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Starcher, J., concurring:

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OF WEST VIRGINIA

I write separately to explain the “mass litigation” system that underlies the majority’s opinion, and to state why such a system is necessary. I also write to explain why the method chosen by the circuit court to assess punitive damages in this case is constitutional under the federal and state due process clauses.

The instant case represents a trial judge struggling to do precisely what the *Rules of Civil Procedure* and the *Trial Court Rules* told him to do: to do whatever was necessary “to secure the just, speedy, and inexpensive determination of every action.” *W.Va.R.Civ.Pro.* Rule 1 [1998]. The defendants, however, contend that a speedy and inexpensive resolution of the question regarding whether they should be subject to punitive damages, for allegedly knowingly marketing a defective product, is contrary to their due process rights under the state and federal *Constitutions*. The defendants assert that the trial court is constitutionally mandated to deny the plaintiffs a just, speedy and inexpensive resolution of their claims in order that the defendants’ property rights may be fully protected.

The majority opinion properly rejects this ridiculous position. The defendants are certainly entitled to due process. But exactly what process is due is entirely dependent upon the trial judge’s discretion, and the trial judge’s duty to afford *all* parties due process.

In the current age, a single mistake by a product manufacturer can injure dozens, hundreds, or even thousands upon thousands of individuals. A few manufacturers take a callous, deliberate, and knowing approach and choose to ignore the injuries caused by their products, or conspire to conceal the problems with their products. Sometimes, the injuries caused by the product cover the nation and span many decades.

The classic example is asbestos. Asbestos is a rock, a wonderful, flexible, fibrous material that is mined from the ground and which gives strength and fire resistance to products. Unfortunately, asbestos is one of the most toxic substances known to the human body. When inhaled over a period of time, it can cause the lungs to form scar tissue that grows and fills the lungs decades after exposure to asbestos stops. Even when inhaled into the lungs in minute quantities, it can cause cancer.

Companies that used asbestos in their products first started learning about asbestos-related diseases in the 1910s and 1920s. But rather than warn the public not to breathe asbestos dust, or stop mixing asbestos into their products, the companies plowed ahead and concealed the dangers. It was not until the 1970s that the government finally took action to prevent the use of asbestos, and required companies to put warnings on their products that breathing asbestos dust was hazardous.

The plaintiffs who filed lawsuits for their asbestos-related injuries did not sue the defendants because the products contained asbestos. Instead, the lawsuits focused on the fact that the products did not bear labels warning the product's users of the dangers of inhaling asbestos fibers. In other words, these were "failure to warn" product defect cases.

West Virginia, with its many chemical and power plants, has many thousands of citizens who were exposed to asbestos dust from the use of asbestos-containing products in the 1940s through the 1980s. As a result, many citizens have developed (or are even just now developing) lung diseases and cancers directly related to asbestos.

Plaintiffs filed lawsuits in counties across West Virginia. First there were a few cases in State court, then a few dozen, then hundreds, then thousands.¹ Circuit courts started to try the cases one at a time, but quickly abandoned that route; trying each case individually would have required hundreds of years. The same lawyers and the same witnesses were employed, using the same documents and evidentiary exhibits, on a full-time basis in counties throughout the State.² Every trial involved weeks of testimony to try the

¹See, e.g., *State ex rel. H.K. Porter Co., Inc. v. White*, 182 W.Va. 97, 100, 386 S.E.2d 25, 28 (1989) (“There are presently 114 asbestos-related personal injury actions pending before the respondent Judge White in the Circuit Court of Pleasants County. Of more immediate concern to the petitioner in this case, however, are ten (10) consolidated cases set for trial on October 23, 1989.”); *Cline v. White*, 183 W.Va. 43, 47 n.2, 393 S.E.2d 923, 927 n.2 (1990) (“According to records kept by the administrative office of the Court, as of March 26, 1990, there were 1,605 asbestos claims pending in West Virginia.”).

