowbrook Corporation, Matthiessen & Hegeler Zinc Company, Inc., Nuzum Trucking Company ("Nuzum"), and Joseph Paushel ("Mr. Paushel").
2. On September 14, 2006, this Court granted class certification and certified both a Property Class and a Medical Monitoring Class ("Plaintiff Classes") in this case pursuant to the provisions of Rule 23 of the West Virginia Rules of Civil Procedure. Upon appeal, the certification of both classes was upheld by the W. Va. Supreme Court. "Having found no error in the circuit court's disposition of each of the elements to be considered in certifying a class under Rule 23(a) and (b), we find that certification was proper. Consequently, DuPont's claim that class certification violated its due process rights by preventing it from presenting individualized evidence and individualized defenses is without merit." *Perrine v. E.I. du Pont de Nemours and Co.* 694 S.E.2d 815, 861 (2010).

3. After extensive discovery and pre-trial litigation, this matter proceeded to trial beginning on September 10, 2007, and the trial lasted for approximately six weeks. The trial consisted of four phases, and the jury returned verdicts in favor of the Plaintiffs. The verdicts were ultimately rendered as awards of fifty-five million five hundred and thirty-seven thousand five hundred and twenty-two dollars and twenty-five cents ($55,537,522.25) for property damage and associated remediation costs, an estimated award of approximately one hundred and thirty million dollars ($130,000,000.00) for a future medical monitoring program to last for 40 years, and a punitive damages award of one hundred and ninety-six million and two hundred thousand dollars ($196,200,000.00).
4. Said verdicts were the result of the jury finding that the Plaintiffs' property and persons were exposed to elevated and dangerous levels of lead, cadmium, and arsenic, among other heavy metals, due to the long operation of a smelting facility in Spelter which polluted the class area.
5. On November 16, 2007, this Court entered an *Amended Final Judgment Order* finalizing the jury's verdict in the amounts described above against Defendant DuPont.
6. Thereafter, both the Plaintiffs and Defendants appealed numerous aspects of this Court's pre-trial, trial, and post-trial rulings to the West Virginia Supreme Court of Appeals.
7. On March 26, 2010, after a lengthy appellate process, the West Virginia Supreme Court of Appeals remanded this litigation to the Court with directions to conduct a trial on DuPont's statute of limitations defense.

8. The Supreme Court modified the punitive damages award, but conditionally affirmed the remainder of the verdict, which then consisted of approximately three hundred million dollars ($300,000,000.00). The Supreme Court determined that this Court erred in granting judgment as a matter of law in favor of the Plaintiffs on the affirmative defense of the statute of limitations and directed this Court to hold a second trial to determine if the defense was merit worthy.

9. The effect of the Supreme Court's directive created an all or nothing proposition for the parties. If the Plaintiffs prevailed on the statute of limitations issue, they would receive the relief obtained in the 2007 trial, as modified by the Supreme Court opinion. If DuPont prevailed, this Court would set aside the 2007 verdicts and render judgment in favor of DuPont, and the Plaintiffs would receive nothing. *Perrine v. E.I. du Pont de Nemours and Co.*, 694 S.E.2d 815, 854 (2010).

10. The Plaintiffs and Defendant both considered the directives of the Supreme Court's opinion and prepared for trial, which was set for the month of March, 2011. The Parties reached this settlement after considering the substantial amount of risk and expense remaining in the case for both sides. On November 19, 2010, the Parties advised the Court that a proposed compromise and settlement had been reached. Thereafter, on November 24, 2010, the Court set a December 30, 2010, hearing to hear the Parties and to receive evidence and argument as to the fairness of the proposed settlement.

11. On December 6, 2010, the Court appointed Meredith McCarthy, a discrete and competent attorney practicing before this Court who is familiar with the facts involved in this case, to serve as guardian *ad litem* to protect the interests of any

minors who may be members of the Plaintiff Classes. Mrs. McCarthy previously served as a guardian *ad litem* in this matter and is uniquely familiar with this issues presented.

12. After determining that proper notice of the settlement was given to all members of the Plaintiff classes and determining that the settlement was fair, this Court entered its *Final Order Approving Settlement* on January 4, 2011.

13. Alongside that *Final Order Approving Settlement*, this Court entered a *Final Order Setting forth the Scope and Operation of the Medical Monitoring Plan.* ("Medical Plan Order"). In that *Medical Plan Order*, this Court adopted language from the parties' *Memorandum of Understanding*, stating that the "Defendant reserves the right to reasonably challenge the enrollment of any Plaintiff in the medical monitoring program and / or property remediation class. With respect to any challenge relevant to the issue of eligibility for enrollment, the challenger shall pay reasonable costs and attorney fees if the challenge is not successful." It also dictates that this Court "will hear any disputes as to the inclusion or exclusion of a potential class member."

