

IN THE CIRCUIT COURT OF MARSHALL COUNTY, WEST VIRGINIA

JOHN F. PETTRY, JR.,

Plaintiff

vs.

RAILSERVE, INC., a Delaware corporation;
E.I. DUPONT DE NEMOURS AND CO., a
Delaware corporation; **TIMOTHY M.**
HARRISON, an individual; and **DEBRA**
HARTMAN, a West Virginia resident,

Defendants.

Civil Action No.: 13-C-1624

COMPLAINT

GENERAL ALLEGATIONS

1. Plaintiff, John F. Pettry, Jr., is a citizen and resident of Cedar Grove, Kanawha County, West Virginia.
2. Defendant, Railsolve, Inc. (sometimes hereafter referred to as "Railsolve"), is a Delaware corporation which is authorized to do business in the State of West Virginia. Defendant, Railsolve, is and was, at all times relevant hereto, engaged in interstate commerce in and throughout the several states of the United States as a common carrier by rail; and for the purpose hereof did operate locomotives, railroad cars and repair facilities, linked various facilities by connection with Norfolk & Southern rail lines, and transacted substantial business throughout the State of West Virginia, and elsewhere. Railsolve's chief officers do not reside in West Virginia, so that venue is proper in Marshall County.
3. At all times relevant, Railsolve was the employer of the Plaintiff within the meaning of the Federal Employer Liability Act, 45 U.S.C. §1 *et seq.* (FELA).

4. During the course of Plaintiff's employment, Defendant was engaged in interstate and intrastate commerce as a common carrier by rail, and all or part of the duties of Plaintiff were in furtherance of and did closely, directly and substantially affect interstate commerce; wherefore, the rights and liabilities of the parties were and are governed by the Federal Employer's Liability Act, 45 U.S.C. §1 *et seq.*, which Act grants this Court jurisdiction over this action.

5. Defendant, E.I. DuPont de Nemours & Co. (sometimes hereinafter referred to as "DuPont"), is a Delaware corporation which has its principal place of business in Wilmington, Delaware, and which does or has done business in Marshall County, West Virginia. At all times relevant hereto, DuPont owned and operated a chemical manufacturing facility in Belle, Kanawha County, West Virginia (sometimes hereinafter referred to as "Belle Works"). DuPont's chief officers do not reside in West Virginia, so that venue is proper in Marshall County.

6. Defendant, Timothy M. Harrison (sometimes hereinafter referred to as "Harrison"), is a citizen of West Virginia, domiciled in Charleston, Kanawha County, West Virginia. During part of the relevant time period, Harrison served as a contractor safety director at the Belle Works.

7. Defendant, Debra Hartman (sometimes hereinafter referred to as "Hartman"), is a citizen of West Virginia, domiciled in Charleston, Kanawha County, West Virginia. During part of the relevant time period, Hartman served as the Safety, Health and Environmental Manager at the Belle Works.

8. Plaintiff hereby affirmatively pleads the "discovery rule" and affirmatively states that the cause of action accrued less than three years prior to the commencement of this suit

pursuant to 45 U.S.C. §56, and less than two years prior to the commencement of this suit pursuant to W. Va. Code § 55-2-12.

9. Plaintiff began employment with Railserve in 2008 at DuPont's Belle Works, and worked there until 2011. Plaintiff's job duties at the Belle Works included moving locomotive cars, facilitating the movement of locomotive cars to and from the Norfolk & Southern rail line that connected to the Belle Works, loading and unloading locomotive cars, lacing airhoses for Norfolk & Southern, moving derailed locomotive cars back onto the tracks, and repairing and replacing rail ties. The locomotive cars carried dangerous and toxic chemicals, including but not limited to amines (such as dimethyl amine, trimethyl amine, and dimethyl sulfate), Lucite, glycolic acid, and Vazo®.

