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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

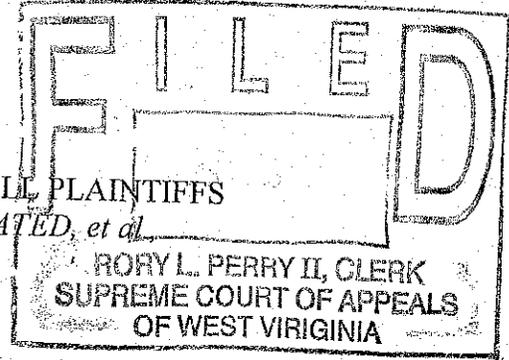
CHEMTALL INCORPORATED, CIBA SPECIALTY CHEMICALS CORPORATION, CYTEC INDUSTRIES INC., G. E. BETZ, INC., HYCHEM, INC., ONDEO NALCO COMPANY, STOCKHAUSEN, INC., ZINKAN ENTERPRISES, INC., JOHN DOE MANUFACTURING AND/OR DISTRIBUTING COMPANY, JOHN CESLOVNIK, ROBERT McKINLEY, EULIS DANIELS, JOHN DOE COMPANY REPRESENTATIVES FOR CHEMTALL INCORPORATED, CIBA SPECIALTY CHEMICALS CORPORATION, CYTEC INDUSTRIES INC., G. E. BETZ, INC., HYCHEM, INC., ONDEO NALCO COMPANY, STOCKHAUSEN, INC., ZINKAN ENTERPRISES, INC.,

Petitioners/Defendants,

v.

THE HONORABLE JOHN T. MADDEN, AND ALL PLAINTIFFS
IN *STERN, et al. v. CHEMTALL INCORPORATED, et al.*
Civil Action No. 03-C-49M

Respondents.



PETITION OF DEFENDANTS FOR RELIEF BY WRIT OF PROHIBITION AND/OR MANDAMUS FROM TWO MEMORANDUM ORDERS ISSUED JANUARY 9, 2007 BY THE HONORABLE JOHN T. MADDEN, CIRCUIT COURT OF MARSHALL COUNTY

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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NOW COME Defendants/Petitioners,¹ by and through counsel, and respectfully petition this Honorable Court for a Writ of Prohibition and/or Mandamus. The support for this Petition is as follows:

¹ Defendants are Cytec Industries Inc. ("Cytec"), G.E. Betz, Chemtall, Inc., Stockhausen, Inc., Ondeo Nalco Company ("Nalco"), Ciba Specialty Chemicals Corporation ("Ciba"), and distributors, Hychem, Inc. and Zinkan Enterprises, all of whom are Defendants in the *Stern* case. Defendants Cytec, Nalco, and Ciba, are also Defendants in the *Petry* case discussed herein.

I. PARTIES AND CLAIMS

Plaintiffs are current and former coal preparation plant workers who seek medical monitoring for diseases they claim may develop in the future because of their exposure to polyacrylamide flocculants, products used to treat coal wash water at the plants where they worked. Defendants are several suppliers and/or manufacturers of polyacrylamide flocculants. Plaintiffs claim the need for medical monitoring arises from residual trace amounts of acrylamide monomer, from which the flocculant is made. Plaintiffs seek a Rule 23(b)(2) class action, and claim to represent coal preparation plant workers in West Virginia and Pennsylvania.

The parties to this case have previously been before this Court on two separate occasions, once to correct error in the Circuit Court's order certifying a seven-state class action without conducting a proper analysis of the legal and constitutional issues raised by such a multistate class, and once to consider the request of two different sets of proposed intervenors and to provide guidance on the management of this case with another very similar case, *Petry, et al. v. Peabody Holding Company, et al.*, Boone County Circuit Court, Civil Action No. 02-C-58 (hereinafter "*Petry*"). See *State ex rel. Chemtall, Inc. v. Madden*, 216 W. Va. 443, 607 S.E.2d 772 (2004) (the "Class Action Appeal Decision") and *Stern, et al. v. Chemtall, Incorporated, et al.*, 217 W. Va. 392, 617 S.E.2d 876 (2005) (the "Intervention Appeal Decision").

Despite this Court's guidance and instructions on these issues, the Circuit Court, on January 9, 2007, issued two Memorandum Orders (the "Intervention Order," attached hereto as **Exhibit A**, and the "Trial Plan Order," attached hereto as **Exhibit B**) in these cases which are contrary to this Court's prior opinions. These Orders present three independent reasons to issue a Writ.

First, the Circuit Court's Intervention Order allowed Teddy Joe Hoosier to intervene on behalf of workers in a totally new industry, water treatment, in violation of the Intervention Appeal Decision. In that decision, this Honorable Court specifically ordered that two of the named Plaintiffs in the *Petry* litigation, Mr. Stump and Mr. Gunnoe, be permitted to intervene in the *Stern* litigation. This Court in the Intervention Appeal Decision clearly and repeatedly

distinguished the two *Petry* litigants, whose class claim in *Petry* was duplicative of the medical monitoring claim in the *Stern* litigation, from the third Intervenor, Teddy Joe Hoosier, who was not a litigant in any pending action and simply sought to bring a medical monitoring claim arising from the separate and distinct water treatment industry into this coal preparation plant industry case. *See* Intervention Appeal Decision, 617 S.E.2d at 880, 883-84, 886. The Circuit Court's decision to now let Mr. Hoosier intervene, just months before trial, misapplies this Court's mandate and is therefore in excess of the Circuit Court's jurisdiction.

Second, the Circuit Court's Trial Plan Order includes procedures for the plaintiffs' punitive damages claim that are plainly unconstitutional. The Circuit Court ordered that the appropriateness of punitive damages and a punitive damages multiplier would be determined in a bifurcated phase one trial. Such a trial would neither establish any defendants' liability for medical monitoring – the only claim presented here – nor any such entitlement to punitive damages, which must be based only upon conduct causing injury to each individual plaintiff. This procedure violates defendants' Due Process rights and requires issuance of a Writ. *See Philip Morris v. Williams*, ___ U.S. ___, 2007 WL 404781 (Feb. 20, 2007). Moreover, defendants believe that a Writ should issue because punitive damages are not recoverable, under any procedure, in an equitable, medical monitoring-only case wherein the plaintiffs do not seek to recover compensatory damages for any individual injuries.

Third, the Circuit Court's Trial Plan Order is erroneous as a matter of law because it fails to address and resolve the continuing choice of law problems in this now two-state putative class action. (Following this Court's Class Action Appeal Decision, plaintiffs voluntarily withdrew all claims for all states plead in the original Complaint, other than Pennsylvania and West Virginia.) Even though the Circuit Court's Trial Plan Order put off class certification until *after* trial on the merits, the Circuit Court nevertheless *sua sponte* concluded that a jury could, consistent with constitutional mandates, adjudicate the medical monitoring claims arising under Pennsylvania law along with the medical monitoring claims arising under West Virginia law, despite significant and serious differences between these two states. The Circuit Court's Trial

Plan Order thus violates this Court's prior mandate regarding class certification, requiring issuance of a Writ.

For the foregoing reasons, as more fully explained in Defendant's Memorandum of Law in Support of this Petition, no other available remedy exists other than relief through this extraordinary Writ. Therefore, immediate review by this Court is requested.

II. ISSUES PRESENTED

The three independent questions presented by this Writ Petition are:

- A. Whether the Circuit Court's January 9, 2007 Intervention Order violated this Honorable Court's mandate in *Stern v. Chemtall Incorporated*, 217 W.Va. 329, 617 S.E.2d 876 (2005), in that the Circuit Court either exceeded its jurisdiction or misconstrued this Court's Mandate by permitting Teddy Joe Hoosier, seeking to represent water treatment workers, to intervene in *Stern, et al. v. Chemtall Incorporated, et al.*, Civil Action No. 03-C-49M, when this Court held only that Franklin Stump and Danny Gunnoe, coal preparation plant workers like *Stern* plaintiffs, may intervene?
- B. Whether, in its January 9, 2007 Trial Plan Order, the Circuit Court denied defendants' Due Process rights by (1) requiring a procedure for determination of punitive damages and a punitive damages multiplier in a phase one trial that does not take into account only harm to individual plaintiffs in this uncertified class action and does not determine liability as to any defendant; and (2) allowing the punitive damages claim to proceed at all in this equitable, medical-monitoring only case wherein plaintiffs do not seek to recover compensatory damages for any actual harm?
- C. Whether, in its January 9, 2007 Trial Plan Order, the Circuit Court erred in failing to find substantial and material differences between the laws of West Virginia and Pennsylvania concerning the issues in this case, when conflicts exist between those states' treatment of medical monitoring claims which will affect Defendants' alleged liability, and prejudice their constitutional Due Process rights.

III. RELIEF REQUESTED

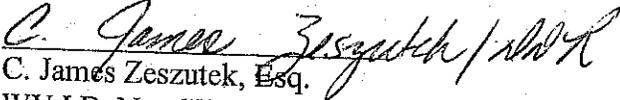
WHEREFORE, because there is no other adequate remedy at law, Petitioners seek a Writ of Prohibition and/or Mandamus with respect to this Intervention Order:

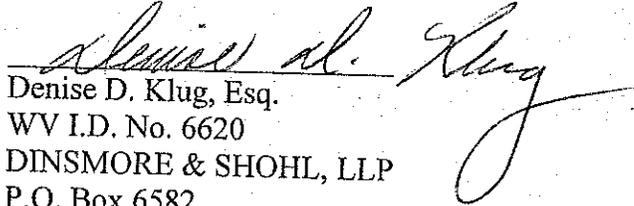
- A. Vacating the Circuit Court's January 9, 2007 Intervention Order as it pertains to permitting Teddy Joe Hoosier to intervene in *Stern, et al. v. Chemtall Incorporated, et al.*, Civil Action No. 03-C-49M.

- B. Vacating the Circuit Court's January 9, 2007 Trial Plan Order as it pertains to the procedures for recovering and availability of punitive damages in this matter.
- C. Vacating the Circuit Court's January 9, 2007 Trial Plan Order as it pertains to the Circuit Court's determination of compatibility of Pennsylvania and West Virginia law in this putative two-state class action.
- D. Granting any and all additional relief deemed just and proper including, but not limited to, all additional measures necessary to assure that Petitioners have the opportunity to seek review in this Court and, if necessary, the United States Supreme Court, before being compelled to prepare for and participate in this class action including, but not limited to, a stay of this matter pending decision regarding this Petition.

Petitioners request oral argument on this Petition pursuant to Rule 12 of the West Virginia Rules of Appellate Procedure. Petitioners also respectfully direct the Court's attention to the Memorandum of Law filed in support of this Petition. Finally, should the Court issue a "Rule to Show Cause," Petitioners have submitted a list of those persons to be served as required by Rule 14(a) of the Rules of Appellate Procedure.

