Nos. 34333, 34334, and 34335 - *Lenora Perrine; Carolyn Holbert; Waunona Messinger Crouser; Rebeccah 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 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*

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Davis, Chief Justice, concurring, in part, and dissenting, in part:

I wish to take this opportunity to commend Judge Moats on his very thorough and well-reasoned opinion in this case. Although the assignments of error presented were numerous and, at times, quite complex, the resulting opinion will prove to be an invaluable resource to members of the bench and the bar faced with similar issues and, most especially, as to the precise procedure to be followed in determining the correctness of a punitive damages award. Nevertheless, I am compelled to write separately to respond to two, distinct issues: (1) Justice Ketchum's objection to Dr. Brown's expert testimony and (2) the majority's refusal to permit the recovery of punitive damages for medical monitoring.

First, I concur generally with the majority's opinion in this case except with respect to its refusal to permit the Plaintiffs to recover punitive damages in connection with their claim for medical monitoring. In addition to this general concurrence, I also

concur specially with respect to the majority's decision finding the testimony of the Plaintiffs' expert, Dr. Kirk Brown, to be admissible. Justice Ketchum, in his separate opinion dissenting, in part, relies heavily upon an unpublished decision from the United States District Court for the Northern District of Oklahoma, which court also considered the admissibility of Dr. Brown's expert testimony in a case strikingly similar to the case *sub judice*. *See Palmer v. Asarco Inc.*, Nos. 03-CV-0498-CVE-PJC, 03-CV-0565-CVE-PJC, 03-CV-0566-CVE-PJC, 03-CV-0567-CVE-PJC, 03-CV-0569-CVE-PJC, 2007 WL 2302584 (N.D. Okla. Aug. 7, 2007). In summary, Justice Ketchum interprets *Palmer* as precluding Dr. Brown's expert testimony in that case. Extending the application of *Palmer* to the instant proceeding, Justice Ketchum then suggests that Dr. Brown should have been prevented from testifying in the case *sub judice*. With Justice Ketchum's interpretation and proposed application of *Palmer*, I disagree.

In *Palmer*, the court considered Dr. Brown's expert qualifications in relation to matters about which he was proffered to testify. The *Palmer* Court then *permitted* Dr. Brown to testify as to all but two issues about which the plaintiffs sought his testimony. The two issues upon which Dr. Brown's testimony was excluded–(1) whether "lead from each defendant's chat pile reached each plaintiff's residence"[1] and (2) whether "any child

[1]2007 WL 2302584, at *5 & *10.

has had such [lead] exposure or has had an elevated blood lead level"[2]–are matters that were not put in issue in the case *sub judice* and about which the Plaintiffs did not seek Dr. Brown's testimony. However, the district court *permitted* Dr. Brown to testify as to all other matters about which the *Palmer* plaintiffs sought to introduce his expert testimony, including that "wind-blown dust has caused lead contamination in [the affected communities]"[3] and that there exists "an increased risk of lead exposure for children living in [those communities]"[4]–issues about which Dr. Brown also testified in the case *sub judice*. Insofar as the court's ruling in *Palmer* was rendered approximately one month before the commencement of the underlying jury trial in this case, I find the *Palmer* court's decision particularly persuasive and concur in the majority's decision finding Dr. Brown's expert testimony to be admissible in the case presently before the Court.

Second, and more importantly, I write separately to respond to the majority's decision prohibiting the Plaintiffs from receiving punitive damages in connection with the successful litigation of their medical monitoring claim. The position taken by the majority on this issue is inconsistent with and confuses existing law, and, therefore, from this ruling, I strongly dissent.

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[2]2007 WL 2302584, at *9 & *10.

[3]2007 WL 2302584, at *7.

[4]2007 WL 2302584, at *9.

A CLAIM FOR MEDICAL MONITORING SUPPORTS AN AWARD OF PUNITIVE DAMAGES

Whether punitive damages may be recovered in connection with a claim seeking medical monitoring is an issue of first impression in West Virginia. A review of the established law of this State, as well as decisions from other jurisdictions, supports the award of punitive damages in a medical monitoring claim.

I. Purpose of Medical Monitoring Cause of Action

In *Bower v. Westinghouse Electric Corporation*, 206 W. Va. 133, 522 S.E.2d 424 (1999), this Court recognized a cause of action for medical monitoring costs. *See* Syl. pt. 2, *id.* ("A cause of action exists under West Virginia law for the recovery of medical monitoring costs, where it can be proven that such expenses are necessary and reasonably certain to be incurred as a proximate result of a defendant's tortious conduct.").[5]

[5]The elements of a medical monitoring claim are set forth in Syllabus point 3 of *Bower v. Westinghouse Electric Corporation*, 206 W. Va. 133, 522 S.E.2d 424 (1999):

> 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

(continued...)

Succinctly stated, "[a] claim for medical monitoring seeks to recover the anticipated costs of long-term diagnostic testing necessary to detect latent diseases that may develop as a result of tortious exposure to toxic substances." *Bower*, 206 W. Va. at 138, 522 S.E.2d at 429. In other words, "a claim for medical monitoring is essentially 'a claim for future damages.'" *Id.*, 206 W. Va. at 138-39, 522 S.E.2d at 429-30 (quoting *Ball v. Joy Techs., Inc.*, 958 F.2d 36, 39 (4th Cir. 1991)).