10. While working for Railserve at the Belle Works, Plaintiff noticed chemical odors on a daily basis. Chemical products frequently spilled onto the ground, and the locomotive cars carrying those products regularly leaked. Over time, the bottoms of Plaintiff's shoes degraded from contact with spilled chemical products. Chemical residue often sprayed onto Plaintiff during loading operations, both when he was loading cars himself, and when he was in the vicinity of loading operations being performed by others. Plaintiff occasionally became nauseated from chemical fumes while working at the Belle Works. Plaintiff sometimes needed rest and fresh air while digging in the soil to replace ties, and occasionally had to wash his face to remove chemical residue and contaminated soil.

11. While DuPont employees had respirators, elbow-length rubber gloves, large goggles, and sometimes thick protective clothing, Plaintiff received no such personal protective equipment. Railserve provided him with simple safety glasses, leather gloves, and a thin rainsuit

that degraded when it came into contact with chemical products or tore when Plaintiff moved. Plaintiff reported the problem with the rainsuit to management. Moreover, Plaintiff asked management why he was not provided a respirator like the DuPont employees, but was told respirators were not required. Plaintiff also complained about being sprayed with chemical products during loading work.

12. In late September or early October 2011, an incident occurred in which a locomotive car carrying an amine product derailed at the Belle Works, and Plaintiff performed the task of returning the car to the tracks. The car was leaking, and in the course of this work, Plaintiff experienced such extensive contact with the car's chemical contents that a hazardous materials handling team was called to evaluate the situation.

13. When Plaintiff returned to work several days later, he was unable to work at his usual pace, and experienced fatigue and difficulty breathing. Plaintiff took a break, but when his symptoms did not improve, he went home for the day. He attempted to go to sleep, but after continuing to experience severe breathing difficulty and chest pain, he collapsed at home and was taken to the hospital. While at the hospital, Plaintiff continued to suffer from difficulty breathing, and demonstrated an altered mental status. Plaintiff's treating physicians found that he was suffering from acute respiratory failure, heart failure, septic shock, liver function abnormalities, renal failure, progressive blood abnormalities, and thyroid abnormalities, and diagnosed him with hemophagocytic syndrome, also known as hemophagocytic lymphohistiocytosis (HLH). While Plaintiff was in the hospital, one of his treating physicians contacted DuPont to ask if Plaintiff was exposed to any toxic chemicals at work. The DuPont representative responded that Plaintiff had not been so exposed. Plaintiff's condition eventually

improved, and after remaining in the hospital for approximately three weeks, he was discharged.

14. Over the next several months Plaintiff underwent intervenous chemotherapy and endured multiple hospitalizations for various symptoms, including abnormal sodium and potassium levels. Eventually, in March 2012, Plaintiff received a stem cell transplant to treat his HLH. He suffered pneumonia and septic shock afterward, for which he was once again hospitalized. Plaintiff remains on prescription medication for his condition, suffers from daily nausea, and is unable to tolerate extensive sunlight.

JURISDICTION AND VENUE

15. The defendants are amenable to jurisdiction before the courts of West Virginia by virtue of the fact that they are either citizens and residents of West Virginia, and/or to the extent they maintain minimum contacts with and/or conduct systematic business in West Virginia such that jurisdiction over the defendants is consistent with traditional notions of fair play and substantial justice, and/or to the extent they are otherwise amenable to jurisdiction in accordance with West Virginia's Long Arm Statutes. Furthermore, jurisdiction is proper in this matter pursuant to U.S.C. 45 U.S.C. §1 *et seq.* U.S.C. 45 U.S.C. §1 *et seq.* prevents removal of this case to federal court, and incomplete diversity of citizenship exists. The Plaintiff expressly disclaims claims arising from any act or omission on a federal enclave, by any officer of the United States, or by any agency or person acting under him occurring under color of such office. The Plaintiff withdraws any asserted State claim that is preempted by federal law.