14. The *Medical Plan Order* also laid out the method by which members of the Plaintiff Classes would register for the medical monitoring program. It mandated that there be a six-month signup period, in which the Plaintiffs would submit "application[s] to enroll" in the program.

15. Personal injury plaintiffs who are currently alleging medical harms brought on by the Defendants' alleged tortuous actions began to sign up for the medical monitoring program after its enactment.

16. Defendants DuPont and T.L. Diamond filed their *Submission in Connection with Precluding Medical Monitoring Program Participation for Present Personal Injury Plaintiffs who Already Allege a Multitude of Diseases and Illnesses* ("Defendants' Submission") on June 7, 2011.

17. In the *Defendants' Submission*, they argue the following:

    a. Their exception to the participation of the present Plaintiffs in the medical monitoring program is properly litigated under the above-styled action and not in *Perrine, et al.* v. *E. I. Du Pont de Nemours and Company, et al.*, Civil Action No. 04-C-296.

    b. This matter is premature for adjudication because the full range of injuries suffered by the Plaintiffs would not be known until July 1, 2011.[1]

    c. The present personal injury Plaintiffs should not be allowed to participate in medical monitoring programs because they would be benefitting twice from the same claim.

18. The class counsel's *Response* and the guardian *ad litem*'s *Response* are substantially similar and can be summarized as follows:

    a. This matter would be best litigated under *Perrine* and not in the instant action.

    b. This matter is ripe for adjudication.

    c. The present personal injury plaintiffs are entitled to participate in the medical monitoring program and pursue their personal injury claims, and their participation would not constitute a "double recovery."

19. The Defendants' *Reply* raised no new arguments.

[1] The Defendants filed their *Submission* containing this argument on June 7, 2011, well before July 1, 2011.

Analysis

In the pleadings discussing whether to allow the present personal injury plaintiffs to pursue medical monitoring, three issues present themselves before this Court. It now addresses those issues in turn.

i. This issue would be best litigated in *Perrine* because all personal injury plaintiffs are class members under that case and because that case spawned the medical monitoring program.

The Defendants chose to avail themselves in the above-styled action when challenging the present personal injury plaintiffs' participation in the medical monitoring program. They argue that they did so because they "seek to preclude any *present* personal injury Plaintiffs from participating in the medical monitoring portion of the Perrine / DuPont Settlement." (Defendants' Submission, p 3). Nowhere else in their *Submission* or *Reply* do they give any other sound reason for filing their challenge in the above-styled action.

However, all parties involved agree that the personal injury plaintiffs were class members of *Perrine*. This challenge is brought under the language adopted from the *Memorandum of Understanding* in *Perrine* and ultimately used in the *Medical Plan Order* entered in *Perrine*. It is abundantly clear to this Court that this challenge is under the dominion and subject-matter of *Perrine*.

Therefore, this Court sees no reason that the Defendants would avail himself to *Crouser* as a vehicle for this challenge. It is only logical, pursuant to the *Memorandum of Understanding*, the *Settlement Order* and the *Medical Plan Order*, that this challenge would be appropriately litigated in that matter, rather than *Crouser*. Shoehorning this matter into *Crouser* is senseless.

It is not necessary for this Court to speculate as to the Defendants' rationale for bringing this challenge under the banner of *Crouser*. Although the Plaintiffs raise poignant hypotheses as to that question[2], the fact that *Perrine* is the superior vehicle for this challenge will suffice. Therefore, this Court will hereby decide this matter under the terms of the *Settlement* and *Medical Plan Order* outlined in *Perrine, et al.* v. *E. I. Du Pont de Nemours and Company, et al.*, Civil Action No. 04-C-296.

ii. This matter is ripe for adjudication because reports on causation have no bearing on the issue at hand: whether all present personal injury plaintiffs are entitled to medical monitoring under the Perrine / DuPont Settlement.

In its *Submission*, the Defendants contend that "until [July 1, 2011, the deadline for Plaintiff expert disclosures] has come and gone, the full range of injuries Plaintiffs are alleging were caused from exposure to the former zinc smelting facility, as well as any further medical expense claims, will not be known." (Defendants' Submission, p 4). However, this argument fails for two reasons.

First, and perhaps most obviously, the July 1, 2011, has, in fact, come and gone. This, perhaps, negates the Defendants' argument *per se*, but even if it did not, this Court still sees no link between expert opinion and ripeness. Since the passage of that date, the Defendants have correctly indicated that the Plaintiffs have not yet produced any expert or medical opinion that exposure to heavy metals from the smelter caused any of the Plaintiffs' alleged injuries. However, the lack of opinions is irrelevant to the ripeness issue at hand.

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[2] The *Perrine* class members, in their *Response to the Defendants' Submission*, contend that "[b]y bringing this issue in this matter, DuPont seeks to avoid the ramifications of unsuccessful challenges to enrollment in the medical monitoring, that is, the payment of attorneys' fees. As evidenced by its statement, 'DuPont questions whether Class counsel . . . should brief this issue at all,' DuPont also seeks to take advantage of pro se litigants who would have representation on this issue if this issue was brought in the appropriate forum."

