

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

CHEMTALL INC., et al.,

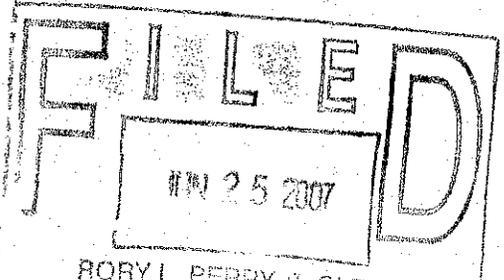
Petitioners,

v.

THE HONORABLE JOHN T. MADDEN,  
et al.,

Respondents.

No. 33380



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MEMORANDUM IN OPPOSITION TO PETITION FOR  
WRIT OF PROHIBITION AND/OR MANDAMUS

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Respondents.

**MEMORANDUM IN OPPOSITION TO PETITION FOR  
WRIT OF PROHIBITION AND/OR MANDAMUS**

Respondents (Plaintiffs and Intervenors in the Circuit Court), through their undersigned counsel, hereby show cause why a writ of prohibition and/or mandamus should not issue in the above-captioned action, as follows:

**INTRODUCTION**

This is a class action seeking medical monitoring for serious latent diseases caused by exposure to acrylamide, a byproduct of a chemical used in treatment of coal and water.<sup>1</sup> This Court has previously issued two decisions concerning the underlying action: First, in *State ex rel. Chemtall, Inc. v. Madden*, 216 W. Va. 443, 607 S.E.2d 772 (2004), this Court vacated a seven-state class certification that included some states that do not recognize medical monitoring, and directed the Circuit Court to consider whether material conflicts in the applicable law would preclude common adjudication of cases arising in the different states. Second, in *Stern v. Chemtall, Inc.*, 217 W. Va. 329, 617 S.E.2d 876 (2005), this Court reversed the Circuit Court's denial of

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<sup>1</sup> See *Stern v. Chemtall, Inc.*, Civil Action No. 03-C-49M (Circuit Court of Marshall County).

intervention sought by coal treatment workers Franklin Stump and Danny Gunnoe (the "Coal Intervenors"), who were parties to a prior pending acrylamide suit,<sup>2</sup> and water treatment worker Teddy Joe Hoosier (the "Water Intervenor"), explaining specifically why the Coal Intervenors must be permitted to intervene.

Following remand, on January 9, 2007 the Circuit Court entered an Intervention Order which permitted intervention by both the Coal Intervenors and the Water Intervenor. On the same day, the Circuit Court entered a Trial Plan Order which (i) extensively analyzed the medical monitoring law of West Virginia and Pennsylvania,<sup>3</sup> concluding that there were not such material differences as to preclude common adjudication "with the help of proper instructions to address any dissimilarities"; and (ii) provided for bifurcation of liability and punitive damages multiplier from causation and medical monitoring damages.

In the present proceeding, Petitioners (Defendants in the Circuit Court) seek a writ of prohibition and/or mandamus, on the asserted grounds that (a) the Intervention Order improperly permitted the Water Intervenor to participate in the action; (b) use of a punitive damages multiplier in a medical monitoring case is unconstitutional; and (c) West Virginia and Pennsylvania medical monitoring law are too different to be tried together. It is Respondents' position that the requested writ should be denied because (a) this Court's intervention decision did not prohibit the Circuit Court from permitting the Water Intervenor to participate; (b) use of a punitive damages multiplier in a medical

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<sup>2</sup> See *Pettry v. Peabody Holding Co.*, Civil Action No. 02-C-58 (Circuit Court of Boone County).

<sup>3</sup> Plaintiffs had previously withdrawn claims arising under the laws of states other than West Virginia and Pennsylvania.

monitoring case is constitutionally permissible; and (c) West Virginia and Pennsylvania medical monitoring law are sufficiently compatible to permit common adjudication.

