

**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA**

**January 2010 Term**

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**FILED**

**March 26, 2010**

**Nos. 34333, 34334, and 34335**

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SUPREME COURT OF APPEALS  
OF WEST VIRGINIA

**LENORA PERRINE; CAROLYN HOLBERT;  
WAUNONA MESSINGER CROUSER; REBECCA MORLOCK;  
ANTHONY BEEZEL; MARY MONTGOMERY; MARY LUZADER;  
TRUMAN R. DESIST; LARRY BEEZEL; and JOSEPH BRADSHAW;  
individuals residing in West Virginia,  
on behalf of themselves and all others similarly situated,  
Plaintiffs below, Appellants in no. 34333, Appellees in nos. 34334 and 34335,**

**V.**

**E. I. DU PONT DE NEMOURS AND COMPANY,  
a Delaware corporation doing business in West Virginia;  
MEADOWBROOK CORPORATION,  
a dissolved West Virginia corporation;  
MATTHIESSEN & HEGELER ZINC COMPANY, INC.,  
a dissolved Illinois corporation formerly doing business in West Virginia; and  
T. L. DIAMOND & COMPANY, INC.,  
a New York corporation doing business in West Virginia,  
Defendants below,**

**E. I. DU PONT DE NEMOURS AND COMPANY,  
Appellee in no. 34333, Appellant in nos. 34344 and 34335.**

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**Appeals from the Circuit Court of Harrison County  
The Honorable Thomas A. Bedell, Judge  
Civil Action No. 04-C-296-2**

**AFFIRMED, IN PART, CONDITIONALLY AFFIRMED, IN PART,  
REVERSED, IN PART, AND REMANDED**

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**Submitted: April 7, 2009  
Filed: March 26, 2010**

**R. Edison Hill  
Hill, Peterson, Carper,  
Bee & Deitzler, PLLC  
Charleston, West Virginia  
Gary W. Rich  
Law Office of Gary W. Rich, LC  
Morgantown, West Virginia  
Perry B. Jones  
Jerald E. Jones  
West & Jones  
Clarksburg, West Virginia  
J. Farrest Taylor, Pro Hac Vice  
Cochran, Cherry, Givens,  
Smith, Lane & Taylor, PC  
Dothan, Alabama  
Attorneys for Plaintiffs,  
Lenora Perrine, *et al.***

**Richard W. Gallagher  
Mary E. Snead  
Robinson & McElwee  
Clarksburg, West Virginia  
William K. Dodds, Pro Hac Vice  
Dechert, LLP  
New York, New York  
Attorneys for T. L. Diamond  
& Company, Inc.**

**David B. Thomas  
James S. Arnold  
Stephanie D. Thacker  
Allen, Guthrie & Thomas, PLLC  
Charleston, West Virginia  
Jeffrey A. Hall, Pro Hac Vice  
Bartlit, Beck, Herman,  
Palenchar & Scott, LLP  
Chicago, Illinois  
Attorneys for Defendant,  
E. I. du Pont de Nemours and Company**

**Carte P. Goodwin  
Jonathan S. Deem  
Office of the Governor  
Charleston, West Virginia  
Attorneys for *Amicus Curiae*  
The Hon. Joe Manchin, III, Governor**

**Michele Grinberg  
J. Dustin Dillard  
Flaherty, Sensabaugh & Bonasso, PLLC  
Charleston, West Virginia  
Tillman J. Breckenridge, Pro Hac Vice  
Fulbright & Jaworski, LLP  
Washington, District of Columbia  
Attorneys for *Amicus Curiae*  
The West Virginia State  
Medical Association**

**Thomas W. Rodd  
The Calwell Practice  
Charleston, West Virginia  
Attorney for *Amicus Curiae*  
The West Virginia Citizen Action Group**

**JUDGE MOATS delivered the opinion of the Court.**

**JUSTICE BENJAMIN and JUSTICE McHUGH disqualified**

**JUDGE DEREK C. SWOPE, and JUDGE ALAN D. MOATS, sitting by temporary assignment**

**CHIEF JUSTICE DAVIS concurs, in part, dissents, in part, and reserves the right to file a separate opinion.**

**JUSTICE WORKMAN concurs, in part, dissents, in part, and reserves the right to file a separate opinion.**

**JUSTICE KETCHUM concurs, in part, dissents, in part, and reserves the right to file a separate opinion.**

## SYLLABUS BY THE COURT

1. If, on an appeal by a defendant from a final judgment, this Court determines that a circuit court erroneously found, as a matter of law, that the case was not barred by the statute of limitations, this Court may conditionally affirm the judgment and remand the case for a jury trial solely on the statute of limitations issue. While on remand, if the jury finds that the statute of limitations did not run, then the judgment in favor of the plaintiff stands; if the jury determines otherwise, the trial court must set aside the verdict and render judgment in favor of the defendant.

2. The standard of review for a trial court's admission of evidence pursuant to Rule 404(b) of the West Virginia Rules of Evidence involves a three-step analysis. First, we review for clear error the trial court's factual determination that there is sufficient evidence to show the other acts occurred. Second, we review *de novo* whether the trial court correctly found the evidence was admissible for a legitimate purpose. Third, we review for an abuse of discretion the trial court's conclusion that the "other acts" evidence is more probative than prejudicial under Rule 403.

3. An objection to a circuit court ruling that admits evidence must be timely made and must state the specific ground of the objection, if the specific ground is not apparent from the context.

4. Generally, this Court will apply an abuse of discretion standard when reviewing a trial court's decision regarding a verdict form.

5. Punitive damages may not be awarded on a cause of action for medical monitoring.

6. When this Court, or a trial court, reviews an award of punitive damages, the court must first evaluate whether the conduct of the defendant toward the plaintiff entitled the plaintiff to a punitive damage award under *Mayer v. Frobe*, 40 W. Va. 246, 22 S.E. 58 (1895), and its progeny. If a punitive damage award was justified, the court must then examine the amount of the award pursuant to the aggravating and mitigating criteria set out in *Garnes v. Fleming Landfill, Inc.*, 186 W. Va. 656, 413 S.E.2d 897 (1991), and the compensatory/punitive damage ratio established in *TXO Production Corp. v. Alliance Resources Corp.*, 187 W. Va. 457, 419 S.E.2d 870 (1992).

7. When a trial or appellate court reviews an award of punitive damages for excessiveness under Syllabus points 3 and 4 of *Garnes v. Fleming Landfill, Inc.*, 186 W. Va. 656, 413 S.E.2d 897 (1991), the court should first determine whether the amount of the punitive damages award is justified by aggravating evidence including, but not limited to: (1) the reprehensibility of the defendant's conduct; (2) whether the defendant profited from the wrongful conduct; (3) the financial position of the defendant; (4) the

appropriateness of punitive damages to encourage fair and reasonable settlements when a clear wrong has been committed; and (5) the cost of litigation to the plaintiff. The court should then consider whether a reduction in the amount of the punitive damages should be permitted due to mitigating evidence including, but not limited to: (1) whether the punitive damages bear a reasonable relationship to the harm that is likely to occur and/or has occurred as a result of the defendant's conduct; (2) whether punitive damages bear a reasonable relationship to compensatory damages; (3) the cost of litigation to the defendant; (4) any criminal sanctions imposed on the defendant for his conduct; (5) any other civil actions against the same defendant based upon the same conduct; (6) relevant information that was not available to the jury because it was unduly prejudicial to the defendant; and (7) additional relevant evidence.

8. A punitive damages award that is not constitutionally excessive under *TXO Production Corp. v. Alliance Resources Corp.*, 187 W. Va. 457, 419 S.E.2d 870 (1992), may nevertheless be reduced by a reviewing court when, in the discretion of the court, a reduction is warranted by mitigating evidence.

9. When a court grants a remittitur, the plaintiff must be given the option of either accepting the reduction in the verdict or electing a new trial.

**Moats, Judge:**

This environmental class action is before this Court upon three separate appeals seeking review of a series of jury verdicts, orders, and rulings by the Circuit Court of Harrison County, West Virginia. In the underlying class action, E. I. du Pont de Nemours and Company, a defendant below (hereinafter referred to as “DuPont”), was found to be liable to class members in the approximate amount of \$381,737,522 for off-site arsenic, cadmium, and lead contamination which emanated from DuPont’s zinc smelter facility in Spelter, West Virginia. The class consists of a property class and an overlapping medical monitoring class. The \$381,737,522 amount includes the following: (1) \$55,537,522 for soil and structural remediation, (2) an estimated cost of \$130,000,000 for medical monitoring, and (3) \$196,200,000 in punitive damages.

On September 25, 2008, this Court granted the three appeals and ordered that they be consolidated for purposes of argument, consideration, and decision.<sup>1</sup> This Court has heard the oral arguments of the parties to this appeal, and has before it their briefs, all matters of record, and *amicus curiae* briefs from the West Virginia State Medical Association, the

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<sup>1</sup>It should be noted that DuPont sought the involvement of this Court prior to the granting of these appeals. In *State ex rel. E. I. DuPont de Nemours & Company v. Bedell, et al.*, no. 070762, this Court, on March 15, 2007, refused DuPont’s petition to prohibit the disclosure of documents said to be the subject of qualified immunity and privilege. In addition, in *State ex rel. E. I. DuPont de Nemours and Company v. Bedell, et al.*, no. 072095, this Court, on June 27, 2007, refused DuPont’s petition to prohibit continuing the litigation as a class action.

West Virginia Citizen Action Group, and the Honorable Joe Manchin, III, Governor of the State of West Virginia.<sup>2</sup>

In Supreme Court appeal no. 34334, DuPont appeals from orders of the circuit court entered on February 25, 2008, denying DuPont's motions for judgment as a matter of law or, in the alternative, to decertify the class; for a new trial; for relief concerning the scope, duration and cost of the medical monitoring plan; and to vacate or reduce the award of punitive damages. Specifically, DuPont contends that the circuit court erred by (1) granting summary judgment in favor of the Plaintiffs on the issue of the statute of limitations; (2) certifying this case as a class action; (3) admitting certain evidence pursuant to Rule 404(b) of the West Virginia Rules of Evidence; (4) qualifying Dr. Kirk Brown as an expert witness for the Plaintiffs and allowing his testimony; (5) adopting a verdict form and allowing certain instructions that permitted the jury to apply inaccurate standards of law; (6) accepting a medical monitoring verdict that was not supported by the evidence; and (7) awarding punitive damages. After thorough consideration of these issues, we conclude that the circuit court's order on the issue of the statute of limitations is reversed; however, the verdict (as modified by this opinion) is conditionally affirmed, and this case is remanded with directions to the circuit court to hold a jury trial on the sole issue of when the Plaintiffs

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<sup>2</sup>As acknowledged during the submission of these appeals, the high quality of the briefs and oral argument presented to this Court by counsel in this complex and difficult matter is appreciated. Also appreciated is the careful preparation and indexing of the record by the Office of the Circuit Clerk of Harrison County.

possessed the requisite knowledge to trigger the running of the statute of limitations.<sup>3</sup> Should the statute of limitations issue be resolved in favor of the Plaintiffs on remand, the remaining issues pertaining to liability and compensatory relief are affirmed, but we reverse the punitive damages award. With regard to the punitive damages award, we first conclude that punitive damages are not proper in connection with a claim for medical monitoring and therefore reduce the punitive damages award by forty percent. In addition, we find that mitigating circumstances warranted a reduction in the punitive damages award. Accordingly, we reverse the punitive damages award and remand the case with directions that the trial court give the Plaintiffs a period of thirty days from the issuance of this Court's mandate to decide whether they will accept a punitive damages remittitur in the amount of \$20,000,000, resulting in a total punitive damages verdict of \$97,720,000, or submit to a new trial on punitive damages only.

In a separate appeal, no. 34335, DuPont challenges the September 14, 2007, order of the circuit court holding that, pursuant to the terms of an October 29, 2001, agreement between DuPont and T. L. Diamond & Company, Inc., an interim owner of the smelter facility, DuPont is obligated to indemnify Diamond for its costs and expenses

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<sup>3</sup>As explained in the body of this opinion, if the jury determines that the Plaintiffs did not have the requisite knowledge more than two years prior to filing their cause of action, then the judgment in favor of the Plaintiffs, as modified by this opinion, stands. If, however, the jury determines that the Plaintiffs had the requisite knowledge more than two years prior to filing their cause of action, then the trial court must set aside the verdict and render judgment in favor of DuPont.

incurred in defending this action. Based upon the 2001 agreement, the circuit court entered a subsequent order on February 15, 2008, holding that Diamond is entitled to reimbursement from DuPont in the amount of \$814,949.37. After careful review, these two orders by the circuit court are affirmed.

Finally, in appeal no. 34333, certain individual plaintiffs appeal from orders entered by the circuit court on September 14, 2007, and on September 20, 2007,<sup>4</sup> which barred their property damage claims (but not their claims for medical monitoring), because their predecessors-in-title executed deeds granting the Grasselli Chemical Company, the original owner and operator of the zinc smelter, and Grasselli's successors, releases and easements with regard to emissions from the facility. After thorough review of this issue, we affirm.

Due to the length of this opinion and the number of issues involved, we set out the following table of contents for the reader's convenience.

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<sup>4</sup>See *infra* note 15 for a comment regarding the filing of two separate summary judgment orders.

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## I.

### FACTUAL AND PROCEDURAL HISTORY

Due to the lengthy and complex history of this case, the historical facts, regulatory history, and procedural facts will each be presented in a separate section in order to assist the reader. Additional facts that are relevant to particular issues raised in this appeal will be set out in the discussion of the issues to which they pertain.

#### *A. Historical Facts*

This action concerns the operation of what was once one of the largest zinc smelter facilities in the United States. The plant was located in the town of Spelter, in Harrison County, West Virginia, about seven miles north of Clarksburg. From 1911, when operations began, until 1972, the plant's primary product was elemental or slab zinc. From

1972 until the plant's closure in 2001, its primary product was zinc dust or powder. The total production of the smelter facility during its years of operation can be measured in the billions of pounds.

The facility, adjacent to the West Fork River and a part of the Spelter community, was surrounded by residential, small commercial, open, and wooded areas. There was also a nearby recreational trail and playground. The community was moderately populated. The smelter facility occupied 112 to 116 acres, fifty acres of which were devoted to the open depositing of waste material, including "zinc tailings."<sup>5</sup> At one point, the waste pile, consisting of continuously smoldering residue, reached a height of 100 feet.

The pyrometallurgical process employed in the smelting of zinc results in the release of potentially harmful by-products, including, at issue in this action, the elements arsenic, cadmium, and lead. According to the Plaintiffs, their cause of action resulted from their continuous exposure, and the continuous exposure of their properties, to arsenic, cadmium, and lead, emanating off-site from the smelter facility in the form of discharges from the fifty-acre waste pile and airborne dust.

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<sup>5</sup>"Tailings" have been described as "the material left over from the process of separating the valuable minerals from the worthless portion of . . . ore." *In re NovaGold Res. Inc. Sec. Litig.*, 629 F. Supp. 2d 272, 277 (S.D.N.Y. 2009). Thus, the term "zinc tailings" refers to the residue produced in the process of zinc smelting.

The history set forth below is relevant to the three consolidated appeals before this Court.

In 1910, construction began on the zinc smelter facility by the Grasselli Chemical Company, and the production of zinc from zinc ore commenced in 1911. Grasselli began the practice of depositing the residue, or zinc tailings, in a pile that ultimately covered the fifty acres. During the Grasselli years, local farmers complained about a decline in crop and livestock productivity and filed a number of actions seeking recovery of damages caused by “fumes, gases and dust” emitted from the smelter.<sup>6</sup>

In the meantime, the Grasselli Chemical Company commissioned a 1919 investigation and report concerning “Conditions Affecting the Growth of Plants and Animals” in the vicinity of the smelter. That report, known as the Bear and Morgan Report, concluded that dust and fumes from the smelter had negatively impacted plants and livestock in the Spelter community. The report, however, was not dispositive with regard to the

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<sup>6</sup>Two such cases reached this Court. In *Bartlett v. Grasselli Chemical Co.*, 92 W. Va. 445, 115 S.E. 451 (1922), this Court reversed a \$15,000 judgment for injury to the agricultural, residential and market value of a farm, caused by emissions from the smelter, and remanded the action for a new trial. Subsequently, in *Lyon v. Grasselli Chemical Co.*, 106 W. Va. 518, 146 S.E. 57 (1928), this Court affirmed a \$2,000 judgment against Grasselli for injury to the fertility and productivity of the landowner’s soil.

specific impact of arsenic, cadmium, and lead in the area. Nor did the Report resolve questions regarding human health.<sup>7</sup>

The smelter facility was acquired by DuPont in 1928, and the plant's operations were upgraded. The horizontal retorts<sup>8</sup> or furnaces used for the extraction of zinc by Grasselli, for example, were replaced with more efficient vertical retorts. In addition, DuPont and Grasselli settled the remaining claims and actions concerning emissions from the plant. As part of the settlement, certain predecessors-in-title to a number of the Plaintiffs in this action executed deeds in the 1930s granting Grasselli, and its successors, releases and easements with regard to emissions from the facility.

Specifically, the Grasselli deeds released all claims concerning various off-site properties, and the productivity thereof, arising from the "past, present or future" operation of the plant or any "substances" discharged therefrom. Moreover, the deeds conveyed to Grasselli, and its successors, a perpetual right, or easement running with the land, for the discharge of "substances" over and onto the off-site properties. The term "substances" was

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<sup>7</sup>The Bear and Morgan Report states "[n]othing was observed to indicate any injury to health of human beings which may have been caused by the 'fumes.' Housewives complain that they have more housecleaning to do on account of the 'dirt' that settles on their lace curtains, *etc.*"

<sup>8</sup>A retort is defined as "a vessel in which substances are subjected to distillation or decomposition by heat and which may be made in various forms and of various materials for different uses." Webster's Third New Int'l Dictionary 1939 (unabr. ed. 1966).

defined in the deeds as including “solids, liquids, smokes, dust, precipitates, gases, fumes, vapors and other matters” discharged from the smelter facility. According to the circuit court, parcels subject to the Grasselli deeds comprise approximately 40% of the land in the class area.

DuPont operated the zinc smelter until 1950 at which time it conveyed the facility to the Matthiessen & Hegeler Zinc Co. Matthiessen proceeded with smelting activities, and, in 1971, sold the facility to T. L. Diamond & Co., Inc.<sup>9</sup> Up to that point, the facility had engaged in primary zinc smelting, resulting in the production of elemental or slab zinc. Beginning in 1972, under Diamond, until the facility closed in 2001, the plant engaged in “secondary zinc smelting” to produce zinc dust or powder from secondary materials. As determined by the circuit court, Diamond followed the practice of previous smelter owners and continued to deposit residue containing arsenic, cadmium and lead onto the exposed waste pile. The waste pile, still smoldering, reached near the West Fork River.

### ***B. Regulatory Background***

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<sup>9</sup>It should be noted that the smelter facility was also known as the Meadowbrook facility. As indicated by the circuit court, the name “Meadowbrook” has been associated with both Matthiessen (as a subsidiary of that company) and Diamond (as merging with Diamond). In any event, Meadowbrook Corporation and Matthiessen & Hegeler Zinc Company, Inc., although named as appellees herein, are dissolved corporations and are not involved in these consolidated appeals.

For purposes of this action, the involvement of regulatory agencies with the Spelter site began during Diamond's ownership of the smelter facility.

In February 1996, an internal memorandum was sent to Abraham Ferdas, Associate Division Director, Office of Superfund Programs of the federal Environmental Protection Agency (hereinafter referred to as "the EPA"). The memorandum, written by Jack L. Downie and entitled Recommendation for Determination of Imminent and Substantial Endangerment, concerned the smelter facility and stated that,

[t]he presence of elevated levels of lead, cadmium and arsenic onsite and in drainage pathways leading directly to the West Fork River create the potential for direct contact to contaminants [sic] by any person that comes on or near the site. The initial data indicates significant offsite exposure either by runoff or wind borne emissions. . . .

. . . .

. . . The tailings pile and Site soils are a massive reservoir of unprotected heavy metals. Site soils and the tailings pile do not support vegetation. The prevailing winds in the area are out of the west and southwest. The Town of Spelter lies in the downwind footprint of the unprotected Site soils and tailings pile. High levels of lead have been found in the Town and playground areas.

The last page of the memorandum included a paragraph signed by Ferdas which stated, in part, "I hereby determine that the release or threatened release of hazardous

substances at and/or from the Site presents or may present an imminent and substantial endangerment to the public health or welfare or to the environment.”

Soon after, in March 1996, the EPA sent a “Notice of Potential Liability” to Diamond and former plant owners pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act of 1980. 42 U.S.C. § 9601, *et seq.* The Notice provided that, inasmuch as the EPA had documented the release or threatened release of hazardous substances from the smelter facility, the “potentially responsible parties,” such as Diamond and DuPont, may be liable for clean-up activities and for damages to natural resources.

Subsequently, in a report dated July 30, 1996, from the federal Agency for Toxic Substances and Disease Registry (hereinafter referred to as “the ATSDR”), the results of blood lead testing of twenty-five children living in the Spelter community were published.<sup>10</sup> The ATSDR, with the cooperation of the Harrison-Clarksburg Health Department, performed the testing because of the possible threat to public health posed by the smelter facility. The Report concluded that,

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<sup>10</sup>Indicating that the ages of the children were twenty-three months to fifteen years, the ATSDR Report stated that “[t]he blood lead concentrations ranged from non-detectable to 12 µg/dL [micrograms per deciliter]. Only one individual had a blood lead level (12 µg/dL) in excess of 10 µg/dL.” The report suggested retesting for children with blood lead levels of 10 to 14 µg/dL.

[b]ased on this limited investigation, it does not appear that children in Spelter are being exposed to hazardous levels of lead.

### **Recommendations**

Further community-wide screening for lead poisoning in Spelter is not indicated at this time. However, CDC [Centers for Disease Control] guidelines for preventing lead poisoning in children should be implemented on an individual basis by private physicians and other primary health care providers.

In September 1997, the EPA issued an administrative order finding that the actual or threatened release of hazardous substances, including arsenic, cadmium and lead, from the smelter posed a risk to public health and the environment and that responsive action was required to abate the problem. A number of remedial measures were set forth in the order for which Diamond and DuPont were determined to be jointly and severally liable. The measures included activities such as: (1) the installation of barrier devices and the consolidation of waste material to prevent off-site drainage and erosion into the community and the West Fork River, (2) the removal of debris from the river bank, (3) the providing of security to prevent public access to the facility and (4) the development of a plan for site control. DuPont returned to the facility, then owned by Diamond, and began work to stabilize and clean up the site. The administrative order did not require off-site remediation in the surrounding community.

Section XXVI of the administrative order stated that upon performance by Diamond and DuPont of Section VIII of the order, entitled “Response Action Plan - Development and Implementation,” the EPA, after review, would provide a notice of completion. In May 1999, the EPA issued a notice of completion to Diamond and DuPont with regard to the smelter facility.

Thereafter, by application dated July 13, 1999, Diamond and DuPont sought acceptance of the smelter facility into the Voluntary Remediation Program established pursuant to the West Virginia Voluntary Remediation and Redevelopment Act, W. Va. Code § 22-22-1, *et seq.*<sup>11</sup> The phrase “voluntary remediation” is defined in the Act as “a series of measures that may be self-initiated by a person to identify and address potential sources of contamination of property and to establish that the property complies with applicable remediation standards.” W. Va. Code § 22-22-2(ff) (1996) (Repl. Vol. 2009). In promulgating the Act, the West Virginia Legislature sought to “encourage persons to voluntarily develop and implement remedial plans without the need for enforcement action by the [West Virginia] Division of Environmental Protection” (hereinafter referred to as “the WV DEP”). W. Va. Code § 22-22-1(d) (1996) (Repl. Vol. 2009). The application filed by

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<sup>11</sup>*See also* Title 60 West Virginia Code of State Regulations, Series 3, entitled “Voluntary Remediation and Redevelopment Rule,” initially effective in 1997, and, in addition, the West Virginia Voluntary Remediation and Redevelopment Act Guidance Manual issued by the West Virginia Division of Environmental Protection.

Diamond and DuPont stated that the fifty-acre waste or tailings pile was the primary source of contamination at the smelter facility.

The smelter facility was accepted into the Program, and, in January 2000, Diamond, DuPont, and the WV DEP executed a document entitled “Voluntary Remediation Agreement for Investigation and Remediation Activities.” Noting that Diamond and DuPont completed “interim remedial measures” under the federal administrative order, the remediation agreement stated that further clean up activities at the facility would be undertaken pursuant to a work plan and under the supervision of a licensed remediation specialist.<sup>12</sup> As in the case of the federal administrative order, the remediation agreement did not require off-site remediation in the surrounding community.

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<sup>12</sup>In this regard, W. Va. Code § 22-22-8 (1996) (Repl. Vol. 2009) provides:

After signing a voluntary remediation agreement, the person undertaking remediation shall prepare and submit the appropriate work plans and reports to the director. The director shall review and evaluate the work plans and reports for accuracy, quality and completeness. The director may approve a voluntary remediation work plan or report or disapprove and notify the person of additional information needed to obtain approval.

Moreover, W. Va. Code § 22-22-7(b) (1996) (Repl. Vol. 2009) provides that “[a]ny voluntary remediation agreement approved by the director shall provide for the services of a licensed remediation specialist for supervision of all activities described in the agreement.” The phrase “licensed remediation specialist” is defined in W. Va. Code § 22-22-2(n) (1996) (Repl. Vol. 2009), as “a person certified by the director . . . as qualified to perform professional services and to supervise the remediation of contaminated sites.”

In 2001, all zinc operations were permanently terminated, and DuPont acquired the facility from Diamond. Specifically, by “ENVIRONMENTAL AND SALE AGREEMENT” dated October 29, 2001, Diamond transferred the facility to DuPont, and DuPont assumed liability for the “past, current and future environmental condition” of the property, including, *inter alia*: (1) “any obligations pursuant to the Voluntary Remediation Agreement,” and (2) “any liabilities related to the off-site migration of soil, sediment, groundwater or surface water from the Real Property.” Moreover, DuPont agreed to release Diamond from and against all claims, costs, expenses, *etc.*, in that regard. The “ENVIRONMENTAL AND SALE AGREEMENT” concluded by providing that Diamond “shall pay to DuPont the sum of \$200,000, adjusted for prepaid property taxes, to be used by DuPont toward the cost of obligations under the Voluntary Remediation Agreement for the Real Property.”

DuPont states that it spent \$20,000,000 for remediation of the site pursuant to EPA and WV DEP requirements. The smelter was dismantled, and the waste pile was capped and covered with soil.

### ***C. Procedural Background***

The proceedings and rulings in the circuit court will be fully set forth as each appeal is discussed in this opinion. This section provides a general procedural background with regard to the entire action.

**1. Pre-Trial Matters.** On June 15, 2004, Lenora Perrine and other residents in the vicinity of the smelter filed an environmental class action in the Circuit Court of Harrison County against DuPont, Diamond and others involved, currently or in the past, with the facility.<sup>13</sup> As stated in the second amended complaint, the Plaintiffs sought: (1) damages for private real property owners, (2) medical monitoring for residents, whether or not they are private real property owners, and (3) punitive damages, all as a result of the off-site migration of hazardous substances, including arsenic, cadmium, and lead, from the Spelter facility. The Plaintiffs made clear that the action “does not seek damages for personal injuries.” The Plaintiffs grounded the action upon theories of: (1) negligence and recklessness, (2) negligence *per se*, (3) public and private nuisance, (4) trespass, (5) strict liability, and (6) unjust enrichment (in failing to abate the emissions).

The second amended complaint contains the following allegation with regard to medical monitoring:

As a proximate result of the exposure, Plaintiffs and others similarly situated have suffered an increased risk of contracting serious latent diseases which makes it reasonably necessary for them to undergo periodic diagnostic medical examinations different from what would be prescribed in the absence of the exposure . . . .

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<sup>13</sup>The other named defendants included: (1) Meadowbrook Corp., (2) Matthiessen & Hegeler Zinc Co., Inc., (3) Nuzum Trucking Co. and (4) Joseph Paushel. Those defendants are not involved in the consolidated appeals before this Court. As previously stated, Meadowbrook Corp. and Matthiessen & Hegeler Zinc Co., Inc., although named as appellees herein, are dissolved corporations.

. . . .

Plaintiffs have no adequate remedy at law, and the establishment of a court-supervised medical monitoring fund is reasonably necessary and highly appropriate to pay for medical monitoring . . . .

As the action progressed, DuPont and Diamond denied the principal allegations of the Plaintiffs and asserted entitlement to contribution from their respective co-defendants. In this regard, DuPont asserted a cross-claim against the co-defendants in the action (which included Diamond) seeking “a judgment against its Co-Defendants in this action for either *pro rata* or comparative contribution.” In addition, Diamond filed a cross-claim against DuPont for indemnification based upon the October 29, 2001, “ENVIRONMENTAL AND SALE AGREEMENT” by which Diamond transferred the facility to DuPont. The cross-claim alleged that, pursuant to the “ENVIRONMENTAL AND SALE AGREEMENT,” DuPont was solely liable for the past, current, and future environmental condition of the smelter site and had agreed to release Diamond from and against all claims, costs, expenses, *etc.*, in that regard.

On November 14, 2005, the Plaintiffs filed a motion asking the circuit court to certify the class pursuant to Rule 23 of the West Virginia Rules of Civil Procedure. A three-day evidentiary hearing was conducted upon the motion in May 2006. On September 14, 2006, the circuit court entered an order granting the motion for certification and dividing

the class into two overlapping subclasses, the property class and the medical monitoring class. As stated in the consolidated petition for appeal filed by DuPont, “[t]he Circuit Court certified two overlapping classes: a property-damage class of property owners in a five-by-seven mile area surrounding the smelter site,<sup>[14]</sup> and a medical-monitoring class of approximately 8,500 people who had lived in the class area[.]” (Footnote added).

Pursuant to the September 14, 2006 order, the property class was defined as “[t]hose who currently own, or who on or after December 1, 2003, have owned, private real property lying within the below-referenced communities or any other private real property lying closer to the Spelter Smelter facility than one or more of the below-referenced communities.” That provision included a footnote which stated that, for clarity, the circuit court further defined the property class “as those who actually own property at the time of entry of this Order [(September 14, 2006),] or owned property as of December 1, 2003.”

The description of the medical monitoring class, however, was not finalized until June 14, 2007, at which time the circuit court entered an order granting the Plaintiffs’ motion to modify the medical monitoring class definition. The June 14 order established

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<sup>14</sup>As set forth in the September 14, 2006, order, the five-by-seven mile area designated for the property class included the following Harrison County communities: (1) Spelter, (2) Erie, (3) Hepzibah, (4) Lambert’s Run, (5) Meadowbrook, (6) Gypsy, (7) Seminole, (8) Lumberport and (9) Smith Chapel.

“proximity zones” for class determination with regard to the community surrounding the facility. Thus, the medical monitoring class was defined as:

THOSE WHO CURRENTLY OR AT ANY TIME IN THE PAST SINCE 1966 HAVE RESIDED ON PRIVATE REAL PROPERTY IN THE CLASS AREA FOR AT LEAST THE MINIMUM TOTAL RESIDENCY TIME FOR A ZONE . . . .

ZONE 1: [CLOSEST TO THE PLANT SITE]: MINIMUM TOTAL RESIDENCY TIME OF ONE YEAR SINCE 1966.

ZONE 2: MINIMUM TOTAL RESIDENCY TIME OF THREE YEARS SINCE 1966.

ZONE 3: MINIMUM TOTAL RESIDENCY TIME OF FIVE YEARS SINCE 1966.

RESIDENCY TIME WITHIN A ZONE OR ZONES CLOSER TO THE FORMER SMELTER FACILITY BUT NOT MEETING THE MINIMUM TOTAL RESIDENCY TIME FOR A CLOSER ZONE IS ACCUMULATED WITH ANY RESIDENCY TIME WITHIN A ZONE OR ZONES FURTHER AWAY IN DETERMINING TOTAL RESIDENCY TIME.

Meanwhile, by agreement dated November 21, 2006, Diamond assigned to the Plaintiffs its right to indemnification under the “ENVIRONMENTAL AND SALE AGREEMENT” with regard to any judgment entered against Diamond arising from the class action. In return, Diamond promised to cease defending against the Plaintiffs’ claims, and the Plaintiffs agreed to limit their pursuit of Diamond’s assets. Thus, in the event of a judgment against Diamond, the Plaintiffs, under the assignment, could hold DuPont accountable to satisfy Diamond’s liability. By letter dated April 23, 2007, and by order

entered on May 7, 2007, the circuit court approved the assignment. Moreover, the order stated:

[T]he indemnification cross-claim by [Diamond] against DuPont is based upon the interpretation of contractual rights and responsibilities under the Environmental and Sale Agreement, and does not pertain to issues of liability or apportionment of fault.

The order concluded further:

[B]ifurcation will aid in the efficient resolution of the common issues to be determined in the tort liability trial by severing for later trial, if necessary, the distinct issues raised by the contractual indemnification cross-claim.

