Nos. 34333, 34334 and 34335 – *Lenora Perrine, et al., v. E. I. du Pont de Nemours and Company, et al.*

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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

Ketchum, J., dissenting, in part, and concurring on the award of a new trial and the ruling that punitive damages are not recoverable in medical monitoring claims:

A. Judgment Should Be Granted in Favor of DuPont

I dissent from the majority's opinion, and believe that a judgment should be entered in favor of DuPont because the plaintiffs failed to prove the required elements of West Virginia's medical monitoring and property damage law. It is easy to enrage a jury against a large multi-national corporation. Nevertheless, our *Constitution* requires that plaintiffs must prove each of the elements of their case before the case can be submitted to the jury for its consideration – and the plaintiffs simply failed to prove their case. At the very least, DuPont should be granted a new trial on all issues, because of the continuous insertions of inadmissible evidence by the plaintiffs' attorneys, and their use of closing arguments prohibited by our law.[1]

I also dissent from the majority's opinion with regard to the issue concerning the Grasselli deeds.

[1]I want to preface the dissenting portion of my opinion by emphasizing that none of my remarks are directed at my colleagues or the trial judge. My colleagues spent hundreds of hours pouring through the briefs, the record and the trial transcripts. Nevertheless, I believe they are mistaken.

1. Retained Experts are Like Eggs

Retained expert witnesses are like eggs. You can buy them by the dozen – they are just more expensive.

Plaintiffs' soil scientist, Kirk Brown, testified that the dust containing lead, cadmium and arsenic from DuPont's smelter caused cancer and other diseases. The bill for his services up to the date of the trial was $910,000.00. A bill had not been calculated for his trial preparation and attendance during trial.

Dr. Brown was the *only* expert witness who testified that the smelter dust caused various types of cancer and other diseases.[2] Without Dr. Brown's testimony, admitted over DuPont's objection, the plaintiffs had no proof that DuPont's dust caused harm to humans. The plaintiffs relied solely upon this retained soil scientist from Texas to prove that DuPont's dust caused cancer and other serious diseases. None of plaintiffs' other witnesses, including Dr. Werntz from West Virginia University who simply relied upon Dr. Brown's findings, gave independent opinions that the dust from the smelter caused cancer, or other diseases to humans, described by Dr. Brown.

The problem is that Dr. Brown had no education, training, or experience in medicine or human toxicology. He is a soil scientist with a degree in agronomy. The

[2]Lead, arsenic and cadmium appear naturally in our environment. Dr. Brown conceded in his testimony that levels of arsenic in West Virginia's forests exceed the safe levels that the EPA mandates at our work sites. Nevertheless, Dr. Brown opined that it was not safe to live in the Town of Spelter. He ignored the undisputed fact that not one instance of disease in humans had been reported in the town in the 100 years since the establishment of the smelter.

plaintiffs contended he was qualified to give medical opinions because he worked with the Environmental Protection Agency on a risk assessment study involving metals. This is a half truth. He worked on an EPA risk assessment study of the metal uptake of plants from the soil which had nothing to do with the effects of metals on humans.

The jury trial was held 30 miles from our flagship educational institution, West Virginia University. Yet, plaintiffs did not call any of its medical doctors, epidemiologist or toxicologists to research or opine whether the dust from DuPont's smelter caused disease in humans. To the contrary, it is undisputed that no human in the area of the smelter has gotten sick or has had a disease from DuPont's dust during the 100 years of the smelter's existence.

Dr. Brown was plainly not qualified to give human toxicology and medical opinions. The trial court held that the jury should hear his opinion, and it was their job to evaluate his credentials and testimony. This is only partially correct. The judge must first determine if the expert is qualified to opine in a particular area. This man had no medical or human toxicology qualifications. West Virginia Rule of Evidence 702 protects all parties from unqualified evidence, even giant multi-national corporations.

Under the plaintiffs' logic, the local shoeshine boy who played with an erector set as a child can opine on quantum physics because it is the jury which evaluates the tendered expert's qualifications. Usually, giant multi-national corporations who have fed and clothed our families for a century take it in the ear using this logic. Rule 702 prohibits unqualified expert testimony.

In *Watson v. Inco Alloys*, 209 W.Va. 234, 545 S.E.2d 294 (2001), Justice Davis teaches that, before the jury gets to pass on the qualifications of expert witnesses, the circuit judge must determine if the proposed expert "meets the minimal educational or experiential qualifications" to render an expert opinion. Second, the trial judge must determine if the expert's area of expertise covers the particular area as to which the expert will opine. The plaintiffs' proposed expert had no qualifications or experience in medicine or human toxicology. Yet, the trial court let Dr. Brown opine and allowed the jury to consider his unqualified testimony.

Justice Davis also teaches that, if the proposed testimony involves scientific evidence, the court must be a gatekeeper and have an *in-camera* hearing to determine if the expert's testimony will be reliable by considering its underlying scientific methodology. Dr. Brown said that he is a scientist and that he conducted a scientific risk assessment study, *i.e.*, the causal relationship between DuPont's dust and cancer and other diseases in humans, as concluded by his scientific risk assessment analysis. Yet, the circuit court did not act as a gatekeeper and take evidence at an *in camera* hearing to determine if his methodology was scientifically reliable, as required by *Watson.*

The majority opinion does not mention that other courts have held that Dr. Brown has no qualifications to testify about human toxicology and other medical issues. In a well-reasoned opinion, the federal judge in *Palmer v. Asarco, Inc.*, 2007 WL 2302584 at 8-9 (N.D. Okla. Aug 7, 2007) ruled that Dr. Brown could only testify about soil issues but not about medicine or human toxicology. The federal court stated:

> Dr. Brown clearly crosses into the realm of toxicology and medical causation. He states that "lead in the soil and house dust is the major source of contamination contributing to the elevated blood levels in children living in Picher and Cardin." . . . While Dr. Brown can testify how lead dust is transported from one place to another, *the actual ingestion and elevation of blood levels is outside of his expertise.* Toxicology is generally described as the study of how substances are absorbed into the body and the effect of substances on the human body.

(emphasis added).

This soil scientist should not have been allowed to opine as to diseases caused by DuPont's dust. The trial court essentially allowed Dr. Brown to become an "uber-juror." This being the only testimony on this pivotal point, the plaintiffs failed to meet their burden of proof. DuPont is entitled to have judgment entered in its favor.