The injury sustained by the plaintiff seeking medical monitoring is "'the exposure itself and the concomitant need for medical testing.'" *Bower*, 206 W. Va. at 139, 522 S.E.2d at 430 (quoting *Hansen v. Mountain Fuel Supply Co.*, 858 P.2d 970, 977 (Utah 1993) (citations omitted)). Stated otherwise,

> "The 'injury' that underlies a claim for medical monitoring–just as with any other cause of action sounding in tort–is 'the invasion of any legally protected interest.'" *Bower v. Westinghouse Electric Corp.*, 206 W. Va. 133, 139, 522 S.E.2d 424, 430 (1999) quoting *Restatement (Second) of Torts* § 7(1) (1964). The specific invasion of a legally protected interest in a medical monitoring claim[] consists of "a significantly increased risk of contracting a particular disease relative to what would be the case in the absence of exposure." 206 W. Va. at 142, 522 S.E.2d at 433.

State ex rel. Chemtall Inc. v. Madden, 216 W. Va. 443, 455-56, 607 S.E.2d 772, 784-85 (2004). *Accord Bandy v. Trigen-Biopower, Inc.*, No. 3:02-CV-459, 2006 WL 5321815, at

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[5](...continued)
early detection of a disease possible.

* 5 (E.D. Tenn. May 5, 2006) ("The *de minimus* 'physical injury' of ingesting a harmful substance can sufficiently satisfy the physical injury or manifestation rule so as to justify the award of . . . medical monitoring." (citation omitted)); *Barnes v. The American Tobacco Co., Inc.*, 989 F. Supp. 661, 665 (E.D. Pa. 1997) ("[T]he injury that a person claims under a medical monitoring cause of action is the cost of the medical care that will, one hopes, detect that injury. . . . This injury is similar to a claim for damages to a person that could be asserted in a traditional negligence or strict liability action." (internal quotations and citations omitted)); *Donovan v. Philip Morris USA, Inc.*, 455 Mass. 215, 225-26, 914 N.E.2d 891, 901 (2009) ("When competent medical testimony establishes that medical monitoring is necessary to detect the potential onset of a serious illness or disease due to physiological changes indicating a substantial increase in risk of harm from exposure to a known hazardous substance, the element of injury and damage will have been satisfied and the cost of that monitoring is recoverable in tort.").

A medical monitoring plaintiff is compensated for such injury, or made whole, by requiring the defendant responsible for the plaintiff's exposure to toxic substances to compensate the plaintiff for the expenses of the medical monitoring incurred by the plaintiff:

> "It is difficult to dispute that an individual has an interest in avoiding expensive diagnostic examinations just as he or she has an interest in avoiding physical injury. When a defendant negligently invades this interest, the injury to which is neither speculative nor resistant to proof, *it is elementary that the*

> *defendant should make the plaintiff whole by paying for the examinations*."

Bower, 206 W. Va. at 139, 522 S.E.2d at 430 (quoting *Friends for All Children, Inc. v. Lockheed Aircraft Corp.*, 746 F.2d 816, 826 (D.C. Cir. 1984) (emphasis added) (footnote omitted)). *See also Bower*, 206 W. Va. at 142, 522 S.E.2d at 433 ("Liability for medical monitoring is predicated upon the defendant being legally responsible for exposing the plaintiff to a particular hazardous substance.").

Accordingly, "'the cost of medical surveillance is a compensable item of damages'" when the elements of a claim for medical monitoring have been satisfied. *Bower*, 206 W. Va. at 141, 522 S.E.2d at 432 (quoting *Ayers v. Township of Jackson*, 106 N.J. 557, 606, 525 A.2d 287, 312 (1987)). *Accord Bower*, 206 W. Va. at 142, 522 S.E.2d at 433 ("'[F]uture medical monitoring . . . is . . . a compensable item of damage when liability is established[.]'" (quoting *Potter v. Firestone Tire & Rubber Co.*, 6 Cal. 4th 965, 1007, 25 Cal. Rptr. 2d 550, 578, 863 P.2d 795, 823 (1993) (en banc))). *Cf. Bower*, 206 W. Va. at 142, 522 S.E.2d at 433 ("Medical monitoring must be available in order to be a necessary, compensable item of damages.").

