Nos. 34333, 34334, and 34335 - *Leonora Perrine; Carolyn Holbert; Waunona Messinger Crouser; Rebeccah Morlock; Antyony Beezel; Mary Montogomery; 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. DuPont 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 dissovled Illinois corporation formerly doing business in West Virginia; and T.L. Diamond Company, Inc, a New York corporation doing business in West Virginia*

FILED
March 26, 2010
released at 3:00 p.m.
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

Workman, Justice, concurring, in part, and dissenting, in part:

While I am in agreement with the thorough, well-researched, and well-reasoned majority opinion regarding the bulk of the issues resolved, I disagree with the majority's conclusion regarding the availability of punitive damages in a medical monitoring cause of action. The majority holds that "[p]unitive damages may not be awarded on a cause of action for medical monitoring." I strongly disagree with this holding as punitive damages should be available in a medical monitoring cause of action, but **only** when the defendant's conduct rises to the level of willful, wanton, and egregious conduct warranting such an award.

The majority reaches its decision by relying upon the reasoning of a separate opinion of Justice Benjamin to the per curiam opinion by the Court in *State ex rel. Chemtall Inc. v. Madden*, 221 W. Va. 415, 655 S.E.2d 161 (2007). In the *Chemtall* separate opinion, in a single paragraph that falls short of a complete analysis of the issue, Justice Benjamin concludes that in a medical monitoring class action, the plaintiffs "have not asserted personal

injury claims, as they have not suffered any actual, present physical injuries from their alleged exposure to petitioners' products" and, therefore, because there are no compensatory damages awarded, and there is no physical injury, there can be no punitive damages awarded. *Id.* at 425, 655 S.E.2d at 171.

Contrary to the separate opinion in *Chemtall*, which serves as the sole basis of the majority's holding in the instant case, this Court in *Bower v. Westinghouse Electric Corp.*, 206 W. Va. 133, 522 S.E.2d 424 (1999), set forth the specific elements[1] which must be proven in order to prevail in a medical monitoring cause of action:

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

[1]Contrary to frequently-made public assertions, there are substantial criteria set forth in *Bower* that must be met before a medical monitoring claim can succeed.

Id. at Syl. Pt. 3.[2] As part of the Court's discussion regarding the "injury" sustained in a medical monitoring cause of action, the Court opined as follows:

> 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." Restatement (Second) of Torts § 7(1) (1964). As one of the first courts to grapple with this subject observed:
>
> > 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.
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> *Friends for All Children, Inc. v. Lockheed Aircraft Corp.*, 746 F.2d 816, 826 (D.C.Cir.1984) (footnote omitted). "Although the physical manifestations of an injury may not appear for years, the reality is that many of those exposed have suffered some legal detriment; the exposure itself and the concomitant need for medical testing constitute the injury." *Hansen v. Mountain Fuel Supply*, 858 P.2d 970, 977 (Utah 1993) (citations omitted). A number of courts have employed similar logic to sustain claims for medical monitoring costs. *See, e.g., Bourgeois v. A.P. Green Indus., Inc.*, 716 So.2d 355, 359 (La.1998); *Potter v. Firestone Tire and Rubber Co.*, 6 Cal.4th 965, 1005, 25 Cal.Rptr.2d 550, 578, 863 P.2d 795, 822-23 (1993) (in bank); *Cook v. Rockwell Int'l Corp.*, 755 F.Supp. 1468, 1477 (D.Colo.1991); *Ayers v. Township of Jackson*, 106 N.J. 557, 601-2, 525 A.2d 287, 308 (1987).
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> The court in *Friends for All Children* gave the following often-quoted hypothetical to illustrate the soundness of permitting recovery for necessary diagnostic testing even in the absence of physical injury:

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[2]A majority of states now recognize medical monitoring claims. However, there is a split in those that recognize the claim in the absence of a present physical injury and those that recognize the claim when accompanied by a physical injury. Joseph K. Hetrick and Allison M. Brown, *Cause of Action for Medical Monitoring Relating to the Use of Medical Devices and Prescription Drugs*, 34 COA2d 249, §§ 7 and 8 (2007).