### ARGUMENT

**A. This Court's Intervention Decision Did Not Prohibit the Circuit Court from Permitting the Water Intervenor to Participate.**

This Court's opinion with respect to intervention focused primarily on the two coal treatment workers, and did not squarely address Mr. Hoosier's claimed right to intervene on behalf of water treatment workers. Based on their parsing of the opinion, Petitioners contend that the Circuit Court directly contravened this Court's mandate by permitting Mr. Hoosier to intervene.

Petitioners' contention overlooks two crucial points. First, this Court reversed the entirety of the Circuit Court's prior order denying intervention, rather than reversing in part as to the Coal Intervenors and affirming as to the Water Intervenor. The focus on the Coal Intervenors in this Court's opinion does not serve to alter its mandate, which was a straightforward, unequivocal reversal as to all parties. Even if this Court's opinions should be read as altering the Court's express disposition of cases, such an alteration should not be inferred from mere emphasis or omission in an opinion. Here, there was nothing in this Court's mandate or its opinion that clearly informed Mr. Hoosier that, notwithstanding the express reversal of the Order from which he appealed, he was actually a losing Appellant with the same result for him as if the Order had been affirmed.

Second, even if this Court's ruling was not intended to require the Circuit Court to allow Mr. Hoosier's intervention, there is nothing in the mandate or opinion that could fairly be interpreted as forbidding permissive intervention. In the absence of such a

prohibition, the background rule leaves such decisions to the sound discretion of the Circuit Court. See W. Va. R. Civ. P. 24. In view of the authority conferred by Rule 24, Petitioners are simply wrong when they charge that the Circuit Court has exceeded its jurisdiction.

Petitioners make no showing that the Circuit Court's allowance of intervention amounted to an abuse of its discretion. Petitioners argue that the common questions and efficiencies identified in this Court's intervention opinion do not apply to water treatment workers. Respondents disagree, and the Circuit Court also disagreed. Despite any differences in the industrial setting, it seems clear that medical monitoring claims of coal and water treatment workers present at least some questions of fact in common - such as, whether acrylamide monomer is hazardous, whether Defendants knew or should have known of the hazard, whether exposure creates a risk of sustaining a serious latent disease, whether a monitoring regime exists for the detection of such disease, etc. See generally *Bower v. Westinghouse Electric Corp.*, 206 W. Va. 133, 522 S.E.2d 424 (1999). Moreover, many questions of law involving the elements of a monitoring claim and any defenses thereto - such as the questions identified by Petitioners and the Circuit Court in comparing West Virginia and Pennsylvania law - are also common to the claims of coal and water treatment workers. The presence of any such common question of law or fact is sufficient to warrant permissive intervention in the discretion of the Circuit Court under Rule 24(b).

Finally, if Petitioners believe they are prejudiced by specific aspects of the Trial Plan Order as it relates to the claims of water treatment workers, they should present their concerns in the first instance to the Circuit Court. This Court should not be

required to engage in advance micro-management of case administration issues.

**B. Use of a Punitive Damages Multiplier in a Medical Monitoring Case Is Constitutionally Permissible.**

This Court has previously upheld bifurcated trial plans that involve application of a punitive damages multiplier determined in the initial liability trial phase to compensatory damages to be determined in a second phase.<sup>4</sup> Petitioners do not ask this Court to revisit that approval now. Instead, they argue that a different result is dictated here by the fact that the plaintiffs have not yet sustained a physical injury, and thus are seeking only a medical monitoring remedy rather than personal injury damages. Specifically, Petitioners argue first, that punitive damages must be based on harm done to others rather than to the plaintiff class, in violation of *Philip Morris v. Williams*, \_\_\_ U.S. \_\_\_, 2007 WL 505781 (Feb. 20, 2007); and second, that in a medical monitoring case there are no compensatory damages against which to assess the proportionality of a punitive damages award. These arguments will be addressed *seriatim*.