²For instance, in *State ex rel. H.K. Porter Co., Inc. v. White*, 182 W.Va. 97, 386 S.E.2d 25 (1989), the Court related the following circumstances about one lawyer representing one defendant that manufactured asbestos-containing products:

. . . H.K. Porter Company, Inc. has been a named defendant in approximately fifteen hundred (1,500) asbestos-related personal injury lawsuits throughout West Virginia, as well as sixty thousand (60,000) similar lawsuits throughout the United States. Since 1981, H.K. Porter Company, Inc. has been represented by the Auburn, Maine, law firm of Skelton, Taintor and Abbott. Steven F. Wright has served as Skelton, Taintor and Abbott’s lead counsel in asbestos litigation since 1985, and, as a result, he

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same issues about the same defendants again and again and again. Virtually everything pertaining to the defendants remained the same. The only issues that changed concerned the plaintiffs, namely the existence and degree of each plaintiff's injury and damages, which defendants' products caused the injury, and the relative fault of each defendant for the plaintiff's damages.

This Court recognized that special procedures were required to address this judicial administrative nightmare, and the current "mass litigation" system grew into being.

Starting in the late 1980s, a handful of circuit judges – myself included – were specially trained in handling complex, "toxic tort" litigation. Using its constitutional administrative authority, the Court transferred asbestos cases from throughout the state to a handful of counties for these specially-trained circuit judges to resolve. Once the asbestos

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has appeared in numerous state and federal jurisdictions in the United States.

In October, 1988, Mr. Wright was retained to represent H.K. Porter Company, Inc. on a regional basis and he became responsible for case disposition in Maine, New Hampshire, Vermont, Massachusetts, Connecticut, Rhode Island, Puerto Rico, the Virgin Islands, and West Virginia. The petitioners state that H.K. Porter Company, Inc. "relies upon Attorney Wright as the attorney to whom it has given ultimate responsibility for settlement or trial of asbestos cases in West Virginia consistent with its national policies and procedures for defending such cases."

182 W.Va. at 99-100, 386 S.E.2d at 27-28. The Court further noted that the attorney had appeared in 1,500 asbestos-related personal injury actions in West Virginia in twenty-four months, and that "Mr. Wright included a list of his appearances at six trials in West Virginia from 1987 to 1989 on behalf of the H.K. Porter Company, Inc." 182 W.Va. at 100 n. 4, 386 S.E.2d at 28 n. 4.

cases were before a single judge, the judge used the authority provided by Rule 42(a) of the *Rules of Civil Procedure* [1998] to manage the case. Rule 42 provides, in part:

When actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all matters in issue in the actions; it may order all the actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay. . . .

Initially, instead of trying cases individually, cases with a common theme were grouped together for trial. The plaintiffs' cases were first placed in groups of twenty or thirty for trial. Usually, the plaintiffs all worked for the same employer or at the same work site, around the same time periods, and were therefore usually injured by the same defendants' products.

But when the numbers of cases began to reach into the thousands, judges adjusted their approach. Several thousand cases were "massed" together into one proceeding, and through the use of Rule 42, the cases were broken down into various sub-proceedings with common issues of law or fact for separate trials.

In run-of-the-mill litigation this Court has indicated that bifurcation of a case into mini-trials is generally disfavored. As we stated in Syllabus Point 4 of *Sheetz, Inc. v. Bowles Rice McDavid Graff & Love, PLLC*, 209 W.Va. 318, 547 S.E.2d 256 (2001):

West Virginia jurisprudence favors the consideration, in a unitary trial, of all claims regarding liability and damages arising out of the same transaction, occurrence or nucleus of operative facts, and the joinder in such trial of all parties who may be responsible for the relief that is sought in the litigation.

However, in mass litigation cases, we have given trial judges substantial leeway to craft the procedures necessary to avoid unnecessary costs or delay. Asbestos cases continued to be litigated as thousands of individual personal-injury claims against dozens of asbestos-using manufacturers were filed. The process for managing this litigation continued to change gradually. For example, by using Rule 42(a), judges began to bifurcate the asbestos cases into two separate proceedings. The first proceeding involved questions of law and fact that were common as to the defendants; the second proceeding involved questions common to the plaintiffs.

