

FILED

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA
AT CHARLESTON

MAR 29 2001

TRANSCRIPT OF PROCEEDINGS

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U. S. District & Bankruptcy Courts
Southern District of West Virginia

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WILBUR EARL TENNANT, et al. : CIVIL ACTION

Plaintiffs, : NO. 6:99-0488

vs. :

E.I. DUPONT NEMOURS & : March 26, 2001

COMPANY, INC. :

Defendant. :

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MOTIONS HEARING

BEFORE THE HONORABLE JOSEPH R. GOODWIN
UNITED STATES DISTRICT JUDGE

APPEARANCES:

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Court Reporter: Lisa A. Cook, RPR-RMR

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1 MR. TINNEY: -- and the reasons that we do it.

2 We believe that the plaintiffs and their counsel
3 should be limited to trying their case within the confines
4 of this court in accordance with the applicable procedural,
5 ethical, and evidentiary rules.

6 Now, the plaintiffs chose this as the forum in
7 which they would have their case heard and to bring their
8 claims before an impartial jury, not in the media or in
9 other government, before other government agencies.

10 Additionally, Your Honor, as as a practical
11 matter, because this case involves Dupont and because it
12 contains allegations of dangerous and widespread
13 contamination, it presents great potential for intense
14 media coverage and great potential for prejudice that will
15 threaten the basic tenet that the outcome of a trial must
16 be decided by impartial jurors.

17 The Court need look no further than the movies
18 for practical application, the enormous success at the box
19 office of Erin Brockovich in a civil action. Indeed,
20 Mr. Bilott's letter, in our view, is intended to salt the
21 minds of potential jurors. And the plaintiffs should not
22 be allowed to shift their burden of proof by trying it
23 through the media or through government personnel or to
24 influence government personnel who will in some instances
25 be fact witnesses, Your Honor.

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1 THE COURT: How is that different, Mr. Tinney,
2 than putting something like that in a complaint?

3 MR. TINNEY: I -- the difference is the complaint
4 has been, is filed and it's here in this court. And this
5 court controls what the evidence is going to be about any
6 allegation about fabrication.

7 Here an allegation has been made to governmental
8 agencies, some or all of which have both prosecutorial
9 authority, both criminal and civil, and, you know, they
10 have regulatory authority.

11 And the request that is in this letter to these
12 government agencies is that they intervene in this action,
13 that they revoke Dupont's permits, that they stop the
14 manufacturing process, that the Washington Works is outside
15 of the scope of this litigation.

16 And part of that request can only be premised
17 upon the reasonable inference that Dupont has fabricated
18 evidence and has created a false standard; so, therefore,
19 there should be regulatory intervention, you know,
20 regulatory investigations, regulatory remedial action
21 because of the fabrication. That's the only reasonable
22 inference.

23 THE COURT: Is it your idea that once a party
24 brings a lawsuit over, let's say, an environmental action
25 like, take the Love Canal, for example, that the party

1 plaintiffs should be then prohibited from pursuing any
2 regulatory remedies?

3 MR. TINNEY: Yes, I do, I do, once you chose the
4 forum -- the forum is this court -- and to litigate the
5 claims of the Tennants in a court setting, in a civil
6 action before a fair and impartial jury, yes. These other
7 governmental agencies, they may very well be involved and
8 they should be impartial testifying fact witnesses.

9 And, so, I believe, and it's my position and I
10 assert on behalf of my client that once they chose, the
11 Tennants and their counsel chose this forum to litigate
12 their claims, that's the forum where the litigation should
13 be heard.

14 And that trial and this action should be fair and
15 perceived to be fair without the influence of outside
16 agencies or extrajudicial statements that could be
17 disseminated to the media which will ultimately impact the
18 selection of a fair and impartial jury.

19 It's a long answer to your question, but the
20 answer is "yes." They chose the forum. That's where they
21 should be.