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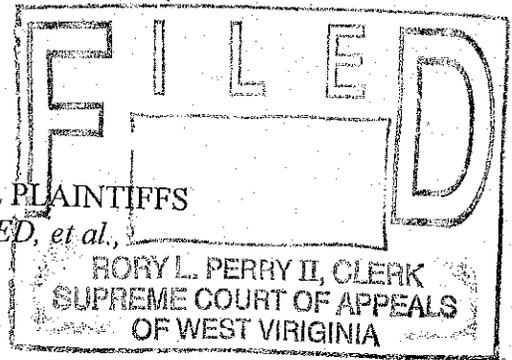
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MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' PETITION FOR WRIT OF PROHIBITION AND/OR MANDAMUS

I. SUMMARY OF THE ARGUMENT

In this action, Plaintiffs seek medical monitoring for diseases they claim may develop in the future because of their exposure to polyacrylamide flocculants, products used to treat coal wash water at coal preparation plants. Plaintiffs claim the need for medical monitoring arises from residual trace amounts of acrylamide monomer, from which the flocculant is made. Plaintiffs seek a Rule 23(b)(2) class action, and claim to represent coal preparation plant workers in West Virginia and Pennsylvania.

On January 9, 2007, the Circuit Court of Marshall County entered two orders in *Stern, et al. v. Chemtall, Inc., et al.*, Civil Action No. 03-C-49M (herein "*Stern*") – the Intervention Order (attached hereto as **Exhibit A**) and Trial Plan Order (attached hereto as **Exhibit B**). These Orders flout prior instructions and mandates of this Court, exceed due process limitations on the

imposition of punitive damages, and create an untenable medical monitoring trial plan, unprecedented in West Virginia jurisprudence. Three distinct errors infect these Orders and require issuance of a Writ.

First, the plainest error committed by the Circuit Court was its application of this Court's remand instructions, contained in its May 31, 2005 order (the "Intervention Appeal Decision"), which permitted the intervention into the *Stern* action by Franklin Stump and Danny Gunnoe, the two litigants from the other coal preparation plant medical monitoring case, *Pettry, et al. v. Peabody Holding Company, et al.*, Boone County Circuit Court, Civil Action No. 02-C-58 (herein "*Pettry*"). This Court's specific intervention mandate, which it repeated *three times*, was that only the "*Pettry* litigants" be permitted to intervene. In direct violation of this mandate, the Circuit Court also granted leave to intervene to Teddy Joe Hoosier, a non-*Pettry* litigant who seeks to interject a whole new industry, "water treatment," into this case just months before the scheduled trial date. Accordingly, the letter and spirit of this Court's instructions, which allowed only Stump and Gunnoe to intervene, must be reimposed upon the Circuit Court, and Intervenor Hoosier must be removed from the *Stern* case.

Second, the Circuit Court trampled upon several constitutional and judicial prohibitions when it declared, again upon Plaintiffs' suggestion and request, that the appropriateness of punitive damages, and a punitive damage multiplier, would both be determined in a liability-free first phase of this medical monitoring action. This aspect of the trial plan is reversible error on several levels. Punitive damages are simply unavailable in an action in which only equitable relief is sought, or where no individual harm is alleged and no compensatory damages are sought. Moreover, even where punitive damages can be considered, the trial court is required to ensure that the punitive damages are tied to the injuries of specific, individual Plaintiffs. *See Philip Morris v. Williams*, ___ U.S. ___, 2007 WL 505781 (Feb. 20, 2007). Finally, the appropriateness of punitive damages cannot be determined prior to a finding of underlying liability, yet the Circuit Court's adoption of the Plaintiffs' bifurcated trial plan ensures exactly that.

Third, the Circuit Court, in its Trial Plan Order, *sua sponte* reviewed the laws of West Virginia and Pennsylvania, the two states remaining in the putative class action, and concluded that the jury could adjudicate medical monitoring claims arising under Pennsylvania and West Virginia law both in the same trial before the Court has certified the case as a class action. In doing so, the Circuit Court ignored this Court's December 2, 2004 Writ instructing it to undertake a full analysis, with a hearing if necessary, of whether the claims of the representatives from the different states are based on "the same legal theory," and whether there exist any "material conflicts, constitutional full faith and credit and due process principles" that prevent the non-West Virginia representative's claims from being tried with those of the West Virginia claims. *See* Trial Plan Order. The Circuit Court's conclusory treatment, without benefit of briefing from either party, erred because the states' laws concerning medical monitoring claims and other important issues are substantially and materially different, thus precluding a joint trial under this Court's December 2, 2004 instructions.

For these and many other reasons, the Circuit Court's January 9, 2007 Intervention Order and Trial Plan Order are violative of West Virginia law and federal constitutional law. Therefore, a Writ of Prohibition and/or Mandamus is urgently needed to correct these errors.

II. STATEMENT OF THE CASE

The *Stern* case was filed on March 5, 2003. *See* Pls.' Class Action Compl., attached hereto as **Exhibit C**. Plaintiffs initially sought medical monitoring for coal preparation plant workers in seven states. In July 2003, *Stern* Plaintiffs moved for, and aggressively sought, a class certification for all seven states, claiming class certification was critical because of a need for immediate medical monitoring. Based on these arguments, on September 26, 2003, the Circuit Court certified four classes of Plaintiffs and allowed all coal preparation plant workers, and their offspring, who alleged significant exposure to polyacrylamide flocculant, from the seven different states, to proceed in a single class action.

On April 13, 2004, Defendants filed a Writ of Prohibition and/or Mandamus from the Order of the Circuit Court. On December 2, 2004, in *State ex rel. Chemtall, Inc. v. Madden*, 216

W. Va. 443, 607 S.E.2d 772 (2004), this Court rendered its opinion with respect to the Petition for Writ of Prohibition and/or Mandamus. This Court found that the Circuit Court failed to conduct the proper analysis in determining what law to apply to the putative class members; failed to conduct a thorough legal analysis, and failed to make detailed and specific findings regarding whether the Rule 23(a) requirements were met. The September 26, 2003 Class Certification Order was vacated.

Despite this Court's ruling, as well as the requirement of Rule 23 that the Circuit Court determine whether a class action is to be maintained "as soon as practicable after the commencement of an action brought as a class action," W.VA. R. CIV. PRO. 23(c)(1), Plaintiffs have done nothing to seek class certification since this decision. To the contrary, without regard for this Court's instructions for certification, plaintiffs now seek to defer any determination of class until after the issues of product defect and punitive damages are determined in an initial trial. In its January 9, 2007 Trial Plan Order, which is the subject of this Writ, the Circuit Court agreed with Plaintiffs' proposal, notwithstanding this Court's contrary instructions.¹

Prior to the *Stern* matter, on March 28, 2002, Franklin Stump, Danny Gunnoe, and others filed a putative class action in Boone County on behalf of injured West Virginia coal preparation plant workers seeking medical monitoring relief against several of the same *Petry* Defendants, based on the same allegations of exposure to the same chemical and the same resulting alleged increased risk of the same disease. After *Petry* Plaintiffs Stump and Gunnoe learned of the *Stern* class certification, on October 28, 2003, they moved to intervene in the *Stern* matter on behalf of themselves and others similarly situated. By Order dated January 15, 2004, the Circuit Court denied the requested intervention.

¹On July 7, 2006, during a status conference, counsel for *Stern* withdrew all claims, including all class allegations, against all Defendants arising out of or in any way related to exposure in five of the original seven states in which class was sought, *i.e.*, Illinois, Indiana, Ohio, Tennessee, and Virginia. Plaintiffs' claims arising out of exposure in West Virginia and Pennsylvania remain.

Teddy Joe Hoosier joined the Motion to Intervene. He filed on behalf of a new proposed class of individuals allegedly exposed to polyacrylamide in an occupational setting completely different from coal, *i.e.*, what Hoosier loosely describes as the "water treatment" industry without further elaboration. Hoosier is not now, and has never been a party to the *Petry* litigation or any litigation arising out of the alleged exposure to polyacrylamide flocculants. Nor is Mr. Hoosier a member of any putative class in either the *Stern* or *Petry* cases.

On February 13, 2004, all three of the proposed Intervenors filed a Petition for Appeal to this Honorable Court seeking a reversal of the Circuit Court's denial of intervention. On June 24, 2004, this Court granted the Intervenors' Petition for Appeal and, on May 31, 2005, issued its opinion. *See Stern, et al. v. Chemtall Inc., et al.*, 217 W. Va. 329, 617 S.E.2d 876 (2005) (the "Intervention Appeal Decision"). This Court specifically ordered that intervention be granted to the *Petry* litigants" (*i.e.*, Mssrs. Stump and Gunnoe, but not Hoosier). The same reasoning led this Court to further instruct the Circuit Court of Boone County to transfer the *Petry* case to the Circuit Court of Marshall County.

A. The Intervention Order

A joint status conference for the *Stern* and *Petry* cases was held on July 7, 2006. Proposed Intervenors Stump, Gunnoe, and Hoosier requested that the Circuit Court execute an Order permitting all three of them to intervene. With respect to Teddy Joe Hoosier, this request was opposed by Petitioners based in part upon the fact that Mr. Hoosier's intervention, and the putative class of the water treatment workers whom he represents, was previously denied by the Circuit Court, and this denial later upheld by this Honorable Court.

Nevertheless, on January 9, 2007, the Circuit Court issued its Intervention Order permitting intervention of *Petry* Plaintiffs Stump and Gunnoe as well as water treatment worker, Teddy Joe Hoosier. *See* Intervention Order.

B. The Trial Plan Order

Following this Court's May 31, 2005 opinion, the Defendants attempted to obtain the *Stern* Plaintiffs' agreement with respect to a case management order. Defendants' proposed case

management order set forth a plan for up-front determination of class certification, as contemplated by this Court, followed by a trial on all of the elements of a medical monitoring case. *See* Defs.' Proposed Amended CMO, attached hereto as **Exhibit D**.

By contrast, *Stern* Plaintiffs proposed that class certification and substantive medical monitoring issues be delayed.² *See* Pls.' Proposed CMO and Trial Plan, attached hereto as **Exhibit E**. Plaintiffs' proposed case management order contemplated a two-phase trial plan, with only those issues and evidence Plaintiffs view as favorable front-loaded in the first trial phase, including a jury determination of punitive damage issues, notwithstanding that plaintiffs will not simultaneously have to prove all the elements of liability in that first trial phase.

In its Trial Plan Order, the Circuit Court adopted nearly verbatim the *Stern* Plaintiffs' Proposed Trial Plan. Specifically, the Circuit Court stated, "Bifurcating the issues of product defect and punitive damages, if applicable, from class certification and medical monitoring is an orderly and efficient manner of disposing of these matters and protecting the interests of the parties." The Circuit Court purported to bifurcate "the issues of liability and punitive damages" from "medical monitoring and class certification issues" (*See* Trial Plan Order at 26-27), but in truth only a few of the liability elements (hand-picked by plaintiffs), will actually be decided in the first phase of trial. Should Plaintiffs prevail on those partial-liability issues, the parties will proceed in the second phase to try the issues of medical causation, medical monitoring viability, and damages. Based upon the Circuit Court's Trial Plan Order, in phase one, the jury is permitted to determine whether any of the Defendants' actions or inactions were of such a nature as to justify punitive damages and, if so, what multiple of general damages would suffice as a deterrent to future actions against that particular Defendant.

