

Nos. 34334 and 34335

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

LENORA PERRINE, et al.

Plaintiffs Below/Appellees,

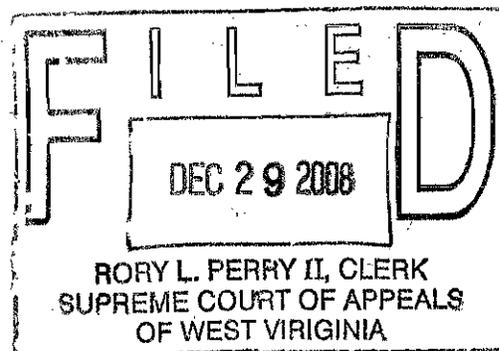
v.

E. I. DU PONT DE NEMOURS AND COMPANY, et al.,

Defendants Below,

E. I. DU PONT DE NEMOURS AND COMPANY,

Appellant.



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INTRODUCTION

Ninety years of pollution left an indelible mark on the communities surrounding the former zinc smelter. For decades, the Spelter landscape was dominated by a mountain of toxic waste that was, in the words of DuPont's in-house counsel, "washing into the North Branch of the Monongahela River in heavy rains, and spill[ing] across a widely used bike path; not to mention the pile as sloped and unfenced [was] irresistible to kids on motorized quads."¹ While the two and one-half million cubic yard mountain of toxic waste is no longer visible, the imprint of the smelter's toxic legacy remains throughout the class area today.² (Binder 40, 09/13/07 Tr. 1063).

Plaintiffs filed a class action to remove that toxic legacy. DuPont primarily defended the case by claiming (1) that, although the smelter site itself, including the buildings located on the site, was highly contaminated, the contamination in the surrounding communities was not harmful and (2) that its conduct was sanctioned by governmental regulators. An eleven-person jury unanimously agreed with Plaintiffs and ordered DuPont to clean up its mess. After unsuccessfully seeking this Court's review twice, DuPont returns for a third time, this time claiming error in virtually every portion of the proceedings below.

Just as it did at trial, DuPont continues to disregard Plaintiffs' evidence of substantial harm. DuPont's argument ignores weeks of testimony and hundreds of exhibits that document dangerous levels of toxins in the class area that justify remediation and medical monitoring. Even after having waived objections, DuPont now attempts to manufacture plain error and invoke constitutional issues, but the Circuit Court's discretionary rulings on routine evidentiary

¹ Plaintiffs' Trial Exhibit 47470, B. Reilly, *Email Re: Spelter...I suggest we get moving now* (1997).

² Plaintiffs' Trial Exhibits 983, 984, 985, 987, 988, 989, 990, 991, 993, Photographs of tailings pile and smelter.

matters do not rise to the level of a due process violation. Contrary to DuPont's claims, the Circuit Court was willing to allow individualized evidence as long as it could be extrapolated to the class; this was a burden that DuPont did not and could not meet. Neither were DuPont's First Amendment rights implicated by Plaintiffs' evidence relating to DuPont's manipulations of governmental agencies because DuPont's primary defense was that it had complied with the mandates of all government agencies. Although DuPont argues that the commencement of the statute of limitations was a question of fact, DuPont failed to present any credible evidence that the class knew, or should have known, of the hidden contamination and failed to overcome Plaintiffs' evidence that DuPont had affirmatively misrepresented the extent of contamination.

Focusing on dollar amounts of the jury awards and using scare tactics, DuPont also challenges the award of punitive damages and medical monitoring. The evidence supporting punitive damages together with the Court's thoughtful review reflect that punitive damages were justified, reasonable, and well within constitutional guidelines. DuPont's concerns that the medical monitoring program is too long and that low-dose single breath hold chest CT scans will harm people are distracting non-issues. The Circuit Court retains oversight of the medical monitoring program, mandates periodic reviews of the program, and ensures that CT scans, with radiation doses equivalent to a mammogram, are optional and only available to class members over the age of 35.

Harrison County has reported record numbers of serious medical conditions which can be caused by arsenic, cadmium and lead. Over the course of six weeks, Plaintiffs demonstrated with independent evidence, as well as through DuPont's own expert's testimony, that (1) class members' homes and soil are contaminated by these products from the smelter and (2) Plaintiffs are in a high risk group within West Virginia and should be allowed access to medical testing. A

jury determined that class members were entitled to medical monitoring (Phase II) as well as property remediation (Phase III). That same jury determined that DuPont's conduct was so egregious that it should be punished, and the jury ordered an award that was reasonable and justified. The jury's verdicts should remain intact.

STATEMENT OF THE FACTS

I. Spelter and the surrounding communities were subjected to decades of smelter pollution.

Spelter's history began in 1899, when an E.I. du Pont de Nemours & Co. subsidiary obtained several hundred acres—at what is now the town of Spelter—to build a gun powder mill. “Powder Hill” was destroyed by a huge explosion after only two years of operation. The mill was never reopened and the property was eventually transferred to the Fairmont Coal Company. (Binder 41, 09/20/07 Tr. 2735-36).

A. The Grasselli era begins in 1910.

In 1910, the Fairmont Coal Company sold Powder Hill to Grasselli Chemical Company (Grasselli) to construct a zinc smelter and a company town, which became the Spelter community. (Binder 41, 09/20/07 Tr. 2735-36). Grasselli began constructing the zinc plant and a company town, which became the Spelter community. The plant was often referred to as the Meadowbrook Plant. By 1915, the plant was the largest horizontal retort furnace zinc plant in the United States. Grasselli produced the zinc from roasted zinc ore, which contains toxic constituents—namely arsenic, cadmium, and lead.

During its ownership, Grasselli began the dangerous environmental practices that were continued by the subsequent owners, including DuPont. Grasselli and the others dumped smoldering waste from the retorts on site, which eventually grew into a literal mountain of toxic waste. Grasselli, and then DuPont, operated the smelter without implementing existing

technology to capture fumes from the retorts. (Binder 41, 09/20/07 Tr. 2761, 2762, 2788-93). As a result, toxic fumes and waste continuously migrated to people and properties surrounding the site. DuPont admitted decades later that it was “clearly on the hook for cleanup, any state or federal claims, toxic tort and natural resource damage claims—*our material*[emphasis added].”³

B. Grasselli commissions a confidential environmental study.

In 1919, DuPont’s predecessor, Grasselli, hired a preeminent geochemist, Furman Bear, to determine the effects of the smelter on surrounding farms. The resulting study detailed and documented the harmful effects of the smelter on plants and farm animals. Grasselli successfully kept the 1919 report confidential, even while Grasselli was defending lawsuits claiming that the smelter was detrimentally affecting agricultural operations. (Binder 41, 09/20/07 Tr. 2776). In fact, the report remained hidden from public view in the DuPont archives until it was uncovered in this litigation.⁴

The 1919 report provided unequivocal proof that the smelter was causing environmental harm. Emissions from the retorts contained 2.6% (26,000 parts per million) lead. (Binder 41, 09/20/07 Tr. 2769). Livestock that grazed on pastures covered with dust from the smelter experienced dramatic weight loss and infertility. Large areas of barren land around the smelter were shown to have high levels of zinc, indicating that smelter pollution was the culprit. Using zinc as a marker, Grasselli’s own scientists found that the effects of the smelter extended for miles from the smelter.

³ Plaintiffs’ Trial Exhibit 33162, Bedsole, *Subject: Previously Divested Site* (2002).

⁴ The 1919 report was provided to a DuPont contractor in 1999. (Binder 41, 9/17/07 Tr. 1666). According to DuPont’s corporate representative, who was also the project manager of the Spelter site, he received the 1919 report in late 2004 and sent it to the U.S.E.P.A. in 2005. (Binder 41, 9/17/07 Tr. 1748-1751). DuPont did not place the 1919 report in the public repository until October 2006. (Binder 41, 9/17/07 Tr. 1784). Plaintiff ultimately uncovered the report in this litigation, but only after the class boundaries had been defined by Plaintiffs’ experts. This timing is particularly important because, as it turned out, the area identified as suffering adverse effects in 1919 almost perfectly matched the area identified by the Plaintiffs’ experts as the class area suffering adverse effects.

C. DuPont acquires Grasselli.

In 1928, Grasselli was purchased by DuPont.⁵ As part of the purchase, DuPont acquired the smelter and the town of Spelter, which served primarily to house the smelter workers. After the consolidation, DuPont abandoned the horizontal retorts for the more modern vertical retorts, which dramatically increased production. (Binder 40, 09/13/07 Tr. 1165, 1069)(Unlike the horizontal retorts, the vertical retorts operated 24 hours a day, seven days a week.) With more production came more waste, which DuPont continued to store on site, piling it higher and higher around the smelter until it reached the bank of the West Fork River. Contrary to DuPont's unsupported assertions, there is no evidence that the vertical retorts diminished the smelter's environmental impact.

D. DuPont sells the smelter following a survey that documented the smelter's extensive air pollution problems and the costs associated with correcting the problems.

After a 1950 internal report showed that the cost to address the air pollution from the smelter would be \$325,000.00, DuPont sold the zinc smelting plant. (Plaintiffs' Trial Exhibit 76730, *Summary of Figure Data – Industrial Department Reports on Water and Air Pollution*). At that time, \$325,000.00 represented the fourth largest pollution abatement project within DuPont and 30% of the market value of the smelter, which was a relatively small DuPont venture. (Binder 41, 09/20/07 Tr. 2818-31; Binder 41, 09/20/07 Tr. 2830-31)⁶. The Meadowbrook expenditure was listed with other expenditures that were “required to abate . . . air pollution . . . where the discharge of waste causes nuisance or conditions which fail to conform

⁵ The Circuit Court found that DuPont was responsible for the conduct of Grasselli under the doctrine of successor liability. (*Order Granting Plaintiff's Motion for Summary Judgment Finding DuPont Responsible for the Conduct of Grasselli Chemical Company* (Binder 40, p. 18355-18361, 09/20/07)). DuPont did not appeal the Circuit Court's ruling on this issue.

⁶ Plaintiffs' Trial Exhibit 76730, *Summary of Figure Data – Industrial Department Reports on Water and Air Pollution* (1950).

with established Governmental regulations.” (Plaintiffs’ Trial Exhibit 76730, *Summary of Figure Data – Industrial Department Reports on Water and Air Pollution*). Rather than resolve the obvious and extensive pollution issues, DuPont sold the smelter to the Matthiessen & Hegeler Zinc Co. of La Salle, Illinois. (Binder 41, 09/20/07 Tr. 2735-36).

II. DuPont returns to Spelter: “We were clearly on the hook for cleanup, any state or federal claims, toxic tort and natural resource damage claims – our material.”⁷ Dwight Bedsole, Director of DuPont’s Corporate Remediation Group.

A. DuPont revisits Spelter in 1980.

In response to federal legislation, during 1979 and 1980, DuPont engaged in an “inactive site review,” attempting to inventory its former dumping sites that might be hazardous.⁸ DuPont sent two of its senior scientists, who specialized in identifying and disposing of toxic waste, to Spelter, West Virginia. The scientists visited the playground adjacent to the smelter site—a playground that had been built over residue from the waste pile and was separated from the waste pile only by a chain-link fence. The proximity of the playground to the smelter raised questions among the DuPont management about the safety of the site, including the possibility of off-site contamination in Spelter, which were documented in an internal memorandum:

... [W]as any waste containing cadmium and/or arsenic deposited on the property converted to the playground? We have no information from which to answer this question. Therefore, I recommend that we contact the Meadowbrook Corporation to determine any information they may have on past waste disposal practices at the site. It would be appropriate to simultaneously inform the Board of Education of our interest.⁹

⁷ Plaintiffs’ Trial Exhibit 33162 D. Bedsole, *Memorandum Re: purchasing the Spelter Smelter Site* (2002).

⁸ Plaintiffs’ Trial Exhibit 72264, Blankenship, *Inactive Site Review* (1980).

⁹ Plaintiffs’ Trial Exhibit 72264, M.R. Blankenship, *Memorandum RE: Site Review of Smelter* (1980).

Ultimately, however, DuPont took no steps to sample the residue at the playground site or even to look beyond the chain-link fence that surrounded the smelter site.¹⁰ Instead, the plan was to “monitor the school playground adjacent to our formerly owned plant in Spelter, West Virginia (now owned by Meadowbrook Corporation) at least once a year to confirm that it is in continued use as a play area by the local population.”¹¹ If this property ceased to be used as a playground, its ownership would automatically revert back to DuPont.¹²

Even this minimal plan was ignored. There is no record that DuPont ever contacted The Meadowbrook Corporation or bothered to warn the Board of Education of the dangers posed by the contaminants from the smelter. In fact, DuPont took no further action at the site, including the playground, until 1996—when regulators from the United States Environmental Protection Agency (“EPA”) began investigating the site.

B. The EPA notifies DuPont that the smelter site is an “imminent endangerment.”

In 1996, DuPont received an “Imminent Endangerment” notification from the EPA prompting DuPont to intervene and eventually repurchase the smelter facility.¹³

Among other things, the EPA noted:

- Spelter Smelter Site, Spelter, Harrison County, West Virginia: The Site is located on West Fork/Meadowbrook Road in the unincorporated Town of Spelter. The Site encompasses 116 acres adjacent to the West Fork River. However, surface run off and wind borne deposition may have *greatly increased the area of potential harm to include private residential properties, a public playground and recreation area, the Harrison County Parks and Recreation Commission Bike and Hike Trail, and a segment of the West Fork River* (emphasis added).

¹⁰ Plaintiffs’ Trial Exhibit 39635, P.A. Palmer and K.D. Dastur, *Memorandum RE: a visit to the Meadowbrook Plant Spelter, WV* (1980); Plaintiffs’ Trial Exhibit 72266, R.M. Salemi, *Memorandum RE: the playground at the Spelter Smelter site* (1981).

¹¹ Plaintiffs’ Trial Exhibit 39640, Dastur, *Memorandum RE: Inspection Frequency—Meadowbrook site* (1980).

¹² Plaintiffs’ Trial Exhibit 71813, Photograph of Playground.

¹³ Plaintiffs’ Trial Exhibit 8797, Downie, *Recommendation for Determination of Imminent Substantial Endangerment* (1996).

- EPA and WVDEP [West Virginia Division of Environmental Protection] investigations have found *the tailings pile to be contaminated with lead, cadmium, arsenic and antimony*. The zinc tailings pile which is up to 100 feet in height borders the bike and hike trail along the back side of the Site. *This area of the tailings pile is collapsing onto the trail due to the steep slope, weather and rain, and recreational activity. Runoff from the pile flows unabated into the West Fork River* (emphasis added).
- The Site is readily accessible from residential and public areas. The presence of elevated levels of lead, cadmium and arsenic onsite and in drainage pathways leading directly to the West Fork River create the potential for direct contact to contaminants by any person that comes on or near the site. *The initial data indicates significant offsite exposure either by runoff or wind borne emissions...The West Fork River receives runoff from the Site containing elevated levels of metals thus posing a threat to fishermen, animals and the food chain. The downstream City of Shinnston is forced to draw water from the Tygart Valley River, a distance of 15 miles, due to the poor water quality of the West Fork River. No municipalities draw water from the West Fork River due to run off from the tailings pile* (emphasis added).
- *The main source of contamination is the 50 acre tailings pile and Site soils...The tailings pile and Site soils are a massive reservoir of unprotected heavy metals. Site soils and the tailings pile do not support vegetation. The prevailing winds in the area are out of the west and southwest. The town of Spelter lies in the downward footprint of the unprotected Site soils and tailings pile. High levels of lead have been found in the Town and playground areas* (emphasis added).
- In most instances, it is not possible for children to tell where the site ends and residential properties begin. In at least one area, *contaminated Site soils have been washed into residential yards*. In a ½ mile length of public bike and hike trail, the zinc tailings pile has joined the trail due to water erosion. Unsafe levels of heavy metals exist on this public trail (emphasis added).

Although DuPont admitted that the imminent hazard had been created by “our material,” it believed that it could “avoid costly remediation” if it could control the site.¹⁴

C. DuPont develops a strategy to avoid costly offsite remediation.

- 1. Restrict the clean-up to the site itself and hope that a few storms wash the contamination downstream.***

If the EPA designated Spelter as a Superfund site, it would likely require remediation both on and off the smelter site. Continued jurisdiction by the EPA would prove far more

¹⁴ Plaintiffs’ Trial Exhibit 33162, D. Bedsole, *Memorandum Re: purchasing the Spelter Smelter Site* (2002).

expensive than jurisdiction by West Virginia's state agencies. DuPont's in-house counsel put it bluntly:

Last year the West Virginia DEP ordered the current owner, T.L. Diamond, to "remove" the pile. If such order were to stand, costs could exceed \$100 [million]. And the current owner would default, these costs would land on DuPont. Our strategy has been to finish the EPA work (pretty much done) and get the site firmly into West Virginia jurisdiction. If this fails, EPA might list it on the Superfund National Priority List, a slow, very costly process with uncertain outcome on remedy selection and natural resource damages (the pile has been washing into the river for years).¹⁵

DuPont's in-house counsel also confirmed DuPont's desire to just deal with the "site itself" and, in the interim, hope that "maybe a few storms will help" wash the contamination downstream, where it would become someone else's problem.¹⁶ The critical concern was avoiding costly off-site remediation, particularly for the West Fork River.

DuPont and Diamond successfully avoided Superfund designation by enrolling the Spelter smelter in the West Virginia Voluntary Remediation Program, thus bringing the site under West Virginia jurisdiction. The *Voluntary Remediation Agreement for Investigation and Remediation Activities* (an agreement between the West Virginia Division of Environmental Protection ("WVDEP") and Diamond and DuPont), obligated DuPont and Diamond to investigate and remediate "the site."¹⁷ By definition, the "site" included only the actual smelter property and excluded any property outside the smelter boundary.¹⁸ While the Voluntary Remediation and Redevelopment Act, which created the Voluntary Remediation Program, prohibits participation if the contamination was "created through gross negligence or willful

¹⁵ Plaintiffs' Trial Exhibit 47669, B. Reilly, *Memorandum Re: WV Governor's office* (1999).

¹⁶ Plaintiffs' Trial Exhibit 76922, B. Reilly, *Re: Spelter VRRRA Agreement* (1999).

¹⁷ Plaintiffs' Trial Exhibit 72056, *Voluntary Remediation Agreement* (2004).

¹⁸ Plaintiffs' Trial Exhibit 12120, *Application to Participate in the Voluntary Remediation Program*, II.B, General Site Description (1999).

misconduct,” this provision relies upon self-policing enforcement. W. Va. Code § 22-22-4(b). In this case, this self-policing responsibility was in the hands of the DuPont Corporate Remediation Group (CRG), which was under the direction of DuPont’s hand-picked Licensed Remediation Specialist.¹⁹

Ultimately, in October 2001, DuPont repurchased the smelter site from Diamond.²⁰ In the Agreement, Diamond agreed to pay \$200,000.00 to be applied to the on-site clean-up that DuPont was overseeing. Even before it repurchased the site, however, DuPont’s management felt “comfortable with co-signing for all issues and all outfalls impacted by the pile.”²¹

2. *Select a licensed remediation specialist that will stay on the “reservation” and “stretch his neck out” for DuPont.*

A Voluntary Remediation Program must be supervised by a Licensed Remediation Specialist (LRS). “The overriding duty of the LRS is to protect the safety, health and welfare of the public in the performance of his/her professional duties.” Although the LRS is paid by the owner or developer of the contaminated site, the “LRS must be completely objective” in supervising the remediation and must represent “the interests of the public”²²

Internal memoranda show that the loyalty of Potesta & Associates to DuPont, and not to the citizens of West Virginia, played a significant role in DuPont’s selection of an employee of Potesta to act as the LRS selection for the Spelter smelter site. (Binder 41, 09/17/07 Tr. 1792, 1798).²³ DuPont wanted an LRS who would “stretch his neck out” for DuPont and would stay on

¹⁹ *Id.* at 2.

²⁰ Plaintiffs’ Trial Exhibit 9058, *Environmental and Sales Agreement*.

²¹ Plaintiffs’ Trial Exhibit 11762, B. Reilly, *Email Re: an agreement with Diamond* (1999).

²² Plaintiffs’ Trial Exhibit 73843, *Guidance Manual § 1.1.1* (1998).

²³ Plaintiffs’ Trial Exhibits 47516, 71730, 76755, 71664, 47562, DuPont internal emails regarding the selection of an LRS.

the “reservation,” traits DuPont believed Potesta possessed.²⁴ DuPont’s in-house counsel summed up the LRS choice: “I don’t think it important who the LRS is on paper, we have a great relationship with Potesta, they have very deep relations with the WVDEP, they have every reason to be helpful to DuPont, the key will be to maintain day to day communication regardless of who ‘on paper’ is the LRS.”²⁵

3. Remediate the site for industrial use but avoid any costly remediation off-site.

Once DuPont resumed ownership of the Spelter smelter in October 2001, DuPont began to remediate its property. High levels of toxic arsenic, cadmium, and lead, as well as zinc, iron, and copper were found on the site. The remedial plan was to place a geosynthetic cap over the contaminated soil and cover it with non-contaminated soil. Because of the hazards at the site, remediation workers were required to wear protective clothing, decontaminate their clothing, and use respiratory protection devices.

While the hazardous clean-up was taking place, DuPont assured its residential neighbors just beyond the chain link fence that their properties were not contaminated and that they should not have their property tested.²⁶ DuPont’s remedial efforts, capping the site itself, failed to affect, much less remediate, the contamination that had spread for almost a century to the surrounding communities with resultant damage. Thousands of people and their property in the class area have been contaminated by the toxic waste from the smelter. Currently, 3,000 people live within a one-mile radius of the smelter site.²⁷ DuPont’s remedial actions ignored (and even denied) the damage caused by off-site contamination.

²⁴ Plaintiffs’ Trial Exhibit 71664, Hartten, *Subject: Re: Spelter VRRRA Agreement*; Plaintiffs’ Trial Exhibit 47562, Reilly, *Subject: PM at Spelter* (1999).

²⁵ Plaintiffs’ Trial Exhibit 76922, B. Reilly, *Re: Spelter VRRRA Agreement* (1999).

²⁶ Plaintiffs’ Trial Exhibit 35, DuPont, *The Spelter Reclamation Project* (2001).

²⁷ Plaintiffs’ Trial Exhibit 2336, DuPont, *Site Characterization Report Spelter Smelter Site Spelter, West Virginia* (2000).