22 THE COURT: We try murderers, sex offenders,
23 child molesters, people in courts of this country every
24 day. And there's media coverage of the allegations, and
25 witnesses make statements to the reporters, and neighbors

1 are asked about the defendant. And the right to a fair
2 trial where you're going to be deprived of your liberty or
3 your life certainly has some irreparable harm elements that
4 perhaps the loss of money in a damages suit does not.

5 So, I understand Judge Widener's concern, but I
6 think there is a difference between a civil action and a
7 criminal action and the level of protection that's
8 desirable. That's not to say that I believe in any wise
9 that an officer of this court can engage in a deliberate
10 attempt to manipulate the attitude of a jury pool for that
11 purpose. But let's just say right now I think the bar is a
12 very high one. Let me let you finish your argument.

13 MR. TINNEY: Yes, Your Honor.

14 Your Honor, I agree with the Court. I'm not
15 disagreeing with the Court at all that there is a
16 difference between, you know, a capital crime and a civil
17 action that involves money. I agree with the Court. And I
18 agree that a gag order in a case like this needs to be
19 specific and it needs to be narrowly drawn to address
20 certain specific behavior by an officer of this court.

21 About 10:15 this morning I was hand-delivered the
22 response papers of the plaintiffs, so I've not had an
23 opportunity to, to study them in detail. But I will make a
24 couple of comments and show the Court a couple of items and
25 point out some of the statements that are in those papers

1 that are particularly disturbing, at least I feel are
2 particularly disturbing in view of a lawyer's duty of
3 candor to the Court and to opposing counsel.

4 Notably, the papers that were hand-delivered to
5 me this morning say that the letter, the March 6th, 2001,
6 letter that is complained of here in this motion to the
7 government agencies were required by law in giving notice
8 of the intent to file suit under the Clean Water Act, the
9 Resource Recovery Act, the RCRA statute, and the Toxic
10 Substances Control Act, or TSCA Act.

11 Now, Your Honor, this was a 19-page,
12 single-spaced letter with 18 footnotes that was directed to
13 11 different public officials; some federal, some state.

14 Now, the statutory requirements for giving notice
15 to file a citizen's suit under the Clean Water Act, under
16 RCRA, under TSCA are very specific. And those are found in
17 the Code of Federal Regulations.

18 And I just want to put in the record just briefly
19 what those requirements are and the Court will see how this
20 19-page letter with 18 paragraphs, 18 footnotes and
21 addressed to 11 different public officials is not the
22 notice that is required or even contemplated by the
23 regulations.

24 In connection with the Clean Water Act, here is
25 the content of notice from the regulations.

1 I submit to the Court to tell you in his papers
2 that his March 6th, 2001, letter is required by law to
3 provide the type of information set forth in the letter is
4 an overreach that perhaps reaches the level of being not
5 only misleading, but a misstatement to this Court.

6 THE COURT: What, again -- let me take you back
7 to what it is in particular that you want this Court to
8 order these lawyers and the parties on the other side not
9 to do.

10 MR. TINNEY: Okay. Your Honor, I recognize that
11 just a broad base, universal gag order is, is, is probably
12 not contemplated. I ask the Court to issue a protective
13 order or a temporary restraining order precluding,
14 prohibiting the plaintiffs and their counsel from making
15 extrajudicial statements to governmental agencies or to
16 members of the media, whether it be print or television,
17 about the content of the evidence that is going to be in
18 this case or giving extrajudicial statements that are
19 intended to influence action by other regulatory agencies
20 to -- for example, the request to intervene in this case.

21 THE COURT: Tell me why that would be a bad
22 thing.

23 MR. TINNEY: Judge, Sara Casper who, for example,
24 is a, a member of the --

25 THE COURT: I'm not saying I would allow it in

1 MR. TINNEY: The differentiation I would make is
2 the difference between objective tests that may be under
3 the authority of the regulatory agency as opposed to an
4 advocacy piece of paper.