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<sup>4</sup> See, e.g., *State ex rel. Appalachian Power Co. v. MacQueen*, 198 W. Va. 1, 479 S.E.2d 300 (1996). Such a bifurcated procedure has also been repeatedly endorsed by the federal courts. See, e.g., *Watson v. Shell Oil Co.*, 979 F.2d 1014, 1019 (5th Cir. 1992), *rehearing en banc granted*, 990 F.2d 805 (5th Cir. 1993) (approving determination in liability phase of "a basis for assessment of punitive damages in the form of a ratio"); *In re Fibreboard*, 893 F.2d 706, 708, 712 (5th Cir. 1990) (approving separate trial phase for determination of punitive damages multiplier); *Jenkins v. Raymark Industries, Inc.*, 782 F.2d 468, 474 (5th Cir. 1986) (rejecting contention that "punitive damages cannot be determined separately from actual damages", and upholding separate trial for determination of liability issues including liability for punitive damages). The Fifth Circuit explained that because the "purpose of punitive damages is not to compensate the victim but to create a deterrence to the defendant . . . . The focus is on the defendant's conduct, rather than on the plaintiff's." *Jenkins*, 782 F.2d at 474. See also *Watson*, 979 F.2d at 1019 ("It need hardly be emphasized that the punitive damages inquiry -- unlike that for compensatory damages -- focuses primarily on the egregiousness of the defendant's conduct.").

**1. Use of a multiplier assures the constitutionally-required basis of punitive damages in a compensatory award.**

In *Williams* the United States Supreme Court held that punitive damages may not be predicated on harm suffered by non-parties to the action in which the damages are awarded. This holding is fully consistent with this Court's jurisprudence, which has long held that a punitive damages award must be reasonable in proportion to the compensatory damages awarded in the same case. See, e.g., *Games v. Fleming Landfill*, 186 W. Va. 656, 668, 413 S.E.2d 897, 909 (1991) ("As a matter of fundamental fairness, punitive damages should bear a reasonable relationship to compensatory damages.").

Petitioners argue that the Circuit Court's Trial Plan violates *Williams* because, since the plaintiffs herein have sustained no personal injury, a contemplated punitive damages award *must* be predicated on injury suffered by others. This argument ignores the inexorable operation of the punitive damages multiplier: if plaintiffs are awarded no compensatory damages, they will receive no punitive damages; any multiplier applied to zero compensatory damages yields zero punitive damages. And as long as harm suffered by non-parties is not included in a compensatory award, it will not enter into a punitive award either.

The source of Petitioners' confusion in this regard appears to be their failure to understand that the compensatory award to which a multiplier will be applied is not compensation for physical injury, but rather, as discussed below, it is compensation for the cost of monitoring made necessary by Defendants' misconduct.<sup>5</sup> Because the need

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<sup>5</sup> Such confusion gives point to this Court's observation that "[m]atters such as . . . the use of a punitive damage multiplier, given the unresolved nature of the use of such

for monitoring and the resulting cost falls directly upon the as-yet physically uninjured plaintiff, application of a punitive multiplier to that cost is necessarily and directly based upon the (financial) harm to the plaintiff, rather than on any risk or harm to non-parties.

**2. Punitive damages are permissible in a medical monitoring case.**

Petitioners argue that in a pure medical monitoring claim, the plaintiffs have sustained no injury and thus there will be no compensatory damages against which to measure the reasonableness of a punitive award. This argument fundamentally misapprehends the nature of a medical monitoring cause of action. The plaintiffs in such an action have sustained a compensable injury, but it is a financial injury comprised of the expense of required monitoring, rather than a physical injury.

In *Bower*, 206 W. Va. at 139, 522 S.E.2d at 430, this Court explained that “[t]he ‘injury’ that underlies a claim for medical monitoring . . . is ‘the invasion of any legally protected interest’”. The Court then identified the interest at stake: “It is difficult to dispute that an individual has an interest in avoiding expensive diagnostic examinations . . . . When a defendant negligently invades this interest, . . . it is elementary that the defendant should make the plaintiff whole by paying for the examinations.” *Id.* (quoting *Friends for All Children, Inc. v. Lockheed Aircraft Corp.*, 746 F.2d 816, 826 (D.C. Cir. 1984)). See also *Bower*, 522 S.E.2d at syl. pt. 2 (“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.”).