II. Purpose of Punitive Damages Award

Punitive damages are awarded to punish and deter defendants who have acted "'maliciously, wantonly, mischievously or with criminal indifference to civil obligations.'" *Peters v. Rivers Edge Mining, Inc.*, 224 W. Va. 160, ___, 680 S.E.2d 791, 821 (2009) (quoting Syl. pt. 3, in part, *Jopling v. Bluefield Water Works & Improvement Co.*, 70 W. Va. 670, 74 S.E. 943 (1912)). *Accord* Syl. pt. 1, *O'Brien v. Snodgrass*, 123 W. Va. 483, 16 S.E.2d 621 (1941) ("Punitive or exemplary damages are such as, in a proper case, a jury may allow against the defendant by way of punishment for wilfulness, wantonness, malice, or other like aggravation of his wrong to the plaintiff, over and above full compensation for all injuries directly or indirectly resulting from such wrong."); Syl. pt. 4, *Mayer v. Frobe*, 40 W. Va. 246, 22 S.E. 58 (1895) ("In 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."). Punitive damages are not designed to compensate an injured plaintiff for his/her actual loss; such compensation is achieved through compensatory, not punitive, damages. *See* Robin Jean Davis and Louis J. Palmer, Jr., *Punitive Damages Law in West Virginia*, at 4,*available at* http://www.state.wv.us/wvsca/PunitiveDamages2010.pdf (last visited Mar. 26, 2010).

In order to recover punitive damages from a defendant, a plaintiff must prove that the defendant's wrongful conduct caused the plaintiff's injury and resultant damages. "'[T]he right to recover punitive damages in any case is not the cause of action itself, but a mere incident thereto.'" Davis & Palmer, *Punitive Damages Law*, at 7 (quoting *Lyon v. Grasselli Chem. Co.*, 106 W. Va. 518, 521, 146 S.E. 57, 58 (1928)) (footnote omitted). Thus, a plaintiff must have sustained an injury and be awarded compensatory damages therefor before he/she may receive an award of punitive damages: "an award of compensatory damages is a necessary predicate for an award of punitive damages. That is, punitive damages may not be awarded by a jury, if the jury fails to award compensatory damages." Davis & Palmer, *id.*, at 7 (footnotes omitted). This is so because "[p]unitive damages must bear a reasonable relationship to the potential of harm caused by the defendant's actions." Syl. pt. 1, in part, *Garnes v. Fleming Landfill, Inc.*, 186 W. Va. 656, 413 S.E.2d 897 (1991) (overruling *Wells v. Smith*, 171 W. Va. 97, 297 S.E.2d 872 (1982), which allowed jury to award punitive damages without finding compensatory damages). However, "when compensatory damages are not large enough to convince a defendant or future defendants to take precautions" to avoid the misconduct that resulted in the plaintiff's injury, "[p]unitive damages are necessary . . . to discourage [the defendant's or future defendants'] future bad acts." *Garnes*, 186 W. Va. at 660-61, 413 S.E.2d at 901-02 (citation omitted).

III. Availability of Punitive Damages for Medical Monitoring

While many courts have recognized medical monitoring, either as a distinct cause of action or as a recoverable item of damages, few courts have definitively authorized an award of punitive damages in a medical monitoring claim. Despite this scant authority, support nevertheless exists for such an award.

A. West Virginia

Although we recognized a cause of action for medical monitoring in *Bower*, we did not determine whether punitive damages are available in connection with such a claim. Subsequent opinions have touched on the issue, but have not definitively ruled thereon. In our first *Chemtall* opinion, *State ex rel. Chemtall Inc. v. Madden*, 216 W. Va. 443, 607 S.E.2d 772 (2004), we observed that the "[p]etitioners reserve other substantive challenges . . . which are not addressed in this case, including the propriety of punitive damages" for medical monitoring. 216 W. Va. at 450 n.3, 607 S.E.2d at 779 n.3. Later, in our third *Chemtall* opinion, *State ex rel. Chemtall, Inc. v. Madden*, 221 W. Va. 415, 655 S.E.2d 161 (2007) (per curiam), we determined that deciding whether punitive damages are available for medical monitoring was premature in the context of that case insofar as a final verdict had not yet been rendered because the case had not yet gone to trial:

> [W]e . . . decline, at this early pre-trial stage, to address the petitioners' claim that punitive damages are not available in cases in which only medical monitoring damages are sought. . . . [W]e are convinced that appellate review of this issue is better left to the review of a verdict after complete

> development of all the facts and testimony and after a trial of all the issues.[6]

221 W. Va. at 421 & n.5, 655 S.E.2d at 167 & n.5 (footnote retained from original text). However, in his separate opinion to *Chemtall III*, Justice Benjamin suggested that "[p]unitive damages are not appropriate in an equitable medical monitoring class action" because the medical monitoring plaintiffs "have not asserted personal injury claims, as they have not suffered any actual, present physical injuries from their alleged exposure to [the defendants'] products." 221 W. Va. at 425, 655 S.E.2d at 171 (Benjamin, J., concurring, in part, and dissenting, in part). In reaching this conclusion, Justice Benjamin rejected the definition of a medical monitoring injury discussed in *Chemtall I*, wherein we referenced the "'significantly increased *risk* of contracting a particular disease.'" 221 W. Va. at 171, 655 S.E.2d at 425 (Benjamin, J., concurring, in part, and dissenting, in part) (quoting *Chemtall I*, 216 W. Va. at 455, 607 S.E.2d at 784) (emphasis added by Justice Benjamin)).

[6]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.*, 855 F.2d 1188 (6th Cir. 1988)[, *modified on other grounds as stated in American & Foreign Ins. Co. v. General Elec. Co.*, 45 F.3d 135 (6th Cir. 1995)].

