
Nos. 34334 & 34335

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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

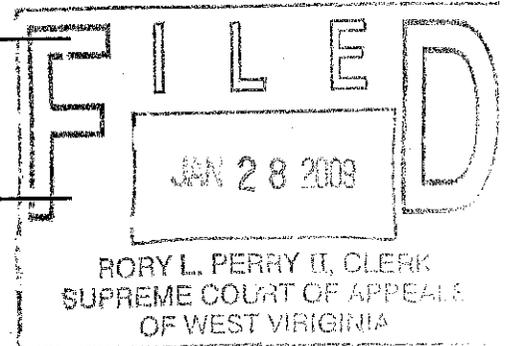
v.

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

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

Honorable Judge Thomas A. Bedell
Circuit Court of Harrison County
Civil Action No. 04-C-296-2

REPLY BRIEF



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INTRODUCTION

The trial court proceedings resulted in (1) a forty-year medical monitoring program for a class of thousands, even though there was no proof of significant increased health risks, (2) a \$55 million damages award for the cleanup of thousands of properties, even though the overwhelming majority of measurements showed contaminant levels on class members' properties are lower than cleanup levels, and (3) a \$196.2 million punitive judgment against DuPont, even though it alone took responsibility and, with regulatory oversight and approval, successfully remediated the plant site, which it had not owned or operated for half a century. The trial court judgments cannot be squared with the evidence. They were the products of the trial court's errors, Plaintiffs' counsel's inflammatory and prejudicial allegations and arguments, and a trial out of control.

In their appeal brief, Plaintiffs have tempered their tone, mostly dispensing with the unrestrained and often poisonous rhetoric that characterized their presentations to the jury. But, as in the trial court, Plaintiffs' factual assertions and legal arguments cannot withstand scrutiny of the record and West Virginia law.

REPLY TO PLAINTIFFS' STATEMENT OF FACTS

This reply statement of facts identifies central facts Plaintiffs do not—and cannot—dispute, and contrasts Plaintiffs' assertions with the record, focusing on class environmental conditions, class health evidence, DuPont's operation of the plant, and DuPont's remediation.

I. Plaintiffs' Own Environmental Measurements Showed No Class Health Risks and No Need for Remediation

Plaintiffs do not dispute that "screening levels" are scientifically based contaminant levels that present no meaningful health risk even to the most sensitive people, assuming daily exposure for a lifetime. (*See Binder 42, 9/25/07 Tr. 3193-95.*) Plaintiffs' soil scientist Dr.

Brown admitted that screening levels, also known as “de minimis standards,” are used to determine whether property is “clean” (Binder 41, 9/20/07 Tr. 2612-14). He agreed that “if [contaminant] levels are below the screening levels, then you don’t have to consider remediation.” (*Id.* 2613.)

Plaintiffs’ own measurements revealed that 95-98 percent of class-area soil samples were below screening levels for arsenic, cadmium, and lead. (Binder 40, 9/13/07 Tr. 1193-97.) Plaintiffs’ allegations of class-wide health risks and a necessity for remediation cannot be reconciled with these actual measurements showing that virtually all class-area soil samples are below screening levels.

Plaintiffs’ suggestion (Br. 15, 64) that dust in home living areas and attics is dangerous is also refuted by the record. Plaintiffs’ living-area dust testing showed that 100 percent of arsenic measurements, 100 percent of cadmium measurements, and 72 percent of lead measurements were below dust guidance levels. (Binder 41, 9/20/07 Tr. 2631-32.) On cross-examination, Brown admitted that his own risk model showed that living-area dust ingestion presents no increased cancer risk in the class area. (*Id.* 2695-96.) Brown similarly conceded that attic dust ingestion poses no elevated cancer risk to the class. (*Id.* 2692.)

Dr. Brown conceded that soil and dust do not explain his cancer-risk calculations. He admitted that his calculation of elevated cancer risk for the class is almost entirely explained by indoor air, which he claims is contaminated. (*Id.* 2696-97 (Brown: 95 percent or more of cancer risk calculation explained by indoor air).) ***But Brown’s cancer-risk calculations rely on assumed, not measured, indoor air-contaminant levels.***

Plaintiffs do not dispute that most of Brown’s class-area measurements of indoor air ***detected no contamination***, and that only one sample (out of 187) found arsenic above the

reporting limit of his equipment. (*Id.* 2664.) Brown first counted the numerous contaminant non-detections as zeros. (*Id.* 2667.) But Plaintiffs concede that shortly before trial, Brown changed his methods, and replaced the zeros for non-detects with assumed contaminant values that were hundreds or even thousands of times higher than air screening levels. (*Id.* 2668, 2675-79.) By assuming high levels of indoor-air contamination in his cancer-risk calculations, Brown *assumed* his result—an increased calculated cancer risk for the class.