4. Reassure the public that the contaminants do not pose any risk and do not have the potential for causing latent effects.

In 1998 and 2002, DuPont sampled the air at the perimeter of its property for arsenic, cadmium, lead, and zinc. (Binder 40, 09/14/07 Tr. 1455-63). The 1998 perimeter air sampling results showed levels of arsenic at the perimeter of the property that exceeded the arsenic regulatory limit for air by a factor of 10. In 2002, after smelting operations had ceased but before the remediation of the site, arsenic levels were twice the arsenic regulatory limit for air. (Binder 40, 09/14/07 Tr. 1462-63). These results would have been even higher if DuPont had not subtracted artificially-high “background” levels. To establish the purported background levels, DuPont inappropriately collected air samples almost directly below and in very close proximity to the waste pile, which caused the background level to be erroneously high and made the perimeter air concentrations artificially low. (Binder 40, 09/14/07 Tr. 1466-69).

Despite the fact that its own air monitoring showed that air contamination at the site’s perimeter exceeded regulatory guidelines, in 2001 DuPont began disseminating a community newsletter stating that smelter emissions posed no off-site risk. According to DuPont’s newsletter, “[t]he current sampling data and risk assessment indicate that there is no current risk to the Spelter community from off-site releases.” DuPont’s newsletter assured the community that “properties in the Town of Spelter have not been impacted by the site and that the site should not diminish property values.” DuPont’s assurances were based on a letter from the WVDEP. WVDEP’s letter, however, was actually conceived by DuPont’s internal team in charge of managing the Spelter smelter, which had even prepared drafts of the letter.²⁸

²⁸ See, for example, Plaintiffs’ Trial Exhibit 16576, Reilly, *Subject: Spelter Smelter, Proposed Letter to Harrison County Planning Commission* (2001).

Along with the newsletter, DuPont developed a “script” to respond to questions raised by residents. DuPont’s “script” anticipated that residents would be concerned about their children: “My children are not sick now, but what if they get sick from exposure a couple of years from now? Who will pay our medical costs?” When such a question would arise, DuPont employees were told to respond: “The constituents at the site (namely lead and zinc) are not the kind of materials that cause health effects several years after the exposure.”²⁹ DuPont omitted two important facts from this scripted answer. First, lead exposure can cause latent effects that may arise many years after exposure. Second, lead and zinc were not the only constituents at the site. Arsenic and cadmium, both known carcinogens which can certainly cause health effects several years after exposure, were also major contaminants of concern on the site.

III. Arsenic, cadmium, and lead contamination in the class area.

Nine months after DuPont assured the public there were no off-site risks, Plaintiffs’ attorneys commissioned a study by a Ph.D. geologist from Tulane University to explore off-site contamination. (Binder 40, 9/13/07 Tr. 1107). The study was the first to document publicly the presence of arsenic, cadmium, and lead in the surrounding communities. Over 1,000 soil samples were collected and analyzed for zinc, cadmium, arsenic, and lead, the same constituents that had also been found in the on-site pile. The results showed contamination throughout the sampling area consistent with emissions from the former smelter. Six months after this study, Plaintiffs filed their lawsuit.

Approximately 1,500 samples of soil, interior dust and interior air were collected and analyzed in the class area by the Plaintiffs’ experts for arsenic, cadmium, lead, and zinc. Attic dust, collected throughout the class, contained high levels of arsenic, cadmium, lead, and zinc.

²⁹ Plaintiffs’ Trial Exhibit 8411, T. Bingman, *Re: Spelter Script* (2003).

Soil samples and interior air and dust samples in the yards and homes of the Plaintiffs demonstrate that the smelter's pollution continues to be a serious problem for the residents living in the class area.

The *Guidance Manual for West Virginia Voluntary Remediation and Redevelopment Act* ("*Guidance Manual*") sets out a statistical test to determine whether an area is contaminated. Because the test compares the data to the higher levels in the control area, the test is biased towards finding no contamination. Even using this conservative test, the class area is conclusively contaminated with arsenic, cadmium, lead, and zinc. (Binder 40, 09/13/07 Tr. 1094-98).

Scientific articles have correlated current health problems with environmental exposure to past pollution from zinc smelters. For example, in an article published in the *Lancet*, which according to DuPont's expert is a well respected medical journal, the authors documented a strong association between lung cancer and living in proximity to a zinc smelter. (Binder 46, 10/4/07 Tr. 4603-05). The authors attributed the increased risk of lung cancer to environmental exposure to cadmium that was a result of past pollution. *Id.* The levels of cadmium in the soil observed by the authors of the *Lancet* article are similar to those found in the class area. *Id.* Historical production records from 1930 to 1971 (the period of primary smelting) reveal that the Spelter smelter released approximately 50,000 pounds of cadmium in the environment every year. (Binder 40, 09/14/07 Tr. 1411).

The class boundaries were defined by using the risk based concentration ("RBC") of arsenic in soil, which is 0.43 mg/kg. (Binder 40, 09/14/07 Tr. 1421-22). The RBC represents the level of smelter contamination that would cause an increase in cancer risk of one in a million, which is a level regulators regard as significant. Using the collected data and computer modeling,

the class boundary was placed where the concentration of arsenic in soil would have been increased by at least one RBC of arsenic, or in other words, where there was at least one RBC of arsenic contributed from the smelter to the soil. The smelter's contribution of arsenic to the soil would increase with decreasing distance from the smelter site. The class boundary represents a conservative contribution of arsenic from the smelter because the modeling only considered plant emissions for the time period from 1930 to 1971. (Binder 40, 9/14/07 Tr. 1405).

Lead levels in attic dust of many of the homes also exceeded the regulatory levels for soil. (Binder 41, 09/19/07 Tr. 2516). Dr. Kirk Brown, a retired professor and remediation expert, performed an incremental cancer risk assessment for the current contamination from the smelter. Dr. Brown found that the incremental cancer risk in the class area ranged from 1 in 10,000 to 1 in 100. An incremental risk of 1 in 1,000,000 requires public notice under the West Virginia Voluntary Remediation and Redevelopment Act. (Binder 40, 09/14/07 Tr. 2545; Plaintiffs' Trial Exhibit 75103, *Guidance Manual* ("That is, the additional risk of cancer to an individual . . . must not be greater than one in ten thousand to one in one million.")). Significantly, had the class area been included as part of the clean-up, DuPont would have been required to either remediate the off-site properties or to issue a public notice informing the residents of the increased cancer risk as a result of pollution from the smelter.³⁰ Dr. Brown's assessment is based solely upon the conditions as they now exist on off-site properties in the class area. (Binder 41, 09/19/07 Tr. 2556). The analysis shows that DuPont's off-site contamination remains unremediated and dangerous.

In 1996, the Agency for Toxic Substances and Disease Registry (ATSDR) conducted, as described by DuPont's expert, an unscientific survey of blood levels in children living in Spelter.

³⁰Plaintiffs' Trial Exhibit 75103 ("Where a residual cancer risk level of greater than 1×10^6 for a residential land use . . . , an information meeting and 30-day public comment period are required.").

(Binder 42, 9/25/07 Tr. 3307). The ATSDR concluded that, in its opinion, there was no problem with excessive lead levels because the average blood lead concentration was less than 10 micrograms of lead per deciliter of blood ($\mu\text{g}/\text{dl}$). The ATSDR neglected to note that the survey confirmed the children in Spelter had a 200% higher average blood lead level than the national average. (Binder 40, 09/14/07 Tr. 1451). Moreover, several medical journal articles contradict the conclusion drawn by the ATSDR. A study published in the *New England Journal of Medicine* showed that lead causes deleterious effects in children at levels well below the ATSDR's screening level of 10 $\mu\text{g}/\text{dl}$. (Binder 46, 10/04/07 Tr. 4589-90). Other scientific articles have concluded that lead contributes to kidney damage even at blood levels below 5 $\mu\text{g}/\text{dl}$. (Binder 46, 10/02/07 Tr. 4086-87). Lead's effect on the cognitive development of children has been observed at levels as low as 2 $\mu\text{g}/\text{dl}$. (Binder 46, 10/02/07 Tr. 4084-85).

Dr. Brown's proposed remediation plan of the class area that surrounds the smelter is similar to DuPont's on site remediation. Rather than remediating the structures on site, DuPont demolished the structures and hauled off the debris. DuPont used 13.9 mg/kg of arsenic in soil as its "screening level" on its own property, which is only to be used for commercial redevelopment and will never be used for residential purposes. (Binder 41, 09/19/07 Tr. 2567). Instead of demolishing the homes and other structures belonging to class members, Dr. Brown has recommended cleaning the structures in the class area. He has also recommended a clean-up standard in soil of 12.5 mg/kg arsenic for zone 1A (the area immediately adjacent to the smelter), which is almost exclusively residential. (Binder 41, 09/19/07 Tr. 2567).

IV. DuPont's Agreement with T. L. Diamond.

In its answer to the class-action Complaint, DuPont brought a cross-claim against its co-defendants, including Diamond, for pro-rata contribution to any judgment.³¹ Diamond denied DuPont's cross-claim³² and brought its own cross-claims for indemnification against co-defendant DuPont.³³ Specifically, Diamond contended that under the terms of the Sale Agreement when DuPont re-purchased the plant site in 2001, DuPont expressly agreed to indemnify Diamond—i.e., be “solely liable”—for the past, current or future environmental conditions of the plant site.³⁴ DuPont denied any obligation to indemnify Diamond. Diamond later assigned its right of indemnification to the Plaintiffs, making Plaintiffs the beneficiaries of any indemnification agreement.

Before trial, both Plaintiffs and DuPont filed motions for summary judgment on the issue of indemnification.³⁵ Both sides conceded that the Sale Agreement's language is plain and unambiguous and, therefore, should be decided as a matter of law. Upon review of the numerous briefs submitted by DuPont, Diamond, and the Plaintiffs, the Circuit Court ultimately relied on

³¹ See *Answer, Defenses and Cross-Claims of Defendant E.I. Du Pont De Nemours and Company* at 20-21 (Binder 1, p. 98-120, 10/04/04); *Second Amended Answer, Defenses and Cross-Claims of Defendant E. I. Du Pont De Nemours and Company* at 21-22 (Binder 1, p. 638-661, 9/21/05).

³² See *Answer of Defendants T.L. Diamond & Company, Inc. and Joe Paushel, Incorrectly Designated as Joseph Paushel, to Cross-Claim of Defendant E.I. DuPont De Nemours and Company* (Binder 1, p. 170-175, 6/13/05).

³³ See *Answer of Defendants T.L. Diamond & Company, Inc. and Joe Paushel, Incorrectly Designated as Joseph Paushel, to Cross-Claim of Defendant E.I. DuPont De Nemours and Company* (Binder 1, p. 170-175, 6/13/05).

³⁴ In addition to the cross-claim for contractual indemnification, Diamond brought a common law cross-claim of implied indemnification and/or comparative contribution against DuPont and the other codefendants. See “*Answer and Cross-Claim of Defendant T.L. Diamond & Company, Inc.*” at 17-20 (Binder --, p.--, 10/04/04).

³⁵ The Circuit Court reserved Phase V (after the liability and damage phases of the trial) for consideration of the indemnity issue in the event the issue could not be decided as a matter of law. Phase V was eliminated after the Circuit Court found as a matter of law that the Sale Agreement obligated DuPont to indemnify Diamond against any damages awarded in the instant litigation. See, *Order Granting Plaintiffs' Motion for Summary Judgment Concerning Defendant DuPont's Duty to Indemnify Defendant T.L. Diamond and Denying DuPont's Motion for Summary Judgment on the Express Indemnity Claim of Defendant T.L. Diamond & Co., Inc.* at 10, n.2 (Binder 40, p. 18362-18373, 9/14/2007).

West Virginia law governing contract interpretation and indemnification and concluded that the Sale Agreement obligated DuPont to indemnify Diamond against any liability in the underlying litigation as well as costs, expenses and fees incurred as a result of defending against the underlying litigation.

After hearing the evidence in Phase I of the trial, the jury of eleven people unanimously agreed that Diamond had caused or contributed to exposing people and property to arsenic, cadmium, or lead but did not hold Diamond responsible for any damages. (Phase I Verdict Form (Binder 42, p. 19451A-1951G, 10/01/07)). The jury's apportionment of responsibility was likely prompted by the closing argument of DuPont's counsel, when he invited the jury to assign all responsibility to DuPont, telling the jury that "*the Court has already ruled that DuPont is responsible for the actions of T.L. Diamond, for Grasselli and for DuPont. So when you're completing [the verdict form], remember if any of these companies are found to have produced dangerous levels of arsenic, cadmium and lead in these zones in the class area, then DuPont is liable for all of those companies.*"³⁶ (Binder 42, 09/28/07 Tr. 3802). Because the jury assigned no responsibility to Diamond, the issue of whether DuPont is liable for Diamond's damages is moot.

After the trial, and pursuant to the Circuit Court's Order, Diamond submitted itemized costs and expenses related to the defense of the action. The Circuit Court found the itemized costs of \$814,949.37 to be reasonable and entered judgment against DuPont in that amount. Thus, the only controversy at issue, related to the Sale Agreement, is DuPont's obligation to pay Diamond's costs and expenses arising out of Plaintiffs' claims. Because Plaintiffs are not an interested party on the issue of cost and expenses, Plaintiffs restrict their response to the

³⁶ DuPont's claim that the pretrial order "fundamentally altered" DuPont's trial strategy is disingenuous. Had DuPont really believed it had no legal obligation to indemnify Diamond or any of the other defendants against any judgment, DuPont could have attempted to place all blame on Diamond and then, had there been any finding of liability against Diamond, appealed the Circuit Court's indemnification ruling. DuPont's "trial strategy" does not create a justifiable controversy or reversible error.

propriety of the Circuit Court's order affirming DuPont's duty to indemnify Diamond against any judgment rendered in this action.

ARGUMENT

I. The Circuit Court acted well within its discretion and followed procedural requirements in the admission of evidence.

A. The Circuit Court followed the *McGinnis* guidelines when addressing Rule 404(b) objections.

The Circuit Court properly applied Rule 404(b) safeguards in response to DuPont's timely and sufficiently particularized objections to potential evidence. DuPont complains about the admission of any reference to any DuPont site other than the Spelter zinc smelter (primarily Parkersburg), contending that such references were evidence of other crimes, wrongs, or acts introduced to show DuPont acted in conformity therewith. With regard to the Forte and Rodricks testimonies, DuPont failed to raise timely, sufficiently particularized objections. Moreover, the evidence at issue did not fall within the protections of Rule 404(b). With regard to the remaining Parkersburg references, particularly in Phase IV, once DuPont made timely and sufficiently particularized objections, the Court followed the *McGinnis* protocol, performed an *in camera* hearing, determined relevance, and weighed probative value against potential prejudice. DuPont cannot show the Circuit Court abused its discretion in making the Rule 404(b) determinations.

1. Because DuPont failed to make a timely and sufficiently particularized objection, its claim of error in Kathleen Forte's testimony is not subject to appellate review.

DuPont failed to preserve any error associated with Kathleen Forte's testimony. DuPont's rendition of its 404(b) objections to Forte's testimony omits significant facts that demonstrate

that DuPont waived this objection. To preserve this error, DuPont was required to refer specifically to Rule 404(b), which it did not do. *State v. DeGraw*, 196 W. Va. 261, 470 S.E.2d 215 (1996).³⁷ “An objection that evidence is ‘irrelevant’ does not normally preserve errors under the more specific exclusionary rules of Rule 404 through 412.” *State v. Sugg*, 193 W. Va. 388 n.19, 456 S.E.2d 469 n.19 (1995). In the instant case, DuPont did not raise Rule 404(b) concerns to the Court until the day *after* Forte’s testimony was played to the jury. Therefore, admission of the evidence is not subject to appellate review.

DuPont had reasonable notice of Forte’s testimony but failed to make timely objection thereto. DuPont knew for nearly two months before trial precisely what portions of Kathleen Forte’s testimony Plaintiffs intended to offer into evidence at trial. Despite this notice, DuPont did not make any specific objections to the Circuit Court referencing Rule 404(b) or “bad acts” or “other conduct” until after the jury heard Forte’s testimony.

DuPont failed to raise its 404(b) objections as required by the case management orders. In accordance with the Circuit Court’s “*Order Setting Case Management Schedule*” (Binder 18, p. 8212-8214, 02/06/07) and the “*Agreed Amended Scheduling Order*,” (Binder 20, p 8717-8719, 04/26/07), on July 11, 2007, Plaintiffs served DuPont with designations of deposition testimony they intended to use during their case in chief. Designations from Kathleen Forte’s deposition were included in that original filing. *See Plaintiffs’ Deposition Designations* at 8-9 (Binder 24, p. 10497-10549, 07/11/07). In response to the Forte designations and as required by the case

³⁷ West Virginia Rule of Evidence 103(a)(1) provides, in pertinent part, that “[e]rror may not be predicated upon a ruling which admits or excludes evidence unless . . . a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context.” *State v. DeGraw*, 196 W. Va. 261, 272, 470 S.E.2d 215, 226 (1996). In interpreting the significance of Rule 103(a)(1), Justice Cleckley in his *Handbook on Evidence for West Virginia Lawyers* states: “the objecting party should not benefit from an insufficient objection if the grounds asserted in a valid objection could have been obviated had the objecting party alerted the offering party to the true nature of the objection.” Franklin D. Cleckley, *Handbook on Evidence for West Virginia Lawyers* Sec. 1-7(c)(2) at 78 (3rd ed. 1994).

management orders, DuPont submitted over 30 pages of line-by-line objections to Forte's deposition testimony without a single reference to Rule 404(b) or "bad acts" or even "other conduct" as a basis for its objections. *See Defendant E. I. DuPont De Nemours and Company's Objections and Counter Designations to Plaintiffs' Deposition Designations* at 34-75 (Binder 30, p. 13134 -13686, 07/31/07); (Binder 40, 09/12/07 Tr. 921-922). Noticeably absent from DuPont's procedural history leading up to the Forte testimony is any reference to its amended objections to Forte's testimony filed on August 1, 2007. (Binder 31, 08/01/07, p. 13706-14160). In its amended objections, DuPont again failed to make any reference to Rule 404(b) or "bad acts" or even "other conduct" as a basis for its objections.

On September 10, 2007, Plaintiffs notified DuPont, 48 hours in advance, that Forte would be Plaintiffs' second witness in its case in chief. In response, DuPont requested that Plaintiffs remove any references to C8 and Benlate, two toxic chemicals produced by DuPont. (Binder 40, 09/12/07 Tr. 921-922). DuPont also requested that the Plaintiffs omit four documents from the deposition. (Binder 40, 09/12/07 Tr. 921-922). Plaintiffs acceded to DuPont's requests. (Binder 40, 09/12/07 Tr. 921-922). Later, DuPont made some additional requests for further redactions, and, again, Plaintiffs complied with DuPont's requests. (Binder 40, 09/12/07 Tr. 921-922). Despite Plaintiffs' many compromises, DuPont still sought to strike all of Forte's testimony.

On September 12, 2007, at 4:45 p.m., DuPont belatedly filed a third motion directed at the Forte testimony that, for the first time, made reference to Rule 404(b).³⁸ (*Defendant E.I. DuPont de Nemours and Company's Supplemental Objections and Counter-Designations to*

³⁸As the judge was leaving court for the day on September 12, 2007 (the day before Forte was scheduled to testify), DuPont handed him its third lengthy filing on the issue--entitled "*Defendant E. I. DuPont De Nemours and Company's Supplemental Objections and Counter-Designations to Plaintiffs' Designations of Kathleen H. Forte.*" (Binder 40, p. 18040-18128, 09/12/07). Buried within 10 pages of objections (with total objections then exceeding 50 pages), DuPont made objections specifically premised on Rule 404(b). However, when the Circuit Court gave DuPont the opportunity to argue its objections, DuPont did not raise any Rule 404(b) objections with the Court. (Binder 40, 9/13/07 Tr. 1202-19).

Plaintiffs' Designations of Kathleen H. Forte (Binder 40, p. 18040-18128, 09/12/07)). In the transcript, DuPont's motion was referred to as a motion to strike. The next morning, September 13, 2007, the Circuit Court heard oral arguments on DuPont's motion to strike Forte's testimony, just before Forte's testimony was scheduled to be played to the jury. (Binder 40, 09/13/07 Tr. 1203-20). In its oral arguments, DuPont acknowledged that the Circuit Court was only given the motion the day before and that the Circuit Court did not have the motion when it addressed the Forte testimony on September 12, 2007. (Binder 40, 9/13/2007 Tr. 1203).

During its oral argument on the motion to strike on the morning of September 13, DuPont described a number of objections, but at no point did DuPont reference Rule 404(b) or impermissible character evidence.³⁹ Instead, it argued that its objections to Forte's testimony were made "primarily because this witness has no personal knowledge of the Spelter site" (Binder 40, 09/13/07 Tr. 1204) and "primarily [as] a motion in limine on post-1950 conduct"⁴⁰ (Binder 40, 09/13/07 Tr. 1216). After hearing DuPont's argument, the court sustained one of DuPont's objections and ordered plaintiffs to redact one document. The jury then watched the designated portions of the video-taped deposition of Forte. (Binder 40, 09/13/07 Tr. 1221-1347). On September 14, 2007—the day after Forte's testimony—DuPont, for the first time, referenced Rule 404(b). (Binder 40, 09/14/07 Tr. 1374).

DuPont's failure to articulate its Rule 404(b) objections or argue the applicability of Rule 404(b) with sufficient distinctiveness to the Circuit Court precludes appellate review of the issue. *State ex. rel. Cooper v. Caperton*, 196 W. Va. 208, 470 S.E.2d 162 (1996) ("The rule in West

³⁹ The single reference to "other sites" by DuPont during its argument was couched solely as a relevance argument. (Binder 40, 09/13/07 Tr. 1204-05).

⁴⁰ Although DuPont had previously filed a motion in limine to preclude evidence of unrelated sites pursuant to Rule 404(b), the Court denied the motion without prejudice and invited DuPont to re-raise the objections at trial. Despite this invitation, DuPont failed to raise this specific motion in limine or refer to Rule 404(b), instead focusing only on the motion in limine seeking to exclude all evidence dated after 1950. *See Order Denying DuPont's Motion in Limine* (Binder 39, p. 17956-58, 09/06/07).