B. Other Jurisdictions

Other jurisdictions also have been reluctant to definitely determine whether punitive damages are available in a claim for medical monitoring. Only the United States District Court for the Eastern District of Pennsylvania has definitively spoken on this issue. In *Carlough v. Amchem Products, Inc.*, 834 F. Supp. 1437 (E.D. Pa. 1993), the court observed that "the exposure-only plaintiffs [therein] have alleged a cognizable claim for medical monitoring and punitive damages" and observed, further, that "it is not uncommon for plaintiffs to join claims for punitive damages with claims for medical monitoring." 834 F. Supp. at 1459-60 (footnote omitted) (citing *Sterling v. Velsicol Chem. Corp.*, 855 F.2d 1188 (6th Cir. 1988), *modified on other grounds as stated in American & Foreign Ins. Co. v. General Elec. Co.*, 45 F.3d 135 (6th Cir. 1995); *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); *In re Fernald Litig.*, No. C-1-85-149, 1989 WL 267039 (S.D. Ohio Sept. 29, 1989); *Catasauqua Area Sch. Dis. v. Raymark Indus., Inc.*, 662 F. Supp. 64 (E.D. Pa. 1987)).

More recently, this same court has, in the context of interpreting and applying Delaware state law, concluded that "the Delaware Supreme Court would permit a claim for medical monitoring." *Guinan v. A.I. duPont Hosp. for Children*, 597 F. Supp. 2d 517, 538 (E.D. Pa. 2009). However, the district court then deviated from its prior ruling in *Carlough* and determined that

> [l]imiting the remedy [in medical monitoring cases] to

> compensatory damages and expressly excluding noneconomic 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. *See Paoli I,* [*In re Paoli R.R. Yard PCB Litig.*, 916 F.2d 829,] 850 [(3d. Cir. 1990)] ("[A]n action for medical monitoring seeks to recover *only* the quantifiable costs of periodic medical examinations necessary to detect the onset of physical harm . . . .") (emphasis added); *Friends for All Children,* [*Friends for All Children, Inc. v. Lockheed Aircraft Corp.*, 746 F.2d 816,] 826 [(D.C. Cir. 1984)] (noting that "[i]n the absence of physical symptoms, emotional distress caused by potential risk may . . . be thought too speculative to support recovery").

597 F. Supp. 2d at 540 n. 10 (referencing *Metro-North Commuter R.R. Co. v. Buckley*, 521 U.S. 424, 117 S. Ct. 2113, 138 L. Ed. 2d 560 (1997)).

Subsequently, in *Hess v. A.I. DuPont Hospital for Children*, No. 08-0229, 2009 WL 595602 (E.D. Pa. Mar. 5, 2009), the district court again quoted this language from *Paoli* to the effect that "the remedy for a medical monitoring claim is 'only the quantifiable costs of periodic medical examinations necessary to detect the onset of physical harm.'" 2009 WL 595602, at *13 (quoting *In re Paoli R.R. Yard PCB Litig.*, 916 F.2d at 850) (footnote and additional citations omitted). The court then commented that, "[i]n *Guinan I,* [*Guinan v. A.I. duPont Hospital for Children*, 597 F. Supp. 2d 517 (E.D. Pa. 2009),] we

interpreted this language to mean that punitive damages are not available with medical monitoring claims. [597 F. Supp. 2d] at [540] n.10." 2009 WL 595602, at *13 n.9.[7]

Other jurisdictions, though not definitely allowing or disallowing punitive damages in medical monitoring, have nevertheless implicitly allowed punitive damages to be recovered in medical monitoring cases. In each of these cases, the plaintiffs asserted claims seeking both medical monitoring costs and punitive damages. The majority of courts presented with such claims have permitted the punitive damages claims to proceed because the courts have not expressly found that punitive damages are improper in conjunction with a medical monitoring claim. However, these courts have not directly ruled upon the punitive damages issue, finding instead that punitive damages are more properly tried on an individual case-by-case basis rather than in a class action, either because the facts supporting a punitive damages award are too individualized or because the plaintiffs are residents of different states, each of which has different standards for the imposition of punitive damages. *See In re Baycol Prods. Litig.*, 218 F.R.D. 197 (D. Minn. 2003) (medical monitoring claims failed to satisfy requirements for class certification, and

[7]It is curious, though, that such a definitive statement that punitive damages are not available for medical monitoring has been made in both *Guinan* and *Hess* based not upon fairly recent authority but based instead upon an interpretation of language contained in a 1990 opinion from the United States Court of Appeals for the Third Circuit in *Paoli*. Even more puzzling is the fact that the *Carlough* court also had the benefit of this same opinion language when it issued its decision in 1993 finding punitive damages to be recoverable in connection with medical monitoring.