In the first proceeding, often called the “liability phase,” one jury would see evidence regarding common questions of law and fact pertaining to the defendants.³ Experts would testify about the uses of asbestos, the diseases caused by asbestos, and would show the jury decades-old documents and discuss what the various defendants knew about the dangers of asbestos and when. The primary question for the jury to consider was this: considering the state-of-the-art knowledge of manufacturing in the 1940s, 1950s, 1960s, or 1970s, did each defendant manufacture a product that was defective because it failed to come with an adequate warning about the dangers of inhaling asbestos fibers?

³Actually, at times there was more than one jury. When the numbers of defendants in a single trial became unmanageable, the defendant manufacturers were divided into different courtrooms with different juries. The defendants were grouped with other defendants with similar characteristics (for instance, asbestos-using gasket makers or glove manufacturers). The juries were brought together into one courtroom to hear evidence common to all defendants – like scientific evidence about the types of injuries caused by asbestos – and separated to hear evidence unique to each defendant.

With this first phase of the proceeding, the plaintiffs and the defendants avoided thousands of days of courtroom work in individual trials. The same lawyers were not required to use the same witnesses to repeatedly retry the same questions. By trying those questions once for all the plaintiffs, Rule 42(a) permitted a court to avoid “unnecessary costs or delay” – for both plaintiffs and defendants.

A corollary question addressed by the jury in the first proceeding concerned punitive damages. If the defendant actually knew about the dangers of asbestos in the 1940s, 1950s, 1960s, or 1970s – and many did – then the jury was asked a second question: did the defendant callously, deliberately or greedily fail to warn the public of those dangers, and if so should the defendant be punished for its actions?

Many of the same witnesses and documents used to prove that the product was defective were also used to prove an entitlement to punitive damages. Both issues overlap and involve the actual knowledge of the defendant. If the defendant knew the product was inherently dangerous for its intended use, the product was defective. Likewise, if the defendant knew that the product was inherently dangerous for its intended use, and knew that the product was causing harm to individuals, and the defendant recklessly or deliberately kept marketing the defective product – well, that’s grounds for punitive damages.

Juries in the first proceeding could easily determine, yes or no, whether punitive damages should be assessed against a defendant. The problem in the first proceeding was with fixing the actual dollar amount of punitive damages. Since the first phase jury knew nothing of the degree of injury or specific financial circumstances of each

of the thousands of plaintiffs, the jury could not knowledgeably determine what dollar amount of punitive damages would be fair for each plaintiff.

It is axiomatic that punitive damages must bear a “reasonable relationship” to the potential of harm caused by the defendant’s actions. Syllabus Point 1, *Garnes v. Fleming Landfill, Inc.*, 186 W.Va. 656, 413 S.E.2d 897 (1991). To meet this reasonable relationship requirement, we indicated in Syllabus Point 3 of *Garnes* that juries must be instructed using the following language:

Punitive damages should bear a reasonable relationship to the harm that is likely to occur from the defendant’s conduct as well as to the harm that actually has occurred. If the defendant’s actions caused or would likely cause in a similar situation only slight harm, the damages should be relatively small. If the harm is grievous, the damages should be greater.

Judges dealing with asbestos cases determined that the mandate of *Garnes* could be met by letting the jury in the first phase assess a “punitive damage multiplier.” The jury was asked to calculate a multiplier such that the final dollar amount of punitive damages paid by the defendant would bear a reasonable relationship to the harm that was likely to occur from the defendant’s conduct as well as the harm that actually occurred. The punitive damage multiplier would be used in the second phase to multiply the amount of the plaintiff’s compensatory damages to actually determine the dollar amount of the defendant’s punitive damage liability.

In the second phase proceeding, questions of law and fact common to the plaintiffs would be resolved. The plaintiffs’ cases would be broken down – into groups by

the plaintiff's asbestos-related disease or by the plaintiff's work place, or even individually – and juries would hear evidence unique to each plaintiff. For instance, medical experts would discuss whether or not the plaintiff had an injury, and whether that injury was caused by asbestos. Economic experts would discuss the plaintiff's loss. Other experts would present evidence concerning the particular asbestos products that caused the plaintiff's injuries.