2. West Virginia's Medical Monitoring Requirements Were Disregarded

Plaintiffs presented *no* evidence to prove the relative comparison between plaintiffs' exposure to a hazardous substance and the exposure of the general population as required by *Bower v. Westinghouse*, 206 W.Va. 133, 522 S.E.2d 424 (1999).

Syllabus Point 3 of *Bower* requires that the plaintiff prove six specific elements to sustain a medical monitoring claim. First, it requires that "a plaintiff *must* prove that (1) he or she has, *relative to the general population*, been significantly exposed; (2) to a proven hazardous substance[.]" (Emphasis added). In this action, there is no proof of plaintiffs' significant exposure to toxic materials relative to the general population.

The plaintiffs' attorneys evidently did not read *Bower*. They began incorrectly outlining the elements of *Bower* in their opening statement and said that they would prove those incorrect elements. The "comparison to the general population" was never mentioned as part of element (1) of *Bower*. In fact, there was absolutely no evidence presented during the entire trial to support the requirement that plaintiffs had significant exposure greater than the general population. Even Dr. Brown did not make this comparison. To the contrary, he testified that the exposure to lead *outside* the class areas was as great or greater than within the class area.

Finally, at the instruction conference concerning the medical monitoring charge to the jury, the lawyers for both sides suddenly announced that the term "relative to the general population" in element (1) of *Bower* was mistakenly omitted from the trial court's instruction. The instruction was corrected to state that the plaintiffs must prove that they had, "relative to the general population, been significantly exposed to a hazardous substance."

There is one huge problem. There was no evidence to support this corrected instruction, and no additional evidence was taken. There was no evidence of plaintiffs' being substantially exposed relative to the general population.

To make matters worse, the Phase II medical monitoring verdict form was not corrected to conform to the amended *Bower* instruction. The verdict form merely required the jury find the plaintiffs had significant exposure, and had a need for medical examinations "different from what would be prescribed in the absence of the exposure." The verdict form did not require a finding that the plaintiffs were significantly exposed in relative comparison

to the general population. *See*, *Rhodes v. E.I. DuPont De Nemours*, 253 F.R.D. 365 (S.D. W.Va. 2008) (discussing *Bower*).

Accordingly, DuPont is entitled to a judgment in its favor on medical monitoring.

3. Our Medical Monitoring Law Should Be Revisited

Every person in the Kanawha and Ohio Valleys has been exposed to chemicals and toxic substances in our air. The Kanawha Valley was known as the chemical valley for decades. The factories along the Ohio River have belched thick dust for over a century. The air is now cleaner because of government regulations, not damage lawsuits. Nevertheless, every person in these industrial hubs has a medical monitoring lawsuit against the manufacturers and chemical plants because they have been significantly exposed to toxic air which necessarily increases their risk of disease. In West Virginia, all of these people are allowed to institute a medical monitoring lawsuit although they have not incurred an injury or disease. Our medical monitoring law does not require these plaintiffs to have been injured or diseased by their exposure.

Medical monitoring class action lawsuits will continue to mount if plaintiffs who are not sick or injured are allowed to pursue benefits for the mere possibility of future harm. We must rely on government regulation to police the emission of toxic substances, not damage lawsuits of uninjured plaintiffs. Damage suits by non-diseased and uninjured persons will only drive our remaining factories out of the State.

The present case against Du Pont is a good example of non-diseased, uninjured persons who will receive medical monitoring damage benefits. A named plaintiff, who lived near the smelter and represents the class, had her blood tested in order to establish that she had an abnormal level of lead in her blood caused by the emissions from the smelter. However, the testing showed that the lead level in her blood was normal. Yet, she will be entitled to medical monitoring benefits. In addition, there have not been any reports of sickness or disease in humans caused by the smelter emissions in the 100 years of its operation. Even though there is no evidence of sickness or disease, Du Pont will pay approximately $130,000,000 to medically monitor the non-diseased plaintiffs.

There is no doubt there will be a flood of additional medical monitoring lawsuits for uninjured plaintiffs against West Virginia's manufactures and businesses. The plaintiffs' lawyers told the jury:

> When this is over, we're going to move to just another part of West Virginia and do the same thing [.]

If we do not modify or abolish our medical monitoring law, the plaintiffs' lawyers from the Du Pont case will wreak enormous economic harm on West Virginia's economy. They will collect millions in fees and return to their out-of-state residences leaving the West Virginia economy in shambles. It reminds me of the out-of-state coal barons who raped our coal resources in the early 1900's and used the untaxed money from our coal to live

opulent lifestyles in far away states. The lawyer fees in the Du Pont case, for our new out-of-state coal barons, may be over $100,000,000.

Our law, until medical monitoring, did not provide a cause of action for the mere possibility of future harm, not yet realized. We should, at least, modify the medical monitoring elements to require that plaintiffs prove a present physical injury (or present disease) caused by the manufacturer or business. This will provide a clear standard as to when a plaintiff has a meritorious cause of action and will eliminate damages for a mere possible future harm. This is only fair. In this case, Du Pont will pay $130,000,000 for medical monitoring where no actual harm has occurred. We should not allow an asymptomatic plaintiff to recover damages by way of medical monitoring for the possibility of contracting a disease in the unpredictable future.

The recent trend has been for courts to reject the adoption of the medical monitoring cause of action. *See*, Herbert L. Zarov, *et al*., A Medical Monitoring Claim for Asymptomatic Plaintiffs: *Should Illinois take the plunge*?, 12 DePaul J. Health Care L 1 (2009). In my view, we should at least require a plaintiff to have a present physical injury or illness before seeking medical monitoring damages. *See*, *Henry v. Dow Chemical*, 473 Mich 63, 701 N.W.2d 684 (2005); *Paz v. Brush Engineered Materials*, 949 So.2d 1 (Miss. 2007); *Metro-North Commuter Railroad v. Buckley*, 521 U.S. 424, 117 S.Ct. 2113, 138 L.Ed.2d 560 (1997).

4. No Punitive Damages Should Be Awarded

I totally agree that no punitive damages can be recovered in medical monitoring actions. However, I totally disagree that any punitive damages should have been awarded in the property damage portion of this action. There was no evidence of actual malice on the part of Du Pont which warrants punitive damages.