> Jones is knocked down by a motorbike which Smith is riding through a red light. Jones lands on his head with some force. Understandably shaken, Jones enters a hospital where doctors recommend that he undergo a battery of tests to determine whether he has suffered any internal head injuries. The tests prove negative, but Jones sues Smith solely for what turns out to be the substantial cost of the diagnostic examinations.

Id. Thus, it logically follows that a plaintiff asserting a claim for medical monitoring costs is not required to prove present physical harm resulting from tortious exposure to toxic substances.

> Nor is the plaintiff required to demonstrate the probable likelihood that a serious disease will result from the exposure. As the Third Circuit indicated in *Paoli I*, "the appropriate inquiry is not whether it is reasonably probable that plaintiffs will suffer [physical] harm in the future, but rather whether medical monitoring is, to a reasonable degree of medical certainty, necessary in order to diagnose properly the warning signs of disease." 916 F.2d at 851. *See also* 2 Dan B. Dobbs, *Law of Remedies* § 8.1(3), at 380 n.30 (2d ed. 1993) ("diagnosis expenses-medical monitoring-may be both reasonable and reasonably certain to occur in the future, even if the disease it is intended to diagnose is not reasonably certain to occur").

Bower, 206 W. Va. 139-40, 522 S.E.2d 430-31. Subsequently, in *State ex rel. Chemtall Inc. v. Madden*, 216 W. Va. 443, 607 S.E.2d 772 (2004), the Court determined that the circuit court erred in its conclusion that the statute of limitations had not begun to run in that case. While the circuit court found that the plaintiffs had not suffered an injury, this Court disagreed and stated that

> [t]he circuit court apparently reasoned that no statute of limitation applies to a medical monitoring claim because the cause of action has not yet accrued, i.e., there is not yet an injury. This is incorrect. "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 claims 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.

Chemtall, 216 W. Va. at 455-56, 607 S.E.2d at 784-85.

Consequently, there is support in West Virginia's jurisprudence to conclude that a valid medical monitoring claim **does** constitute an injury, just like any other tort. Further, when a plaintiff proves the necessary elements of a medical monitoring cause of action, the damages that are awarded are compensatory damages. As the Court stated in *Bowyer*,

> a claim for medical monitoring is essentially "a claim for future damages." *Ball v. Joy Tech., Inc*., 958 F.2d 36, 39 (4th Cir.1991). Consequently, we resort to elementary principles of tort law to determine whether medical monitoring is a proper subject of compensatory damages.
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> Since before the turn of the century, this jurisdiction sanctioned the recovery of future medical expenses where a plaintiff could prove with reasonable certainty that such costs would be incurred as a proximate consequence of a defendant's tortious conduct.

206 W. Va. 139, 522 S.E.2d 430.

When a plaintiff has sustained an injury and has been awarded compensatory damages in conjunction with his medical monitoring cause of action, his pursuit of punitive damages is warranted so long as the defendant's conduct is sufficiently willful and egregious to support such an award. The Court has long recognized that compensatory damages must be returned by a jury prior to an award of punitive damages and that "[p]unitive damages

must bear a reasonable relationship to the potential of harm caused by the defendant's actions." Syl. Pt. 1, *Garnes v. Fleming Landfill, Inc.*, 186 W. Va. 656, 413 S.E.2d 897 (1991). Further, the Court explained this procedure in syllabus point seven of *Alkire v. First National Bank of Parsons*, 197 W.Va. 122, 475 S.E.2d 122 (1996) :

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

197 W.Va. 122, 475 S.E.2d 122.

To that end, the first inquiry necessarily focuses upon a defendant's conduct. In syllabus point four of *Mayer v. Frobe*, 40 W.Va. 246, 22 S.E. 58 (1895), the Court held that "[i]n actions of tort, where gross fraud, malice, oppression, or wanton, willful, or reckless conduct or criminal indifference to civil obligations affecting the rights of others appear, or where legislative enactment authorizes it, the jury may assess exemplary, punitive, or vindictive damages; these terms being synonymous." The Court has further instructed in *Peters v. Rivers Edge Mining, Inc.*, 224 W. Va. 160, 680 S.E.2d 791 (2009), that