As a result, the circuit court bifurcated the question of indemnification, in the context of the “ENVIRONMENTAL AND SALE AGREEMENT” and the assignment, from the issues of tort liability arising from the operation of the smelter facility. With regard to tort liability, the circuit court, on June 14, 2007, issued a management plan stating that the upcoming jury trial would consist of the following four phases: Phase I, the general liability phase, would concern evidence of the alleged exposure of the property and medical monitoring classes to contaminants from the smelter facility; Phase II would concern whether medical monitoring is warranted; Phase III would concern the Plaintiffs’ claims for property damages; and Phase IV would concern punitive damages.

In July 2007, DuPont and the Plaintiffs filed motions for summary judgment upon the issue of indemnification. DuPont asserted, *inter alia*, that its duty to indemnify Diamond under the “ENVIRONMENTAL AND SALE AGREEMENT” did not apply in this action because DuPont did nothing to cause Diamond to be named as a defendant and because the “ENVIRONMENTAL AND SALE AGREEMENT” did not contemplate the indemnification of Diamond against its own fault. The Plaintiffs, however, as assignees of Diamond, argued that the “ENVIRONMENTAL AND SALE AGREEMENT” plainly obligated DuPont to indemnify and release Diamond from and against any claims arising from the Spelter litigation.

On September 14, 2007, the circuit court entered an order granting summary judgment in favor of the Plaintiffs on the indemnification issue. The circuit court concluded that the terms of the “ENVIRONMENTAL AND SALE AGREEMENT” were unambiguous and that DuPont had an obligation pursuant to the Agreement to indemnify Diamond from and against any liability in the action, including any damages or other relief which may be awarded. In the order, the circuit court noted that Diamond had already incurred costs and expenses in defending the action. Such costs and expenses were not expressly contemplated in the prior November 21, 2006, assignment to the Plaintiffs. Ultimately, therefore, on February 15, 2008, a judgment was entered against DuPont in the amount of \$814,949.37 for Diamond’s costs and expenses in defending the action.

DuPont also filed a motion for summary judgment alleging, in relevant part, (1) that the property damage claims of numerous plaintiffs are barred by releases and easements set forth in the Grasselli deeds, and (2) that the Plaintiffs' claims were also barred by the statute of limitations. The Plaintiffs opposed the motion. By separate order, also dated September 14, 2007, and pursuant to a subsequent order entered on September 20, 2007,<sup>15</sup> the circuit court granted DuPont's motion for summary judgment with regard to the Grasselli deeds. The circuit court determined that the Grasselli releases and easements are "binding and enforceable" upon those plaintiffs who are successors-in-title to the original grantors. The damage claims of those members of the property class were, therefore, dismissed, thus forming the basis of the Plaintiffs' appeal in no. 34333. In the same two orders, the circuit court denied DuPont's motion for summary judgment with respect to the statute of limitations, and granted summary judgment in favor of the Plaintiffs on that issue. The circuit court's summary judgment ruling is challenged by DuPont as part of appeal no. 34334.

In a third order dated September 14, 2007, the circuit court held that, except for the property claims barred by the Grasselli releases and easements, DuPont is responsible

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<sup>15</sup>The circuit court entered two separate summary judgment orders addressing, *inter alia*, the Grasselli deeds and the statute of limitations. One order was entered on September 14, 2007, and contains the circuit court's findings of fact. A subsequent order, entered on September 20, 2007, focuses on the circuit court's conclusions of law. We take this opportunity to point out that we do not approve of the practice of having separate orders setting out findings of fact and conclusions of law.

as a matter of law for the conduct of the Grasselli Chemical Company concerning the smelter facility. In that regard, the circuit court found that DuPont's acquisition of Grasselli in 1928 constituted a consolidation or merger and that DuPont assumed successor liability at the time of the transaction. Therefore, according to the circuit court, because DuPont assumed the liabilities of Grasselli, "DuPont bears successor liability as to both compensatory and punitive damages."

**2. Trial and Post-Trial Matters.** The six-week trial of the action commenced in September 2007 with Phase I concerning general liability. The same jury was utilized throughout the trial. On October 1, 2007, the jury returned a Phase I verdict finding that Grasselli, DuPont, Matthiessen & Hegeler, and Diamond had caused, or contributed to, the exposure of residents or property in the class area to arsenic, cadmium, or lead. The jury determined that the exposure occurred in each zone within the area and resulted from negligence, public and private nuisance, trespass and strict liability. The jury assigned 100% of the responsibility for the negligence, public and private nuisance, trespass, and strict liability, to DuPont and 0% to Grasselli, Matthiessen & Hegeler and Diamond.

Phase II concerned medical monitoring, and on October 10, 2007, the jury returned a verdict finding: (1) that the class members were significantly exposed in each zone to arsenic, cadmium, or lead; (2) that those elements are hazardous substances; and (3) that the significant exposure to those hazardous substances was "due to emissions from the

smelter.” Furthermore, the jury found that, as a proximate result of exposure to arsenic, cadmium or lead, due to emissions from the smelter, the class members have a “significantly increased risk of contracting” certain diseases making it “reasonably necessary” for all class members to undergo periodic diagnostic medical examinations “different from what would be prescribed in the absence of the exposure.” The diseases thus determined by the jury included: (1) skin cancer, (2) lung cancer, (3) bladder cancer, (4) kidney cancer, (5) stomach cancer, (6) decreased renal function, (7) renal failure, (8) plumbism (lead poisoning), and (9) neurocognitive injury.

Thereafter, Phase III, the property damage phase, began, and on October 15, 2007, the jury returned a verdict in favor of the Plaintiffs in the amount of \$55,537,522.25 for soil and structural remediation. The jury determined that the Plaintiffs who were owners of “non-released or otherwise non-excluded properties” were entitled to reasonable costs and expenses for the remediation of their properties. Specifically the jury found that the Plaintiffs were entitled to remediation damages with regard to: (1) soil, (2) residences, (3) mobile homes and (4) commercial structures. Although the jury returned no damages for “annoyance and inconvenience associated with loss of use during the repair period,” the jury found that the Plaintiffs were entitled to damages for the reasonable costs of “management, overhead, profit and contingencies associated with the implementation of the remediation.”<sup>16</sup>

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<sup>16</sup>As set forth on the Phase III verdict form, the \$55,537,522.25 consisted of  
(continued...)

Finally, in Phase IV, the jury returned a verdict for punitive damages in favor of the Plaintiffs on October 19, 2007, in the amount of \$196,200,000. As indicated on the verdict form, the jury found that “the Classes proved that DuPont engaged in wanton, willful, or reckless conduct with respect to the Spelter plant.”

Accordingly, on November 16, 2007, the circuit court, by amended order: (1) entered judgment as to Phase I in favor of the property class and the medical monitoring class, with all liability attributed to DuPont, (2) entered judgment as to Phase II in favor of the medical monitoring class “based upon the jury’s finding that Defendant DuPont is responsible for medical monitoring,” (3) entered judgment as to Phase III in favor of the property class “based upon the jury’s finding that Defendant DuPont is responsible for remediation costs in the amount of \$55,537,522.25” and (4) entered, as to Phase IV, “judgment in favor [of] the Plaintiffs based upon the jury’s finding that Defendant DuPont is responsible for punitive damages in the amount of \$196,200,000.” The amended order

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<sup>16</sup>(...continued)

the following components as determined by the jury:

1. soil remediation: \$5,652,977.43 (Zone 1A);
2. residential remediation: \$5,961,752.51 (Zone 1); \$8,732,368.95 (Zone 2); \$12,970,954.25 (Zone 3);
3. mobile home remediation: \$755,185.79 (Zone 1); \$1,170,619.64 (Zone 2); \$852,287.09 (Zone 3);
4. commercial structure remediation: \$65,410.77 (Zone 1); \$200,830.88 (Zone 2); \$749,777.42 (Zone 3); and
5. management, overhead, profit and contingencies: \$18,425,357.52.

concluded with a provision that the circuit court would retain jurisdiction “to determine the management, scope, and duration of the medical monitoring plan, the management and distribution of the monies for the remediation costs, the management and distribution of punitive damages, and any other post-trial issues necessary to implement the jury’s verdict[.]”

On February 25, 2008, the circuit court entered five orders pertaining to post-judgment matters in this action. In the first order, the circuit court, after conducting an evidentiary hearing, set forth several rulings concerning the scope, duration and cost of the medical monitoring plan. Noting that 8,528 people are eligible to participate in the program, the circuit court adopted the medical monitoring plan described by the Plaintiffs’ expert, Dr. Charles Werntz, a physician in the Department of Occupational and Environmental Medicine at West Virginia University. The circuit court, thus, concluded that the duration of the plan would be forty years based upon the latency periods of various cancers associated with exposure to arsenic, cadmium, and lead, and would include: (1) medical screening every two years, (2) informed consent by the patient with regard to testing and (3) review by the circuit court every five years. Finally, the order stated that the cost of the medical monitoring program would be \$129,625,819 and would be funded upon a “pay as you go” approach. As explained in the order,

[t]he Court believes the most appropriate and equitable approach is to have a “pay as you go” approach to fund the medical monitoring program so that the medical monitoring

remedy is funded and paid for based on actual experience and costs incurred over time. Furthermore, the precise mechanism by which any amounts are escrowed, how the escrow is replenished, how funds are disbursed, and other similar matters should be evaluated by the Special Master, who should in turn make a prompt recommendation to the Court.

In the second order, the circuit court appointed a “Claims Administrator and Special Master to aid the Court in carrying out the medical monitoring, property remediation, and punitive damages distribution aspects of this case.”

In the third, fourth and fifth orders, the circuit court denied DuPont’s motion for judgment as a matter of law or, in the alternative, to decertify the class action in order to litigate claims and defenses upon an individual basis; denied DuPont’s motion for a new trial; and denied DuPont’s motion to vacate or reduce the punitive damages award.

As indicated above, the post-trial orders entered on February 25, 2008, form the basis of DuPont’s appeal in no. 34334.

On March 13, 2008, the circuit court entered orders staying the amended final judgment order with regard to the jury trial; the order concerning the scope, duration and cost of the medical monitoring plan; and the indemnification order directing DuPont to pay costs and expenses to Diamond. On September 25, 2008, this Court granted the appeals in no.

34333, no. 34334, and no. 34335, and ordered that they be consolidated for purposes of argument, consideration and decision.

## **II.**

### **STANDARD OF REVIEW**

Although this Court typically sets out our standard for reviewing appeals in a separate section of the published opinion, due to the variety of issues raised in these three consolidated appeals, we will set out the standards for our review of each particular issue or group of similar issues in connection with our discussion of those issues.

## **III.**

### **DISCUSSION**

Our discussion of the issues raised in this appeal is organized as follows: We will first discuss three issues that were resolved on summary judgment, those issues being DuPont's indemnity of T.L. Diamond, the effect of the Grasselli deeds, and the statute of limitations. We will then address, seriatim, class certification, the propriety of certain 404(b) evidence, expert testimony, the verdict form and instructions, the sufficiency of evidence pertaining to medical monitoring, and, finally, issues pertaining to the punitive damages award.

***A. Summary Judgment Issues  
(Indemnity, Grasselli Deeds, and Statute of Limitations)***

Three of the issues raised in these consolidated appeals relate to summary judgment orders of the circuit court. This Court's standards of review concerning summary judgments are well settled. Upon appeal, "[a] circuit court's entry of summary judgment is reviewed *de novo*." Syl. pt. 1, *Painter v. Peavy*, 192 W. Va. 189, 451 S.E.2d 755 (1994). Accord Syl. pt. 1, *Koffler v. City of Huntington*, 196 W. Va. 202, 469 S.E.2d 645 (1996). In conducting our *de novo* review, we are mindful that, pursuant to Rule 56 of the West Virginia Rules of Civil Procedure, summary judgment is proper where the record demonstrates "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." W. Va. R. Civ. P. 56(c). See generally Franklin D. Cleckley, Robin J. Davis, & Louis J. Palmer, Jr., *Litigation Handbook on West Virginia Rules of Civil Procedure* § 56, at 1113 (3d ed. 2008); 11A Michie's Jur. *Judgment and Decrees* § 217.1-217.5, at 351 (Repl. Vol. 2007). Indeed, applying Rule 56, this Court has held that "[a] motion for summary judgment should be granted only when it is clear that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of the law." Syl. pt. 3, *Aetna Cas. & Sur. Co. v. Federal Ins. Co. of New York*, 148 W. Va. 160, 133 S.E.2d 770 (1963). Accord Syl. pt. 2, *Jackson v. Putnam County Bd. of Educ.*, 221 W. Va. 170, 653 S.E.2d 632 (2007) (per curiam); Syl. pt. 1, *Mueller v. American Elec. Power Energy Servs., Inc.*, 214 W. Va. 390, 589 S.E.2d 532 (2003) (per curiam). In other words, "[t]he circuit court's function at the summary judgment stage is not

to weigh the evidence and determine the truth of the matter, but is to determine whether there is a genuine issue for trial.” Syl. pt. 3, *Painter v. Peavy*, 192 W. Va. 189, 451 S.E.2d 755.

With due consideration for the foregoing standards, we proceed to separately address the summary judgment rulings of the circuit court involving DuPont’s indemnification of Diamond, the enforceability of the releases and easements contained in the Grasselli deeds, and the statute of limitations.

**1. Indemnification of Diamond.** In 2001, all zinc operations at the Spelter plant were terminated, and, pursuant to the October 29, 2001, “ENVIRONMENTAL AND SALE AGREEMENT,” DuPont acquired the facility from Diamond. The Agreement provided that Diamond would pay DuPont the sum of \$200,000 to be used by DuPont toward the cost of compliance with the Voluntary Remediation Agreement executed in January 2000 by Diamond, DuPont, and the WV DEP. The terms of the “ENVIRONMENTAL AND SALE AGREEMENT” required DuPont to assume liability for the “past, current and future” environmental condition of the property and to release Diamond from and against all claims, costs, expenses, *etc.*, in that regard. Diamond retained liability for certain “government imposed fines or penalties.”

On November 21, 2006, Diamond assigned to the Plaintiffs its right to indemnification under the “ENVIRONMENTAL AND SALE AGREEMENT” with regard

to any judgment entered against Diamond arising from the class action. Thus, as a result of the assignment, the Plaintiffs, rather than Diamond, filed a motion for summary judgment on the issue of indemnification. DuPont likewise sought summary judgment with respect to the indemnity issue. On September 14, 2007, the circuit court granted summary judgment in favor of the Plaintiffs on this issue. Thereafter, on February 15, 2008, a supplementary order was entered directing payment by DuPont in the amount of \$814,949.37 for Diamond's costs and expenses in defending the action.<sup>17</sup>

The following provisions of the "ENVIRONMENTAL AND SALE AGREEMENT" formed the basis of the summary judgment granted in favor of the Plaintiffs:

5. . . . as between TLD [Diamond] and DuPont, DuPont shall be solely liable for the past, current and future environmental condition of the Real Property, including, but not limited to: (a) any obligations pursuant to the Voluntary Remediation Agreement; (b) any obligations pursuant to the NPDES [National Pollutant Discharge Elimination System] Permit & Consent Order; [and] (c) any liabilities related to the off-site migration of soil, sediment, groundwater or surface water from the Real Property . . . .

6. From and after the Closing Date, DuPont shall release TLD [Diamond], its officers, directors, shareholders and employees from and against any and all losses, claims, demands, liabilities, obligations, causes of action, damages, costs,

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<sup>17</sup>Although Diamond assigned to the Plaintiffs its claim for indemnification, the circuit court's award of costs and expenses was made directly to Diamond and not the Plaintiffs. Insofar as Diamond was a beneficiary of the summary judgment order, Diamond has standing to file a brief, separate from the Plaintiffs' brief, on the indemnification issue in this Court.

expenses, fines or penalties (including, without limitations, attorney and consultant fees) arising out of the past, current or future environmental condition of the Real Property, including, but not limited to: (a) any obligations pursuant to the Voluntary Remediation Agreement; (b) any obligations pursuant to the NPDES Permit & Consent Order; [and] (c) any liabilities related to the off-site migration of soil, sediment, groundwater or surface water from the Real Property . . . .

. . . .

8. DuPont shall take no action to include, or that leads any other person to include, TLD [Diamond] in any judicial or administrative proceeding related to a Released Claim. If DuPont takes any such action, DuPont shall be solely liable for the defense of TLD [Diamond] in such proceeding and for the payment of any judgment entered against TLD [Diamond] in such proceeding.

According to DuPont, paragraph five is the only paragraph in the Agreement that actually is an indemnification provision, and paragraph five does not apply to the claims asserted by the Plaintiffs in this action because it does not clearly state that DuPont assumed liability for Diamond's own negligence or other wrongful conduct committed by Diamond. Moreover, according to DuPont, paragraph six is a release provision, rather than an indemnification provision, and, consequently, is limited to precluding claims DuPont alone could have asserted against Diamond. Therefore, paragraph six would not support any obligation by DuPont to indemnify Diamond in connection with third-party claims, such as the claims alleged by the Plaintiffs. Finally, DuPont argues that, although paragraph eight required indemnification in connection with third-party claims, paragraph eight is inapplicable to this action because it is conditioned upon DuPont taking action to include,

or leading another person to include, Diamond in a judicial or administrative proceeding. According to DuPont, it was the Plaintiffs, rather than DuPont, who included Diamond in this action, and, thus, the indemnification provisions of paragraph eight were never triggered.

The Plaintiffs and Diamond, however, assert that the “ENVIRONMENTAL AND SALE AGREEMENT” clearly and unambiguously obligated DuPont to indemnify and release Diamond with regard to the claims alleged by the Plaintiffs in this action. Relying primarily upon paragraph five, the circuit court agreed and concluded that indemnification was required as a matter of law.

“‘Where the terms of a contract are clear and unambiguous, they must be applied and not construed.’ Syl. Pt. 2, *Bethlehem Mines Corp. v. Haden*, 153 W. Va. 721, 172 S.E.2d 126 (1969).” Syl. pt. 2, *Orteza v. Monongalia County General Hosp.*, 173 W. Va. 461, 318 S.E.2d 40 (1984). Accord Syl. pt. 1, *Kanawha Valley Power Co. v. Justice*, 181 W. Va. 509, 383 S.E.2d 313 (1989) (per curiam). Stated another way,

“‘[i]t is not the right or province of a court to alter, pervert or destroy the clear meaning and intent of the parties as expressed in unambiguous language in their written contract or to make a new or different contract for them.’ Syllabus Point 3, *Cotiga Development Co. v. United Fuel Gas Co.*, 147 W. Va. 484, 128 S.E.2d 626 (1962).” Syllabus point 1, *Hatfield v. Health Management Associates of West Virginia*, 223 W. Va. 259, 672 S.E.2d 395 (2008) (per curiam).

Syl. pt. 5, *Dan’s Carworld, LLC v. Serian*, 223 W. Va. 478, 677 S.E.2d 914 (2009).

Moreover, a contract is not rendered ambiguous merely because the parties disagree as to its construction. As expressed by this Court in Syllabus point 1 of *Berkeley County Public Service District v. Vitro Corp. of America*, 152 W. Va. 252, 162 S.E.2d 189 (1968), “[t]he mere fact that parties do not agree to the construction of a contract does not render it ambiguous. The question as to whether a contract is ambiguous is a question of law to be determined by the court.” *Accord* Syl. pt. 3, *Energy Dev. Corp. v. Moss*, 214 W. Va. 577, 591 S.E.2d 135 (2003).

Express indemnity agreements, such as the written “ENVIRONMENTAL AND SALE AGREEMENT” between DuPont and Diamond, are commonly governed by the principles surrounding the requisites, validity and construction of contracts generally.<sup>18</sup> As Syllabus point 4 of *Vankirk v. Green Construction Company*, 195 W. Va. 714, 466 S.E.2d 782 (1995), observes, “[i]n construing the language of an express indemnity contract, the ordinary rules of contract construction apply.” *See also Sydenstricker v. Unipunch Prods. Inc.*, 169 W. Va. 440, 445, 288 S.E.2d 511, 515 (1982) (commenting that “express indemnity agreements are based on contract principles”); *Sellers v. Owens-Illinois Glass Co.*, 156 W. Va. 87, 92, 191 S.E.2d 166, 169 (1972) (explaining that “[t]he rules governing the

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<sup>18</sup>In Syllabus point 1 of *Valloric v. Dravo Corp.*, 178 W. Va. 14, 357 S.E.2d 207 (1987), this Court distinguished express indemnity, based upon a written agreement, from implied indemnity, arising out of equitable principles and the relationship of the parties. *See also Valloric*, 178 W. Va. at 17 & 18 n.5, 357 S.E.2d at 210 & 211 n.5. *Accord Vankirk v. Green Constr. Co.*, 195 W. Va. 714, 721 n.12, 466 S.E.2d 782, 789 n.12 (1995); *City Nat’l Bank of Charleston v. Wells*, 181 W. Va. 763, 774, 384 S.E.2d 374, 385 (1989).

requisites and validity of contracts generally apply to contracts of indemnity”); 42 C.J.S. *Indemnity* § 10, at 112 (2007) (stating “[t]he general rules which govern the construction and interpretation of other contracts apply in construing a contract of indemnity . . . .”). Thus, facilitating the intention of the parties is a fundamental consideration. Syllabus point 2 of *Sellers, supra*, holds that, “[i]n construing a contract of indemnity and determining the rights and liabilities of the parties thereunder, the primary purpose is to ascertain and give effect to the intention of the parties.” *See also Moore v. Chesapeake & Ohio Ry. Co.*, 493 F. Supp. 1252, 1269 (S.D. W. Va. 1980) (“In construing a contract of indemnity . . . the primary purpose is to ascertain and give effect to the intention of the parties.”), *aff’d*, 649 F.2d 1004 (4th Cir. 1981).

The September 14, 2007, order granting the Plaintiffs’ motion for summary judgment essentially tracks the key language of the “ENVIRONMENTAL AND SALE AGREEMENT” to the effect that, in paragraphs five and six, DuPont assumed sole liability for, and promised to release Diamond from and against, the past, current, and/or future environmental condition of the property with regard to “any liabilities related to the off-site migration of soil, sediment, groundwater or surface water” from the smelter facility. The language in these paragraphs makes clear that the actions of Diamond, including the possibility of negligence, while engaging in secondary zinc smelting between 1972 and 2001 were within the contemplation of the parties when the “ENVIRONMENTAL AND SALE AGREEMENT” was executed. Finally, although not relied upon by the circuit court,

paragraph eight of the agreement, concerning indemnification for including Diamond “in any judicial or administrative proceeding,” provides an additional basis for DuPont’s obligation to indemnify Diamond. In that regard, the filing by DuPont of a cross-claim against Diamond for contribution, in the context of this complex litigation, was sufficient to trigger that provision.

Upon our *de novo* review, this Court is of the opinion that Diamond’s motion for summary judgment on the issue of DuPont’s duty to indemnify Diamond was properly granted. Accordingly, the September 14, 2007, order of the circuit court granting summary judgment in favor of Diamond upon the indemnification issue, and the February 15, 2008, order directing payment by DuPont in the amount of \$814,949.37 for Diamond’s costs and expenses, are affirmed.<sup>19</sup>

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<sup>19</sup>DuPont also asserts that the “ENVIRONMENTAL AND SALE AGREEMENT” fails to provide indemnification to Diamond because the Agreement is limited to the off-site migration of contaminants through soil and water, whereas the Plaintiffs’ claims are primarily based upon airborne emissions from the smelter facility. In that regard, paragraphs 5 and 6 of the Agreement state that DuPont shall indemnify or release Diamond with regard to liabilities related to the off-site migration of “soil, sediment, groundwater or surface water.” Airborne emissions are not mentioned.

The Plaintiffs and Diamond respond by asserting that there is ample evidence in the record to show that the contamination from the facility followed a number of pathways, such as through the West Fork River, to reach off-site locations. Moreover, the second amended complaint alleges, *inter alia*, that hazardous substances were simply “released” from the facility. Thus, the Plaintiffs contend that their claims were not based upon airborne emissions alone. In any event, this Court notes that paragraphs 5 and 6 of the “ENVIRONMENTAL AND SALE AGREEMENT” specifically state that DuPont’s  
(continued...)

**2. The Grasselli Deeds.** This appeal concerns the validity of the circuit court’s orders of September 14, 2007, and September 20, 2007,<sup>20</sup> dismissing the property damage claims of those plaintiffs who are successors-in-title to the original grantors of the Grasselli deeds. The Grasselli deeds sought to preclude all claims relating to various off-site properties, and any decline in crop and livestock productivity thereof, arising from the “past, present or future” operation of the smelter facility or any substances discharged therefrom.<sup>21</sup>

The Grasselli Chemical Company, the original owner and operator of the smelter, using horizontal retorts or furnaces in the zinc extraction process, began the practice of depositing zinc residue or tailings<sup>22</sup> at an on-site location that ultimately became the fifty-acre waste pile. Production under Grasselli took place from 1911 until 1928 when DuPont acquired the facility. During the Grasselli years, local farmers complained about a decline in crop and livestock productivity and filed a number of actions seeking recovery of damages

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<sup>19</sup>(...continued)  
responsibility “includ[es], but [is] not limited to,” migration through soil and water. Consequently, this Court concludes that DuPont’s assertion, that the Agreement does not apply to airborne emissions, is unconvincing.

<sup>20</sup>*See supra* note 15 for a comment regarding the entry of two separate summary judgment orders.

<sup>21</sup>This aspect of the action does not concern medical monitoring. Although DuPont asserted in its summary judgment motion that the Grasselli deeds precluded *all* claims asserted by the property owners subject thereto, the circuit court ruled that the deeds did not bar the affected plaintiffs’ medical monitoring claims. This ruling by the circuit court has not been appealed.

<sup>22</sup>For a definition of the term “tailings,” see note 5 *supra*.

caused by fumes, gases, and dust emitted from the smelter. The Bear and Morgan Report, commissioned by Grasselli in 1919, concluded that dust and fumes from the smelter had negatively impacted plants and livestock in the Spelter Community. Following the 1928 acquisition, DuPont and Grasselli settled the claims and actions of the farmers and other property owners in the community.<sup>23</sup>

As part of the settlement, certain predecessors-in-title to a number of the plaintiffs in the property class executed deeds in the 1930s granting Grasselli, and its successors, releases and easements with regard to emissions from the facility. Specifically, the Grasselli deeds released all claims concerning various off-site properties, and any decline in crop and livestock productivity thereof, arising from the “past, present or future” operation of the plant or any substances discharged therefrom. Moreover, the deeds conveyed to Grasselli, and its successors, a perpetual right, or easement running with the land, for the discharge of substances over and onto the off-site properties. According to the circuit court, parcels subject to the Grasselli deeds comprise approximately forty percent of the land in the class area.

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<sup>23</sup>As previously indicated, the circuit court, in this action, found that DuPont’s acquisition of Grasselli in 1928 constituted a consolidation or merger and that DuPont assumed successor liability for Grasselli’s conduct concerning the smelter facility.

The following provisions are representative of the releases and easements found in the Grasselli deeds:

the said party of the first part does hereby remise, release and forever discharge said parties of the second part [the Grasselli Chemical Company, its successors, *etc.*], and each of them, and the successors and assigns of them and each of them, of and from all actions, causes of action, suits, liabilities, damages, claims, debts and/or demands, in law or equity, which said party of the first part . . . shall or may have against said parties of the second part . . . for or by reason of any and all injuries, damages and/or losses of every kind whatsoever, to said land of said party of the first part, the productivity and/or products of said land . . . which have been caused, arisen or resulted, or are caused, arise or result [or] hereafter may or shall be caused, arise or result from, by reason or out of said plant or the past, present or future existence, construction, maintenance or operation of said plant, or any substance or substances in the past, present or future produced, discharged, emanating, cast, precipitated or escaping therefrom. . . . The substance or substances hereinbefore and elsewhere in this deed mentioned do and shall include and extend to any and all solids, liquids, smokes, dust, precipitates, gases, fumes, vapors and other matters and things which have been, are or hereafter may or shall be produced, discharged, emanated, cast or precipitated, or did, do or shall escape, by or from said plant in, about or by reason of the manufacture, smelting, extraction or production of zinc or any product thereof. . . .

. . . the] party of the first part does hereby grant and convey to said The Grasselli Chemical Company, a Delaware corporation as aforesaid, and its successors and assigns forever, the full, free and perpetual right to construct, maintain, operate and use the said plant . . . to carry on the manufacturing, smelting, extracting and/or producing operation aforesaid, and to produce, discharge, emanate, cast, precipitate and cause or permit to escape the aforesaid substance or substances therefrom and over, on and/or onto said land of said party of the first part or any property or thing, real, personal or mixed, therein or thereon, without any compensation except the above recited consideration already

received as aforesaid . . . said party of the first part, for himself, and the heirs, personal representatives and assigns of him, hereby releasing any and all such actions, causes of action, suits, liabilities, damages, claims, debts and/or demands.

Said party of the first part, for himself, and the heirs, personal representatives and assigns of him, covenants and agrees that all of the grants, releases, rights, easements, restrictions, covenants and agreements in or by this deed made, granted, created or imposed shall run with said land and the title thereto and shall bind said land, said party of the first part, and the heirs, personal representatives and assigns of him, and every subsequent owner, possessor or occupant of said land, or any part thereof, and shall inure to the benefit of said parties of the second part and each of them, and the successors and assigns of them and each of them forever.

The Plaintiffs in the current action sought, *inter alia*, recovery for damage to real property resulting from the off-site migration of hazardous substances, including arsenic, cadmium and lead, from the Spelter facility. As alleged in the second amended complaint, the release of hazardous substances from the plant “occurred on a continuing basis for over 90 years” and the release of arsenic, cadmium and lead “also contaminated nearby water bodies and groundwater.”

In July 2007, DuPont filed an omnibus motion for summary judgment which included the following averment concerning the Grasselli deeds: “[t]he claims of numerous individual plaintiffs are barred by the operation of releases and easements granted to the Grasselli Chemical Company and its successors and assigns which expressly allow for the

discharge of the products and by-products of the smelter's operations over and onto their lands." The Plaintiffs responded by asserting that the releases and easements do not bar the property damage claims: (1) because the extent of the potential contamination and damage was beyond the contemplation of the original landowners and (2) because the releases and easements, ostensibly allowing off-site emissions of contaminated materials, violate public policy.

In nearly identical orders entered on September 14, 2007, and September 20, 2007,<sup>24</sup> the circuit court granted DuPont's motion for summary judgment with regard to the Grasselli deeds, thereby dismissing the property damage claims of those plaintiffs who are successors-in-title to the original grantors of the Grasselli deeds. The circuit court noted that the deeds resulted from the settlement of prior claims and lawsuits, and, finding that the releases and easements were unambiguous, relied upon the express language of the deeds to conclude that the releases and easements set forth therein are "binding and enforceable" upon those plaintiffs who are successors-in-title to the original grantors. The property damage claims of those plaintiffs were, therefore, dismissed.<sup>25</sup> Upon careful examination of the Grasselli deeds, we agree with the circuit court.

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<sup>24</sup>See *supra* note 15 for a comment regarding the entry of two separate summary judgment orders.

<sup>25</sup>As previously noted, the circuit court ruled that the deeds did not preclude the Plaintiffs' medical monitoring claims.

This Court has long recognized that, “[w]here the intent of the parties is clearly expressed in definite and unambiguous language on the face of the deed itself, the court is required to give effect to such language and, ordinarily, will not resort to parole or extrinsic evidence.” *Pocahontas Land Corp. v. Evans*, 175 W. Va. 304, 308, 332 S.E.2d 604, 609 (1985). *Accord Carr v. Michael Motors, Inc.*, 210 W. Va. 240, 245, 557 S.E.2d 294, 299 (2001); *Henderson v. Coombs*, 192 W. Va. 581, 585, 453 S.E.2d 415, 419 (1994) (per curiam). *See generally* 4A Michie’s Jur. *Contracts* § 40, at 458 (Repl. Vol. 2007) (observing that, if the written contract is unequivocal, the court is not at liberty to search for its meaning beyond the instrument itself).

A review of the Grasselli deeds reveals that the deeds utilized plain language to clearly express the intent of the parties. Notably, the Grasselli deeds were executed as part of the settlement of numerous lawsuits brought against Grasselli by local land owners seeking to recover damages caused by fumes, gases, and dust emitted from the smelter. In exchange for settling these claims, the deeds, in plain language, released Grasselli and its successors and assigns from *all actions* for losses of “every kind whatsoever” caused by the “past, present or future” operation of the plant or caused by “any substance or substances in the past, present or future,” emanating from the plant.<sup>26</sup> The deeds further grant Grasselli and

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<sup>26</sup>The term “substances” is defined in the deeds as

any and all solids, liquids, smokes, dust, precipitates, gases,  
(continued...)

its successors the “free and perpetual right” to discharge, or permit to escape onto the off-site lands of the grantors, the substances specified therein. Finally, the deeds provide that the releases and easements “shall run with [the] land” to the benefit of Grasselli and its successors. Not only do the Grasselli deeds utilize unmistakable language, but we additionally find notable the fact that the deeds were executed in the settlement of actions brought by area landowners seeking compensation for damage to their property caused by the substances emanating from the smelter. This fact leaves no doubt that the parties to the Grasselli deeds understood that they were agreeing to the continued discharge of harmful substances onto their properties, even if they did not know the exact composition of those substances. Accordingly, we find no error in the circuit court’s conclusion that, due to the plain language utilized, the Grasselli deeds are “binding and enforceable.” The Plaintiffs, however, present this Court with two arguments challenging the deeds on grounds other than the language therein used: (1) under West Virginia law, the exculpatory clauses in the deeds do not protect DuPont from reckless or wanton conduct, and (2) exculpatory clauses insulating parties against actions for grossly negligent, wanton or intentional conduct are void as a matter of public policy. We address these issues in turn.