Although the vast majority of actual measurements in the class area show contaminants below screening levels, evidencing no class-wide health risks or need for remediation, Plaintiffs repeatedly characterize the class area as “contaminated.” They do not explain that by “contaminated” they mean only that arsenic, cadmium, and lead were sometimes found at levels above pristine, natural background levels, not that contaminants are present at levels that would present health risks. As Dr. Brown admitted:

Q. Above background is what you mean by “contamination.”

A. Yes.

Q. Because we’re not above screening values on this chart, are we?

A. Correct.

(*Id.* 2694; *see also* Binder 40, 9/13/07 Tr. 1166, 1168-69 (Plaintiffs’ expert Flowers).)

Under this definition of “contamination”—above pristine, natural background levels—contamination is common. (Binder 42, 9/25/07 Tr. 3202-03.) That class-area contaminant levels are, in some cases, above natural background levels says nothing about whether class-wide health risks exist or whether class-area remediation is appropriate. Health risks and remediation are properly evaluated by reference to screening levels, which are designed to protect the most sensitive people over a lifetime of exposure. (*Id.* 3200.) Comparison of class-area contaminant

levels to screening levels demonstrates that Plaintiffs' claims of class health risks and the need for remediation are unfounded.

II. There Was No Evidence of Meaningful Increased Health Risk to the Class

No class member claims to have suffered personal injury caused by exposure to contaminants. No class representative presented any evidence of harmful contaminant levels in his or her body. Plaintiffs do not dispute that the only such class representative evidence—the 2005 blood-lead test of Lenora Perrine—was normal (although the Circuit Court barred DuPont from presenting this test result to the jury). Plaintiffs also concede that after testing blood-lead levels of children in the area, the ATSDR concluded in 1996 that “it does not appear that children in Spelter are being exposed to hazardous levels of lead.” (DX 648 at 3.)

A. Harrison County Health Statistics Showed No “Record Numbers” of Medical Conditions

Despite the absence of evidence of any class-member health problems connected to contaminants, Plaintiffs twice assert, without citation, that they are in a “high risk group” because “Harrison County has reported record numbers of serious medical conditions.”¹ (Pl. Br. 2, 70.) Plaintiffs do not explain how Harrison County statistics could be meaningful when the class-area population is just 6 percent of the county. (Binder 46, 10/4/07 Tr. 4523.)

In any event, Plaintiffs' unsupported assertions about Harrison County are contrary to the record. The trial evidence showed no “record numbers” of Harrison County medical conditions. West Virginia's 2006 Department of Health and Human Resources report of 1993-2003 health statistics showed that Harrison County lung and bronchial cancer rates are *not* statistically

¹ This Court has underscored “counsel's obligation to present this Court with specific references to the designated record that is relied upon.” *State v. Honaker*, 193 W. Va. 51, 56 n.4, 454 S.E.2d 96, 101 n.4 (1994).

different from the State average and *not* among the highest county rates in the State. (PX 77257 at 96; Binder 46, 10/4/07 Tr. 4529-31.)

B. The Class Area Was Not Properly Defined by Any Health Risks

Plaintiffs' contention that the five-by-seven-mile class area was properly defined by health risks is also contradicted by the record. Plaintiffs admit that the class-area boundaries were defined by modeling purporting to show incremental increased soil arsenic levels of 0.43 ppm. (Pl. Br. 14-15.) But they fail to mention the testimony of their own expert Dr. Brown about soil-arsenic concentrations of 0.43 ppm. Brown admitted that a soil-arsenic level of 0.43 ppm is "a bogus number," that "soils almost everywhere are much higher than that," and that arsenic levels even 100 times higher may be acceptable:

Q. Now, you have testified yourself, haven't you, that *that .43 number that Doctor Flowers and Doctor MacIntosh spoke to the jury about is a bogus number*. You've used—*those are your words "bogus number," right?*

A. *Yes*.

Q. And in fact, you've testified that that .43 number we heard from Doctor Flowers and Doctor MacIntosh is off by about a factor of 100.

A. No, what I was referring to is, *the .43 can't be used because soils almost everywhere are much higher than that*.

Q. You've testified that numbers as high as 43, 100 times .43, 43, are acceptable, haven't you?

A. In some instances, those have been acceptable levels, yes.

(Binder 41, 9/20/07 Tr. 2617-18 (emphasis added).)