In West Virginia, punitive damages are an outgrowth of a confusing hodgepodge of our common law. Some of our cases indicate that punitives can be awarded for intentional, wilful or wanton conduct. Other cases indicate that punitives can be recovered for negligence which is gross, reckless or wanton. *See, Hensley v. Erie Insurance Co.*, 168 W.Va. 172, 283 S.E.2d 227 (1981). Our trial judges are bemused when they attempt to instruct a jury in an action involving punitive damages. At trial, the lawyers present the judges with case law containing contradictory language dating back to the 1800s when our Court could not decide whether the purpose of punitive damages was to compensate victims for anguish or to punish the misconduct of defendants. *See, Pegram v. Stortz*, 31 W.Va. 220, 6 S.E. 485 (1888); *Mayer v. Frobe*, 40 W.Va. 246, 22 S.E. 58 (1895).

We should overrule all our previous cases defining the evidence required for a jury to award punitive damages and adopt a concise, simple rule defining the burden of proof required to establish a punitive damage claim. We need to clarify this confusing area of the law because our Legislature has not followed the lead of other states in codifying the law of punitive damages. *See*, for example, *Ohio Revised Code* § 2315.21. Therefore, our Court should, at least, modify three elements of our punitive damage law:

(a) Burden of Proof

The purpose of punitive damages is not to compensate a plaintiff but to punish and deter egregious conduct. Punitive damages are actually a civil fine or penalty. Therefore, the plaintiff should be required to prove, by clear and convincing evidence, that the defendant's actions or omissions demonstrate a conscious wrongdoing with actual malice.

Actual malice should be defined as: (1) "the state of mind under which the defendant's conduct is characterized by hatred, ill will or a spirit of revenge or (2) a conscious disregard for the rights and safety of other persons that has a great probability of causing substantial harm." *Preston v. Murty*, 32 Ohio St.3d 334, 512 N.E.2d 1174 (1987).[3] Because "state of mind" is difficult to prove, actual malice can be inferred from the

[3] An example of a defendant proceeding in conscious disregard for the rights and safety of other persons may be found in the law concerning driving while intoxicated. As stated in John J. Kircher and Christine M. Wiseman, *Punitive Damages: Law and Practice*, 2nd ed., § 5:03 (West Group 2000):

> The jurisdictions that view driving while intoxicated as sufficient, in and of itself, to warrant imposition of punitive damages strongly emphasize the fact that the defendant knowingly ingested a substance which would seriously affect the ability to drive safely, posing a clear danger to others encountered on the highway. Thus, the conscious choice to drive after drinking to intoxication is viewed as sufficient antisocial conduct for the imposition of the punitive sanction. In a California case, for example, the court * * * held that one who voluntarily continues to consume alcoholic beverages to the point of intoxication, while knowing that a motor vehicle will later be operated, may be held to have exhibited conscious disregard for the safety of others.

Accordingly, such behavior would be sufficient to demonstrate the malice required for an award of punitive damages.

defendant's conduct and the surrounding circumstances. *Burns v. Prudential Securities, Inc.*, 167 Ohio App.3d 809, 857 N.E.2d 621 (2006).

(b) Bifurcation of Punitives

In a West Virginia punitive damage action, the plaintiff is entitled to admit evidence of the defendant's financial condition. The defendant's wealth is then improperly used as a weapon to induce the jury to find for the plaintiff on the issue of liability. Kircher and Wiseman, *Punitive Damages: Law and Practice*, 2nd ed., *supra*, § 12:11. Therefore, either party, upon motion, should be entitled to have the punitive damage phase of a jury trial bifurcated.

I suggest that we adopt the Texas approach. The jury first hears the evidence relevant to liability for actual damages, the amount of actual damages, and liability for punitive damages. If the jury finds in the plaintiff's favor on the punitive-liability issue, the same jury hears the evidence on punitive damages and determines the amount of the punitive award, considering the totality of the evidence presented at both stages of the trial. *Transportation Insurance Co. v. Moriel*, 879 S.W.2d 10 (Texas 1994).

(c) Distribution of Punitive Award

In West Virginia, before punitive damages may be awarded, the jury must fully compensate the plaintiff for his or her actual damages. The jury can then punish, or "fine," the defendant, and the plaintiff receives a monetary windfall by way of punitive damages. Therefore, after the jury, made up of citizens of the community, fines the defendant, the plaintiff reaps the reward.

Many states have enacted laws to correct this unfairness. The punitives awarded (fine) are divided between the state and the plaintiff. Courts in other states, as an arm of their common law, have on a case-by-case basis distributed the punitive award to make a significant societal statement, while considering the plaintiff's effort in obtaining the punitive award. *Dardinger v. Anthem Blue Cross & Blue Shield*, 98 Ohio St.3d 77, 781 N.E.2d 121 (2002).

I suggest that our Court adopt a similar rule concerning punitive damages in order to prevent a monetary windfall to the plaintiff. The distribution of a punitive award should be as follows: First, the trial court should deduct litigation expenses, including attorney fees. The amount of attorney fees should be determined by the contract between the plaintiff and his or her lawyer. Any contingency fee agreed to in the contract should be approved as long as the contingency percentage is reasonable. Second, the trial court should determine the amount of the remaining award that should go to the plaintiff considering the plaintiff's effort in obtaining the award. Third, the balance should be paid to a societal good that can rationally off-set the harm done by the defendant. For example, in a toxic tort incident causing cancer, a fund could be established at the Marshall University School of Medicine's Joan Edwards Cancer Center for cancer research.

Of course, guidelines for our circuit courts to follow would have to be established for the distribution of punitive awards. In addition, consideration of the various methods of dividing the award between expenses and fees, the plaintiff's entitlement and

societal good would need to be studied. Nevertheless, a change is needed to correct the unfairness in this State's current law concerning punitive damages.

5. Rule 404(b) Evidence Was Improperly Allowed

Several weeks before trial, DuPont filed a motion *in limine* to preclude the plaintiffs from introducing evidence of other alleged wrongs or bad acts concerning unrelated chemicals, plants and locales, including DuPont's use of the chemical C8 at its Parkersburg, West Virginia, plant. Rule 404(b) of the *West Virginia Rules of Evidence* was cited by defendants in objecting to this unrelated "bad acts" evidence. However, the circuit court denied the motion with leave to revisit the admissibility of such evidence at trial.