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<sup>26</sup>(...continued)

fumes, vapors and other matters and things which have been, are or hereafter may or shall be produced, discharged, emanated, cast or precipitated, or did, do or shall escape, by or from said plant in, about or by reason of the manufacture, smelting, extraction or production of zinc or any product thereof.

In support of their argument that, “[u]nder West Virginia law, the general exculpatory clause in the [Grasselli deeds] does not shield DuPont from liability for reckless or wanton conduct,” the Plaintiffs primarily rely on *Murphy v. North American River Runners, Inc.*, 186 W. Va. 310, 412 S.E.2d 504 (1991). The Plaintiffs’ reliance on *Murphy* is misplaced. *Murphy* involved a release executed by the plaintiff prior to embarking upon a white-water rafting expedition offered by the defendant, North American River Runners, Inc. (hereinafter referred to as “North American”). After sustaining an injury during the rafting trip,<sup>27</sup> Ms. Murphy sued North American. North American filed a motion for summary judgment based upon the anticipatory release that had been executed by Ms. Murphy. The trial court granted the motion, and Ms. Murphy appealed. This Court then held that,

[a] general clause *in a pre-injury exculpatory agreement* or anticipatory release purporting to exempt a defendant from all liability for any future loss or damage will not be construed to include the loss or damage resulting from the defendant’s intentional or reckless misconduct or gross negligence, *unless the circumstances clearly indicate that such was the plaintiff’s intention.*

Syl. pt. 2, *Murphy*, 186 W. Va. 310, 412 S.E.2d 504 (emphasis added).

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<sup>27</sup>Ms. Murphy was injured when the guide operating her raft attempted to rescue another raft, which was also owned by the defendant North American River Runners, Inc., that had become trapped among rocks in the rapids. *Murphy v. North Am. River Runners, Inc.*, 186 W. Va. 310, 313-14, 412 S.E.2d 504, 507-08 (1991). Ms. Murphy’s guide attempted to dislodge the ensnared raft by intentionally bumping the raft with the raft upon which Ms. Murphy was riding. *Id.* The force of the bump threw Ms. Murphy out of her raft causing her injury. *Id.*

Notably, the *Murphy* holding is expressly limited to a “*pre-injury*” exculpatory agreement. A *pre-injury* exculpatory agreement is distinguishable from the type of release/easement granted in the instant case. In the *pre-injury* context, a release is granted before any injury has been caused, and is often required in exchange for receiving a service that is accompanied by some element of danger, such as white-water rafting. In such a circumstance, the grantor of the release is entitled to expect that the person or entity being released will act with reasonable care and will not intentionally cause harm. Indeed, in the pre-injury release context, an intentional act would not be foreseeable; therefore, the law will not excuse “intentional or reckless misconduct or gross negligence, unless the circumstances clearly indicate that such was the plaintiff’s intention.” Syl. pt. 2, *Murphy*, 186 W. Va. 310, 412 S.E.2d 504.<sup>28</sup>

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<sup>28</sup>Likewise, the other cases cited by the Plaintiffs involve pre-injury agreements. See *Tudor v. Charleston Area Med. Ctr., Inc.*, 203 W. Va. 111, 506 S.E.2d 554 (1997) (pertaining to pre-injury release signed by job applicant allowing prospective employer to obtain employment information from prior employer); *Johnson v. Junior Pocahontas Coal Co., Inc.*, 160 W. Va. 261, 234 S.E.2d 309 (1977) (involving pre-injury exceptions and reservations contained in deed whereby plaintiffs acquired their property); *Stamp v. Windsor Power House Coal Co.*, 154 W. Va. 578, 177 S.E.2d 146 (1970) (discussing enforceability of pre-injury conveyances of coal seams that waive the right to subjacent support of the surface); *Continental Coal Co. v. Connellsville By-Prod. Coal Co.*, 104 W. Va. 44, 138 S.E. 737 (1927) (addressing pre-injury provision in title papers conveying coal seam). But see *Rose v. Oneida Coal Co., Inc.*, 180 W. Va. 182, 375 S.E.2d 814 (1988) (enforcing pre-injury reserve in severance deed granting right to mine coal without liability for injury to surface in claim by surface owner alleging willful, negligent and wanton conduct).

Conversely, a release granted in connection with a settlement, such as that at issue in the instant case, is executed *after* an injury has occurred. In this circumstance, there is no foreseeability issue. Because the injury has already been caused, the circumstances “clearly indicate . . . the plaintiff’s intention” to allow the injury to continue. Syl. pt. 2, in part, *Murphy*. Therefore, the grantor, who is aware that an injury has been suffered and has sought redress for the same, may agree to permit continued harm in exchange for compensation in consideration for the harm. This is especially true where, as here, that intention is expressly set out in the unambiguous terms of the agreement (here, the deed).

It has been similarly observed that there are several contexts, including trespass to land, in which consent to actions that would otherwise amount to intentional torts is acceptable in the right circumstances:

Concerning intentional conduct, . . . it is universally held that in the right circumstances one can consent to certain actions that otherwise would be intentional torts. This is true of defamation, surgical procedures, *trespass to land*, sporting events that involve physical contact, and a host of other acts that would be tortious in the absence of consent. *See generally* PROSSER & KEETON ON TORTS § 18 (consent as defense to intentional torts). Moreover, even when an act is a *criminal offense*, consent can bar a tort suit, though not a criminal prosecution. With certain exceptions not involved here, “consent is effective to bar recovery in a tort action although the conduct consented to is a crime.” RESTATEMENT (2D) OF TORTS § 892C (1979).

*Smith v. Holley*, 827 S.W.2d 433, 438 (Tex. Ct. App. 1992) (first emphasis added) (footnote omitted). *See also* Restatement (Second) of Torts § 892A(1) (1979) (“One who effectively

consents to conduct of another intended to invade his interests cannot recover in an action of tort for the conduct or for harm resulting from it.”).

In the instant case, numerous landowners brought lawsuits against Grasselli in the late 1920s for injury to their land and personal property caused by Grasselli’s discharge of the residue of its zinc smelting activities. The parties to these lawsuits negotiated settlements with Grasselli in which they agreed to accept monetary compensation in exchange for expressly allowing Grasselli to continue to discharge onto their land the residue of its zinc smelting activities. Because the landowners had already experienced the harm resulting from the discharge of the smelting residue, they could easily foresee the harm caused to their property from the smelting residue. In these circumstances, West Virginia law does not prohibit landowners from granting a release authorizing reckless or wanton conduct.

In addition, we note that the releases at issue expressly authorized the *intentional* continuation of harm by Grasselli and its successors and assigns. Insofar as the release authorized intentional acts, it is rather nonsensical for the Plaintiffs to now complain that the actions of Grasselli and its successors should have been prohibited as being reckless<sup>29</sup>

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<sup>29</sup>The term “reckless” is “[c]haracterized by the creation of a substantial and unjustifiable risk of harm to others and by a conscious (and sometimes deliberate) disregard for or indifference to that risk; heedless; rash.” *Black’s Law Dictionary* 1276 (7th ed. 1999). (continued...)

and wanton.<sup>30</sup> Moreover, the landowners' consent to the continued intentional contamination of their land was granted in the form of easements. This Court has previously recognized that "an easement allows a person to engage in activities on another's land that, in the absence of the easement, would be a nuisance." *Quintain Dev., LLC v. Columbia Nat. Res., Inc.*, 210 W. Va. 128, 135, 556 S.E.2d 95, 102 (2001). Finally, the easements were designated to run with the land and were duly recorded. Therefore, subsequent owners were put on notice of the existence of the easements encumbering their land. Based upon these facts, we find no grounds upon which to conclude that the releases and easements contained in the Grasselli deeds do not protect DuPont from liability for reckless or wanton conduct.

The Plaintiffs next contend that the Grasselli deeds are void as a violation of public policy insofar as they insulate DuPont from grossly negligent, wanton or intentional conduct. This argument is very similar to the preceding argument asserted by the Plaintiffs, and we reject it for very similar reasons.

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<sup>29</sup>(...continued)

In the context of the Grasselli deeds, "harm" refers only to harm to the land and personal property of the Plaintiffs whose land is subject to the Grasselli easements. As noted above, the circuit court concluded that the Grasselli deeds did not preclude the Plaintiffs' medical monitoring claims, and this ruling has not been appealed. *See supra* note 21.

<sup>30</sup>"Wanton misconduct" refers to "[a]n act, or a failure to act when there is a duty to do so, in reckless disregard of another's rights, coupled with the knowledge that injury will probably result." *Black's Law Dictionary* 1014 (7th ed. 1999).

First, we are unpersuaded by the Plaintiffs' reliance on general principles of contract law pertaining to exculpatory agreements. Plaintiffs cite numerous cases for the general proposition that courts will not enforce, on public policy grounds, exculpatory provisions that attempt to absolve a party of its wanton, reckless or intentional conduct. However, a review of these cases reveals that the agreements at issue in nearly all of those cases were executed in the context of a *pre-injury* release;<sup>31</sup> thus, as explained in the

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<sup>31</sup>See, e.g., *Wright v. Sony Pictures Entm't, Inc.*, 394 F. Supp. 2d 27 (D.D.C. 2005) (pre-injury contestant release form for participation in "Wheel of Fortune" game show); *American Motorist Ins. Co. v. Morris Goldman Real Estate Corp.*, 277 F. Supp. 2d 304 (S.D.N.Y. 2003) (pre-injury waiver of subrogation clause contained in lease agreement); *Western Alliance Ins. Co. v. Wells Fargo Alarm Servs., Inc.*, 965 F. Supp. 271 (D. Conn. 1997) (pre-injury release in contract for security/alarm system); *Wolfgang v. Mid-Am. Motorsports, Inc.*, 898 F. Supp. 783 (D. Kan. 1995) (pre-injury release related to automobile racing); *In re Sikes*, 184 B. R. 742 (M.D. Tenn. 1995) (pre-injury personal guarantee pertaining to construction loan); *Public Serv. Enter. Group, Inc. v. Philadelphia Elec. Co.*, 722 F. Supp. 184 (D.N.J. 1989) (pre-injury release in owners agreement); *Airfreight Exp. Ltd. v. Evergreen Air Ctr., Inc.*, 215 Ariz. 103, 158 P.3d 232 (Ariz. Ct. App. 2007) (settlement agreement operating as pre-injury release because it purportedly released intentional injuries involving the quality of future repairs to an airplane); *City of Santa Barbara v. Superior Court*, 41 Cal. 4th 747, 161 P.3d 1095, 62 Cal. Rptr. 3d 527 (2007) (pre-injury release in camp application form); *U.S. Fire Ins. Co. v. Sonitrol Mgmt. Corp.*, 192 P.3d 543 (Colo. Ct. App. 2008) (pre-injury release in contract for burglar and fire alarm services); *Chadwick v. Colt Ross Outfitters, Inc.*, 100 P.3d 465 (Colo. 2004) (pre-injury release agreement for hunting expedition); *Moore v. Waller*, 930 A.2d 176 (D.C. 2007) (pre-injury release of liability signed when plaintiff joined fitness center); *McFann v. Sky Warriors, Inc.*, 268 Ga. App. 750, 603 S.E.2d 7 (2004) (pre-injury release in instructor agreement); *Laeroc Waikiki Parkside, LLC v. K.S.K. (Oahu) Ltd. P'ship*, 115 Hawai'i 201, 166 P.3d 961 (2007) (pre-injury purchase agreement); *Falkner v. Hinckley Parachute Ctr., Inc.*, 178 Ill. App. 3d 597, 533 N.E.2d 941, 127 Ill. Dec. 859 (1989) (pre-injury release in training agreement); *State Group Indus. (USA) Ltd. v. Murphy & Assocs. Indus. Servs., Inc.*, 878 N.E.2d 475 (Ind. Ct. App. 2007) (pre-injury contract provision exempting a party from liability); *Adloo v. H.T. Brown Real Estate, Inc.*, 344 Md. 254, 686 A.2d 298 (1996) (pre-injury release in real estate listing contract); *Ball v. Waldoch Sports, Inc.*, No. C0-03-227, 2003 WL 22039946 (Minn. (continued...))

preceding discussion, they simply do not apply in the context of an unambiguous post-injury *settlement agreement*.

Furthermore, this Court has previously held that “[a] deed will be interpreted and construed as of the date of its execution.’ Syllabus point 2, *Oresta v. Romano Brothers, [Inc.]* 137 W. Va. 633, 73 S.E.2d 622 (1952).” Syl. pt. 3, *Quintain Dev., LLC v. Columbia Nat. Res., Inc.*, 210 W. Va. 128, 556 S.E.2d 95. Therefore, a determination of whether the agreements at issue violate public policy must be determined based upon the public policy

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<sup>31</sup>(...continued)

Ct. App. Sept. 2, 2003) (pre-injury release signed by participant as condition of participating in snowmobile grass drag race); *Conant v. Rodriguez*, 113 N.M. 513, 828 P.2d 425 (N.M. Ct. App. 1992) (release not executed as part of a settlement, appears to have been a pre-injury release), *criticized by Baker v. Bhajan*, 117 N.M. 278, 281 n.1, 871 P.2d 374, 377 n.1 (1994) (“[T]he Court of Appeals may have implied that releases which purport to grant a release of liability for willful or reckless conduct are invalid. This proposition is too broad. ‘It is universally held that in the right circumstances one can consent to certain actions that otherwise would be intentional torts. This is true of defamation . . . .’ *Smith v. Holley*, 827 S.W.2d 433, 438 (Tex. Ct. App. 1992) . . . .”); *Smith v. Golden Triangle Raceway*, 708 S.W.2d 574 (Tex. Ct. App. 1986) (pre-injury release required in order to gain access to raceway pit area); *Finch v. Southside Lincoln-Mercury, Inc.*, 274 Wis. 2d 719, 685 N.W.2d 154 (Wis. Ct. App. 2004) (pre-injury clauses in two dealership facility leases). The Plaintiffs have also cited *In re Cunningham*, 365 B.R. 352 (D. Mass. 2007), in support of their broad argument that courts will not enforce, on public policy grounds, exculpatory provisions that attempt to absolve a party of its wanton, reckless or intentional conduct. *Cunningham* does not support this principle of law. While the *Cunningham* court did recognize this general principle, it went on to distinguish the agreement before it on the ground that the agreement “was made during the course of litigation, was in the nature of an agreement for judgment, and was enforced by the Superior Court. . . .” *Cunningham* 365 B.R. at 365. Ultimately, the *Cunningham* court concluded that the exculpatory agreement at issue therein, which excused liability for harm caused intentionally, was binding.

in existence in the early 1930s when the agreements were executed. With respect to public policy, this Court has recognized that,

[t]he determination of the existence of public policy in West Virginia is a question of law. Syl. pt. 1, *Cordle v. General Hugh Mercer Corp.*, 174 W. Va. 321, 325 S.E.2d 111 (1984). Additionally, the determination of public policy requires careful thought:

‘Much has been written by text writers and by the courts as to the meaning of the phrase “public policy.” All are agreed that its meaning is as “variable” as it is “vague,” and that there is no absolute rule by which courts may determine what contracts contravene the public policy of the state. The rule of law, most generally stated, is that “public policy” is that principle of law which holds that “no person can lawfully do that which has a tendency to be injurious to the public or against public good \* \* \*” even though “no actual injury” may have resulted therefrom in a particular case “to the public.” It is a question of law which the court must decide in light of the particular circumstances of each case.

The sources determinative of public policy are, among others, our federal and state constitutions, our public statutes, our judicial decisions, the applicable principles of the common law, the acknowledged prevailing concepts of the federal and state governments relating to and affecting the safety, health, morals and general welfare of the people for whom government – with us – is factually established.

*Morris v. Consolidation Coal Co.*, 191 W. Va. 426, 433 n.5, 446 S.E.2d 648, 655 n.5 (1994) (quoting *Cordle v. General Hugh Mercer Corp.*, 174 W. Va. at 325, 325 S.E.2d at 114) (additional citation omitted). See also *Mitchell v. Broadnax*, 208 W. Va. 36, 45, 537 S.E.2d

882, 891 (2000), *superseded by statute on other grounds as stated in* Syl. pt. 7, *Findley v. State Farm Mut. Auto. Ins. Co.*, 213 W. Va. 80, 576 S.E.2d 807 (2002).

In their “RESPONSE IN OPPOSITION TO DEFENDANT DUPONT’S MOTION FOR SUMMARY JUDGMENT,” the Plaintiffs relied on emissions violations recorded by the WV DEP and the EPA between the years 1971 and 1998 as the source of the public policy allegedly violated by the Grasselli deeds. Thus, this Court is being asked to retroactively impose public policy spanning the years 1971 to 1998 on an agreement executed in the 1930s. We simply are not at liberty to do so. A 1930s agreement must be judged upon the public policy that existed in the 1930s.<sup>32</sup> In the absence of any evidence that the agreement violated public policy at the time it was entered, we find that the circuit court

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<sup>32</sup>Furthermore, we are being asked to retroactively impose a standard of conduct on a facility that is no longer in operation. We note that, if the Spelter Smelter was still operating today, and the landowners subject to the Grasselli deeds wished to rely on current public policy in order to have the agreements declared void in order to halt the continued pollution of their land, we might reach a different result. This is so because we would then be imposing current public policy in order to stop current conduct. Here, however, the conduct has already ceased, and the Plaintiffs merely seek monetary compensation for damage to their land. This would be a duplication of the compensation paid by Grasselli in the 1930s in exchange for the releases and easements granted in the Grasselli deeds. Because those releases and easements were designated to run with the land and were duly recorded, subsequent purchasers of the land were on notice of their existence. Thus, any adverse impact on the value of the land should have been accounted for in the price paid by subsequent purchasers of that land.

did not err in granting partial summary judgment in favor of DuPont with respect to the property damage claims of those plaintiffs subject to the Grasselli deeds.<sup>33</sup>

**3. The Statute of Limitations.** In the circuit court, DuPont sought summary judgment based upon the argument that all of the Plaintiffs' claims, for both medical monitoring and property damage, were barred by the two-year statute of limitations applicable to tort actions under West Virginia law.<sup>34</sup> DuPont recognized the application of the discovery rule to the Plaintiffs' claims, and provided the circuit court with various exhibits that, according to DuPont, demonstrated that the Plaintiffs possessed knowledge adequate to trigger the running of the statute of limitations long before the Plaintiffs' action was filed on June 15, 2004. Specifically, DuPont directed the circuit court's attention to, *inter alia*, (1) the fact that property owners in the area had filed lawsuits in the 1920s alleging property damage resulting from emissions from the smelter; (2) the deposition testimony of

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<sup>33</sup>We additionally acknowledge the Plaintiffs' assertion that forty percent of the land involved in this action is subject to the Grasselli deeds, and the failure to remediate that land would lead to re-contamination of surrounding remediated land. However, addressing this issue would require the Court to deal in the abstract. It is not proper for this Court to resolve an issue that is dependent upon speculative future events, and we decline to do so in this instance.

<sup>34</sup>*See* W. Va. Code §55-2-12 (1959) (Repl. Vol. 2008) ("Every personal action for which no limitation is otherwise prescribed shall be brought: (a) Within two years next after the right to bring the same shall have accrued, if it be for damage to property; (b) within two years next after the right to bring the same shall have accrued if it be for damages for personal injuries; and (c) within one year next after the right to bring the same shall have accrued if it be for any other matter of such nature that, in case a party die, it could not have been brought at common law by or against his personal representative.").

plaintiff Benjamin Quinones, which indicated that Mr. Quinones had believed there might be health hazards associated with the smoke blowing into the town of Spelter as early as the 1950s when he went to work at the plant; (3) newspaper articles from 1993 and 1997 that characterized the smelter as an environmental hazard, and reported that EPA and WV DEP tests found lead, arsenic and cadmium in the waste pile;<sup>35</sup> (4) deposition testimony from lead plaintiff Lenora Perrine wherein she stated that she had read newspaper articles pertaining to the smelter in the 1990's;<sup>36</sup> and (5) deposition testimony from Dr. Joseph Simoni, a sociology professor from West Virginia University, stating that he, along with the Plaintiffs' counsel Gary Rich, attended numerous meetings with Spelter residents in the early 2000's concerning the suspected effects on the community of the former operation of the smelter.

In response to DuPont's motion, the Plaintiffs argued that the issue of whether the Plaintiffs knew of the off-site contamination more than two years prior to the filing of their complaint was a question of fact. With respect to the media reports relied upon by DuPont to show knowledge, the Plaintiffs asserted that the reports failed to inform the communities that their yards and homes were contaminated, and "often carried assurances by agency officials that the smelter posed no problem to residents." The Plaintiffs

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<sup>35</sup>The 1997 article further reported that the lead, arsenic and cadmium were finding their way into ground water and the West Fork River, and that "air borne particles have the potential to harm people through inhalation or ingestion."

<sup>36</sup>DuPont averred that numerous plaintiffs had acknowledged seeing these and other articles.

maintained further that DuPont failed to provide evidence that any class member was aware of the 1920s litigation. Additionally, the Plaintiffs opined that the deposition testimony of Mr. Benjamin Quinones was an insufficient basis upon which to grant DuPont's motion for summary judgment. The Plaintiffs argued that a reasonable juror could conclude that they did not have knowledge of the contamination until after a study, published in December 2003 (only six months before the filing of their complaint), showed widespread off-site contamination. Finally, the Plaintiffs asserted that federal law controlled the commencement of the statute of limitations pursuant to 42 U.S.C. § 9658(a)(1) (1986) (2006 ed.).

In two separate summary judgment orders , one entered on September 14, 2007, and the other entered on September 20, 2007,<sup>37</sup> the circuit court denied DuPont's motion for summary judgment with respect to the statute of limitations issue, and went on to grant summary judgment in favor of the Plaintiffs on this issue. In this regard, the circuit court's order of September 14, 2007, set out the evidence submitted by the parties, and then concluded:

In this case, there is abundant evidence that the class members did not know and had no reason to know about their claims more than two years prior to the filing of their Complaint. The undisputed evidence reflects DuPont publicly assured the Plaintiffs they had no reason to be concerned. Media reports were equivocal at best. Government agencies – e.g., the Harrison County Planning Commission and the EPA – appear

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<sup>37</sup>See *supra* note 15 for a comment regarding the entry of two separate summary judgment orders.

to remain uncertain to this day whether . . . the residents should be concerned for their property or their health.

The Court finds that the evidence submitted by the parties would lead a reasonable factfinder to conclude that before 2003, the class members did not know, nor should they have known, that the smelter was the cause of widespread, heavy metal contamination in the class area and that they and/or their properties had been injured by the smelter. For the reasons outline[d] above, the Court finds as a matter of law that Plaintiffs' claims as set forth in the Second Amended Class Action Complaint were filed in a timely manner and, therefore, none of [the] Plaintiffs' claims is time-barred.

As an initial matter, DuPont essentially argues that the circuit court erred by granting summary judgment in favor of the Plaintiffs when they did not file a motion requesting summary judgment on the statute of limitations issue.<sup>38</sup> This argument is without merit. This Court has previously held that,

[w]hen it is found from the pleadings, depositions and admissions on file, and the affidavits of any party, in a summary judgment proceeding under Rule 56 of the West Virginia Rules of Civil Procedure, that a party who has moved for summary judgment in his favor is not entitled to such judgment and that there is no genuine issue as to any material fact, a summary judgment may be rendered *against such party* in such proceeding.

Syl. pt. 6, *Employers' Liab. Assurance Corp. v. Hartford Accident & Indem. Co.*, 151 W. Va. 1062, 158 S.E.2d 212 (1967). In awarding summary judgment in favor of a non-moving

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<sup>38</sup>Furthermore, DuPont repeatedly mischaracterizes the ruling of the circuit court as being *sua sponte*. Because the circuit court was presented with a motion for summary judgment, *i.e.* DuPont's motion, its decision was not *sua sponte*.

party, however, a trial court must ensure that the parties have had ample opportunity to fully brief the issue being decided on summary judgment. *Cf.* Syl. pt. 4, *Southern Erectors, Inc. v. Olga Coal Co.*, 159 W. Va. 385, 223 S.E.2d 46 (1976) (per curiam) (“Where a court acts with great caution, assuring itself that the parties to be bound by its judgment have had an adequate opportunity to develop all of the probative facts which relate to their respective claims, the court may grant summary judgment under Rule 56, W. Va. R.C.P., *sua sponte*.”). Indeed, when a summary judgment issue has been fully briefed, a trial court’s grant of summary judgment in favor of the non-moving party promotes the purpose of summary judgment proceedings. In this regard, it has been recognized that “[a]s the purpose of a summary judgment proceeding is to expedite the disposition of the case, summary judgment may be rendered against the party moving for summary judgment and in favor of the opposing party, even though such party has made no motion for [summary] judgment.” Cleckley, Davis, & Palmer, Jr., *Litigation Handbook on West Virginia Rules of Civil Procedure* § 56(c)[4], at 1122 (3d ed. 2008) (footnote omitted) (citing *B.F. Goodrich v. Betkoski*, 99 F.3d 505 (2d Cir. 1996), *overruled in part on other grounds as recognized in New York v. National Servs. Indus., Inc.*, 352 F.3d 682 (2d Cir. 2003); *Bosarge v. United States Dep’t of Educ.*, 5 F.3d 1414 (11th Cir. 1993); *National Expositions, Inc. v. Crowley Maritime Corp.*, 824 F.2d 131 (1st Cir. 1987); *Southern Erectors, Inc. v. Olga Coal Co.*, 159 W. Va. 385, 223 S.E.2d 46 (1976) (per curiam); *Employers’ Liability Assur. Corp. v. Hartford Acc. & Indem. Co.*, 151 W. Va. 1062, 158 S.E.2d 212 (1967)). Stated simply, there is no error in a trial court granting summary judgment in favor of the nonmoving party when

that party is entitled to judgment. Thus, the question we must address to resolve the statute of limitations issue is whether the Plaintiffs were entitled to summary judgment.

According to DuPont, the Plaintiffs were not entitled to summary judgment on the statute of limitations issue. DuPont argues that the circuit court erred in failing to grant summary judgment in its favor on this issue. In the alternative, DuPont contends that the question of when the Plaintiffs possessed the requisite knowledge to trigger the running of the statute of limitations was a question of fact that should have been determined by the jury. The Plaintiffs respond that the circuit court correctly ruled that their complaint was timely filed as a matter of law, because DuPont failed to establish that the Plaintiffs possessed the requisite knowledge more than two years prior to the filing of their complaint.<sup>39</sup>

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<sup>39</sup>The Plaintiffs also contend that federal law controls the commencement of the statute of limitations. The circuit court concluded, in its order of September 20, 2007, that “[t]he record before the Court, however, reveals that Plaintiffs lacked knowledge sufficient to trigger the running of the statute *under either* Syllabus Point 4 of *Gaither* [ *v. City Hospital, Inc.*, 199 W. Va. 706, 487 S.E.2d 901 (1997)], or the provisions of 42 U.S.C. § 9658(a)(1) until December 2003 – approximately six months prior to the commencement of this action . . . .” (Emphasis added).

With regard to the statute of limitations, the federal Comprehensive Environmental Response Compensation and Liability Act (hereinafter referred to as “CERCLA”), 42 U.S.C. § 9601, *et seq.*, provides that,

[i]n the case of any action brought under State law for personal injury, or property damages, which are caused or contributed to by exposure to any hazardous substance, or pollutant or contaminant, released into the environment from a facility, if the applicable limitations period for such action (as

(continued...)

With respect to the commencement of the statute of limitations period under the discovery rule, this Court has clarified that,

[i]n tort actions, unless there is a clear statutory prohibition to its application, under the discovery rule the statute of limitations begins to run when the plaintiff knows, or by the exercise of reasonable diligence, should know (1) that the plaintiff has been injured, (2) the identity of the entity who owed the plaintiff a duty to act with due care, and who may have engaged in conduct that breached that duty, and (3) that the conduct of that entity has a causal relation to the injury.

Syl. pt. 4, *Gaither v. City Hosp., Inc.*, 199 W. Va. 706, 487 S.E.2d 901 (1997). Elaborating on *Gaither*, this Court has recently held that,

A five-step analysis should be applied to determine whether a cause of action is time-barred. First, the court should identify the applicable statute of limitation for each cause of action. Second, the court (or, if questions of material fact exist, the jury) should identify when the requisite elements of the

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<sup>39</sup>(...continued)

specified in the State statute of limitations or under common law) provides a commencement date which is earlier than the federally required commencement date, such period shall commence at the federally required commencement date in lieu of the date specified in such State statute.

42 U.S.C. § 9658(a)(1) (1986) (2006 ed.). CERCLA defines the “federally required commencement date,” in relevant part, as “the date the plaintiff knew (or reasonably should have known) that the personal injury or property damages referred to in subsection (a)(1) of this section were caused or contributed to by the hazardous substance or pollutant or contaminant concerned.” 42 U.S.C. § 9658(b)(4)(A). We perceive no practical difference between this federal standard and the West Virginia standard for the commencement of the statute of limitations period under the discovery rule as set out in Syllabus point 4 of *Gaither v. City Hospital, Inc.*, 199 W. Va. 706, 487 S.E.2d 901 (1997). Accordingly, applying 42 U.S.C. § 9658(a)(1), we conclude that West Virginia law applies to the determination of when the statute of limitations commenced in this action.

cause of action occurred. Third, the discovery rule should be applied to determine when the statute of limitation began to run by determining when the plaintiff knew, or by the exercise of reasonable diligence should have known, of the elements of a possible cause of action, as set forth in Syllabus Point 4 of *Gaither v. City Hosp., Inc.*, 199 W. Va. 706, 487 S.E.2d 901 (1997). Fourth, if the plaintiff is not entitled to the benefit of the discovery rule, then determine whether the defendant fraudulently concealed facts that prevented the plaintiff from discovering or pursuing the cause of action. Whenever a plaintiff is able to show that the defendant fraudulently concealed facts which prevented the plaintiff from discovering or pursuing the potential cause of action, the statute of limitation is tolled. And fifth, the court or the jury should determine if the statute of limitation period was arrested by some other tolling doctrine. Only the first step is purely a question of law; the resolution of steps two through five will generally involve questions of material fact that will need to be resolved by the trier of fact.

Syl. pt. 5, *Dunn v. Rockwell*, \_\_\_ W. Va. \_\_\_, \_\_\_ S.E.2d \_\_\_, 2009 WL 4059061 (Nov. 24, 2009). Moreover, the *Dunn* Court held:

Under the discovery rule set forth in Syllabus Point 4 of *Gaither v. City Hosp., Inc.*, 199 W. Va. 706, 487 S.E.2d 901 (1997), whether a plaintiff “knows of” or “discovered” a cause of action is an objective test. The plaintiff is charged with knowledge of the factual, rather than the legal, basis for the action. This objective test focuses upon whether a reasonable prudent person would have known, or by the exercise of reasonable diligence should have known, of the elements of a possible cause of action.

Syl. pt. 4, *Id.*

Finally, we note that this Court has clearly established that the determination of when the plaintiff possessed the requisite knowledge to trigger the running of the statute of limitations is a question of fact for the jury. In this regard, the Court held that

[w]here a cause of action is based on tort or on a claim of fraud, the statute of limitations does not begin to run until the injured person knows, or by the exercise of reasonable diligence should know, of the nature of his injury, and determining that point in time *is a question of fact to be answered by the jury.*

Syl. pt. 3, *Stemple v. Dobson*, 184 W. Va. 317, 400 S.E.2d 561 (1990) (emphasis added). *Accord Gaither v. City Hosp., Inc.*, 199 W. Va. at 714-15, 487 S.E.2d at 909-10 (“In the great majority of cases, the issue of whether a claim is barred by the statute of limitations *is a question of fact for the jury.*” (emphasis added)). Thus, the question is proper for the court only “[w]here there are undisputed facts from which only one conclusion may be drawn[.]” *Carey v. Kerr-McGee Chem. Corp.*, 999 F. Supp. 1109, 1115 (N.D. Ill. 1998) (concluding statute of limitations had run on claims of adult members of medical monitoring class and property class in toxic tort action).

In the case *sub judice*, there was conflicting evidence with respect to when the Plaintiffs possessed the requisite knowledge to trigger the running of the statute of limitations under the discovery rule. Indeed, the circuit court’s own ruling of September 14, 2007, demonstrates that the court resolved conflicting evidence in order to reach its conclusion that the Plaintiffs’ action was not barred by the statute of limitations: “[t]he Court finds that the evidence submitted by the parties would lead a reasonable factfinder to conclude . . . .”