punitive damages not proper for class certification because different facts supported individual plaintiffs' claims for punitive damages and different states' laws governed punitive damages awards); *Lewallen v. Medtronic USA, Inc.*, No. C 01-20395 RMW, 2002 WL 31300899 (N.D. Cal. Aug. 28, 2002) (punitive damages not proper for class certification because different facts supported individual plaintiffs' claims for punitive damages and different states' laws governed punitive damages awards); *In re Telectronics Pacing Sys., Inc.*, 172 F.R.D. 271 (S.D. Ohio 1997) (punitive damages not proper for class certification because different states' laws governed punitive damages awards); *Baker v. Wyeth-Ayerst Labs. Div.*, 338 Ark. 242, 251, 992 S.W.2d 797, 802 (1999) (medical monitoring claims failed to satisfy requirements for class certification, but acknowledging, regarding superiority inquiry, that "the asymptomatic plaintiffs also asked for punitive damages, which could justify the cost of individual litigation"). *See also Hansen v. The American Tobacco Co., Inc.*, No. LR-C-96-881, 1999 WL 33659388 (E.D. Ark. July 21, 1999) (medical monitoring claims failed to satisfy requirements for class certification, thus not reaching issue of whether punitive damages are available for medical monitoring); *Marin v. Brush Wellman, Inc.*, No. B208202, 2009 WL 2596259 (Cal. Ct. App. Aug. 24, 2009) (same); *Wilson v. Brush Wellman, Inc.*, 103 Ohio St. 3d 538, 817 N.E.2d 59 (2004) (same). *Cf. Abbatiello v. Monsanto Co.*, 522 F. Supp. 2d 524, 543 (S.D.N.Y. 2007) (upholding plaintiffs' claims, including claim for medical monitoring, and concluding that plaintiffs' "allegations of [defendants'] willful and wanton misconduct can be asserted as part of an 'underlying cause of action upon which a demand for punitive damages can be

grounded'" (quoting *Rocanova v. Equitable Life Assurance Soc'y of the U.S.*, 83 N.Y.2d 603, 616, 612 N.Y.S.2d 339, 344, 634 N.E.2d 940, 945 (1994))). *But see Gallien v. Procter & Gamble Pharms., Inc.*, No. 09 Civ. 6903 (JFK), 2010 WL 768937, at *5 (S.D.N.Y. Mar. 5, 2010) (denying punitive damages for medical monitoring because, under Louisiana law, statute must specifically authorize punitive damages and governing statute did not specifically authorize punitive damages in connection with medical monitoring claim); *Trimble v. Asarco, Inc.*, 232 F.3d 946 (8th Cir. 2000) (denying punitive damages for medical monitoring because neither medical monitoring nor punitive damages are cognizable claims under Nebraska law), *abrogated on other grounds by Exxon Mobil Corp. v. Allapattah Servs. Inc.*, 545 U.S. 546, 125 S. Ct. 2611, 162 L. Ed. 2d 502 (2005).

Still other courts have permitted plaintiffs to amend their complaints to add punitive damages claims. *See, e.g., In re Harvey Term Litig.*, 872 So. 2d 584 (La. Ct. App. 2004) (permitting plaintiffs asserting claims for medical monitoring and property remediation to amend complaint to assert facts in support of claim for punitive damages); *Foust v. Southeastern Pennsylvania Transp. Auth.*, 756 A.2d 112 (Pa. Commw. Ct. 2000) (upholding plaintiffs' amended complaint which added class claims for medical monitoring, emotional distress, property damage, and punitive damages).

IV. Allowing Punitive Damages for Medical Monitoring is Consistent with Existing West Virginia Punitive Damages Law

Allowing punitive damages to be recovered in connection with a medical monitoring claim is consistent with West Virginia punitive damages law. Apart from the wrongfulness of the defendant's conduct, a plaintiff seeking punitive damages must prove that the defendant's misconduct caused his/her injury, and the plaintiff must receive an award of compensatory damages for such injury. *See* Syl. pt. 1, *Garnes v. Fleming Landfill, Inc.*, 186 W. Va. 656, 413 S.E.2d 897 (1991); Davis & Palmer, *Punitive Damages Law*, at 7.

In a claim for medical monitoring, both of these criteria are satisfied. First, we recognized in *Bower* that "'the exposure itself and the concomitant need for medical testing constitute the injury.'" *Bower*, 206 W. Va. at 139, 522 S.E.2d at 430 (quoting *Hansen v. Mountain Fuel Supply Co.*, 858 P.2d at 977 (citations omitted)). *Accord State ex rel. Chemtall Inc. v. Madden*, 216 W. Va. at 455-56, 607 S.E.2d at 784-85 (discussing injury in medical monitoring claim as invasion of legally protected interest due to "'significantly increased risk of contracting a particular disease'" (quoting *Bower*, 206 W. Va. at 142, 522 S.E.2d at 433)). Second, a medical monitoring plaintiff is made whole when the defendant is required to pay for his/her medical examinations. *Bower*, 206 W. Va. at 139, 522 S.E.2d at 430. Thus, "[m]edical monitoring . . . [is a] compensable item of damages." *Bower*, 206 W. Va. at 142, 522 S.E.2d at 433. *Accord Fried v. Sungard*