Virginia is that parties must speak clearly in the circuit court, on pain that, if they forget their lines, they will likely be bound forever to hold their peace.”). In *DeGraw*, the defendant objected to references in a video-deposition to prior criminal offenses on the basis of improper impeachment (Rule of Evidence 609), but never cited West Virginia Rule of Evidence 404(b) as a supporting ground for his objection. 196 W. Va. at 271, 470 S.E.2d at 225. Noting that the objecting party should not benefit from an insufficient objection, the Court announced it was barred from hearing the defendant’s 404(b) argument. Similarly, DuPont has waived appellate review of this issue by failing to articulate a timely and sufficiently particularized Rule 404(b) objection. *See also State v. Johnson*, 210 W. Va. 404, 411, 557 S.E.2d 811, 818 (2001)(observing “Court has a difficult time finding reversible error where the defendant’s counsel failed to object to the introduction of the prior bad acts evidence” and “finds equally troubling defense counsel’s failure to request a Rule 404(b) hearing”); *State v. Whittaker*, 221 W. Va. 117, 131, 650 S.E.2d 216, 230 (2007)(“Ordinarily, a party must raise his or her objection contemporaneously with the trial court’s ruling to which it relates or be forever barred from asserting that that ruling was in error.”).

2. Evidence of “other sites” was used to impeach Forte’s credibility and did not implicate Rule 404(b).

The testimony proffered through Forte does not fall within the protections of Rule 404(b). Rule 404(b) is intended to exclude evidence of other crimes, wrongs or acts admitted solely to show the defendant acted in conformity therewith. Plaintiffs’ counsel elicited the testimony related to “other sites” to impeach Forte’s credibility. Through Forte, Plaintiffs established DuPont’s purported standard of care in being truthful and forthcoming in its communications with the residents surrounding the smelter, as well as DuPont’s actual breach of this standard by interfering with the dissemination of information. When Forte claimed she was unable to recall

specific statements related to a meeting in which the actual policy of limiting information was discussed, Plaintiffs' counsel used a document from the meeting (which contained references to other sites) to impeach her credibility.

Forte had been the Vice President of Public Affairs for DuPont for over 9 years. (Binder 40, 09/13/07 Tr. 1221). She claimed to "have responsibility for global employee communications and external communications related to DuPont actions and directions as [DuPont] interface[s] with the news-media, financial communications, [DuPont's] crisis management system for the company, the annual review for the company, as well as online communications related to [DuPont's] website." (Binder 40, 09/13/07 Tr. 1222). The crux of Ms. Forte's testimony related to DuPont's accountability in communicating accurate and complete information to the public during a potential health crisis, such as the Spelter crisis. As "the lead communications person for the company" (Binder 40, 09/13/07 Tr. 1246), Ms. Forte established that DuPont's purported standard of care, also referred to as "DuPont's core values," is to be honest and forthcoming to the public. (Binder 40, 09/13/07 Tr. 1274). She agreed that DuPont should publicly share facts relative to the plant and its products consistent with DuPont's purported core values and principles. (Binder 40, 09/13/07 Tr. 1276.). Yet when she was confronted with evidence of a meeting she attended in which DuPont appeared to be adopting a policy of "minimizing the dissemination of information," Forte claimed not to recall the specifics of the policy (known as "Connecting the Dots"). (Binder 40, 09/13/07 Tr. 1300). In an effort to impeach Forte's denial of DuPont's policy of limiting the dissemination of information, Plaintiffs' counsel referred her to the document and to the sites (or "dots") referenced in the document and/or meeting.

3. *Because DuPont failed to make a timely and sufficiently particularized objection, its claim of error regarding admission of other crimes, wrongs or acts of defendant during Joseph Rodricks's testimony is not subject to appellate review.*

DuPont tells the Court that it again objected to "other acts" evidence introduced, this time during the cross-examination of Joseph Rodricks, and, again, DuPont is wrong. The record reflects that DuPont objected to the Parkersburg monograph evidence only on the basis of relevance and prejudice (Binder 42, 09/25/07 Tr. 3353-63), but did not object on the basis of Rule 404(b) or "other acts evidence" until the day *after* Rodricks testified (Binder 42, 09/26/07 Tr. 3498-3503). As noted above, a defendant's claim of error regarding admission of other crimes, wrongs, or acts of defendant to show that he acted in conformity with them is not subject to appellate review when he fails to state before the trial court the other crimes rule as the grounds for objection. *DeGraw*, 196 W. Va. 261, 470 S.E.2d 215. In the instant case, DuPont did not raise Rule 404(b) concerns to the Court until the day *after* Rodricks testified about the altered monograph and *after* Rodricks's testimony was complete. (Binder 42, 09/26/07 Tr. 3498-3503). Therefore, admission of the evidence is not subject to appellate review.

Despite DuPont's failure to articulate a timely and sufficiently particularized objection, the Circuit Court applied Rule 404(b) safeguards to the monograph evidence. The Circuit Court heard a proffer from Plaintiffs' counsel concerning the monograph at issue and concluded it was admissible for purposes of bias. (Binder 42, 09/25/07 Tr. 3363, "to the extent that this witness has been directly involved with the matters that you're about to get into and that you've shown, I think that that's fair game to show bias, prejudice."). The next day, when DuPont belatedly objected to the Parkersburg monograph on the basis of Rule 404(b), the Circuit Court reiterated that "the jury understood" that the evidence "was being offered, in essence, for a limited purpose, of impeachment and not to unnecessarily talk about the C8 litigation." (Binder 42, 09/26/07 Tr.

3502). Significantly, DuPont did not request that the Court provide the jury with an instruction informing the jury of the limited purpose of the Parkersburg monograph evidence.

4. Rule 404(b) is not applicable to the impeachment testimony elicited from Dr. Rodricks.

DuPont chose Dr. Rodricks as its sole testifying expert witness in Phase I of this trial. When DuPont chose to call Dr. Rodricks as its expert witness, DuPont made its relationship with Dr. Rodricks fair game for cross-examination. Plaintiffs were entitled to explore Dr. Rodricks's relationship with DuPont including his work on DuPont's Parkersburg site. The procedural protections of Rule 404(b) are not relevant to the Parkersburg monograph testimony elicited from Dr. Rodricks. The testimony identified by DuPont fits squarely within the evidentiary realm of impeachment under Rule 608(b).⁴¹ Plaintiffs' counsel was cross-examining Dr. Rodricks, a toxicologist testifying for DuPont, on his past associations with DuPont, which are proper inquiries to show bias and attack his credibility. *State v. Graham*, 208 W. Va. 463, 467, 541 S.E.2d 341, 346 (2000).

The allegedly improper testimony related to Dr. Rodricks's involvement in submitting misleading or false information to the United States Environmental Protection Agency about a chemical manufactured by DuPont. Specifically, ENVIRON, Dr. Rodricks's company, of which he is a founding member,⁴² was retained by DuPont to draft a "monograph" recommending a safe level of PFOA (a DuPont Chemical known as C8) in the drinking water. (Binder 42, 09/25/07 Tr. 3373). After reviewing the monograph, DuPont requested and ENVIRON apparently agreed to remove a page referring to "major adverse effects for the liver weights in all

⁴¹ DuPont also contends that the monograph evidence violated Rule 608(b). Again, however, DuPont did not raise this specific objection for the Circuit Court's timely consideration.

⁴² In a recently published book, *Doubt is Their Product*, the author details how ENVIRON "skewed" data in a paper published in a scientific journal to favor other industrial groups who are clients of ENVIRON. Michaels, *Doubt is Their Product*, 107, 108 (2008).

dose groups” caused by C8. (Binder 42, 09/25/07 Tr. 3368-72). This redacted report was ultimately provided by DuPont to the EPA. (Binder 42, 09/25/07 Tr. 3368). Initially, Dr. Rodricks denied working on Parkersburg for DuPont. (Binder 42, 09/25/07 Tr. 3353). As cross-examination progressed, however, Dr. Rodricks took responsibility for the report (Binder 42, 09/25/07 Tr. 3371), admitted receiving the e-mail referencing the omitted page (Binder 42, 09/25/07 Tr. 3374), and conceded that he received special permission to work with DuPont on the monograph and that he had reviewed the calculations of the drinking water recommendations (Binder 42, 09/25/07 Tr. 3375).

The admissibility of evidence regarding a witness’s character for truthfulness or untruthfulness is within the sound discretion of the trial judge and depends upon the totality of the circumstances. *State v. Wood*, 194 W.Va. 525, 460 S.E.2d 771 (1995). The Circuit Court did not err by permitting such an inquiry. In fact, assuming the objection was properly made, it would have been reversible error for the Circuit Court to *prohibit* Plaintiffs from making the inquiry. The extent of cross-examination respecting collateral matters tending to show a witness’s lack of honesty, bias, or truthfulness rests within the judge’s discretion, but refusal of the right to examine at all with respect to such matters is reversible error. *Pullman Co. v. Hall*, 55 F.2d 139 (4th Cir. 1932).

5. In its “External Advocacy” memorandum, it was DuPont, not the Plaintiffs, that lumped Spelter in with a number of other DuPont sites.

DuPont complains about references in one of the closing arguments to a DuPont internal memorandum titled *2002 External Advocacy Related Expenditures Memberships* (Plaintiffs’ Trial Exhibit 71759) that details money that DuPont was sending to various organizations. DuPont donated \$15,000.00 to the Harvard Center for Risk Analysis (HCRA), which is a division of Harvard’s School of Public Health (Binder 46, 10/4/07, Tr. 4578). According to

DuPont's memorandum, members from HCRA are often asked to provide advice to regulators and Congress on public policy issues concerning health risks. DuPont believed that its participation with the HRCA "enables [DuPont] to leverage this relationship in the form of support from the center for our various risk advocacy initiatives." In effect, DuPont was buying favorable testimony from supposedly unbiased scientists who were providing input to lawmakers on key decisions affecting public health.

In its *External Advocacy* memorandum, DuPont also detailed its activities with another group called the Ad-Hoc Natural Resource Damage Assessment Group whose purpose it was to aid industry in fighting natural resource damage claims (for example, pollution in the West Fork River). A number of DuPont sites, including Spelter, were listed in the exhibit as locations where this ad-hoc group could help fight natural resource claims.

During Phase II, DuPont presented the expert testimony of Dr. Valberg. Dr. Valberg is a professor in Harvard's School of Public Health and an employee of Gradient Corporation, a corporation that has ties with HRCA. During his testimony, Dr. Valberg was questioned about his and his company's ties with HRCA. In cross-examination, Dr. Valberg was specifically questioned about DuPont's *2002 External Advocacy Related Expenditures Memberships* memorandum.

When the *External Advocacy* memorandum was introduced into evidence during Dr. Valberg's testimony, the Circuit Court admitted evidence while reserving a ruling on hearsay objections. (Binder 46, 10/04/07, Tr. 4575-76, 4584-85). Significantly, the memorandum was offered and admitted without any 404(b) objections. Having failed to object to this exhibit on 404(b) grounds when it was introduced and admitted, DuPont waived its right to object to the use of this document during closing and cannot raise this objection on appeal for the first time.

6. The Court followed the McGinnis protocol in response to the timely, sufficiently particularized objections based on Rule 404(b).

Other than the Forte and Rodricks testimonies, DuPont's remaining complaints about the admission of Parkersburg and/or C8 evidence occurred during the punitive damages phase of the trial. Portraying the Circuit Court as subverting the West Virginia Rules of Evidence, DuPont would have this honorable Court believe that the Circuit Court never conducted an *in camera* review of the documents at issue and merely issued a catch-all instruction. A review of the record reflects just the opposite.⁴³ (Binder 50, 10/16/07 Tr. 5135-99).

On the morning (October 16, 2007) before opening statements for the punitive damages phase of the trial and in the midst of numerous objections by DuPont to Plaintiffs' proposed witnesses and exhibits, DuPont finally stated a timely and particularized Rule 404(b) objection to the evidence Plaintiffs intended to introduce during the final phase of the trial. (Binder 40, 09/14/07 Tr. 1535-36). In response, the Circuit Court asked that the parties present all disputed evidence prior to opening statements for "appropriate review" in order to expedite the proceedings before the jury. (Binder 50, 10/16/07 Tr. 5140). The Circuit Court even characterized the Rule 404(b) *in camera* review as "more pressing" than some of DuPont's other

⁴³ "Rule 404(b) adopts an inclusionary rather than exclusionary approach, making evidence of prior crimes, wrongs or acts potentially admissible, subject to other limitations such as Rule 403 where they may be offered for *any* relevant purpose that does not compel an inference from character to conduct." *State v. McGinnis*, 193 W. Va. 147, 154, 455 S.E.2d 516, 523 (1994). The circumstances under which such evidence may be found relevant and admissible under Rule 404(b) has been described as infinite. *State v. Charles*, 183 W. Va. 641, 647, 398 S.E.2d 123, 129 (1990). This Court's role "is limited to whether the trial court acted in a way that was so arbitrary or irrational that it can be said to have abused its discretion. In reviewing the admission of Rule 404(b) evidence, [the Court] review[s] it in the light most favorable to the party offering the evidence. . . maximizing its probative value and minimizing its prejudicial effect." *McGinnis*, 193 W. Va. at 159, 455 S.E.2d at 528. The risk of prejudice under Rule of Evidence 403 is not likely to be as great in a civil case as it is in a criminal case. *Stafford v. Rocky Hollow Coal Co.*, 198 W. Va. 593, 598, 482 S.E.2d 210, 215 (1996).

objections that proposed testimony was cumulative. (Binder 50, 10/16/07 Tr. 5155-56).⁴⁴ In response, Plaintiffs provided the Circuit Court and opposing counsel with a stack of documents for review. Contrary to DuPont's claim that the court did not actually review the evidence (see DuPont's Brief at 23), the Circuit Court reviewed the documents at issue for an hour before hearing the parties' arguments on the matter.⁴⁵ (Binder 50, 10/16/07 Tr. 5161).

The Circuit Court accepted the proposed documents as a proffer of evidence showing that DuPont had engaged in the same manipulation, miscommunication, misdirection, and cover-up of off-site contamination at Parkersburg as it had done at Spelter. (Binder 50, 10/16/07 Tr. 5179, Court: "But they are not offering to show that conduct. It's—according to the plaintiff, it's the—it's the matter of having information that showed that there were detrimental effects of the chemical to the public health and then lying to the public about it, according to the plaintiff's versions of things . . . it's the matter that there was information to them which they either withheld or misrepresented to the public, [that] is the conduct."). The Circuit Court then continued its *McGinnis* analysis, finding that the documents reviewed *in camera* established by a preponderance of the evidence that DuPont had engaged in similar conduct of misrepresentation and that such evidence was relevant pursuant to Rules 401 and 402. (Binder 50, 10/16/07 Tr. 5181-82). The Circuit Court also concluded that the probative value was not outweighed by any prejudicial value and that the evidence would therefore be admitted along with a limiting

⁴⁴ "I guess what I believe to be more pressing from the Court's perspective is that we need to also have at least an *in camera* review, if not more, with regards to any 404(b) issues. That's—I'd like to do that so we don't keep the jury waiting. (Binder 50, 10/16/07 Tr. 5155-56).

⁴⁵ On the morning before the punitive damages phase began, Plaintiffs provided DuPont with the exhibits they intended to reference during Opening Statements. (Binder 50, 10/16/07 Tr. 5175). In addition, DuPont was given time to review the proposed stack of documents while the Circuit Court performed his own *in camera* review. (Binder 50, 10/16/07 Tr. 5181)(DuPont Counsel: Your Honor, this is—under 403, the hearing is, they've got to proffer your Honor. We haven't seen the documents, we haven't seen the proofs. The Court: What have you done for the last hour if you haven't seen the documents, Mr. Gallagher?).

instruction. (Binder 50, 10/16/07 Tr. 5182). In short, when faced with a timely and particularized Rule 404(b) motion, the Circuit Court considered an *in camera* review of the proffered evidence as pressing, insisted that the parties initiate an *in camera* review, and made a good faith effort to satisfy the safeguards of *McGinnis* and its progeny.

The record also reflects that the Circuit Court insisted on a narrow limiting instruction identifying the specific reasons for admission of the Parkersburg evidence. (Binder 50, 10/16/07 Tr. 5194-97). Indeed, the Circuit Court rejected the first proposed limiting instruction concerning the 404(b) evidence because “[t]he applicable case law in West Virginia, either *McGinnis* or one of the other subsequent cases indicates that you can’t just repeat the litany of reasons under Rule 404(b).” (Binder 50, 10/16/07 Tr. 5194). Recognizing that the Parkersburg evidence reflected DuPont’s pattern and practice at Spelter of manipulation and misrepresentation of information concerning off-site contamination, the Circuit Court limited consideration of the Parkersburg evidence to showing preparation, plan, knowledge, and absence of mistake or accident, and this is the precisely the limiting instruction the Circuit Court provided to the jury each time the Parkersburg evidence was raised.

B. The Circuit Court properly exercised its discretion by allowing the testimony of Dr. Kirk Brown, a respected pioneer in the field of environmental science.

During the three years of litigation leading up to this trial, DuPont did not send a single expert or even request that its experts be allowed to sample the air, water, or house dust in the class area. In stark contrast, Plaintiffs’ experts took approximately 1,500 samples in the class area. Dr. Brown personally visited 100 homes in the class area and collected 440 samples from these homes. (Binder 41, 9/19/07 Tr. 2491). Dr. Brown used the data from these samples to perform a risk assessment, which calculates the incremental increase in cancer probabilities from the smelter contamination.

Dr. Brown is a respected pioneer in the field of environmental science and, particularly, in risk assessment. He recently retired from Texas A&M University following 20 years as a tenured professor teaching and conducting research in environmental science. He obtained a Ph.D. in the 1960s in soil science, focusing on the emissions of chemicals from contaminated soils. In the early 1980s, Dr. Brown worked with the EPA to develop the methodology for risk assessments. (Binder 41, 09/19/07 Tr. 2466). Dr. Brown also worked with the Agency for Toxic Substances and Disease Registry (ATSDR) as a reviewer of epidemiological studies. His evaluations were used to update literature published by the ATSDR on the toxicity of certain chemicals. At Texas A&M University, Dr. Brown taught graduate level courses in human risk assessments. (Binder 41, 09/19/07 Tr. 2465-66, 2469, 2476). Dr. Brown was even hired by DuPont in the early 1990s to perform an ecological risk assessment at its Victoria facility in Texas. (Binder 41, 09/19/07 Tr. 2477).

DuPont professes outrage that the Circuit Court allowed Dr. Brown to testify about the effects of arsenic, cadmium, and lead even though these effects are universally accepted by environmental scientists. DuPont states, “[f]or example, Brown offered his opinions on the dose of arsenic that is lethal, types of cancer that arsenic causes, types of cancer that cadmium causes, and the health effects of lead.” (DuPont Brief at 27, 28). These opinions, however, were based upon epidemiological studies that are universally accepted.

“Rule 702 permits a circuit court to qualify an expert by virtue of education or experience or by some combination of these attributes.... [W]e have stated clearly that a broad range of knowledge, skills, and training qualify an expert as such, and rejected any notion of imposing overly rigorous requirements of expertise.” *Gentry v. Mangum*, 195 W.Va. 512, 524-25, 466 S.E.2d 171, 183-84 (1996). “Moreover whether a witness is qualified to state an opinion is a

matter which rests within the discretion of the trial court and its ruling on that point will not ordinarily be disturbed unless it clearly appears that its discretion has been abused.” *Overton v. Fields*, 145 W. Va. 797, 809, 117 S.E.2d 598, 607 (1960).

The Circuit Court did not abuse its discretion when it allowed Dr. Brown to testify regarding his risk assessment. Dr. Brown’s “broad range of knowledge, skills, and training qualify” him as an expert in the field of risk assessment. Dr. Brown was a pioneer in the field of risk assessment and taught risk assessment to graduate students. He developed the methodology of risk assessment used by the EPA. Based upon this experience, DuPont cannot show that the Circuit Court “clearly abused” its discretion when it allowed Dr. Brown to testify.

C. DuPont may not rely on regulatory agencies’ findings as a defense and, at the same time, preclude Plaintiffs from presenting evidence of DuPont’s continued manipulation of those very agencies.

DuPont’s argument that the Circuit Court impermissibly allowed the jury to punish DuPont because of its communications with regulators is meritless. At every stage of this litigation, including at trial, DuPont defended itself by relying on the same communications that it now complains were used unfairly against it. (See e.g., affirmative defenses 9, 41, 42, 43, 45, and 47 in *Second Amended Answer, Defenses and Cross Claims of Defendant E. I. DuPont de Nemours and Company* (Binder 1, p. 638-661, 09/21/05)).⁴⁶ A litigant cannot use a privilege as both a sword and shield by selectively invoking the privilege to prove a point but then invoking the privilege to prevent an opponent from challenging the assertion. It is axiomatic that, when a party injects an issue into litigation, that party waives any privileges it may have relating to that issue. See *State ex rel. Med. Assurance of W. Va., Inc. v. Recht*, 213 W.Va. 457, 481, 583 S.E.2d 80, 104 (2003) (a “privilege may therefore be deemed waived where the party asserting the

⁴⁶ In its Brief to this Court, DuPont continues to use agency action or inaction as a defense to the Plaintiffs’ claims. See *Appellant’s Brief* at 8.

privilege, in the course of litigation, raises an issue the effective rebuttal of which requires inquiry into privileged communications”).

Although the *Noerr-Pennington* doctrine and West Virginia’s Constitution provide a qualified immunity from suit to parties attempting to influence or encourage government action, neither the doctrine nor the Constitution mandates (or even suggests) that evidence of such activity is irrelevant and should be excluded from *any* litigation. In fact, the *Pennington* court specifically acknowledged that the trial court had discretion to admit evidence of attempts to influence government action. *United Mine Workers v. Pennington*, 381 U.S. 657, 670, n.3 (1965) (“It would of course still be within the province of the trial judge to admit this evidence, if he deemed it probative and not unduly prejudicial”),⁴⁷ *see also Harris v. Adkins*, 189 W.Va. 465, 469, 432 S.E.2d 549, 553 (1993) (“there is no absolute privilege attached to the right to petition”); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974) (“neither the intentional lie nor the careless error materially advances society’s interest in uninhibited, robust, and wide-open debate on public issues”).