(Emphasis added). Accordingly, we find that the circuit court erred in granting summary judgment in favor of the Plaintiffs on an issue that should have been determined by the jury. Having determined that the circuit court erred in failing to have the jury decide this factual issue, we must now determine whether to remand for retrial of the entire case, or remand for jury determination of the statute of limitations question only.

Looking to how other courts have addressed similar issues, we find that at least three federal courts have affirmed verdicts, in whole or in part, but remanded the case for resolution of a statute of limitations issue. *See Anixter v. Home-Stake Prod. Co.*, 977 F.2d 1549 (10th Cir. 1992) (affirming verdict, but remanding for resolution of statute of limitations issue); *Gross v. United States*, 676 F.2d 295, 304 (8th Cir. 1982) (“We affirm the district court in all matters except its treatment of the statute of limitations issue.”); *Cook v. Avien, Inc.*, 573 F.2d 685 (1st Cir. 1978) (affirming judgment in favor of several defendants, and remanding to consider statute of limitations issue as to one defendant). Based upon the foregoing authority, along with considerations of judicial economy, we now hold that, if, on an appeal by a defendant from a final judgment, this Court determines that a circuit court erroneously found, as a matter of law, that the case was not barred by the statute of limitations, this Court may conditionally affirm<sup>40</sup> the judgment and remand the case for a jury trial solely on the statute of limitations issue. While on remand, if the jury finds that the

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<sup>40</sup>*See, e.g., Aetna Life Ins. Co. v. Lavoie*, 505 So. 2d 1050, 1054 (Ala. 1987) (per curiam) (affirming conditionally).

statute of limitations did not run, then the judgment in favor of the plaintiff stands; if the jury determines otherwise, the trial court must set aside the verdict and render judgment in favor of the defendant.

Applying this holding, we conditionally affirm the verdict, as modified by this opinion, and remand this case with directions to the circuit court to conduct a jury trial on the sole issue of when the Plaintiffs possessed the requisite knowledge to trigger the running of the statute of limitations. If the jury determines that the Plaintiffs did not have the requisite knowledge more than two years prior to filing their cause of action, then the judgment in favor of the Plaintiffs, as modified herein, stands. If, however, the jury determines that the Plaintiffs had the requisite knowledge more than two years prior to filing their cause of action, then the trial court must set aside the verdict and render judgment in favor of DuPont.

### ***B. Class Certification***

On November 14, 2005, the Plaintiffs filed a motion asking the circuit court to certify the class pursuant to Rule 23 of the West Virginia Rules of Civil Procedure. A three-day evidentiary hearing was conducted upon the motion in May 2006. On September 14, 2006, the circuit court entered a forty-four page order granting class certification. In the order, the circuit court thoroughly set out the grounds upon which it relied. The order

divided the class into two overlapping subclasses,<sup>41</sup> (1) a property class made up of property owners in a five-by-seven mile area surrounding the smelter site and initially defined as<sup>42</sup> “[t]hose who currently own, or who on or after December 1, 2003[,] have owned, private real property lying within the below-referenced communities or any other private real property lying closer to the Spelter Smelter facility than one or more of the below-referenced communities”<sup>43</sup>; and (2) a medical monitoring class made up of approximately 8,500 people who had lived in a designated area around the smelter site. By order entered June 14, 2007, the circuit court granted the Plaintiffs’ motion to modify the medical monitoring class definition. The June 14th order established “proximity zones” for class determination with

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<sup>41</sup>See Rule 23(c)(4) of the West Virginia Rules of Civil Procedure, which authorizes subclasses.

<sup>42</sup>This Court has explained that, “[b]efore certifying a class pursuant to Rule 23 of the West Virginia Rules of Civil Procedure, it is imperative that the class be identified with sufficient specificity so that it is administratively feasible for the court to ascertain whether a particular individual is a member.” Syl. pt. 3, *State ex rel. Metropolitan Life Ins. Co. v. Starcher*, 196 W. Va. 519, 474 S.E.2d 186 (1996). Moreover, “[t]o demonstrate the existence of a class pursuant to Rule 23 of the West Virginia Rules of Civil Procedure, it is not required that each class member be identified, but only that the class can be objectively defined.” Syl. pt 2, in part, *Id.* Based upon the circuit court’s definition of the property class quoted above, we conclude that this class was adequately defined.

<sup>43</sup>The order specified that

[t]he initial proposed class area includes the following communities within Harrison County, West Virginia, and all other private real property lying closer to the Spelter Smelter facility than one or more of these communities: Spelter, Erie, Hepzibah, Lambert’s Run, Meadowbrook, Gypsy, Seminole, Lumberport, Smith Chapel, and as further modified to include additional impacted areas as described in Plaintiffs’ air model.

regard to the community surrounding the facility, and defined the medical monitoring class as follows:<sup>44</sup>

THOSE WHO CURRENTLY OR AT ANY TIME IN THE PAST SINCE 1966 HAVE RESIDED ON PRIVATE REAL PROPERTY IN THE CLASS AREA FOR AT LEAST THE MINIMUM TOTAL RESIDENCY TIME FOR A ZONE . . . .

ZONE 1: [CLOSEST TO THE PLANT SITE]: MINIMUM TOTAL RESIDENCY TIME OF ONE YEAR SINCE 1966.

ZONE 2: MINIMUM TOTAL RESIDENCY TIME OF THREE YEARS SINCE 1966.

ZONE 3: MINIMUM TOTAL RESIDENCY TIME OF FIVE YEARS SINCE 1966.

RESIDENCY TIME WITHIN A ZONE OR ZONES CLOSER TO THE FORMER SMELTER FACILITY BUT NOT MEETING THE MINIMUM TOTAL RESIDENCY TIME FOR A CLOSER ZONE IS ACCUMULATED WITH ANY RESIDENCY TIME WITHIN A ZONE OR ZONES FURTHER AWAY IN DETERMINING TOTAL RESIDENCY TIME.

On June 22, 2007, DuPont filed in this Court an “Emergency Verified Petition in Prohibition” seeking to decertify the class. This Court denied the petition on June 27,

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<sup>44</sup>Based upon the circuit court’s definition of the medical monitoring class quoted above, we conclude that this class was adequately defined. See *supra* note 42 for a discussion of the requirement for a properly identified class.

2007.<sup>45</sup> DuPont now reasserts that the circuit court’s certification of this case as a class action was in error.

With regard to our standard for reviewing this issue, it is established that “[t]his Court will review a circuit court’s order granting or denying a motion for class certification pursuant to Rule 23 of the *West Virginia Rules of Civil Procedure* [1998] under an abuse of discretion standard.” Syl. pt. 1, *In re West Virginia Rezulin Litigation*, 214 W. Va. 52, 585 S.E.2d 52 (2003). Accord Syl. pt. 1, *Gulas v. Infocision Mgmt. Corp.*, 215 W. Va. 225, 599 S.E.2d 648 (2004) (per curiam). With due consideration for this standard, we address the class certification issues raised by DuPont.

DuPont argues that trying this case as a class action violated due process by preventing Du Pont from introducing individualized evidence and individualized defenses. To support this claim, DuPont has listed a number of instances where individualized evidence or defenses were not permitted because the case was being tried as a class action. To the extent that this class action was properly certified by the trial court, all of DuPont’s

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<sup>45</sup>Because this Court’s denial of a petition for writ of prohibition is not a decision on the merits, DuPont is not barred from raising this issue again on appeal. See *State ex rel. Miller v. Stone*, 216 W. Va. 379, 382 n.3, 607 S.E.2d 485, 488 n.3 (2004) (per curiam) (“[T]his Court’s rejection of an application for appeal or a petition for an extraordinary writ generally is not an indication that we find the lower court’s judgment correct unless we specifically state as much.”).

individualized evidence issues have no merit. Thus, to resolve this issue, we must determine whether the case was properly certified as a class action.

Class certification and maintenance are governed by Rule 23 of the West Virginia Rules of Civil Procedure. This Court has observed that Rule 23

is a procedural device that was adopted with the goals of economies of time, effort and expense, uniformity of decisions, the promotion of efficiency and fairness in handling large numbers of similar claims. *See, e.g., Life of the Land v. Land Use Commission of State of Hawaii*, 63 Haw. 166, 178, 623 P.2d 431, 442 (1981); *Lilian v. Commonwealth*, 467 Pa. 15, 19, 354 A.2d 250, 253 (1976).

Rule 23 provides trial courts with a tool to vindicate the rights of numerous claimants in one action when individual actions might be impracticable. *Hicks v. Milwaukee County*, 71 Wis. 2d 401, 238 N.W.2d 509 (1976). A primary function of the class action is to provide a mechanism to litigate small damage claims which could not otherwise be economically litigated.

*In re West Virginia Rezulin Litig.*, 214 W. Va. 52, 62, 585 S.E.2d 52, 62.

Examining the mechanics of the portions of the rule relevant to this appeal reveals that Rule 23(a) sets out the prerequisites to a class action, while Rule 23(b) establishes the criteria that must also be met for the class action to be maintainable. Following the standards set out in Rule 23(a) & (b), this Court has previously held that,

[b]efore certifying a class under Rule 23 of the *West Virginia Rules of Civil Procedure* [1998], a circuit court must determine that the party seeking class certification has satisfied all four prerequisites contained in Rule 23(a) – numerosity,

commonality, typicality, and adequacy of representation – and has satisfied one of the three subdivisions of Rule 23(b). As long as these prerequisites to class certification are met, a case should be allowed to proceed on behalf of the class proposed by the party.

Syl. pt. 8, *In re West Virginia Rezulin Litig.*<sup>46</sup> We will consider, in turn, whether the requirements of Rule 23(a) and Rule 23(b) have been met in this action.

**1. Certification Requirements Under Rule 23(a).**<sup>47</sup> As recognized by this Court in Syllabus point 8 of *In re West Virginia Rezulin Litigation*, class certification first requires the trial court to determine that the plaintiff has satisfied all four prerequisites

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<sup>46</sup>It has been further clarified that,

“[t]he party who seeks to establish the propriety of a class action has the burden of proving that the prerequisites of Rule 23 of the West Virginia Rules of Civil Procedure have been satisfied.” Syllabus Point 6, *Jefferson County Board of Education v. Jefferson County Education Association*, 183 W. Va. 15, 393 S.E.2d 653 (1990).

Syl. pt. 4, *In re West Virginia Rezulin Litig.*, 214 W. Va. 52, 585 S.E.2d 52 (2003).

<sup>47</sup>Rule 23(a) of the West Virginia Rules of Civil Procedure states:

*Prerequisites to a class action.* – One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

contained in Rule 23(a): numerosity, commonality, typicality, and adequacy of representation. In conducting our review of whether the circuit court properly certified the class action under Rule 23(a), we need not concern ourselves with what the trial evidence ultimately showed. This is so, because “[a] circuit court’s consideration of a motion for class certification should not become a mini-trial on the merits of the parties’ contentions.” *In re West Virginia Rezulin Litig.*, 214 W. Va. at 63, 585 S.E.2d at 63. Indeed,

[w]hen a circuit court is evaluating a motion for class certification under Rule 23 of the *West Virginia Rules of Civil Procedure* [1998], the dispositive question is not whether the plaintiff has stated a cause of action or will prevail on the merits, but rather whether the requirements of Rule 23 have been met.

Syl. pt. 7, *In re West Virginia Rezulin Litig.* We will now examine the circuit court’s rulings on each of the Rule 23(a) criteria.

**a. Numerosity.** This Court has held that,

[t]he numerosity provision of Rule 23(a)(1) of the *West Virginia Rules of Civil Procedure* [1998] requires that a class be so numerous that joinder of all of its members is “impracticable.” It is not necessary to establish that joinder is impossible; rather, the test is impracticability. The test for impracticability of joining all members does not mean “impossibility” but only difficulty or inconvenience of joining all members.

Syl. pt. 9, *In re West Virginia Rezulin Litig.*, 214 W. Va. 52, 585 S.E.2d 52. The *In re West Virginia Rezulin Litigation* Court observed that “[t]here is no ‘magic minimum number that breathes life into a class . . . and lack of knowledge of the exact number of persons affected

is not a bar to certification[.]’” 214 W. Va. at 65, 585 S.E.2d at 65 (quoting *Clarkson v. Coughlin*, 783 F. Supp. 789, 798 (S.D.N.Y. 1992)). However, federal courts<sup>48</sup> have concluded that it may be presumed that numerosity exists when a class is over a certain size, such as forty members. *See Consolidated Rail Corp. v. Town of Hyde Park*, 47 F.3d 473, 483 (2d Cir. 1995) (“[N]umerosity is presumed at a level of 40 members.” (citation omitted)); *Casale v. Kelly*, 257 F.R.D. 396, 405 (S.D.N.Y. 2009) (“Sufficient numerosity can be presumed at a level of forty members or more.” (footnote omitted)); *In re Cooper Cos. Inc. Sec. Litig.*, 254 F.R.D. 628, 634 (C.D. Cal. 2009) (“[N]umerosity is presumed where the plaintiff class contains forty or more members.” (citation omitted)); *Ruggles v. Wellpoint, Inc.*, 253 F.R.D. 61, 66 (N.D.N.Y. 2008) (“In the Second Circuit, numerosity is presumed at a level of 40 members, . . . and the exact number and identity of members is unnecessary, even for certification.” (quotations and citation omitted)); *Romero v. Producers Dairy Foods, Inc.*, 235 F.R.D. 474, 485 (E.D. Cal. 2006) (“A class with over forty members is presumed to satisfy the numerosity prerequisite.” (citations omitted)). *See generally* 1 Alba Conte & Herbert Newberg, *Newberg on Class Actions* § 3:5, at 247 (4th ed. 2002) (“In light of

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<sup>48</sup>“Traditionally, this Court has utilized decisions of federal courts when interpreting and applying our Rules of Civil Procedure.” *Kiser v. Caudill*, 215 W. Va. 403, 410 n.4, 599 S.E.2d 826, 833 n.4 (2004) (citations omitted). *See also Love v. Georgia Pac. Corp.*, 214 W. Va. 484, 488 n.2, 590 S.E.2d 677, 681 n.2 (2003) (per curiam) (Davis, J., dissenting) (“Due to the similarities between our Rules of Civil Procedure and the Federal Rules, we often look to decisions of the Federal Courts interpreting their rules as persuasive authority on how to apply our own rules.” (citation omitted)); *Lawyer Disciplinary Bd. v. Cunningham*, 195 W. Va. 27, 33 n.11, 464 S.E.2d 181, 187 n.11 (1995) (“[W]e follow our usual practice of giving substantial weight to federal cases in determining the meaning and scope of our rules of civil procedure.” (citation omitted)).

prevailing precedent, the difficulty inherent in joining as few as 40 class members should raise a presumption that joinder is impracticable, and the plaintiff whose class is that large or larger should meet the test of Rule 23(a)(1) on that fact alone.”); Cleckley, Davis, & Palmer, Jr., *Litigation Handbook on West Virginia Rules of Civil Procedure* § 23(a), at 536 (“Courts have held that a rebuttable presumption of numerosity exists when it is established that the class size is between 25-30 members.” (footnote omitted)).

It has also been established that

[a] party seeking class certification is not required to prove the identity of each class member. . . .

Furthermore, a circuit court may not deny a class certification motion merely because some members of the class have not suffered an injury or loss, or because there are members who may not want to participate in the class action.

*In re West Virginia Rezulin Litig.*, 214 W. Va. at 66, 585 S.E.2d at 66 (citations omitted).

With respect to numerosity in the case *sub judice*, the trial court found that

[i]n this particular case, class size alone makes joinder impractical. Defendants have made no serious attack on numerosity. Plaintiffs have identified slightly over 2,700 parcels in the class area and the owner of each parcel. While one may quibble over whether 17 or 50 or even 500 persons is enough, there can be little serious debate about whether joining 3,000 persons (Plaintiffs’ estimate of residents in the affected communities) is feasible.

(Footnote omitted). Given the large number of plaintiffs involved in the instant case, we find no error in the circuit court's conclusion that the numerosity prerequisite was met for both the property and the medical monitoring classes.

**b. Commonality.** This Court has held that

[t]he “commonality” requirement of Rule 23(a)(2) of the *West Virginia Rules of Civil Procedure* [1998] requires that the party seeking class certification show that “there are questions of law or fact common to the class.” A common nucleus of operative fact or law is usually enough to satisfy the commonality requirement. The threshold of “commonality” is not high, and requires only that the resolution of common questions affect all or a substantial number of the class members.

Syl. pt. 11, *In re West Virginia Rezulin Litig.*, 214 W. Va. 52, 585 S.E.2d 52. Elaborating on this holding, the Court has explained that although

[c]ommonality requires that class members share a single common issue. . . . However, not every issue in the case must be common to all class members. . . . The common questions need be neither important nor controlling, and one significant common question of law or fact will satisfy this requirement. . . . In other words, [t]he class as a whole must raise at least one common question of law or fact to make adjudication of the issues as a class action appropriate to conserve judicial and private resources.

*Id.*, 214 W. Va. at 67, 585 S.E.2d at 67 (internal quotations and citations omitted). It has been recognized that the commonality requirement “is easily met in most cases.” 1 Conte & Newberg, *Newberg on Class Actions* § 3:10, at 274-77 (footnote omitted).

The trial court in the instant case found numerous questions of fact were common to the class: (1) the alleged source of the toxic chemicals was the same for each proposed class member; (2) the alleged conduct that caused the contamination is identical for each proposed class member; (3) for medical monitoring purposes, whether (a) the substances were hazardous, (b) the community was exposed to the substances, (c) the defendant behaved tortiously, (d) exposure may result in increased risk of latent diseases, and (e) monitoring procedures exist to detect latent diseases; and (4) for property damage purposes, property valuation. In addition, the trial court found common questions of law in the case. In this regard, the court referred to the issue of whether the defendant's conduct was unlawful and the Plaintiffs' legal theories.

“The Rule 23(a)(2) [commonality] prerequisite is qualitative rather than quantitative; that is, there need be only a single issue common to all members of the class.”  
1 Conte & Newberg, *Newberg on Class Actions* § 3:10, at 272-74 (footnote omitted).  
Because there were numerous common factual and legal issues in this action pertaining to both the property and the medical monitoring classes, we find no error in the circuit court's conclusion that the commonality requirement had been met.

**c. Typicality.** In this Court's *In re West Virginia Rezulin Litigation* opinion, it was also held that:

The “typicality” requirement of Rule 23(a)(3) of the *West Virginia Rules of Civil Procedure* [1998] requires that the “claims or defenses of the representative parties [be] typical of the claims or defenses of the class.” A representative party’s claim or defense is typical if it arises from the same event or practice or course of conduct that gives rise to the claims of other class members, and if his or her claims are based on the same legal theory. Rule 23(a)(3) only requires that the class representatives’ claims be typical of the other class members’ claims, not that the claims be identical. When the claim arises out of the same legal or remedial theory, the presence of factual variations is normally not sufficient to preclude class action treatment.

Syl. pt. 12, *In re West Virginia Rezulin Litig.*, 214 W. Va. 52, 585 S.E.2d 52. The *In re West Virginia Rezulin Litigation* Court went on to explain that,

[t]he rationale behind the requirement is that a class representative with typical claims “will pursue his or her own self-interest in the litigation, and in so doing, will advance the interests of the class members[.]” 1 [Conte & Newberg,] *Newberg on Class Actions* . . . § 3:13, at 325. “[M]ere anticipation that all class members will benefit from the suit . . . is not enough. But interests sufficiently parallel to ensure a vigorous and full presentation of all potential claims for relief should satisfy Rule 23(a)(3).” *Weiss v. York Hosp.*, 745 F.2d 786, 810 (3d Cir. 1984).

214 W. Va. at 68, 585 S.E.2d at 68. Moreover,

differences in the situation of each plaintiff or each class member do not necessarily defeat typicality: The harm suffered by the named plaintiffs may differ in degree from that suffered by other members of the class so long as the harm suffered *is of the same type*. . . . Furthermore, [t]he fact that a defense may be asserted against the named representatives, as well as some other class members, but not the class as a whole, does not destroy the representatives’ status.

*Id.* at 68, 585 S.E.2d at 68 (quotations and citations omitted).

In this case, the trial court found that the representative parties were affected by the same conduct as the class, and they would rely on legal theories and remedies available to each other and the class members. Accordingly, we find no error in the circuit court's conclusion that the typicality requirement was met for both the property and medical monitoring classes.

**d. Adequacy of Representation.** The final prerequisite under Rule 23(a) addresses adequacy of representation. In this regard, the Court has held that,

[t]he “adequacy of representation” requirement of Rule 23(a)(4) of the *West Virginia Rules of Civil Procedure* [1998] requires that the party seeking class action status show that the “representative parties will fairly and adequately represent the interests of the class.” First, the adequacy of representation inquiry tests the qualifications of the attorneys to represent the class. Second, it serves to uncover conflicts of interest between the named parties and the class they seek to represent.

Syl. pt. 13, *In re West Virginia Rezulin Litig.*, 214 W. Va. 52, 585 S.E.2d 52.

The trial court found that no conflicts existed between the named plaintiffs and the class. In addition, the trial court found that the Plaintiffs' counsel were qualified to represent the class. In this regard, the circuit court observed that,

[c]lass counsel has demonstrated their ability to investigate the claims of the proposed class and to fully prosecute this case. Class counsel has conducted a thorough investigation of the contamination in the class area. To conduct this investigation, class counsel has employed well-qualified experts in the fields of geochemistry, remediation, economics and real estate,

medicine, industrial hygiene, and toxic exposure modeling. Over 1,000 samples have been taken and analyzed. In addition, class counsel has thoroughly mapped and documented the class area including the identification of every parcel and its owner.

We find no error in the circuit court's conclusion that the class representatives and class counsel were adequate representatives of both the property class and the medical monitoring class. Having determined that the circuit court did not err in finding that the Plaintiffs had established each of the prerequisites to class certification under Rule 23(a), we must now consider whether the circuit court correctly concluded that the Plaintiffs satisfied one of the elements set out in Rule 23(b).

## 2. Certification Requirements Under Rule 23(b).<sup>49</sup> “To be maintainable

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<sup>49</sup>Rule 23(b) of the West Virginia Rules of Civil Procedure states,

*Class actions maintainable.* – An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) The prosecution of separate actions by or against individual members of the class would create a risk of

(A) Inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) Adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) The party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) The court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a

(continued...)

as a class action, a suit must meet not only the prerequisites of Rule 23(a), but also the additional requirements of one of the subparts of Rule 23(b).” Cleckley, Davis, & Palmer, Jr., *Litigation Handbook on West Virginia Rules of Civil Procedure* § 23(b)[2], at 543. *Accord* Syl. pt. 8, *In re West Virginia Rezulin Litig.*, 214 W. Va. 52, 585 S.E.2d 52. The circuit court found that each of the requirements of Rule 23(b) had been satisfied; however, because only one of the Rule 23(b) criteria needs to be met for each class, we will limit our discussion to the criteria in Rule 23(b)(3). We focus on Rule 23(b)(3) because the circuit court found that both the medical monitoring and property damage classes, as well as the Plaintiffs’ claims for punitive damages, qualified for certification under Rule 23(b)(3).<sup>50</sup>

Rule 23(b)(3) states:

*Class actions maintainable.* – An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

. . . .

(3) The court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class

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<sup>49</sup>(...continued)  
class action.

<sup>50</sup>Other courts have found certification proper under Rule 23(b)(3) for both equitable and legal claims. *See, e.g., Black v. Rhone-Poulenc, Inc.*, 173 F.R.D. 156 (S.D. W. Va. 1996) (certifying equitable claim and monetary claim, including punitive damages, under Rule 23(b)(3)); *In re Three Mile Island Litig.*, 87 F.R.D. 433 (M.D. Pa. 1980) (certifying property damage and medical monitoring claims under Rule 23(b)(3)); *Pruitt v. Allied Chem. Corp.*, 85 F.R.D. 100 (E.D. Va. 1980) (certifying claims for injunctive and monetary relief under Rule 23(b)(3)).

action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

Thus, in order to be certified under Rule 23(b)(3), a class must first satisfy both the predominance test and the superiority test:

Under Rule 23(b)(3), a class action may be certified to proceed on behalf of a class if the trial court finds “that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members,” and finds that a class action “is superior to other available methods for the fair and efficient adjudication of the controversy.”

*In re West Virginia Rezulin Litig.*, 214 W. Va. at 71, 585 S.E.2d at 71. The rule then sets out four additional factors that must be considered. We examine these criteria in turn.

**a. Predominance Test.** Under the predominance test, “[a] trial court is required to find . . . that questions common to the class predominate over questions affecting individual members.” Cleckley, Davis, & Palmer, Jr., *Litigation Handbook on West Virginia Rules of Civil Procedure* § 23(b)(3)[2][a], at 553 (footnote omitted). This Court has recognized that, “[t]he predominance criterion in Rule 23(b)(3) is a corollary to the ‘commonality’ requirement found in Rule 23(a)(2). While the ‘commonality’ requirement

simply requires a showing of common questions, the ‘predominance’ requirement requires a showing that the common questions of law or fact outweigh individual questions.” *In re West Virginia Rezulin Litig.*, 214 W. Va. at 71, 585 S.E.2d at 71. Furthermore,

“[a] conclusion on the issue of predominance requires an evaluation of the legal issues and the proof needed to establish them. As a matter of efficient judicial administration, the goal is to save time and money for the parties and the public and to promote consistent decisions for people with similar claims.” *In the Matter of Cadillac V8-6-4 Class Action*, 93 N.J. 412, 430, 461 A.2d 736, 745 (1983). The predominance requirement is not a rigid test, but rather contemplates a review of many factors, the central question being whether “adjudication of the common issues in the particular suit has important and desirable advantages of judicial economy compared to all other issues, or when viewed by themselves.” 2 [Conte & Newberg], *Newberg on Class Actions*, 4th Ed., § 4:25[,] at 174.

*Id.* at 72, 585 S.E.2d at 72.

In the instant case, the trial court found that

there are common questions of law or fact that predominate over any individual issues that may arise among the class members. Liability is one such issue. A common overriding question in this litigation is, “did the defendants’ operation and management of the smelter site cause the contamination of the proposed class area?” *Olden v. LaFarge Corp.*, 383 F.3d 495 (6th Cir. 2004) (Liability of plant owner for toxic emissions was a common issue that predominated over individual questions of damages); *Bolanos v. Norwegian Cruise Lines, Ltd.*, 212 F.R.D. 144 (S.D.N.Y. 2002) (“Courts should particularly focus on the liability issue . . . and if the liability issue is common to the class, common questions are held to predominate over individual questions.”). The defendants’ liability arises out of the same nucleus of operative facts for each plaintiff. For example, each plaintiff would rely upon the same evidence to

show the negligent conduct of each defendant. Each proposed class member would rely on the same evidence to prove the defendants' knowledge of the dangers posed by the waste generated at the smelter and of the releases of this waste into the surrounding communities.

Indeed, the only issue of any significance that is not identical to all class members is the amount of damages sustained by each claimant. But the need for an individual showing of damages does not preclude class certification under Rule 23(b)(3) where, as here, common issues predominate. *Rezulin*, 214 W. Va. at 72, 585 S.E.2d at 72. Moreover, the medical monitoring remedy is a class remedy that has as its purpose an ongoing determination of any individual injuries.

Applying the principles pertaining to the predominance test set out above to the analysis utilized by the trial court, we find no error in the court's conclusion that "common questions of law or fact . . . predominate over any individual issues that may arise among the class members."

**b. Superiority Test.** Under the superiority test, a trial court must "compare[] the class action with other potential methods of litigation." Cleckley, Davis, & Palmer, Jr., *Litigation Handbook on West Virginia Rules of Civil Procedure* § 23(b)(3)[2][b], at 554 (footnote omitted). See also *Nolan v. Reliant Equity Investors, LLC*, No. 3:08-CV-62, 2009 WL 2461008, at \*4 (N.D. W. Va. Aug. 10, 2009) ("Superiority requires that a class action be superior to other methods for the fair and efficient adjudication of the controversy." (quotations and citations omitted)); *In re West Virginia Rezulin Litig.*, 214 W. Va. at 75, 585

S.E.2d at 75 (stating that superiority “requirement focuses upon a comparison of available alternatives”).

“Factors that have proven relevant in the superiority determination include the size of the class, anticipated recovery, fairness, efficiency, complexity of the issues and social concerns involved in the case.” Cleckley, Davis, & Palmer, Jr., *Litigation Handbook on West Virginia Rules of Civil Procedure* § 23(b)(3)[2][b], at 554 (footnote omitted). In addition, this Court has observed that consideration must be given to the purposes of Rule 23, “‘including: conserving time, effort and expense; providing a forum for small claimants; and deterring illegal activities.’” *In re West Virginia Rezulin Litig.*, 214 W. Va. at 76, 585 S.E.2d at 76 (quoting 2 Conte & Newberg, *Newberg on Class Actions* § 4:32, at 277-78).

Turning to the instant case, the trial court found, with respect to the superiority test, that “[c]lass action is superior to other methods for adjudicating Plaintiffs’ claims. Litigating common issues is far superior to thousands of individual claims.” Based upon our review of this action in light of the superiority considerations identified above, we agree with the circuit court and find no error in its conclusion that the class had satisfied the superiority test.

**c. Additional 23(b)(3) Factors to Be Considered.** Finally, we note that Rule 23(b)(3) directs that certain matters are pertinent when determining the propriety of class certification. These pertinent matters include:

(A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

W. Va. R. Civ. P. 23(b)(3).

The circuit court made the following specific findings relevant to the foregoing matters:

Applying the four factors set out in Rule 23(b)(3) underscores the superiority of class adjudication. The Court is persuaded that two individual actions out of the thousands of class members is insufficient to show that there is any interest by the putative class members in individually controlling the litigation. The Court further finds that the two pending cases will not present any difficulty in allowing this case to proceed as a class.

Only two individual cases have been filed, which does not indicate there is an interest among the class members in individually controlling the prosecution. To the contrary, the fact that only two cases have been filed out of potentially thousands of cases demonstrates the superiority of class treatment. Individual actions would likely be prohibitively expensive. For example, class certification will permit a mass appraisal method to determine the effect, if any, the smelter's operations have had on property values. Such a mass appraisal will allow spreading of the cost of the model over the entire

class of property owners, as opposed to each property owner being forced to develop expensive and time consuming appraisal models to quantify the effects, if any, the smelter has had on his or her property value.

As to the third factor, the desirability or undesirability of concentrating the litigation of the claims in the particular forum, a class approach not only to liability but also to the establishment of uniform medical monitoring and property damage programs is highly desirable. As to the fourth factor, through proper case management, any difficulties likely to be encountered in the management of this class action will be minimized and will pale in comparison to the onerous, if not impossible task, of trying hundreds, if not thousands, of similar claims separately. Indeed, because of the type of vigorous defense mounted by Defendants, and the expense of hiring experts and otherwise challenging such a defense, it is doubtful that many of these relatively small medical monitoring and property damage claims could be brought without a class approach.

Common defenses such as the Grasselli “release” issue will also greatly benefit by common treatment as to those properties to which they apply. Since some of the class representatives’ properties are subject to the release issue, the issue will be joined and will be far more effectively litigated in a common manner than through piecemeal litigation. Similarly, to the extent Defendants request to undertake additional sampling for use in developing alternative remediation cost assessments, these requests can be timely managed through the discovery process.

Post-class trial (i.e., phase two) individual damages adjudications may prove necessary for calculating individual damages such as mental suffering and individual application of the punitive damage liability findings. However, bifurcation, if it proves necessary, will not hinder the efficient litigation of the many class issues.

The decision faced by this Court, in sum, is whether to fragment the common issues into thousands of individual

lawsuits, where each plaintiff would assert the same theories against the same defendants based on the same evidence, or to certify the class. In answer, this Court finds that a class action is superior to other available methods for the fair and efficient adjudication of the present controversy.

(Footnotes omitted).

We find no error in the circuit court’s conclusions with respect to the final four factors of analysis contained in Rule 23(b)(3). Having found no error in the circuit court’s disposition of each of the elements to be considered in certifying a class under Rule 23(a) and (b), we find that certification was proper. Consequently, DuPont’s claim that class certification violated its due process rights by preventing it from presenting individualized evidence and individualized defenses is without merit.<sup>51</sup>

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<sup>51</sup>DuPont argues that the classes should have been decertified for two reasons. First, DuPont contends that the circuit court certified the property class for the remedy of diminished value only, but that during trial the evidence went to remediation. This argument is without merit as the circuit court’s order clearly stated that it was certifying the class for diminished value and for “[c]ommon administration of any remediation program . . . .” Second, DuPont contends that the trial court should have decertified the medical monitoring class because the evidence failed to show significant exposure. We reject this argument because the record clearly demonstrates that the evidence established significant widespread exposure of the medical monitoring class to the contaminants. Moreover, while DuPont attempted to present evidence establishing insufficient exposure, the jury simply was not persuaded by DuPont’s evidence. See *infra* Section III. F. of this opinion for further discussion of the sufficiency of the medical monitoring evidence.