16. Venue is proper in this judicial district pursuant to W. Va. Code § 56-1-1.

COUNT ONE
Railservice-Federal Employers' Liability Act

17. Plaintiff repeats the allegations contained in paragraphs 1 through 16 as if repeated herein verbatim.

18. Plaintiff worked as a conductor, brakeman, and engineer for Railservice. His job necessitated spending significant amounts of time in and around locomotives, railroad cars, locomotive boilers and their appurtenances, railroad yards and/or other buildings. Plaintiff's job duties at the Belle Works included moving locomotive cars, facilitating the movement of locomotive cars to and from the Norfolk & Southern rail line that connected to the Belle Works, loading and unloading locomotive cars, lacing airhoses for Norfolk & Southern, moving derailed locomotive cars back onto the tracks, and repairing and replacing rail ties. During his tenure with Railservice, Plaintiff was negligently exposed to dangerous and toxic chemicals, including but not limited to amines (such as dimethyl amine, trimethyl amine, and dimethyl sulfate), Lucite, glycolic acid, and Vazo[®], at excessive levels for unreasonably extended periods of time on a daily and continuous basis, without personal protective equipment, adequate ventilation, adequate work instruction, and adequate warnings of potential hazards.

19. Exposure to dangerous and toxic chemicals, including but not limited to amines (such as dimethyl amine, trimethyl amine, and dimethyl sulfate), Lucite, glycolic acid, and Vazo[®] caused, in whole or in part (even the slightest), Plaintiff's contracting HLH and the attendant conditions described above.

20. At all times relevant, Plaintiff was unaware of the dangers and propensities of the toxic substances to which he was exposed and was unaware of the cause of his abnormal medical

condition.

21. Plaintiff's injuries resulted from the negligence of Railserve, its agents, servants and employees.

22. At all times relevant, Railserve knew, or should have known that exposure to the toxic substances was dangerous and potentially deadly.

23. At all times relevant, Railserve knew, or should have known, that Plaintiff would be exposed to the inhalation of dangerously toxic and potentially deadly substances.

24. Railserve:

- a. Failed to provide Plaintiff with a reasonably safe place in which to work;
- b. Failed to limit Plaintiff's exposure to hazardous substances;
- c. Failed to warn Plaintiff of the danger of his exposure to hazardous substances;
- d. Failed to provide Plaintiff with appropriate safety garments or personal protective equipment which would minimize Plaintiff's exposure to hazardous substances;
- e. Failed to furnish Plaintiff with reasonably necessary and proper equipment with which to perform his assigned duties;
- f. Failed to provide Plaintiff with a locomotive and its appurtenances which were in a proper and safe condition;
- g. Failed to inspect and/or monitor Plaintiff's work place and/or equipment to discover the presence of hazardous substances;
- h. Failed to furnish Plaintiff with necessary and proper supervision in the performance of his assigned duties;

- i. Failed to adequately train Plaintiff in appropriate methods to minimize his exposure to toxic substances;
- j. Failed to warn Plaintiff of reasonably foreseeable hazardous conditions existing with Railserve's equipment and DuPont's equipment;
- k. Failed to satisfy contemporary industrial and relevant governmental safety standards;
- l. Failed to inspect the premises on which Plaintiff worked;
- m. Failed to conduct adequate industrial hygiene monitoring of workers such as Plaintiff;
- n. Failed to timely install adequate engineering controls to protect workers such as Plaintiff from over-exposure to toxic substances;
- o. Failed to timely implement medical monitoring and testing of employees such as Plaintiff to determine their exposure and/or over-exposure to toxic substances; and
- p. Failed to design and/or implement adequate administrative controls to prevent employees and/or workers such as Plaintiff's over-exposure to toxic substances.

These acts and omissions constitute a failure to exercise reasonable care on the part of Railserve and caused, in whole or in part (even the slightest), Plaintiff's injuries.