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mechanisms, can be better addressed by this Court upon appeals taken from final orders.” *State ex rel. Mobil Corp. v. Gaughan*, 211 W. Va. 106, 113, 563 S.E.2d 419, 426 (2002).

Thus, Respondents' claim in this action is for the recovery of monitoring expenses, which, in "making the plaintiff whole", is compensatory in nature. There is no reason that a punitive multiplier may not be applied to such a compensatory award, in keeping with established practice in other tort cases.

**C. West Virginia and Pennsylvania Medical Monitoring Law Are Sufficiently Compatible to Permit Common Adjudication.**

Respondents believe that Petitioners are simply wrong when they claim that West Virginia and Pennsylvania law differ in any meaningful way with respect to the elements of a medical monitoring claim. In *Bower*, 206 W. Va. at 141, 522 S.E.2d at 432, this Court expressly recognized that it was adopting the same formulation as that adopted by the Pennsylvania Supreme Court in *Redland Soccer Club, Inc. v. Dep't of the Army*, 548 Pa. 178, 696 A.2d 137 (1997). The principal purported difference to which Petitioners allude -- that Pennsylvania requires negligence rather than permitting monitoring as a remedy in a strict liability case -- simply mischaracterizes Pennsylvania law. Indeed, the case of *Simmons v. Pacor*, 674 A.2d 232, 239-40 (Pa. 1996), in which the Pennsylvania Supreme Court first recognized the viability of a medical monitoring remedy in the absence of compensable present injury, was itself a strict liability case. Respondents suggest that Petitioners' position, based on lower court holdings and *dicta*, will not ultimately prevail as a matter of Pennsylvania law. *Cf. Barnes v. American Tobacco Co.*, 161 F.3d 127, 152 n.31 (3d Cir. 1998) ("assum[ing] without deciding that the Pennsylvania Supreme Court would allow . . . strict products liability to be the underlying theory of liability in a claim for medical monitoring").<sup>6</sup>

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<sup>6</sup> Moreover, Pennsylvania and West Virginia law on strict liability are in close accord. *Compare Morningstar v. Black and Decker Mfg. Co.*, 162 W. Va. 857, 253

Moreover, even if Petitioners were correct in their contention that West Virginia and Pennsylvania law differ in some respects, there is no basis for presuming that the Circuit Court will be unable to manage the case through judicious use of instructions and other available devices. As this Court observed in rejecting a similar invitation to engage in advance micro-management of a trial plan, "[t]he trial court deserves to be accorded the necessary flexibility to consider and address the issues raised by the parties and, perhaps even more critically, the opportunity to reevaluate the trial plan during its operation and to make necessary modifications when it determines that alterations are warranted." *Mobil*, 211 W. Va. at 114, 563 S.E.2d at 427.

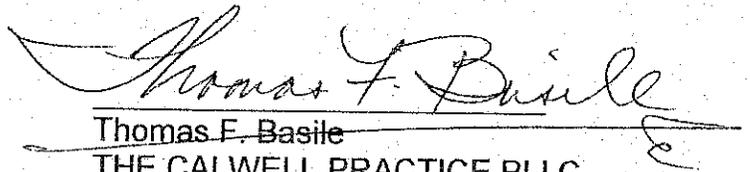
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S.E.2d 666, syl. pt. 4 (1979) ("the general test for establishing strict liability in tort is whether the involved product is defective in the sense that it is not reasonably safe for its intended use"), with, *Azzarello v. Black Bros. Co.*, 480 Pa. 547, 559, 391 A.2d 1020, 1027 (1978) ("the jury may find a defect where the product left the supplier's control lacking any element necessary to make it safe for its intended use or possessing any feature that renders it unsafe for the intended use").

CONCLUSION

For the foregoing reasons, the Petition for Writ of Prohibition and/or Mandamus should be denied.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that I have served a true and correct copy of the foregoing Memorandum in Opposition to Petition for Writ of Prohibition and/or Mandamus upon all parties by first class United States mail, postage prepaid, to their counsel of record this 25<sup>th</sup> day of June, 2007, addressed as follows:

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