> "[t]o sustain a claim for punitive damages, the wrongful act must have been done maliciously, wantonly, mischievously, or with criminal indifference to civil obligations. A wrongful act, done under a bona fide claim of right, and without malice in any form, constitutes no basis for such damages." Syl. pt. 3, *Jopling v. Bluefield Water Works & Improvement Co.*, 70 W.Va. 670, 74 S.E. 943 (1912).

224 W. Va. at ___, 680 S.E.2d at 821. It is also significant that the generally accepted law of this country is that "[p]unitive damages are damages, other than compensatory or nominal damages, awarded against a person to punish him [or her] for his outrageous conduct and to deter him and others like him from similar conduct in the future." Restatement (Second) of Torts § 908(1) (1979).

Thus, medical monitoring cases, just like any other action in tort, should be susceptible to an award of punitive damages **if and only if** the conduct of the defendant or defendants is willful, wanton, reckless, and done knowingly in disregard of the right to human health. Just as in other types of cases, the right to an award of punitive damages should be available only when a defendant is guilty of extreme and egregious bad conduct. It is the exception, not the rule, as the level of bad conduct on the part of a defendant must be very high in order to meet the punitive standard.

* * *

Turning to the issue of whether punitive damages were justified in the instant case, it has long been held that "factual findings made by the trial court are given great deference by this Court and will not be overturned unless they are clearly erroneous." *CMC Enterprise, Inc. v. Ken Lowe Management Co.*, 206 W.Va. 414, 418, 525 S.E.2d 295, 299 (1999). In this case, the circuit court's February 25, 2008, thorough and lengthy order

provided a mountain of factual findings detailing DuPont's wanton, reckless, and willful conduct justifying the underlying punitive damages award.

As long ago as 1919, Grasselli, which later merged with and became a subsidiary of DuPont, commissioned a study of the surrounding communities to investigate the effects of smelter emissions. The resulting study, *Report of Investigation of Conditions Affecting the Growth of Plants and Animals in the Vicinity of the Meadowbrook Zinc Works of the Grasselli Chemical Company*, concluded that livestock, plants, and soil in the area were being adversely impacted by the smelter emissions. As the circuit court explained,

> [s]pecifically, the report noted that emissions from the smelter were having deleterious effects, such as blight to surrounding pasture grass, fruit trees and other vegetation and sick and dying livestock, on properties withing three miles of the plant in all directions and within five miles in a north northeast and northeast direction. Clearly the plant's emissions were a threat to the health and safety of the surrounding community. The investigators predicted that the effects from the continued operation of the smelter would be felt at increasingly greater distances and would 'become apparent as far north as Shinnston and probably for a considerable distance beyond.'

The circuit court found that in spite of the dire warnings contained in the 1919 study, Grasselli and DuPont continued to operate the plant for another thirty years, full-time, with the on-site waste pile "dramatically increasing" as emissions into the surrounding communities were significant. The circuit court also pointed to the release of arsenic, which was identified as a component of smoke from smelters, and its known effects on human health. Likewise, it recognized the fact that both Grasselli and DuPont had technical

expertise in a variety of areas which would have allowed them to fully understand their own processes and what the effects of the waste and emissions would be on the environment, animals, humans, and the surrounding areas.

In spite of complaints by neighbors about the pollution and contamination as early as 1914, and in spite of an expert witness who confirmed the existence of arsenic in the zinc dust as well as on the neighboring properties,[3] Grasselli and DuPont ignored reasonable solutions to deal with the dangerous emissions. For example, in 1927, Grasselli considered installing a Cottrell electrostatic precipitator system to control emissions, a technology being used at other smelters across the company; however, as the circuit court explains, "Grasselli rejected it because it did not appear profitable nor would it pay for itself, [and, instead,] Grasselli and DuPont simply continued depositing emissions on neighboring properties and building its mountain of waste." The circuit court pointed out that: "Despite this knowledge of emissions and a way to control them, Grasselli elected to simply continue production and fight the lawsuits with a public relations campaign that included threatening the community with a loss of jobs."