² This proposal is a complete reversal of Plaintiffs' position taken at the outset – that the class should be certified immediately.

Moreover, the Circuit Court set a schedule leading to a trial on eleven questions, many of which are couched with findings of fact and unwarranted assumptions that are strongly disputed by Defendants. For example, one first trial phase question plaintiffs drafted (and the Circuit Court adopted) prejudicially asks “whether the Defendants, or any of them, had actual or constructive knowledge of the hazard posed by their acrylamide-containing products.” See Trial Plan Order at 27. Whether any alleged “hazards” existed in Defendants’ products subject to this litigation is yet to be determined and has been specifically denied by Defendants. The Circuit Court’s adoption of plaintiffs’ phrasing of this and other questions was entirely inappropriate. At this time, Petitioners have no other available remedy to correct the errors in the Circuit Court’s Intervention Order and Trial Plan Order other than this extraordinary Writ.

III. STANDARDS OF REVIEW

A. Grounds for Issuing Writ of Prohibition

A writ of prohibition is appropriate to correct “substantial, clear-cut, legal errors plainly in contravention of a clear statutory, constitutional, or common law mandate which may be resolved independently of any disputed facts and only in cases where there is a high probability that the trial will be completely reversed if the error is not corrected in advance.” *State ex rel. Oak Cas. Ins. Co. v. Henning*, 505 S.E.2d 424, 424 (1998), quoting *Hinkle v. Black*, 164 W.Va. 112, 262 S.E.2d 744 (1979). See also *McFoy v. Amerigas, Inc.*, 170 W.Va. 526, 532, 295 S.E.2d 16, 23 (1982), quoting *Hinkle*. See also, W. Va. Code § 53-1-1 (2003) (“The writ of prohibition shall lie as a matter of right in all cases of usurpation and abuse of power”); *State ex rel. Frazier & Oxley, L.C. v. Cummings*, 214 W.Va. 802, 807, 91 S.E.2d 728, 733 (2003).

This Court weighs five factors in determining whether to grant the instant Writ where the Circuit Court exceeded its legitimate powers: (1) whether Defendants have no other adequate means to obtain the desired relief, such as a direct appeal; (2) whether Defendants will be damaged or prejudiced in a way that is not correctable on appeal; (3) whether the Circuit Court’s Intervention Order and Trial Plan Order are clearly erroneous as a matter of law; (4) whether the Intervention Order and Trial Plan Order are an oft-repeated error or manifest persistent disregard

for procedural or substantive law; and (5) whether the Intervention Order and Trial Plan Order raise new and important problems or issues of law of first impressions. Syl. Pt. 4, *State ex rel. Hoover v. Berger*, 199 W.Va. 12, 483 S.E.2d 12, 14-15 (1996). The third factor, whether there was clear legal error, must be given substantial weight. *State ex rel. Jeanne U. v. Canady*, 210 W.Va. 88, 94, 554 S.E.2d 121, 127 (2001).

B. The Intervention Order – Standard of Review

This Court's review of whether the Circuit Court entered an Order inconsistent with this Court's mandate regarding the intervention of Teddy Joe Hoosier into the *Stern* action is a question of law subject to a *de novo* standard of review. *State ex rel. Frazier & Oxley, L.C.*, 214 W.Va. at 810, 91 S.E.2d at 736 (after setting forth general grounds for issuing writ of prohibition, this Court adopted *de novo* standard of review to determine whether circuit court's proceedings violated a mandate of the Supreme Court of Appeals of West Virginia) (holding "that a circuit court's interpretation of a mandate of this Court and whether the circuit court complied with such mandate are questions of law that are reviewed *de novo*."). See also, Syl. Pt. 3, *State ex rel. Artimez v. Recht*, 216 W.Va. 709, 613 S.E.2d 76 (2005) (granting writ of prohibition because circuit court erroneously misconstrued mandate). Any order entered by the Circuit Court that is inconsistent with this Court's mandate "is erroneous and will be reversed." *Id.* at 734, quoting Syl. Pt. 1, *Johnson v. Gould*, 62 W.Va. 599, 59 S.E. 611 (1907).

C. The Trial Plan Order – Standard of Review

This Court should review the Circuit Court's Trial Plan Order allowing punitive damages and a punitive damages "multiplier" under an abuse of discretion standard because Plaintiffs' medical monitoring claim, in the form of a court-supervised fund, is the type of equitable relief where punitive damages are not permitted. See *Given v. United Fuel Gas Co.*, 84 W.Va. 301, 99 S.E. 476 (1919); 7A MICHIE'S JURISPRUDENCE OF VIRGINIA AND WEST VIRGINIA, Equity § 9, p. 237-38 (2006). The application of equitable principles is to be reviewed for an abuse of discretion. *Helton v. Reed*, 638 S.E.2d 160, 163 (2006), citing, e.g., Syl. Pt. 1, *Burnside*, 460 S.E.2d 264 (applying abuse of discretion standard in reviewing equitable distribution rulings).

This Court observed that “the use of a court-supervised fund to administer medical-surveillance payments in mass exposure cases . . . is a highly appropriate exercise of the Court’s equitable powers.” *Bower v. Westinghouse Elec. Corp.*, 206 W.Va. 133, 143, 522 S.E.2d 424, 434 (1999), quoting *Ayers v. Township of Jackson*, 525 A.2d 287, 314 (N.J. 1987) (emphasis added). See also *In re West Virginia Rezulin Litigation*, 214 W.Va. 52, 585 S.E.2d 52, 71 (2003).

This Court will apply an abuse of discretion standard in reviewing the legality of the Circuit Court’s Trial Plan Order in this action which bifurcated issues of liability and punitive damages from issues of class certification, medical monitoring and damages, as a writ of prohibition is the appropriate remedy to correct a circuit court’s pre-trial order and to effectuate a unitary trial. See *State ex rel. Crafton v. Burnside*, 207 W.Va. 74, 78, 528 S.E.2d 768, 772 (2000), citing *State ex rel. Tinsman v. Hott*, 424 S.E.2d 584 (1992) (granting writ and applying abuse of discretion standard in reversing circuit court’s ruling bifurcating Plaintiff’s claims; holding that claims could be tried together without unfair prejudice to parties, and there is a strong preference for unitary trials).

IV. ARGUMENT

A. **THE CIRCUIT COURT ERRED ON REMAND BY PERMITTING THE “WATER TREATMENT” WORKER TO INTERVENE IN THIS CASE, IN CONTRAVENTION OF THIS COURT’S CAREFULLY-TAILORED DECISION PERMITTING ONLY THE COAL PREPARATION WORKERS FROM THE “PETTRY LITIGATION” TO INTERVENE.**

The Circuit Court’s Intervention Order dated January 9, 2007 either overlooked or misconstrued this Court’s instructions contained in its May 31, 2005 Intervention Appeal Decision. This Court mandated only that the “Pettry litigants” (i.e. Franklin Stump and Danny Gunnoe) be allowed to intervene in this action. On remand, the Circuit Court exceeded its jurisdiction and committed a clear error of law when it expressly ordered that the third putative Intervenor, Teddy Joe Hoosier – who is indisputably not a member of the *Pettry* litigation – be allowed to intervene in this action. Respectfully, this error must be corrected, and the intent of this Court effectuated.

1. **This Court's Intervention Appeal Decision Directed the Circuit Court to Permit Only the Two "Pettry Litigants" to Intervene, Excluding Intervenor Hoosier.**

Every aspect of this Court's May 31, 2005 Intervention Appeal Decision makes clear that Intervenor Hoosier, from the different "Water Treatment" industry, was excluded from the Court's intervention mandate. At the outset of the Intervention Appeal Decision, this Court described and defined the "Pettry litigation," and the "Pettry litigants," in the process making clear that it was distinguishing between the two coal preparation Intervenor from *Pettry* and the Intervenor Hoosier from the separate and distinct "Water Treatment" industry. On the very first page of the Decision, the Court noted that the Intervenor were Plaintiffs in the "Pettry litigation," and expressly distinguished the Water Treatment Intervenor Hoosier because "[a]t the time of this appeal, Hoosier was not a party to the *Pettry* litigation or any litigation arising out of the alleged exposure to any chemicals." *Stern v. Chemtall Incorporated, et al.*, 617 S.E.2d at 879 n.1 (Intervention Appeal Decision). The Court later reinforced this distinction, specifically defining the "Pettry litigants" to include only Stump and Gunnoe:

As previously noted . . . on March 28, 2002, Intervenor Franklin Stump, Danny Gunnoe, along with several other individuals, filed a separate putative class action in the Circuit Court of Boone County on behalf of West Virginia coal treatment workers seeking medical monitoring relief against several of the same defendants as in the *Stern* case, based on the same exposure to acrylamide with the same resulting risk for the same diseases (hereinafter the "Pettry litigation"). The Pettry litigants, however, alleged numerous additional claims . . . which were not asserted by the current litigants in the *Stern* litigation.

Id. at 880. (emphasis added)

As discussed below, these descriptions of the "Pettry litigation" and the "Pettry litigants" -- both of which excluded the Water Treatment Intervenor Mr. Hoosier -- are uniformly employed by the Court to describe and limit the scope of its Intervention Appeal Decision.

This Court next set forth the various arguments asserted by the parties. Consistent with its prior distinction of Mr. Hoosier's allegations, this Court in reciting the parties' arguments in this section failed to cite a single argument advanced by the Intervenor as to why Mr. Hoosier

should be permitted to intervene in *Stern*. Instead, this Court cites only the Intervenor arguments as to why intervention should be permitted for the two *Petry* litigants (who, unlike Mr. Hoosier, are members of the putative class defined in *Stern*). *Id.* at 881-82. After summarizing the arguments of the parties, the Court provides the bases for its rulings that the *Petry* litigation should be transferred to Marshall County and that the “*Petry* litigants” should be permitted to intervene. First, the Court noted the substantial similarities between *Stern* and *Petry*. *See id.* at 883 (“we recognize that . . . not every party involved in either the *Petry* or *Stern* litigation is a party to both actions; however, most of the parties are involved in both cases”); *id.* (“we believe the issues are similar enough that many of the same depositions, requests for admission, interrogatories, and various other discovery requests will be identical in nature”).

Based on its finding that *Petry* and *Stern* overlapped, this Court ruled that the “*Petry* litigation” should be transferred and that the “*Petry* litigants” should be permitted to intervene:

It is with these issues in mind that we believe we are called upon to exercise our inherent authority . . . to transfer the entire *Petry* litigation to the Circuit Court of Marshall County for further disposition of both causes of action. We further order that the *Petry* litigants be permitted to intervene in the *Stern* action

Id. at 883-84. (emphasis added)

After carefully reciting this limited intervention mandate, the Court then noted the benefits of having the *Petry* and *Stern* litigations handled by one court, including “help[ing] to ensure that none of the parties is prejudiced by the potential of duplication of efforts and of possible inconsistent results,” and “alleviat[ing] the concerns that some interests of potential class members are not adequately protected by the current representative Plaintiffs and . . . help[ing] to prevent any unnecessary expenses or the possibility of adverse decisions that could occur in separate circuit courts.” *Id.* at 886. Again, these intervention advantages cited by the Court do not apply to the Water Treatment Intervenor Mr. Hoosier.