The second, "individual issues" or "damage phase" trials would begin with a brief statement to the jury by the lawyers about what happened in the first, "liability phase" trial. The juries would be instructed by the judge that the defendant's product was defective; the jury would only be charged with sorting out whether the defendant's product caused the plaintiff's injury, and the amount of the plaintiff's compensatory damages.

After the trial was complete, the judge would take the punitive damages multiplier determined in the first trial, multiply the plaintiff's compensatory damages by that multiplier, and thereby know the dollar amount of the punitive damages due and owing to the plaintiff. Furthermore, the judge would then conduct a post-trial review of the punitive damages award to ensure that the award was constitutionally fair and reasonably related to the harm that the defendant caused and could have caused to the plaintiff.⁴

⁴As we stated in Syllabus Point 4 of *Garnes*:

When the trial court reviews an award of punitive damages, the court should, at a minimum, consider the factors given to the jury as well as the following additional factors:

(1) The costs of the litigation;

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By the mid-1990s, this Court recognized that other individual personal-injury actions with characteristics similar to asbestos were being filed. The Court therefore took steps to codify the procedures that evolved in the context of asbestos litigation.

In 1999, the Court adopted Trial Court Rule 26.01, formalizing the “mass litigation” system. Rule 26.01 created a “Mass Litigation Panel” consisting of six judges, and empowered the Panel to resolve any “mass litigation” case that the Chief Justice of this Court referred to the panel.⁵ Essentially, the judges on the Panel are the specially trained

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(2) Any criminal sanctions imposed on the defendant for his conduct;

(3) Any other civil actions against the same defendant, based on the same conduct; and

(4) The appropriateness of punitive damages to encourage fair and reasonable settlements when a clear wrong has been committed. A factor that may justify punitive damages is the cost of litigation to the plaintiff.

Because not all relevant information is available to the jury, it is likely that in some cases the jury will make an award that is reasonable on the facts as the jury know them, but that will require downward adjustment by the trial court through remittitur because of factors that would be prejudicial to the defendant if admitted at trial, such as criminal sanctions imposed or similar lawsuits pending elsewhere against the defendant. However, at the option of the defendant, or in the sound discretion of the trial court, any of the above factors may also be presented to the jury.

⁵Rule 26.01(c) defines “mass litigation” thusly:

“Mass litigation” shall be defined as two (2) or more civil actions pending in one or more circuit courts: (a) involving common questions of law or fact in mass accidents or single catastrophic events in which a number of people are injured; or

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judges who are ready and willing to take on cases with common questions of law or fact where large numbers of individuals have potentially been harmed, physically or economically, as a result of a catastrophe or as a result of a defective product.

The trial judge in the instant case has been an active participant on the Panel, and has aggressively worked to resolve mass litigation cases. In the instant case, it appears that he adopted the two-phase trial model that was used by judges in asbestos cases.

The defendants, however, insist that the bifurcation of these cases is improper. The defendants argue that they are entitled, pursuant to the due process clauses of the State and federal *Constitutions*, to try the question of punitive damages one case at a time, so that the jury can assess each defendant's culpability to each plaintiff individually. The defendants insist that the only way punitive damages may be reasonably related to the potential harm

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(b) involving common questions of law or fact in "personal injury mass torts" allegedly incurred upon numerous claimants in connection with widely available or mass-marketed products and their manufacture, design, use, implantation, ingestion, or exposure; or (c) involving common questions of law or fact in "property damage mass torts" allegedly incurred upon numerous claimants in connection with claims for replacement or repair of allegedly defective products, including those in which claimants seek compensation for the failure of the product to perform as intended with resulting damage to the product itself or other property, with or without personal injury overtones; or (d) involving common questions of law or fact in "economic loss" cases incurred by numerous claimants asserting defect claims similar to those in property damage circumstances which are in the nature of consumer fraud or warranty actions on a grand scale including allegations of the existence of a defect without actual product failure or injury.

caused to an individual plaintiff is by a jury hearing evidence about both a defendant's conduct and the actual or potential harm to the plaintiff at the same time. In sum, the defendants assert that punitive damages can never be assessed in a "mass" litigation under Rule 42(a), or for that matter in a class action under Rule 23.