In Phase I of the trial concerning general liability, the plaintiffs were permitted to play for the jury the videotaped deposition they took of Kathleen H. Forte, the vice-president of public affairs for DuPont. The day before the videotape was played for the jury, DuPont filed a number of objections concerning the Forte deposition video which referenced Rule 404(b), and argued that the videotape contained inflammatory questions asked by plaintiffs' counsel concerning DuPont's activities at other sites, including Parkersburg. As watched at trial, Forte was shown a map and was asked by plaintiffs' counsel about "other areas throughout the country where DuPont was involved with contamination sites." Forte stated that she knew that two were contamination sites but indicated that she was unfamiliar with the other eight locations presented to her. In addition, Forte was asked about the existence of medical monitoring at DuPont facilities in Parkersburg, West Virginia, and

Pompton, New Jersey, and then asked why there was no medical monitoring at the remaining sites. The plaintiffs' lawyer also asserted at the videotaped deposition – *but never proved* – that the C8 produced at Parkersburg was inserted by DuPont at unsafe levels into the drinking water and that C8 caused cancer.

After the videotape was played for the jury, DuPont moved for the trial court to exclude Forte's testimony, or, in the alternative, for a limiting instruction, citing Rule 404(b). The following day, DuPont filed a written request for a limiting instruction. Thereafter, during the consideration of the Phase I jury instructions, DuPont renewed its request for a Rule 404(b) limiting instruction.

The circuit court did not conduct an *in camera* hearing concerning the accuracy of the "other sites" contamination assertions or the similarity of alleged contamination at other sites to the Spelter site. The circuit court also did not give the jury a limiting instruction concerning Ms. Forte's testimony. Our cases plainly hold that Rule 404(b) requires that the trial court, *in camera*, find that the other bad acts actually occurred and that the defendant committed them before this evidence is presented to the jury. *Taylor v. Cabell Huntington*, 208 W.Va. 128, 538 S.E.2d 719 (2000).

Moreover, contrary to the assertions of the plaintiffs, the questioning of Ms. Forte did not constitute impeachment. After all, it was the plaintiffs' attorney's direct examination of Ms. Forte, and the video deposition contained numerous unproven assertions by plaintiffs' counsel. These unproven, badgering assertions that DuPont was guilty of bad acts at other sites were unknown to witness Forte. Nevertheless, the unproven, badgering

assertions continued. The questions of Ms. Forte were inflammatory and failed to impeach anything she said. *See Arnoldt v. Ashland Oil*, 186 W.Va. 394, 407, 412 S.E.2d 795, 808 (1991) (a party is not free to introduce otherwise inadmissible evidence under the guise of impeachment).

An *in camera* hearing required by Rule 404(b) should have been conducted to determine whether the lawyers' "other site" contamination assertions were accurate and whether DuPont committed those acts. *State v. Taylor*, 215 W.Va. 74, 593 S.E.2d 645 (2004). Plainly stated, the jury was allowed to consider lawyers' assertions that were never proven. *If this was our rule of law when I was in private practice, I would never have lost a case*!

Phase II of the trial concerned medical monitoring, and DuPont's Rule 404(b) objection in that phase concerned plaintiffs' closing argument. At the end of Phase II, plaintiffs' counsel stated that DuPont, in the face of increasing penalties, had adopted a "risk-based analysis" with regard to the communities in which it does business which places profit above public health concerns. There was no proof on this point. In closing, plaintiffs' counsel referred to bad acts in the oil, tobacco and pharmaceutical industries. Citing Rule 404(b), DuPont moved for a mistrial. The circuit court denied the motion.

Phase IV concerned punitive damages, and DuPont raised Rule 404(b) objections prior to opening statements. The circuit court conducted an inadequate *in camera* hearing. The court took no evidence other than reviewing some documents. No witnesses were called. At the beginning of the hearing, the circuit court indicated that it did not know

what the evidence was going to be. Yet the trial judge heard from no witnesses. The matters in question included whether C8 levels at Parkersburg had been shown to cause death in monkeys and whether a pregnant DuPont employee at the Parkersburg location had sustained a "neural tube defect." Although these assertions were made by plaintiffs' lawyers, there was no evidence presented to support the lawyers' assertions.

At the conclusion of the *in camera* hearing, devoid of testimony except for lawyer assertions, the circuit court ruled that the plaintiffs had shown sufficient similarities between Parkersburg and Spelter to admit the assertions at trial. As stated by the circuit court, the issue did not concern the merits of whether C8 had caused harm. Instead, the issue concerned whether DuPont had engaged in a similar pattern of withholding information from the public at both Parkersburg and Spelter. Again, there was no evidence presented to prove this assertion was accurate as required by Rule 404(b).

The circuit court held: "[T]he facts complained of as drawn the parallels . . . have been established . . . that under 401, 402, 403 analysis, that one, they are admissible evidence, and two, . . . the probative value is not outweighed by the prejudice and will be allowed." Yet, no evidence was presented to support this ruling, only lawyer assertions.

The trial resumed and the plaintiffs focused upon DuPont's Washington plant near Parkersburg, West Virginia, as much as upon the Spelter facility. No scientific evidence was submitted as a foundation for the plaintiffs' lawyers' assertions concerning whether C8 had caused death in monkeys or whether there was a connection between the Parkersburg facility and the medical condition of the pregnant Parkersburg employee.

Although the required *in camera* evidentiary hearing was not conducted on the accuracy of the alleged contamination at other sites, or its similarity to Spelter, the plaintiffs' lawyers continually commented on and argued about other "bad acts." These unproven comments included: (1) suggestions of contamination and medical monitoring at other DuPont facilities, (2) references to C8, a different chemical from arsenic, cadmium or lead, (3) an assertion that DuPont sent a misleading report to the Environmental Protection Agency concerning cancer in children and (4) an assertion that DuPont utilized a risk-based analysis to systematically advance financial concerns over public health issues.

It is clear that reversible error occurred and a new trial should have been granted: (1) for the failure to conduct a meaningful Rule 404(b) *in camera* hearing during any of the four phases of the trial, (2) because of the unproven badgering assertions made by plaintiffs' lawyer while questioning Forte, and (3) because of the unproven assertions in the plaintiffs' opening statements and closing arguments.