Three times in its Intervention Appeal Decision, this Court announced that the “*Petry* litigants” were permitted to intervene. The Court never once included Water Treatment

Intervenor Hoosier within its mandate. It did not discuss any arguments in favor of Mr. Hoosier's intervention. It did not identify any prejudices that could be avoided by adding this Water Treatment Intervenor to *Stern*. It did not cite to any efficiencies that might be advanced by inclusion of the new Water Treatment allegations in *Stern*, or otherwise mention a single benefit that would be gained by having Mr. Hoosier added to *Stern*.³

Mr. Hoosier worked in an entirely different industry from coal preparation, his interests were not represented in *Petry* or *Stern*, and he had no pending actions that might form the basis of inconsistent results. Accordingly, the inescapable conclusion from a plain reading of the letter and spirit of the Intervention Appeal Decision is that leave to intervene was explicitly limited to the two "*Petry* litigants."

2. The Circuit Court Exceeded its Jurisdiction in Permitting Hoosier, the Non-*Petry* Litigant, to Intervene in the *Stern* case.

It is settled law that "[u]pon remand of a case for further proceedings after a decision by this Court, the Circuit Court must proceed in accordance with the mandate and the law of the case as established on appeal. The trial court must implement both the letter and the spirit of the mandate, taking into account the appellate court's opinion and the circumstances it embraces." Syl. Pt. 3, *State ex rel. Frazier & Oxley, L.C. v. Cummings*, 214 W.Va. 802, 805, 591 S.E.2d 728, 731 (2003). "When a circuit court fails or refuses to obey or give effect to the mandate of this Court, misconstrues it, or acts beyond its province in carrying it out, the writ of prohibition is an appropriate means of enforcing compliance with the mandate." *Id.* at Syl. Pt. 5.

³ The Court only mentions Hoosier's arguments in its footnote distinguishing him from the "*Petry* litigants" ("Hoosier maintains that while he is not a named member of the *Stern* class, he faces a similar risk of the same diseases . . . and will be prejudiced if intervention is denied") (*Id.* at 879, n.1), and in its procedural history of the case (noting that Hoosier unsuccessfully argued to the circuit court that he should be permitted to intervene "based upon exposure to the same chemical to prevent the duplication of effort and potential inconsistent results that would necessarily occur following uncoordinated simultaneous prosecution of overlapping class actions") (*Id.* at 880).

The Circuit Court's unauthorized expansion of this Court's mandate to include the third Intervenor from the "Water Treatment" industry not only violated the letter of the Intervention Appeal Decision, it contravened the spirit and purpose of the mandate as well. As discussed above, this Court's rationale for transferring *Petry* to Marshall County, and for granting leave to the *Petry* litigants to intervene in *Stern*, was premised on the fairness and efficiency of having all the allegations of the coal preparation plant workers from *Petry* and *Stern* managed before one court, and its belief that the duplication of discovery efforts can be avoided because "many of the same depositions, requests for admissions, interrogatories, and various other discovery requests will be identical in nature." *Stern v. Chemtall Incorporated, et al.*, 617 S.E.2d at 883.

This is simply not the case with respect to this new and distinct Water Treatment industry. The products used in the Water Treatment industry are different. The way in which the product is used is different. The theoretical sources of potential exposure at issue will be different. New experts will have to be retained who are knowledgeable about the use of these new products in the Water Treatment industry. Separate and distinct analyses will have to be undertaken to determine potential paths and levels of exposure, if any, in this new industry. Legal questions regarding the relative safety of the products will require a different analysis because the product uses and alternatives are necessarily different depending on the industry.⁴

Moreover, unlike the coal preparation industry, no separate action has been filed or is pending in connection with the Water Treatment industry. Documents collected and exchanged between the parties in *Stern* to date have been limited to the coal preparation industry. No depositions have been taken with respect to the Water Treatment industry. No interrogatories or

⁴ Just as one example, the *Stern* complaint discusses the inner workings of coal preparation plants, how the polyacrylamide products are used within the plants, and how workers might theoretically be exposed in such a work environment. Those allegations are equally applicable to the claims of the *Petry* litigants, but completely inapplicable to the claims of Water Treatment worker Hoosier, who fails to allege anything regarding his water treatment industry and his potential exposure routes to polyacrylamide.

requests for admission have been answered with respect to this industry. Indeed, Mr. Hoosier leaves entirely unclear the context in which he was exposed to polyacrylamide, the breadth of the worker class he seeks to represent, and the types of water treatments his claim purports to encompass. Mr. Hoosier purports to represent an entirely different class of workers to intervene in a case in which no class has been certified. In short, extensive discovery will have to commence anew in order to fold a whole new industry into the case. In the process, all of the efficiencies intended to be promoted through this Court's prior ruling will be destroyed, the case significantly broadened, and the issues hopelessly complicated.

Making matters worse, the Circuit Court entered a second order on January 9, 2007 setting forth a schedule for the remainder of the case, with a rapid succession of deadlines leading up to a trial less than ten months away starting on December 3, 2007. This expedited schedule no doubt was entered in part based on the length of time the *Stern* and *Pettry* cases have been pending, and the amount of discovery the parties have completed in *Stern*. In setting this schedule, however, the Circuit Court failed to account for an entirely new industry being folded into this case as a result of its misreading of the Intervention Appeal Decision. This has left Defendants in the possibly unprecedented position of having been served with Mr. Hoosier's proposed trial witness list *before* they were even required to file an initial answer to Mr. Hoosier's allegations, and before they had commenced any discovery whatsoever against him. Indeed, the Circuit Court fails to account for the fact that, in connection with the coal industry allegations, it ruled that a bifurcated trial plan is warranted, and set forth the precise questions that will be at issue in this first phase of trial. That trial plan presumably will also apply to the Water Treatment allegations, leaving Defendants in the untenable position of being unfairly rushed to trial on a whole new set of allegations over different products in a different industry.

Similar prejudices will be suffered throughout the remainder of the case should the Water Treatment Intervenor be permitted to remain in the case. For example, even assuming, *arguendo*, Defendants are able to begin obtaining discovery about this new Water Treatment industry by April 2007, Defendants will have mere weeks to locate and retain appropriate experts

on this unknown industry. Under the Circuit Court's schedule, those experts will then have to undertake all their analyses of the Water Treatment allegations and prepare their Rule 26(b) information for service by May 5, 2007. Defendants will have to meet these and many other untenable deadlines while simultaneously preparing their defenses to the factually distinct allegations of the coal preparation plant workers. This is just a sampling of the prejudices that Defendants currently face as a result of the Circuit Court's misapplication of this Court's Intervention Appeal Decision. The Circuit Court's clear error, and the extreme prejudice suffered by Defendants as a result of this error, must be corrected by issuance of a writ.

B. THE CIRCUIT COURT'S RULING REGARDING THE AVAILABILITY AND PROCEDURE GOVERNING PUNITIVE DAMAGES IS UNCONSTITUTIONAL.

The Circuit Court's Trial Plan Order allows the jury to determine whether punitive damages against each Defendant are warranted and, if so, a multiplier for such damages *before* a finding of liability as to any Defendant toward any Plaintiff; *before* any Plaintiff must demonstrate entitlement to medical monitoring, the only claim presented here; and *before* any verdict becomes binding through a determination of class certification. *See* Trial Plan Order at 25-29 (listing questions for Phase One of trial, none of which concern proof of Plaintiff's harm or causation). In this case, Plaintiffs seek *only* equitable relief, have *not* brought personal injury claims, and are not entitled to *any* compensatory damages.

The Trial Plan Order, while seemingly similar to trial plans utilized in some West Virginia Trial Court Rule 26 cases, such as the asbestos docket, is thus actually a significant departure from the well-settled law of this State and the precedents of the United States Supreme Court, including *Philip Morris v. Williams*, ___ U.S. ___, 2007 WL 505781 (Feb. 20, 2007), just issued by the Court. Because the very structure of the punitive damages determination set up by the Circuit Court is suspect, appellate review through remittitur after any such award is made will be inadequate to cure the constitutional defect. The error requires correction now,

prior to trial, to ensure that the parties and Circuit Court avoid the expense and prejudice of a constitutionally-infirm trial.

1. **The Circuit Court's Procedure for Awarding Punitive Damages Violates Defendants' Due Process Rights.**

The Fourteenth Amendment bars West Virginia from depriving "any person of life, liberty, or property, without due process of law." U.S. CONST., AMEND. XIV. Punitive damages are a deprivation of property requiring safeguards to ensure any such award is not arbitrary and fully comports with due process. *Williams*, 2007 WL 505781 at *2. This requirement applies both to the procedures applicable to the jury's decision to award punitive damages and the calculation of the amount. *Id.* at *4 (both "the procedures for awarding punitive damages" and "the amounts forbidden as grossly excessive" present Due Process Clause concerns).

The procedure set forth in the Circuit Court's Order fails to ensure that any punitive damages award is reasonably related to any actual harm suffered by any Plaintiff in this uncertified class action seeking an equitable court-supervised medical monitoring program. As set forth below, the procedure ordered by the Circuit Court violates Defendants' Due Process Clause rights because:

- Punitive damages must be tied to a particular Plaintiff and the particular injury he suffers; punitive damages cannot be determined where, as here, the phase one issues pertain to no particular named Plaintiff and no class has been certified; and
- Punitive damages entitlement cannot be determined prior to finding any Defendant liable on the medical monitoring claim presented by Plaintiffs, as contemplated by the Circuit Court's Order.

The Circuit Court's Order is thus unconstitutional in its design and must be remedied by this Court in order to prevent a deprivation of Defendants' rights.

a. **The Due Process Clause Requires that a Jury Determine Punitive Damages Based on a Plaintiff's Individualized Harm.**

The phase one punitive damages trial plan ordered by the Circuit Court violates due process because all issues to be tried in that phase, at the same time the jury determines entitlement to punitive damages, are general issues not tied to any claim of any specific Plaintiff. See Trial Plan Order at 27-28. This plan will prevent Defendants from raising available affirmative defenses. There will simply be no way for any Defendant to respond to allegations of general harm by even attempting to demonstrate that these particular Plaintiffs have valid claims, for example by showing their particularized exposures, if any, caused no increased risk of contracting a particular disease, as required by *Bower*.

This procedure is in clear violation of the Supreme Court's just-issued decision in the *Phillip Morris v. Williams* case, ___ U.S. ___ 2007 WL 505781. In *Williams*, the Supreme Court vacated and remanded an Oregon Supreme Court opinion upholding a jury verdict finding Williams' death was caused by smoking Philip Morris products, and awarding \$821,000 in compensatory damages and \$79.5 million in punitive damages. The *Williams* Court found that the trial court violated defendant's Due Process Clause rights when it failed to ensure that the jury did not base its punitive damages award "in part upon its desire to *punish* the defendant for harming persons who are not before the court." *Id.* at *3 (emphasis in original).