COUNT TWO

Railserve-W. Va. Code § 23-4-2 (in the alternative to Count One)

25. Plaintiff incorporates paragraphs 1 through 24 of the Complaint, as if repeated herein verbatim.

26. At all times relevant hereto, Railserve's actions and inactions, as described below, were conducted by and through its servants, agents and employees, duly authorized and acting within the scope and authority of their employment.

27. At all times relevant hereto, a specific unsafe working condition existed in the Belle Works (i.e. requiring Plaintiff to perform his job duties in areas where he would be exposed to impermissibly high levels of hazardous chemical products, without being warned of the dangers posed by the same, and without being provided adequate safety equipment) which presented a high degree of risk and a strong probability of serious injury or death, and Railserve despite having actual knowledge of the existence of same, nevertheless required Plaintiff to perform his job duties without adequate training, and without being warned of the hazards posed by the same, and without being provided adequate safety equipment, controls and/or procedures when so performing his job duties.

28. Railserve possessed actual knowledge that the hazardous chemical products Plaintiff was working with, near and around were destroying his work clothing, causing him to become physically ill, and were inherently dangerous and toxic, and nevertheless intentionally exposed Plaintiff to said unsafe working conditions.

29. Despite such actual knowledge, Railserve violated, disregarded, circumvented, and bypassed the applicable state and federal safety statutes, rules, regulations, and standards, as well as commonly accepted and well-known safety standards of the defendant's industry concerning the warnings which must be given, as well as the other precautions which must be taken when an employee, such as Plaintiff, was required to work in, around, near, and with hazardous chemical products, by having: failed to provide adequate respiratory and other forms of personal protective equipment; failed to provide adequate warnings of the dangers associated

with exposure to hazardous chemical products; and otherwise failed to provide, institute, observe, and enforce reasonable, adequate, proper and acceptable safety rules and standards accepted and acceptable in Railserve's industry in order to make safe the areas in, and conditions under which Plaintiff worked.

30. All such actions and inactions by Railserve as more specifically set forth above, constitute, establish and demonstrate a deliberate intention on the part of Railserve to expose employees in general, and Plaintiff in particular, to the unsafe working conditions set forth above.

31. Railserve's deliberate and intentional acts and omissions were a direct and proximate cause of Plaintiff's development of HLH, which resulted in his severe injuries, disabilities, and damages as set forth more fully below.

COUNT THREE
DuPont-Premises Liability

32. Plaintiff incorporates by reference, as if pleaded herein verbatim, the allegations of paragraphs 1 through 31 of the Complaint.

33. DuPont owned, operated, maintained, controlled, supervised, inspected, and/or regulated the premises of the Belle Works.

34. DuPont, as the owner and/or operator of the premises of the Belle Works, owed Plaintiff the duty to provide a reasonably safe place to work and a duty to exercise reasonable care in protecting him from work place hazards.

35. Through his work on the DuPont Belle Works premises, Plaintiff was exposed to dangerous and toxic chemicals, including but not limited to amines (such as dimethyl amine, trimethyl amine, and dimethyl sulfate), Lucite, glycolic acid, and Vazo®.

36. At all times relevant herein, Plaintiff was exposed to the hazards of the above-mentioned substances in the ordinary and regular course of his employment on the DuPont Belle Works premises.

37. At all times mentioned herein, DuPont carelessly, negligently, recklessly and wantonly operated, maintained, controlled, supervised, inspected and/or regulated the Belle Works in that DuPont:

- a. Failed to provide proper, adequate, and sufficient safeguards, precautions and devices over and about the facility, so as to permit the creation of dangerous and unsafe working conditions (specifically exposures to hazardous and toxic chemicals), which DuPont knew, or in the exercise of reasonable care should have known existed;
- b. Failed to provide adequate warnings of the dangers associated with exposure to hazardous chemical products;
- c. Failed to provide contract workers, such as Plaintiff, with adequate respiratory and other forms of personal protective equipment; and
- d. Failed to provide contract workers, such as Plaintiff, with a reasonably safe places to work.