At the earliest stages of this litigation, DuPont defended against claims of off-site contamination and the lack of off-site remediation by pointing to regulatory agencies that purportedly approved remediation restricted to the smelter property. For example, four of DuPont’s affirmative defenses specifically put its relationship and, therefore, communications with governmental agencies *directly* at issue in this case:

A substantial portion of DuPont’s activities which Plaintiffs and the putative class members contend caused them injury were done

⁴⁷ Although Plaintiffs do not base their causes of action on DuPont’s communications with regulatory agencies, it should be noted that the West Virginia Supreme Court of Appeals has suggested that where petitioners have attempted to instigate agency action in any way other than through “proper and established channels” such as “marshal[ling] political clout,” such activity may be actionable. *See Webb v. Fury*, 167 W. Va. 434, 453, 282 S.E.2d 28, 39 (1981), rev’d on other grounds by *Harris v. Adkins*, 189 W. Va. 465, 432 S.E.2d 549 (1993).

while DuPont was *acting under the complete direction of federal officers and federal agencies* (Sixth Affirmative Defense);

The claims of Plaintiffs and the putative class members are barred, in whole or in part, because DuPont's activities at the site are and always have been consistent with available technological, scientific, and industrial state-of-the-art and comply, and *have complied with all applicable government regulations* (Fourteenth Affirmative Defense);

Some or all of the injuries alleged in the claims or causes of action asserted by Plaintiffs *resulted from intervening acts of public agencies* (Forty-Fifth Affirmative Defense);

Some or all of the injuries alleged in the claims or causes of action asserted by Plaintiffs resulted from the actions taken or omitted *at the direction of [WVDEP]* (Forty-Seventh Affirmative Defense).

Second Amended Answer, Defenses & Cross-Claims of Defendant E.I. du Pont de Nemours & Co. at 11, 13, 20 (Binder 2, p. 638-661, 09/22/07) (emphasis added).

In its opposition to class certification, DuPont again defended itself by claiming that “[u]nder the direction, and subject to the approval, of [WVDEP], DuPont . . . collected and analyzed data to determine the appropriate remediation of the site. . . .” *DuPont’s Memorandum of Law in Opposition to Class Certification* at 15-16 (Binder 9, p. 4020-4027, 04/03/06) (emphasis added). Later in the proceedings, DuPont argued that “[t]he approval of regulatory authorities, including the [EPA] and the [WVDEP], negates any finding that DuPont’s conduct was reckless, wanton, malicious or willful.” *DuPont’s Motion for Judgment as a Matter of Law, or, In the Alternative, to Decertify the Class* at 6 (¶ 13) (Binder 51, p. 23428-23668, 12/04/07) (emphasis added). DuPont continued this line of defense in pre-trial proceedings stating:

DuPont further intends to prove that upon being notified by the USEPA of the agency’s interest in the clean up of the site, *DuPont worked cooperatively with both the USEPA and the WVDEP and*

remediated the site. As part of those remediation efforts, DuPont entered into a Voluntary Remediation Agreement with WVDEP. That agency reviews and determines whether DuPont's actions in the remediation are in compliance with applicable state regulations and the parties' undertakings in the Voluntary Remediation Agreement. *The entire remediation process at Spelter is significant evidence of both DuPont's state of mind* and total absence of any bases for a punitive damage award.

DuPont's *Consolidated Pre-trial Memorandum and Order* at 8-9 (Binder 39, p. 17798-17929, 08/29/07) (emphasis added).

At trial, DuPont's *entire* defense was based upon its supposed compliance with WVDEP rules and regulations. *See e.g.* (Binder 41, 09/18/07 Tr. 2202-86); (Binder 41, 09/19/07 Tr. 2305-56); (Binder 50, 10/18/07 Tr. 5753) ("So when you're evaluating DuPont's conduct, when it comes back and works to clean up this site, you won't see any evidence that DuPont didn't comply with any rules or regulations"); (Binder 50, 10/18/07 Tr. 5754) ("This is the Remedial Evaluation Report prepared by DuPont, submitted to the DEP, reviewed by the DEP and approved by the DEP required for cleanup").

DuPont insists that the regulatory agencies' approval of the remediation plan negates any claims of wanton and willful conduct on its part, but, at the same time, insists that Plaintiffs should not be permitted to adduce any evidence of DuPont's communications with regulatory agencies that evidence DuPont's manipulation and distortion of the process leading up to the approval of the remediation plan. DuPont's reliance on regulatory decisions as a defense makes DuPont's communications with the agency relevant. DuPont does not enjoy immunity for its wrongful acts merely because it elected to channel them through a regulatory agency.⁴⁸

⁴⁸ *See Garfinkle v. Arcata Nat'l Corp.*, 64 F.R.D. 668, 689 (S.D.N.Y. 1974) (privilege may be waived if substance of privileged communication is injected as an issue in case by party which enjoys its protection, *and waiver may occur by pleading privileged material as a defense*).

The Circuit Court was correct in permitting evidence of DuPont's communications with regulatory agencies because such communications confirmed the existence and the magnitude of the contamination, are admissions made by a party opponent, impeach DuPont's claims that there is no off-site contamination and no need for remediation, and impeach DuPont's reliance on regulatory agencies' findings of no unreasonable risk of off-site contamination. DuPont put these issues on trial from the earliest stages of this litigation and cannot now claim immunity simply because Plaintiffs accepted their invitation to examine these communications. West Virginia law is firmly established on this issue – "a judgment will not be reversed for any error in the record introduced by *or invited by* the party seeking reversal." *State v. Johnson*, 197 W.Va. 575, 582, 476 S.E.2d 522, 529 (1996) (citation omitted).⁴⁹ DuPont should not be permitted to rely on regulatory agencies' findings as a defense and, at the same time, preclude Plaintiffs from presenting evidence of DuPont's continued manipulation of those very same agencies.

II. The Circuit Court correctly ruled that the Complaint was timely filed.

After all parties had fully briefed and argued the issue of the statute of limitations, the Circuit Court ruled that the Complaint was timely filed. *Meadows v. Wal-Mart Stores, Inc.*, 207 W. Va. 203, 212, 530 S.E.2d 676, 685, n. 4 (1999) ("Where a court acts with great caution, assuring itself that the parties to be bound by its judgment have had an adequate opportunity to develop all the probative facts which relate to their respective claims, the court may grant summary judgment . . . *sua sponte*."). The Circuit Court correctly determined that DuPont failed to offer any credible evidence to show that the residents knew, or should have known, that their homes and yards were contaminated with arsenic, cadmium, and lead.

⁴⁹See also *Rohrbaugh v. Wal-Mart*, 212 W.Va. 358, 365-66, 572 S.E.2d 881, 889 (2002) (denying motion for new trial because a party "cannot now complain of error about matters he placed into evidence during his case-in-chief") (citations omitted); *In re Tiffany Marie S.*, 196 W.Va. 223, 233, 470 S.E.2d 177, 187 (1996) ("[W]e regularly turn a deaf ear to error that was invited by the complaining party.").

A. DuPont reassures the community that there are no off-site contamination issues.

“The current sampling data and risk assessment indicate that there is no current risk to the Spelter community from off-site releases.” DuPont Spelter Community Newsletter, 2001.⁵⁰

“The properties in the Town of Spelter have not been impacted by the site and that the site should not diminish property values.” *Id.*

“The constituents at the site (namely lead and zinc) are not the kind of materials that cause health effects several years after the exposure.” DuPont’s Scripted Answers to the Communities’ Questions.⁵¹

DuPont made these public declarations, claiming they were backed by governmental agencies that had supposedly investigated off-site contamination. On one hand, DuPont offers such public disinformation, numerous governmental reports, a WVDEP letter, and an informal blood lead survey as proof that there were no off-site contamination issues, but on the other hand, DuPont argues that Plaintiffs knew or should have known that their properties were contaminated. *See, e.g., LaSalle Bank National Association v. Lehman Brothers Holdings, Inc.*, 237 F. Supp. 2d 618 (D. Md. 2002) (no inquiry notice when one of referenced reports proposed no further action for soil or groundwater contaminants); *LaBauve v. Olin Corp.*, 231 F.R.D. 632, 661 (S.D. Ala. 2005) (holding that the CERCLA statute of limitations requires a plaintiff to possess notice of contamination sufficient to cause the plaintiff to disbelieve any further misrepresentations by the defendant about the contamination.). In light of DuPont’s public assurances and other evidence, the Circuit Court was correct when it ruled that the Plaintiffs did not have the knowledge sufficient to trigger the statute of limitations until the Plaintiffs’ expert issued his report.

⁵⁰ Exhibit 30, Exhibits in Support of Class Certification (Binder 2, 11/14/05, p. 876 – 881).

⁵¹ Plaintiffs’ Trial Exhibit 8411, T. Bingman, *Re: Spelter Script* (2003).

B. Federal law controls the commencement of the statute of limitations.

Under the federal statute, if West Virginia's statute of limitations provides for a commencement date that is more restrictive than the federally required commencement date, the running of the statute of limitations shall commence on the federally required commencement date. Title 42, section 9658 (a)(1) of the United States Code provides:

(a) State statutes of limitations for hazardous substance cases

(1) Exception to State statutes

In the case of any action brought under State law for personal injury, or property damages, which are caused or contributed to by exposure to any hazardous substance, or pollutant or contaminant, released into the environment from a facility, if the applicable limitations period for such action (as specified in the State statute of limitations or under common law) *provides a commencement date which is earlier than the federally required commencement date, such period shall commence at the federally required commencement date in lieu of the date specified in such State statute* (emphasis added).

Stated another way, West Virginia's commencement date would only apply if it were more liberal than the federally required commencement date. If DuPont is not entitled to summary judgment on the federally required commencement date, then it is not necessary to determine if West Virginia law provides for a longer period to file a lawsuit.

Knowledge triggers the running of the statute of limitations under federal law. Under federal law, courts have sharpened the inquiry-notice standard by stating that such notice requires that the plaintiff know or should know of facts sufficient to place him or her on notice of the environmental contamination and its cause. *See In re Tutu Wells Contamination Litigation*, 909 F. Supp. 980 (D.V.I. 1995). Mere suspicions, even when reasonable, do not equate with

knowledge.⁵² The fact that residents may have suspected that their properties were affected by the smelter is not a sufficient basis for ruling as a matter of law that the residents should have known about the damage to their property. *Freirer v. Westinghouse Elec. Corp.*, 303 F.3d 176, 205-206 (2nd Cir. 2002); *Crawford v. Boyette*, 464 S.E.2d 301 (N.C. Ct. App. 1995), *cert. denied*, 467 S.E.2d 902 (N.C. 1996). At best, DuPont offered nothing more than suspicions by the residents.

The court in *Reichold Chemicals, Inc. v. Textron, Inc.*, 888 F. Supp. 1116 (N.D. Fla. 1995), held that the CERCLA statute of limitations begins to run when a plaintiff knows of environmental contamination, rather than the date when the plaintiff has reason to suspect that the defendant was the cause of the contamination. In other words, the CERCLA statute of limitations begins to run on the date the plaintiff learns of the injury. *Id.* at 1126. The plaintiff must know the fact of contamination in order for the CERCLA statute of limitations to commence. *Id.* At least one court has further specified that the CERCLA statute of limitations begins to run on the date of an expert's report pinpointing the cause of the contamination at issue, not on an earlier date when a governmental agency issues notice of potential contamination. *See Kleen Laundry & Dry Cleaning Services, Inc. v. Total Waste Management Corp.*, 817 F. Supp. 225, 234-235 (D.N.H. 1992).

C. DuPont's vague and ambiguous evidence fails to establish the requisite knowledge to trigger the statute of limitations.

DuPont argues that media reports and community meetings provided knowledge to the Spelter residents, which creates a question of fact regarding the statute of limitations. While the

⁵² DuPont's arguments fail to recognize the distinction between knowledge that would trigger the running of the statute of limitations and mere suspicions or concerns: "Simoni . . . attended numerous meetings . . . with community residents concerning the smelter and the *suspected* effects . . ." DuPont Summary Judgment Motion at 6 (Binder 24, p. 9998-10211, 07/09/07). "Plaintiffs' cause of action against DuPont accrued . . . as soon as community residents have a reasonable basis to *suspect* that their properties may have been damaged by DuPont's former operations." *Id.* "[R]esidents were put on *notice* . . ." *Id.* at 10.

smelter was discussed in news reports and at public meetings that occurred before the 2003 study, these discussions failed to inform the residents that their yards and homes were contaminated with heavy metals from the smelter. Instead, these discussions included many assurances from agency officials or DuPont that the smelter posed no off-site problem.

DuPont also presents the ambiguous testimony of a former smelter worker who knew that he worked with dangerous substances at the smelter. But the first time the class members had affirmative knowledge that the dangerous substances at the smelter had contaminated their off-site properties was after December 2003 when several hundred soil samples were collected from the surrounding community. Just months before this soil sampling, DuPont had engaged in a public campaign precisely directed to misinform the residents that there was no off-site contamination.

D. Media reports emphasized the lack of knowledge of any adverse, off-site effects from the activities on the smelter site.

The circumstances are identical to those in *Freirer v. Westinghouse Electric Corp.*, 303 F.3d 176, 209 (2nd Cir. 2002), where “defendants submitted to the [circuit] court numerous documents showing that there were local concerns and controversies” regarding possible dangers posed by an environmental hazard. The Second Circuit correctly dismissed that evidence out of hand: “if notice of controversy were the issue, defendants’ motion for summary judgment would have had greater merit. But that is not the standard for determining the Federal Commencement Date”. Similarly, DuPont’s newspaper articles show concerns and controversy, but no knowledge. In fact, the media accounts presented by DuPont require a reasonable fact finder to conclude that the class members did not know, before the testing conducted in December 2003, that the smelter was the cause of widespread, heavy metal contamination in the class area. Media coverage of the Spelter smelter site did not provide the knowledge necessary to inform the class

members either that their properties were contaminated or that they were at increased risk for disease. According to the *Clarksburg Exponent*, “the question of the actual health consequences of the pile is still unanswered.” Agency officials quoted in the same article minimized or equivocated about any off-site contamination and hazards: “Dr. John Hando, with the state DEP, said many of the people he has talked to in Spelter are healthy. In addition, too many variables—including genetics, behavior and work environment—have to be considered before blaming any health problems to the pile, said Hando. It’s very difficult to say this particular site caused this particular problem, [Hando] said.” (*DuPont’s Motion for Summary Judgment*, Exhibit D (Binder 24, p. 9998-10211, 07/09/07)). With such equivocal public statements by agency officials in the local media, “[t]he evidence of publicity . . . did not connect the dots.” *O’Connor v. Boeing N. Am.*, 311 F.3d 1139, 1155 (9th Cir. 2002).

The lack of information provided to the community through the media is demonstrated by the testimony of several local residents from DuPont’s witness list. Terri Schulte, Director of the Harrison County Planning Commission, testified that she had no knowledge of historical or current air emissions from the Spelter smelter even though she is responsible for maintaining the public repository of documents on the Spelter smelter site. (*Plaintiffs’ Opposition to DuPont’s Motion for Summary Judgment*, Exhibit 15 (Binder 27, p. 11440-11482, 07/23/07)). DuPont’s witness, Cindy Riddle, a realtor and resident of Spelter, testified that she had no knowledge of the chemical make-up of the air emissions from the Spelter smelter. (*Plaintiffs’ Opposition to DuPont’s Motion for Summary Judgment*, Exhibit 16 (Binder 27, p. 11440-11482, 07/23/07)).

Anita Menendez, another DuPont witness who is a resident of Spelter and member of the Harrison County Planning Commission, testified that she had no personal knowledge of contamination in Spelter. (*Plaintiffs’ Opposition to DuPont’s Motion for Summary Judgment*,

Exhibit 17 (Binder 27, p. 11440-11482, 07/23/07)). When asked whether she had read any scientific reports about contamination in Spelter, Ms. Menendez responded, "I read newspaper [] once in a while but it doesn't mean a lot to me because I don't know chemistry." Ms. Menendez was even assured by the EPA that the Spelter smelter would not affect the sale of properties in Spelter and that the town of Spelter was not contaminated. Although Ms. Menendez visited the public repository, she did not understand any of the technical reports it contained. In fact, Ms. Menendez testified that her only source of information regarding soil contamination was from this litigation.

E. Concerns raised at community meetings did not rise to the level of knowledge as required by the federal commencement rule.

Community meetings did not give prospective class members knowledge that their properties were contaminated. DuPont has failed to provide any evidence that data was provided to the residents during these meeting that would have informed them that their yards and homes were contaminated with heavy metals from the former zinc smelter. DuPont's contractor attended these meetings and prepared a written report summarizing his recollection of the meetings.⁵³

As demonstrated by DuPont's contractor's report, no information was provided to the residents that would have given them knowledge about the community-wide contamination. Joe Simoni, a sociology professor from West Virginia University, provided results from a single soil lead test, but there is no indication of the source of the lead. In fact, a resident identified an alternative source and questioned whether the nearby power plant might be impacting the

⁵³ See *Plaintiffs' Opposition to Summary Judgment*, Exhibit 14, Williams Notes from Spelter Meeting (Binder 27, p. 11440-11482, 07/23/07).

community. Concerns raised at the meetings did not trigger the running of the statute of limitations.

F. Class members lacked the resources and scientific know-how to determine if their health or property had been affected by the smelter.

Even supposing, *arguendo*, that some notice of contamination in the class area had been made public, an average class member had no means to conduct the type of comprehensive scientific study necessary to connect the contamination to the smelter and to any damage he or she may have suffered. Connecting the dots linking the smelter and pile emissions to the contamination found in the class area required a team of experts analyzing thousands of samples using statistical models at a cost greatly exceeding several million dollars. Even assuming class members had a duty to inquire about possible contamination, they could not have discovered their claims because they did not have the resources to investigate the contamination. *O'Connor*, 311 F.3d at 1157.

DuPont cites *Ranney v. Parawax Co.*, 582 N.W.2d 152 (Iowa 1998), and *Labauve v. Olin Corp.*, 231 F.R.D. 632 (S.D. Ala. 2005), but neither case controls this determination. *Ranney* discusses the state law statute of limitations for an Iowa workers' compensation claim and rejects the holding of cases based upon federal law. In *Labauve*, an expert report did not trigger the statute of limitations for the commonsense reason that the report post-dated the filing of the lawsuit by six months. *Labauve*, 231 F.R.D. at 659. Of course, that is not the case here.

G. There was no evidence that the Plaintiffs knew, or should have known, that they are at significant increased risk of contracting a particular disease.

"A medical monitoring cause of action accrues when a plaintiff knows, or by the exercise of reasonable diligence should know, that he or she has a significantly increased risk of contracting a particular disease due to significant exposure to a proven hazardous substance...."

State of West Virginia ex rel. Chemtall, Inc. v. Madden., 216 W. Va. 443, 456, 607 S.E.2d 772, 785 (2004). Before the testing of their yards and homes, all the information available to the Plaintiffs indicated that there was no risk of disease from the constituents of the smelter site. DuPont even went so far as expressly to inform the public that there was no risk even though DuPont had not done any testing. The Circuit Court correctly found that the Plaintiffs did not know, nor could they reasonably have known, that they were at increased risk of disease because of the information distributed by DuPont and because their properties or homes had not been tested.

III. The Circuit Court correctly interpreted the indemnification agreement. Additionally, DuPont encouraged the jury to find solely against DuPont.

A. In his closing argument, DuPont's counsel invited the jury to find solely against DuPont: "So when you're completing [the verdict form], remember if any of these companies are found to have produced dangerous levels of arsenic, cadmium, and lead in these zones in the class area, then DuPont is liable for all those companies."

The Circuit Court's finding that DuPont was responsible for any liability of Diamond did not require DuPont to alter its trial strategy. In fact, DuPont maintained the same strategy it had taken throughout the course of this litigation: regardless of the source, the contamination in the class area was inconsequential. DuPont had the opportunity, but chose not to take it, to present evidence against the three other entities: Meadowbrook, Matthiessen & Hegeler, and Diamond. Rather than spreading the liability in Phase I, DuPont made a calculated decision not to put on any evidence against these other defendants and to remind the jury of the Circuit Court's ruling, literally inviting the jury to find solely against DuPont. This strategy was consistent with DuPont's contentions throughout discovery, class certification, pre-trial motions, and trial—i.e., there was no significant risk off-site to residents or property.

The verdict form allowed the jury to apportion fault among DuPont/Grasselli; Meadowbrook; Matthiessen & Hegeler; and Diamond. The defendants were individually listed so as to allow the DuPont to seek contribution and to preserve the indemnification issue for appeal. DuPont had the opportunity to present evidence against Diamond and a verdict form to preserve the issue. Then, if the jury accepted DuPont's evidence and assigned liability to Diamond, DuPont would have preserved the issue for appeal. Even assuming the Circuit Court's indemnification ruling was in error, DuPont has waived its right to appeal this issue because it failed to avail itself of the opportunity to present evidence and assign liability to Diamond.

B. Whether DuPont must indemnify Diamond against any judgments arising out of Plaintiffs' claims is moot.

During the liability phase of a six-week trial, an eleven-member jury unanimously determined that the only defendant that should be held responsible for negligence, nuisance, trespass and strict liability and for exposing class members and their property to toxic metals is DuPont. The jury consistently declined to apportion any responsibility to any other defendants—including Diamond. There is no judgment that DuPont must pay to Plaintiffs on behalf of Diamond. In light of the jury's determination, DuPont's indemnification obligation for any judgment is no longer a live controversy and is, therefore, not properly cognizable by the Court.

The West Virginia Supreme Court of Appeals has consistently held that "moot questions or abstract propositions, the decision of which would avail nothing in the determination of controverted rights of persons or of property, are not properly cognizable by a court." Syl. Pt. 1, *State v. Merritt*, 221 W. Va. 141, 650 S.E.2d 240 (2007)(quoting Syl. Pt. 1, *State ex rel. Lilly v. Carter*, 63 W. Va. 684, 50 S.E.2d 873 (1908)). Because the jury assessed no damages against Diamond, there is no judgment for which DuPont must indemnify Diamond. The Court's review

of the indemnification obligation would not advance this litigation in any way. Rather, it would simply be a theoretical exercise in contract interpretation.

In its appeal, DuPont did not identify a single exception to the mootness doctrine sufficient to justify the Court hearing this issue. *See e.g., Syl., Gallery v. West Virginia Secondary School Activities Com'n*, 205 W. Va. 364, 518 S.E.2d 368 (1999)(identifying three factors to be considered in deciding whether to address technically moot issues). The Circuit Court's ruling on DuPont's duty to indemnify Diamond against any judgments arises from the idiosyncratic language contained in a unique commercial contract between two sophisticated corporations. The interpretation of such a contract is unlikely to implicate the public interest or to be a matter that is repeatedly presented to the trial court yet evades appeal. Nor has DuPont pointed to any collateral consequences that will result from determination of the question. *See West Virginia Education Assoc. v. Consolidated Public Retirement Board*, 194 W. Va. 501 460 S.E.2d 747, n. 30 (1995) (pending issue of attorneys' fees and expenses is not a sufficient collateral issue to justify hearing technically moot issue; issue of fees and expenses can be examined without reviewing mooted issue).