The Court ruled that a punitive damages award must rely upon the defendant's conduct toward plaintiff. *Id.* at *5. Otherwise, a defendant has no adequate notice of the magnitude of the penalty that might be assessed against it; no ability to raise its defenses against the claim of persons not before the court; and no opportunity to contest liability as to such individuals. *Id.*; see also *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443 (1993); *B.M.W. of North America, Inc.*, 517 U.S. at 575-76 (1996) (discussing factors to be applied); *Mayer v. Frobe*, 40 W.Va. 246, 22 S.E. 58 (1895) (recognizing an assessment of punitive damages requires a determination of whether the conduct of an actor toward another person entitles that person to a punitive damage award). The Court stated:

[T]o permit punishment for injuring a nonparty victim would add a near standardless dimension to the punitive damages equation. How many such

victims are there? How seriously were they injured? Under what circumstances did injury occur? The trial will not likely answer such questions as to nonparty victims. The jury will be left to speculate. And the fundamental due process concerns to which our punitive damages cases refer – risks of arbitrariness, uncertainty and lack of notice – will be magnified. . .

[W]e can find no authority supporting the use of punitive damages awards for the purpose of punishing a defendant for harming others. We have said that it may be appropriate to consider the reasonableness of a punitive damages award in light of the *potential* harm the defendant's conduct could have caused. But we have made clear that the potential harm at issue was harm potentially caused *the plaintiff*.

Williams, 2007 WL 505781 at *5 (emphasis in original) (citing *State Farm Mut. Automobile Ins. Co. v. Campbell*, 538 U.S. 408, 416 (2003)). The Court therefore “explicitly” held that “a jury may not punish for the harm caused others,” regardless of whether the other harm is similar to that alleged to have harmed plaintiff. *Id.* at 7.

The Supreme Court therefore concluded that procedural safeguards must be employed to ensure that juries do not impose awards that run afoul of the Due Process Clause:

[G]iven the risks of arbitrariness, the concern for adequate notice, and the risk that punitive damages awards can, in practice, impose one State's (or one jury's) policies (e.g., banning cigarettes) upon other States – all of which accompany awards that, today, may be many times the size of such awards in the 18th and 19th centuries . . . – it is particularly important that States avoid procedure that unnecessarily deprives juries of proper legal guidance.

Id. at *6.

Such procedural safeguards are not just absent here, they are precluded by the trial plan. The Circuit Court's decision to allow a punitive damages determination in phase one under the collective issues to be presented in that phase, without any liability finding as to any particular Plaintiff, prevents Defendants from exercising the basic due process rights to “present every available defense” and to confront and cross-examine adverse witnesses. *See id.* at *5, quoting *Lindsey v. Normet*, 405 U.S. 56, 66 (1972). Plaintiffs will be allowed instead to seek punitive damages by “portraying [coal preparation and water treatment workers] as a large, unified group that suffered a uniform, collective injury,” while Defendants are forced to “defend against a fictional composite without benefit of deposing or cross-examining the disparate individuals

behind the composite creation.” *Broussard v. Meineke Disc. Muffler Shops, Inc.*, 155 F.3d 331, 345 (4th Cir. 1998). This procedure will create the “near standardless dimension to the punitive damages equation” forbidden by *Williams*. 2007 WL 505781 at *5.

This error is compounded untold times by the Circuit Court’s decision to delay class certification proceedings until *after* trial on the merits. Thus, the universe of plaintiffs will not even be defined prior to the jury’s determination of punitive damages entitlement and multiplier. See Trial Plan Order at 24-26. Under the Court’s trial plan, it will be unknown at the time of trial whether any class will be certified, how such class(es) may be defined, etc. – and therefore whether any individual will be bound by the jury’s phase one punitive damages decision or multiplier.⁵ As the United States Supreme Court has noted, only parties to the action are bound by a judgment. *State Farm*, 538 U.S. at 423. Thus, not only does the Court’s trial plan fail to tie any punitive damages determination to the alleged harm to any particular Plaintiff, it also fails to determine whether the collective award that may be visited upon Defendants binds anyone other than named Plaintiffs.

At the time of trial, Defendants will have no assurance one way or the other as to whether additional individuals will be bound by the judgment; who those individuals might be through class descriptions; how the time frames might be defined for those Plaintiffs, etc.⁶ Even if

⁵ See also, Defendants’ argument in Section D, *infra*, regarding material conflicts between Pennsylvania and West Virginia law regarding, *inter alia*, class certification issues.

⁶ Besides the application of a two-year statute of limitations for bringing medical monitoring claims, see *State ex rel. Chemtall v. Madden*, 216 W.Va. 443, 456 (2004), more importantly, for purposes of this Petition, the applicable time frame is directly relevant to the issue of what conduct of any given defendant a jury is permitted to consider in connection with a punitive damages award. Polyacrylamide flocculant has been in use in water treatment applications since the late 1960s, and it continues to be used today. The product manufacturing techniques, scientific knowledge, industry practices, Material Safety Data Sheets, application equipment, and many other things have changed over time. Individual defendants have entered or exited the market at different times. Behavior a jury might find culpable that occurred in 1969, or in 1999, will not apply to all defendants, or to all named plaintiffs, or to all potential but as-yet-undefined class members. It will therefore be impossible with the trial plan implemented by the court to assure defendants’ due process right to have evidence applicable to individual plaintiffs considered with respect to any punitive damage finding or multiplier.

delayed class certification were an appropriate trial management decision in a usual case seeking only compensatory damages (and Defendants note that mass trials are often not brought as class actions at all), it is *not* appropriate to delay class certification proceedings when plaintiffs seek to obtain a punitive damages judgment on a class-wide basis. *See Williams*, 2007 WL 505781 at *5 (a State may not use a punitive damages award “to punish a defendant for injury that it inflicts upon nonparties or those whom they directly represent”) Named Plaintiffs will represent no one other than themselves at the time of trial under the plan implemented by the Circuit Court, yet they will still benefit from the gloss of being “representatives” of the putative class(es). The plan creates a lose-lose for Defendants: should any Defendant be found liable for punitive damages, that decision will be inflated by the jury’s consideration of harm to others not represented by Plaintiffs in violation of *Williams*; conversely, a “win” on the punitive damages issue by any Defendant in phase one binds no one but the named Plaintiffs, and presumably the incentive for Plaintiffs to even attempt to certify the class disappears entirely, leaving Defendants vulnerable to brand new punitive damage claims from a new set of putative class representatives, based upon the same conduct.

Because the Circuit Court’s Order violates Defendants’ due process rights by allowing the jury to consider punitive damages without regard to any findings specific to any particular Plaintiff’s exposure claim, and further errs by conducting this flawed phase one trial prior to considering class certification, a Writ should issue.

b. **The Circuit Court’s Order Is Unconstitutional Because it Requires a Determination of Punitive Damages Prior to any Finding of Actual Liability Against Any Defendant.**

In *Williams*, the Court stated unequivocally that punitive damages are meant to punish “unlawful conduct.” *Id.* at *4 (quoting *B.M.W. of North America, Inc. v. Gore*, 517 U.S. 559, 575-76 (1996)). Whatever the other flaws in the trial court’s procedures as outlined by the Supreme Court in that case, the *Williams* jury did consider the liability of defendant Philip

Morris and found defendant liable to Plaintiff Williams for compensatory damages prior to awarding punitive damages.

In this case, the jury will not even be given the task of finding any Defendant actually liable to any Plaintiff prior to determining Plaintiffs' entitlement to punitive damages in this case. In its Order, the Circuit Court bifurcated "liability and punitive damages" from "medical monitoring and class certification." Trial Plan Order at 26-27 (emphasis supplied). The Circuit Court did not demonstrate an understanding that Defendants will *not* be liable in this medical monitoring-only case unless all factors of *Bower* are met; the court stated, "[s]hould Plaintiffs prevail on the issue of liability [in phase one], the parties will proceed in the second phase to try the issues of medical causation, medical monitoring viability, and damages." *Id.* at 28-29. Phase One therefore *excludes* key components of liability, such as actual causation and all factors of *Bower* necessary to determine the appropriateness of medical monitoring – the only liability claim presented by Plaintiffs – and it places the determination of punitive damages *ahead of* any liability finding. *See* Trial Plan Order at 26-28.

The Circuit Court's decision to allow a jury to determine whether punitive damages are appropriate, and to then select a multiplier, *prior* to determining medical monitoring liability is constitutionally flawed. Due process allows awards of punitive damages only for "unlawful conduct." *See Williams*, 2007 WL 505781 at *4. Punitive damages must "bear a reasonable relationship to the harm that is likely to occur from the defendant's conduct as well as to the harm that actually has occurred," and can be awarded only if a defendant is liable to a plaintiff. *Garnes v. Fleming Landfill, Inc.*, 186 W.Va. 656 (1991), Syl. Pts.1, 3; *see also Alkire v. First National Bank of Parsons*, 197 W. Va. 122 (1996) (requiring jury to consider actual harm when determining punitive damages entitlement.) Indeed, punitive damages "must be determined *after* proof of liability to individual plaintiffs." *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 418 (5th Cir. 1998); *Engle v. Liggett Group, Inc.*, 2006 WL 1843363 at *8-9 (Fla., as amended Dec. 21, 2006) (finding that it was error not to conduct a full liability determination, including actual damages and causation, prior to determination of punitive damages.) A multiplier awarded in a

vacuum, with neither a full liability determination as to all *Bower* factors nor even any evidence as to the scope of medical monitoring that may be sought, violates this principle.

The Second Circuit's decision in *In Re Simon II Litigation*, 407 F.3d 125 (2d Cir. 2005), provides a cogent analysis of these issues in a similar context, involving an attempt to certify a multistate punitive damages class against tobacco manufacturers. The Second Circuit found that the trial court's plan to assess punitive damages prior to liability awards of compensatory damages for each individual plaintiff did not satisfy the Due Process Clause. Thus, the court found that determining entitlement to punitive damages prior to any actual liability finding against any individual defendant in favor of any individual plaintiff was unconstitutional, and it refused to certify a class under such a plan.

The Second Circuit came to this conclusion even though (1) the trial would have occurred after class certification; and (2) the jury would have been asked to determine an "estimated total value" of compensatory damages before even determining whether punitive damages were available. Even these minimal protections are absent from the Circuit Court's Order here.

Determining a multiplier before a decision on all liability factors is especially troubling in this case, because Plaintiffs seek *only* a medical monitoring fund, and are neither entitled to nor seeking compensatory damages. A determination of the amount of any medical monitoring fund will involve, presumably, a calculation of the cost and recommended frequency of available testing, the number of eligible claimants, the number of years monitoring that may be appropriate, and similar factors which are not at all similar to the calculation of personal injury damages meant to compensate a plaintiff for actual injury more typically performed by juries. The concept of a "multiplier" is supposed to provide a measure of proportionality between the amount that compensates a plaintiff for a defendant's unlawful conduct and the amount of punishment. Here, the amount that may ultimately be paid into a medical monitoring fund is not by any measure a compensatory award; hence, a punitive damages "multiplier" tied to the medical monitoring fund amount would never yield a proportional punishment as required by the Due Process Clause. See *State Farm*, 538, U.S. at 416-18; *Bowyer v. Hi-Lad, Inc.*, 216 W. Va.