5 THE COURT: But I, I need, I need to know what's
6 a -- before I get to the substantial likelihood that this
7 would affect a fair trial --

8 MR. TINNEY: Right.

9 THE COURT: -- I first need to know what it is
10 that you think might affect your right to a fair trial.

11 MR. TINNEY: Right. Well, the rule, Rule 3.6 of
12 the, of the Code of Professional Responsibility says a
13 lawyer is to refrain from making extrajudicial statements
14 that go to the, quote, character or credibility of, of a
15 witness. If you --

16 THE COURT: What statements are they making that
17 you want to stop in that regard?

18 MR. TINNEY: That Dupont fabricated results; that
19 Dupont engaged in impropriety; that the only reasonable
20 inference that can be drawn from it is they got a consent
21 order through Eli McCoy when he was then an employee of the
22 Department of, of Environmental Protection of the State of
23 West Virginia in connection with a consent decree that
24 would give Dupont transactional immunity from an EPA
25 enforcement action; and that thereafter Mr. McCoy went to

1 work for one of Dupont's consultants. The inference is
2 that Dupont did something improper, that they bribed
3 somebody. That's the reasonable inference from, from that,
4 from that piece of writing that appears in this letter.
5 And that would be the inference that a newspaper reporter
6 would put on it, that there was some impropriety.

7 THE COURT: Well, go ahead.

8 MR. TINNEY: And that's, that's what I'm asking
9 the Court for relief for. If that's out in the press and
10 that's --

11 THE COURT: Which?

12 MR. TINNEY: That's going to be disseminated.

13 THE COURT: What's out in the press in
14 particular?

15 MR. TINNEY: In particular, did Dupont fabricate
16 test results.

17 THE COURT: All right. Does that -- is that in
18 this letter?

19 MR. TINNEY: Yes, it is. It actually appears two
20 places. It appears, I believe, on Page, Page 12. It
21 appears in Footnote 14 at the last, the last sentence of
22 the footnote. "Yet, when even the well with the C-8
23 readings traditionally below 1 ppb yielded a result of 1.9
24 ppb, Dupont fabricated a new 3.0 ppb screening level for
25 C-8 to avoid having to reference any drinking water results

1 exceeding Dupont's own 1 ppb CEG in its own plant drinking
2 water."

3 And also, I believe, on Page 14, the last
4 sentence of the paragraph that, the partial paragraph that
5 begins on Page 14, the language is that Dupont is
6 deliberate. "Dupont has chosen, instead, to focus either
7 on current, somewhat lower C-8 levels, or to simply
8 fabricate a totally new drinking water screening level of 3
9 ppb for the Washington Works Plant when faced with having
10 to disclose to USEPA in its RFI report for the Washington
11 Works the existence of C-8 in the plant's drinking water at
12 levels well above 1 ppb."

13 There is no other reading of that, Your Honor.
14 That statement says that Dupont has told a story. That's
15 not true. And they want to use that to poison the minds of
16 the regulatory agencies that it sent and it's publicized
17 that would be --

18 THE COURT: Besides these allegations of
19 fabrication, what else is it you don't want them to do?

20 MR. TINNEY: I don't, I don't want them, as they
21 did on Page 10 of the letter, implying that Dupont has
22 somehow greased the wheels to get transactional immunity
23 from an EPA enforcement action.

24 The allegations -- the reasonable inference that
25 is made there is, "Within a matter of weeks, Dupont

1 completed its negotiations with the state and entered a
2 consent decree to bar further governmental enforcement,"
3 i.e. the EPA, "action in exchange for Dupont's payment to
4 the West Virginia Department of Environmental Protection of
5 a \$200,000 penalty. Soon thereafter Mr. McCoy left the
6 West Virginia DEP and began working for the same Dupont
7 consultant that would assist Dupont in complying with the
8 consent decree - Potesta & Associates."