While DuPont purchased the smelter and Grasselli became a division of DuPont, the existing management did not change and the Grasselli-DuPont smelter continued

[3]This expert testified as a part of a 1919 lawsuit initiated by the surrounding residents of the Spelter smelter site.

business as usual. Throughout the years, DuPont installed new furnaces allowing for greater and more efficient production; yet it chose not to bother to install emission control or other pollution devices. Rather, in spite of the ongoing lawsuits and the 1919 report, *supra*, the circuit court enunciates that DuPont "produced at maximum capacity, dumping the waste behind and beside the plant [even though it] was well aware that it was polluting its neighbor's property."

The circuit court also declared that in late 1949 or early 1950, DuPont ordered and performed a company-wide pollution survey and that "[t]he documents suggest that DuPont was aware of its need to implement and update air and water pollution controls but that certain divisions either could not or would not request the funds necessary to implement the controls." Moreover, as of 1950, DuPont was only spending $8,200.00 per year for air pollution control at the smelter, while internal documents estimated the cost of future air pollution control necessary to bring the smelter in conformance with governmental standards to be $325,000.00. The circuit court notes, "[d]uring its ownership, despite its policy encouraging the abatement of air pollution and despite the dangerous emissions being deposited on its neighbors' lands, DuPont took no steps to control the pile or institute emissions controls at the smelter." The circuit court further found that:

> Rather than making the necessary projected investment of $325,000, DuPont elected to sell the plant, knowingly leaving behind a plant that had been emitting toxic metals throughout the surrounding community for over 40 years and leaving behind a burning mountain of waste that would continue to pollute the surrounding communities with dangerous heavy metals. Without so much

> as a warning to the residents or the dangers raining down on them, DuPont sold the plant and did not return to Spelter until 1979 or 1980.

The circuit court also discussed DuPont's "inactive site-review" in response to federal legislation wherein it was attempting to inventory sites that might be hazardous. One area of interest was the safety of a playground adjacent to the smelter–a playground separated from the plant and waste pile only by a chain link fence. The proximity of the playground to the smelter raised questions among the DuPont management about the safety of the site as evidenced by an internal memorandum wherein it asked:

> Was any waste containing cadmium and/or arsenic deposited on the property converted to the playground? We have no information from which to answer this question. Therefore, I recommend that we contact The Meadowbrook Corporation to determine any information they may have on past waste disposal practices at the site. It would be appropriate to simultaneously inform the Board of Education of our interest.

The circuit court states that there is no record of DuPont actually contacting The Meadowbrook Corporation or taking any action to warn the residents of the dangers posed by the contaminants from the smelter. The circuit court further explained that:

> Although at least two DuPont scientists recognized that the playground had been built over residue from the smelter, DuPont ultimately took no steps to identify the contents of the residue or to even look beyond the chain-link fence. Instead, DuPont's Real Estate Division was instructed to 'monitor the school playground adjacent to our formerly owned plant in Spelter, West Virginia (now owned by Meadowbrook Corporation) at least once a year to confirm that it is in continued use as a play area by the local population.' Any further steps to minimize the risk would have required DuPont perform a comprehensive sampling program. Not only did DuPont fail to perform a comprehensive sampling program of the site, DuPont did not bother to follow up on its scientists' recommendation that the site be examined on an annual

> basis or even to contact The Meadowbrook Corporation to alert it of risks involved with the waste.