6. Plaintiffs' Closing Arguments Bore No Relation to the Facts

Phase IV of the trial concerned punitive damages. During closing arguments, a number of unproven, inflammatory, "other bad act" comments and assertions were made by plaintiffs' counsel to the jury. Those comments and assertions included: (1) suggesting that the Mississippi River will receive harmful arsenic particles from the Spelter site; (2) comparing arsenic, cadmium and lead to fallout from a nuclear bomb; (3) referring numerous times to the atrocity of mountaintop mining; (4) referring to the Parkersburg site

and C8 in terms of birth defects and animal studies; (5) suggesting that DuPont managers are carpetbaggers engaged in "raping the natural resources of this area;" (6) telling the jury, in conjunction with spurious videos shown during closing argument, that DuPont is like a burglar breaking into "your house" and stealing your health and quality of life; and (7) calling DuPont a renegade corporation.

For example, with regard to the reference to carpetbaggers engaged in "raping the natural resources of this area" – a statement which had nothing to do with the issues before the jury – plaintiffs' counsel asserted:

> And when you tell them 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.[4]

As to the non-evidentiary burglary videos shown during the plaintiffs' closing argument, DuPont argued:

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[4]Speaking of carpetbaggers, one of plaintiffs' counsel, Robert F. Kennedy, Jr., in his punitive damage closing argument, said that he helped the plaintiffs in this case because his father – Bobby Kennedy – had toured West Virginia and found "the poorest people" that was a result "of injustice and [] because of abuse of power." After touring West Virginia, Bobby Kennedy said to his children at the dinner table, "I hope that when you children grow up, that you'll do something to remediate that injustice." My research indicates that his father, Bobby Kennedy, toured West Virginia campaigning for his brother John in the 1960 presidential primary. I suggest counsel read Allen H. Loughry, II, "John F. Kennedy's 1960 Primary Election and a Culture of Corruption in Southern West Virginia," *Don't Buy Another Vote, I Won't Pay For A Landslide*, (McClain Printing Co., 2006) at 3-27.

> Your honor, we saw a video of a masked burglar breaking into a house. We then saw a video of a man in jail sticking his hands out from the bars. Those videos were not in evidence. They are highly inflammatory, prejudicial. They were intended, obviously, to whip the jury up. Those videos, which were never disclosed to us, never put into evidence, never shown to your Honor, have no place in a punitive damages trial, in our view, and they were obviously put up for one reason and one reason only, and your Honor, I think it may just work. Those videos alone – and I've made other arguments that we think, standing alone, suggest a mistrial is warranted – those videos alone should have never been played. And were obviously intended to inflame the jury.

The circuit court denied Du Pont's motions for a mistrial. In its subsequent motion for a new trial, DuPont again alleged due process and Rule 404(b) violations, as well as error concerning inflammatory arguments by plaintiffs' counsel. The motion for a new trial was denied by order entered on February 25, 2008.

Rule 23.04(b) of the *West Virginia Trial Court Rules* provides in part:

> Counsel may not comment upon any evidence ruled out, nor misquote the evidence, *nor make statements of fact dehors the record*, nor contend before the jury for any theory of the case that has been overruled. Counsel shall not be interrupted in argument by opposing counsel, except as may be necessary to bring to the court's attention objection to any statement to the jury made by opposing counsel and to obtain a ruling on such objection. (emphasis added).

The comments and assertions of plaintiffs' counsel, set forth above, during closing argument warrant a new trial. As stated in *Polaroid Corp. v. Casselman*, 213 F.Supp. 379, 381 (S.D.N.Y. 1962):

> A lawsuit is not a game but a search for the truth. The ends of justice are served, not by giving one side a vested right to exhaust the other, but by affording both an equal opportunity to a full and fair adjudication on the merits.

7. Property Damage Remediation Violated West Virginia Law

Phase III specifically concerned property damage, and 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 property owners, 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."

As set forth on the Phase III verdict form, the $55,537,522.25 consisted of 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.

In West Virginia, the measure of damages to real property is the cost of repair. However, if the damage cannot be repaired, or if the cost of the repair exceeds the market value of the property, then the measure of damages is the diminished value of the property. Syllabus Point 2 of *Jarrett v. E. L. Harper & Son, Inc*., 160 W.Va. 399, 235 S.E.2d 362 (1977), holds:

> When realty is injured the owner may recover the cost of repairing it, plus his expenses stemming from the injury, including loss of use during the repair period. If the injury cannot be repaired or the cost of repair would exceed the property's market value, then the owner may recover its lost value, plus his expenses stemming from the injury including loss of use during the time he has been deprived of his property.

The measure of damages is much the same with regard to personal property. Syllabus Point 7 of *Cato v. Silling*, 137 W.Va. 694, 73 S.E.2d 731 (1952), holds:

> As a general rule the proper measure of damages for injury to personal property is the difference between the fair market value of the property immediately before the injury and the fair market value immediately after the injury, plus necessary reasonable expenses incurred by the owner in connection with the injury. When, however, injured personal property can be restored by repairs to the condition which existed before the injury and the cost of such repairs is less than the diminution of the market value due to the injury, the measure of damages may be the amount required to restore such property to its previous condition.

Nevertheless, West Virginia's law on diminished value as a measure of damages was never considered. Instead, as evidenced by the Phase III verdict form, the actual cost of remediation was the standard given to the jury. That is because the plaintiffs *abandoned* West Virginia's diminished value measure of damages during the trial.

In denying DuPont's motion for a new trial, the circuit court concluded:

> During trial, *plaintiffs withdrew its Diminution of Value claim* and, instead, pursued only remediation for the class properties. DuPont contends plaintiffs' decision to abandon their diminution claim unfairly prejudiced DuPont because it had been prepared to defend against diminution. The Court finds DuPont was not prejudiced. DuPont was faced with the same property damage remedy, i.e., remediation, that plaintiffs had sought since the inception of the lawsuit. (emphasis added)

As a result of the court not following the law of property damage in West Virginia some property owners will receive more remediation money than the value of their

building. Many of the structures in the class area were not examined by plaintiffs' expert for their structural integrity because plaintiffs' experts only sampled homes in the class area to prove remediation damages. Some of the structures to be remediated were abandoned, dilapidated and unlivable, having little value. Nevertheless, the owners of these run-down structures will now receive money for new light fixtures, new carpet, new air conditioning, new ceilings, new double-hung insulated windows, new kitchen ranges and new furniture. Some structures had a dirt basement floor. Dr. Brown testified that to remediate a basement dirt floor, there needed to be a new concrete basement poured.