9 The inference there is that Dupont engaged in
10 somekind of under-the-table activity in order to head off
11 and get immunity from an EPA enforcement action by entering
12 into a consent decree on the same transaction with the
13 State of West Virginia.

14 Those are the things that I think this Court has
15 the absolute inherent power to constrain, and that kind of
16 a specific gag order does not violate any kind of over
17 breadth or provide any kind of prior restraint to an
18 attorney's right to free speech. And that's exactly what
19 Rule 3.6(a) and 3.6(b) contemplates.

20 THE COURT: Where did this information come from,
21 the information on which they reach the conclusions that
22 they do and make the allegations that they do? Where did
23 they obtain the information about the test results?

24 MR. TINNEY: The test results are obtained
25 through the discovery process.

1 a gag order on the plaintiffs' counsel to prevent us from
2 having apparently any discussions whatsoever with anyone
3 regarding anything that's going on with the Tennant
4 lawsuit.

5 We think that that request is, frankly,
6 outrageous, overbroad, and without any merit whatsoever.
7 The request is based upon the fundamental factual premise
8 that there has been something committed by plaintiffs'
9 attorneys that was unethical in some regard, something that
10 was, that, frankly, is just not true.

11 THE COURT: Tell me just -- I don't mean to take
12 you off the subject a minute. Tell me a little bit about
13 the EPA hearing that's planned for tomorrow.

14 MR. BILOTT: There is a hearing that's planned
15 tomorrow to discuss a proposed USEPA regulation on a series
16 of chemicals that the 3-M company proposed to remove from
17 the market last year. USEPA has proposed a regulation that
18 will begin regulating certain of those chemicals as
19 potentially hazardous to human health.

20 There is a hearing -- a proposal went out, a
21 proposed regulation, to regulate those chemicals. That
22 regulation excluded C-8 for the time being. It is set for
23 a public hearing tomorrow in Washington, D.C., where
24 anybody who has any interest in the outcome of that
25 regulation is entitled to speak or make any presentation.

1 THE COURT: So, the intent tomorrow is for
2 someone on behalf of your clients to ask them to include
3 another substance?

4 MR. BILOTT: Your Honor, what -- all we intend to
5 do tomorrow is we have asked for approximately 15 minutes
6 of the entire presentation to simply advise those who are
7 in the process of determining what is the proper scope of
8 this regulation that based upon information that we have
9 become aware of, there is no rational basis not to include
10 C-8 among the list of chemicals that are to be regulated as
11 potentially hazardous, and that we are simply going to make
12 that statement, that we ask the EPA to review whatever
13 information is available to them to include C-8 among those
14 chemicals that it regulates. We don't intend to have any
15 discussion about the substance of this case at all.

16 THE COURT: Your letter of March 6th, 2001, is
17 addressed to EPA, the Attorney General, certain Assistant
18 Attorney Generals, and other EPA officials. What are you
19 hoping to accomplish by sending this information?

20 MR. BILOTT: A couple things, Your Honor.

21 First of all, let me address something that
22 Mr. Tinney said here about the purpose of that, purpose of
23 that letter as required under the federal statutes. I
24 think Mr. Tinney has mischaracterized, frankly, what is
25 required by the notice requirements under the federal

1 the insinuation that we intend to was simply false. We
2 have no intention of doing that.

3 As you'll see from our submission, the only party
4 that has been actively communicating with the media
5 directly is Dupont. And, in fact, one of the things we
6 cite in our, in our papers, Your Honor, is that one of the
7 particularly authorized forms of speech by an attorney is
8 when you're sending information out directly to respond to
9 information that the other side has put out to the media.

10 And in this case, Dupont has worked directly with
11 its counsel with the Lubeck Public Water District to draft
12 a letter that went out as a mass mailing to all of the, all
13 of the, all of the current customers of the Lubeck Public
14 Water District.