As recognized by the circuit court's findings, DuPont did not take any further action at the site, including the playground, until 1996 when regulators from the EPA put DuPont on notice of its potential environmental liability. DuPont received an EPA "Imminent Hazard" letter notifying it of its potential environmental liability for the Spelter site. As the circuit court explained, DuPont began to be concerned that the Spelter site would be listed on the National Priority List of the EPA and be declared a Superfund site, and in spite of its acknowledgment that "offsite soils data indicates elevated levels of Zn, As and Pb in residential backyards," DuPont responded with a policy of containment, "trying to limit any remediation to on-site remediation, and 'managing the regulatory process' to stay off the National Priority List and 'managing public relations . . . to prevent potential legal, tort and/or public issues."

DuPont's internal emails reflect its knowledge of the waste pile, observing that it was "irresistible to children" and a common recreation area, and that the waste from the pile was discharging heaving metals into the West Fork river. In spite of such knowledge, the circuit court found that DuPont's plan for avoiding costly remediation, according to the director of the DuPont division responsible for environmental liability and remediation, was "to do as little as possible . . . and the site may just go away."

The circuit court also included citation to numerous DuPont internal emails that reflected its knowledge that heavy metals had leaked from the site to the surrounding areas. It further pointed out that governmental regulatory agencies also told DuPont that there was off-site contamination. For example, in 1996, the EPA told DuPont that "a threat to public health or welfare or the environment exists at the Spelter Smelter Site." The EPA recommended that the site be considered "an imminent and substantial endangerment to the public health or welfare or the environment because of an actual or threatened release of a hazardous substance at/or from the Site." The EPA stated that "initial data indicates significant offsite exposure either by runoff or wind borne emissions" and specifically instructed DuPont to "establish adequate site security to eliminate the potential for trespassing." Despite this instruction, DuPont failed to secure the site for several more years.

The circuit court order also determined that the EPA was not the only agency that informed DuPont of the offsite health risks. In fact, the DEP informed DuPont that "[e]ach day, large quantities of heavy metal particulates and metal fumes are exhausted into the Spelter community atmosphere." The DEP further informed DuPont that residential wells had significantly elevated levels of arsenic, cadmium and lead. As the circuit court explains, "instead of taking action to remediate the class area, DuPont used the well-water tests as an opportunity to continue to tell the residents of the class area that there was nothing about which to be concerned."

The circuit court also detailed DuPont's special concern and attempt to avoid having the site listed by the EPA on the National Priorities List, which would cause greater costs and the loss of control of the site. As the circuit court explained, "DuPont was confident in its ability to influence and control the actions of the West Virginia DEP, primarily because of its connections with the DEP. . . ." Throughout this process, DuPont continued to stress the need to "manage the regulatory process" to "stay off NPL" as DuPont affirmatively reached out to the DEP feeling it could "reach relatively quick agreement with DEP" and "give them the environmental victory that they need." As DuPont concluded, having the site in the hands of the DEP would "get us working towards the clearly lowest cost and protective [to DuPont] option." DuPont stated that "state control, using voluntary, risk-based remediation would potentially save tens of millions of $."

In its continued quest to ignore off-site contamination and to stay off the EPA's National Priorities List, DuPont worked a plan to enroll the Spelter smelter in the West Virginia "Voluntary" Remediation Program, wherein DuPont's obligation was simply to investigate and remediate "the site." By definition, the "site" included only the actual smelter property and did not include any property outside the boundary of the smelter. DuPont then hired licensed remediation specialists who, according to the circuit court, "would ignore their obligation to the community and protect DuPont's desire to keep the off-site property from being remediated or even tested." DuPont sought licensed remediation specialists who understood DuPont's point of view, were loyal, and would "stay on the

reservation." The circuit court concluded that one such specialist's "company was selected, at least in part, because he had previously 'affirmed his loyalty to DuPont.'" DuPont questioned whether [the specialist] was "willing to stretch his neck out for DuPont?", while DuPont's in-house counsel opined that he had "every reason to preserve his relationship with DuPont, I see no risk of him going off our view of the reservation."