DuPont is entitled to a new trial on the amount of property damage using the correct standard for property damage. In addition, no property owner should be awarded damages on a sampling of another persons' property. Even in a class action, each plaintiff's damages must generally be actually proven rather than awarding money based on a random sampling. *See, e.g., Babineau v. Federal Express Corp.*, ___ F.3d ___ (11th Cir. 2009); *B.W.I. Custom Kitchen v. Owens-Illinois, Inc.*, 191 Cal.App.3d 1341, 235 Cal.Rptr. 228 (1987) ("Injury or 'fact of damage,' which must be proven on classwide basis in antitrust action, is separate and distinct from issuance of actual damages." Most class actions contemplate individual proof of actual damages.) *But see, Long v. Trans World Airlines, Inc.*, 761 F.Supp. 1320, 1326 (N.D. Ill. 1991) ("courts have approved various methods of discovering and determining damages in class actions on the basis of classwide, rather than individualized proof of damages, and the use of statistics and representative samples are one such legitimate method."); *Windham v. American Brands, Inc.*, 565 F.2d 59, 68 (4th Cir.1977)

(if compensatory damages are capable of formula calculations, no manageability problem exists even though individual claims may exist).

8. The Circuit Court Erroneously Excluded All Evidence of Class Representative Lenora Perrine's Normal Blood Lead Test

In 2005, a lead class representative, Lenora Perrine, who had lived very near the Spelter plant site for decades, had a blood-lead test to determine if the smelter's emissions had caused an abnormal elevation of lead in her blood. The test showed that she had a normal blood-lead level, below any level of concern. The trial court refused to allow DuPont to present this evidence to the jury. This evidence would have directly refuted plaintiffs' expert, Dr. Brown, who claimed that, despite DuPont's twenty-million dollar remediation of the closed plant site, hazardous exposure to contaminants was still ongoing in the class area. It would have refuted the unproven assertions and arguments by the plaintiffs' lawyers that this 80-year-old woman, who lived near the smelter, suffered bodily and mental injury.

First, the court barred DuPont from introducing the testimony of Mrs. Perrine's treating physician, Dr. Haeley Harman. Dr. Harman would have explained that her staff gave Mrs. Perrine a blood-lead test in 2005 and that Mrs. Perrine's blood-lead level was normal.

Second, the court precluded DuPont from asking Mrs. Perrine any questions about her blood-lead test even though Mrs. Perrine had testified on direct that she was terribly worried about elevated lead levels.

Next, the court prohibited DuPont from eliciting any testimony about Mrs. Perrine's blood-lead level from DuPont's expert toxicologist, Dr. Rodricks. Dr. Rodricks would have testified that Mrs. Perrine's blood-lead test showed her blood-lead level to be "very, very much below (a) level of concern." The court precluded Dr. Roderick's testimony on this issue even though, only the day before, plaintiffs had *conceded* that such evidence could be admissible through DuPont's expert.

Even when plaintiffs conceded that Mrs. Perrine's blood-lead test was admissible, the circuit court ruled it inadmissible. Plaintiffs' expert Dr. Werntz asserted that blood-lead testing in the class area *supported* the theory of ongoing lead exposure in the class area – though Plaintiffs submitted no test results to substantiate his assertion. Yet when DuPont sought to refute this assertion with Mrs. Perrine's actual blood-lead measurement, the circuit court again excluded the evidence.[5]

In a case involving claims of health hazards due to lead exposure, the measurement of lead in a plaintiff's body is not just relevant, it is crucial. The Perrine blood-lead test would have fatally undermined Dr. Brown's theory of "ongoing" exposure.

[5]Plaintiffs say that DuPont, not Dr. Werntz, opened the door. But DuPont asked Dr. Werntz: "You would expect, wouldn't you, if you took blood lead tests of people who lived in the class area, in light of that ongoing exposure that you say is happening, their blood leads would be elevated?" Dr. Werntz responded: "Yes, and that was what was found." Dr. Werntz, not DuPont, opened the door when he went beyond answering the question by providing non-responsive (and misleading) testimony that blood-lead tests of class members were elevated.

According to that theory, Mrs. Perrine's test should have shown "significantly elevated" lead levels, not normal ones.

Had Mrs. Perrine been an individual litigant seeking to vindicate only her own claims based on alleged excessive lead exposure, it is inconceivable that this blood-lead test would have been excluded. But here the court excluded the evidence using the class-action form as a justification, ruling that the test results "can't be offered for any extrapolation purposes that can be applied class-wide." In other words, because the evidence related only to a lead plaintiff, Mrs. Perrine, the circuit court deemed it inadmissible. The court's exclusion of evidence central to the claim of a leading class representative turns the class-action concept on its head.

Mrs. Perrine was a lead class representative in this case, and she testified in that capacity. The fact that she showed no signs of exposure (much less significant exposure) counts against any award of class-wide relief. *See*, *Avery v. State Farm Mut. Auto Ins. Co.*, 216 Ill. 2d 100, 139, 835 N.E.2d 801, 827 (2005) ("It is well settled that a class cannot be certified unless the named plaintiffs have a cause of action."). Fundamental to a class action is that the class representative is "typical" of and serves as a proxy for the absent class members, permitting the jury to evaluate the class's claims by evaluating the class representative's claims. *Thorn v. Jefferson-Pilot Life Ins. Co.*, 445 F.3d 311, 318 (4th Cir. 2006). (A class action "allows a representative party to prosecute his own claims and the claims of those who present similar issues."); Alba Conte & Herbert B. Newburg, *Newburg on Class Actions* § 1:1, at 2 (4th ed. 2002) (Class actions are "[r]epresentative suits on behalf

of others similarly situated."). A class action does not allow the class representative to avoid being confronted with the weaknesses in her own case.