The jury's decision—at DuPont's own urging—to exculpate Diamond from liability has mooted the issue of whether DuPont must pay any damages on behalf of Diamond. *See e.g., Quackenbush v. Quackenbush*, 159 W. Va. 351, 222 S.E.2d 20 (1976)(after the Circuit Court had denied the husband's complaint for divorce, there was no longer any justiciable controversy requiring the Court to pass on the constitutionality of a statute challenged by the wife). There is no live controversy in this regard, and, consequently, the Court is without subject matter jurisdiction. W. Va. Const., Article VII, Section 3.

C. The plain language of the Sale Agreement assigns sole liability for all environmental conditions, including liability for off-site contamination, to DuPont.

DuPont complains that the Circuit Court erred in conflating DuPont's duty to indemnify (found in Paragraph 5) with DuPont's release of claims (found in Paragraph 6). Regardless of the release language found in Paragraph 6, DuPont's duty to indemnify Diamond is expressly stated in Paragraph 5 and obligates DuPont to indemnify Diamond against the Plaintiffs' environmental claims. Although DuPont resists defining the precise extent of its duty to indemnify Diamond, the plain language in Paragraph 5, which even DuPont admits is an indemnification provision,⁵⁴ defines DuPont's duty:

After the Closing Date, TLD [Diamond] shall remain a Co-Applicant under the Voluntary Remediation Agreement. TLD [Diamond] and DuPont shall cooperate with each other in execution of documents required by the Voluntary Remediation Agreement. However, from and after the Closing Date (except as provided in Paragraph 12 hereof) as between TLD [Diamond] and DuPont, *DuPont shall be solely liable for the past, current and future environmental condition of the Real Property, including, but not limited to:* (a) any obligations pursuant to the Voluntary Remediation Agreement; (b) any obligations pursuant to the NPDES Permit & Consent Order; (c) any liabilities related to the off-site migration of soil, sediment, groundwater or surface water from the Real Property; (d) any demolition of the buildings on the Real Property; and (e) any liabilities arising from building demolition or other actions taken pursuant to the Voluntary Remediation Agreement or the NPDES Permit & Consent Order. TLD [Diamond] shall remain liable for any government imposed fines or penalties for violations of law by TLD [Diamond] unrelated to the environmental conditions being addressed through the Voluntary Remediation Agreement and the NPDES Permit & Consent Order. (Emphasis Added).

DuPont expressly assumed sole liability for the past, current, and future environmental condition of the plant site. The parties also provided an illustrative list of examples of conditions for which DuPont would be responsible. The list was prefaced by the non-limiting language of

⁵⁴ See DuPont's Petition for Appeal at 10.

“including, but not limited to,” emphasizing this was not a finite list of potential liability scenarios. For example, DuPont agreed that it would be solely liable for any obligations arising under the West Virginia Voluntary Remediation Agreement. DuPont further agreed that it would be solely liable for any obligations arising under the National Pollutant Discharge Elimination System Permit. DuPont agreed that it would be solely responsible for any liabilities arising from building demolition. DuPont agreed it would be solely responsible for any liabilities arising from actions taken pursuant to the Voluntary Remediation Agreement or the NPDES Permit. *DuPont even agreed it would be solely responsible for any liabilities related to off-site migration of soil, sediment, and water.*

Each example of potential liability reflects an environmental condition that arose from the plant’s operations. This list demonstrates that the parties intended DuPont to be solely responsible for any environmental liability arising from the smelter’s operation, including liability for damages caused to property and persons off site. DuPont’s express acceptance of sole liability for off-site migration claims in Paragraph 5 demonstrates that the parties contemplated third-party off-site contamination claims, like those in the instant litigation, to be the precisely the type of claims from which Diamond needed guaranteed protection.

The plain language of the Sale Agreement, with or without the illustrative list, assigns sole liability for all environmental conditions of the former zinc smelter, including off-site contamination, to DuPont.

- 1. The Sale Agreement contains express language indemnifying Diamond against any liabilities related to the past, current, or future environmental conditions of the plant site, regardless of whether DuPont took action to include Diamond as a party.*

Seizing on Paragraph 8 of the Agreement, DuPont argues that its duty to indemnify Diamond against any judgment is *only* triggered in the event that DuPont takes some action that

causes Diamond to be included in any judicial or administrative proceeding. Specifically,

Paragraph 8 provides:

8. DuPont shall take no action to include, or that leads any other person to include, [Diamond] in any judicial or administrative proceeding related to a Released Claim. If DuPont takes any such action, DuPont shall be solely liable for the defense of [Diamond] in such proceeding and for the payment of any judgment entered against [Diamond] in such proceeding.

Paragraph 8 of the Agreement certainly requires DuPont to be *solely liable* if it takes some action to include Diamond in a judicial or administrative proceeding. In the instant action, DuPont brought a cross-claim against all of its co-defendants, including Diamond, for contribution. By leveling a cross-claim against Diamond, DuPont took action to include Diamond in the trial below and triggered its obligation to pay for the defense and any judgment entered against Diamond.

Furthermore, regardless of whether DuPont brought a cross-claim against Diamond and triggered its indemnification obligation pursuant to Paragraph 8, Paragraph 8 does not specify the *only* circumstances under which DuPont may have a duty to indemnify Diamond. It does not limit the effect of the preceding paragraphs (Paragraphs 5, 6, and 7),⁵⁵ which serve to transfer

⁵⁵Paragraph 5 provides:

After the Closing Date, TLD [Diamond] shall remain a Co-Applicant under the Voluntary Remediation Agreement. TLD [Diamond] and DuPont shall cooperate with each other in execution of documents required by the Voluntary Remediation Agreement. However, from and after the Closing Date (except as provided in Paragraph 12 hereof) as between TLD [Diamond] and DuPont, *DuPont shall be solely liable for the past, current and future environmental condition of the Real Property, including, but not limited to:* (a) any obligations pursuant to the Voluntary Remediation Agreement; (b) any obligations pursuant to the NPDES Permit & Consent Order; (c) any liabilities related to the off-site migration of soil, sediment, groundwater or surface water from the Real Property; (d) any demolition of the buildings on the Real Property; and (e) any liabilities arising from building demolition or other actions taken pursuant to the Voluntary Remediation Agreement or the NPDES Permit & Consent Order. TLD [Diamond] shall remain liable for any government imposed fines or penalties for violations of law by TLD [Diamond] unrelated to the environmental conditions being addressed through the Voluntary Remediation Agreement and the NPDES Permit & Consent Order. (Emphasis Added).

almost all liability to DuPont.⁵⁶ Like Paragraph 8, Paragraphs 5, 6, and 7 identify instances in which DuPont will be solely liable for claims. Paragraph 8 is simply another iteration of when DuPont must assume liability for Diamond and provides no limitations related to the preceding paragraphs and DuPont's assumption of liability.

Indeed, if DuPont's duty of indemnification were only activated under the circumstances articulated in Paragraph 8, then Paragraphs 5, 6, and 7 would be rendered meaningless. Such a result is intolerable: "No part or word in [a written instrument] can be ignored, disregarded, treated as meaningless or denied purpose and effect unless there be irreconcilable contradiction and repugnancy." *Diamond v. Parkersburg-Aetna Corp.*, 146 W. Va. 543, 553, 122 S.E.2d 436, 442 (1961), quoting *State v. Harden*, 62 W. Va. 313, 58 S.E. 715 (1912). "Where the whole can be read to give significance to each part, that reading is preferred." *Fraternal Order of Police*

Paragraph 6 provides:

From and after the Closing Date, DuPont shall release TLD [Diamond], its officers, directors, shareholders and employees from and against any and all losses, claims, demands, liabilities, obligations, causes of actions, damages, costs, expenses, fines or penalties (including, without limitations, attorney and consultant fees) arising out of the past, current and future environmental condition of the Real Property, including, but not limited to: (a) any obligations pursuant to the Voluntary Remediation Agreement; (b) any obligations pursuant to the NPDES Permit & Consent Order; (c) any liabilities related to the off-site migration of soil, sediment, groundwater or surface water from the Real Property; (d) any demolition of the buildings on the Real Property; and (e) any liabilities arising from building demolition or other actions taken pursuant to the Voluntary Remediation Agreement or the NPDES Permit & Consent Order (hereinafter collectively referred to as "Released Claims"). (Emphasis Added).

Paragraph 7 provides:

DuPont shall be solely liable for all payments required by the EPA oversight fee invoice dated August 9, 2001, whether assessed against DuPont or TLD [Diamond]. (Emphasis Added).

⁵⁶ DuPont excluded from its acceptance of liability any government fines or penalties for violations of law by TLD unrelated to the environmental conditions being addressed through the Voluntary Remediation Agreement and the NPDES Permit & Consent Order. See Paragraph 5. This specific exclusion demonstrates that DuPont was capable of identifying specific exceptions to the general indemnity agreement when so inclined and that DuPont, for whatever reason, chose not to exclude liability arising from claims of off-site contamination.

Lodge Number 69 v. City of Fairmont, 196 W. Va. 97, 103, 468 S.E.2d 712, 718 (1996), quoting Restatement (Second) of Contracts, Section 202 cmt. d at 2 (1981). Paragraphs 5 through 8 harmoniously and consistently identify four separate instances of DuPont's duty to indemnify Diamond under various circumstances and should be enforced as written.

2. DuPont agreed to protect Diamond from claims arising out of the past condition of the property, regardless of whether the claims were predicated on Diamond's negligence.

"The rules governing the requisites and validity of contracts generally apply to contracts of indemnity and the language of such a contract must clearly and definitely show an intention to indemnify against a certain loss or liability, otherwise it is not a contract of indemnity. In construing a contract of indemnity and determining the rights and liabilities of the parties thereunder, the primary purpose is to ascertain and give effect to the intention of the parties." *Sellers v. Owens-Illinois Glass Co.*, 156 W. Va. 87, 191 S.E.2d 166 (1972). Although West Virginia requires that contract language be clear and definite where a party is to be relieved from his own negligence, West Virginia does not require an indemnity contract to contain any specific language or magic words. The contract at issue in the instant case reflects a clear intention by the parties to relieve Diamond of any responsibility for any past, current, or future environmental condition of the plant site.

Language specifically absolving the indemnitee of negligence or other wrongdoing is not required or even necessary. As long as the intent of the parties is clear, West Virginia courts have extended indemnification agreements with broad language to include situations where the indemnitee was negligent. *Id.* at 96-97. For example, the Supreme Court of Appeals has upheld and applied the indemnification language of a contract to a party found negligent even though the language did not expressly state its intention to absolve the indemnitee from its own

negligence. *Dalton v. Childress Service Corp.*, 189 W. Va. 428, 432 S.E.2d 428 (1993); *see also Rice v. Pennsylvania R. Co.*, 202 F.2d 861 (2d Cir. 1953)(cited in *Sellers*, 156 W. Va. 87, 93, 191 S.E.2d 166, 169 (1972)(enforcing indemnity agreement where it was apparent indemnity would be triggered by negligence of the indemnitee).

The Sale Agreement, as a whole, clearly contemplated DuPont would indemnify Diamond against any claims, regardless of whether the claims were based on Diamond's wrongdoing. DuPont explicitly agreed to assume liability from Diamond (the term "liable" inherently referring to apportionment of fault) for the past environmental condition of the Real Property. By necessity, the "past" conditions would include any conditions created by or caused by Diamond's conduct during its ownership of the property. Furthermore, DuPont agreed to assume liability from Diamond for off-site migration from the property, and, again, off-site migration would include migration created by or caused by Diamond's conduct during its ownership of the property. To now excuse DuPont from indemnifying Diamond for any past negligent conduct (or even trespass) related to the environmental condition of the property is tantamount to eliminating DuPont's express agreement to remain solely liable for off-site migration from the property (regardless of whether the migration occurs via air, soil, or otherwise).

Had DuPont wanted to exclude from its assumption of sole liability any claims predicated on Diamond's negligence, DuPont could have done so. Indeed, DuPont excluded a category of liabilities with its final sentence in Paragraph 5 cautioning that Diamond would remain liable for any government imposed fines or penalties. DuPont did not, however, exclude any other liabilities. Instead, DuPont included language that clearly and unequivocally expressed its intent to become solely liable for and to release Diamond from liability for the past, current or future

environmental conditions of the property. DuPont should not now be allowed to now reallocate the risks of the contract by adding a new exclusion of “except when Diamond is negligent.”

3. DuPont assumed sole liability for past, present, and future environmental conditions, which includes off-site releases of dust and other byproducts during and after plant operations.

Contrary to the broad language of the Sale Agreement to which it previously agreed, DuPont now seeks a narrow interpretation of the indemnification clause by arguing that because the non-exclusive list of examples in Paragraph 5 did not specifically provide that DuPont would assume liability for “the airborne transmission of certain chemical byproducts or the zinc smelting process,” any such liability falls outside the indemnification agreement. DuPont mistakenly asserts that because Plaintiffs’ claims do not relate to the migration of soil, sediment or water, it is excused from an indemnifying Diamond against the Plaintiffs’ claims. Not only does DuPont erroneously represent the nature of Plaintiffs’ claims in this action, but DuPont also ignores the plain language of the indemnification agreement.

DuPont erroneously asserts that Plaintiffs’ claims are based solely “on the airborne transmission of certain chemical byproducts of the zinc smelting process that formerly occurred on the property.” Appellant’s Br. at 47-48. Not only did Plaintiffs present evidence that the class area was contaminated by emissions from the smelter from 1931 to 1970, before Diamond began secondary smelting, Plaintiffs also presented substantial evidence that the class area had been continuously contaminated by the enormous waste pile. Dr. Brown testified that there were *two* primary sources of contamination at the smelter: the smelter itself and the pile. (Binder 41, 09/19/07 Tr. 2547-48). The pile, consisting of dust⁵⁷ containing fine metal particles, was “nearly a continuous source of dust over the whole time that the pile was there.” (Binder 41, 09/19/07

⁵⁷ “Dust” is defined as “fine particles of matter (as of earth)” by Merriam-Webster Online Dictionary. Retrieved July 15, 2008, from <http://www.merriam-webster.com/dictionary/dust>.

Tr. 2547). While Dr. MacIntosh only modeled the emissions from the smelting, he agreed that the waste pile and dust contributed to the contamination in the class area. (Binder 40, 09/14/07 Tr. 1415 – 18). Plaintiffs presented evidence that air samples, which were contaminated with soil and dust from the site, were taken at the perimeter of the site in 1998 and 2001 and exceeded regulatory guidelines for the presence of arsenic, cadmium, and lead. (Binder 40, 09/14/07 Tr. 1462-71).

The “off-site migration” illustration does not limit DuPont’s liabilities for past, present and future environmental conditions. Even if DuPont’s representations concerning Plaintiffs’ claims were accurate, DuPont would still be responsible under the agreement. First, the phrase “but not limited to” “requires a broad interpretation.” *In the Matter of the Welfare of M. M.*, 561 N.W.2d 528, 529 (Minn. App. 1997).⁵⁸ DuPont’s liability is “**not limited to**” the liability scenarios listed in Paragraph 5(c). Although the parties agreed that DuPont’s liabilities would include “liabilities related to the off-site migration of soil, sediment, groundwater or surface water from the Real Property,” DuPont’s liabilities would **not be limited** only to liability for off-site migration of soil, sediment, groundwater or surface water.⁵⁹

⁵⁸ See also *Lusa v. Grunberg*, 923 A.2d 795, 805 (Conn. App. 2007)(Although the defendant would have us interpret the list of included items in subparagraph (A) in a restrictive manner that would not encompass a gift from a parent, the phrase “[‘including but not limited to’] convey[s] a clear intention that the items listed in the definition do not constitute an exhaustive or exclusive list.”); *State v. Jones*, 51 Conn.App. 126, 137, 721 A.2d 903 (1998), cert. denied, 247 Conn. 958, 723 A.2d 814 (1999). “Although ‘including’ has been found to be ambiguous by itself, other language may remove the ambiguity, as in this case.... By adding the phrase ‘but not limited to,’ the statute clearly indicates that ‘including’ is meant as a term of expansion.” (Citation omitted.) *Id.*)

⁵⁹ DuPont has previously argued that the parties intentionally omitted “air” in the “off-site migration clause,” and therefore it is excused from responsibility for any air pollution that occurred during the plant’s operation. The absence of the word “air” does not change DuPont’s liability for environmental conditions associated with the property. Had the parties intended to exclude air omissions as the one environmental condition for which DuPont would not be liable, the parties would surely have expressly articulated such an exception. DuPont demonstrated it was perfectly capable of identifying and including exceptions to its sole liability. DuPont, however, articulated only one exception to its intent to assume all liability related to past, current or future environmental conditions, expressly excluding liability “for any government imposed fines or penalties for violations of law by TLD [Diamond] unrelated to the

IV. The Circuit Court's exercise of discretion in certifying the class or excluding certain evidence did not violate DuPont's right to a fair trial.

The Circuit Court certified this class on September 14, 2006. DuPont did not seek any interlocutory appeal of the certification order for nine months. During these nine months, the Plaintiffs expended enormous resources preparing their case. On June 22, 2007, just two and half months before trial, DuPont filed with this Court an "Emergency Verified Petition in Prohibition" seeking to decertify the class. The belated Petition was denied by this Court on July 2, 2007.

This case was ideally suited for class treatment. The Circuit Court was faced with potentially thousands of similar claims arising from the same course and conduct of the defendants. In a proper exercise of discretion, the Circuit Court certified the class.

A. Due process was not implicated by the exclusion of Mrs. Perrine's blood test or the preclusion of the testimony from eight class representatives.

DuPont argues that its right to a fair trial was denied when the Circuit Court excluded a single blood lead test from Mrs. Perrine. The single test was taken in 2004 and, according to DuPont's own expert, could not be extrapolated to the class and tells nothing about exposure to the class in general. (Binder 42, 09/25/07 Tr. 3295). Based upon this testimony, the Circuit Court was well within its bounds to exclude this evidence.

Dr. Rodricks, the only DuPont expert who testified during the liability phase of the trial, admitted during voir dire that he could not extrapolate information applicable to the class based

environmental conditions being addressed through the Voluntary Remediation Agreement and the NPDES Permit & Consent Order." See Sale Agreement at ¶ 5.

By explicitly identifying this single exception, the parties evinced an intent to include all other liabilities related to the property's environmental condition, including air pollution formed on the property. Had the parties intended to omit off-site contamination claims, whether airborne or otherwise, they would have explicitly identified that exclusion, just as they did with the exclusion for fines or penalties. The fact that DuPont included only one exception to its acceptance of liabilities underscores its intent to protect Diamond from all other liabilities related to the environmental condition of the plant site.

on Mrs. Perrine's single blood lead test. (Binder 42, 09/25/07 Tr. 3295) (Q: Doctor [Rodricks], would you agree with me that the blood lead testing for Ms. Perrine applies solely to Ms. Perrine? A: Applies solely to her? Yes. Q: You can't make any extrapolations as to what that blood lead test would mean to the class based on her single blood lead test, could you? A: No, no.).⁶⁰ Defense counsel even acknowledged that it would be a "foolish mistake of trying to extrapolate" the results of Mrs. Perrine's test. (Binder 42, 09/25/07 Tr. 3301).

After hearing Dr. Rodricks's testimony during voir dire, the Court noted that "both sides agree that Mrs. Perrine's blood test cannot be offered for any extrapolation purposes that can be applied class-wide." (Binder 42, 09/25/07 Tr. at 3302). Concluding that the probative value for rebutting Dr. Brown's testimony was very limited (i.e., that Dr. Brown had not been testifying about exposure in an acute situation), the Court ultimately determined that the single test would not assist the trier of facts with regard to Phase 1. (Binder 42, 09/25/07 Tr. at 3303). Based upon this testimony, the Circuit Court was well within its bounds to exclude this evidence.

Even if this exclusion of evidence was in error, DuPont was not deprived of presenting such evidence. DuPont presented evidence of a blood lead level survey of 25 children. (See e.g. Binder 42, 09/25/07 Tr. 3306). Because DuPont was able to make its point with this survey, the exclusion of this one blood lead level sample was well within the Circuit Court's discretion and did not deprive DuPont of a fair trial.

DuPont also contends it should have been permitted during the liability phase of the trial to present excerpts from the class representatives' depositions concerning whether any of the

⁶⁰Contrary to DuPont's representation, Plaintiffs did not "concede" that Mrs. Perrine's blood lead test was admissible through the testimony of an expert. Rather, Plaintiffs specified that the test would be relevant if presented through an expert who could testify about the implications of the single blood lead test for the class. (Binder 42, 09/24/07 Tr. 2975) ("They're clearly trying to get an inference to this one lead test as some sort of broad implication for everybody in the class, and it simply can't do that. But if they want to tie that up, they have to do that with an expert.")). DuPont, however, was unable to produce any expert who could draw those conclusions.

named representatives had communicated directly with DuPont and whether any of the named representatives had requested or undergone testing for the presence of arsenic, cadmium and lead.⁶¹ The Court correctly ruled that testimony as to whether the Plaintiffs “did or didn’t talk to DuPont or whether they did or didn’t ask for screening of lead, cadmium and arsenic” would not assist the trier of fact in any way and, therefore, was inadmissible. (Binder 42, 09/25/07 Tr. 3304).

Phase I was the liability phase. The issue was whether the defendants’ conduct had exposed people and property to arsenic, cadmium and/or lead. Whether the class representatives ever talked to a DuPont representative or ever requested a heavy metal screening does not make exposure more or less probable. The Court was correct in its judgment that the testimony would not aid the jury in deciding the ultimate issue in the liability phase.