The circuit court then outlined DuPont's selection of contractors who were willing to manipulate the data in an effort to stay on-site with any remediation efforts. For example, the circuit court said,

> [i]n fact, so determined was DuPont to guard against the possibility of off-site testing (and any resulting remediation) that when one of DuPont's contractors collected a soil sample from off-site, he was told by DuPont manager, Sathya Yalvigi, in no uncertain terms that the soil sample should not be analyzed. The soil sample remains in DuPont's possession to this day.

The circuit court also described DuPont's strategy to limit remediation to on-site as dovetailing nicely "with a corporate strategy that called for limiting and controlling information." The circuit court found that DuPont accomplished its corporate strategy of limiting public interest, in part, with misleading newsletters, and manipulation and control of regulatory agencies. It said that DuPont's strategy was called "Connecting the Dots" and was a corporate policy of containment to shield DuPont from the "Plaintiffs' bar, local environmental & environmental justice activists, community advocates, media . . . Government Agencies . . . [and] national/international environmental." DuPont constructed

a team whose primary objective was to "minimize the potential for issues/dots to be connected" meaning to minimize the dissemination of information and, ultimately, to thwart toxic tort claims. The circuit court explained that "Connecting the Dots" is, literally, a power point slide show used during a DuPont meeting to discuss management of environmental trouble-spots at various plant sites. DuPont adopted such a policy to avoid tort liability, avoid cleaning up its environmental mess, and to maximize its profits.

The circuit court specifically found that DuPont prevented class members from connecting the dots by "limiting the information it gave to the class, providing with half-truths and omitting important information [and that] in its quest to contain its liability for remediation, DuPont misled the community concerning the potential dangers of contamination." The circuit court explained:

> For example, in 2001, DuPont began disseminating public information, in the form of a newsletter, stating that smelter emissions did not pose any off-site risk. DuPont's newsletter stated that "[t]he current sampling data and risk assessment indicate that there is no current risk to the Spelter community from off-site releases." DuPont's newsletter goes on to state that "properties in the Town of Spelter have not been impacted by the site and that the site should not diminish property values." As support for its position, DuPont relied upon a letter from DEP that had been conceived by DuPont's internal team in charge of managing the Spelter smelter site."

The circuit court further detailed DuPont's 2001 response to a notice from the DEP that the groundwater near the smelter had been contaminated with high levels of arsenic, cadmium and lead and the smelter was the cause of the contamination. DuPont, through its consultants, told the Spelter community residents that their wells needed to be capped

because they had "not [been] properly abandoned in accordance with current guidelines and rules put in place by the West Virginia Bureau for Public Health, Office of Environmental Health Services and the Harrison County Health Department." As the circuit court points out, "[u]sing this catastrophe as a public relations event, DuPont touted the well-capping 'as a service to the Spelter community and at no cost to you. . . .' DuPont, however, neglected to mention the real reason for the capping was that it had contaminated the groundwater with unacceptable levels of arsenic, cadmium and lead."

The circuit court further explained that DuPont devised talking points for its employees answering questions about capping the wells and that its answers were evasive and misleading, designed to keep people from learning about the real risks associated with the potential exposure to arsenic, cadmium and lead." The circuit court outlined numerous talking points devised by DuPont for employees to use when speaking with anyone regarding the plant. The circuit court also provided examples of DuPont "affirmatively [lying] to the media and the residents of the class area." For example, DuPont stated to the residents of the class area, "[w]e have no evidence that health problems could be caused by the site." Moreover, in a community newsletter, DuPont told the residents that "[t]he current sampling data and risk assessment indicate that there is no current risk to the Spelter community from off-site releases."

Based on this extensive record, the circuit court found that the evidence supported the underlying verdict relating to punitive damages. It explained that the jury found that DuPont intentionally acted with disregard to a known risk with the high probability that harm would follow, and that DuPont knew or should have known of the risks attendant to its conduct. The circuit court further concluded:

> Despite this knowledge and the obvious needs to abate the air pollution, DuPont made no effort to implement any air pollution controls. Instead, DuPont simply continued smelting zinc at full-capacity. Finally, when it appeared that DuPont could no longer avoid allocating money for air pollution controls, DuPont sold the smelter and left town. At a minimum, DuPont's conduct of knowingly disposing of huge piles of zinc tailing containing toxic wastes on its property and consciously discharging those same toxins into the air from its smoke stacks rises to the level of intentional, wanton, and reckless conduct.