Recovery Servs., Inc., 925 F. Supp. 372, 374 (E.D. Pa. 1996) ("Under the medical monitoring case-law, a plaintiff will only be entitled to medical monitoring if he or she can prove, through reliable expert testimony, that surveillance to monitor the effects of exposure to toxic chemicals is reasonable and necessary. If a plaintiff can make such a showing, *those future medical expenses are simply compensatory damages like any other medical expenses*." (emphasis added) (internal quotations and citation omitted)); *Cook v. Rockwell Int'l Corp.*, 778 F. Supp. 512, 514 (D. Colo. 1991) ("'A medical monitoring claim compensates a plaintiff for diagnostic treatment, a tangible and quantifiable item of damage caused by a defendant's tortious conduct. Such relief is akin to future medical expenses.'" (quoting *Cook v. Rockwell Int'l Corp.*, 755 F. Supp. 1468, 1478 (D. Colo. 1991))).

Moreover, recovery of punitive damages in connection with a claim for medical monitoring in which no present physical injury is manifest but continuous medical testing is needed to determine if and/or when such physical injury will manifest itself is consistent with our allowance of punitive damages in connection with a claim for intentional infliction of emotional distress that requires medical treatment. In *Tudor v. Charleston Area Medical Center, Inc.*, 203 W. Va. 111, 506 S.E.2d 554 (1997), we recognized that an award for intentional infliction of emotional distress damages may have an inherently punitive component, particularly where there exists no present injury and no present treatment is required. However, where treatment is required, emotional distress

damages are more akin to compensatory damages. Thus, an additional award of punitive damages is permissible and is not duplicative.

> In cases where the jury is presented with an intentional infliction of emotional distress claim, without physical trauma or without concomitant medical or psychiatric proof of emotional or mental trauma, i.e. the plaintiff fails to exhibit either a serious physical or mental condition requiring medical treatment, psychiatric treatment, counseling or the like, any damages awarded by the jury for intentional infliction of emotional distress under these circumstances necessarily encompass punitive damages and, therefore, an additional award for punitive damages would constitute an impermissible double recovery. *Where, however, the jury is presented with substantial and concrete evidence of a plaintiff's serious physical, emotional or psychiatric injury arising out of the intentional infliction of emotional distress, i.e. treatment for physical problems, depression, anxiety, or other emotional or mental problems, then any compensatory or special damages awarded would be in the nature of compensation to the injured plaintiff(s) for actual injury, rather than serving the function of punishing the defendant(s) and deterring such future conduct, a punitive damage award in such cases would not constitute an impermissible double recovery.*

Syl. pt. 14, in part, *Tudor*, 203 W. Va. 111, 506 S.E.2d 554 (emphasis added).

In a claim for medical monitoring, ongoing treatment, by way of testing, is required as it is in cases in which an emotional distress plaintiff requires ongoing medical care. Thus, an award for medical monitoring is compensatory in nature insofar as it reimburses the injured plaintiff for the cost of medical testing occasioned by the defendant's wrongful conduct such that an additional award of punitive damages would not be duplicative of the plaintiff's medical monitoring recovery. This reasoning is

consistent with our recognition in *Bower* that no recovery may be had for medical monitoring where no testing is available for the plaintiff's potential injury. *See Bower*, 206 W. Va. at 142, 522 S.E.2d at 433 ("Medical monitoring must be available in order to be a necessary, compensable item of damages. 'If no such test exists, then periodic monitoring is of no assistance and the cost of such monitoring is not available.'" (quoting *Bourgeois v. A.P. Green Indus., Inc.*, 716 So. 2d 355, 361 (La. 1998), *superseded by statute on other grounds as stated in Edwards v. State ex rel. Dep't of Health & Hosps. for Southeast Louisiana State Hosp. at Mandeville, La.*, 804 So. 2d 886 (La. Ct. App. 2001))).

Despite this jurisprudential foundation to support an award of punitive damages for medical monitoring, the majority, instead, has held, in Syllabus point 5, that "[p]unitive damages may not be awarded on a cause of action for medical monitoring." With this holding, the majority has essentially eviscerated any potential recovery of punitive damages not only for medical monitoring claims but also for claims of intentional infliction of emotional distress, effectively overruling Syllabus point 14 of *Tudor*. The holding announced by the majority today fails to distinguish between these two types of claims or to explain why a plaintiff who requires ongoing future medical treatment for emotional distress is entitled to an award of punitive damages but a plaintiff who requires ongoing future medical monitoring for a fatal illness is not entitled to such an award. Both plaintiffs were innocent bystanders of a defendant's *tortious* conduct, and, in both cases, the defendant's conduct was so *egregious* as to require the plaintiffs to require ongoing

future medical care. Yet, the plaintiff receiving medical care to detect whether the defendant's conduct has caused him/her to develop a fatal illness is not entitled to punitive damages. This plaintiff could die as a result of the defendant's conduct, but this Court will not permit either this plaintiff, or his/her estate, to recover damages to punish a defendant who has acted "'maliciously, wantonly, mischievously or with criminal indifference to civil obligations.'" *Peters v. Rivers Edge Mining, Inc.*, 224 W. Va. at ___, 680 S.E.2d at 821 (quoting Syl. pt. 3, in part, *Jopling v. Bluefield Water Works*, 70 W. Va. 670, 74 S.E. 943). Such a result is inconsistent, unfair, inequitable, unjust, and, in a nutshell, just plain wrong.