### *C. 404(b) Evidence*

DuPont avers that the trial court erred in repeatedly allowing the Plaintiffs to present what DuPont characterizes as highly prejudicial “other acts” evidence without following the requirements of West Virginia Rule of Evidence 404(b).<sup>52</sup> Following an examination of the proper standards for our review, and some general principles pertaining to Rule 404(b), we will address DuPont’s challenges.

This Court has previously held that “[a] trial court’s evidentiary rulings, as well as its application of the Rules of Evidence, are subject to review under an abuse of discretion standard.” Syl. pt. 4, *State v. Rodoussakis*, 204 W. Va. 58, 511 S.E.2d 469 (1998). More specifically, we have explained, and we now hold, that,

“[t]he standard of review for a trial court’s admission of evidence pursuant to Rule 404(b) [of the West Virginia Rules of Evidence] involves a three-step analysis. First, we review for clear error the trial court’s factual determination that there is

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<sup>52</sup>West Virginia Rule of Evidence 404(b) states:

*Other crimes, wrongs, or acts.* – Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he or she acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.

sufficient evidence to show the other acts occurred. Second, we review *de novo* whether the trial court correctly found the evidence was admissible for a legitimate purpose. Third, we review for an abuse of discretion the trial court's conclusion that the 'other acts' evidence is more probative than prejudicial under Rule 403." *State v. LaRock*, 196 W. Va. 294, 310-11, 470 S.E.2d 613, 629-30 (1996).

*State v. Minigh*, 224 W. Va. 112, \_\_\_, 680 S.E.2d 127, 137 (2009) (per curiam). *See also McKenzie v. Carroll Int'l Corp.*, 216 W. Va. 686, 690, 610 S.E.2d 341, 345 (2004) ("[T]his Court reviews a circuit court's decision on whether 'to admit evidence pursuant to Rule 404(b) under an abuse of discretion standard.'" (citation omitted)); *State v. McGinnis*, 193 W. Va. 147, 159, 455 S.E.2d 516, 528 (1994) ("[W]e review the trial court's decision to admit evidence pursuant to Rule 404(b) under an abuse of discretion standard." (citations omitted)).

In *State v. McGinnis*, this Court set out the requirements for admitting 404(b) evidence as follows:

Where an offer of evidence is made under Rule 404(b) of the West Virginia Rules of Evidence, the trial court, pursuant to Rule 104(a) of the West Virginia Rules of Evidence, is to determine its admissibility. Before admitting the evidence, the trial court should conduct an *in camera* hearing as stated in *State v. Dolin*, 176 W. Va. 688, 347 S.E.2d 208 (1986)[, *overruled in part on other grounds by State v. Edward Charles L.*, 183 W. Va. 641, 398 S.E.2d 123 (1990)]. After hearing the evidence and arguments of counsel, the trial court must be satisfied by a preponderance of the evidence that the acts or conduct occurred and that the defendant committed the acts. If the trial court does not find by a preponderance of the evidence that the acts or conduct was committed or that the defendant was the actor, the

evidence should be excluded under Rule 404(b). If a sufficient showing has been made, the trial court must then determine the relevancy of the evidence under Rules 401 and 402 of the West Virginia Rules of Evidence and conduct the balancing required under Rule 403 of the West Virginia Rules of Evidence. If the trial court is then satisfied that the Rule 404(b) evidence is admissible, it should instruct the jury on the limited purpose for which such evidence has been admitted. A limiting instruction should be given at the time the evidence is offered, and we recommend that it be repeated in the trial court's general charge to the jury at the conclusion of the evidence.

Syl. pt. 2, *State v. McGinnis*, 193 W. Va. 147, 455 S.E.2d 516. With the foregoing standards and principles in mind, we proceed to the merits of DuPont's claimed errors.

**1. General Liability Phase: Videotape Deposition Testimony of Plaintiffs' Witness Kathleen Forte.** During Phase I, the general liability phase, the Plaintiffs offered into evidence the videotaped deposition of Kathleen Forte, a DuPont executive. DuPont complains that the Plaintiffs used the Forte deposition to interject into the trial allegations about other DuPont sites, other chemicals, and other acts unrelated to Spelter. DuPont characterizes this evidence as 404(b) evidence,<sup>53</sup> and argues further that the circuit court ignored the requirements for admitting 404(b) evidence set out by this Court in Syllabus point 2 of *State v. McGinnis*, 193 W. Va. 147, 455 S.E.2d 516. In response, the Plaintiffs submit that DuPont failed to raise a timely, sufficiently particularized objection,

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<sup>53</sup>Due to the manner in which we resolve this issue, it is not necessary for this Court to determine whether the deposition evidence at issue was in fact 404(b) evidence.

and, therefore, the claimed error pertaining to Ms. Forte's deposition testimony is not subject to appellate review. We agree with the Plaintiffs.

With respect to the necessity for a proper objection to preserve for appellate review the admissibility of evidence pursuant to evidentiary Rule 404(b), this Court has reasoned as follows:

We agree with the State's contention that the Appellant's claim of error under Rule 404(b) is precluded from appellate review based on his failure to state this authority as ground for his objection before the trial court. West Virginia Rule of Evidence 103(a)(1) provides, in pertinent part, that "[e]rror may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and . . . [i]n case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the *specific* ground of objection, if the specific ground was not apparent from the context. . . ." *Id.* (emphasis added). In interpreting the significance of Rule 103(a)(1), Justice Cleckley in his *Handbook on Evidence for West Virginia Lawyers* states: "the objecting party should not benefit from an insufficient objection if the grounds asserted in a valid objection could have been obviated had the objecting party alerted the offering party to the true nature of the objection." 1 Franklin D. Cleckley, *Handbook on Evidence for West Virginia Lawyers* § 1-7(C)(2) at 78 (3rd ed. 1994); see *Leftwich v. Inter-Ocean Casualty Co.*, 123 W. Va. 577, 585-86, 17 S.E.2d 209, 213 (1941) (Kenna, J., concurring) ("It is well established that where the objection to the admission of testimony is based upon some specified ground, the objection is then limited to that precise ground and error cannot be predicated upon the overruling of the objection, and the admission of the testimony on some other ground, since specifying a certain ground of objection is considered a waiver of other grounds not specified."); 1 Jack B. Weinstein et al., *Weinstein's Evidence* ¶ 103[02] at 103-37 (1995) (stating that "a specific objection made on the wrong grounds and overruled

precludes a party from raising a specific objection on other, tenable grounds on appeal”); *see also United States v. Reed*, 977 F.2d 14, 16 (1st Cir. 1992) (finding that defendant failed to make timely Rule 404(b) objection to admission of prior possession of cocaine conviction where, before trial court, defendant only argued that said admission violated Rule 403); *United States v. Mascio*, 774 F.2d 219, 221-23 (7th Cir. 1985) (stating that defendant cannot raise Rule 404(b) issue for first time on appeal, where objection before trial court only concerned lack of foundation and lack of specificity).

*State v. DeGraw*, 196 W. Va. 261, 272, 470 S.E.2d 215, 226 (1996) (footnote omitted).

We have reviewed the relevant portion of the transcript in the instant case and note that, at trial, DuPont asserted a number of grounds as to why Ms. Forte’s deposition testimony should not be played to the jury. However, the only reference that even remotely implicated Rule 404(b) was DuPont’s counsel’s comment that “[w]e also object because there is testimony or questioning with regard to other sites which are not the subject of this litigation, including Parkersburg and Pompton Lakes.” This statement alone, in the context of the numerous other grounds that DuPont raised, is wholly insufficient to alert the trial court that a Rule 404(b) objection was being made and that a specific *McGinnis* ruling was being requested. The inadequacy of counsel’s objection is made clear in the record. While the trial court specifically addressed a number of the objections that DuPont raised regarding Ms. Forte’s deposition, there was absolutely no comment by the trial court with reference to a Rule 404(b) objection. The record further demonstrates that, after DuPont made the vague aforementioned reference to evidence related to “other sites,” it never followed up by making

a specific Rule 404(b) objection. In other words, DuPont allowed the hearing to terminate without ever having its vague reference expressly addressed by the trial court.

Thus, DuPont attempted to bombard the trial court with a number of objections to Ms. Forte's testimony, and, during this bombardment, DuPont neglected to alert the trial court that it was attempting to make a Rule 404(b) argument. *See, e.g., Coleman v. Sopher*, 201 W. Va. 588, 600-01, 499 S.E.2d 592, 604-05 (1997) ("In the course of this testimony, Sopher's counsel made two objections pertaining to the form of the particular question being asked and one additional objection as to relevancy. Because Sopher failed to raise, on the record, the specific errors he now asserts [that the evidence should have been excluded under West Virginia Rule of Evidence 404(b)], we deem any such errors were waived."); *State v. DeGraw*, 196 W. Va. 261, 271, 470 S.E.2d 215, 225 (concluding that objection was insufficient to preserve 404(b) issue for appeal where, "[p]rior to trial, the Appellant filed a motion objecting to the above-mentioned questions and responses thereto, stating that 'the State made pointed reference to prior criminal offenses of [the] defendant' which was 'a naked attempt to circumvent the rule against impeachment of a criminal defendant by prior conviction (Rule of Evidence 609).' The Appellant never cited West Virginia Rule of Evidence 404(b) as a supporting ground for this objection." (footnote omitted)).

With respect to the requirement for a particularized objection, this Court has previously lamented that,

[t]ime and again, we have reiterated that “[t]o preserve an issue for appellate review, a party must articulate it with such sufficient distinctiveness to alert a circuit court to the nature of the claimed defect.” Syllabus Point 2, *State ex rel. Cooper v. Caperton*, 196 W. Va. 208, 470 S.E.2d 162 (1996). We have further explained:

The rule in West Virginia is that parties must speak clearly in the circuit court, on pain that, if they forget their lines, they will likely be bound forever to hold their peace. . . . It must be emphasized that the contours for appeal are shaped at the circuit court level by setting forth with particularity and at the appropriate time the legal ground upon which the parties intend to rely.

*Id.*, 196 W. Va. at 216, 470 S.E.2d at 170 (citation omitted). *Trial courts should not have to guess the nature of claimed defects. Further, this Court should not have to examine with a fine tooth comb the lines of trial transcripts to discern the true meaning of objections made at trial.*

*State v. Ladd*, 210 W. Va. 413, 428-29, 557 S.E.2d 820, 835-36 (2001) (emphasis added).

Additionally, we note that “Rule 103 of the West Virginia Rule of Evidence is also indicative of this principle[.]” *State v. Shrewsbury*, 213 W. Va. 327, 334, 582 S.E.2d 774, 781 (2003).

Rule 103 states, in relevant part:

(a) *Effect of erroneous ruling.* – Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and

(1) Objection. – In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, *stating the specific ground of objection*, if the specific ground was not apparent from the context . . . .

(Second emphasis added). Based upon the foregoing, we now expressly hold that an objection to a circuit court ruling that admits evidence must be timely made and must state the specific ground of the objection, if the specific ground is not apparent from the context.

See also W. Va. R. Civ. P. 46 (“Formal exceptions to rulings or orders of the court are unnecessary; but for all purposes for which an exception has heretofore been necessary it is sufficient that a party, at the time the ruling or order of the court is made or sought, *makes known to the court the action which the party desires the court to take or the party’s objection to the action of the court and the grounds therefor*; and, if a party has no opportunity to object to a ruling or order at the time it is made, the absence of an objection does not thereafter prejudice the party.” (emphasis added)).

Because DuPont failed to tender a sufficiently specific objection to the trial court, the issue of whether the evidence presented in Ms. Forte’s deposition violated Rule of Evidence 404(b) has not been preserved for appellate review.<sup>54</sup>

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<sup>54</sup>Likewise, DuPont’s allegation that the circuit erred in failing to exclude, on Rule 404(b) grounds, evidence presented during the Plaintiffs’ cross-examination of DuPont’s expert witness Dr. Joseph Rodricks was not preserved. DuPont’s counsel objected to the Plaintiffs’ questioning of Dr. Rodricks as follows:

MR. HALL: We’re here because he’s talking about Parkersburg, your Honor. It has absolutely nothing to do with this case. He’s suggesting to the jury that I somehow travel around with Doctor Rodricks and Doctor Rodricks has some role here.

(continued...)

**2. Punitive Damages Phase.** DuPont also complains that, during Phase IV of the trial, the punitive damages phase, the circuit court conducted an inadequate *McGinnis* hearing and thereby permitted the Plaintiffs to introduce a “mountain of improper 404(b) evidence.” The Plaintiffs disagree and assert that the trial court conducted a proper *McGinnis* hearing and reviewed all 404(b) documents *in camera*. We have reviewed the *McGinnis* hearing and find that the trial court indicated that it had conducted an *in camera* review of the documents, and that it would admit the documents tendered by the Plaintiffs into evidence. Thus, we find no merit to DuPont’s contention that the trial court failed to conduct an adequate review.<sup>55</sup>

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<sup>54</sup>(...continued)

It’s beyond the bounds – it has nothing to do with this lawsuit, and it’s okay on cross to go after people, but there’s always the same goal here, to inject these issues that don’t have anything to do with – they are prejudicial, and we object to it.

This objection is simply inadequate to alert the trial court that defense counsel is objecting on Rule 404(b) grounds. There was no mention of Rule 404(b), of “[o]ther crimes, wrongs, or acts,” or any request that the trial court conduct a hearing pursuant to *State v. McGinnis*.

<sup>55</sup>Furthermore, we note that DuPont’s brief makes only general allegations about the 404(b) evidence that was introduced at the punitive damages phase, without identifying any of the documents or explaining why the circuit court erred in admitting them. DuPont’s representation simply does not permit this Court to perform a specific review of each piece of evidence that was introduced. Thus, we once again admonish that, “[j]udges are not like pigs, hunting for truffles,” *State v. Honaker*, 193 W. Va. 51, 56 n. 4, 454 S.E.2d 96, 101 n. 4 (1994) (internal quotations and citations omitted), and neither are the members of this Honorable Court.” *State ex rel. Brooks v. Zakaib*, 214 W. Va. 253, 267, 588 S.E.2d 418, 432 (2003).

Accordingly, we find no error with respect to the Rule 404(b) issues raised by DuPont.<sup>56</sup>

#### ***D. Expert Testimony***

During Phase I of the trial, the general liability phase, the Plaintiffs tendered Dr. Kirk Brown as “an expert in contaminant assessment, remediation, related fields such as fate and transport, risk assessment and the [sic] fingerprinting contamination,” and the circuit court qualified Dr. Brown “within his areas of expertise and within the limits as expressed by him.” DuPont argues on appeal that the circuit court erred by allowing Dr. Brown to testify outside his area of expertise. Specifically, DuPont complains of the following

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<sup>56</sup>DuPont has also asserted that the circuit court erred by allowing the Plaintiffs’ counsel to present Rule 404(b) evidence during the Phase II closing argument. Notably, Rule 404(b) is an *evidentiary* rule. This Court has made clear that closing arguments are not evidence:

Every trial judge knows, as every trial lawyer knows, and every appellate court judge should know, that the statements of counsel in an argument are not evidence but are merely the expression of his individual views, and that jurors almost without exception during the trial of a case are so informed or instructed by counsel and the court.

*Crum v. Ward*, 146 W. Va. 421, 457, 122 S.E.2d 18, 38 (1961) (Haymond, President, dissenting). *See also West Virginia Fire & Cas. Co. v. Mathews*, 209 W. Va. 107, 112 n.5, 543 S.E.2d 664, 669 n.5 (2000) (per curiam) (“Statements made by lawyers do not constitute evidence in a case.” (citing *Crum v. Ward*)). Accordingly, Rule 404(b) does not apply to closing arguments.

testimony, which it characterizes as involving “medical and toxicology” expertise, given by

Dr. Brown during his direct examination by the Plaintiffs:

Q. Dr. Brown, . . . what are the health effects of arsenic, cadmium and lead exposure?

. . . .

Q. Just take them one by one.

A. Okay. Arsenic – we all know that someone can be poisoned rather quickly with arsenic. A couple of doses and it will kill you, and it will kill you within four or five days. That’s not what we’re talking about here.

There is a – there’s no such concentrations here. People have not been exposed to the point where we would even consider that.

However, we do know that over long-term exposures of low doses of arsenic, it does increase the probability that you would get cancer. The cancer would be skin cancer, bladder cancer, lung cancer, then there’s some evidence for kidney cancer.

So that’s what we’re concerned about for arsenic.

For cadmium, the cancers that we’re concerned about, after a long-term exposure again, would be lung cancer and kidney cancer. We also have other things that might happen before you get kidney cancer. There could be kidney failure and things of that nature.

Lead is a little bit different. We have less evidence, although there is growing evidence, that lead could be cancerous to lungs, kidney and perhaps even stomach. However, the immediate concern – just as we have an immediate concern with arsenic, we have an immediate concern with lead.

And the concern is particularly about children, children under the age of six. Lead exposure to children under the age of six – particularly by hand-to-mouth transfer, that is, they're exposed by touching things that have dust on them or lead on them and putting them in their mouth – that's why we just recently heard that these toys coming from China that had lead paint, that they're suddenly being recalled and taken off the market.

In this country, we have made a lot of progress to get lead out of the environment. No more lead in gas; no more lead in paint in this country. And we've made marvelous progress protecting children and adults from lead.

But if a child is exposed in an environment where there is elevated lead and they can get their hands on it, dust, soil, toys, whatever it is, within a few days, their blood lead level can increase.

And the nasty thing about increasing blood lead level in a child is that it interferes with brain development. A child ultimately has a lower IQ and potential and could have a detrimental impact on them for the rest of their life.

So this would be short-term exposures. The longer they're in that environment, the more damage that will be done. And this is why you hear about people cleaning the lead paint out of their house and why we hear about cautions for lead paint.

We do not want to allow children to be exposed to this chemical, even on a short-term basis.

Additionally, DuPont complains about the following testimony by Dr. Brown:

Q. Let's talk about doing a risk assessment and risk methodology. Will you describe to the jury how you go about doing it and what you did in this case?

A. What one does in a risk assessment is evaluate all the pathways which are likely to cause exposure to people. So

where we're interested in a metal like arsenic, we're interested in how are people exposed and what's the mechanism of exposure.

So people can be exposed if they get it on their skin. They can be exposed by breathing it. They can be exposed by eating it, ingestion, we call that.

Now, none of us want to admit that we eat dirt, okay? But studies have been done where we – where scientists have figured out how much soil or dirt children get into their mouth and eat and how much soil or dirt each of us adults eat, and it's not very much. It's a small amount, about 100 milligrams a day. But that's what they figure that we ingest.

And we all know that, you know, there are occasions where we didn't wash that piece of fruit that may have set on the table when we eat it, and you know, there's the five-second rule, it drops on the floor and you wait and grab it, can't be contaminated.

So we're all exposed to – to soil. We also know, through careful studies, how much people breathe. We know how much children breathe. Typical adult is breathing 10 to 20 cubic meters a day. So we have all these factors then that we're able to add up from the concentration, how much metal, a particular metal, one at a time, people are exposed to through the various pathways.

We know that if we eat produce that has metal in it, eat something from the garden or something from the grocery store, we're going to have some levels of metal. If our drinking water has some in, we will have some levels of metal. That doesn't appear to be a problem here, but it's a part of risk assessment.

If people are eating meat, deer meat or fish from the environment, that will also carry some metal. So what we do is: We take all these pathways and figure out which ones of them are important and put them together in a set of equations that then we use to calculate based on the concentration of the

metal in the various media, how much is in the air, how much is in the dust, and then also relationships that have been developed and are published and are, in fact, reviewed by ATSDR [(Agency for Toxic Substances and Disease Registry)] on a five-year basis, as to what dose increases your probability of cancer.

So every cancer-causing chemical is different. So what dose is – is going to increase your probability of cancer?

So then you put all that together in the equation, and you calculate out what the risk is for that particular chemical. Did that for arsenic, and we did it again for cadmium.

Now, since [arsenic] and cadmium are both known to cause lung cancer, then we add those together. So we add the various metals. So we're looking at all exposure pathways, all the metals that are put together.

I did not include lead. The data is less certain on lead. We think it may be a carcinogen in humans, but to be conservative, I didn't include lead. Zinc we didn't include at all, because we don't have evidence that it's going to be harmful to us.

So we did it for cadmium, we did it for arsenic, we added those together. This was methodology that was developed and approved by the U.S. EPA. It's a methodology that's used by West Virginia DEP. It's a very standard methodology.

The decisions have to be made, though, by the risk assessor as to which pathways to include and what concentrations to use, because one might say, "Well, we're not going to include the pathway from skin contact," or "We're going to say, instead of using this data, we don't believe this data, so we're going to somehow estimate the data from something else," so for instance if we don't have – if somebody says, "We don't have the concentration in air in the house," there have been methods suggested by the EPA where you could calculate the method of air – the concentration of air in the

house, form methods from dust in the floor or even form methods from the soil outside.

So it's a matter of which data you use. You can create your own data or you use the data that's available when you put this together. The methodology is the same methodology that was used by DuPont. In fact, had they not used this methodology, the risk assessment would not have been accepted by the West Virginia Department of Environmental Protection.

So for their on-site risk assessment, they did the same thing, only keep in mind there's nobody living on-site, so they didn't do the complete risk assessment for people off-site. You've heard that six ways already.

But essentially, what they did was the same thing I did, but I did it more complete since I was also interested in off-site.

Q And let's go to the next slide. And what were the results of your risk assessment?

A. Risk assessment is put to scale, and this is the probability of an individual getting cancer. And the scale increases from the – as we go up. The regulatory residential standard that West Virginia uses and the normal standard above which you should give public notification is called 1 times 10 to the minus 6 or 1 in a million, so that's an increase of cancer of 1 in a million.

The cancers that we found – or the probability of increased cancers that we found, the people living within the class area range from 7 times 10 to minus 5 or a little bit lower than 1 in 10,000 to over 1 in 1000.

So we're 100 – 1000 times greater than the minimum risk which is often considered by the regulatory community as being acceptable.

You go up to the highest one there, that's 1 in 100 of getting cancer, and when I did a risk calculation on one home in Spelter, which is right across from the front gate, that's just about the risk in that one individual home.

When we did it by the class area, we're between 7 times 7 minus 5 and 2.8 times 10 to minus 3 increase in cancer risk.

Q. And let's just go back to the 1 times 10 to the minus 6. You've got an asterisk by that. Now, you said something about "notification." What do you mean by "notification?"

A. Right. The West Virginia Department of Environmental Protection requires public notification if you're going to do a cleanup, and the cleanup would cause a calculated risk of greater than 1 in a million or 1 times 7 to the minus 6.

Q. And if DuPont had included these communities in their cleanup, what would that have required them to do?

A. That, in my opinion, would have required them to give public notification.

The Plaintiffs respond that the circuit court did not err in allowing the testimony of Dr. Brown, who is a respected pioneer in the field of environmental science.

In reviewing a circuit court's determination as to the admissibility of testimony by an expert witness, we apply an abuse of discretion standard:

"The admissibility of testimony by an expert witness is a matter within the sound discretion of the trial court, and the trial court's decision will not be reversed unless it is clearly wrong." Syllabus Point 6, *Helmick v. Potomac Edison Company*, 185 W. Va. 269, 406 S.E.2d 700 (1991), *cert. denied*, 502 U.S. 908, 112 S. Ct. 301, 116 L. Ed. 2d 244 (1991).

Syl. pt. 3, *Green v. Charleston Area Med. Ctr., Inc.*, 215 W. Va. 628, 600 S.E.2d 340 (2004) (per curiam).

The analysis to be applied in determining whether an expert is qualified to give an opinion has been well established by this Court. Initially, we note that “‘Rule 702 of the *West Virginia Rules of Evidence* is the paramount authority for determining whether or not an expert is qualified to give an opinion.’ Syl. Pt. 6, in part, *Mayhorn v. Logan Med. Found.*, 193 W. Va. 42, 454 S.E.2d 87 (1994).” Syl. pt. 2, *Walker v. Sharma*, 221 W. Va. 559, 655 S.E.2d 775 (2007).<sup>57</sup> Notably,

[w]e have previously interpreted Rule 702 as containing three major requirements: “(1) the witness must be an expert; (2) the expert must testify to scientific, technical or specialized knowledge; and (3) the expert testimony must assist the trier of fact.” *Gentry [v. Mangum]*, 195 W. Va. 512, 524, 466 S.E.2d 171, 183 (1995)].

*Watson v. Inco Alloys Int’l, Inc.*, 209 W. Va. 234, 242, 545 S.E.2d 294, 302 (2001). In other words,

“[i]n determining who is an expert, a circuit court should conduct a two-step inquiry. First, a circuit court must determine whether the proposed expert (a) meets the minimal educational or experiential qualifications (b) in a field that is relevant to the subject under investigation (c) which will assist the trier of fact.

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<sup>57</sup>Rule 702 of the West Virginia Rules of Evidence states: “If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.”

Second, a circuit court must determine that the expert's area of expertise covers the particular opinion as to which the expert seeks to testify." Syllabus point 5, *Gentry v. Mangum*, 195 W. Va. 512, 466 S.E.2d 171 (1995).

Syl. pt. 4, *Id.* Furthermore, this Court has recognized that,

the Rules of Evidence are liberal and . . . a trial court should "err on the side of admissibility." [*Gentry*,] 195 W. Va. at 525, 466 S.E.2d at 184 ("What must be remembered, however, is that there is no 'best expert' rule. Because of the 'liberal thrust' of the rules pertaining to experts, circuit courts should err on the side of admissibility." (citing II Franklin D. Cleckley, *Handbook on Evidence for West Virginia Lawyers* § 7-2(A), at 24 (" '[t]his standard is very generous and follows the general framework of the federal rules which favors the admissibility of all relevant evidence'")))).

*Watson*, 209 W. Va. at 246, 545 S.E.2d at 306. Pertinent to the specific error assigned by DuPont, that Dr. Brown testified outside of his expertise, this Court has also previously observed that,

"[t]he second part of the expert qualification criteria is assuring that the expert has expertise in the particular field in which he testifies. Here too, a circuit court has reasonable discretion. In discussing how much of a specialist should the expert be, a circuit court must always remember that the governing principle is whether the proffered testimony can assist the trier of fact. Necessarily the 'helpfulness' standard calls for decisions that are very much *ad hoc*, for the question is always whether a particular expert can help resolve the particular issue at hand."

*Watson*, 209 W. Va. at 245-46, 545 S.E.2d at 305-06 (quoting *Gentry*, 195 W. Va. 512, 526, 466 S.E.2d 171, 185). Finally, we note that,

[a]s we acknowledged in *Gentry*, pursuant to Rule 702, an expert may testify if he or she is "'qualified as an expert by

knowledge, skill, experience, training, or education.” 195 W. Va. at 520, 466 S.E.2d at 179 (quoting W. Va. R. Evid. 702). It has been noted that the use in Rule 702 of the disjunctive “or” allows an expert to be qualified by any of the five methods listed. See II Franklin D. Cleckley, *Handbook on Evidence for West Virginia Lawyers* § 7-2(A)(1), at 24 (1994) (“[I]nasmuch as the rule is disjunctive, a person may qualify to render expert testimony in any one of the five ways listed.”).

*Watson*, 209 W. Va. at 246, 545 S.E.2d at 306.

Prior to being qualified by the circuit court to provide the above-quoted expert testimony in this case, Dr. Brown testified as to his qualifications. Dr. Brown stated that he had served as a tenured professor at Texas A&M University for approximately twenty years, where he taught courses on environmental science, including courses “on waste disposal, the land disposal of waste, in particular, [and] land treatment,” to both undergraduate and graduate students.<sup>58</sup> He further explained that “those courses also include considerations of the fate and movement of contaminants in the environment, risk assessment, remediation, selection of how you clean up and how you restore contaminated properties.”

Dr. Brown testified that he possessed a bachelor’s degree, as well as a masters degree, and a Ph.D., in agronomy. He explained that he “specialized in soils, focusing more on the environmental aspects, emission of chemicals from the soil released to the

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<sup>58</sup>Dr. Brown testified that he had retired and presently served as a professor emeritus for Texas A&M University.

environment.” With respect to risk assessment, Dr. Brown testified that in the early 1980’s he had worked for the EPA and had “developed some aspects of risk assessment, including plant uptake of metals, which of course then goes into the food chain, and some of my early research in that time period, ultimately was used in developing the early aspects of some of the risk assessments that we now use.” He stated that he had also worked for the ATSDR (Agency for Toxic Substances and Disease Registry), where he

served for many years as a reviewer. As more information became available, every five years, the ATSDR upgrades its review of and scientific information on the toxicity of certain chemicals. For many years, I served as a reviewer on creosote.

My responsibility there was to evaluate the epidemiological studies, that is, studies where people were known to have been exposed, that then showed up in known cancers or other detrimental effects.

I also reviewed the animal studies that were done, tumor studies in mice and rabbits and other things.

I also reviewed data that was being collected on the impact of these chemicals on other biological systems. Because we can use, for instance, microbes instead of animals to see when there is mutation which could lead to detrimental impact of chemicals . . . .

So I reviewed the whole spectrum of tests every five years to assist the ATSDR in upgrading their publication which said how toxic, how cancer-causing that particular chemical was.

So in doing one chemical, I became very familiar with the procedures, the data that goes into it and how that’s evaluated and how the agency then actually decides whether or not a chemical would be called carcinogenic or not.

Elaborating on his experience in risk assessment, Dr. Brown testified further that,

I developed some of the early data and some of the early concepts on risk assessments. I was then assisting the EPA in putting some of these early studies together. As a result, I soon became aware of the efforts we were putting in there, and risk assessment includes such factors as how much of a metal is taken up by a plant growing in a garden that then one might eat and how much that metal you'd be exposed to, and that's the type of data I was developing.

I then followed that development of the risk assessment, and then once the Environmental Protection Agency put out a formal set of equations, if you will, to calculate risk assessment, I studied those, so became well aware of them, read the literature on it and then began teaching that in courses.

In addition, Dr. Brown testified that he had

worked on a variety of smelters and a variety of even Superfund sites that are metal contaminants. I've worked particularly on chromium sites and lead sites, although arsenic and zinc – in fact, one of the lead sites that I'm working on and continue to work on was a zinc mine where a lot of lead was released into the environment.

During voir dire by DuPont, Dr. Brown explained his toxicology experience thusly:

I do not classify myself as a toxicologist. I know and have researched and published on certain aspects of things that are within the realm of toxicology, but I don't generally call myself a toxicologist.

. . . .

My expertise stops . . . at the point where I know what kind of concentrations cause what end points of diseases in the body. But I stop there. I don't know the mechanism; I don't know the – you know, the time course of those things. I haven't studied those type of things.

When asked about his experience, training or education regarding what causes cancer, Dr. Brown replied, “That – the question's a bit broad. I know what causes cancer from exposure. I don't have expertise in the actual biochemical processes within the body that cause cancer, but I know if you're exposed to certain chemicals – benzene, arsenic, cadmium, for instance – I know that they cause cancer.”

Having reviewed the specific expert testimony of which DuPont complains in light of Dr. Brown's testimony regarding his knowledge, skill, experience, training, and education, we find Dr. Brown's expert testimony was within his demonstrated expertise. Dr. Brown plainly detailed his background as it related to understanding the health effects of certain substances, including arsenic, cadmium, lead and zinc, and the risk of cancer involved therewith. Not only did he demonstrate his knowledge about calculating risks, but he explained that he had played a role “in developing the early aspects of some of the risk assessments that we now use.” Thus, we find no error on the part of the circuit court in allowing Dr. Brown's testimony.

### *E. Verdict Form and Instructions*

DuPont next contends that the verdict form and instructions provided to the jury in Phase I<sup>59</sup> erroneously allowed the jury to apply inaccurate standards of law with respect to the property damage class.

At the outset, we consider the proper standard for our review of this issue.

With respect to jury instructions, this Court has held that,

“[a]s a general rule, the refusal to give a requested jury instruction is reviewed for an abuse of discretion. By contrast, the question of whether a jury was properly instructed is a question of law, and the review is *de novo*.” Syl. pt. 1, *State v. Hinkle*, 200 W. Va. 280, 489 S.E.2d 257 (1996).

Syl. pt. 2, *Foster v. Sakhai*, 210 W. Va. 716, 559 S.E.2d 53 (2001). Moreover,

[t]he formulation of jury instructions is within the broad discretion of a circuit court, and a circuit court’s giving of an instruction is reviewed under an abuse of discretion standard. A verdict should not be disturbed based on the formulation of the language of the jury instructions so long as the instructions given as a whole are accurate and fair to both parties.

Syl. pt. 6, *Tennant v. Marion Health Care Found., Inc.*, 194 W. Va. 97, 459 S.E.2d 374 (1995).