634, 649 (2004).⁷ Should punitive damages be found appropriate and a multiplier chosen under the Circuit Court's scheme, Defendants will be left to ask: a multiplier of what? *See Williams*, 2007 WL 505781 at *5 (noting that punitive damages finding based upon harm to nonparties rather than on liability of defendant for harm incurred by plaintiff adds a "near standardless dimension" to the punitive damages decision in violation of the Due Process Clause).

2. **Plaintiffs Are Not Entitled To Seek Punitive Damages In This Equitable Medical Monitoring Class Action Case.**

Williams makes clear that the procedures relied upon by the Circuit Court here for the imposition of punitive damages are unconstitutional, and Defendants believe, at a minimum, this Court should issue a Writ on that basis. Defendants also assert that, regardless of the procedure utilized by the Circuit Court, no award of punitive damages would ever be constitutional in this case because

- Punitive damages are not available in an equitable medical monitoring case where Plaintiffs allege no actual individual injury and do not seek compensatory damages;
- Punitive damages cannot be awarded on a class-wide basis, at least in a multiple Defendant, multiple product toxic tort action presenting individual issues of exposure, warnings, and other actions of individual Defendants that do not apply to all class members.

Defendants therefore ask the Court to issue a Writ finding that the Circuit Court has exceeded its authority by permitting Plaintiffs to proceed with a punitive damages claim in this matter, and directing that the punitive damages claim presented by Plaintiffs be dismissed outright.

⁷ The Court need not, therefore, revisit in this case whether initially determining a punitive damages multiplier for a compensatory damages award – a procedure used in other West Virginia cases – is constitutional under *Williams* or any other precedents, and defendants take no position on this issue because it is not presented by this medical monitoring-only matter.

a. **Punitive Damages are Unconstitutional Because Plaintiffs' Allege No Actual Harm and No Compensatory Damages.**

A plaintiff may not recover punitive damages in the absence of actual harm and recovery of compensatory damages. See *Garnes*, 186 W. Va. at 667 & Syl. Pt. 1. See also *Given v. Fuel Gas. Co.*, 99 S.E. 476 (W.Va. 1919); *Livingston v. Woodworth*, 56 U.S. 546, 559 (1853) (“A court of equity may not be converted to an instrument for the punishment of simple torts.”); 11A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice & Procedure* § 2942 at 53-54 (2d ed. 1995). Plaintiffs here neither seek to prove actual harm, nor to recover any compensatory damages for such harm; they seek only an equitable, court-supervised medical monitoring program. See Pls.’ Class Action Compl. ¶ 31; Compl. of Intervenors, Prayer for Relief (attached hereto as **Exhibit F**); Trial Plan Order (“As previously ordered, Plaintiffs have advised the Court that they will proceed under Rule 23(b)(2) of the West Virginia Rules of Civil Procedure and that their claim under Rule 23(b)(3) is withdrawn. It is so ordered.”) Plaintiffs have asserted no personal injury claims, and have not suffered any actual, present physical injuries from their alleged exposure to Defendants’ products. In these circumstances, punitive damages are not available.

The West Virginia Supreme Court of Appeals has defined the “injury” claimed by a medical monitoring plaintiff as a “significantly increased risk of contracting a particular disease.” See *Chemtall v. Madden*, 216 W. Va. 433, 455 (2004) (emphasis supplied). A medical monitoring claim under *Bower* imposes liability not for actual harm, but for increased risk of future harm. Under *Bower*, a “plaintiff is not required to show that a particular disease is certain or even likely to occur as a result of exposure.” 206 W.Va. at 142, 522 S.E.2d at 433. “All that must be demonstrated is that the plaintiff has a significantly increased risk of contracting a particular disease relative to what would be the case in the absence of exposure, and ‘[n]o particular level of quantification is necessary to satisfy this requirement.’” *Id.* (citations omitted.) No actual disease or physical harm is required, and indeed Plaintiffs have specifically requested monitoring only for disease that may develop in the future.

The Due Process Clause, as explained in *Williams, State Farm v. Campbell* and elsewhere as discussed above, requires a jury to measure the entitlement to punitive damages by the amount of harm suffered by plaintiff, and prohibits “grossly excessive or arbitrary punishments.” *State Farm*, 538 U.S. at 416. Both the United States Supreme Court and this Court have held that the proper measure of such deprivation begins with a determination of the proportionality between compensatory damages and punitive damages. *Id.* at 418; *Bowyer v. Hi-Lad, Inc.*, 216 W.Va. 634, 649 (2004); *Rohrbaugh v. Wal-Mart Stores*, 212 W.Va. 358, 363 (2002). By the design of Plaintiffs’ own claim, the jury will be without any such standard here, rendering constitutionally suspect any determination awarding punitive damages. In the absence of any claim for actual damages, the Court itself also will lack a standard by which it can later review any assessment of punitive damages. Thus, any punitive damages award can only be arbitrary and would deny the Defendants’ due process rights.

A separate lawsuit, the *Petry* case (involving some but not all of the *Stern* Defendants), alleges personal injury and has been transferred to the Circuit Court of Marshall County; any *Stern* Plaintiff presumably will bring a claim for personal injury (either in the *Petry* litigation or separately) should an injury develop. Intervenors from the *Petry* matter have expressly removed any personal injury claim from this case, and have sought monitoring only for future disease. *See* Compl. of Intervenors, Prayer for Relief. Thus, if indeed Defendants’ products are harmful as Plaintiffs allege, the *Stern* medical monitoring case will not be the last or only litigation on that issue. Any question of punitive damages entitlement will more appropriately be litigated in the context of seeking compensatory damages for an actual injury, rather than in a case where the harm is only theoretical or possible.

Plaintiffs wish to proceed with a claim for medical monitoring in the absence of physical injury, and also seek to obtain punitive damages. The question is: how far from traditional, injury-based torts will the Court allow Plaintiffs to roam? An inchoate or incomplete tort – bad conduct without injury – is generally not a legitimate basis for recovery in tort. Only under very narrow circumstances, such as defined in the Court’s *Bower* decision, are such incomplete torts

allowed. See *Bower v. Westinghouse Elec. Corp.*, 206 W. Va. 133, 143-44, 522 S.E.2d 424, 434-35 (1999) (Maynard, J., dissenting).

Defendants urge the Court to hold the boundary of permissible punitive damage awards to those cases wherein a plaintiff alleges actual present injury, and a defendant is found liable for compensatory damages to that plaintiff. This lawsuit is not such a case, and the Circuit Court's Order permitting the punitive damages claim to proceed at trial must be reversed.

b. **Punitive Damages Cannot Be Awarded On A Class-Wide Basis In This Multiple Defendant Products Liability Case.**

The *Williams* case makes clear that entitlement to punitive damages, and the amount of the award, must directly relate to the harm to the individual Plaintiff before the Court, or "those whom they directly represent." *Williams*, 2007 WL 505781 at *5. *Williams* did not arise in the context of a class action, and the Supreme Court has not provided other guidance as to whether or how punitive damages can be applied in a class action context. However, the very specific holding in *Williams* – that actual harm to the plaintiff and "harm potentially caused *the plaintiff*" must be the touchstones for any punitive damages award – indicates that class treatment of punitive damages is not possible in this case. *Id.*

Indeed, in the class action context, the requirement of individualized punitive damages assessment has led numerous courts to refuse to certify punitive damages claims for class-wide treatment. See *In re Telectronics Pacing Systems, Inc.*, 172 F.R.D. 271, 294 (S.D. Ohio 1997) (class certification of punitive damages not proper because, like compensatory damages, punitive damages measured individually based on the facts and local law); *In Re Simon II Litigation*, 2005 WL 1052659 (2d Cir. 2005); *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 417-18 (5th Cir. 1998); *In re Baycol Prods. Litig.*, 218 F.R.D. 197, 215 (D. Minn. 2003); *Smith v. Brown & Williamson Tobacco Corp.*, 174 F.R.D. 90, 97 (W.D. Mo. 1997); *Philip Morris, Inc. v. Angeletti*, 752 A.2d 200, 249 (Md. 2000); *Southwestern Ref. Co. v. Bernal*, 22 S.W.3d 425, 433 (Tex. 2000).

Defendants do not ask the Court to find that punitive damages can *never* be treated on a class-wide basis; instead, Defendants assert that such treatment cannot be given in this case because all issues in this matter that involve the appropriateness of punitive damages depend upon proof specific to individual plaintiffs and defendants. See W.VA. R. CIV. PRO. 23(a) (requiring named Plaintiff's claims to be typical and common of all class members). Here, there are eight unrelated corporate Defendants, and all manufactured and/or sold dozens of different polyacrylamide flocculant products to, potentially, hundreds of different coal preparation facilities. Such sales occurred at different times, over decades, and were accompanied by individual Defendant warnings, sales practices, research, etc. In addition, Plaintiffs each worked at different facilities, experiencing different levels and years of potential exposure. Even if punitive damages could be treated on a class-wide basis in, for example, an insurance practices case, or a pharmaceuticals case against a particular manufacturer, punitive damages cannot be given class-wide treatment here consistent with *Williams* and Rule 23(a). Defendants therefore ask the Court to issue a Writ instructing the Circuit Court to dismiss Plaintiffs' punitive damages claim outright.

3. **This Court Should Review the Clear Legal Error and Constitutional Defects in the Circuit Court's Trial Plan Order which Cannot Be Cured By Post-Verdict Appellate Review.**

A Writ under W.VA. R. APP. PRO. 14 should issue where, as here, the Circuit Court has committed a "substantial, clear-cut legal error" that contravenes statutory, constitutional, or common-law mandates and "there is a high probability that the trial will be completely reversed if the error is not corrected in advance." Syllabus Point 2, *State ex re. George B.W. v. Kaufmann*, 199 W. Va. 269, 274 (1997). Here, the error is indeed substantial, contravening Defendants' constitutional right of due process. Moreover, because it infects the very determination of entitlement to punitive damages, not just the amount of any such award, the Circuit Court's error will force complete reversal of trial if not corrected now, wasting resources of both the litigants and the judiciary.

The reality is that proceeding under the Circuit Court's Order will leave Defendants with a partial finding that excludes several issues they believe very relevant to their defense, and will be forced to bear a punitive damages determination based upon this partial decision. Such a procedure is especially inefficient in this case because polyacrylamide flocculant is not a product (unlike asbestos, or solvents such as benzene, for example) where there is a track record at trial, or even a well-settled body of scientific evidence, upon which the parties may draw to consider their litigation options after a partial phase one trial. Defendants fully believe they have sold a safe product for its intended and foreseeable uses, which have been marketed and sold across the industry for years. There is no body of evidence to suggest that these products have made anyone ill. Medical monitoring is neither desirable nor proper under the criteria established in West Virginia. Defendants believe they should be permitted to find out whether they are correct in a full and fair trial on all elements of Plaintiffs' claim, and that they should not be subject to any punitive damages determination in the absence of that opportunity. A Writ must therefore issue now to protect Defendants from an unfair, constitutionally-infirm trial.

a. **The Punitive Damages Issues Raised In This Petition Present Important Matters Of First Impression.**

Since *Bower*, this Court has had an opportunity to review and comment upon only a handful of cases seeking medical monitoring. None of the Court's opinions has sanctioned a procedure for determination of punitive damages in a medical monitoring action like the one employed by the Circuit Court here. Thus, this Writ Petition presents an important issue of first impression for the Court. See Syllabus Point 4, *State ex rel. Hoover v. Berger*, 199 W. Va. 12, 21 (1996), particularly in light of the Supreme Court's just-issued *Williams* decision. Because medical monitoring claims, especially in the class action context, present new and important challenges for both the circuit courts and litigants, review of this Petition to correct the Circuit Court's error is warranted.