The inherent flaw with the defendants' argument is the assumption that due process, particularly to protect property rights, is a concrete concept. Instead, what process is due under the due process clause is determined under a sliding scale, and changes with the facts of each case. "When due process applies, it must be determined what process is due and consideration of what procedures due process may require under a given set of circumstances must begin with a determination of the precise nature of the government function involved as well as the private interest that has been impaired by government action." Syllabus Point 2, *Bone v. W.Va. Dept. of Corrections*, 163 W.Va. 253, 255 S.E.2d 919 (1979). "(D)ue process is flexible and calls for such procedural protections as the particular situation demands." *Morrissey v. Brewer*, 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972). Necessarily implicit in the above quote, which was also expressed in *Mathews v. Eldridge*, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976), is the principle that due process issues must be decided on the facts of the particular case. Once it is determined that due process applies, the question to be answered is "What process is due?"

The courtroom process that is due someone who has a few parking tickets is different from the procedural protections due a shoplifter, and vastly different from the process to be accorded someone who is accused of murder. And the due process protections

for someone accused of a single murder are going to be different from someone accused of being a mass murderer, like Herman Goering or Saddam Hussein. Likewise, the amount of process that is due in a criminal case, where personal liberty or life is at stake, is different from the process that is due in a civil case, where only property interests are at stake.

The defendants argue that *State Farm v. Campbell*, 538 U.S. 408, 123 S.Ct. 1513, 155 L.Ed.2d 585 (2003), mandates that all evidence of punitive damages must be presented to the jury and heard in relation to the injury caused to each specific plaintiff. Ignoring the fact that *Campbell* involved one defendant who had caused harm to a husband and wife in one instance (and not dozens of defendants who caused harm to thousands of plaintiffs over several decades), the defendants argue that *Campbell* preempts West Virginia's system of mass litigation. The inevitable result of accepting the defendants' argument is that it creates a judicial administrative nightmare. The same lawyers would be working for years, probably decades, to present the same witnesses to testify using the same documents in each separate plaintiff's case.

If the majority opinion had accepted this reasoning by the defendants, we would essentially be saying that the more people a defendant injures with its defective product, the less likely the defendant is ever going to have to pay compensatory or punitive damages to the people injured by the product. The defendant would therefore be accorded a right to thousands upon thousands of individual trials that would cause the legal system to grind to a halt. At the same time, we would be telling the individual plaintiffs that they have

no rights to any process – because of administrative gridlock, the individual plaintiffs would *de facto* be denied their day in court. The majority opinion rightly rejected this position.

As the members of this Court have noted before, *State Farm v. Campbell* presented no new law in the field of punitive damages. The case was nothing more than a summary, a collation, of prior case law. See *Boyd v. Goffoli*, 216 W.Va. 552, 608 S.E.2d 169 (2004) (Davis, J., concurring) and (Starcher, J., concurring); *Jackson v. State Farm Mut. Auto. Ins.*, 215 W.Va. 634, 600 S.E.2d 346 (2004) (Davis, J., concurring) and (McGraw, J., concurring).

The due process protections mandated by *State Farm v. Campbell* and its predecessors are, as the majority opinion indicates, encompassed in the trial plan which the circuit court initially adopted. The first phase trial permits a jury to examine a defendant's relevant misconduct, and determine whether punitive damages should be assessed. If the jury believes that punitive damages are warranted, then the jury also determines a punitive damages multiplier that establishes a numerical relationship between the potential harm of a defendant's conduct and each plaintiff's compensatory damages. In the second phase proceeding, the trial judge actually multiplies the plaintiff's actual compensatory damages by the multiplier and establishes a punitive damage dollar figure. The circuit judge is then obligated by *Garnes* to review the punitive damages award to assess its fairness under the circumstances.

Under this process, thousands of allegedly injured plaintiffs will be permitted their day in court. The defendants will be permitted, in one proceeding instead of thousands,

to contest the plaintiffs' claim that the defendants should pay punitive damages. And, if the trial judge determines this is the best course to take, the plaintiffs and the defendants will have secured the just, speedy, and inexpensive determination of every action.

I therefore concur in the majority's decision.