Turning to DuPont’s argument pertaining to the verdict form, we note that this Court has never expressly set out its standard for reviewing a trial court’s decision regarding

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<sup>59</sup>Phase I was the general liability phase of the trial.

a verdict form. However, in *Adkins v. Foster*, the Court applied an abuse of discretion standard in determining that, “[u]nder the circumstances, the Court cannot conclude that the trial judge *abused his discretion* in submitting the verdict form submitted rather than the verdict form offered by the appellant or that the refusal of the court to submit the appellant’s form constituted reversible error.” 195 W. Va. 566, 573, 466 S.E.2d 417, 424 (1995) (per curiam) (emphasis added) (footnote omitted). *See also Dodrill v. Nationwide Mut. Ins. Co.*, 201 W. Va. 1, 17, 491 S.E.2d 1, 17 (1996) (“The record in this case does not demonstrate that the trial court abused its sound discretion by using its verdict form rather than the special interrogatories submitted by Nationwide.”). *See generally* Cleckley, Davis, & Palmer, Jr., *Litigation Handbook on West Virginia Rules of Civil Procedure* § 49[2], at 1014 (3d ed. 2008) (discussing West Virginia Rule of Civil Procedure 49 and observing that, “[a]s a general rule, a trial court has considerable discretion in determining what verdict form to use” (footnote omitted)).<sup>60</sup> *Cf. Syl. pt. 8, Barefoot v. Sundale Nursing Home*, 193 W. Va. 475, 457

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<sup>60</sup>We further observe that other courts have applied an abuse of discretion standard when reviewing verdict forms. *See Malone v. Reliastar Life Ins. Co.*, 558 F.3d 683, 692 (7th Cir. 2009) (“We review a district court’s formulation of questions on a special verdict form for an abuse of discretion.” (citation omitted)); *Klein v. Sears Roebuck & Co.*, 773 F.2d 1421, 1427-28 (4th Cir. 1985) (finding “no abuse of discretion in the selection of the verdict form or in the jury’s instruction”); *J.T.A. Factors, Inc. v. Philcon Servs., Inc.*, 820 So. 2d 367, 371 (Fla. Ct. App. 2002) (“The form of the verdict to be used, however, lies within the sound discretion of the trial court.”); *People v. Battle*, 393 Ill. App. Ct. 3d 302, 313, 912 N.E.2d 786, 796, 332 Ill. Dec. 299, 309 (2009) (“A court reviews a trial court’s decision regarding instructions and verdict forms using an abuse of discretion standard.” (citation omitted)); *South Carolina Dep’t of Transp. v. First Carolina Corp. of S.C.*, 372 S.C. 295, 300, 641 S.E.2d 903, 906 (2007) (“The trial judge has the discretion to determine how a case is submitted to the jury.” (citation omitted)).

S.E.2d 152 (1995) (“As a general rule, a trial court has considerable discretion in determining whether to give special verdicts and interrogatories to a jury unless it is mandated to do so by statute.”). Accordingly, we now expressly hold that, generally, this Court will apply an abuse of discretion standard when reviewing a trial court’s decision regarding a verdict form.<sup>61</sup> We now consider whether the circuit court abused its discretion in the instant case.

**1. Verdict Form.** DuPont complains that the verdict form permitted the jury to find DuPont liable and to award property remediation damages without finding that the Plaintiffs’ property was harmed.<sup>62</sup> The Plaintiffs respond that DuPont, in making this argument, ignores the fact that the jury instructions required the jury to find harm to the Plaintiffs’ land. We agree.

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<sup>61</sup>There are exceptions to a trial court’s discretion with regard to verdict forms, in circumstances where the trial court’s action is mandatory. *See Barefoot v. Sundale Nursing Home*, 193 W. Va. 475, 491, 457 S.E.2d 152, 168 (1995) (“In West Virginia, there appear to be three [exceptions] to the general rule that special verdicts and/or special interrogatories are within the complete discretion of the trial court. The first is where special interrogatories are compelled by statute. . . . The second is in cases involving multiple causes of action where at least one of the causes of action is not supported by sufficient evidence to make it a legitimate jury issue. The third [exception] involves punitive damage cases.” (footnote omitted) (internal quotations and citations omitted)). *See generally* Franklin D. Cleckley, Robin J. Davis, & Louis J. Palmer, Jr., *Litigation Handbook on West Virginia Rules of Civil Procedure* § 49[2], at 1014 (3d ed. 2008) (identifying three exceptions to trial court’s discretion as to verdict forms). None of these exceptions apply in the instant case.

<sup>62</sup>DuPont avers that the circuit court rejected its proposed verdict form which would have required the jury to find that arsenic, cadmium, or lead created an “unreasonable risk of harm,” and the instruction it offered, which was also refused by the trial court, would have explained that only “material[ly]” increased levels of arsenic, cadmium or lead create an unreasonable risk of harm.

Although DuPont complains that the verdict form did not contain specific language requiring the jury to find an “unreasonable risk of harm,” DuPont has failed to provide this Court with any authority placing a mandatory duty upon the trial court to include such language in the verdict form. Thus, if the jury was properly instructed, then there was no abuse of discretion on the part of the trial court in not duplicating the instructions on the verdict form. *See, e.g., Horne v. Owens-Corning Fiberglas Corp.*, 4 F.3d 276, 284 (4th Cir. 1993) (“The district court’s decision to omit ‘gross negligence’ from the verdict form in this case will not represent an abuse of discretion if, when viewed in the context of controlling North Carolina law, the verdict form and charge to the jury adequately informed the jury of the issues before it.”).

In our review of the jury instructions, we find that the trial court adequately informed the jury that it must find an unreasonable risk of harm caused by DuPont’s conduct. For example, the trial court instructed the jury, in part, as follows:

In deciding whether the defendants’ conduct at or regarding the Spelter zinc smelter site that [sic] was abnormally dangerous, you must consider the following factors: A, whether there existed *a high degree of risk of some harm to the person, land or personal property of others*; B, whether the likelihood – whether *the likelihood* [sic] *that the harm that would result from the defendant’s conduct would be great*; C, whether there existed an inability to eliminate the risk of harm by the exercise of reasonable care; D, whether the conduct is a matter of common usage; E, whether the defendant’s conduct was appropriate to the place where it was carried on; and F, whether the value of the defendant’s conduct to the community was outweighed by its dangerous attributes.

(Emphasis added). In our review of the jury instructions, we find that the trial court properly instructed the jury to consider whether the property class plaintiffs suffered harm to their property. Therefore, the trial court did not abuse its discretion in declining to repeat this element on the verdict form.

**2. Instructions.** DuPont next argues that the trial court improperly rejected a jury instruction that would have explained that “only ‘material[ly] increased levels’” of arsenic, cadmium, or lead created an unreasonable risk of harm. With regard to jury instructions, this court has held that

“[a] trial court’s refusal to give a requested instruction is reversible error only if: (1) the instruction is a correct statement of the law; (2) it is not substantially covered in the charge actually given to the jury; and (3) it concerns an important point in the trial so that the failure to give it seriously impairs a defendant’s ability to effectively present a given defense.” Syl. Pt. 11, *State v. Derr*, 192 W. Va. 165, 451 S.E.2d 731 (1994).

Syl. pt. 5, *Alley v. Charleston Area Med. Ctr., Inc.*, 216 W. Va. 63, 602 S.E.2d 506 (2004) (per curiam). We find that it was within the trial court’s discretion to reject DuPont’s instruction. The concept that the property class plaintiffs must have suffered harm to their property from DuPont’s actions was conveyed in the jury instructions, particularly that portion of the instructions quoted above. Thus, DuPont’s requested instruction was

substantially covered in the charge actually given to the jury, and it was not error for the trial court to refuse the instruction.<sup>63</sup>

### *F. Sufficiency of the Medical Monitoring Evidence*

DuPont argues that the evidence presented by the Plaintiffs was insufficient to support the medical monitoring verdict rendered by the jury.

In *Bower v. Westinghouse Electric Corp.*, 206 W. Va. 133, 522 S.E.2d 424 (1999), this Court recognized a cause of action for medical monitoring by holding:

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<sup>63</sup>DuPont attempts to assign error with regard to other jury instruction issues, but DuPont has inadequately briefed these issues, and, therefore, they will not be addressed. Likewise, DuPont has also attempted to raise what is essentially a challenge to the sufficiency of the evidence pertaining to the property damage claims. We find this issue was also inadequately briefed. See *Cooper v. City of Charleston*, 218 W. Va. 279, 290, 624 S.E.2d 716, 727 (2005) (per curiam) (“Although we liberally construe briefs in determining issues presented for review, issues which are not raised, and those mentioned only in passing but are not supported with pertinent authority, are not considered on appeal.” (citations omitted)); *Farmer v. Knight*, 207 W. Va. 716, 722, 536 S.E.2d 140, 146 (2000) (per curiam) (“It is . . . well settled . . . that casual mention of an issue in a brief is cursory treatment insufficient to preserve the issue on appeal.” (quoting *State v. Lilly*, 194 W. Va. 595, 605 n.16, 461 S.E.2d 101, 111 n.16 (1995))); *Tiernan v. Charleston Area Med. Ctr., Inc.*, 203 W. Va. 135, 140 n.10, 506 S.E.2d 578, 583 n.10 (1998) (“Issues not raised on appeal or merely mentioned in passing are deemed waived.” (citation omitted)); *State Dep’t Of Health & Human Res. v. Robert Morris N.*, 195 W. Va. 759, 765, 466 S.E.2d 827, 833 (1995) (“[a] skeletal ‘argument,’ really nothing more than an assertion, does not preserve a claim . . . .” (citation omitted)). See also *Albright v. White*, 202 W. Va. 292, 298 n.9, 503 S.E.2d 860, 866 n.9 (1998) (refusing to address issues on appeal that had not been adequately briefed); *Ohio Cellular RSA Ltd. P’ship v. Board of Pub. Works of W. Va.*, 198 W. Va. 416, 424 n.11, 481 S.E.2d 722, 730 n.11 (1996) (same).

In order to sustain a claim for medical monitoring expenses under West Virginia law, the plaintiff must prove that (1) he or she has, relative to the general population, been *significantly exposed*; (2) to a proven hazardous substance; (3) through the tortious conduct of the defendant; (4) as a proximate result of the exposure, plaintiff has suffered an *increased risk of contracting a serious latent disease*; (5) the increased risk of disease makes it reasonably necessary for the plaintiff to undergo periodic diagnostic medical examinations different from what would be prescribed in the absence of the exposure; and (6) monitoring procedures exist that make the early detection of a disease possible.

Syl. pt. 3, *id.* (emphasis added).

At the conclusion of Phase II of the trial, the medical monitoring phase, the jury returned a verdict in favor of the Plaintiffs on all issues. Pertinent to this assignment of error, the jury specifically found, *inter alia*, that class members in each of the designated zones had “been significantly exposed to arsenic, cadmium, or lead,” and that, as a proximate result of their exposure to arsenic, cadmium, or lead, class members have a significantly increased risk of contracting certain diseases.<sup>64</sup>

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<sup>64</sup>The jury found that class members have a significantly increased risk of skin cancer and bladder cancer from exposure to arsenic from the smelter; a significantly increased risk of lung cancer and kidney cancer from exposure to arsenic, cadmium, or lead from the smelter; a significantly increased risk of decreased renal function and renal failure from exposure to cadmium or lead from the smelter; and a significantly increased risk of stomach cancer, plumbism (lead poisoning), and neurocognitive injury, from exposure to lead from the smelter.

DuPont now urges this Court to find that the evidence presented at trial was insufficient to support the portions of the jury's medical monitoring verdict finding significant exposure and increased risk. The Plaintiffs, on the other hand, contend that the evidence was sufficient to support the verdict.

Concerning our standard of review of this issue, we note that a finding of insufficient evidence to support a verdict is not easily made. Thus, DuPont bears a heavy burden in attempting to establish an error in this regard. *Cf.* Syl. pt. 6, in part, *State v. McCracken*, 218 W. Va. 190, 624 S.E.2d 537 (2005) (per curiam) (“‘A criminal defendant challenging the sufficiency of the evidence to support a conviction takes on a heavy burden. . . .’” (quoting Syl. pt. 3, *State v. Guthrie*, 194 W. Va. 657, 461 S.E.2d 163 (1995))). Indeed, this Court has held that,

“[i]n determining whether there is sufficient evidence to support a jury verdict the court should: (1) consider the evidence most favorable to the prevailing party; (2) assume that all conflicts in the evidence were resolved by the jury in favor of the prevailing party; (3) assume as proved all facts which the prevailing party's evidence tends to prove; and (4) give to the prevailing party the benefit of all favorable inferences which reasonably may be drawn from the facts proved.” Syl. pt. 5, *Orr v. Crowder*, 173 W. Va. 335, 315 S.E.2d 593 (1983).

Syl. pt. 15, *Foster v. Sakhai*, 210 W. Va. 716, 559 S.E.2d 53 (2001). *See also* *Dodrill v. Nationwide Mut. Ins. Co.*, 201 W. Va. 1, 11, 491 S.E.2d 1, 11 (1996) (“When examining the record for the sufficiency of evidence to support the verdict, we view the evidence in the light most favorable to the prevailing party. We are not concerned with how we might decide

the facts in the jury's stead, nor does our review favor the inferences and conflicts in the evidence helpful to the losing party."); Syl. pt. 3, *Walker v. Monongahela Power Co.*, 147 W. Va. 825, 131 S.E.2d 736 (1963) ("In determining whether the verdict of a jury is supported by the evidence, every reasonable and legitimate inference, fairly arising from the evidence in favor of the party for whom the verdict was returned, must be considered, and those facts, which the jury might properly find under the evidence, must be assumed as true.").

In support of its argument, DuPont submits that "[t]he actual measurements showed that arsenic, cadmium, and lead are not present throughout the class area at levels that increase the risk of disease." In addition, DuPont states that the Plaintiffs' environmental data are consistent with the ATSDR's<sup>65</sup> blood-lead measurement of children in the Spelter community, and the ATSDR concluded that "it does not appear that children in Spelter are being exposed to hazardous levels of lead." DuPont further complains that the Plaintiffs' medical monitoring expert, Dr. Charles Werntz, simply assumed significant class-wide exposure to arsenic, cadmium, and lead. Finally, DuPont asserts that uncontradicted evidence established that the "increased risk" deemed sufficient by the Plaintiffs' soil expert, Dr. Brown, was equal to the risk from smoking a single pack of cigarettes over an entire lifetime.

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<sup>65</sup>ATSDR is an acronym for the Agency for Toxic Substances and Disease Registry.

The Plaintiffs respond that Dr. Wertz did not assume exposure. Rather, he relied on a team of experts who actually measured the levels of contamination in the class area and developed a risk assessment that showed a significant increase in the risk of cancer for people living in the class area. The Plaintiffs explain that the evidence revealed that, for decades, the smelter blanketed the class area with toxic smoke, and that particles from this smoke contaminated the soil and homes, thus creating multiple paths of exposure. In addition, the Plaintiffs state that in a majority of the homes tested by Dr. Brown, lead levels in the indoor dust exceeded the screening level for outdoor soil, and, in some of the homes, the lead levels were five times greater than the screening level for lead in soil. The Plaintiffs opine that indoor levels that exceed the screening level of outdoor soil is persuasive evidence of significant exposure. Dr. Brown also found elevated levels of cadmium in living space dust of the homes he tested. The elevated levels ranged from eight to seventy times the level of cadmium found in typical house dust.

Based upon our review of the record, we find the evidence was controverted on this issue, with both sides presenting evidence in support of their position. However, as noted above, we are bound to view the evidence in the light most favorable to the Plaintiffs as the prevailing parties, and we must view every reasonable and legitimate inference, fairly arising from the evidence, in favor of the Plaintiffs. Under this standard, we find there was

sufficient evidence to support the portions of the jury's medical monitoring verdict finding significant exposure and increased risk.<sup>66</sup>

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<sup>66</sup>DuPont has asserted two additional errors pertaining to Medical Monitoring; however, we find these arguments to be without merit. First, DuPont contends that the circuit court erroneously included CT scans in the medical monitoring plan. DuPont asserts, as a basis for this argument, that the CT scans should have been rejected based upon DuPont's evidence that the CT scans presented more of a cancer risk to the class members than their exposure to arsenic, cadmium, and lead from the smelter. The Plaintiffs, on the other hand, tendered evidence that the CT scans are a reasonable option that will be given only at the election of the individual members of the medical monitoring class in consultation with their respective physicians. Notably, this Court has previously disapproved of the argument that medical monitoring should be rejected due to its risk of harm. *See Bower v. Westinghouse Elec. Corp.*, 206 W. Va. 133, 142, 522 S.E.2d 424, 433 (1999) ("This Court is not entirely in accord with the statement in *Hansen[ v. Mountain Fuel Supply*, 858 P.2d 970, 977 (Utah 1993)], to the effect that . . . 'if a reasonable physician would not prescribe . . . [medical monitoring] for a particular plaintiff because the benefits of monitoring would be outweighed by the costs, which may include, . . . risk of harm to the patient, then recovery would not be allowed.' 858 P.2d at 980; . . . Moreover, the requirement that diagnostic testing must be medically advisable does not necessarily preclude the situation where such a determination is based, at least in part, upon the subjective desires of a plaintiff for information concerning the state of his or her health."). Furthermore, this Court observes that, while DuPont has attacked the use of CT scans as outside the tests that "a qualified physician would prescribe" (citing *Bower* 206 W. Va. at 142, 522 S.E.2d at 433), DuPont has failed to suggest any alternative whatsoever. In other words, DuPont suggests that there is no medical monitoring remedy for the harm it has caused to the Plaintiffs. We reject this unsupported argument. Likewise, DuPont assigns error to the forty-year duration of the medical monitoring plan adopted by the circuit court, asserting that forty years is well beyond the latency period (the time between chemical exposure and disease onset) of the diseases involved in the case *sub judice*. On the contrary, the Plaintiffs submitted evidence that the majority of the cancers for which the Plaintiffs are at risk have a latency period of forty years. Dr. Charles Werntz, who developed the medical monitoring program adopted by the circuit court, also testified that, while he recognized that some of the conditions had varying latency periods, he applied one duration to the entire program in the interest of simplicity. Moreover, the Plaintiffs allege that DuPont failed to offer at trial any evidence to support an alternative duration being sufficient, and we note that DuPont has similarly failed to direct this Court's attention to any such evidence. Thus, due to DuPont's utter lack of evidence suggesting alternatives to CT scans and the forty-year duration of the medical

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### *G. Punitive Damages*

The next issue we address involves punitive damages. DuPont asserts four general assignments of error to support its argument that the punitive damages award should be vacated. In this regard, DuPont argues that the circuit court erred by: (1) refusing to give an instruction offered by DuPont pertaining to dissimilar conduct; (2) allowing allegedly improper comments by the Plaintiffs' counsel; (3) permitting the award of punitive damages in connection with the Plaintiffs' claims for medical monitoring; and (4) upholding a punitive damages award that was excessive and not supported by the evidence. We will address each of these issues in turn.

**1. Dissimilar Conduct.** DuPont contends that the punitive damages award should be vacated because the circuit court erred in refusing to give an instruction offered by DuPont that informed the jury that it could not punish DuPont based on evidence of dissimilar conduct. Initially, we note that

[t]he formulation of jury instructions is within the broad discretion of a circuit court, and a circuit court's giving of an instruction is reviewed under an abuse of discretion standard. A verdict should not be disturbed based on the formulation of the language of the jury instructions so long as the instructions given as a whole are accurate and fair to both parties.

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<sup>66</sup>(...continued)

monitoring program, we find the program adopted by the trial court to be reasonable.

Syl. pt. 6, *Tennant v. Marion Health Care Found., Inc.*, 194 W. Va. 97, 459 S.E.2d 374 (1995). Thus, “[a]s a general rule, the refusal to give a requested jury instruction is reviewed for an abuse of discretion. By contrast, the question of whether a jury was properly instructed is a question of law, and the review is *de novo*.” Syl. pt 1, *State v. Hinkle*, 200 W. Va. 280, 489 S.E.2d 257 (1996).

In conducting our review, we are mindful that,

“‘[i]t will be presumed that a trial court acted correctly in giving or in refusing to give instructions to the jury, unless it appears from the record in the case that the instructions were prejudicially erroneous or that the instructions refused were correct and should have been given.’ Syllabus Point 1, *State v. Turner*, 137 W. Va. 122, 70 S.E.2d 249 (1952).” Syllabus point 1, *Moran v. Atha Trucking, Inc.*, 208 W. Va. 379, 540 S.E.2d 903 (1997).

Syl. pt. 3, *Matheny v. Fairmont Gen. Hosp., Inc.*, 212 W. Va. 740, 575 S.E.2d 350 (2002).

Furthermore,

[a] trial court’s instructions to the jury must be a correct statement of the law and supported by the evidence. Jury instructions are reviewed by determining whether the charge, reviewed as a whole, sufficiently instructed the jury so they understood the issues involved and were not misle[d] by the law. A jury instruction cannot be dissected on appeal; instead, the entire instruction is looked at when determining its accuracy. A trial court, therefore, has broad discretion in formulating its charge to the jury, so long as the charge accurately reflects the law. Deference is given to a trial court’s discretion concerning the specific wording of the instruction, and the precise extent and character of any specific instruction will be reviewed only for an abuse of discretion.

Syl. pt. 4, *State v. Guthrie*, 194 W. Va. 657, 461 S.E.2d 163 (1995).

During Phase IV of the trial, which addressed punitive damages, the Plaintiffs presented evidence involving DuPont's conduct toward nonparties at one of its facilities in Parkersburg, West Virginia. In response, DuPont characterized this evidence as dissimilar conduct and proposed the following instruction, which was rejected by the circuit court: "[a] defendant's dissimilar acts, independent from the acts upon which you based your previous findings of liability, may not serve as the basis for punitive damages." (Internal quotations omitted). DuPont relied on *Boyd v. Goffoli*, 216 W. Va. 552, 608 S.E.2d 169 (2004), and *State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 U.S. 408, 123 S. Ct. 1513, 155 L. Ed. 2d 585 (2003), as authority for its proposed instruction.

Although the trial court rejected DuPont's proposed instruction, it gave the following relevant instructions:

The Court instructs the jury that during the course of Phase 4, you've heard evidence of alleged DuPont conduct relating to sites other than Spelter and involving individuals who are not plaintiffs or class members in this lawsuit. *You may not award punitive damage to punish DuPont on account of alleged harm to nonparties.*

In considering whether DuPont's conduct is reprehensible, however, you may consider evidence of actual harm to nonparties, but only if the harm to nonparties was caused by the same conduct that allegedly harmed the plaintiffs.

The Court instructs the jury that you may not assess punitive damages against the defendant to punish or deter any perceived deficiencies of a defendant's operations outside of the state.

The Court instructs the jury that you've heard evidence mentioning another DuPont site at Parkersburg, West Virginia. This evidence is not to be considered for the purpose of proving the character of DuPont, to show that it acted in conformity therewith.

It is, however, admissible for other purposes, such as proof of intent, preparation, plan, knowledge or absence of mistake or accident.

In this case, plaintiffs are offering this evidence to show how DuPont managed the off-site environmental issues at another site within the State of West Virginia.

(Emphasis added).

Reviewing the circuit court's instructions in light of this Court's decision in *Boyd v. Goffoli*, 216 W. Va. 552, 608 S.E.2d 169,<sup>67</sup> and the United States Supreme Court decisions in *State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 U.S. 408, 123 S. Ct. 1513, 155 L. Ed. 2d 585,<sup>68</sup> and *Philip Morris USA v. Williams*, 549 U.S. 346, 127

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<sup>67</sup>In *Boyd v. Goffoli*, 216 W. Va. 552, 608 S.E.2d 169 (2004), this Court closely reviewed the United States Supreme Court decision in *State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 U.S. 408, 123 S. Ct. 1513, 155 L. Ed. 2d 585 (2003).

<sup>68</sup>In *State Farm Mutual Automobile Insurance Co. v. Campbell*, the United States Supreme Court observed that "[a] State cannot punish a defendant for conduct that may have been lawful where it occurred." 538 U.S. 408, 421, 123 S. Ct. 1513, 1522, 155 L. Ed. 2d 585. However, the Court went on to explain that

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S. Ct. 1057, 166 L. Ed. 2d 940 (2007),<sup>69</sup> we find that the instructions, when considered as a

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<sup>68</sup>(...continued)

[l]awful out-of-state conduct may be probative when it demonstrates the deliberateness and culpability of the defendant's action in the State where it is tortious, but that conduct must have a nexus to the specific harm suffered by the plaintiff. A jury must be instructed, furthermore, that it may not use evidence of out-of-state conduct to punish a defendant for action that was lawful in the jurisdiction where it occurred.

*Id.*, 538 U.S. at 422, 123 S. Ct. at 1522-23, 155 L. Ed. 2d 585 (citation omitted).

<sup>69</sup>In *Philip Morris USA v. Williams*, the United States Supreme Court explained:

In our view, the Constitution's Due Process Clause forbids a State to use a punitive damages award to punish a defendant for injury that it inflicts upon nonparties or those whom they directly represent, *i.e.*, injury that it inflicts upon those who are, essentially, strangers to the litigation. . . .

. . . .

Respondent argues that she is free to show harm to other victims because it is relevant to a different part of the punitive damages constitutional equation, namely, reprehensibility. That is to say, harm to others shows more reprehensible conduct. Philip Morris, in turn, does not deny that a plaintiff may show harm to others in order to demonstrate reprehensibility. Nor do we. Evidence of actual harm to nonparties can help to show that the conduct that harmed the plaintiff also posed a substantial risk of harm to the general public, and so was particularly reprehensible--although counsel may argue in a particular case that conduct resulting in no harm to others nonetheless posed a grave risk to the public, or the converse. Yet for the reasons given above, *a jury may not go further than this and use a punitive damages verdict to punish a defendant directly on account of harms it is alleged to have visited on nonparties.*

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whole, were legally correct in directing the jury that it could consider DuPont's conduct against non-parties in determining whether DuPont's conduct was reprehensible, only if "the harm to nonparties was caused by the same conduct that allegedly harmed the plaintiffs." But, more importantly, the trial court instructed the jury that it could not award punitive damages as punishment for conduct toward nonparties. Accordingly, we find that the circuit court did not abuse its discretion in refusing DuPont's instruction.

**2. Comments by the Plaintiffs' Counsel.** DuPont argues that the circuit court erred in allowing the Plaintiffs' counsel to urge the jury to "send a message" to large, out-of-state corporations. Specifically, DuPont complains about the following statements by the Plaintiffs' counsel during Phase IV closing arguments:

This is the company that you need to send back home and you need to say, "Don't come into our state and do that."

And when you tell them [DuPont] that with a number, you won't have people blowing tops off of mountains, and you won't have people polluting your rivers, and you won't have these carpetbaggers coming into this town - that's the only way I know how to describe it - and raping the natural resources of this area. You will not have it if they get it.

And you know what? This is the first time in - in this state - I'm sure you all figured it out. This is the first time this is gonna be tested in this state, with a full-blown community environmental process, right here.

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<sup>69</sup>(...continued)

549 U.S. 346, 353 & 355, 127 S. Ct. 1057, 1063-64, 166 L. Ed. 2d 940 (2007) (emphasis added).

DuPont also complains of comments by the Plaintiffs' counsel during opening statements for Phase IV of the trial, which DuPont characterizes as urging the jury to punish DuPont for choosing to defend itself in court:

[W]hat does it take for this corporation to get it? They didn't get it the first time you came out with the first part of the verdict, they didn't get it. They didn't get it the second time you came out with the second part of your verdict, they didn't get it. They didn't get it yesterday when you came back with your verdict, they didn't get it. And they don't get it today.<sup>[70]</sup>

At the conclusion of the Phase IV opening and closing arguments quoted above, DuPont tendered a motion for a mistrial, which was denied by the circuit court each time. With respect to a circuit court's ruling on a motion for mistrial, this Court has held:

Whether a motion for a mistrial should be sustained or overruled is a matter which rests within the trial court's discretion and the action of the trial court in ruling on such a motion will not be cause for reversal on appeal unless it clearly appears that such discretion has been abused.

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<sup>70</sup>This portion of the Plaintiffs' opening statement pertained to DuPont's conduct in Parkersburg. The quoted text was preceded by the following comments:

Do you see any parallels between what happened right here in Spelter? What we're going to show you is that this is conduct that – it's only being offered – and just to be very clear, it's only being offered – Parkersburg's not on trial. What they did in Parkersburg is not on trial.

But to show the conduct, the continuing conduct, what does it take for this corporation to get it? . . .

Syl. pt. 4, *Moore, Kelly & Reddish, Inc. v. Shannondale, Inc.*, 152 W. Va. 549, 165 S.E.2d 113 (1968). *Accord Board of Educ. of McDowell County v. Zando, Martin & Milstead, Inc.*, 182 W. Va. 597, 611, 390 S.E.2d 796, 810 (1990). Furthermore, with respect to the circuit court's determination as to the propriety of counsel's arguments, we have held:

“‘The discretion of the trial court in ruling on the propriety of argument by counsel before the jury will not be interfered with by the appellate court, unless it appears that the rights of the complaining party have been prejudiced, or that manifest injustice resulted therefrom.’ Syl. pt. 3, *State v. Boggs*, 103 W. Va. 641, 138 S.E. 321 (1927).” Syllabus point 2, *Lacy v. CSX Transportation, Inc.*, 205 W. Va. 630, 520 S.E.2d 418 (1999).

Syl. pt. 6, *Matheny v. Fairmont Gen. Hosp., Inc.*, 212 W. Va. 740, 575 S.E.2d 350. Finally, this Court has advised that

“‘[g]reat latitude is allowed counsel in argument of cases, but counsel must keep within the evidence, not make statements calculated to inflame, prejudice or mislead the jury, nor permit or encourage witnesses to make remarks which would have a tendency to inflame, prejudice or mislead the jury.’ Syl. pt. 2, *State v. Kennedy*, 162 W. Va. 244, 249 S.E.2d 188 (1978).’ Syl. pt. 8, *Mackey v. Irisari*, 191 W. Va. 355, 445 S.E.2d 742 (1994).” Syllabus point 1, *Lacy v. CSX Transportation, Inc.*, 205 W. Va. 630, 520 S.E.2d 418 (1999).

Syl. pt. 7, *Id.*

This Court recently addressed improper closing arguments in *Jones v. Setser*, \_\_\_ W. Va. \_\_\_, 686 S.E.2d 623 (2009) (per curiam). In *Jones*, defense counsel attacked the “character and ethics” of the plaintiff’s counsel and the plaintiff’s expert witness, and

“personalized the effects of his rhetoric through the use of demonstrative aids to argue that both [counsel and the expert] were intent on pursuing claims of medical malpractice regardless of whether such claims had merit.” *Id.*, \_\_\_ W. Va. at \_\_\_, 686 S.E.2d at 630.<sup>71</sup> This Court concluded that the trial court erred in refusing to grant a mistrial based upon the “cumulated prejudicial effects on the jury that arose through the viewing of the cartoon, being subjected to disparaging remarks about plaintiff’s counsel and expert witness, and from the wrongful appeal to the local passions and concerns of the jurors.” *Id.*, \_\_\_ W. Va. at \_\_\_, 686 S.E.2d at 632.

Turning to the instant case, we note that we do not approve of the comments made by the Plaintiffs’ counsel; however, we do not find that those comments rise to the level of the improper prejudicial error that warranted a new trial in *Jones*. Accordingly, we affirm the circuit court’s denial of DuPont’s motion for a mistrial on punitive damages, based upon the closing arguments and opening statements of the Plaintiffs’ counsel.

**3. Punitive Damages for Medical Monitoring Claims.** Prior to the Phase IV trial on punitive damages, the circuit court rejected DuPont’s motion to preclude a

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<sup>71</sup>The demonstrative aids used by defense counsel were a cartoon that made reference to suing a doctor, and a document entitled “Dr. Setser Can’t Win” that included three statements asserting that Dr. Setser would be sued by the plaintiff’s counsel regardless of what course of treatment he provided. This document was displayed to the jury during defense counsel’s closing arguments. *See Jones v. Setser*, \_\_\_ W. Va. \_\_\_, \_\_\_, 686 S.E.2d 623, 627 (2009) (per curiam).

punitive damages phase in this case, based, in part, upon DuPont’s argument that punitive damages may not be awarded for medical monitoring claims. In addition, DuPont proposed a jury verdict form that allowed punitive damages to be awarded *only* for the property damage claims. The trial court rejected DuPont’s verdict form and instead used a verdict form that simply inquired of the jury “[d]o you find that the Classes proved that DuPont engaged in wanton, willful, or reckless conduct with respect to the Spelter plant?” Before this Court, DuPont argues that the circuit court erred in allowing the jury to award punitive damages to the medical monitoring class. We agree.

At the outset, we note that the issue of whether to allow punitive damages in connection with a medical monitoring claim presents a question of law, for which we exercise *de novo* review. See Syl. pt. 1, *Crystal R.M. v. Charlie A.L.*, 194 W. Va. 138, 459 S.E.2d 415 (1995) (“Where the issue on an appeal from the circuit court is clearly a question of law or involving an interpretation of a statute, we apply a *de novo* standard of review.”).

