

FAX TRANSMISSION

WV SUPREME COURT OF APPEALS

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From: Kandi L. Greter
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Subject:

COMMENTS:

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

LENORA PERRINE, et al.,

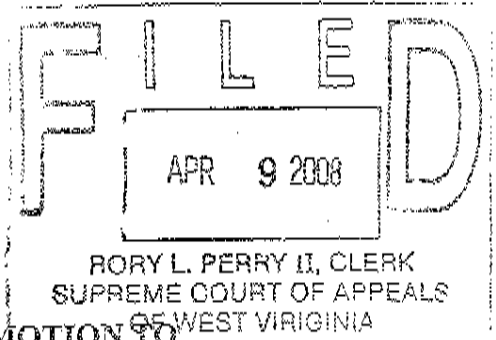
Petitioners,

v.

No. 080721

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

Respondents.



**DUPONT'S RESPONSE TO PETITIONERS' MOTION TO
RECUSE AND DISQUALIFY THE HONORABLE BRENT D. BENJAMIN**

Respondent E.I. du Pont de Nemours and Company ("DuPont") responds to Petitioners' Motion to Recuse and Disqualify the Honorable Brent D. Benjamin as follows:

1. Petitioners' Motion exaggerates the role of T.L. Diamond & Co., Inc. and Robinson & McElwee PLLC in this matter. In September 2007, the Circuit Court granted partial summary judgment against DuPont, finding that DuPont is required to indemnify T.L. Diamond. T.L. Diamond, represented by Robinson & McElwee, did not appear on any day of the more than five week trial of this matter. Nor did T.L. Diamond appear at the post-trial medical monitoring proceedings in this matter. T.L. Diamond has not yet participated, and may never participate, in any way in the proceedings in this Court regarding this matter.

2. On March 31, 2008, Petitioners moved to recuse Justice Benjamin "from all manner of all proceedings before the West Virginia Supreme Court of Appeals in this matter." Motion at 2-3. Petitioners argue that Justice Benjamin should disqualify himself "to avoid any

appearance of bias or impropriety.” *Id.* at 6. Petitioners say that the risk of an appearance of bias exists because Justice Benjamin was an attorney practicing at the law firm of Robinson & McElwee in October 2004, which is when T.L. Diamond, one of several defendants in this matter, filed an answer. T.L. Diamond was and is represented by Robinson & McElwee.

3. On September 14, 2007, the Circuit Court granted Plaintiffs’ Motion for partial Summary Judgment on the issue of whether DuPont is required to indemnify T.L. Diamond, and denied DuPont’s Motion for Summary Judgment on T.L. Diamond’s express indemnity claim.

4. Since that time, T.L. Diamond’s role in this matter has been limited to pursuing indemnification from DuPont for legal fees and expenses that T.L. Diamond incurred in connection with this matter.

5. T.L. Diamond did not appear on any day of the more than five week trial of this matter.

6. The jury assigned no responsibility to T.L. Diamond for any tort, and awarded no damages or other relief against T.L. Diamond.

7. T.L. Diamond has not appeared at any of the post-trial medical monitoring proceedings before the Circuit Court in this matter.

8. Neither Petitioners’ Petition nor DuPont’s Response to that Petition relates to the rights or liabilities of T.L. Diamond. Petitioners’ Petition challenges a single Circuit Court order granting summary judgment in favor of DuPont and against Plaintiffs on the property-damage claims of a subset of Plaintiffs whose chain of title contained certain releases and easements. The narrow issue raised in the Petition is unrelated to DuPont’s alleged obligation to indemnify

T.L. Diamond. Neither Petitioners nor DuPont so much as mention T.L. Diamond in their briefs.

9. T.L. Diamond has filed no pleading, motion, or brief of any kind in this Court in connection with this matter (No. 080721).

10. DuPont intends to file one or more Petitions with this Court on or before June 24, 2008. DuPont expects to raise in its Petition(s) the Circuit Court's erroneous rulings that occurred at trial and during the post-trial medical monitoring proceedings, none of which T.L. Diamond appeared at. For the reasons stated above, these rulings do not relate to T.L. Diamond.

11. DuPont may assign as error the Circuit Court's order regarding the T.L. Diamond indemnification issue. If DuPont assigns the T.L. Diamond indemnification issue as error, then DuPont intends to raise that issue in a separate Petition.


For all of these reasons, Petitioners' Motion should be denied. In the alternative, any decision on Petitioners' Motion should await the filing of DuPont's Petition(s), at which time the Court will have a far more complete factual basis for analyzing Petitioners' asserted grounds for recusal.

Respectfully submitted,

E.I. DU PONT DE NEMOURS AND CO.

Respondent

BY COUNSEL:



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Dated: April 9, 2008

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

LENORA PERRINE, et al.,

Petitioners,

v.

No. 080721

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

Respondents.

CERTIFICATE OF SERVICE

I, James S. Arnold, counsel for Respondent, E.I. du Pont de Nemours and Company, hereby certify that service of "DuPont's Response to Petitioners' Motion to Recuse and Disqualify the Honorable Brent D. Benjamin" has been made upon counsel of record via Regular U. S. Mail and Federal Express for overnight delivery on this 9th day of April, 2008, addressed as follows:

Regular U. S. Mail

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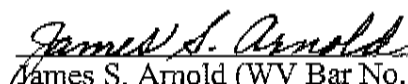
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STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 2nd day of April 2008, the following order was made and entered:

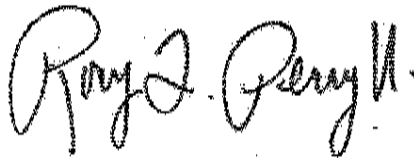
Lenora Perrine, et al.

vs.) No. 080721

E. I. DuPont De Nemours and Company, et al.

On this day, to-wit, April 2, 2008 came the Honorable Brent D. Benjamin, Justice of the Supreme of Court of Appeals of West Virginia, and notified the Clerk of this Court of his voluntary disqualification from participating in the above-captioned proceedings, pursuant to Canon 3(E)(1) (b) of the Code of Judicial Conduct.

A True Copy




Attest: _____

Clerk, Supreme Court of Appeals

MEMORANDUM

To: Rory L. Perry, II, Clerk
Edythe Nash, Deputy Clerk

From: Brent D. Benjamin, Justice 

Date: April 2, 2008

Re: *Lenora Perrine, et al. v. E. I. DuPont De Nemours and Company, et al.*
Case No. 080721

Pursuant to Canon 3(E)(1)(b) of the Code of Judicial Conduct, please be advised that I voluntarily disqualify myself from participating in the above-referenced case.

cc: Chief Justice Maynard
Justice Starcher
Justice Davis
Justice Albright
Bruce Kayuha, Chief Counsel
Shannon Green, Recusal Administrative Assistant