B. Class certification was not solely predicated on evidence of a mass appraisal.

DuPont claims that class certification was based solely upon evidence of a “mass appraisal” and when Plaintiffs elected not pursue their diminution in value remedy at trial, “the premise of class certification disappeared.” Even a cursory review of the class certification order proves that DuPont’s claim is a distortion. *Order Granting Class Certification* (Binder 16, p. 7316-7360, 09/14/06). The Circuit Court highlighted numerous times the fact that remediation was particularly suited for class treatment in this case. While Plaintiffs argued that a diminution in value can be dealt with on a class-wide basis, neither the Circuit Court nor the Plaintiffs

⁶¹ Although DuPont sought to include testimony of some of the class representatives who stated they had not discussed their concerns with their doctors, DuPont did not seek to include testimony of the class representatives who testified that they were frightened for their grandchildren to visit the contaminated community and had made substantial changes in how they used their homes and properties. In the event the Court permitted DuPont’s irrelevant excerpts, Plaintiffs had prepared counter-designations detailing the history of contamination in the area, Plaintiffs’ fears to eat produce from gardens in the class area, and at least one Plaintiff’s refusal to allow her grandchildren to even enter the class area.

predicated class certification on a “mass appraisal.” In its Order, the Circuit Court made specific findings and conclusions that remediation was a common remedy well suited for class treatment.

C. Plaintiffs proved common issues related to exposure.

The crux of DuPont’s objections is that class members have vastly different exposure levels.⁶² DuPont’s objections, however, ignore the overwhelming similarities that warranted class certification: the same course of conduct caused the exposures, all medical monitoring class members had to meet the same threshold risk making irrelevant the differences in the length of time they have lived in the class area, and remediation is a common remedy.

It is a well-recognized rule, both in the federal courts and among those states which, like West Virginia, have adopted Federal Rule of Civil Procedure 23, that it is “no bar to class certification that the extent of injury is not common to all class members.”⁶³

DuPont has exaggerated the requirements for class certification. While exposures may vary, the degree of exposure for entry into the medical monitoring classes is common. Other courts have rejected arguments that exposure must be exactly same for each class member. For

⁶² West Virginia’s medical monitoring cause of action allows for class-wide proof addressing issues of exposure and source—including exposure levels and the need for monitoring. Individual dose calculations are unnecessary. *See In re Paoli Railroad Yard PCB Litigation*, 35 F.3d 717, 788 (3rd Cir. 1994)(“[W]here experts individualize their testimony to a group of individuals with a common characteristic (i.e., levels of exposure to chemical X above Y amount), we do not think there is a need for greater individualization so long as they testify that the risk to each member of the group is significant. We fail to see the purpose in requiring greater individualization.”).

⁶³*James v. Madigan*, 806 F. Supp. 239, 241 (M.D. Ala. 1992); *see, e.g., Cavin v. Home Loan Ctr., Inc.*, 236 F.R.D. 387, 392 (N.D. Ill. 2006) (objection to class certification based on differences among class members’ damages was “a nonstarter” because “the mere fact that the damages may differ does not alter the existence of a common nucleus of operative facts”); *Blihovde v. St. Croix County, Wis.*, 219 F.R.D. 607, 621 (W.D. Wis. 2003) (“the cases are legion in which courts have rejected arguments that differences in damages among the class members should preclude class certification”); *BNL Equity Corp. v. Pearson*, 340 Ark. 351, 10 S.W.3d 838, 842, *cert. denied*, 531 U.S. 823, 121 S. Ct. 66, 148 L.Ed.2d 32 (2000); *OCE Printing Sys. USA, Inc. v. Mailers Data Servs, Inc.*, 760 So. 2d 1037, 1043 (Fla. App. 2000); *Health Cost Controls v. Sevilla*, 365 Ill. App. 3d 795, 850 N.E.2d 851, 864, *appeal denied*, 222 Ill. 2d 571, 861 N.E.2d 654 (2006); *Northern Ind. Pub. Serv. Co. v. Bolka*, 693 N.E.2d 613, 617 (Ind. App. 1998); *Johnson v. Travelers Ins. Co.*, 89 Nev. 467, 515 P.2d 68, 73 (1973); *Bice v. Petro-Hunt, L.L.C.*, 681 N.W.2d 74, 78 (N.D. 2004); *DeCaesare v. Lincoln Benefit Life Co.*, 852 A.2d 474, 488 (R.I. 2004); *Henry Schein, Inc. v. Stromboe*, 28 S.W.3d 196, 207 (Tex. App. 2000).

example, in *Rapp v. Iberia Parish School Board*, 926 So. 2d 30 (La. Ct. App.), writ denied, 937 So. 2d 386 (La. 2006), the court concluded that a class action was the superior procedure for adjudicating claims arising from injuries caused by fumes and chemicals released at a school, even though the plaintiffs had varying levels of exposure to the chemicals. According to the court, liability was the central issue, and one that was common to all class members, and any variations between class members relative to exposure would go to the issue of damages, not liability. 926 So. 2d at 36.

In *Meyer ex rel. Coplin v. Fluor Corp.*, 220 S.W.3d 712 (Mo. 2007), the court held that the requirements for class certification were satisfied in an action against the owner of a smelter on behalf of area children allegedly exposed to lead, when the fact of exposure to a set of toxins from a single source was the common and overriding issue in the case. *Id* at 719. The court also held that the class members' claim for the expenses of prospective medical monitoring did not require individualized proof of present physical injury, so as to militate against class certification. *Id.* at 719.

V. Plaintiffs' properties were contaminated with arsenic, cadmium, and lead in levels sufficient to justify liability, remediation, and medical monitoring.

A. The Circuit Court properly instructed the jury on the determination of liability for property contamination.

DuPont cannot demonstrate that the Circuit Court's alleged failure to give DuPont's requested jury instructions was reversible error. DuPont has simply ignored the fact that the issue of "unreasonable risk" was substantially covered in the charge actually given to the jury. *Alley v. Charleston Area Med. Ctr. Inc.*, 216 W. Va. 63, 602 S.E. 2d 506 (2004) ("A trial court's refusal to give a requested instruction is reversible error only if: (1) the instruction is a correct statement

of the law; (2) *it is not substantially covered in the charge actually given to the jury; and (3) it concerns an important point in the trial so that the failure to give it seriously impairs a defendant's ability to effectively present a given defense.*"(emphasis added)).

DuPont, complaining that the verdict form allowed the jury to find liability without a finding of material harm to properties, improperly focuses solely on the jury verdict form while ignoring the jury instructions that actually addressed DuPont's concerns:

The level of care which the defendants were required to exercise to avoid being negligent was that which a reasonable – a reasonable person in its position, with his information and competence, would recognize as necessary to prevent the act from *creating an unreasonable risk of harm to another*. (Binder 42, 09/28/07 Tr. 3686) [. . .] A private nuisance is a *substantial and unreasonable* interference with the private use and enjoyment of another's land. (Binder 42, 09/28/07 at Tr. 3687).

In Phase I, the jury had to find that DuPont's conduct created an unreasonable risk of harm to the Plaintiffs. Having found an unreasonable risk of harm and that DuPont caused this unreasonable risk of harm, the only question remaining in Phase III was whether the Plaintiffs were entitled to remediation. When the "entire instruction" is considered, the Circuit Court properly instructed the jury on the law of West Virginia and explicitly instructed the jury that Defendants' conduct must pose an unreasonable risk of harm.

Any alleged failure to give an instruction on "unreasonable risk" or "material harm" did not impair DuPont's ability to present its defense that the contamination, if any, was inconsequential. DuPont's sole expert witness in Phase I devoted much of his time and effort to trivializing the risks posed by the arsenic, cadmium, and lead in the class area. In their closings, DuPont's attorneys continued this theme and argued that the levels measured in the class did not present an unreasonable risk, did not justify remediation, and did not warrant medical monitoring.

B. Contaminated homes and yards and an increased risk of cancer show that the Plaintiffs proved that the smelter materially harmed the class area.

DuPont refuses to accept that the Plaintiffs proved much more “than trivial amounts of arsenic, cadmium, or lead.” Plaintiffs proved that the smelter’s “activities materially increased” carcinogens and toxins in the soils and homes of the class area. *Browning v. Halle*, 219 W. Va. 89, 632 S.E.2d 29 (2005).⁶⁴ The eleven-person jury heard evidence that residential attics throughout the class area were repositories of airborne heavy metal smelter pollution. The jury also heard evidence that arsenic, cadmium, and lead posed other, non-cancer dangers. For example, even with low level lead exposure, children are at risk for developmental problems. The jury heard evidence that the incremental cancer risk—cancer risk due solely from the smelter contaminants—in the class area ranged from 1 in 100 to 1 in 10,000, far exceeding the action threshold required under the West Virginia Voluntary Remediation and Redevelopment Act.⁶⁵ Evidence of an increased cancer risk that exceeds public notification guidelines certainly demonstrates an unreasonable risk of harm and justifies remediation.

DuPont seeks to change West Virginia trespass law by requiring “substantial interference.” DuPont attempted this exact argument in *Stevenson v. DuPont*, 327 F.3d 400 (5th Cir. 2003). The Fifth Circuit rejected DuPont’s argument because it was a departure from established Texas law. Likewise, West Virginia trespass law does not require substantial interference. *Hark v. Mountain Fork Lumber Co.*, 127 W. Va. 586, 592, 34 S. E. 2d 348, 352 (1945) (“Trespass is defined . . . as an entry on another man’s ground without lawful authority, and doing some damage, however inconsiderable, to his real property.”). Even if such were the requirement, Plaintiffs have demonstrated “substantial interference.”

⁶⁴ *Browning* was based upon nuisance law, which requires a “substantial and unreasonable interference.”

⁶⁵ Plaintiffs’ Trial Exhibit 73843, *Guidance Manual* at § 1.2.5.

VI. Decades of pollution created a reservoir of arsenic, cadmium, and lead in the class area resulting in significant exposure and increased risk.

Dr. Werntz⁶⁶ did not *assume* exposure. Rather, he relied upon a team of experts who actually measured the levels of contamination in the class area and developed a risk assessment that showed a significant increase in the risk of cancer for people living in the class area.

For decades, the smelter blanketed the class area with toxic smoke. For miles in every direction, the toxic particles from this smoke found its way into the soil and the homes. As a result, smelter contamination is found throughout the class area, creating multiple paths of exposure. The soil is contaminated, homes are contaminated, and the interior air of the homes is contaminated. These multiple paths of exposure increase the cancer risk for those living in the class area. Ironically, the cancer risk on the actual smelter site, after remediation, is orders of magnitude less than the cancer risk in the class area. It is safer to be on site than off site. The jury, hearing this evidence, properly found that there was significant exposure.

Significant exposure is a question of fact that should be decided on a case-by-case basis. Factors that should be considered in deciding significant exposure are the likelihood of exposure to humans, intensity of exposure, duration of exposure, and toxicity of the contaminants. Applying these factors to this case demonstrates that the jury correctly found that there was significant exposure. Class members are certain to be exposed to arsenic, cadmium, and lead from the smelter even in their homes.

Smelter contamination was found in almost every structure tested by the Plaintiffs' experts. Initially, Dr. Brown sampled dust from living space from 14 homes in the class area.⁶⁷

⁶⁶ Dr. Carl Werntz is a licensed practicing physician on faculty at West Virginia University, and he developed the proposed medical monitoring plan presented to the Circuit Court. (Binder 46, 10/02/07 Tr. 4013-14). Board-certified in both internal and occupational medicine, Dr. Werntz serves in the Department of Community Medicine at WVU, where he teaches public health and environmental health. (*Id.* at 4015-16).

In a majority of the homes he tested, the lead levels in the indoor dust even exceeded the screening level for outdoor soil. In some of the homes, the lead dust levels were five times greater than the screening level for lead in soil. Having indoor lead levels that exceed the screening level of outdoor soil is persuasive evidence of significant exposure.

During the course of three surveys of the class area, Dr. Brown sampled over 100 homes. He sampled dust in the living space, dust in the attics, and air in the home. Significant exposure is demonstrated by the amount of arsenic, cadmium, and lead trapped in the homes of the class members. For example, in a home near the class boundary, dust collected from a convective furnace in the home contained 140 mg/kg arsenic, which is ten times greater than DuPont's soil remediation goal for non-residential soils. Even though the home was well away from the smelter, the heating system had accumulated airborne pollution from the smelter. This data also illustrates how the toxic metals were continually circulated in the home causing exposure to the residents.

Dr. Brown's study also showed elevated cadmium in the living space dust. Cadmium levels ranged from 16.8 to 140 mg/kg, which represents eight to seventy times the level of cadmium found in surveys of typical house dust. (Binder 41, 09/19/07 Tr. 2504). Attics, which are historical reservoirs of smelter contamination, provide additional evidence of significant exposure.

Dr. Brown's risk assessment provides a quantitative measurement of the cancer risk from the exposure to arsenic and cadmium in the air and soil. Airborne exposure to arsenic and cadmium was a significant contributor to the overall cancer risk. The jury heard evidence that the class members are at increased risk from cancer due to contamination from the smelter. This

⁶⁷ See Dr. Brown's testimony from Phase I (Binder 41, 09/20/07, Tr. 2602-99).

enhanced risk ranges from 1 in 10,000 to 1 in 100, levels that are considered significant under the *Guidance Manual*.

The *Guidance Manual* also shows that the soil in the class area is contaminated with arsenic, cadmium, lead and zinc. A statistical test set out in the *Guidance Manual* conclusively shows that the class area is contaminated with arsenic, cadmium, lead, and zinc when compared to the control area. *Bourgeois, et al. v. A. P. Green Indus. Inc.*, 716 So. 2d 355, 360 (La. 1998) (“Such exposure must be significant . . . , meaning that the plaintiff must prove an exposure greater than normal background levels.”).

As it did at trial, DuPont argues that blood samples taken from 25 Spelter children in 1996 is evidence that the smelter has not caused harm to the class area.⁶⁸ As a preliminary matter, lead serves no biological purpose, and no safe level of lead exposure has been demonstrated. (Binder 40, 09/14/07 Tr. 1455). The average blood lead concentration from these 25 samples was 3.8 micrograms/deciliter. Even assuming the scientific validity of this survey, children in Spelter still had 200% higher blood lead levels than the national average. (Binder 40, 09/14/07 Tr. 1452-53). At the blood levels seen in Spelter, lead will impair cognitive development. In fact, recent studies have shown that the effects of lead may have its greatest impact at concentrations in blood between 2 and 5 micrograms/deciliter (Binder 46, 10/02/07 Tr. 4088).

⁶⁸ Even DuPont’s expert, Dr. Rodricks, recognized the limitation of this 1996 testing of blood lead levels: “This is not truly a scientific research study; it is just a survey—important survey—but not a study.” (Binder 42, 09/25/07 Tr. 3308).

VII. The Circuit Court properly relied on substantial evidence to determine the duration and scope of the Medical Monitoring Plan.

Mischaracterizing much of the evidence, DuPont argues that the medical monitoring plan is unsafe and too long. A review of the evidence, however, demonstrates that the Circuit Court had substantial evidence for its determination of the duration and scope of the plan.

A. The Circuit Court's decision to include the *option* of Computed Tomography (CT) scans for lung cancer screening is supported by the evidence.

DuPont criticizes the Circuit Court's decision to leave the option of CT scans in the medical monitoring program. Plaintiffs presented evidence that single-breath hold chest CT scans are an effective tool for screening lung cancer and that medical monitoring participants should be given *access* to the CT scan for such screening after informed consent. Importantly, the Circuit Court did not dictate that all participants must undergo a CT scan. Rather, the Circuit Court included the CT scan as an option if a patient elected to undergo the monitoring after consulting with his or her physician and providing informed consent.

Actual Role of CT Scans in the Medical Monitoring Program: Dr. Wertz, a qualified physician, recommended that the participants of the medical monitoring program who are over the age of 35 "have *access* to CT for lung cancer screening" every two years. (Binder 46, 10/02/07 Tr. 4119)(Binder 53, 01/15/08 Tr. 32). Dr. Carl Wertz is a licensed practicing physician on faculty at West Virginia University, and he developed the proposed medical monitoring plan presented to the Circuit Court. (Binder 46, 10/02/07 Tr. 4013-14). Board-certified in both internal and occupational medicine, Dr. Wertz serves in the Department of Community Medicine at WVU, where he teaches public health and environmental health. (*Id.* at 4015-16).

Dr. Wertz reiterated that ultimately whether participants undergo a CT scan is their choice and would only occur after informed consent. (Binder 53, 01/15/08 Tr. 11)(Binder 46,

10/02/07 Tr. 4119) (“The – both – participation in any part of the program is voluntary. There’s – nothing is required. And a class member could decide to have parts of the testing and not other parts. That’s perfectly acceptable. The big deal here is not that—it’s not that testing is required; it’s access to testing. And it’s access because of increased risk, because of the exposure to arsenic, cadmium, and lead.”). The Circuit Court has ordered that the CT scans, along with other tests included in the medical monitoring plan, be reevaluated on a regular basis for efficacy and safety.

Efficacy of low dose single-breath hold chest CT scans: Early stage lung cancer can be detected by CT scan. (Binder 46, 10/02/07 Tr. 4116). Earlier diagnosis allows for consideration of a treatment plan and possible extension of life and long-term survival. *Id.* Some studies have found long term survival with a CT screening program. (Binder 46, 10/02/07 Tr. 4116). At a minimum, early detection allows the patient to explore treatment options and prepare business and family matters. Doctor Wertz confirmed the CT scan as a diagnostic tool for lung cancer is “very promising” and that “it is being used in a number of centers around the country currently to screen for lung cancer.” (Binder 53, 01/15/08 Tr. 41).

Purported Risks: Using scare tactics, DuPont has cited selected portions of studies in an effort to deny participants access to the CT scan. Plaintiffs now offer this Court the rest of the story:

- Generally, the United States Preventive Service Task Force (“USPSTF”) only makes screening recommendations for the general population, as opposed to an exposed population. Moreover, the USPSTF makes no recommendation for or against screening asymptomatic persons for lung cancer with low-dose computerized tomography or any other screening test.

- New England Journal of Medicine*: Although DuPont cites to an article⁶⁹ published after trial that it contends demonstrates CT scans will cause unacceptable risk to the medical monitoring participants, DuPont omits a number of salient facts. For example, DuPont does not mention that the article discusses risks from head and abdomen CT scans—not the low dose single breath hold chest CT scan recommended by Dr. Wertz. (Binder 53, 01/15/08 Tr. 31, 39-40). DuPont does not mention that the chest CT scans use a far lower dose of radiation than either the head or the abdomen CTs. *Id.* Nor does DuPont mention that the radiation data in the article is taken from Japanese atomic bomb survivors and not from CT scan patients. *Id.* Doctor Arnold Van Moore, Jr., chair of the American College of Radiology Board of Chancellors, has stated that “Relying on Japanese atomic bomb survivors to gauge CT risk is like comparing apples and oranges.” (Binder 53, 01/15/08 Tr. 38-39).
- Dr. Valberg*: DuPont’s expert relied on old studies and old technology to form his conclusions. Specifically, he relied on old atomic bomb studies of radiation and data for whole body CT scanning, rather than low-dose single breath hold chest CTs. During cross-examination he was forced to acknowledge that “CT scans used a low dose of radiation, less than one average background radiation a person receives in the United States, and similar to that of a mammogram.” (Binder 46, 10/04/07 Tr. 4615). He also

⁶⁹ Notably, DuPont entered this article into evidence post-trial through its only witness at the post-trial hearing addressing the scope, duration, and funding of the medical monitoring program. That witness was a CPA from Seattle about whom the Circuit Court remarked: “Of the plethora of witnesses that testified at the scores of hearings and trial in this matter, the Court finds Mr. Meneberg to be the least credible of all. It is clear that if one has the money, Mr. Meneberg will provide an opinion whether it is within his field of expertise or not and whether there is any factual or professional basis for the opinion or not. In the sixteen years as a sitting trial judge, Mr. Meneberg is the biggest ‘hack’ to have testified before this Court.” (Final Order Regarding the Scope, Duration, and Costs of the Medical Monitoring Plan at 8, n. 9, (Binder 54, p. 24919-24934, 02/25/08)).

admitted that he was unfamiliar with the academic articles criticizing the use of atomic bomb data as having significant errors. (Binder 46, 10/04/07 Tr. 4610-4611).

Role of Reassessment: The Circuit Court included within the medical monitoring plan a requirement that the plan be reviewed at regular intervals every five years. *Final Order Regarding the Scope, Duration, and Costs of the Medical Monitoring Plan* at 15 (Binder 54, p. 24919-24934, 02/25/08)). Dr. Wertz specifically recommended this review: “What I proposed is that periodically the program would be reevaluated as far as what tests are being performed. I don’t expect that the diseases will change significantly but that the—as technology changes in medicine, that it would be appropriate to re-evaluate and make sure we’re using the best tests available at the time to detect the diseases in question. (Binder 53, 01/15/08 Tr. 11). Dr. Wertz indicated to the Court that the CT scan is one of the tests that should be reevaluated on a regular basis. (Binder 53, 01/15/08 Tr. 40-41). Noting that over time the efficiency of CT scanning has increased and radiation dosage has decreased, Dr. Wertz observed that every few years a new CT technology is developed that requires “lower and lower and lower doses to achieve the same picture quality.” (Binder 53, 01/15/08 Tr. 41). Recognizing the change in all testing technology, including CT scans, Dr. Wertz encouraged the Court to include a re-evaluation provision, so that if conclusive evidence of increased risk involving CT scanning should emerge, different testing could be substituted. (Binder 53, 01/15/08 Tr. 32-33).

With its mandatory order of a regular review, the Court has adhered to Dr. Wertz’s recommendations and complied with the *Bower* requirement that tests be ones “that a qualified physician would prescribe.” *Bower v. Westinghouse Elec. Corp.*, 206 W. Va. 133, 142, 522 S.E.2d 424, 433 (1999). As Dr. Wertz noted, we “don’t have the luxury of waiting. If it’s not granted—

access to this potentially life-saving technology is not granted now, it can't be added later." (Binder 46, 10/02/07 Tr. 4164-65).

In short, the Circuit Court has merely authorized access by the medical monitoring class to low dose single breath hold chest CT scans after full informed consent and physician/patient interactions. That access will be reevaluated on a regular basis. The Circuit Court does not *require* participants to undergo CT scans, and participants are not even eligible until after they reach the age of 35. Since Harrison County has reported record numbers of serious medical conditions which can be caused by arsenic, cadmium, and lead, and Plaintiffs have demonstrated with independent evidence, as well as through Dr. Rodricks' testimony, that class members' homes and soil are contaminated by these products from the smelter, they are in a high risk group within West Virginia and should be allowed access to medical testing.