DuPont argues that punitive damages should not be permitted for medical monitoring claims because an award of punitive damages requires a showing of actual harm and an award of compensatory damages. DuPont contends these two elements are missing from a claim for medical monitoring, which requires only a showing of increased risk of

disease, not actual present harm.<sup>72</sup> The Plaintiffs, on the other hand, assert that, in West Virginia, medical monitoring damages are considered actual harm, therefore, punitive damages may be proper.<sup>73</sup>

The issue of whether to allow punitive damages in connection with a medical monitoring claim has not previously been resolved by this Court. We were asked to decide this issue in the case of *State ex rel. Chemtall Inc. v. Madden*, 221 W. Va. 415, 655 S.E.2d 161 (2007) (per curiam), which was an original jurisdiction action in prohibition that was filed before the action had been tried. Finding the question would be “best decided in light of a verdict based on a full development of the evidence at trial,” this Court declined to address the issue at the “early pre-trial stage” of the *Chemtall* litigation. 221 W. Va. at 421, 655 S.E.2d at 167.<sup>74</sup> However, in a separate opinion, concurring in part and dissenting in

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<sup>72</sup>In support of this argument, DuPont cites *Bower v. Westinghouse Elec. Corp.*, 206 W. Va. 133, 522 S.E.2d 424 (1999).

<sup>73</sup>In support of this argument, the Plaintiffs cite *State ex rel. Chemtall Inc. v. Madden*, 216 W. Va. 443, 607 S.E.2d 772 (2004).

<sup>74</sup>The Court did, however, make the following observation in a footnote:

At least one court has recognized that “it is not uncommon for plaintiffs to join claims for punitive damages with claims for medical monitoring.” *Carlough v. Amchem Products, Inc.*, 834 F. Supp. 1437, 1460 (E.D. Pa.1993), citing *Day v. NLO, Inc.*, 814 F. Supp. 646 (S.D. Ohio 1993); *Cook v. Rockwell Int’l Corp.*, 755 F. Supp. 1468 (D. Colo. 1991); *Catasauqua Area School Dist. v. Raymark Indus., Inc.*, 662 F. Supp. 64 (E.D. Pa.1987); *Sterling v. Velsicol Chem. Corp.*,

(continued...)

part, Justice Benjamin persuasively explained his view that punitive damages are not appropriate in medical monitoring cases:

Our Court has defined the “injury” claimed by medical monitoring plaintiffs as a “significantly increased *risk* of contracting a particular disease.” *See State ex rel. Chemtall, Inc. v. Madden*, 216 W. Va. 443, 455, 607 S.E.2d 772, 784 (2004) (emphasis added). A plaintiff is not required to show that a particular disease is certain or even likely to occur as a result of exposure. “All that must be demonstrated is that the plaintiff has a significantly increased risk of contracting a particular disease relative to what would be the case in the absence of exposure, and ‘[n]o particular level of quantification is necessary to satisfy this requirement.’” *Bower [v. Westinghouse Elec. Corp.]*, 206 W. Va. [133,] 142, 522 S.E.2d [424,] 433 [(1999)]. Our Court has long recognized that a plaintiff may not recover punitive damages in the absence of actual harm and recovery of compensatory damages. *See Garnes [v. Fleming Landfill, Inc.]*, 186 W. Va. [656,] 667[, 413 S.E.2d 897, 908 (1991),] & Syl. Pt. 1 [of *Garnes*]. Because the respondents have not asserted personal injury claims, as they have not suffered any actual, present physical injuries from their alleged exposure to petitioners’ products, punitive damages simply should not be available in this case.

Furthermore, the Due Process Clause requires a jury to measure the entitlement to punitive damages by the amount of harm suffered by the respondents, and prohibits “grossly excessive or arbitrary punishments.” *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 416, 123 S. Ct. 1513, 155 L. Ed. 2d 585 (2003). A proper measure of punitive damages

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<sup>74</sup>(...continued)  
855 F.2d 1188 (6th Cir. 1988).

*State ex rel. Chemtall Inc. v. Madden*, 221 W. Va. 415, 421 n.5, 655 S.E.2d 161, 167 n.5 (2007) (per curiam). As explained in the discussion that follows, a careful reading of the cases cited in the foregoing quote reveals that they do not support allowing punitive damages for medical monitoring claims.

begins with a determination of the proportionality between compensatory damages and punitive damages. *Id.*, 538 U.S. at 418, 123 S. Ct. 1513. Any award of punitive damages in this class action will be completely arbitrary because there are no actual compensatory damages on which to base a multiplier. . . .

*Chemtall*, 221 W. Va. at 425, 655 S.E.2d at 171.

Surveying how other jurisdictions have addressed this issue reveals that there is a lack of case law discussion on the issue of recovering punitive damages on a purely medical monitoring claim. Our research has uncovered only three cases, all from the same federal district, that have addressed the issue.

Only one case appears to have expressly held that punitive damages could be awarded for medical monitoring. *See Carlough v. Amchem Prods., Inc.*, 834 F. Supp. 1437 (E.D. Pa. 1993). In *Carlough*, the Plaintiffs filed a class action seeking medical monitoring due to asbestos exposure. The federal district judge, in response to a motion by the defendants, had to determine whether the Plaintiffs' claim would result in a recovery that equaled the jurisdictional minimum for bringing an action in federal court. In making that determination, the defendants argued that the trial judge could not consider any potential recovery for punitive damages, because punitive damages were not allowed purely for medical monitoring. The trial court disagreed as follows:

In any event, it is not uncommon for plaintiffs to join claims for punitive damages with claims for medical monitoring. The potential substantiality of such claims is shown by *In re*

*Fernald Litig.*, [No. C-1-85-149,] 1989 WL 267039, 1989 U.S. Dist. LEXIS 17764 (S.D. Ohio [Sept. 29,] 1989). There the court approved a class action settlement of claims brought by owners of property adjacent to a nuclear facility and certain current and former employees of the facility. In evaluating the settlement, the court noted that, to facilitate settlement, it had conducted an advisory summary jury trial in which the non-binding verdict included “\$1,000,000 for diminution of property values, \$80,000,000 for a medical monitoring fund, and \$55,000,000 for punitive damages.” *Id.*, 1989 WL 267039, at \*2, 1989 U.S. Dist. Lexis 17764, at \*4.

*Carlough*, 834 F. Supp. at 1460 (footnote omitted).<sup>75</sup>

In two recent cases, federal courts have held that punitive damages could not be awarded for medical monitoring. *See Guinan v. A.I. duPont Hosp. for Children*, 597 F. Supp. 2d 517 (E.D. Pa. 2009); *Hess v. A.I. DuPont Hosp.*, No. 08-0229, 2009 WL 595602 (E.D. Pa. Mar. 5, 2009).

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<sup>75</sup>The case cited by *Carlough*, *In re Fernald Litigation*, No. C-1-85-149, 1989 WL 267039 (S.D. Ohio Sept. 29, 1989), does not actually support the decision, because *In re Fernald* failed to state whether the advisory jury’s punitive damages award was for medical monitoring and/or the claim for diminution in the value of property. Further, *Carlough* cited to four other cases for support; however, all of those cases involved medical monitoring claims brought along with other causes of action. *See Sterling v. Velsicol Chem. Corp.*, 855 F.2d 1188 (6th Cir. 1988) (claims for property damage and medical monitoring); *Day v. NLO, Inc.*, 814 F. Supp. 646 (S.D. Ohio 1993) (claims for emotional distress, property damage and medical monitoring); *Cook v. Rockwell Int’l Corp.*, 755 F. Supp. 1468 (D. Colo. 1991) (claims for intentional infliction of emotional distress, misrepresentation and medical monitoring); *Catasauqua Area Sch. Dist. v. Raymark Indus., Inc.*, 662 F. Supp. 64 (E.D. Pa. 1987) (case actually dismissed punitive damage claim) (ultimately all claims in the case were dismissed (*see Catasauqua Area Sch. Dist. v. Eagle-Picher Indus., Inc.*, No. CIV. A. 85-3743, 1988 WL 102689 (E.D. Pa. Sept. 28, 1988))).

The federal court in *Guinan v. A.I. duPont Hospital for Children*, 597 F. Supp. 2d 517 (E.D. Pa. 2009), had to decide whether Delaware, whose state law applied to the case, recognized a claim for medical monitoring. The district court held that based upon prior decisions of Delaware courts, it believed Delaware would recognize a cause of action for medical monitoring. In doing so, the opinion indicated in a footnote that such a cause of action would be recognized because “[l]imiting the remedy to compensatory damages and expressly excluding non-economic and punitive damages serves as a disincentive to the hordes of plaintiffs’ attorneys who the Supreme Court feared might be tempted to bring an onslaught of medical monitoring litigation.” *Guinan*, 597 F. Supp. 2d at 540 n.10. The decision in *Hess v. A.I. DuPont Hospital*, No. CIV. A. 08-0229, 2009 WL 595602 (E.D. Pa. Mar. 5, 2009), interpreted the footnote in *Guinan* “to mean that punitive damages are not available with medical monitoring claims.” *Hess*, at \*13 n.9.

Given the well reasoned argument made by Justice Benjamin in his separate opinion in *State ex rel. Chemtall Inc. v. Madden*, 221 W. Va. 415, 655 S.E.2d 161, and the scant authority on this issue from other jurisdictions, we now hold that punitive damages may not be awarded on a cause of action for medical monitoring. Applying this holding to the instant case, we conclude that the circuit court erred in allowing the jury to award punitive damages for the Plaintiffs’ medical monitoring claims.

The verdict form in the instant action did not allocate punitive damages between the Plaintiffs' property damage claims and their medical monitoring claims. During oral argument, however, the parties stated that, after the punitive damages verdict was returned, the trial court apportioned punitive damages between the property claims and the medical monitoring claims, allocating forty percent to the medical monitoring claims and sixty percent to the property claims.<sup>76</sup> Accepting this undisputed representation by the parties, we reduce the \$196,200,000 punitive damages award by forty percent, leaving punitive damages in the amount of \$117,720,000 to be applied solely to the claims of the property class.

**4. Propriety and Excessiveness of Punitive Damages.** Finally, DuPont argues that the circuit court erred in upholding an award of punitive damages that was excessive and not justified by DuPont's conduct. Following Phase IV, DuPont filed a motion to vacate or reduce the punitive damages award under *Garnes v. Fleming Landfill*, 186 W. Va. 656, 413 S.E.2d 897 (1991). The circuit court denied the motion in a thirty-five page *Garnes* order. Before this Court, DuPont contends that the evidence failed to establish that

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<sup>76</sup>We have been unable to locate, in the voluminous record submitted in connection with this appeal, any order or apportionment by the trial court, either written or delivered orally. However, because neither party disputed the apportionment as represented to this Court during oral argument, we will accept that figure. In addition, we note that neither party has assigned any error to the trial court's apportionment of punitive damages between the medical monitoring and property claims.

DuPont's actions warranted punitive damages, that the circuit court conducted an inadequate review under *Garnes*, and that the punitive damages violate federal due process.

Before addressing the merits of the issues raised by DuPont, we examine the proper standard for our review. It has been recently clarified that,

[w]hen reviewing an award of punitive damages in accordance with Syllabus point 5 of *Garnes v. Fleming Landfill, Inc.*, 186 W. Va. 656, 413 S.E.2d 897 (1991), and Syllabus point 5 of *Alkire v. First National Bank of Parsons*, 197 W. Va. 122, 475 S.E.2d 122 (1996), this Court will review *de novo* the jury's award of punitive damages and the circuit court's ruling approving, rejecting, or reducing such award.

Syl. pt. 16, *Peters v. Rivers Edge Mining, Inc.*, 224 W. Va. 160, 680 S.E.2d 791 (2009). In addition, to the extent that DuPont's alleged errors require us to consider the sufficiency of the evidence, we note that,

[i]n determining whether there is sufficient evidence to support a jury verdict the court should: (1) consider the evidence most favorable to the prevailing party; (2) assume that all conflicts in the evidence were resolved by the jury in favor of the prevailing party; (3) assume as proved all facts which the prevailing party's evidence tends to prove; and (4) give to the prevailing party the benefit of all favorable inferences which reasonably may be drawn from the facts proved.

Syl. pt. 5, *Orr v. Crowder*, 173 W. Va. 335, 315 S.E.2d 593 (1983). It is from the above described perspective that we proceed to consider DuPont's alleged errors.

This Court has previously characterized the analytical model for addressing challenges to a punitive damages awards as follows:

“Our punitive damage jurisprudence includes a two-step paradigm: first, a determination of whether the conduct of an actor toward another person entitles that person to a punitive damage award under *Mayer v. Frobe*, 40 W. Va. 246, 22 S.E. 58 (1895); second, if a punitive damage award is justified, then a review is mandated to determine if the punitive damage award is excessive under *Garnes v. Fleming Landfill, Inc.*, 186 W. Va. 656, 413 S.E.2d 897 (1991).” Syllabus Point 7, *Alkire v. First Nat. Bank of Parsons*, 197 W. Va. 122, 475 S.E.2d 122 (1996).

Syl. pt. 9, *Bower v. Hi-Lad, Inc.*, 216 W. Va. 634, 609 S.E.2d 895 (2004) (per curiam). *See also Kessel v. Leavitt*, 204 W. Va. 95, 191-92, 511 S.E.2d 720, 816-17 (1998) (“Upon the appeal to this Court of a punitive damages assessment, we review awards of punitive damages in the first instance to determine whether the facts and circumstances of the case at issue are sufficient to permit an award of such damages. . . . In conducting a review of the propriety of punitive damages, we employ the criteria set forth [in *Mayer v. Frobe*] describing the situations in which punitive damages are proper. We next review such awards to ascertain whether the amount of punitive damages actually awarded by the jury is proper or whether such an award is excessive.” (citations omitted)). However, our review of a circuit court’s decision also requires an analysis under Syllabus point 15 of *TXO Production Corp. v. Alliance Resources Corp.*, 187 W. Va. 457, 419 S.E.2d 870 (1992). *See* Syl. pt. 6, *in part, Alkire v. First Nat’l Bank of Parsons*, 197 W. Va. 122, 475 S.E.2d 122 (1996) (“Every post-trial analysis as to the amount of the punitive damage award should be conducted by the trial court exclusively within the boundaries of Syllabus Points 3 and 4 of

*Garnes v. Fleming Landfill, Inc.*, 186 W. Va. 656, 413 S.E.2d 897 (1991), and Syllabus Point 15 of *TXO Production Corp. v. Alliance Resources Corp.*, 187 W. Va. 457, 419 S.E.2d 870 (1992) . . . .”). Thus, to synthesize the process for reviewing punitive damages awards, we now hold that, when this Court, or a trial court, reviews an award of punitive damages, the court must first evaluate whether the conduct of the defendant toward the plaintiff entitled the plaintiff to a punitive damage award under *Mayer v. Frobe*, 40 W. Va. 246, 22 S.E. 58 (1895), and its progeny. If a punitive damage award was justified, the court must then examine the amount of the award pursuant to the aggravating and mitigating criteria set out in *Garnes v. Fleming Landfill, Inc.*, 186 W. Va. 656, 413 S.E.2d 897 (1991), and the compensatory/punitive damage ratio established in *TXO Production Corp. v. Alliance Resources Corp.*, 187 W. Va. 457, 419 S.E.2d 870 (1992).<sup>77</sup>

**a. Propriety of Punitive Damages Under *Mayer v. Frobe*.** Pursuant to Syllabus point 4 of *Mayer v. Frobe*,

[i]n actions of tort, where gross fraud, malice, oppression, or wanton, willful, or reckless conduct or criminal indifference to civil obligations affecting the rights of others appear, or where legislative enactment authorizes it, the jury may assess exemplary, punitive, or vindictive damages; these terms being synonymous.

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<sup>77</sup>For a thorough discussion of punitive damages law in West Virginia, see Robin J. Davis, Louis J. Palmer, Jr., *PUNITIVE DAMAGES LAW IN WEST VIRGINIA*, <http://www.state.wv.us/wvsca/PunitiveDamages2010.pdf>.

40 W. Va. 246, 22 S.E. 58. *Accord* Syl. pt. 4, *Alkire v. First Nat'l Bank of Parsons*, 197 W. Va. 122, 475 S.E.2d 122. DuPont contends that the evidence was insufficient to establish that its conduct warranted consideration of punitive damages by the jury under *Mayer*. In other words, DuPont contends that the circuit court's finding that "[t]he Plaintiffs presented evidence of wanton, reckless and willful conduct by DuPont sufficient to justify a punitive damage [instruction]" was in error. We disagree.

DuPont specifically argues that its conduct does not support punitive liability for the following reasons: (1) DuPont's 1928-1950 conduct in connection with operating the smelter does not justify punitive damages, because such operation was both lawful and in accord with industry standards of the time; and (2) DuPont's remediation efforts cannot support punitive damages, because DuPont complied with all applicable regulations and government orders in remediating the site and the WV DEP and the EPA concluded that off-site remediation was not necessary.

In its order denying DuPont's motion to vacate or reduce punitive damages, the circuit court devoted approximately twenty pages to describing evidence submitted by the Plaintiffs to show that DuPont's conduct was wanton, willful, or reckless. Following its review of the evidence, the circuit court concluded that

DuPont intentionally acted with a disregard to a known risk with the high probability that harm would follow. DuPont knew or reasonably should have known of the risks attendant to its

conduct. DuPont argues that its historical operations of the Spelter smelter met or exceeded the prevailing industry standards at the time and therefore it cannot be deemed to have acted recklessly. DuPont, however, was aware that emissions from the smelter were landing on its neighbors' properties. Residents complained of pollution as early as 1914, a commissioned study in 1919 showed the smelter had already had profound deleterious effects on the surrounding vegetation and livestock, and the Grasselli litigation throughout the 1920s and 1930s confirmed the existence of arsenic and other heavy metals in the emissions. Despite this knowledge and the obvious needs to abate the air pollution, DuPont made no effort to implement any air pollution controls. Instead, DuPont simply continued smelting zinc at full-capacity. Finally, when it appeared that DuPont could no longer avoid allocating money for air pollution controls, DuPont sold the smelter and left town. At a minimum, DuPont's conduct of knowingly disposing of huge piles of zinc tailings containing toxic wastes on its property and consciously discharging those same toxins into the air from its smoke stacks rises to the level of intentional, wanton and reckless conduct.

When DuPont was called back to Spelter, it was faced with the possibility of a Superfund site, which would likely require off-site remediation as well as on-site remediation. In an effort to save an estimated \$300 million that the Superfund remediation would require, DuPont initiated its corporate strategy of minimizing and manipulating information and misleading the public. While DuPont remediated the property it owned (after the EPA and [WV] DEP became involved) . . . , it actively worked to avoid cleaning up the class area, intentionally concealing and misrepresenting information to the residents of the class in order to hide from them the true nature of the risk they were facing and to avoid responsibility for the situation it had caused.

DuPont argues that its recent site remediation was conducted in full compliance with the applicable rules and regulations and therefore it cannot be assessed with punitive damages. DuPont's machinations to avoid its responsibilities to the class members vitiates DuPont's claims of voluntary

remediation and good corporate citizenry. In an effort to stay off the National Priority List and manage public relations to prevent potential legal, tort and/or public issues, DuPont chose to conceal or misrepresent information concerning the health risks associated with the smelter. From the day DuPont purchased the smelter, DuPont knew that hazardous emissions of heavy metals were escaping from the smelter plant and pile and landing on its neighbors' properties. DuPont did nothing to fix the problem, instead leaving town when fixing the problem was going to be costly. When DuPont finally returned, at the federal government's insistence, DuPont cleaned the site but, in the hopes of avoiding of [sic] tort liability and the expense of off-site remediation, followed an aggressive, dishonest strategy of keeping regulators close to the vest, insisting on loyalty from contractors who were willing to manipulate the data, and limiting information by misleading the public.

Finally, DuPont argues that it cannot be held responsible for punitive damages on the basis of its lobbying efforts toward the [WV] DEP to limit the scope of the remediation. First, the Court has previously addressed and denied this argument in its Order denying DuPont's Motion for a New Trial and incorporates that Order herein.<sup>[78]</sup> Second, the Court notes that

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<sup>78</sup>In its order denying DuPont's motion for a new trial, the circuit court explained that

DuPont argues the jury should not have been permitted to hear evidence of DuPont's efforts to obtain favorable administrative action. The Court rejects DuPont's invocation of the *Noerr-Pennington* doctrine in the circumstances of this case.

Plaintiffs' causes of action arose from DuPont's contamination of the communities surrounding the Spelter smelter and DuPont's refusal to remove the contamination from surrounding properties. DuPont defended against claims of off-site contamination and the lack of off-site remediation by pointing to regulatory agencies that purportedly approved of a remediation restricted to the smelter property and contending

(continued...)

DuPont has defended against claims of off-site contamination and the lack of off-site remediation by pointing to regulatory agencies that purportedly approved of a remediation restricted to the smelter property and contending that the regulatory agencies' approval of the remediation plan is evidence of no unreasonable contamination to the surrounding communities. DuPont may not rely on regulatory agencies' findings as a

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<sup>78</sup>(...continued)

that the regulatory agencies' approval of the remediation plan is evidence of no unreasonable contamination to the surrounding communities. DuPont may not rely on regulatory agencies' findings as a defense and, at the same time, preclude Plaintiffs from presenting evidence of DuPont's purported manipulation of those same agencies.

The *Noerr-Pennington* doctrine and the West Virginia Constitution prevent a party from predicated a cause of action upon a party's mere attempt to influence government. Although the *Noerr-Pennington* doctrine and West Virginia's Constitution provide a qualified immunity from suit to parties attempting to influence or encourage government action, neither the doctrine nor the Constitution precludes evidence of such activity if the evidence is probative and not unfairly prejudicial. DuPont's reliance on regulatory decisions as a defense makes DuPont's communications with the agency relevant. In the instant action, the Court admitted evidence of DuPont's communications with regulatory agencies because such communications confirmed the existence and the magnitude of the contamination, were admissions made by a party opponent, rebutted DuPont's claims that there is no off-site contamination and no need for remediation, and rebutted DuPont's defense/reliance on regulatory agencies' findings of no unreasonable risk of off-site contamination.

“[T]he *Noerr-Pennington* doctrine, . . . was established in *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 81 S. Ct. 523, 5 L. Ed. 2d 464 (1961), and *United Mine Workers of America v. Pennington*, 381 U.S. 657, 85 S. Ct. 1585, 14 L. Ed. 2d 626 (1965).” *State v. Berrill*, 196 W. Va. 578, 582, 474 S.E.2d 508, 512 (1996).

defense and, at the same time, prevent the jury from hearing how DuPont obtained those findings.

Third, the Court finds that Plaintiffs presented evidence sufficient to warrant punitive damages regardless of any evidence associated with DuPont's manipulation of regulatory agencies. DuPont was aware of the health hazards of arsenic, cadmium and lead, deliberately misinformed the community residents, refused to inform the members of the class of the offsite contamination and the threats to their health, and continuously refused to address the off-site contamination issue. . . .

(Footnote added).

We agree with the circuit court's conclusions and find no error in the circuit court's decision to instruct the jury on the issue of punitive damages. Having determined that the circuit court properly allowed the issue of punitive damages to go to the jury, we next examine whether the amount of punitive damages awarded by the jury is excessive under the analyses set out in Syllabus points 3 and 4 of *Garnes v. Fleming Landfill, Inc.*, and Syllabus point 15 of *TXO Production Corp. v. Alliance Resources Corp.*

**b. Excessiveness of Punitive Damages Under *Garnes v. Fleming Landfill, Inc.* and *TXO Production Corp. v. Alliance Resources Corp.*** Before conducting our review under *Garnes* and *TXO* to determine whether the amount of punitive damages awarded in this case is excessive, we first wish to clarify the analysis to be utilized by this Court and circuit courts when addressing the excessiveness issue under *Garnes*. In this

regard, we observe that Syllabus point 3 of *Garnes* actually sets out aggravating and mitigating factors to be considered by a *jury* in determining the amount of punitive damages:<sup>79</sup>

When the trial court instructs the jury on punitive damages, the court should, at a minimum, carefully explain the factors to be considered in awarding punitive damages. These factors are as follows:

(1) 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.

(2) The jury may consider (although the court need not specifically instruct on each element if doing so would be unfairly prejudicial to the defendant), the reprehensibility of the defendant's conduct. The jury should take into account how long the defendant continued in his actions, whether he was aware his actions were causing or were likely to cause harm, whether he attempted to conceal or cover up his actions or the harm caused by them, whether/how often the defendant engaged in similar conduct in the past, and whether the defendant made reasonable efforts to make amends by offering a fair and prompt settlement for the actual harm caused once his liability became clear to him.

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<sup>79</sup>See generally Cleckley, Davis, & Palmer, Jr., *Litigation Handbook on West Virginia Rules of Civil Procedure* § 59(a), at 196 (3d ed. Cum. Supp. 2010) ("It should be clearly understood that the factors under syllabus points 3 and 4 of *Garnes* impose two types of review: (1) an examination of the aggravating evidence that supports the amount of a punitive damage award, and (2) an examination of any mitigating evidence that would permit a reduction in the amount of a punitive damage award.").

(3) If the defendant profited from his wrongful conduct, the punitive damages should remove the profit and should be in excess of the profit, so that the award discourages future bad acts by the defendant.

(4) As a matter of fundamental fairness, punitive damages should bear a reasonable relationship to compensatory damages.

(5) The financial position of the defendant is relevant.

186 W. Va. 656, 413 S.E.2d 897. *Accord* Syl. pt. 10, *Bowyer v. Hi-Lad, Inc.*, 216 W. Va. 634, 639-40, 609 S.E.2d 895, 900-01 (2004). Syllabus point 4 of *Garnes* instructs that *trial courts* reviewing punitive damages awards must consider the same evidence considered by the jury under Syllabus point 3 of *Garnes*, and adds additional aggravating and mitigating factors that must also be considered by the *trial court*:

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;

(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.

(Emphasis added). *Accord* Syl. pt. 11, *Bowyer v. Hi-Lad, Inc.* Importantly, the “at a minimum” language contained in Syllabus point 4 of *Garnes* demonstrates that the list of factors contained therein is not intended to be exhaustive. Thus, it is within the trial court’s discretion to consider other relevant aggravating and mitigating evidence. *Accord Bowyer v. Hi-Lad, Inc.*, 216 W. Va. at 650, 609 S.E.2d at 911 (“Finally, the appellant has not been exposed to punitive damages, criminal sanctions, or excessive litigation expenses as a result of its misconduct, all factors which might merit a reduction by the circuit court of a punitive damage award as specified in Syllabus Point 4 of *Garnes*.”).

Upon an appeal of a punitive damages award to this Court, we will consider the same aggravating and mitigating evidence that we require the circuit court to consider. *See* Syl. pt. 5, in part, *Garnes*, 186 W. Va. 656, 413 S.E.2d 897 (“Upon petition, this Court will review all punitive damages awards. In our review of the petition, we will consider the same factors that we require the jury and trial judge to consider . . .”). *Accord* Syl. pt. 5, *Alkire v. First Nat’l Bank of Parsons*, 197 W. Va. 122, 475 S.E.2d 122.

Without changing any of the criteria set out in *Garnes*, we believe that court review of punitive damages awards would be simplified if the factors were grouped according to their purpose. Therefore, we now hold that, when a trial or appellate court reviews an award of punitive damages for excessiveness under Syllabus points 3 and 4 of *Garnes v. Fleming Landfill, Inc.*, 186 W. Va. 656, 413 S.E.2d 897 (1991), the court should first determine whether the amount of the punitive damages award is justified by aggravating evidence including, but not limited to: (1) the reprehensibility of the defendant's conduct; (2) whether the defendant profited from the wrongful conduct; (3) the financial position of the defendant; (4) the appropriateness of punitive damages to encourage fair and reasonable settlements when a clear wrong has been committed; and (5) the cost of litigation to the plaintiff. The court should then consider whether a reduction in the amount of the punitive damages should be permitted due to mitigating evidence including, but not limited to: (1) whether the punitive damages bear a reasonable relationship to the harm that is likely to occur and/or has occurred as a result of the defendant's conduct; (2) whether punitive damages bear a reasonable relationship to compensatory damages; (3) the cost of litigation to the defendant; (4) any criminal sanctions imposed on the defendant for his conduct; (5) any other civil actions against the same defendant based upon the same conduct; (6) relevant information that was not available to the jury because it was unduly prejudicial to the defendant; and (7) additional relevant evidence.

We now review the punitive damages in the instant case pursuant to the criteria set out in *Garnes*. We begin by reviewing the aggravating evidence. In conducting our analysis, however, we remain mindful that “we cannot simply examine these . . . criteria seriatim, awarding a certain number of points to each. The *Garnes* factors are interactive and must be considered as a whole when reviewing punitive damages awards.” *TXO Prod. Corp. v. Alliance Res. Corp.*, 187 W. Va. 457, 474, 419 S.E.2d 870, 887.

**(i). *Garnes* Aggravating Factors.**

(aa). Reprehensibility of DuPont’s Conduct. The first factor to be considered as an aggravating factor supporting the amount of punitive damages awarded is the reprehensibility of DuPont’s conduct. DuPont asserts that, without proof that DuPont could have or should have prevented the emissions, or had known that they posed significant health risks, the evidence does not support any punitive award. DuPont argues further that its failure to remediate beyond the boundaries of the smelter does not give rise to punitive damages, because expert regulators told DuPont that such remediation was unnecessary. With respect to this factor, the circuit court found that,

DuPont’s conduct rose to the level of reprehensibility. DuPont’s conduct occurred over a 90 year period, from the time it purchased the smelter knowing that it was actively polluting and contaminat[ing] the surrounding properties, causing blight and death to vegetation and livestock, to the time it repurchased the smelter and initiated a strategy to conceal the extent of the contamination . . . . Plaintiffs demonstrated it was DuPont’s practice . . . to obscure and limit information to thwart claimants. The Court is unaware of any attempt by DuPont to

make amends or offer a settlement for the actual harm once its liability became clear to it. Indeed, DuPont has yet to acknowledge any liability.

We agree with the trial court's finding, in essence, that the Plaintiffs presented sufficient evidence from which the jury could conclude that DuPont covered up the extent of the damage it had caused to the Plaintiffs. Thus, we find no error in the circuit court's conclusion that DuPont's conduct was reprehensible.

(bb). Profitability of Wrongful Conduct. The next aggravating factor under *Garnes* requires consideration of whether DuPont profited from its conduct and instructs that punitive damages should remove the profit, and be in excess of the profit, so as to discourage future bad acts by DuPont. The circuit court concluded that,

[w]hile there was no evidence showing that DuPont's conduct in misleading the Plaintiffs and concealing the contamination directly profited DuPont, DuPont profited indirectly. From the time it purchased the smelter, DuPont avoided installing pollution control devices. When it looked as if DuPont would have to install the devices at a hefty price, DuPont sold the plant. DuPont has avoided the cost of cleaning up its pollution for over half a century. By staying off the National Priorities List, DuPont avoided a remediation cost of the surrounding communities that was estimated at \$300 million. DuPont has profited, albeit indirectly, from its conduct.

DuPont contends that its profits do not justify the punitive damages award granted in this case; however, the basis for DuPont's argument is largely unresponsive to this issue. To support its argument, DuPont contends that the \$325,000 the Plaintiffs assert it

would have cost DuPont to install the pollution-control equipment necessary to comply with governmental standards is not a sufficient amount to support the large punitive damages award in this case. DuPont also responds by referring to evidence of profit that was not considered by the circuit court and is not relevant to this issue, such as DuPont's total firm-wide profit, and the amount of money DuPont saved in its on-site remediation by capping, as opposed to removing, the tailings pile. In determining that DuPont had indirectly profited from its conduct in this case, the circuit court did refer to the savings DuPont achieved by failing to install pollution control devices, but the circuit court did not consider DuPont's firm-wide profits or any savings it achieved in connection with its on-site remediation of the Spelter smelter. Indeed, these latter two elements are irrelevant to this issue. Rather, the circuit court concluded that DuPont had experienced significant savings through years of successfully avoiding any off-site remediation of the community surrounding the Spelter smelter.<sup>80</sup> DuPont has not challenged this finding, and, therefore, we find no error with the circuit court's conclusion that DuPont profited, albeit indirectly, from its wrongful conduct.

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<sup>80</sup>We note that at least one witness's testimony is inconsistent as to whether the \$300 million figure represented the difference between off-site remediation as opposed to on-site remediation. The witness, Mr. Sathya Yalvigi, initially agreed that the \$300 million figure represented the estimated cost of off-site remediation, then later during the same examination, Mr. Yalvigi seemed to suggest that the \$300 million was related to on-site remediation. The circuit court interpreted the evidence as indicating that the \$300 million represented the amount of DuPont's savings for avoiding off-site remediation.

(cc). Defendant's Financial Position. Under *Garnes*, we next consider

DuPont's financial position. The circuit court concluded that,

[g]iven DuPont's size and resources, a large punitive damage award is reasonable. While the wealth of a defendant cannot justify an unconstitutional punitive damages award, the award in this case is not unconstitutional or excessive. Indeed, to accomplish punishment and deterrence for such a wealthy company, a punitive damage award must necessarily be large. *See, e.g., Leach v. Biscayne Oil and Gas Co.*, 169 W. Va. [624, 628, 289 S.E.2d 197, 199] (1982) (quoting *Pendleton v. Norfolk & W. Ry. Co.*, 82 W. Va. 270, 277-78[, 95 S.E. 941, 944] (1918) ("The object of such punishment is to deter the defendants from committing like offenses in the future, and this it may be said is one of the objects of all punishment, and we recognize that it would require, perhaps, a larger fine to have this deterrent effect upon one of large means than it would upon one of ordinary means, granting the same malignant spirit was possessed by each.")).