In its meticulously detailed order, the circuit court found that DuPont was aware of the health hazards of arsenic, cadmium and lead, deliberately misinformed the community residents, refused to inform the members of the class of the offsite contamination and the threats to their health, and continuously refused to address the off-site contamination issue. The circuit court outlined a pattern of behavior throughout a ninety-year period that was unconscionable. In consideration of all of the above, there was certainly a multitude of facts and circumstances justifying the underlying punitive damages award.

Upon review of the circuit court's order and the findings of fact therein, it is abundantly clear that the court did not abuse its discretion in determining that the conduct

of the defendants in the instant case warranted the award of punitive damages that was made by the jury.

* * *

Perhaps most importantly, as recognized in the Restatement of Torts, *supra*, and extensive case law across the country, one of the primary purposes of punitive damages is to send a message to those who willfully, flagrantly, and knowledgeably harm others that, as a matter of public policy, such conduct will not be condoned in an organized, civilized society. However, in a case where there is not yet evidence of actual physical injury, there is concern that a punitive damages award could be characterized as a "windfall" for such plaintiffs who have not yet exhibited physical injury.

Recognizing that medical monitoring claims are unique from typical tort cases, in that actual physical injury may not yet be present, it may be time to consider whether in a medical monitoring case, punitive damages, or a part thereof, should be directed into a fund to remediate and correct similar damages and/or to hold in trust for plaintiffs who actually do ultimately suffer significant physical injury as a result of the defendant's conduct. As the Court reasoned in *Dardinger v. Anthem Blue Cross and Blue Shield*, 781 N.E.2d 121 (Ohio 2002):

> There is a philosophical void between the reasons we award punitive damages and how the damages are distributed. The community makes the statement, while the plaintiff reaps the monetary award. Numerous states have formalized through legislation a mechanical means to divide a punitive damages award between the plaintiff and the state. In some states, the state's portion goes to a special fund, in others, to the general fund. Annotation (1993), 16 A.L.R. 5th 129. In Ohio, punitive damages are an outgrowth of the common law. *Roberts v. Mason* (1859), 10 Ohio St. 277, 1859 WL 78; *Saberton v. Greenwald* (1946), 146 Ohio St. 414, 32 O.O. 454, 66 N.E.2d 224; *Preston v. Murty* (1987), 32 Ohio St.3d 334, 512 N.E.2d 1174. Therefore, Ohio's courts have a central role to play in the distribution of punitive damages. Punitive damages awards should not be subject to bright-line division but instead should be considered on a case-by-case basis, with those awards making the most significant societal statements being the most likely candidates for alternative distribution.

781 N.E.2d at 145-46 (directing that a portion of punitive damages go to a state institution and specifically a cancer research fund at Ohio State University).

In holding that punitive damages are never available in a medical monitoring claim, the majority has removed a very strong deterrent to the type of unconscionable conduct that would treat the most basic human right to health and life as if it were meaningless. The people of West Virginia should have a fundamental right to be free from having toxic substances, which the depositor thereof **has knowledge** are likely to cause serious illness and death, rained upon them in a manner that can be characterized as callous, ruthless, wanton, willful, or reckless. As this Court recognized as early as 1895, this type of gross indifference to civil obligations affecting the rights of others should be subject to an assessment of punitive damages. *Mayer v. Frobe*, 40 W.Va. at 247, 22 S.E. at 58, Syl. Pt. 4. Now that the majority has removed the potential for punitive damages from a medical

monitoring claim, there is no deterrent to the type of willful, wanton, and egregious conduct demonstrated by the defendants in this case. Thus, any concern about sanctions for knowingly engaging in conduct that threatens human life has become a much smaller factor in the equation used for determining the profit margin for that activity.