38. As a direct and proximate result of the carelessness, negligence, recklessness and wantonness of DuPont, Plaintiff developed HLH, as a consequence of which Plaintiff was severely injured, disabled, and damaged as more fully set forth below.

COUNT FOUR
DuPont-Respondeat Superior

39. Plaintiff incorporates by reference, as if pleaded herein verbatim, the allegations

of paragraphs 1 through 38 of the Complaint.

40. Plaintiff further alleges that, throughout his entire course of employment at the Belle Works, DuPont exercised control over its management employees and contractors (including Harrison and Hartman) in such a manner as to render DuPont liable under the doctrine of respondeat superior as master for its servants.

41. DuPont is responsible for its servants' negligent, careless, and reckless failures to provide Plaintiff with reasonably safe places to work.

42. As a direct and proximate result of DuPont's servants' negligence, carelessness, and recklessness, Plaintiff developed HLH, as a consequence of which Plaintiff has been severely injured, disabled, and damaged as is set forth below.

COUNT FIVE
Harrison-Negligence

43. Plaintiff incorporates by reference, as if pleaded herein verbatim, the allegations of paragraphs 1 through 42 of the Complaint.

44. Harrison was acting as contractor safety director at the Belle Works during the time that Plaintiff was on the premises performing his job duties, was trained in hazards and proper safety procedure, and had a duty to supervise safety within the aforementioned facilities.

45. Harrison negligently, carelessly, willfully, wantonly and with reckless disregard of the consequences of his acts and under such conditions and circumstances that a reasonable person would know, or have reason to know, that such conduct would, in a high degree of probability, result in substantial harm to others, allowed persons within the Belle Works to be exposed to hazardous and toxic chemicals while he knew, or with reasonable care should have known, that persons exposed to such products generally and Plaintiff specifically would not

know of such danger to their and his health, and Harrison nonetheless:

- a. failed to advise Plaintiff of the dangerous nature of the aforementioned substances;
- b. failed to advise Plaintiff as to what, if any, would be reasonably safe and sufficient clothing, protective equipment and appliances to protect him from being poisoned and disabled as he was by exposure to the aforementioned substances;
- c. failed and omitted to verbalize to Plaintiff any warnings, or sufficient warnings, of the dangers to Plaintiff's health of the aforementioned substances;
- d. failed and omitted to take reasonable precautions or to exercise reasonable care to publish, adopt and enforce a safety plan and a safe method of handling and working with the aforementioned substances;
- e. failed to adequately warn, if in fact he warned at all, persons such as Plaintiff, of the dangers to his health in coming into contact with the aforementioned substances;
- f. failed to recommend methods to improve the work environment; and continued to allow Plaintiff to work with and/or in close proximity to substances known to cause cancer.

46. As a direct and proximate result of the aforesaid negligence, carelessness, recklessness and willfulness of Harrison as set forth above, Plaintiff developed HLH, as a consequence of which Plaintiff has been severely injured, disabled, and damaged as is more fully set forth below.

COUNT SIX
Hartman-Negligence

47. Plaintiff hereby realleges and incorporates by reference paragraphs 1 through 46 as the same were fully set forth herein verbatim.

48. Hartman was acting as Safety, Health and Environmental Manager at the Belle Works during the time that Plaintiff was on the premises performing his job duties, was trained in hazards and proper safety procedure, and had a duty to supervise safety within the aforementioned facilities.