The net effect of the majority's holding on the principles recognized in *Tudor* will be twofold. First, every plaintiff seeking medical monitoring will necessarily add a claim for intentional infliction of emotional distress to ensure that he/she will be permitted to seek and recover an award of punitive damages. Second, every defendant who is currently embroiled in a lawsuit in which the plaintiff has advanced a claim for intentional infliction of emotional distress and has been awarded punitive damages has been put on alert to appeal the punitive damages award. These defendants will then knock on this Court's door to ask that they be excused from paying punitive damages because the analogous case of *Perrine v. DuPont* holds that punitive damages cannot be awarded for future medical care. Although I do not believe that this upheaval of our punitive damages precedent was intended by the majority of the Court when it rendered its decision in this

case, such is the practical effect of this Court's holding. Therefore, until this Court is presented with the opportunity to revisit either its holding disallowing punitive damages for medical monitoring or its holding allowing punitive damages for intentional infliction of emotional distress, the availability of punitive damages remains uncertain and creates much confusion for members of the bench and the bar alike.

V. Additional Considerations Supporting an Award of Punitive Damages for Medical Monitoring

In addition to this Court's punitive damages law and our prior decision in *Tudor*, additional considerations support the award of punitive damages in connection with a claim for medical monitoring: (1) procedural safeguards that prevent a duplicative, double recovery of punitive damages in a subsequent personal injury action and (2) this Court's allowance of punitive damages in other cases of first impression.

A. Effect of Medical Monitoring Punitive Damages on Subsequent Personal Injury Recovery

As we recognized in *Tudor*, a plaintiff may not twice recover punitive damages for the same injury inflicted by the same defendant. *See* Syl. pt. 14, *Tudor*, 203 W. Va. 111, 506 S.E.2d 554. However, a medical monitoring plaintiff who receives punitive damages and then later has a manifestation of the injury the monitoring is

designed to detect, files suit for such physical injury,[8] and receives an award of compensatory and punitive damages could potentially receive such an impermissible double recovery. Several safeguards are in place, however, to ensure that the injured plaintiff's recovery of punitive damages is not duplicative.

First, the factors to be considered in awarding and reviewing an award of punitive damages requires a consideration of the actions the defendant has taken in mitigation of his/her damages. *See generally* Syl. pts. 3 & 4, *Garnes*, 186 W. Va. 656, 413 S.E.2d 897 (detailing factors for jury and judge to consider in awarding punitive damages). *See also* Davis & Palmer, *Punitive Damages Law*, at 40 (indicating that review of punitive damages award under *Garnes* requires "an examination of any mitigating

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[8]In *Donovan v. Philip Morris USA, Inc.*, the Supreme Court of Massachusetts explained why a plaintiff, who previously had been awarded damages for medical monitoring, is permitted to later assert a personal injury claim against the same defendant when the injury or disease that the medical monitoring had been awarded to detect becomes manifest:

> [T]he single controversy rule would not apply [to a claim for personal injuries following recovery on a claim for medical monitoring to detect such personal injuries] because the subsequent cause of action would not accrue until the disease is manifested. . . . [W]e conclude that, in the context of toxic torts, the single controversy rule does not bar a subsequent action for negligence if one of these plaintiffs actually contracts cancer.

455 Mass. 215, 227, 914 N.E.2d 891, 902 (2009) (citing *Ayers v. Jackson*, 106 N.J. 557, 583-84, 525 A.2d 287, 300 (1987)).

evidence that would permit a reduction in the amount of a punitive damage award"). Therefore, a trial court presiding over a personal injury case in which the plaintiff has previously received punitive damages in his/her medical monitoring suit must consider such damages as a mitigating factor with respect to the amount of punitive damages that may be awarded in the subsequent personal injury case and may have to remit said award to prevent an improper double recovery. *See generally* Davis & Palmer, *id.*, at 40.

Moreover, our holding in *Tudor* specifically directs trial courts to review awards of emotional distress damages and corresponding awards of punitive damages to ensure no impermissible double recovery has occurred:

> Where a jury verdict encompasses damages for intentional infliction of emotional distress, absent physical trauma, as well as for punitive damages, it is incumbent upon the circuit court to review such jury verdicts closely and to determine whether all or a portion of the damages awarded by the jury for intentional infliction of emotional distress are duplicative of punitive damages such that some or all of an award for punitive damages would constitute an impermissible double recovery. If the circuit court determines that an impermissible double recovery has been awarded, it shall be the court's responsibility to correct the verdict.

Syl. pt. 15, *Tudor*, 203 W. Va. 111, 506 S.E.2d 554. A similar standard should be implemented in medical monitoring cases insofar as an award of medical monitoring damages has been observed to inherently contain a deterrence component: "'[T]here is a deterrence value in recognizing medical surveillance claims–allowing plaintiffs to recover the cost of this care deters irresponsible discharge of toxic chemicals by defendants.'"