Mrs. Perrine's normal blood-lead test would have directly refuted Brown's testimony that the community "continued to put people at risk," and that "it was not safe to live in Spelter". If any of this were true, then Mrs. Perrine's blood-lead levels would have been significantly elevated, not normal.

Mrs. Perrine's blood-lead test is relevant regardless of whether it can be "extrapolated" to the whole class. Plaintiffs cite no authority to the contrary. The class's case depended on the class representatives' case. *Thorn v. Jefferson-Pilot Life Ins. Co., supra*; *Avery v. State Farm Mut. Auto Ins. Co.*, 216 Ill. 2d 100, 139, 835 N.E.2d 801, 827 (2005). Mrs. Perrine was a lead class representative. DuPont had a "right . . . to challenge the allegations of individual plaintiffs" and a "right to raise individual defenses against each class member." *McLaughlin v. Am. Tobacco Co.*, 522 F.3d 215, 232 (2nd Cir. 2008); *see also, Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 192 (3d Cir. 2001) ("[D]efendants have the right to raise individual defenses against each class member."); *Guillory v. Am. Tobacco Co.*, 2001 WL 290603, at 8 (N.D. Ill. Mar. 20, 2001) ("[I]f defendants were not able to individually probe into the peculiarities of each class member's case, the result would be that they would be denied the opportunity to prepare a defense.").

DuPont is entitled to a new trial because the blood test results on Ms. Perrine were relevant. DuPont's request for its admission into evidence was proper.

9. The Summary Judgment Concerning the Grasselli Deeds

The circuit court found that the real estate in the chain of title from the original Grasselli deeds covered 40% of the class area. Although the entire class area needed remediation, the trial court held that the buildings and land in the area covered by the Grasselli deeds will not be remediated. Therefore, 40% of the land and buildings near the smelter will remain unsafe.

The circuit court ruled that various releases and easements found within the Grasselli deeds, which allow discharges from the smelter to be deposited upon the plaintiffs' lands, are binding and will be enforced. In my opinion, however, the releases in the Grasselli deeds violate the public policy of this State with regard to the welfare of the residential and small business owners within the class area. The releases and easements in the Grasselli deeds should be set aside, and, therefore, I respectfully dissent.

There are a number of reasons why the releases and easements in the Grasselli deeds, executed in the 1930s, are unenforceable in terms of the welfare of the public. As discussed below, those reasons include: (1) the allowance of unlimited, continuous emission deposits upon the parcels in question, (2) the interference with efforts to remediate nonexcluded properties, (3) the excluded parcels as a secondary source of contamination in the class area, (4) the patent ambiguity in the deeds surrounding the term *easement* and (5) the potential limitation of judicial authority to review covenants and agreements in deference

to administrative agencies. Any of those reasons alone, or in combination, warrant the setting aside of the releases and easements.

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 at an on-site location which ultimately became the 50 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 lawsuits seeking recovery of damages caused by "fumes, gases and dust" emitted from the smelter. No illness in humans was reported. 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 lawsuits of the farmers and other property owners in the community.

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 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 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 40% of the land in the class area.

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

> [T]he 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, arisen 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 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.

In July 2007, DuPont filed for summary judgment which included the following averment concerning the Grasselli deeds: "The 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, the circuit court granted DuPont's motion for summary judgment with regard to the Grasselli deeds. The circuit court noted that the deeds resulted from the settlement of prior claims and lawsuits. The circuit court relied upon the express language of the deeds and concluded, without elaboration, 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 damage claims of those plaintiffs were, therefore, dismissed.

In relying upon the express language of the Grasselli deeds, the summary judgment orders do not address whether the import of the releases and easements was beyond the contemplation of the original parties or whether the releases and easements constitute a transgression of public policy. Instead, the circuit court indicated that the releases and easements are unambiguous and are, therefore, binding and enforceable.

I agree that the releases and easements are unambiguous to the extent of the redundancy employed in those provisions to bind the successors of both the original landowners and the Grasselli Chemical Company. As long recognized, "[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 Corporation v. Evans*, 175 W.Va. 304, 308, 332 S.E.2d 604, 609 (1985); *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). *See also*, 4A M. J., *Contracts* § 40 (Matthew Bender & Co. 2007) (observing that, if the written contract is unequivocal, the court is not at liberty to search for its meaning beyond the instrument itself).

Nevertheless, with regard to the extent of the deposit of substances allowed upon the excluded parcels, a patent ambiguity appears in the language of the Grasselli deeds surrounding the term *easement*. Although the Grasselli deeds speak of *easements* and *releases*, those terms are distinguishable. An *easement* is commonly associated with a right to cross or use land in a manner not inconsistent with the general use of the land by the owner. The Grasselli deeds, however, allow substances to be deposited upon the *entirety* of the surface of each parcel, in perpetuity, since, obviously, the deposits cannot be limited to a particular area of the property. Consequently, in the Grasselli deeds, *easement* can only be defined as encompassing 100% of the surface (plus all other items of property thereon, "real, personal or mixed") of each excluded parcel, to the detriment of the general use of the land by the owner. In that regard, the term *easement* in the Grasselli deeds is a misnomer or, at the very least, evidences an ambiguity regarding the extent of the emission deposits contemplated by the original parties.

The language of the releases and easements violate public policy. In *Cordle v. General Hugh Mercer Corp.*, 174 W.Va. 321, 325 S.E.2d 111 (1984), this Court observed that a determination of the existence of public policy in West Virginia is a question of law to be resolved by the court in light of the particular circumstances of each case, public policy

embodying the principle that no person can lawfully do that which has a "tendency to be injurious to the public or against public good." 174 W.Va. at 325, 325 S.E.2d at 114. *See*, *Mitchell v. Broadnax*, 208 W.Va. 36, 45, 537 S.E.2d 882, 891 (2000) (decision of a public policy issue is a legal query, but such a determination is made on a case-by-case basis).

DuPont asserts that upholding the summary judgment orders would vindicate public policy because the releases and easements: (1) resulted from the original parties' freedom of contract and (2) resulted from the settlement of claims and lawsuits which is favored and encouraged in the law. The plaintiffs contend, however, that those considerations must give way to a greater public policy of halting the unrestricted, continuous migration of hazardous materials from a facility, such as the Spelter plant, onto the soil and the residential and commercial structures of an adjacent community.