B. The Circuit Court set the duration of the Medical Monitoring Program based on a substantial amount of evidence.

In determining the scope of the medical monitoring program, the Circuit Court had the benefit of the experience, education, and training of Dr. Carl Wertz. Dr. Wertz proposed a 40 year medical monitoring plan. Medical monitoring screens for disease while the disease is still in its latency—i.e., from the time of exposure until the development of overt symptoms. (Binder 53, 01/15/08 Tr. 10). The diseases at issue at Spelter are skin cancer, lung cancer, bladder cancer, kidney cancer, stomach cancer, decreased renal function, renal failure, plumbism, and neurocognitive injury. (Phase II Verdict Form (10/10/07). Dr. Wertz⁷⁰ proposed a 40 year plan based upon the following factors:

⁷⁰Pointing to one portion of Dr. Wertz's deposition testimony, DuPont misleadingly advises this Court that Dr. Wertz's recommended 40 year plan was based *solely* on one study of lung cancer. DuPont fails to note, however, *any* of Dr. Wertz's testimony at trial or post-trial.

- The latency period of the majority of the cancers associated with exposure to arsenic, cadmium and lead is relatively long and can be decades (Binder 53, 01/15/08 Tr. 9-11)(Binder 46, 10/02/07 Tr. 4092);
- Dr. Werntz's review of the literature supports the conclusion that lung, bladder, stomach, and skin cancer have very long latency periods up to and exceeding 40 years (Binder 46, 10/02/07 Tr. 4092)(Binder 53, 01/15/08 Tr. 9-10);
- Although some of the non-cancers may have shorter latency periods, Dr. Werntz selected a single latency period for administrative convenience of the medical monitoring program since most of the cancers at issue have a latency period of 40+ years and participants would be entering the program at different stages of exposure (Binder 46, 10/02/07 Tr. 4106). DuPont simply attacks Dr. Werntz's recommendation without offering any evidence whatsoever supporting an alternative duration.

In short, the overwhelming evidence—the only evidence—supports the Court's finding that 40 years is an appropriate duration for the medical monitoring program.

VIII. Punitive damages were warranted and the jury's award was reasonable.

After four phases and six weeks of trial, a unanimous jury of eleven entered a verdict requiring DuPont to pay \$196.2 million in punitive damages to the *Perrine* class. DuPont was afforded all of the protections required under West Virginia law and the Due Process Clause of the Fourteenth Amendment. The Circuit Court appropriately reviewed the evidence prior to allowing the question of punitive damages to be submitted to the jury, appropriately instructed the jury as required under *Garnes v. Fleming Landfill, Inc.*, 186 W. Va. 656, 413 S.E.2d 897 (1992), and conducted a thorough, post-trial review of the award of punitive damages. Based upon the evidence presented and the instructions of the Circuit Court, the jury found that a

punitive verdict of \$196,200,000 was “reasonable and proper for the purpose of punishment.” Given the overwhelming evidence of DuPont’s conduct, the jury finding that such conduct was “wanton, willful or reckless,” and the Circuit Court’s post-trial review, this Court should not disturb the punitive damages verdict.

A. DuPont’s conduct in relationship to the Spelter smelter was properly determined to be wanton, willful, or reckless

The jury was presented with multiple lines of evidence during the trial that established DuPont’s conduct as wanton, willful or reckless. This evidence was from both the time of DuPont’s ownership and operation of the facility from 1928-1950 as well as the time DuPont regained ownership and successfully minimized the remediation efforts at the site itself by influencing government agencies to prevent remediation in the offsite communities surrounding the facility. DuPont’s conduct during either of these times is sufficient to merit punitive damages. When its conduct during these two time periods is viewed together, there is no question that punitive damages are merited.

1. DuPont’s failure to implement emission controls and the creation of a mountain of toxic waste during the period from 1928-1950 was wanton, willful or reckless.

Beginning with the time period between 1928-1950 when DuPont owned and operated the smelter, the jury was presented with substantial evidence that DuPont failed to control contamination at the facility and, once it became clear that implementing sufficient controls would be very costly, DuPont simply left town. The evidence showed that DuPont was aware of the health and environmental risks its operation of the plant caused and that DuPont disregarded those risks. DuPont left behind a literal mountain of burning, toxic waste. This mountain, which DuPont admitted in internal documents that it largely created, was one hundred feet tall and

covered sixty acres of property. It was a health risk and blight upon the community. DuPont's creation and abandonment of this mountain alone is a sufficient basis for punitive damages.

DuPont had in its possession a report from 1919 known as the Bear & Morgan study. This study was commissioned by DuPont's predecessor, the Grasselli Chemical Company, and documented in detail the harmful effects of the smelter on agriculture, plants and farm animals. (Binder 41, 09/20/07 Tr. 2776). The report provided unequivocal proof that the smelter was causing substantial environmental harm. The evidence showed that, once DuPont took over operations of the smelter, DuPont had the technical expertise to understand the manufacturing process, what such process would emit in terms of waste and air pollution, and what the effects of those emissions would be on the environment and people within the surrounding communities. (Binder 41, 09/20/07 Tr. 2734). DuPont had two methods for handling the enormous amount of waste from the smelter: emit it into the air, thereby allowing it to spread into the surrounding communities (Binder 40, 09/14/07 Tr. 1405-16) or store it on site, which ultimately accumulated into a burning mountain of toxic waste that emitted its own contamination into the surrounding communities through the air and through runoff from the site (Binder 40, 09/14/07 Tr. 1416) (Binder 40, 09/13/07, Tr. 1078-79, 1158).

Despite DuPont's assertions that its emission controls were "state of the art," there is no question that DuPont failed to implement available controls. By 1919, the Cotrell Electrical Process was the leading technology to control emissions of fumes, dust, and metallurgical smoke from smelting and other industries (Binder 41, 09/20/07 Tr. 2752-53, 2789). Although DuPont knew that this process was an available, viable means of controlling emissions, it failed to implement it. (Binder 41, 09/20/07 Tr. 2788-92). Similarly, while DuPont belittles the testimony of Steven Amter, his testimony provided evidence that "bag houses" were used extensively in the

first half of the 20th century to control emissions and that DuPont chose not to utilize this method of control (Binder 41, 09/20/07 Tr. 2761-62). Due to the failure to implement these emission controls, the toxic byproducts of DuPont's zinc smelting process, including cadmium, arsenic and lead, migrated from the facility and DuPont's waste mountain to contaminate the people and communities surrounding the smelter.

DuPont argues that implementing the more modern vertical retorts was an effort to control contamination; however, DuPont provided no evidence during the trial that vertical retorts diminished the smelter's environmental impact. Plaintiffs, however, presented undisputed evidence that the vertical retorts dramatically increased production at the smelter. Plaintiff's expert, Dr. George Flowers, provided testimony showing, that while the vertical retorts "are a better operation," the increase in production allowed a continued operation that would lead to an even greater environmental impact. Dr. Flowers testified that the vertical retorts allowed for a mechanized conveyor belt and, most importantly, continuous production twenty-four hours a day, seven days a week. (Binder 40, 09/13/07 Tr. 1165, 1069). Because they were able to operate continuously, the vertical retorts increased, rather than reduced, emissions and waste. This, in turn, led to the production of more solid waste, which DuPont stored on site, building the toxic mountain higher and higher around the smelter.

The creation of a toxic mountain did not have to happen. DuPont's choice to store its waste onsite stands in contrast to another smelter in nearby Clarksburg, which elected to remove its waste by rail car to be burned as fuel elsewhere. (Binder 41, 09/20/07 Tr. 2843-45). DuPont's decision to build a mountain of toxic waste, that literally stretched to the banks of the West Fork River, was a direct cause of the contamination that impacted property and significantly increased the risk of cancer and other health effects for people who live around the site. DuPont even

admitted, decades later, that it was “clearly on the hook for cleanup, any state or federal claims, toxic tort and natural resource damage claims – our material.”⁷¹

The final chapter in DuPont’s operation of the smelter was the tragic decision to sell the facility and to leave behind the toxic mess DuPont created, rather than implement new controls in 1950. In 1950, DuPont conducted a company-wide air pollution survey. (Binder 41, 09/20/07 Tr. 2819-23). The end result was that the smelter would require an additional \$325,000.00 in funding to abate air pollution. (Binder 41, 09/20/07 Tr. 2828-30).⁷² DuPont elected to cut its losses and run, turning its back on Spelter and the surrounding communities. DuPont knowingly and recklessly left behind an operation that had contaminated the community and a toxic mountain that would continue to burn and emit toxins for decades.

Simply taking into consideration the conduct above, it would be reasonable for a jury to find DuPont’s conduct to be wanton, willful, or reckless, and to impose punitive damages. The decisions DuPont made demonstrate an attitude of reckless indifference regarding the consequences of its decisions to refuse to implement appropriate environmental controls. DuPont’s actions form the foundation for a situation that ultimately caused widespread contamination and significantly elevated health risks for the people who lived around the site. DuPont’s efforts, decades later, to avoid liability and to minimize its efforts to remedy nearly eighty years of environmental abuse serve only to reinforce the need for punishment.

2. DuPont’s efforts to avoid off-site remediation and leave the communities at risk justify the imposition of punitive damages.

The jury was also presented with ample evidence to support its finding of wanton, willful or reckless conduct given DuPont activities to ensure that all remedial efforts were minimal and,

⁷¹ Plaintiffs’ Trial Exhibit 33162, Bedsole, *Subject Previously Divested Site* (2002).

⁷² Plaintiffs’ Trial Exhibit 76730, *Summary of Figure Data – Industrial Department Reports on Water and Air Pollution*.

most importantly, were limited to the site of the smelter itself. From its first known visit to the site in 1980 until the end of the onsite remediation efforts, DuPont used its influence with government regulators to minimize the scope and financial impact of any remediation. In essence, the Department of Environmental Protection became an arm of DuPont whose sole role was to approve the minimalist approach that DuPont envisioned. DuPont knew from the beginning that it could control and influence the WVDEP. The desire to keep the site out of the hands of the EPA was the central reason that DuPont desired to avoid a Superfund listing.

The success of DuPont's strategy is demonstrated by the undisputed fact that the Plaintiffs were the first parties to conduct significant offsite testing. As found by the jury, this testing showed extensive offsite contamination. If not for this testing, the residents of the class area would have never discovered the risks to which DuPont has subjected them. Despite the results of this testing, DuPont argues to this Court that punitive damages cannot be imposed because its actions were sanctioned by a governmental body that was influenced by people whose loyalty was with DuPont, rather than with the residents of the class area. Given the evidence of DuPont's relationship and influence over these regulators, their approval of DuPont's decisions should be given little credence—particularly given a jury finding that DuPont's conduct was wanton, willful, or reckless.

The evidence of DuPont's conduct is extensive and has been discussed throughout this brief. However, a listing of some of the more egregious actions of DuPont is illustrative and shocking:

- As early as 1980, DuPont began visiting the site, including the playground that bordered the smelter property, and recognized the potential for exposure, but took no steps to warn the residents using the playground or living around the smelter.

- In 1996, DuPont acknowledged that “offsite soils data indicates elevated levels of Zn, As and Pb in residential backyards.”⁷³ Instead of warning the residents of the class area or taking proactive steps to alleviate significant potential health concerns, DuPont’s strategy was to “manage the regulatory process,” to stay off the National Priority List, and to “manage public relations . . . to prevent potential legal, tort and/or public issues.”⁷⁴
- DuPont was also told by its consultant, Woodward-Clyde Diamond Group, that there were elevated levels of arsenic, cadmium, and lead in the waste piles and in the soil adjacent to the site and that there were elevated levels of lead in residential yards and play areas in Spelter. Still DuPont did nothing and continued recklessly to ignore the significant health hazards in the class area.
- DuPont even acknowledged in 2002 that the Spelter site was a high priority site with off-site contamination.⁷⁵ Despite this recognition, DuPont refused to conduct off-site testing.⁷⁶

Despite all of the above evidence showing that DuPont was aware of the extensive contamination offsite, DuPont decided to try to avoid disclosure and remediation rather than to clean up the mess it caused. The most significant piece of evidence of DuPont’s conduct was set out in a document entitled “Connecting the Dots.” DuPont implemented a corporate policy to cover up its environmental problems. To implement this policy, DuPont constructed a team whose primary objective was “[t]o minimize the potential for issues/dots to be connected.”⁷⁷

Just what did DuPont mean? DuPont wanted to prevent groups such as environmentalists,

⁷³Plaintiffs’ Trial Exhibit 47494, A. Harten, *Email, Re: Spelter Strategy Notes* (1998).

⁷⁴ *Id.*

⁷⁵Plaintiffs’ Trial Exhibit 33097, D. Bedsole, *E-mail Re: Hodgson Review* (2002).

⁷⁶ DuPont’s consultant, Kevin Suter, testified that DuPont was opposed to offsite sampling from day one because of the concern that if they found contamination, they would have to remediate off-site. (Binder 41, 9/17/07 Tr. 1716).

⁷⁷Plaintiffs’ Trial Exhibit 75727, E-mail to Lipp Re: Work Meeting (2002).

community advocates, lawyers, the media and government agencies from “connecting the dots.”⁷⁸ To accomplish this, DuPont devised a strategy to “minimize the amount of information being disseminated.”⁷⁹ Continuing to conceal the hazards and refusing to inform residents of the risks is a prime example of this policy.

DuPont wanted to limit interest in the “dots” in order to “diminish our exposure.” (*Id.*) The Spelter site was listed as one of the “dots.” In addition to minimizing information to the residents of the class, DuPont’s “Connect the Dots” policy also stated that for off-site issues, DuPont desperately wanted to avoid a Superfund listing. Not surprisingly, this is the exact strategy DuPont developed for dealing with the tragedy of the Spelter smelter site.

To prevent the public from connecting the dots in Spelter, DuPont subverted the administrative process. DuPont was most concerned about the potential that the Spelter site would be listed by the EPA on the National Priorities List—primarily because of the additional costs and the loss of control of the site. DuPont was much more comfortable with its ability to influence and control the actions of the West Virginia WVDEP than those of the EPA. DuPont affirmatively reached out to the WVDEP believing that it could “reach relatively quick agreement with DEP” and “give[] them the environmental victory that they need.”⁸⁰ Most importantly, DuPont felt that having the site in the hands of the DEP would “get us working towards the clearly lowest cost and protective [to DuPont] option.”⁸¹

As was shown by the evidence, DuPont was particularly interested in the DEP having authority for the clean-up of the site to save money. As DuPont lawyer Bernard Reilly wrote, “I expect state (vs. EPA) control, using voluntary, risk-based remediation would potentially save

⁷⁸ Plaintiffs’ Trial Exhibit 71769, “*Connecting the Dots.*”

⁷⁹ *Id.*

⁸⁰ Plaintiffs’ Trial Exhibit 47686, B. Reilly, *E-mail Re: Spelter Remedial Plan* (1998).

⁸¹ *Id.*

tens of millions of \$.”⁸² DuPont knew its options under Superfund would not be voluntary and would cost substantially more than the voluntary program under the DEP. DuPont’s strategy was “to finish the EPA work (pretty much done), and get the site firmly into WV jurisdiction.” The strategy was important because “[i]f this fails, EPA might list it on the Superfund National Priority List, a slow, very costly process with an uncertain outcome on remedy selection and natural resource damages.”⁸³

To accomplish its goal, DuPont spoke with officials at the WVDEP and obtained their cooperation in having the site controlled by the WVDEP.⁸⁴ DuPont recruited the WVDEP to help contact the EPA as “it would be better to talk first with the WV officials, where we have good cooperation, and let them help us on this rather than taking our chances on what EPA III would do . . .”⁸⁵

In addition to working closely with the WVDEP, from whom DuPont felt it had “good cooperation,” DuPont also hired a consultant with close ties to the WVDEP.⁸⁶ This consultant was Ron Potesta, whose company employed the supposedly neutral and unbiased LRS, and who had previously “affirmed his loyalty to DuPont.”⁸⁷ Potesta had such close ties to the WVDEP that DuPont questioned if he was “willing to stretch his neck out for DuPont?”⁸⁸ Bernard Reilly eased these concerns, explaining that Potesta had “every reason to preserve his relationship with DuPont, I see no risk of him going off our view of the reservation.”⁸⁹

⁸² Plaintiffs’ Trial Exhibit 76861, E-mail to B. Reilly from Skaggs re: Spelter Order.

⁸³ Plaintiffs’ Trial Exhibit 47669, B. Reilly, *E-mail Re: W.V. Governor’s Office* (1999).

⁸⁴ Plaintiffs’ Trial Exhibit 76845, *E-mail Re: Governor Intercedence with EPA*.

⁸⁵ *Id.*

⁸⁶ Plaintiffs’ Trial Exhibit 76922, B. Reilly, *E-mail Re: Spelter VRRRA Agreement* (1999).

⁸⁷ Plaintiffs’ Trial Exhibit 47516, B. Reilly, *E-mail Re: Potesta Call on Spelter* (1998).

⁸⁸ Plaintiffs’ Trial Exhibit 71664, A. Hartten, *E-mail Re: Spelter VRRRA Agreement* (1999).

⁸⁹ Plaintiffs’ Trial Exhibit 47562, B. Reilly, *E-mail Re: P.M.at Spelter* (1999).

Central to the “Connecting the Dots” policy was supplying the public with misinformation. DuPont’s campaign of misinformation included the following:

- DuPont lied to the residents of the class by telling them that “[w]e have no evidence” that health problems could be caused by the site.⁹⁰
- In a community newsletter, DuPont told the residents that “[t]he current sampling data and risk assessment indicate that there is no current risk to the Spelter community from off-site releases.”⁹¹
- DuPont went so far as to tell residents of the class area that “[t]he constituents at the site (namely lead and zinc) are not the kind of materials that cause health effects several years after the exposure. All that said, we really don’t foresee any future health effects resulting from this situation.”^{92, 93}

As these examples show, there is ample evidence to support the Circuit Court’s finding that DuPont’s conduct justified an award of punitive damages. Whether DuPont’s conduct justified punitive damages is even easier to determine after comparing this finding with other West Virginia punitive damage cases.⁹⁴ Certainly, DuPont’s conduct in willfully exposing the residents surrounding Spelter to arsenic, cadmium, and lead and in subjecting them to a

⁹⁰ Plaintiffs’ Trial Exhibit 72310, R. Moore, *E-mail Re: Water Well Abandonment* (2001).

⁹¹ Plaintiffs’ Trial Exhibit 35, DuPont, *Community Newsletter* (December 2001).

⁹² Even DuPont’s consultant, Kevin Suter, had to acknowledge that this statement wasn’t true. (Binder 41, 9/17/2007 Tr. 1737:19-1738:7).

⁹³ Plaintiffs’ Trial Exhibit 8411, T. Bingman, *Re: Spelter Script* (2003).

⁹⁴ See e.g., *Alkire v. First Nat’l Bank*, 197 W.Va. 122, 475 S.E.2d 122 (1996) (evidence showing bank deliberately misinformed plaintiff about the results of an investigation into a lost bank deposit and harming plaintiff’s reputation in the community sufficient to allow jury to determine punitive damages); *Davis v. Celotex*, 187 W.Va. 566, 420 S.E.2d 557 (1992) (evidence showing defendants aware of risks of asbestos and despite this evidence continued to manufacture and distribute the product without a warning was sufficient to allow jury to determine punitive damages); *Marsch v. American Elec. Power Co.*, 207 W.Va. 174, 530 S.E.2d 173 (1999) (evidence of reckless conduct sufficient to allow jury to assess punitive damages for the failure to secure an area around a hole in the floor).

significantly increased lifetime risk of disease and illness is sufficient to justify punitive damages.

Given all of these facts, the Circuit Court, after reviewing extensive briefing and hearing oral arguments by both parties, correctly ruled that the question of whether DuPont's conduct was wanton, willful, or reckless was appropriate for the jury. (Binder 50, 10/15/07 Tr. 5064–68). *See Ellis v. Gallatin Steel Co.*, 390 F.3d 461, 471 (6th Cir. 2004) (The court of appeals held that evidence the defendant slag processor knew that dust from its facility created a nuisance but refused to act until forced to do so through a court order and knew that explosions would occur as a consequence of rain hitting the molten slag but continued its operations uncorrected supported the finding necessary for punitive damages that the defendant acted with wanton or reckless disregard for the lives, safety, or property of neighboring landowners.); *Gray v. Westinghouse Electric Corp.*, 624 N.E.2d 49 (Ind. Ct. App. 1993) (The court held that allegations that defendant knowingly dumped toxic chemicals and failed to abate a nuisance, with knowledge to the danger to the plaintiff's health and property supported a claim for punitive damages).

Post-trial, the Circuit Court conducted a “meaningful and adequate review . . . using well-established principles” as required under *Garnes*. In an extensive thirty-five page order, the Circuit Court meticulously reviewed the evidence in the record and ordered that punitive damages were justified and not excessive. The Circuit Court dedicated twenty (20) pages of its order to detailing the evidence of DuPont's conduct from as far back as 1911 and up to the filing of this suit in 2004. See *Order Denying DuPont's Motion to Vacate or Reduce Punitive Damages Award Under Garnes v. Fleming Landfill* (Binder 54, p. 24972-25007, 02/25/08)). The evidence set out by the Circuit Court completely rebuts DuPont's proclamations of good conduct as set out

in its Appellate Brief. As was stated by the Circuit Court, “The evidence, when construed in favor of the Plaintiffs, supports the punitive verdict. Plaintiffs showed, and the jury found, that DuPont intentionally acted with a disregard to a known risk with the high probability that harm would follow.” (*Id.*)

Both a unanimous eleven-member jury and the Circuit Court, after hearing six weeks of evidence, have found that the evidence supports a finding that DuPont’s conduct was wanton, willful, or reckless. While DuPont may believe its conduct cannot support the jury finding, the jury found otherwise, and there is no reason to disturb this finding on appeal.

B. The instructions given by the Circuit Court were appropriate and consistent with West Virginia and federal law.

The Circuit Court instructed the jury as required by the law of the State of West Virginia and United States Supreme Court precedent. DuPont’s requested charge was a superfluous charge given that the instructions issued by the Circuit Court accomplished the same purpose.