DuPont argues that “the wealth of a defendant cannot justify an otherwise unconstitutional punitive damages award,”<sup>81</sup> and observes that the United States Supreme Court recently applied a strict ratio cap against what DuPont characterizes as the wealthiest company in the world.<sup>82</sup> Accordingly, DuPont asserts its wealth has no bearing on the question of whether the punitive damages award in this case was excessive. We reject this

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<sup>81</sup>Citing *State Farm Mut. Auto Ins. Co. v. Campbell*, 538 U.S. 408, 123 S. Ct. 1513, 155 L. Ed. 2d 585 .

<sup>82</sup>DuPont cites *Exxon Shipping Co. v. Baker*, \_\_\_ U.S. \_\_\_, 128 S. Ct. 2605, 171 L. Ed. 2d 570 (2008). Notably, *Exxon Shipping* is a maritime case that has no application to the instant action.

argument on the simple ground that the United States Supreme Court approved of the *Garnes* factors in its review of those factors in *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 113 S. Ct. 2711, 125 L. Ed. 2d 366 (1993).

On the merits of the matter, we agree with the circuit court’s conclusion that “to accomplish punishment and deterrence for such a wealthy company [as DuPont], a punitive damages award must necessarily be large.” Thus, DuPont’s financial position supports the amount of punitive damages awarded in the case *sub judice*.

(dd). Encourage Fair and Reasonable Settlements. This *Garnes* factor asks the reviewing court to consider whether the amount of punitive damages is appropriate to encourage fair and reasonable settlements when a clear wrong has been committed. DuPont argues that its failure to settle the claims does not warrant a large punitive award because there was no “clear wrong” here. Moreover, contends DuPont, this massive punitive award, against a party that complied with all regulations, magnifies “the stark unpredictability of punitive awards,” and renders future settlements less likely. Quoting *Exxon Shipping Co. v. Baker*, \_\_\_ U.S. \_\_\_, \_\_\_, 128 S. Ct. 2605, 2610, 171 L. Ed.2d 570 (2008).<sup>83</sup> DuPont further asserts that reliance on this factor violates its right to litigate potentially meritorious defenses.

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<sup>83</sup>As we previously noted, *Exxon Shipping Co. v. Baker* is a maritime case that has no application to the instant action. *See supra* note 82.

DuPont has misinterpreted the purpose behind this factor. DuPont appears to construe this factor as requiring consideration of whether DuPont was adequately punished for failing to settle this action. This interpretation is incorrect. The focus of the reviewing court's consideration of whether the punitive damages award would encourage fair and reasonable settlements is on the impact it is likely to have on future litigants. That is, was the award large enough so that a future defendant who has committed a clear wrong will be encouraged to accept a fair and reasonable settlement rather than force the wronged plaintiff into litigation and risk incurring a similarly large punitive damages award. In the instant case, the circuit court concluded that,

punitive damages are most likely necessary in this instance to deter DuPont and other similar companies from engaging in reckless disregard of its neighbors' property and persons, continuing in a course of contamination and then concealment. A large award such as this should reasonably encourage companies like DuPont to resolve similar disputes without the necessity of claimants expending, literally, millions of dollars to have companies clean up their environmental messes.

We agree with the circuit court's conclusions and find the amount of punitive damages awarded in this case is likely to encourage fair and reasonable settlements in the future.

(ee). The Cost of Litigation to the Plaintiffs. The circuit court observed that

[t]he Plaintiffs have expended in excess of \$8 million to bring this case to trial and have devoted over 30,000 hours of attorney time. The fact that the Plaintiffs did not individually finance this litigation does not reduce the cost necessary to bring DuPont to trial. Indeed, it is highly unlikely that any individual

claimant could have had the resources necessary to bring DuPont to justice.

We find that the high cost of this litigation to the Plaintiffs supports the amount of punitive damages awarded in this case.

Having completed our review of aggravating evidence, and considering that evidence as a whole, we conclude that the award of punitive damages in this case is justified by the aggravating factors standing alone. However, our analysis does not end here. The amount of the punitive damages award must also be within the constitutional boundaries set by this Court in Syllabus point 15 of *TXO Production Corp. v. Alliance Resources Corp.*, 187 W. Va. 457, 419 S.E.2d 870, and scrutinized under the mitigating factors set out in *Garnes*. Thus, we will next consider the award under *TXO*, and then we will weigh any mitigating *Garnes* factors to determine whether a reduction in the amount of punitive damages should be permitted.

**(ii). Ratio Determination Under *TXO Production Corp. v. Alliance Resources Corp.*** DuPont argues that the ratio of compensatory to punitive damages in this case warrants a reduction in the punitive damages award. We disagree. Subsequent to *Garnes*, this Court elaborated on what an acceptable ratio between punitive damages and compensatory damages might be in *TXO Production Corp. v. Alliance Resources Corp.*, 187 W. Va. 457, 419 S.E.2d 870. The *TXO* Court observed that, “[a]lthough there is no

mechanical mathematical formula to use in all punitive damages cases, we think it appropriate here to offer some broad, general guidelines concerning whether punitive damages bear a reasonable relationship to actual damages.” 187 W. Va. at 474, 419 S.E.2d at 887. The *TXO* Court held that,

[t]he outer limit of the ratio of punitive damages to compensatory damages in cases in which the defendant has acted with extreme negligence or wanton disregard but with no actual intention to cause harm and in which compensatory damages are neither negligible nor very large is roughly 5 to 1. However, when the defendant has acted with actual evil intention, much higher ratios are not *per se* unconstitutional.

Syl. pt. 15, *TXO*. The Court went on to explain that greater or lesser ratios would be entirely appropriate in circumstances where the compensatory damages are either very large or negligible:

This is not necessarily the case, however, when compensatory damages are minimal. In cases such as *Hospital Authority of Gwinnett County v. Jones*, 261 Ga. 613, 409 S.E.2d 501 (1991), in which the potential for harm from the defendant’s conduct was tremendous, but the actual compensatory damages were negligible, punitive damages in a ratio much greater than five to one were entirely appropriate.<sup>12</sup>

*TXO*, 187 W. Va. at 476, 419 S.E.2d at 889. In footnote 12 of the above quote, the *TXO* court continued by stating that “[c]oncomitantly, if the compensatory damages are very high then punitive damages even in the ratio of 5:1 might be excessive. *See, e.g., Mason v. Texaco, Inc.*, 948 F.2d 1546 (10th Cir. 1991) (compensatory damages of \$9.025 million; punitive damages remitted to \$12.5 million from \$25 million).” *Id.* at n.12.

The circuit court, having observed that “comparing the property remediation award against the punitive damages award, the ratio is 3.5:1—well within the ratio of 5 to 1,” concluded that “the ratio of punitive damages to the remediation award . . . is reasonable.” Because we have ruled in this appeal that punitive damages are not permitted with respect to claims for medical monitoring, and have accordingly reduced the punitive damages award to \$117,720,000, a new ratio may be calculated. Comparing the adjusted punitive damages award of \$117,720,000 to the \$55,537,522.25 awarded for property remediation, the ratio becomes 2.1:1, a figure that is well within that permitted by *TXO*.

At this juncture, we wish to clarify that, while a court is *required* to reduce a punitive damages award that is found to be unconstitutionally large under the analysis set out in *TXO*, the *TXO* analysis *does not* deprive a reviewing court of its discretion to reduce a constitutionally acceptable punitive damages award when a reduction is warranted by mitigating factors such as those set out in Syllabus point 4 of *Garnes*. See *Miller v. Triplett*, 203 W. Va. 351, 356, 507 S.E.2d 714, 719 (1998) (citing *Abdulla v. Pittsburgh & Weirton Bus Co.*, 158 W. Va. 592, 213 S.E.2d 810 (1975), for proposition that remittitur is reviewed for abuse of discretion). See, e.g., *South Carolina Farm Bureau Mut. Ins. Co. v. Love Chevrolet, Inc.*, 324 S.C. 149, 153-54, 478 S.E.2d 57, 59 (1996) (“[I]t is clear that *Gamble* [*v. Stevenson*, 305 S.C. 104, 406 S.E.2d 350 (1991),] did not alter the discretion historically afforded to trial courts of this state to reduce, or add to, verdicts which they find inadequate or excessive. *Gamble* merely draws a bright line at which a trial court must reduce a punitive

damages award, to ensure the defendant's due process rights have not been violated. *Gamble* did not, however, hold that a trial judge may only reduce a damages award upon finding a due process violation, nor did it overrule prior precedent permitting the trial judge to exercise its discretion in reducing, or adding to, verdicts it finds overliberal."). See generally, Cleckley, Davis, & Palmer, Jr., *Litigation Handbook on West Virginia Rules of Civil Procedure* § 59(a), at 196-97 (3d ed. Cum. Supp. 2010) ("[E]ven though the amount of a punitive damages award may ultimately satisfy the requirements of syllabus point 15 of *TXO*, a trial court may nevertheless require a remittitur in the amount of punitive damages or grant a new trial on such damages because of mitigating circumstances. However, requiring a reduction in punitive damages because of mitigating circumstances is a purely discretionary decision of the trial court. That is, the Supreme Court has never held that the mere fact that mitigating factors are present necessitates a reduction in the amount of punitive damages." (footnote omitted)).

Accordingly, we now expressly hold that, a punitive damages award that is not constitutionally excessive under *TXO Production Corp. v. Alliance Resources Corp.*, 187 W. Va. 457, 419 S.E.2d 870 (1992), may nevertheless be reduced by a reviewing court when, in the discretion of the court, a reduction is warranted by mitigating evidence. We now consider whether any mitigating factors exist in this case.

(iii). ***Garnes* Mitigating Factors.** The *Garnes* mitigating factors include, but are not limited to: (1) whether punitive damages bear a reasonable relationship to compensatory damages; (2) whether punitive damages bear a reasonable relationship to the harm that is likely to occur and/or has occurred as a result of the defendant's conduct; (3) the cost of litigation to the defendant; (4) any criminal sanctions imposed on the defendant for his conduct; (5) any other civil actions against the same defendant based upon the same conduct; (6) relevant information that was not available to the jury because it was unduly prejudicial to the defendant; and (7) additional relevant evidence.

(aa). Reasonable Relationship Between Punitive Damages and Compensatory Damages. DuPont contends that the large compensatory damages award in this case is justification for a lower punitive damages award. In addressing this challenge below, the circuit court observed that “the property remediation costs are distributed among 2,821 parcels, resulting in an actual award of approximately \$20,000 per parcel. Individually, the remediation award does not result in a ‘large’ compensatory award.”

Given that the compensatory damages are not large when considered in light of the size of the class of plaintiffs, we find no error in the circuit court's conclusion that the relationship between punitive and compensatory damages in this case does not warrant any reduction in the amount of punitive damages awarded.

(bb). Reasonable Relationship to Harm. A punitive damages award should bear a reasonable relationship to the harm that has occurred. In the case sub judice, the circuit court expressly found that,

[t]he actual harm in the instant action is continuing exposure to heavy metals on their properties . . . . As a result, Plaintiffs must have their properties remediated . . . . These remedies do [not] make the Plaintiffs whole. They mitigate, rather than eliminate, the damages to the property . . . . DuPont subjected over 2000 parcels of land to damage . . . . Given this amount of harm . . . the Court finds a reasonable relationship between the punitive damages and the harm that has occurred . . . .<sup>[84]</sup>

(Footnote added).

Considering the evidence presented, we agree with the circuit court's conclusion that there is a reasonable relationship between the punitive damages awarded and the harm caused. In this case, the evidence demonstrated that DuPont caused grievous harm to the Plaintiffs by knowingly depositing on their properties known hazardous substances for a period of twenty-two years (from 1928 to 1950). Thereafter, DuPont planned and engaged in a course of conduct designed to avoid any obligation to clean up any contaminated property lying outside the boundaries of the plant itself. Accordingly, no reduction in punitive damages is warranted by this factor.

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<sup>84</sup>References pertaining to medical monitoring have been omitted due to this Court's conclusion that punitive damages are not properly awarded in connection with claims for medical monitoring.

(cc). The Cost of Litigation to the Defendant. DuPont has not addressed this issue in its brief to this Court. In Syllabus point 5 of *Garnes*, this Court held that,

[u]pon petition, this Court will review all punitive damages awards. In our review of the petition, we will consider the same factors that we require the jury and trial judge to consider, and all petitions must address each and every factor set forth in Syllabus Points 3 and 4 of this case with particularity, summarizing the evidence presented to the jury on the subject or to the trial court at the post-judgment review stage. *Assignments of error related to a factor not specifically addressed in the petition will be deemed waived as a matter of state law.*

186 W. Va. 656, 413 S.E.2d 897 (emphasis added). Accordingly, because DuPont failed to properly address this issue, it has been waived. *Cf. Syl. pt. 6, Addair v. Bryant*, 168 W. Va. 306, 284 S.E.2d 374 (1981) (“Assignments of error that are not argued in the briefs on appeal may be deemed by this Court to be waived.”).

(dd) Criminal Sanctions Imposed on the Defendant. The circuit court found, and DuPont has conceded, that there have been no criminal sanctions imposed upon DuPont for its conduct. Therefore, no consideration will be given as to whether a reduction is appropriate with respect to this factor.

(ee) Other Civil Actions Against the Same Defendant Based upon the Same Conduct. The circuit court concluded, in essence, that DuPont was not entitled to a reduction in the amount of punitive damages based upon other civil actions for the same

conduct because DuPont had not been subject to any such civil actions.<sup>85</sup> The circuit court’s conclusion as to this element is correct only up to the point that DuPont assumed liability for the Grasselli litigants.<sup>86</sup> To the extent that DuPont may have been entitled to some reduction in the punitive damages award because of costs it may have incurred in resolving the Grasselli actions, the parties have failed to direct this Court’s attention to any part of the record in this case providing details of what those costs may have been. Moreover, we observe that DuPont’s brief on this issue is extremely terse and, in fact, demonstrates a misunderstanding of how this factor is applied by asserting that “the deterrent effect of other lawsuits” does not support the punitive damages award granted in this case.

We can only assume that DuPont’s misunderstanding of this issue explains why the parties have not identified evidence showing the cost that DuPont may have incurred in connection with the Grasselli lawsuits. Nevertheless, it is not this Court’s duty to find mitigating evidence for a defendant.<sup>87</sup> Indeed, we find that, by failing to adequately set out

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<sup>85</sup>We have observed that in its “Motion to Vacate or Reduce Punitive Damages Award” filed in the circuit court, DuPont did argue that it had faced two recent lawsuits arising from the operation of the Spelter smelter. However, having failed to repeat this argument to this Court, DuPont has waived the same. *See* Syl. pt. 6, *Addair v. Bryant*, 168 W. Va. 306, 284 S.E.2d 374 (1981) (“Assignments of error that are not argued in the briefs on appeal may be deemed by this Court to be waived.”).

<sup>86</sup>For information regarding the Grasselli lawsuits, see *supra* Sections I.A. and III.A.2 of this opinion.

<sup>87</sup>As we have previously advised, “[i]n short, ‘[j]udges are not like pigs, hunting for truffles,’ *State v. Honaker*, 193 W. Va. 51, 56 n.4, 454 S.E.2d 96, 101 n.4 (1994) (continued...) ”

an argument pertaining to other civil actions and summarizing the evidence, DuPont has waived this issue. *See* Syl. pt. 5, in part, *Garnes v. Fleming Landfill, Inc.*, 186 W. Va. 656, 413 S.E.2d 897 (“Assignments of error related to a factor not specifically addressed in the petition will be deemed waived as a matter of state law.”). *Cf.* Syl. pt. 6, *Addair v. Bryant*, 168 W. Va. 306, 284 S.E.2d 374 (“Assignments of error that are not argued in the briefs on appeal may be deemed by this Court to be waived.”).

(ff) Relevant Information That Was Not Available to the Jury Because it Was Unduly Prejudicial to the Defendant. DuPont has not directed this Court’s attention to any unduly prejudicial evidence that was not presented to the jury. Therefore, no reduction is appropriate with respect to this factor.

(gg) Additional Relevant Evidence. DuPont has argued, in part, that punitive damages are improper because of its remediation efforts at the Spelter smelter site. As explained above, we have heretofore concluded that DuPont’s conduct was sufficiently willful, wanton, and reckless for the question of punitive damages to be presented to the jury, and the aggravating evidence presented at trial was sufficient to support the amount of punitive damages. Therefore, we reject DuPont’s claim that the entire punitive damages

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<sup>87</sup>(...continued)  
(internal quotations and citations omitted), and neither are the members of this Honorable Court.” *State ex rel. Brooks v. Zakaib*, 214 W. Va. 253, 267, 588 S.E.2d 418, 432 (2003).

award should be set aside. However, the circuit court also rejected DuPont's argument that it should receive consideration for the cost of remediation of the Spelter smelter site itself. This was error. In this case, DuPont's remediation efforts should have been considered by the trial court in its review of the punitive damages. Trial testimony indicated that DuPont spent approximately \$20 million for the remediation of the Spelter smelter site.<sup>88</sup>

Thus, based upon our review of the mitigating evidence presented at trial, we find that DuPont is entitled to a reduction in the amount of punitive damages equal to the amount that it has spent to remediate the Spelter smelter site.<sup>89</sup> The method of granting such a reduction is by remittitur. It has been explained that,

[t]he historic rationale for remittitur practice is that it saves the time and expense of a new trial if the plaintiff will accept a lesser sum as a verdict. The plaintiff is satisfied because the expense of a new trial is avoided, and the defendant is satisfied because he or she either obtains a new trial, or has had the verdict against him or her reduced. Thus this procedure

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<sup>88</sup>The Plaintiffs have not challenged DuPont's assertions that it performed onsite remediation and spent approximately \$20 million in doing so. Therefore, we accept these facts as accurate. Moreover, we wish to point out that this opinion relies on that figure exclusively. That is, when this case is remanded, DuPont is precluded from attempting to increase the amount for onsite remediation.

<sup>89</sup>While we find that, in this particular case, a reduction in the amount of punitive damages equal to the amount that DuPont has spent to remediate the smelter site is warranted, we do not suggest that such a reduction should always be granted when a defendant has performed remediation, or that, when granted, such a reduction should match a defendant's remediation costs on a dollar-for-dollar basis. These determinations must be made on a case-by-case basis.

generally has the effect of facilitating settlement, thereby enhancing judicial economy.

*Allsup's Convenience Stores, Inc. v. North River Ins. Co.*, 127 N.M. 1, 6, 976 P.2d 1, 6 (1998). It is generally understood that, when a court grants a remittitur, the plaintiff is given the option of either accepting the reduction in the verdict or electing a new trial. *See Jordan v. Bero*, 158 W. Va. 28, 210 S.E.2d 618 (1974) (remanding case with directions to the trial court to give plaintiff a period of thirty days to decide whether he will accept remittitur or submit to a new trial). *See generally* 1 Linda L. Schlueter, *Punitive Damages* § 6.2A, at 366 (5th ed 2005) (“If remittitur is ordered, the plaintiff has the option of either accepting the reduced award or seeking a new trial on the issue. The trial court should not simply order remittitur but must get plaintiff’s consent or order a new trial.” (footnotes omitted)). Accordingly, we now expressly hold that, when a court grants a remittitur, the plaintiff must be given the option of either accepting the reduction in the verdict or electing a new trial.<sup>90</sup>

Furthermore,

[w]e recognized in Syllabus Point 3 of *Gebhardt v. Smith*, 187 W. Va. 515, 420 S.E.2d 275 (1992), that where liability has been clearly established and, on appeal, error has been found to have occurred, a new trial may be awarded *on that issue alone*:

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<sup>90</sup>We wish to clarify that remittitur is not required when a court reduces a punitive damages award to the 5:1 ratio required by *TXO Production Corp. v. Alliance Resources Corp.*, 187 W. Va. 457, 419 S.E.2d 870 (1992). *See Vandevender v. Sheetz, Inc.*, 200 W. Va. 591, 490 S.E.2d 678 (1997) (per curiam) (reversing punitive damages award, for claim of unlawful termination/failure to rehire, with ratio of 7:1, and reducing said award so that ratio equaled 5:1).

“Rule 59(a), [West Virginia Rules of Civil Procedure], provides that a new trial may be granted to any of the parties on all or part of the issues, and in a case where the question of liability has been resolved in favor of the plaintiff leaving only the issue of damages, the verdict of the jury may be set aside and a new trial granted on the single issue of damages.’ Syl. pt. 4, *Richmond v. Campbell*, 148 W. Va. 595, 136 S.E.2d 877 (1964).”

*Wilt v. Buracker*, 191 W. Va. 39, 52, 443 S.E.2d 196, 209 (1993) (emphasis added). *See, e.g., Harless v. First Nat’l Bank in Fairmont*, 169 W. Va. 673, 698, 289 S.E.2d 692, 706 (1982) (according right of remittitur to plaintiff on condition that he accept reduced judgment against defendant within forty-five days from mandate of this Court or judgment would be set aside and plaintiff entitled to *new trial on issue of damages*); *Delong v. Albert*, 157 W. Va. 874, 205 S.E.2d 683 (1974) (granting new trial on issue of damages); *Biddle v. Haddix*, 154 W. Va. 748, 179 S.E.2d 215 (1971) (same); *Richmond v. Campbell*, 148 W. Va. 595, 136 S.E.2d 877 (1964) (same). Thus, when there are no issues as to liability or compensatory damages, a plaintiff may choose to either accept a remittitur, or submit to a new trial only as to punitive damages. *See Chopra v. General Elec. Co.*, 527 F. Supp. 2d 230, 246-47 (D. Conn. 2007) (“If plaintiff does not accept the remittitur, the Court shall vacate the punitive damages award and conduct *a new trial limited to the question of punitive damages.*” (emphasis added) (citing *Vasbinder v. Scott*, 976 F.2d 118, 123 (2d Cir. 1992))).

Accordingly, we reverse and remand the award of punitive damages with instructions to the circuit court to give the Plaintiffs a period of thirty days from the date the mandate for this opinion is issued to advise the circuit court whether they will accept remittitur in the amount of \$20 million, or submit to a new trial on punitive damages only.

**c. Federal Due Process.** DuPont's final argument related to the propriety and excessiveness of punitive damages is that the award violates federal due process. In this regard, DuPont contends that the amount of punitive damages awarded in this case exceeds constitutional limits as set forth in *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 116 S. Ct. 1589, 134 L. Ed. 2d 809 (1996), and *State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 U.S. 408, 123 S. Ct. 1513, 155 L. Ed. 2d 585 (2003). Thus, we will examine each of these cases in turn.

**(i). *BMW of North America, Inc. v. Gore*.** DuPont argues that the punitive damages award in the instant case exceeds constitutional limits pursuant to the three factors set out by the United States Supreme Court in *BMW*. The United States Supreme Court in *BMW* set out the following three guideposts for assessing punitive damages awards:

Perhaps the most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct. . . . The second and perhaps most commonly cited indicium of an unreasonable or excessive punitive damages award is its ratio to the actual harm inflicted on the plaintiff. . . . Comparing the punitive damages award and the civil or criminal penalties that could be imposed

for comparable misconduct provides a third indicium of excessiveness.

517 U.S. 559, 575, 580, & 583, 116 S. Ct. 1589, 1599, 1601, & 1603 (footnote omitted) (citation omitted). Subsequent to *BMW*, in a case styled *Vandevender v. Sheetz, Inc.*, 200 W. Va. 591, 490 S.E.2d 678 (1997) (per curiam), this Court reexamined the punitive damages analysis established in *Garnes v. Fleming Landfill, Inc.*, 186 W. Va. 656, 413 S.E.2d 897, and concluded that the *Garnes* analysis satisfied the requirements of *BMW*. The *Vandevender* Court observed that,

[w]hile the *BMW* decision clearly delineates three “guideposts” for use in connection with the review of punitive damage awards, these so-called “guideposts” are merely reiterations of factors previously-adopted by both this Court and the United States Supreme Court. Contrary to Sheetz’ position that *BMW* somehow alters this State’s law on punitive damages review, . . . [o]ther than utilizing the “guidepost” terminology, *BMW* does not depart from existing law regarding punitive damages. Although *BMW* confines its analysis of the issue of notice to these three “guideposts” – a term that certainly suggests the possible use of additional factors – there is nothing in *BMW* that eliminates reference to previously-delineated factors that are not among the big three “guideposts.” Proof of this point is gleaned from the section of the *BMW* opinion that discusses the second “guidepost.” Although that particular “guidepost” is phrased in terms of the ratio between the plaintiff’s compensatory damages and the amount of the punitive damages, the *BMW* opinion approvingly quotes its prior decision in *TXO [Production Corp. v. Alliance Resources Corp.]*, 509 U.S. 443, 113 S. Ct. 2711, 125 L. Ed. 2d 366 (1993), as stating “the proper inquiry” to be ““whether there is a reasonable relationship between the punitive damages award and the harm likely to result from the defendant’s conduct as well as the harm that actually has occurred.”” 517 U.S. at \_\_\_, 116 S. Ct. at 1602 (quoting *TXO*, 509 U.S. at 460, 113 S. Ct. at 2721-22 (emphasis in original), quoting [*Pacific Mut. Life Ins.*

*Co. v. Haslip*, 499 U.S. 1, 21, 111 S. Ct. 1032, 1045, 113 L. Ed. 2d 1 (1991)]. Thus, the Supreme Court’s own analysis in *BMW* demonstrates by its reference to an expanded concept of “the proper inquiry” necessary to a ratio comparison that the “guideposts” were not crafted for the purpose of replacing existing law on punitive damages nor were they intended to be viewed in a limiting fashion, as Sheetz suggests. *See Rush* [v. *Scott Specialty Gases, Inc.*, 930 F. Supp. 194, 201 (E.D. Pa. 1996),] (referring to *BMW*, *TXO*, and *Haslip* and noting “[o]ur reading of these three opinions reveals a *presumably non-exclusive* list of factors that combine to create a reasonable verdict”) (emphasis supplied)[, *rev’d on other grounds*, 113 F.3d 476 (3rd Cir. 1997)]. Upon analysis, there is simply no basis for Sheetz’ suggestion that *BMW* demands that punitive damages awards be reviewed differently from the fashion in which they are currently being reviewed under *Garnes* and its progeny.

*Vandevender v. Sheetz, Inc.*, 200 W. Va. at 605-06, 490 S.E.2d at 692-93. Although the *Garnes* analysis has been determined to satisfy the principles of *BMW*, we note that there is one guidepost from *BMW* that is not expressly set out in our *Garnes* analysis. That guidepost is a comparison of the punitive damages award with civil or criminal sanctions that could be imposed for comparable misconduct.<sup>91</sup> In this regard, DuPont argues that the punitive award vastly exceeds civil penalties for comparable conduct. In support of this argument, DuPont submits that the WV DEP does not make its penalties publicly available, but the highest penalty discussed in a published judicial decision was only \$100,000 imposed for the illegal discharge of raw sewage into a waterway.<sup>92</sup> DuPont further contends that the highest fine

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<sup>91</sup>We note that, where there are no civil or criminal penalties that would be imposed for comparable misconduct, this guidepost would be irrelevant.

<sup>92</sup>DuPont cites *Taylor v. Culloden Public Service District*, 214 W. Va. 639, (continued...)

ever imposed by EPA’s Region 3, which includes West Virginia, is \$12 million for a “catastrophic explosion” that killed a worker and caused a “massive discharge of spent sulfuric acid.” The Plaintiffs point out that the examples set out by DuPont are far from similar to the conduct involved in the case *sub judice*.<sup>93</sup> While we find that these civil penalties provide *some* guidance, we agree with the Plaintiffs that the duration and extent of the exposure to toxic substances involved in the instant case does not compare with that of DuPont’s examples. Thus, we do not believe that the civil penalties relied upon by DuPont set the proper measuring tool.

(ii). *State Farm Mutual Automobile Insurance Co. v. Campbell*. Finally, DuPont argues that the punitive damages award is excessive pursuant to the ratio established by the United States Supreme Court in *State Farm*.<sup>94</sup> We disagree. The *State Farm* Court established that “[s]ingle-digit multipliers are more likely to comport with due process, while still achieving the State’s goals of deterrence and retribution . . . .” *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 425, 123 S. Ct. 1513, 1524, 155 L. Ed. 2d 585 (2003).

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<sup>92</sup>(...continued)  
642-43 n.10, 591 S.E.2d 197, 200-01 n.10 (2003).

<sup>93</sup>For instance, the conduct involved in the instant case occurred over a long period of time, while the conduct that occurred in the examples cited by DuPont appear to have involved isolated events.

<sup>94</sup>DuPont also relies on *Exxon Shipping Co. v. Baker*, in support of its argument. However, as we have previously noted, *Exxon* is a maritime case that has no application to the instant action. *See supra* note 82.

Thus, any punitive damages award that is in single digits would presumptively be within the constitution. In the instant case, we have reduced the punitive damages award to \$117,720,000 by removing that portion of the award that related to the Plaintiffs' medical monitoring claims. As we have previously observed in this opinion, comparing the punitive damages award of \$117,720,000 to the \$55,537,522.25 awarded to the Plaintiffs for property remediation, the ratio becomes 2.1:1. Moreover, should the Plaintiffs accept the \$20 million remittitur herein ordered, the punitive damages will be further reduced to \$97,720,000, and the ratio to compensatory damages will be 1.76:1. Therefore, we find that this award does not violate the principles of due process under *State Farm*.<sup>95</sup>

In summary, to conclude our review of the punitive damages award in the instant case, we reverse the circuit court's award of punitive damages in connection with the Plaintiffs' claims for medical monitoring, and therefore reduce the punitive damages award by forty percent, leaving punitive damages in the amount of \$117,720,000, to be applied solely to the claims of the property class. In addition, we reverse the circuit court insofar as it declined to give DuPont credit for the \$20 million it expended to remediate the Spelter

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<sup>95</sup>We point out that DuPont also suggests that a lower ratio may be warranted in some cases; however, we note that *State Farm* held that "[t]he precise award in any case, of course, must be based upon the facts and circumstances of the defendant's conduct and the harm to the plaintiff." *State Farm Mut. Auto. Ins. Co. v. Campbell* 538 U.S. 408, 425, 123 S. Ct. 1513, 1524 (2003). Based upon this language and our prior analysis, DuPont's conduct in this case warrants the amount of punitive damages approved of in this opinion.

smelter site, and grant a remittitur in that amount. In all other respects, the circuit court's order denying DuPont's motion to vacate or reduce the punitive damages award is affirmed.<sup>96</sup>

#### IV.

### CONCLUSION

For the reasons set out in the body of this opinion, the September 14, 2007, order of the circuit court granting summary judgment in favor of Diamond upon the indemnification issue, and the February 15, 2008, order directing payment by DuPont in the amount of \$814,949.37 for Diamond's costs and expenses, are affirmed. The September 14, 2007, and September 20, 2007, orders of the circuit court are affirmed in part and reversed in part. We affirm that portion of the orders granting partial summary judgment in favor of DuPont with respect to the property damage claims of those plaintiffs subject to the Grasselli deeds. We reverse those portions of the September 14, 2007, and September 20, 2007, orders granting summary judgment in favor of the Plaintiffs on the issue of the statute of limitations. Accordingly, we remand with directions to the circuit court to hold a jury trial on the sole issue of when the Plaintiffs possessed the requisite knowledge to trigger the running of the statute of limitations. If the jury determines that the Plaintiffs did not have the requisite knowledge more than two years prior to filing their cause of action, then the judgment in favor of the Plaintiffs, as modified by this opinion, stands. If, however, the jury determines

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<sup>96</sup>DuPont also contends that the circuit court erroneously allowed the jury to punish DuPont for its constitutionally protected communications with government officials. We reject this argument based upon the manner in which it was addressed by the trial court, as set out, *supra*, in footnote 78, which is found in Section III.G.4.a. of this opinion.

that the Plaintiffs had the requisite knowledge more than two years prior to filing their cause of action, then the trial court must set aside the verdict and render judgment in favor of DuPont.

Furthermore, the circuit court's order of September 14, 2006, granting class certification, is affirmed. Likewise, we affirm the circuit court's rulings admitting certain evidence pursuant to Rule 404(b) of the West Virginia Rules of Evidence, qualifying Dr. Kirk Brown as an expert witness and allowing his testimony, and utilizing a verdict form and certain instructions that were objected to by DuPont. In addition, we find the evidence was sufficient to support the jury's medical monitoring verdict finding significant exposure and increased risk.

Finally, we reverse the punitive damages award. Because we have concluded that punitive damages are not proper on a cause of action for medical monitoring, we reduce the punitive damages award by forty percent. In addition, we find that mitigating circumstances warranted a \$20,000,000 reduction in the punitive damages award. Accordingly, we remand with directions that the trial court give the Plaintiffs a period of thirty days from the issuance of this Court's mandate to decide whether they will accept a punitive damages remittitur in the amount of \$20,000,000, resulting in a total punitive damages verdict of \$97,720,000, or submit to a new trial on punitive damages only.

Affirmed, in part, Conditionally Affirmed, in part, Reversed, in part, and Remanded.