Manifestly, the principles set forth by DuPont are not absolute. Syllabus Point 3 of *Wellington Power Corporation v. CNA Surety Corporation*, 217 W.Va. 33, 614 S.E.2d 680 (2005), holds: "This State's public policy favors freedom of contract which is the precept that a contract shall be enforced except when it violates a principle of even greater importance to the general public." *See*, 15 Corbin on Contracts § 79.1 (Matthew Bender & Co. 2003) (suggesting that the freedom of contract is not superior to the general welfare of the public). Moreover, in Syllabus Point 1 of *Sanders v. Roselawn Memorial Gardens*, 152 W.Va. 91, 159 S.E.2d 784 (1968), this Court said: "The law favors and encourages the resolution of controversies by contracts of compromise and settlement rather than by litigation; and it is the policy of the law to uphold and enforce such contracts if they are fairly

made and are not in contravention of some law or public policy." Syllabus Point 8, *Certain Underwriters at Lloyd's London v. Pinnoak Resources*, 223 W.Va. 336, 674 S.E.2d 197 (2008); Syllabus Point 4, *Horkulic v. Galloway*, 222 W.Va. 450, 665 S.E.2d 284 (2008); Syllabus Point 3, *Berardi v. Meadowbrook Mall Company*, 212 W.Va. 377, 572 S.E.2d 900 (2002).

The Grasselli deeds, made in the 1930s, released Grasselli and its successors from all claims for losses of every kind caused by the past, present or future operation of the plant or caused by any substance, in the past, present or future, emanating from the plant. Although the term *substances* is defined in the deeds as relating to the smelting of zinc ore, the by-products arsenic, cadmium and lead are not mentioned. The deeds further grant Grasselli and its successors the "free and perpetual right" to discharge, or permit to escape, the substances onto the lands of the grantors. Finally, the deeds provide that the releases and easements "shall run with the land" and "shall bind said land" to the benefit of Grasselli and its successors. No reference is made to any standard of conduct on the part of the operators of the smelter facility. Nor is any restriction placed upon the volume of material allowed to migrate to the off-site properties. As long as the emissions relate to smelting, the servient estates are subject to any amount or combination of emission deposits, including arsenic, cadmium and lead, upon a daily basis, in perpetuity.

In such circumstances, public policy concerns with regard to the present and future outlook of the class area arise with blinding clarity. Certainly, the economic development of the region is a matter within the authority of the Legislature. Nevertheless,

the binding of the excluded parcels to exposure to hazardous substances for all the future through the Grasselli releases and easements, and the long-term impact of that exposure upon the entire class area, is a factor which may be judicially considered in the circumstances of this action in determining public policy.

Smelting activities at the plant began in 1911 and continued until the facility closed in 2001. The last operator, Diamond, continued the practice of depositing residue containing arsenic, cadmium and lead onto the exposed waste pile. Ultimately, the waste pile covered 50 acres, was 100 feet in height and reached the bank of the West Fork River. The February 1996 internal memorandum of the Environmental Protection Agency noted that the town of Spelter "lies in the downwind footprint of the unprotected site soils and tailings pile." In September 1997, the Environmental Protection Agency 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. The subsequent application of Diamond and DuPont for participation in the West Virginia Voluntary Remediation Program stated that the 50 acre waste or tailings pile was the primary source of contamination at the smelter facility. While DuPont has gone to great lengths to remediate the plant site, administrative orders entered by the regulatory agencies in that regard did not require remediation of the off-site properties.

To now engage in remediation activities in the class area while 40% of that area is excluded because of the Grasselli releases and easements will, no doubt, be

counterproductive, especially since the excluded, unremediated properties potentially constitute a secondary source of contaminant migration, further endangering the community environment. Remediation efforts will have to avoid the excluded parcels, and, after remediation is completed, natural weathering processes will likely migrate hazardous substances throughout the remediated area. There is an old saying to the effect that an elephant is nothing more than a horse designed by a committee. That is the result of excluding some properties in the class area while randomly remediating others.

In determining this aspect of the class action, the public policy asserted by the plaintiffs against the validity of the Grasselli releases and easements does not depend upon whether the substances were negligently or recklessly deposited upon the off-site properties or whether there was actual harm to the public. The standard for determining public policy in the circumstances herein is the magnitude of the threat to the welfare of the public and the tendency of the otherwise valid exculpatory provisions in the Grasselli deeds to be injurious to the public or against the public good. *See*, *Cordle*, *supra*, 174 W.Va. at 325, 325 S.E.2d at 114.[6] Certainly, the greater the risk to the welfare of the public, the more compelling the rationale for invalidating unrestricted releases and easements which allow the migration of hazardous substances upon servient properties.

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[6]It should be noted that *W.Va. Code*, 22-22-7(d) [1996], of the West Virginia Voluntary Remediation and Redevelopment Act states: "No voluntary remediation agreement may be modified or amended, unless the amendment or modification is reduced to writing and mutually agreed upon by the parties to the agreement: *Provided, That when the director determines that there is an imminent threat to the public, he or she may unilaterally modify or amend the agreement*[.]" (Emphasis added).

Nor should this Court defer to the federal Environmental Protection Agency or the West Virginia Department of Environmental Protection to vindicate public policy. The remediation orders issued by those agencies, to date, concern only the immediate smelter facility and not the off-site properties. Moreover, the responsibility of plant operators in terms of government regulation did not vest until decades after the emissions began and the waste pile was created. In any event, the challenge of the plaintiffs to the Grasselli releases and easements, and DuPont's defense thereof, are grounded in the law of contracts. The validity of the Grasselli deeds, therefore, is for the courts to decide.

The language of the releases and easements in the Grasselli deeds, in conjunction with the circumstances surrounding the operations at the smelter facility, warrant the conclusion that the releases and easements violate the public policy of this State as a matter of law with regard to the welfare of the entire class area. Accordingly, the summary judgment orders entered on September 14, 2007, and September 20, 2007, should be reversed, and the claims of the members of the Property Class, heretofore excluded, should be reinstated.

B. Concurrence

I agree with the majority on the award of a new trial on the statute of limitations issue and the holding that no punitive damages are available in medical monitoring cases.

However, while I agree that DuPont is entitled to a new trial on the statute of limitation issue, a new trial on this question alone will hardly make up for the numerous prejudicial errors throughout the trial.