The Circuit Court's Order does not find support in this Court's decisions regarding medical monitoring. The plaintiffs in *In re West Virginia Rezulin Litigation*, 215 W. Va. 52

(2003), for example, sought both a monetary award for medical monitoring costs and compensatory damages through W.VA. CODE § 46-6-101 (2003) *et seq.*, the Consumer Protection Act; it did not present a situation like the one faced here of an equitable medical monitoring-only claim. The Court's opinion arose out of a class certification determination, pretrial, and did not touch at all upon whether or how punitive damages would be available to the plaintiffs. In short, the *Rezulin* decision, involving suit against a single pharmaceutical company and its subsidiary for an allegedly fraudulent marketing campaign for one diabetes drug, discussed only the appropriateness of class treatment; it said nothing about the propriety of punitive damages determined in the manner ordered by the Circuit Court here.

Another decision, *In re Tobacco Litigation (Medical Monitoring Cases)*, 215 W. Va. 476 (2004), arose from a defense verdict at trial, under a Circuit Court trial plan far different and superior to the one in place here. In that matter, a class of plaintiffs certified prior to trial presented a jury all elements of their medical monitoring claim as set forth in *Bower*, and the jury found against plaintiffs on two of those factors, rendering judgment for defendants. Thus, a punitive damages award was not at issue, and the trial itself involved a proper full-liability phase one determination.⁸

No other opinions of this Court even touch upon the viability of a punitive damages claim in a medical monitoring-only case. Defendants recognize that this Court found, in *In re: Tobacco Litigation (Personal Injury Cases)*, 218 W. Va. 301, 624 S.E.2d 738 (2005), that *State Farm v. Campbell* does not prevent, *per se*, a bifurcated trial wherein "certain elements of liability and a punitive damages multiplier" are determined in the first phase, and "compensatory damages and punitive damages, based upon the punitive damages multiplier" are determined for each individual plaintiff in the second phase. *Id.* at 303, 739. That case arose in the context of a

⁸ This was, in essence, the plan defendants asked the Circuit Court to consider here. *See* Defs.' Proposed Amended CMO; Defs.' Brief in Opp'n to Pls.' Proposed CMO and Trial Plan.

certified question, and did not address the adequacy of the specific evidence sought to be included in each phase of trial, or whether there were "other legal reasons" to question the viability of the trial plan. In addition, that case concerned a mass tort litigation under Trial Court Rule 26.01, wherein personal injury claims were asserted by individuals who would, prior to recovering any sum from any defendant, have to prove specific causation, actual damages, and, if appropriate, individual entitlement to punitive damages under whatever multiplier the jury may determine. Therefore, even if this Court would leave *In re: Tobacco Litigation (Personal Injury Cases)* untouched in light of the *Williams* case just issued by the Supreme Court, that opinion does not and should not govern this equitable medical monitoring-only class action case.

Plaintiffs here have brought a medical monitoring claim only; the case has been filed as a class action; and the class action status will not even be determined until after trial in accordance with the circuit court's plan. *No case in West Virginia has allowed a phase one trial of partial liability plus punitive damages entitlement and multiplier, to occur in an uncertified, medical monitoring-only class action in which no personal injury claims have even been brought. See also In re: Tobacco Litig. (Personal Injury Cases), 218 W. Va. 301 at 313 n.2 (Benjamin, J. concurring) (noting that such a trial plan is disfavored even in the context of mass tort cases nationwide).* Defendants urge the Court not to allow this matter to be the first.

b. Post-Verdict Review Of Any Punitive Damages Award Will Not Cure The Constitutional Defect.

A Writ should issue now because post-verdict review will not cure the constitutional defects in the Trial Plan order which will affect both the jury's decision to award punitive damages, as well as the amount of any such damages. *See Garnes, 186 W. Va. at 667-68 (requiring Court review of amount of punitive damages awarded); see also Hygh v. Jacobs, 961 F.2d 359, 367 n.1 (2d Cir. 1992) (remittitur only available when jury, despite proper evidentiary instruction, renders excessive verdict).* Post-verdict review of a jury determination infected by error does not cure the error; when the matter at issue is whether a decision awarding punitive damages was properly determined under constitutional procedures in the first instance, any court

decision attempting to cure the error would improperly substitute the initial judgment of the jury for that of the reviewing court. See W.VA. CONST. ART. III, § 13; U.S. CONST., AMEND. VII; *Robinson v. Charleston Area Med. Ctr.*, 186 W. Va. 720, 731 (1991) (state and federal constitutional provisions on civil jury trial “virtually identical”). Thus, this error must be cured.

C. THE CIRCUIT COURT ERRED BY ISSUING A TRIAL PLAN ORDER THAT FAILS TO ADDRESS THE MATERIAL DIFFERENCES IN WEST VIRGINIA AND PENNSYLVANIA LAW, AND WHICH WILL SUBSTANTIALLY AFFECT LIABILITY ISSUES AND PREJUDICE DEFENDANTS’ CONSTITUTIONAL RIGHTS TO DUE PROCESS.

The Circuit Court’s Trial Plan Order fails to address continuing choice of law problems posed by Plaintiffs’ proposed multi-state class. There are fundamental differences in the laws of the two states for which Plaintiffs continue to seek class certification, West Virginia and Pennsylvania, that will go to the heart of the liability issues to be addressed in the proposed trial. To allow the existing Order to stand could subject the Defendants to an unfair judgment using the wrong set of legal rules. The Order thus fails to protect the due process rights of the Defendants, constitutes clear error, and should be vacated.

This Court found that “the circuit court clearly erred in failing to conduct the proper analysis in determining what law to apply to the putative class members.” *State ex rel. Chemtall Inc. v. Madden*, 216 W.Va. 443, 456, 607 S.E.2d 772, 785 (2004). It then remanded this action to the Circuit Court with express instructions. For class certification to occur, Plaintiffs were to “show, and the circuit court must find, that the West Virginia medical monitoring claims are typical of the medical monitoring claims of the proposed class members who were allegedly exposed in the other states. In other words, it must be shown, among other things, that their claims are based *on the same legal theory*.”—*See id.* (emphasis in original.) This Court went on to hold that “[i]f there are material conflicts, constitutional full faith and credit and due process principles prevent West Virginia from applying its own substantive law to out-of-state class members unless it has “a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair.” *See Chemtall*,

216 W. Va. at 452, 607 S.E.2d at 781, citing *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 818, 105 S.Ct. 2965, 2978, 86 L.Ed.2d 628 (1985) (additional citations omitted).⁹

After remand, the parties submitted differing case management proposals to the Circuit Court. At a hearing on the Case Management Order proposals, *Stern* Plaintiffs withdrew their claims for medical monitoring and class action status for five of the original seven states, but continued to assert claims and class status for the states of West Virginia and Pennsylvania. See Pls.' Proposed CMO and Trial Plan. Plaintiffs' Proposed Case Management Order also sought deferral of class certification and trial on the merits of the medical monitoring claims. Instead, *Stern* Plaintiffs requested bifurcation, with an initial trial limited to the legal questions of product defect, the appropriateness of punitive damages, and a punitive damages multiplier. See *id.*

Defendants opposed Plaintiffs' plan. They proposed a Case Management Order whereby class would be determined first, leading to a trial where the appropriateness of medical monitoring would be determined, based upon the factors enumerated in *Bower v. Westinghouse*, 206 W. Va. 133, 522 S.E.2d 424 (1999). See Defs.' Brief in Opp'n to Pls.' Proposed CMO and Trial Plan, attached hereto as **Exhibit G**. Defendants argued that Rule 23 of the West Virginia Rules of Civil Procedure as interpreted by this Court requires a determination of the appropriateness of class as soon as practicable. *In re Rezulin Litigation*, 214 W. Va. 52, 62, 585 S.E.2d 52, 62 (2003). Defendants further argued that a pre-*Rezulin* decision of this Court, *McFoy v. Amerigas*, 170 W. Va. 526, 295 S.E.2d 16, 21 (1982), relied on by Plaintiffs for the proposition that liability could be determined before class, was inapposite. *McFoy* only permitted liability determinations before class where the question of liability was separable from

⁹ In general, West Virginia adheres to the conflicts of law doctrine of *lex loci delicti*. Syllabus Point 1, *Paul v. National Life*, 177 W.Va. 427, 352 S.E.2d 550 (1986). "[T]hat is, the substantive rights between the parties are determined by the law of the place of injury." *Vest v. St. Albans Psychiatric Hosp.*, 182 W.Va. 228, 229, 387 S.E.2d 282, 283 (1989) (citation omitted). Therefore, a West Virginia court must apply the substantive laws of Pennsylvania to those class members whose alleged exposure to polyacrylamide occurred in that state. See *Chemtall*, 216 W. Va. at 456, 607 S.E.2d at 786.

that of class. But, Defendants pointed out, the continuing multi-state nature of Plaintiffs' case makes class inseparable from liability, as liability standards vary considerably between the two remaining states. See Defs.' Letter Brief, attached hereto as **Exhibit H**).

The Circuit Court issued an Order adopting Plaintiffs' proposed trial plan. See Trial Plan Order. Despite Plaintiffs' proposal that class be set aside for purposes of the first trial, and without affording Defendants the opportunity to specifically brief the issue, the Circuit Court reviewed the laws of West Virginia and Pennsylvania, and deemed them "compatible." See Trial Plan Order at 3. While the Circuit Court did not at that point certify a two-state class, the clear implication of the discussion in its Order is that it intends to do so. The Court's trial plan thus contemplates a trial of liability and punitive damages under Pennsylvania and West Virginia law. There is no limitation to one state or the other in the Order.

This trial plan is unworkable and clear error. The Circuit Court has indicated that it will certify this matter as a two state class, and the current order contemplates a trial not limited to one state or the other. However, there are significant variations in the medical monitoring cause of action, and additional, important differences in Pennsylvania and West Virginia law, that prevent their joint consideration by the same jury.

Under *Bower*, a finding of tort liability is necessary to support medical monitoring. Any theory of tort liability however, including product defect, is sufficient. See *Bower v. Westinghouse Elec. Corp.*, 206 W. Va. 133, 522 S.E.2d 424, 433 (1999). Plaintiffs' plan as ordered by the Circuit Court seeks to try the question of whether polyacrylamide is a defective product. No other liability theory is contemplated.