49. Hartman negligently, carelessly, willfully, wantonly and with reckless disregard of the consequences of her acts and under such conditions and circumstances that a reasonable person would know, or have reason to know, that such conduct would, in a high degree of probability, result in substantial harm to others, allowed persons within the Belle Works to be exposed to hazardous and toxic chemicals while she knew, or with reasonable care should have known, that persons exposed to such products generally and Plaintiff specifically would not know of such danger to their and his health, and Hartman nonetheless:

- a. failed to advise Plaintiff of the dangerous nature of the aforementioned substances;
- b. failed to advise Plaintiff as to what, if any, would be reasonably safe and sufficient clothing, protective equipment and appliances to protect him from being poisoned and disabled as he was by exposure to the aforementioned substances;
- c. failed and omitted to verbalize to Plaintiff any warnings, or sufficient warnings, of the dangers to Plaintiff's health of the aforementioned

substances;

- d. failed and omitted to take reasonable precautions or to exercise reasonable care to publish, adopt and enforce a safety plan and a safe method of handling and working with the aforementioned substances;
- e. failed to adequately warn, if in fact she warned at all, persons such as Plaintiff, of the dangers to his health in coming into contact with the aforementioned substances;
- f. failed to recommend methods to improve the work environment; and continued to allow Plaintiff to work with and/or in close proximity to substances known to cause cancer.

50. As a direct and proximate result of the aforesaid negligence, carelessness, recklessness and willfulness of Hartman as set forth above, Plaintiff developed HLH, as a consequence of which Plaintiff has been severely injured, disabled, and damaged as is more fully set forth below.

DAMAGES

51. As a result of the injuries sustained by Plaintiff, he has been caused to undergo extensive medical treatment. Plaintiff has suffered, and because such injuries are permanent in nature, will continue in the future to suffer pain, nervousness, and mental anguish, and the use, movement and function of his entire body has been severely impaired; his enjoyment of life and earning capacity have been greatly reduced. Plaintiff further alleges that as a result of his health problems, he has been forced to incur medical expenses by way of doctor, hospital and drug bills in an effort to treat his condition and will be required to incur additional medical expenses in the future.

52. As a result of the Defendants' negligence, Plaintiff has suffered, is still suffering, and will continue to suffer in the future, the following damages:

- a. Physical pain and suffering and mental anguish;
- b. Loss of wages and benefits;
- c. Physical impairment; and
- d. Medical expenses.

53. The aforementioned medical expenses were incurred for necessary care and treatment of the injuries resulting from the acts and/or omissions complained of. The charges were reasonable and they were the customary charges made for such services in the area in which they were rendered.

54. Plaintiff was a strong and able-bodied man capable of gainful employment at the time of the manifestation of his illness, and as a direct and proximate result, in whole or in part, of one or more of the foregoing negligent acts or omissions on the part of the Defendants Plaintiff suffers and will continue to suffer future damages by way of lost wages and earning capacity and by way of his diminished ability to render services, society, affection, counseling and support to his household.

55. Defendant DuPont acted in willful, wanton, gross and in total disregard for the health and safety of others, including Plaintiff, and in such actions and inactions intentionally disregarded the health and safety of others, including Plaintiff, all of which resulted in harm to Plaintiff. Plaintiff therefore seeks exemplary and punitive damages against DuPont to punish it for its said actions and inactions, where appropriate.

WHEREFORE, Plaintiff demands compensatory damages from all defendants, jointly and severally, in an amount to be determined by the trier of fact, as well as an award of punitive

damages against defendant E.I. DuPont de Nemours and Co., in an amount to be determined by the trier of fact. Plaintiff further demands prejudgment and post-judgment interest, as well as such other relief as a judge or jury shall find fair and just.

PLAINTIFF DEMANDS A TRIAL BY JURY.

JOHN F. PETTRY, JR., Plaintiff

By: 

Counsel for Plaintiff

Charles M. Johnstone, II (WV Bar # 5082)
David A. Dobson (WV Bar # 12092)
JOHNSTONE & GABHART, LLP
P.O. Box 313
Charleston, WV 25321
Telephone (304) 343-7100

R. Dean Hartley (WV Bar # 1619)
Mark R. Staun (WV Bar # 5728)
J. Michael Prascik (WV Bar # 9135)
HARTLEY & O'BRIEN, PLLC
2001 Main Street, Suite 600
Wheeling, WV 26003
Telephone (304) 233-0777