15 THE COURT: I think we talked about that the last
16 time we gathered together.

17 MR. BILOTT: That information is out there, Your
18 Honor. We have not had any communications with the media.

19 THE COURT: What's the -- let me go back to
20 Mr. Tinney.

21 Mr. Tinney, what can you tell me that would talk
22 me into the idea that there is a substantial likelihood
23 that sending this letter, which is what you complain of,
24 will substantially, result in a substantial likelihood that
25 you will be unable to get a fair trial?

1 MR. TINNEY: Okay, sir. Number one is the
2 potential to influence and taint the minds of a jury if
3 this becomes public, it is in the press, and will be in the
4 Parkersburg Sentinel and wherever else the jury pool, you
5 know, may come from. I think it will clearly set the stage
6 that a huge international chemical company has, quote,
7 fabricated test results dealing with drinking water and
8 will impair the ability to, to seat a fair and impartial
9 jury.

10 The second thing is the attempt to influence and
11 advocate the regulatory agencies' actions that have nothing
12 to do with the claims in this case; to revoke permits for
13 the landfill, to cease and desist the manufacturing process
14 at the Washington Works, to cause remedial actions to be
15 taken. All of the things that are in those letters, you
16 know, they're self-evident by the language itself.

17 And as to the EPA meeting tomorrow, this is just
18 another forum where I would assert that Mr. Bilott will
19 intend to use for further leverage in this case.
20 Tomorrow's meeting is a significant and technical meeting.
21 It deals with a chemical that is not in this case. It
22 deals with a chemical called PFOA. It's a 3-M manufactured
23 chemical. It has nothing to do with this case. It's a
24 totally different chemical compound.

25 THE COURT: When is this case scheduled for

1 trial?

2 MR. TINNEY: It's scheduled for trial October of
3 this year, Your Honor.

4 And an effort to get the EPA then to -- this
5 chemical, PFOA -- C-8 is a nonregulated chemical. An
6 effort to, to influence and persuade the EPA to regulate
7 PFOA would be a substantial prejudicial thing to Dupont to,
8 to the trial of this case, to a fair and impartial trial.

9 And the -- clearly if there was an EPA cease and
10 desist order that we have to stop using C-8 in our
11 manufacturing process between now and the trial, the impact
12 of that would, would be catastrophic. You couldn't -- that
13 would be everywhere. The plant would shut down. And, so,
14 it would be perceived that was because --

15 THE COURT: Then you would be asking me not to
16 allow a citizen to make a complaint to a federal agency
17 with jurisdiction to determine that.

18 MR. TINNEY: Your Honor, we're not talking about
19 a citizen here. We're talking about a party litigant.

20 And --

21 THE COURT: They're still citizens.

22 MR. TINNEY: But they've chosen to bring their
23 claims in this court. And it would be no more fair, you
24 know, for, for any party to go to a regulatory agency and
25 try to bring extrajudicial regulatory, remedial cease and

1 copy of the, of the draft letter of November of 2000 that
2 was in the record.

3 THE COURT: You're saying this is a different
4 letter.

5 MR. TINNEY: It's a different letter. And I'll
6 hand up a clean copy of it and the Court and your clerk can
7 see that there is a tremendous amount of new material
8 that's added to the March 6th letter.

9 THE COURT: All right. I'm not persuaded that
10 there is a substantial likelihood that the extrajudicial
11 comments identified by the defendant which it anticipates
12 being made by this letter and in complaints to governmental
13 agencies would prejudice Dupont's right and its ability to
14 have a fair trial or prohibit this Court or prejudice this
15 Court's ability to conduct a fair trial in this case.

16 I would note that the case is set for trial more
17 than six months from this date. I would also note that
18 while I think this is properly more like a motion for
19 protective order, if I were to treat it as filed as a
20 motion for restraining order or injunction, I would note
21 that there is a substantial public interest in citizens
22 being allowed to petition their government and to file
23 complaints with appropriate agencies as, as they see fit.

24 Moreover, I'm not persuaded that the defendant in
25 this case has shown any irreparable harm that would arise.