DuPont charges the Circuit Court with reversible error in refusing to instruct the jury that: “A defendant’s dissimilar acts, independent from the acts upon which you based your previous findings of liability, may not serve as the basis for punitive damages.” However, the Court gave the following instruction:

The Court instructs the jury that during the course of Phase 4, you’ve heard evidence of alleged DuPont conduct relating to sites other than Spelter and involving individuals who are not plaintiffs or class members in this lawsuit. **You may not award punitive damages to punish DuPont on account of alleged harm to nonparties.** In considering whether DuPont’s conduct is reprehensible, however, you may consider evidence of actual harm to nonparties, but **only if the harm to nonparties was caused by the same conduct that allegedly harmed the plaintiffs.**

(Binder 50, 10/18/07 Tr. 5677–78) (emphasis added).⁹⁵ The instruction given by the Circuit Court accomplishes the same purpose as DuPont’s requested instruction and is a more accurate statement of the law. The instruction specifically informs the jury that it is only to consider harm to nonparties if it was caused by the same conduct that harmed the Plaintiffs. In other words, the jury was instructed that it should not consider dissimilar conduct but only “the same conduct.” The instruction requested by DuPont was superfluous, and the Circuit Court, given its discretion in instructing the jury, cannot be said to have committed reversible error.

While DuPont continues to argue that the conduct that occurred in Parkersburg (also referred to as “Washington Works”) was dissimilar, the evidence presented during trial showed that DuPont had a prevailing corporate policy that factored into decisions DuPont made regarding the Parkersburg site and the Spelter site. The focal point of this evidence was the “Connect the Dots” corporate policy that expressly included both sites in the State of West Virginia.⁹⁶

Spelter and Parkersburg were covered by the same misguided DuPont policies. These policies controlled conduct, and it was proper for the jury to consider this evidence in determining the reprehensibility of DuPont’s conduct.

C. The Circuit Court did not abuse its discretion in allowing the arguments of Plaintiffs’ counsel in the punitive damages phase of the trial.

DuPont has cited no authority that suggests the arguments of counsel warrant a new trial. In fact, West Virginia law supports the arguments made by counsel and the rulings of the Circuit Court. In *Skibo v. Shamrock Co., Ltd.*, 202 W.Va. 361, 504 S.E.2d 188 (1998), for example, this Court ruled that the following argument did not merit reversal: “If you’re going to make him

⁹⁵*Philip Morris USA v. Williams*, 127 S. Ct. 1057, 1064 (2007) (“Evidence of actual harm to nonparties can help the party show that the conduct that harmed the plaintiff also posed a substantial risk of harm to the general public, and so was particularly reprehensible.”).

⁹⁶Plaintiffs’ Trial Exhibit 71769, “*Connecting the Dots.*”

[Mr. Mascaro] pay the price for what he did and send—send a message—to this community, you have to give a verdict big enough so the State” *Id.* at 364-65, 191. The posture of *Skibo* makes it even more probative. Prior to closing arguments, the circuit court ruled that punitive damages were inappropriate. *Id.* at 364, 191. Despite the fact that punitive damages were not at issue, this Court ruled that counsel’s arguments inviting the jury to send a message did not warrant reversal. *Id.* at 365, 192. If such an argument does not merit reversal in a case where punitive damages are not at issue, it surely cannot be an abuse of discretion for the Circuit Court to allow similar arguments when punitive damages are the specific issue being decided by the jury. This is particularly true given that one of the primary purposes of punitive damages is to “deter others from pursuing a similar course.” *Celotex*, 187 W. Va. at 569, 420 S.E.2d at 560 (quoting *Harless v. First Nat’l Bank*, 169 W. Va. 673, 691, 289 S.E.2d 692, 702 (1982)).

D. The amount of the punitive award is neither excessive nor unconstitutional.

The amount of the punitive damages award conforms to the requirements established by the United States Supreme Court in *BMW v. Gore*, 517 U.S. 559 (1996), and *State Farm Mutual Auto Ins. Co., v. Campbell*, 538 U.S. 408 (2003), and to the factors established by this Court in *Garnes*. As this Court has stated regarding punitive damages, there must be “(1) reasonable constraint on jury discretion; (2) a meaningful and adequate review by the trial court using well-established principles; and (3) a meaningful and adequate appellate review.” *Garnes*, 186 W. Va. at 667, 413 S.E.2d at 907-08 (citing *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991)). Reasonable constraint was placed upon the jury and the Circuit Court provided an appropriate review of the verdict. No error was committed by the Circuit Court in applying the *Garnes* factors or federal precedent. Thus, DuPont’s due process rights have been fully protected.

Given that DuPont's due process rights were protected, DuPont argues that the award itself was constitutionally excessive. However, DuPont's arguments are without merit when compared to precedent. One of the purposes of punitive damages is to cause "people to internalize, rather than externalize their costs" without going so far as to deter useful activities. *Garnes*, 486 W. Va. at 662, 413 S.E.2d at 903. DuPont argues that the compensatory award itself is sufficient to deter, but simply forcing DuPont to remediate the class area and to monitor the residents is not a sufficient punishment when considering the reprehensibility of its conduct, the extent of the harm it caused, and the sheer wealth of DuPont. A jury heard all of the evidence of DuPont's conduct and decided that its actions were "wanton, willful, or reckless." As a result, the jury decided that DuPont's conduct should be punished beyond simply making the Plaintiffs whole.

While state law does not require punitive damages to be greater than compensatory damages, the amount decided upon by the jury, and affirmed by the trial court, is constitutionally sound. That is the measure to be applied by this Court when determining whether an award of punitive damages is excessive. The Circuit Court correctly applied the law in reviewing the award of punitive damages. DuPont now suggests that the role of the Circuit Court was to arbitrarily decide whether the compensatory award itself was sufficient punishment and replace the jury's verdict with its own. This Court has set standards for the review of a punitive award, and the standards for review were met in this case.

The United States Supreme Court has identified three non-exclusive factors to guide courts in determining whether an award of punitive damages exceeds constitutional limits: "(1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the actual or potential harm suffered by plaintiff and the punitive damages award; and (3) the difference

between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases.” *State Farm*, 538 U.S. at 418.

Reprehensibility. Reprehensibility is “[t]he most important indicium of the reasonableness of a punitive damages award.” *Gore*, 517 U.S. at 575. The factors to consider when assessing the degree of reprehensibility of DuPont’s conduct include whether “the harm caused was physical as opposed to economic; the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident.” *State Farm*, 538 U.S. at 419. Given the extreme reprehensibility of DuPont’s conduct, a substantial award of punitive damages is justified.

In *Cook v. Rockwell International Corp.*, 564 F. Supp. 2d 1189 (D. Colo. 2008), the court ruled that an award of exemplary damages did not violate the due-process rights of the defendant operators of a nuclear-weapons manufacturing plant. The plaintiff class alleged that the defendants’ facility released plutonium and other hazardous substances onto their properties. *Id.* at 1201. According to the court, the award of exemplary damages was supported by evidence that the defendants’ misconduct was not the result of a single incident but consisted of a series of incidents and routine practices over decades, some of which were attended by dishonesty, subterfuge, and deceit. *Id.* at 1211. As such, this Court should uphold the findings of the jury and the Circuit Court and no further review of this award is required.

The harm imposed by DuPont was both physical and economic. Plaintiffs’ persons and properties were injured. Due to DuPont’s conduct, the Plaintiffs have been subjected to a

significantly increased lifetime risk of developing multiple latent diseases and will therefore require medical monitoring for forty years from the date their properties are remediated.

Further, DuPont's conduct showed an indifference to or a reckless disregard for the health and safety of the class. Despite understanding for decades that arsenic, cadmium and lead had invaded the properties of the Plaintiffs, DuPont did nothing to warn the residents, test their properties for contamination or remediate the contamination offsite. The evidence showed that DuPont's conduct was financially motivated. Because of DuPont's greed, the Plaintiffs in this case have been subjected to health risks they would not have otherwise have faced.

DuPont continues to cite the clean-up of its own property, as if this alleviates its obligations to the community. This case is not about the damage done or the remediation conducted on the property itself. This case is about the harm that DuPont caused to property it did not own—the communities surrounding the smelter—and the reckless and conscious indifference DuPont displayed to the people living in these communities. DuPont continually misled the residents of the class regarding the extent of the hazards and health risks DuPont created. Such conduct does indeed “evince an indifference to or a reckless disregard of the health or safety of others.”

The targets of DuPont's conduct were financially vulnerable. There is no question that DuPont knew that the residents of the class would be unable to pay for the type of testing necessary to discover the damage done to their property and the substantial risks to their health. Knowing the residents of the class would be unable to discover on their own the true extent of the contamination and the substantial health effects, DuPont freely misled them. Again, such conduct weighs heavily toward the reprehensibility of DuPont's acts.

To make matters worse, DuPont's conduct in Spelter was part of a pattern and practice by DuPont to minimize information made available to people affected by their actions. As the jury was shown, DuPont's conduct at its Parkersburg facility was eerily similar to the conduct that occurred in Spelter. The conduct was similar because it was part of a corporate policy that was set out in explicit detail in the "Connecting the Dots" presentation. The residents of Spelter, like the residents of Parkersburg, were the unfortunate victims of this policy.

Finally, as was set out in detail above, evidence showed that the harm that resulted in this case was a result of "intentional malice, trickery, or deceit." DuPont intentionally misled the Plaintiffs concerning the extent of the contamination caused to their property and the substantial health risks resulting from the Defendant's acts. This type of conduct is reprehensible, and DuPont should be punished beyond simply paying compensatory damages. While the compensatory damages themselves are monetarily large, they are being applied to a class comprised of several thousand affected persons. Further, compensatory damages only seek to restore Plaintiffs back in the position they were in prior to DuPont's tortious conduct. The reprehensible nature of DuPont's conduct in attempting to avoid responsibility for subjecting the members of the class to substantially increased lifetime risks of health effects like cancer from their exposure to arsenic, cadmium, and lead deserves further punishment.

Simply forcing DuPont to remediate property it contaminated and to medically monitor the class residents for health effects to which DuPont's conduct subjected them to is not sufficient. As was shown at trial, DuPont earns \$300 million a month. The only way to punish such a large corporation is with a large punitive award. This is exactly why the Supreme Court of Appeals in *Garnes* expressly stated that the financial position of the defendant is relevant. "The object of such punishment is to deter the defendants from committing like offenses in the future,

and this it may be said is one of the objects of all punishment, and we recognize that it would require, perhaps, a larger fine to have this deterrent effect upon one of large means than it would upon one of ordinary means, granting the same malignant spirit was possessed by each.” *Leach v. Biscayne Oil & Gas Co., Inc.*, 169 W. Va. 624, 628, 289 S.E.2d 197, 199(1982) (quoting *Pendleton v. Norfolk & W. Ry. Co.*, 82 W. Va. 270, 277-78, 95 S.E. 941, 944 (1918)).

Relationship between punitive damages and the potential harm suffered by the plaintiffs.

The second guidepost to be considered is the relationship between the punitive damages awarded and the harm or potential harm suffered by the plaintiffs. In considering whether there is a reasonable relationship between punitive and compensatory damages, courts typically examine the ratio between the award of the punitive damages and that of the compensatory damages. This Court’s precedent is quite instructive on this issue. “The outer limit of the ratio of punitive damages to compensatory damages in cases in which the defendant has acted with extreme negligence or wanton disregard but with no actual intention to cause harm and in which compensatory damages are neither negligible nor very large is roughly 5 to 1. However, when the defendant has acted with actual evil intention, much higher ratios are not per se unconstitutional.” *Boyd v. Goffoli*, 216 W. Va. 552, 565, 608 S.E.2d 169, 181 (2004), citing *TXO Prod. Corp. v. Alliance Res. Corp.*, 187 W. Va. 457, 461, 419 S.E.2d 870, 874 (1992).

Under any comparison, the award of punitive damages is well within the ratio of 5 to 1. The jury awarded punitive damages of \$196.2 million. Prior to the jury’s verdict on punitive damages, the jury awarded the property class \$55,537,522.25 for property damages and determined that the medical monitoring class was entitled to be monitored due to the significant increased health risk to which each member of the class was subjected. The Circuit Court subsequently found that the cost to fund the medical monitoring program would be

\$129,625,819. Thus, the total of compensatory damages awarded to the class was \$185,163,341.25. The ratio between the punitive damages and compensatory damages is thus approximately 1:1. As has been stated by the Supreme Court, “[s]ingle digit multipliers are more likely to comport with due process, while still achieving the State’s goals of deterrence and retribution.” *State Farm*, 538 U.S. at 425. Accepting solely for the sake of argument DuPont’s position that only the property damages should be considered, a ratio of 3.5:1 is still reasonable when considering the extent of the harm actually caused and the reprehensibility of DuPont’s conduct. *Grefer v. Alpha Technical*, 965 So. 2d 511 (La. Ct. App.), writ denied, 967 So. 2d 523 (La. 2007), cert. denied, 128 S. Ct. 2054 (2008) (An amended punitive damage award of \$112.3 million in an action by surrounding landowners for contamination of their properties with naturally occurring radioactive material, where the evidence established that the defendant had acted wantonly and recklessly, was not excessive and not in violation of the defendant’s due process rights. The amount of compensatory damages awarded by the jury was \$56.1 million. *Id.* at 514.).

Difference between punitive damages and civil penalties. DuPont spends a great deal of time arguing that any potential civil fine weighs in favor of its position that the punitive award is excessive. Plaintiffs agree that the punitive damages awarded exceed the civil fines imposed by regulatory agencies that DuPont has cited as examples. However, the examples set out by DuPont are far from similar, as they primarily involved the violation of permits or isolated events. There is no comparable fine for the decades of deceit displayed by DuPont. DuPont’s argument also ignores the cleanup costs associated with any fine for contaminating an entire community. However, accepting the \$12 million fine for purposes of comparison, and, noting that DuPont has provided nothing to show that this is the maximum civil fine that could be

imposed, prior Supreme Court precedent suggests that the \$196.2 million punitive damages award is in line with such a fine. As was pointed out in *State Farm*, a punitive damages award one hundred times greater than the civil penalty would not be excessive. *Boyd v. Goffoli*, 216 W. Va. 552, 567, 608 S.E.2d 169, 184 (2004) (citing *State Farm v. Campbell*, 538 U.S. at 429). Accordingly, the potential civil fine also weighs in favor of upholding the punitive damages award.

“Only when an award can fairly be categorized as ‘grossly excessive’ in relation to [the State’s interests in punishment and deterrence] does it enter into the zone of arbitrariness that violates the Due Process Clause of the Fourteenth Amendment.” *Gore*, 517 U.S. at 568. Applying the guideposts set out by the United States Supreme Court, there is no basis to hold that the punitive damages awarded in this case are grossly excessive or violate DuPont’s due process rights.

After addressing the Constitutional guideposts under *Gore*, the Court must then consider the factors enunciated under *Garnes*. The Circuit Court followed the precise process required under West Virginia law in conducting such a review of the punitive damages award. This Court now conducts the same *Garnes* review:

After the trial court has examined and ruled on the punitive damages award, the losing party may petition for appeal to this Court. In our review of the petition, we will consider the same factors that we require the jury and trial judge to consider, and all petitions must address each and every factor set forth in Syllabus Points 4 and 5 of this case with particularity, summarizing the evidence presented to the jury on the subject or to the trial court at the post-judgment review stage.

Garnes, 186 W. Va. at 669, 413 S.E.2d at 910.

Continuing the first *Garnes* factor, reasonable relationship to the harm that is likely to occur or has occurred, it is without question that DuPont caused a great amount of harm. The properties of all members of the class area were contaminated and must be remediated. The jury

determined that the extent of the damage was such that it will cost approximately \$55 million to clean either the soil and/or the structures. In addition, DuPont subjected approximately 8,000 people to a substantially increased risk of several different cancers as well as neurological deficits and other health effects. Given the great amount of harm, the first *Garnes* factor weighs heavily in favor of sustaining both the jury's verdict and the Circuit Court's post-verdict order.

The second factor is the reprehensibility of DuPont's conduct. As shown above, DuPont's conduct was highly reprehensible. DuPont's actions, in consideration of the entire time period in which the Defendant either owned and operated the smelter or was aware of the contamination caused by the smelter and concealed both the extent of the contamination and the potential health effects from the class, occurred over a 90-year period. DuPont was clearly aware that its actions were causing harm and actively attempted to conceal the harm caused. Compounding the reprehensibility, DuPont engaged in similar conduct at Parkersburg, practicing a policy of minimizing information to prevent people from "connecting the dots."

Third, the Court must consider any profits from the conduct so that they can be removed. Although DuPont's conduct in misleading the Plaintiffs and concealing the off-site contamination may not have directly profited DuPont, DuPont did profit indirectly. For a period of over fifty years, DuPont avoided responsibility for the cleanup of an environmental disaster that it largely caused as DuPont admitted through its own documents. It should not be lost on this Court that DuPont profited from not having to clean up the communities surrounding the smelter. While this profit was indirect, it was still income that DuPont was not forced to divert from some other aspect of its business. As the evidence made clear, DuPont's primary motivation was to avoid all responsibility for the cleanup and, to the extent it had to do anything, to find the least expensive method and to do as little as possible.

Fourth, as established above, the punitive damages award bears a reasonable relationship to compensatory damages.

Fifth, given the financial position of DuPont, a large punitive damages award is even more reasonable. While the wealth of a defendant cannot justify an unconstitutional punitive damages award, the award in this case is not unconstitutional or excessive under either *Gore* or *Garnes*. Given the financial position of DuPont, and to accomplish the true purpose of punishment and deterrence, the punitive damages award must be large. As to the costs, litigation costs exceeded \$8 million. The fact that the Plaintiffs had the benefit of a well-financed legal team is hardly relevant. Without such a well-financed team, DuPont's conduct would have never been made public, and DuPont would never have been forced to remedy its wrongs. Clearly, this factor weighs in favor of a large punitive damages award. DuPont feebly suggests that because Plaintiffs' counsel was well-financed and that the Plaintiffs themselves did not have to incur out-of-pocket expenses, this factor does not weigh in favor of a large punitive damages award. Plaintiffs would suggest that, at the time *Garnes* was decided, it was understood by the Supreme Court of Appeals that the majority of cases seeking punitive damages would be within the confines of a contingency agreement. The import of this factor is the cost of bringing the Defendant to trial. In this case, the cost was extreme.

DuPont next misconstrues the factors regarding criminal sanctions and other civil actions. As was set out in *Garnes*, any sanctions or other civil awards should mitigate against a punitive damages award. There have been no criminal sanctions for DuPont's conduct in relation to the communities surrounding the smelter nor have there been other civil awards for this conduct. While there were two civil settlements (a wrongful death action and a property damage claim), the amounts of these settlements should have no bearing on the award of punitive damages.

Finally, the Court must consider the appropriateness of punitive damages to encourage fair and reasonable settlements when a clear wrong has been committed. Plaintiffs believe that a clear wrong was committed in this case. DuPont was aware of the hazard it created and intentionally set about to cover up the known risk and the extent of the contamination. A large punitive award will encourage companies like DuPont to resolve disputes like this one when such a clear wrong has been committed, and Plaintiffs will not be required to spend over \$8 million to finance litigation necessary to obtain compensation.

A review of this case shows that the guideposts of *Gore* and the factors of *Garnes* support the punitive damages award. The award is appropriate given the reprehensibility of DuPont's conduct and the extreme harm caused to the members of the class. For all of the reasons set out above, this Court should find that the award of punitive damages was not excessive as a matter of state or federal law and uphold the award in its entirety.

E. The punitive damages award was appropriately allowed for the members of the medical monitoring class.

The Circuit Court's decision to allow the medical monitoring class to seek and to recover punitive damages was not error. Under the law of the State of West Virginia, medical monitoring damages are considered "actual harm." *Chemtall*, 216 W. Va. at 55, 607 S.E.2d at 784 ("The circuit court apparently reasoned that no statute of limitation applies to a medical monitoring claim because the cause of action has not yet accrued, *i.e.*, there is not yet an injury. This is incorrect. The 'injury' that underlies a claim for medical monitoring—just as with any other cause of action sounding in tort—is 'the invasion of any legally protected interest.'").

DuPont's argument that the medical monitoring class has not proven or alleged actual harm because there is no allegation of personal injuries is a misstatement of the law. This Court's opinions on medical monitoring damages consistently state that medical monitoring damages are

compensatory damages designed to make the plaintiff whole. In characterizing claims for medical monitoring, this Court has said “plaintiffs are seeking . . . *compensation* for the cost of future medical testing aimed at diagnosing potential ailments caused by the alleged toxic exposure.” *Bower v. Westinghouse Elec. Corp.*, 206 W. Va. 133, 137, 522 S.E.2d 424, 428 (1999) (emphasis added). “Although the physical manifestations of an injury may not appear for years, the reality is that many of those exposed have suffered some legal detriment; the exposure itself and the concomitant need for medical testing constitute the injury.” *Id.* at 139, 430 (quoting *Hansen v. Mountain Fuel Supply*, 858 P.2d 970, 977 (Utah 1993)).

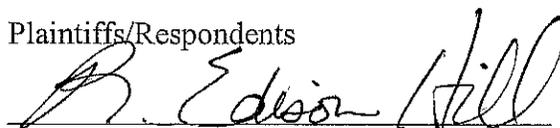
This Court has characterized medical monitoring damages as compensatory damages designed to make the plaintiff whole. Thus, the decision of the Circuit Court to allow the medical monitoring class to participate in and to recover damages for punitive damages was appropriate. This is particularly true given that “punitive damages should bear a reasonable relationship to the *potential of harm* caused by the defendant’s actions” *Garnes*, 186 W.Va. at 667, 413 S.E.2d at 908 (emphasis added). Medical monitoring damages are one of the better methods to determine the potential of harm caused by DuPont’s actions. Accordingly, it was not error for the Circuit Court to allow the medical monitoring class members to recover punitive damages.

CONCLUSION

DuPont claims the record is rife with error. A review of the record reveals that DuPont’s claim is without merit. The Circuit Court followed West Virginia law and acted reasonably and within its discretion. For the reasons discussed above, the Court should deny the relief requested by DuPont.

Respectfully submitted,

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

LENORA PERRINE, et al., Plaintiffs Below/Appellees,

v.

E. I. DU PONT DE NEMOURS AND COMPANY, et al., Defendants Below,

E. I. DU PONT DE NEMOURS AND COMPANY, Appellant.

CERTIFICATE OF SERVICE

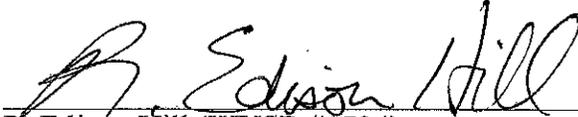
I, R. Edison Hill, counsel for Plaintiffs, hereby certify that I have served a true and exact copy of **"APPELLEES' RESPONSE BRIEF"** upon the following counsel via US Mail this 29th day of December 2008:

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