Bower, 206 W. Va. at 140, 522 S.E.2d at 431 (quoting *Potter*, 6 Cal. 4th at 1008, 25 Cal. Rptr. 2d at 579, 863 P.2d at 824) (additional internal quotations and citations omitted). Such reviews for mitigating factors and duplicity would ensure that a plaintiff will not receive an improper double recover of punitive damages for medical monitoring.

B. Punitive Damages Permitted in Other Cases of First Impression

As support for its decision to deny punitive damages in a claim for medical monitoring, the majority explains that there is "scant authority on this issue." Maj. Op. at 137. Many times throughout the history of this Court, causes of action and theories of recovery presenting matters of first impression have been embraced and adopted. Among these matters of first impression presented for the Court's consideration are numerous causes of action that we have adopted as the law in this State and for which we have permitted the recovery of punitive damages. *See, e.g.*, *Kessel v. Leavitt*, 204 W. Va. 95, 511 S.E.2d 720 (1998) (tortious interference with parental relationship); *Persinger v. Peabody Coal Co.*, 196 W. Va. 707, 474 S.E.2d 887 (1996) (employer's fraudulent misrepresentation of employee's Workers' Compensation claim); *Shamblin v. Nationwide Mut. Ins. Co.*, 183 W. Va. 585, 396 S.E.2d 766 (1990) (insurer's failure to settle claim within policy limits); *Hayseeds, Inc. v. State Farm Fire & Cas.*, 177 W. Va. 323, 352 S.E.2d 73 (1986) (insurer's failure to pay insured's claim), *modified on other grounds by Miller v. Fluharty*, 201 W. Va. 685, 500 S.E.2d 310 (1997); *Harless v. First Nat'l Bank in Fairmont*, 169 W. Va. 673, 289 S.E.2d 692 (1982) (retaliatory discharge); *Sprouse v. Clay*

Communication, Inc., 158 W. Va. 427, 211 S.E.2d 674 (1975) (libel action by candidate for public office); *Sutherland v. Kroger Co.*, 144 W. Va. 673, 110 S.E.2d 716 (1959) (illegal search by private individual). *See also Tudor v. Charleston Area Med. Ctr., Inc.*, 203 W. Va. 111, 506 S.E.2d 554 (1997) (clarifying when punitive damages may be recovered for intentional infliction of emotional distress); *Bullman v. D & R Lumber Co.*, 195 W. Va. 129, 464 S.E.2d 771 (1995) (permitting landowner to recover punitive damages, in addition to treble damages authorized by W. Va. Code § 61-3-48a, for unauthorized destruction or removal of timber and other growing plants). *Cf. Cattrell Cos., Inc. v. Carlton, Inc.*, 217 W. Va. 1, 614 S.E.2d 1 (2005) (permitting imposition of sanctions for party's failure to attend deposition in violation of W. Va. R. Civ. P. 37(d)).

I am not convinced that simply because scant authority exists to support a principle of law that it should, for that reason, be rejected out of hand, particularly when it is well-grounded in this Court's jurisprudence.

VI. Conclusion

In the final analysis, an award of punitive damages to a plaintiff who has prevailed on a claim for medical monitoring is consistent with the punitive damages law of this State. A claim for medical monitoring satisfies the initial punitive damages prerequisites of an injury and an award of compensatory damages. Moreover, various safeguards are already in place to ensure that a plaintiff who has been awarded punitive

damages in connection with his/her medical monitoring claim does not obtain an impermissible double recovery of punitive damages in his/her subsequent personal injury suit in which damages are sought for the injury detected by the medical monitoring.

Although it is a matter of first impression for this Court and is a fairly new theory of recovery nationwide, punitive damages are available for medical monitoring.

> "I am not an advocate for frequent changes in laws and constitutions. But laws and institutions must go hand in hand with the progress of the human mind. As that becomes more developed, more enlightened, as new discoveries are made, new truths discovered and manners and opinions change, with the change of circumstances, institutions must advance also to keep pace with the times[.]"[9]

(Footnote added). Recognition of the right to recover punitive damages for medical monitoring appreciates advances in law, medicine, environmental science, and other fields that enable a plaintiff who has been wrongfully exposed to toxic substances to receive appropriate medical care and to hold the offending defendant accountable for his/her injuries.

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[9] *State ex rel. City of Martinsburg v. Sanders*, 219 W. Va. 228, 235, 632 S.E.2d 914, 921 (2006) (Starcher, J., dissenting) (quoting Thomas Jefferson Memorial, National Mall & Memorial Parks, Washington, District of Columbia, at Southeast Interior Wall (redacted from Letter from Thomas Jefferson to Samuel Kercheval, July 12, 1816)).

While I also "am not an advocate for frequent changes in laws,"[10] I am an advocate for changes in the law that are legally correct and that are supported by the facts and law of a case. In this case, it is inequitable to deny Ms. Perrine and the other Plaintiffs an award of punitive damages for DuPont's egregious conduct that necessitates medical monitoring where both the facts and the applicable law support such an award. Because the majority of the Court has determined otherwise, I respectfully dissent.

[10] *Id.*