To prevail on a claim of medical monitoring in Pennsylvania however, the Supreme Court of that state has held that plaintiff must demonstrate *negligence* on the part of the defendant. See, e.g., *Redland Soccer Club, Inc. v. Department of the Army and Dept. of Defense of the U.S.*, 548 Pa. 178, 696 A.2d 137, 145 (Pa. 1997). Put another way, Pennsylvania does not recognize a cause of action for medical monitoring based on strict liability, the only predicate tort alleged in *Stern*, and the only liability question at issue in the trial ordered by the Circuit

Court. See *Cull v. Cabot*, 61 Pa. D.&C.4th 343, 347, 2001 Pa. D.&C. LEXIS 297 (Pa. Com. Pl. Ct. 2001) (attached hereto as **Exhibit I**).

The Circuit Court attempts in its Trial Plan Order to expand Pennsylvania law to encompass medical monitoring premised on strict liability claims, but is incorrect. The Circuit Court bases its reasoning on *Barnes v. American Tobacco Co.*, 161 F.3d 127 (3rd Cir.1998). There, the Circuit Court argues, the U.S. Court of Appeals for the Third Circuit “assumed without deciding that the Pennsylvania Supreme Court would allow an intentional tort or strict product liability claim for medical monitoring.” Trial Plan Order at 6. Any relevance of *Barnes* can be questioned, if it “assumed without deciding” that the Pennsylvania Supreme Court would expand the medical monitoring cause of action to include strict liability claims. Moreover, an examination of *Barnes* shows little support for the notion that it was predicting or advocating such an expansion. The *Barnes* court considered what statute of limitations applied to the plaintiffs' medical monitoring claims alleged in both negligence and strict liability.

The limited and careful language chosen by the Third Circuit indicated it was neither ruling, nor predicting, nor advocating that a medical monitoring cause of action could be based on strict liability in Pennsylvania. Indeed, the *Barnes* Court expressly noted that “[u]nder *Redland*, a plaintiff must prove that he was exposed to a proven hazardous substance as *a result of the defendant's negligence*.” 161 F.3d at 152 (emphasis added).

The Circuit Court also mistakenly stated that “one Pennsylvania appellate court has permitted plaintiffs in a class action in a case involving a theory of strict liability.” See Trial Plan Order at 7, n. 1 citing *Wagner v. Anzon Inc.*, 684 A.2d 570, 579 (Pa. Super. Ct. 1996). In *Wagner*, the Pennsylvania Appellate Court upheld a trial court's grant of directed verdict for defendants on plaintiffs' medical monitoring claim. 684 A.2d at 579. In so doing, the Court held that “Appellants cannot satisfy the first requirement for medical monitoring, *i.e.*, *negligent conduct by the defendant*” (emphasis added). Thus, *Wagner* in fact stands for the proposition that a finding of negligence is required to establish medical monitoring under Pennsylvania law, not the converse. See *id.* at 576. Moreover, the Circuit Court acknowledges without comment or

explanation that several Pennsylvania trial courts have specifically refused to permit medical monitoring as an element of damages on a strict liability claim. See Trial Plan Order at 6 n. 1, citing *Brown v. Dickinson*, 2000 WL 33342381 (Pa. Ct. Com. Pl. 2000).

Without the requisite underlying tort, relief is not available for medical monitoring in Pennsylvania. See *Redland*, 548 Pa. at 178, 696 A. 2d at 145. Here, Plaintiffs do not allege negligence, and do not seek to litigate it in their proposed trial ordered by the Circuit Court. Plaintiffs fail to even assert, let alone establish, a cause of action for medical monitoring under Pennsylvania law. The trial as proposed cannot resolve the question of liability for medical monitoring in Pennsylvania. By contrast, West Virginia does provide for medical monitoring on a showing of product defect. This indeed is a "variation in medical monitoring that would preclude certification." See *Chemtall*, 216 W. Va. at 455, 607 S.E.2d at 784.

A trial that apparently will be applied to Pennsylvania litigants should not go forward on a liability theory not recognized under Pennsylvania law. But this is not the only problem with the Circuit Court's Order. There are a number of additional conflicts or potential conflicts between the law of West Virginia and Pennsylvania with regard to various defenses that Defendants will assert at trial. In Pennsylvania, "state-of-the-art" evidence is *not* available as a defense in a strict liability action. See *Santiago v. Johnson Mach. & Press Corp.*, 834 F. 2d 84 (3rd Cir. 1987); *Lewis v. Coffing Hoist Div.*, 528 A. 2d 590, 594 (Pa. 1987). That a product complied with customary or industry standards is not admissible as to the issue of defect. Moreover, Pennsylvania does *not* allow evidence of compliance with government standards to be admitted in strict liability actions. *Harsh v. Petroll*, 840 A.2d 404 (Pa. Commw. 2003); 3 WEST'S PA. PRACTICE, *Torts: Law and Advocacy* § 9.39.

By contrast, West Virginia specifically permits "state of the art" evidence in a product defect case. See *Church v. Wesson*, 385 S.E. 2d 393, 396 (W. Va. 1989). Moreover, in West Virginia, compliance with appropriate statutes or regulations may be cited as evidence of due care. See *In re Flood Litig.*, 607 S. E. 2d 863, 867 (2004); *Miller v. Warren*, 390 S.E.2d 207, Syl. Pt. 1 (1990). The Circuit Court recognized this dichotomy in its Order, see p. 16, but said,

without elaboration, that this 180-degree difference was not "material" and could be cured with limiting instructions.

Another defense under consideration and that may be presented by one or more Defendants is the learned intermediary or sophisticated user defense, which holds that the duty to warn an ultimate user may be acquitted by providing a warning to an intermediate party, such as a reseller or employer. The Circuit Court held that neither jurisdiction had applied the sophisticated user/learned intermediary doctrine outside the context of prescription drugs. See Trial Plan Order at 17. Presumably, it thereby meant neither jurisdiction would recognize the doctrine under the circumstances of this case and therefore there was no conflict.

The Circuit Court's analysis on this issue was incomplete (and Defendants were never allowed to brief it). Pennsylvania has considered the sophisticated user/learned intermediary doctrine outside the context of pharmaceuticals. The decisions are not unambiguous, but do appear to indicate that the sophisticated user doctrine will not extend beyond the prescription drug context. See *Phillips v. A-BEST Products Company*, 665 A.2d 1167, 1170-72 (Pa. 1995); *Alexander v. Morning Pride Manufacturing, Inc.*, 913 F. Supp. 362 (E.D. Pa. 1995) (applying Pennsylvania law). Conversely, while West Virginia has not expressly adopted the sophisticated user/learned intermediary defense in a non-pharmaceutical context, it has indicated that it might extend the doctrine, at least in some (non-pharmaceutical) circumstances. See *Ilosky v. Michelin Tire Corp.*, 172 W. Va 435, 442 n. 8, 307 S.E.2d 603, 610, n. 8 (1983).

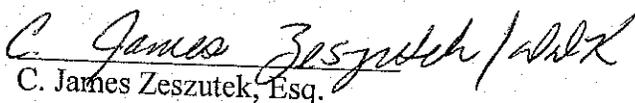
These are important differences in the basic cause of action, and defenses between the states at issue here. These differences pose significant obstacles for the conduct of the joint trial that has been ordered. Evidence that would be inculpatory, or exculpatory, in West Virginia, would be irrelevant, or inadmissible, in Pennsylvania. Quite obviously, in any of these scenarios, whether or not any evidence went to the ultimate fact finder would be critical. It is impossible to credibly envision jury instructions or a trial plan that could cure such substantive differences. The Circuit Court's solution of "instructions to address any dissimilarities" is simply impractical and prejudicial. See Trial Plan Order at 23.

Because the relevant legal standards for Plaintiffs' claims vary between West Virginia and Pennsylvania, trying actions under the laws and standards of the two states, in the same trial, would constitute clear error. Applying West Virginia law to the claims of Pennsylvania claimants would be arbitrary and capricious and violate the Defendants' due process rights, as would the converse. Arbitrary application of West Virginia law to claims that accrued in Pennsylvania, or *vice versa*, would significantly prejudice the parties. Accordingly, the Circuit Court's Trial Order constitutes clear error and must be vacated.

V. CONCLUSION

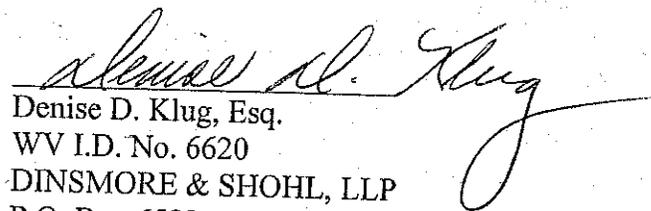
For all of the foregoing reasons, Petitioners, the Chemical Company Defendants, have no available remedy from the January 9, 2007 Intervention Order and Trial Plan Order of the Circuit Court of Marshall County, West Virginia other than seeking relief through the instant extraordinary Writ. Accordingly, Petitioners respectfully request that this Court grant this Writ of Prohibition and/or Mandamus, and that it undertake an immediate review to correct the Circuit Court's substantial and prejudicial errors.

Respectfully submitted,



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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

CHEMTALL INCORPORATED, CIBA SPECIALTY CHEMICALS CORPORATION, CYTEC INDUSTRIES INC., G. E. BETZ, INC., HYCHEM, INC., ONDEO NALCO COMPANY, STOCKHAUSEN, INC., ZINKAN ENTERPRISES, INC., JOHN DOE MANUFACTURING AND/OR DISTRIBUTING COMPANY, JOHN CESLOVNIK, ROBERT MCKINLEY, EULIS DANIELS, JOHN DOE COMPANY REPRESENTATIVES FOR CHEMTALL INCORPORATED, CIBA SPECIALTY CHEMICALS CORPORATION, CYTEC INDUSTRIES INC., G. E. BETZ, INC., HYCHEM, INC., ONDEO NALCO COMPANY, STOCKHAUSEN, INC., ZINKAN ENTERPRISES, INC.,

Petitioners/Defendants,

v.

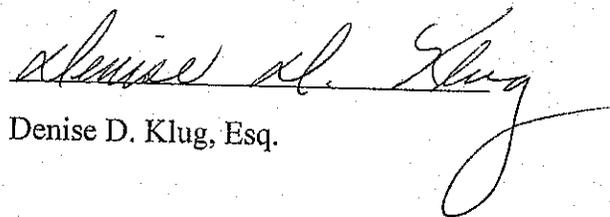
THE HONORABLE JOHN T. MADDEN, AND ALL PLAINTIFFS
IN *STERN, et al. v. CHEMTALL INCORPORATED, et al.*,
Civil Action No. 03-C-49M

Respondents.

CERTIFICATE OF SERVICE

I hereby certify that I have served a true and correct copy of the foregoing **(1) Petition of Defendants for Relief by Writ of Prohibition and/or Mandamus from Two Memorandum Orders Issued January 9, 2007 by the Honorable John T. Madden, Circuit Court of Marshall County; (2) Memorandum of Law in Support of Defendants' Writ of Prohibition and/or Mandamus; and (3) Appendix of Exhibits to Defendants' Petition and Memorandum of Law in Support of Petition**, upon all parties by first class United States mail, postage prepaid, to their counsel of record this 16th day of March, 2007, addressed as follows:

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