"West Virginia does not require plaintiffs to show physical injury before obtaining medical monitoring." *Bower v. Westinghouse Elec. Corp.*, 552 S.E.2d 424 (W. Va. 1999). There is no correlation between whether expert opinion has established a causal link between alleged tortuous act and alleged harm and ripeness for this suit.

Furthermore, delaying judgment on this issue could adversely affect the health of many of the medical monitoring claimants. Simply put, this Court sees absolutely no reason why it should wait to issue a ruling concerning medical monitoring participation.

iii. The present personal injury Plaintiffs have the right to participate in the medical monitoring program while pursuing their personal injury claims because they are entitled, under the Perrine / DuPont settlement, to be monitored for latent harms.

In their *Submission*, the Defendants accuse the Plaintiffs of attempting to obtain a double recovery. In essence, they contend that, because the present personal injury Plaintiffs already allege the existence of a myriad of injuries, those Plaintiffs should not be allowed to use the medical monitoring as a *de facto,* thinly veiled attempt to prove their alleged injuries sustained at the hands of the Defendants' alleged wrongful conduct.

The West Virginia Supreme Court has spoken out against double recovery. In doing so, it has stated that "[i]t is generally recognized that there can be only one recovery of damages for one wrong or injury. Double recovery of damages is not permitted; the law does not permit a double satisfaction for a single injury." Syl. Pt. 7, *Harless v. First Nat'l Bank of Fairmont*, 289 S.E.2d 692 (W. Va. 1982). However, as our Supreme Court has also articulated, medical monitoring constitutes a separate cause of action in tort cases. "A cause of action exists under West Virginia law for the recovery of medical monitoring costs, where it can be proven that such expenses are necessary and reasonably certain to be incurred as a proximate result of a defendant's tortuous conduct."

Bower v. Westinghouse Electric Corporation, 206 W. Va. 133, 140 (W. Va. 1999). Therefore, a medical monitoring claim constitutes an independent injury. In medical monitoring claims, the injury is "the exposure itself and the concomitant need for medical testing." *Id.* at 139. After all, "physical harm resulting from such exposure is often latent." *Id.* at 138.

Here, the present personal injury plaintiffs are currently seeking damages for already-identified diseases. In this case, like many other toxic tort cases, there are also latent diseases that can arise after the initial cause of action is long-gone. The Defendants miss the point in contending that "[e]ither the Plaintiffs suffer *present* injury as they have alleged [...] or they do not currently suffer any *present* personal injury." (Defendants' *Reply*, p. 3). The purpose of medical monitoring, pursuant to the DuPont / Perrine settlement, is to ensure that these latent diseases are found early, if they manifest, so that they might be treated in an expedient manner.

However, the Defendants argue that this cry for vigilance is a smokescreen. In their pleadings, they have submitted excerpts from several depositions in which members of the medical monitoring plaintiff class discuss using test results to detect present injuries. The Defendants contend that this motive should preclude all present injury plaintiffs from participating in the program. This Court disagrees. The fact that the Plaintiffs might decide to use testing results to bolster their claims is incidental to the terms of the Perrine / DuPont settlement. Ultimately, medical monitoring is still needed to scan for any latent diseases that might arise.

Conclusion

In seeking medical monitoring, the present personal injury Plaintiffs are not attempting to "have it both ways." Clear West Virginia precedent dictates that a claim for medical monitoring is a separate cause of action. Clear policy dictates that the present personal injury Plaintiffs need medical monitoring to ensure appropriate medical attention if latent diseases should manifest. Therefore, it is clear to this Court that the present personal injury plaintiffs should be allowed to participate in medical monitoring.

Accordingly, it is **ORDERED** that the present personal injury Plaintiffs shall be allowed to participate in the medical monitoring program promulgated in the Perrine / Dupont Settlement.

It is further **ORDERED** that, pursuant to that agreement and the *Medical Plan Order*, the Defendants shall pay the attorney's fees of all parties that accumulated because of and during this unsuccessful challenge.

Finally, it is **ORDERED** that the Clerk of this Court shall provide certified copies of this Order to the following:

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ENTER: August 16, 2011

THOMAS A. BEDELL, Judge

STATE OF WEST VIRGINIA
COUNTY OF HARRISON, TO-WIT:

I, Donald L. Kopp II, Clerk of the Fifteenth Judicial Circuit and the 18th Family Court Circuit of Harrison County, West Virginia, hereby certify the foregoing to be a true copy of the ORDER entered in the above styled action on the 16 day of August, 2011.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix Seal of the Court this 16 day of August, 2011.

Donald L Kopp II

Fifteenth Judicial Circuit & 18th Family Court
Circuit Clerk
Harrison County, West Virginia