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OF WEST VIRGINIA

Maynard, Chief Justice, dissenting:

It is a well-known fact that I did not agree with this Court’s recognition of a cause of action for medical monitoring or I at least opposed allowing recoveries to be spent on anything but medical testing. For that reason, I dissented in *Bower v. Westinghouse Electric Corp.*, 206 W.Va. 133, 522 S.E.2d 424 (1999). However, I respect decisions of this Court and acknowledge that *Bower* is well-settled law in West Virginia, thus, we are now all compelled to follow it as precedent. However, since it is the law, *Bower* should be applied fairly. Accordingly, I respectfully dissent in this case because I believe that the appellants clearly did not receive a fair trial of their medical monitoring claims.

One of my primary concerns is that the trial court excluded the appellants’ evidence of differences between machine-measured and actual tar and nicotine deliveries, especially after the defendant tobacco companies went so far as to intimate that “FTC tar” and “FTC nicotine” figures represent amounts an individual would “get” when smoking a cigarette. The trial court even observed that the tobacco companies’ questioning fell within the area of inadmissible evidence and “opened the door somewhat.” Nevertheless, the trial court declined to permit the appellants to develop the issue further. This is very troubling. It simply is not fair to allow one side to put on evidence of an issue in front of the jury and

refuse to allow the other side to present evidence on the exact same issue.

Here, the tobacco companies were allowed to put on evidence before the jury about how hard they had worked to develop a safer cigarette, when they actually were developing a cigarette to fool a machine which measures tar and nicotine levels. Nevertheless, when the appellants attempted to present very reliable, contrary evidence on that same issue, including documents which are phenomenally incriminating, the circuit court refused to permit it.

While the majority opinion acknowledges the evidentiary issues raised by the appellants, it blithely concludes that “[a]bsent . . . from the appellants’ arguments is a serious challenge to the jury’s conclusion . . . that the appellants’ exposure to smoke from the appellees’ cigarettes does not ‘make it reasonably necessary for all class members to undergo periodic medical examinations different from what would be prescribed in the absence of exposure.’” The majority opinion concluded that the excluded evidence, if admitted at trial, may have changed the jury’s mind on the issues of whether the appellees engaged in tortious conduct or willful or wanton misconduct, but had no bearing on the issue of whether the appellants showed the reasonable necessity of all class members undergoing periodic medical examinations. I disagree.

I believe that the evidentiary issues, all but overlooked in the majority opinion,

call into question the jury's findings not only on the issues of tortious and willful and wanton conduct, but also on whether the appellants established that it was reasonably necessary to undergo medical monitoring. To repeat, the jury was permitted to hear how diligently the tobacco companies worked to design a safer cigarette, but it was not permitted to hear how these companies intentionally and purposefully designed their cigarettes to cheat the FTC machine by providing low machine yields and significantly higher actual yields of tar and nicotine. This excluded evidence could have affected the jury's determination of the reasonable necessity of medical monitoring in at least two ways. First, the jury may have concluded that no monitoring was necessary for the appellants because the tobacco companies did nothing wrong. Second, if the jury had heard evidence that the cigarettes were not as safe as claimed and that they really had much higher yields of tar and nicotine, the jury may have concluded that medical monitoring was reasonably necessary due to the increased risk of harm.

In sum, I cannot subscribe to the majority opinion's reasoning that the improper exclusion of highly probative and relevant evidence affected some issues before the jury but not others. The tobacco companies deliberately and purposefully underestimated just how poisonous their cigarettes were. Their deceit is astonishing and chilling, and the jury had a right to know of such misconduct. Now, the majority opinion mistakenly underestimates just how much the entire trial was poisoned by the improper and unfair exclusion of important evidence. There are several other errors that could be extensively developed in this dissent,

but the majority has spoken, and there is simply nothing further that can be done to rectify this injustice. So, I will merely mention the other errors in outline form without further discussion. Any single one of the errors listed below would alone warrant a retrial, but cumulatively they are extremely compelling.

The majority misapprehended how cumulative error, which the majority acknowledged in its opinion, prejudiced the entire trial in:

- (1) the exclusion of evidence concerning youth smoking;
- (2) the exclusion of evidence of the poisonous nature of the cigarettes;
- (3) the exclusion of evidence of design manipulation;
- (4) the failure of the trial court to instruct on product liability law; and
- (5) the failure to stop the defendant tobacco companies from repeatedly “slipping” evidence before the jury which the trial court had ruled inadmissible.

Because of the evidentiary and other errors enumerated hereinabove, I believe the appellants’ trial was not fair. I would reverse and remand for a new trial. Accordingly, I respectfully dissent.