Even in the natural area near West Milford that Plaintiffs' experts called a "control area," the average soil-arsenic concentration was 8.8 ppm—more than 20 times 0.43 ppm, the incremental level that Plaintiffs used to delineate the class. (Binder 40, 9/13/07 Tr. 1086, 1112, 1169.)

Because Plaintiffs' five-by-seven mile class area is defined by a purported incremental soil-arsenic value that their own soil expert describes as "bogus," Plaintiffs' risk model produces absurd results. Plaintiffs do not deny that the "increased risk" sufficient for admission into their medical-monitoring program is equivalent to the risk from smoking a *single pack* of cigarettes over an entire *lifetime*. (Binder 46, 10/4/07 Tr. 4511-15.)

III. DuPont's Operation of the Plant

A. The 1919 Report Found "No Human Health Effects Associated with the Plant"

Plaintiffs repeatedly refer to the 1919 report on plant emissions, written a decade before DuPont acquired the plant. But Plaintiffs do not acknowledge their own expert's admission that the authors of the 1919 report concluded that "to their knowledge, there were no human health effects associated with the plant." (Binder 40, 9/13/07 Tr. 1164-65 (testimony of Dr. Flowers).)

Plaintiffs charge that the 1919 report was "hidden from public view" until it was "uncovered in this litigation." (Pl. Br. 4.) But the record shows that the report was kept in a public museum, and that it was DuPont that obtained it and produced it to Plaintiffs, the EPA, and the DEP. (Binder 41, 9/18/07 Tr. 2210-13; Binder 41, 9/19/07 Tr. 2362-63.)

B. DuPont Upgraded the Plant Technology, Resulting in a "Cleaner Operation"

In criticizing DuPont's operations, Plaintiffs avoid mentioning the testimony of their own expert as to the effect of DuPont's new vertical retort technology, which it licensed and implemented when it took over the plant:

Q. Now, you agree, don't you, sir, that this change in 1930 after DuPont took over the plant, this change to vertical retort technology, resulted in a *cleaner operation*, right?

A. Yes, I would agree that it's a better operation than horizontal retorts.

(Binder 40, 9/13/07 Tr. 1165 (emphasis added).) Plaintiffs cannot dispute that, after DuPont took over the plant and implemented a cleaner operation, community lawsuits about emissions ceased. (Binder 42, 9/24/07 Tr. 2926.)

Plaintiffs contend that DuPont failed to implement appropriate control technology in its operation of the plant from 1928-1950. (Pl. Br. 3-5.) But they cite only the testimony of Steven Amter, a hydrogeologist claiming expertise in “the state of knowledge of industries affecting the environment.” (Binder 41, 9/20/07 Tr. 2719-20.) Amter criticized DuPont for failing to use a “bag house” on its vertical retorts sixty to eighty years ago.

But Plaintiffs do not tell the Court that, on cross-examination, Amter admitted that he had examined practices of other zinc smelters (*id.* 2879-80), but could not identify even one that used a bag house at any time before 1950 (Binder 42, 9/24/07 Tr. 2926-27). Plaintiffs do not explain how a supposed failure to take steps that no other zinc smelter had taken could be considered negligence, much less “willful and wanton” conduct.

C. DuPont’s 1950 Sale of the Smelter Had Nothing to Do with Plant Emissions

Citing a 1950 air pollution survey, Plaintiffs assert that DuPont sold the smelter that year in order to avoid the costs of pollution control. (Pl. Br. 5-6.) But Plaintiffs’ claim regarding the motives of unnamed DuPont decision makers some sixty years ago is not supported by the record. The 1950 document Plaintiffs cite does not even discuss the reasons for selling the smelter, let alone suggest that the sale had anything to do with air emissions. (PX 76730.)

Another trial exhibit, which Plaintiffs do not mention, does describe why DuPont sold the plant. A 1950 DuPont memorandum shows that DuPont began its efforts to sell the plant in 1943, seven years before the 1950 pollution survey. (DX 5038 at DPZ0337779-81; Binder 41, 9/20/07 Tr. 2876-79.) That same memorandum shows that DuPont’s reasons for selling the

smelter were unrelated to environmental issues, and included that DuPont had “no internal requirements for zinc.” (DX 5038 at DPZ0337781.)

D. DuPont Did Nothing Wrong in Connection with its 1980 Visit to Spelter

Plaintiffs say that DuPont somehow acted improperly following a visit to Spelter in 1980, thirty years after selling the plant, claiming that DuPont inspected a playground near the plant but “took no further action.” (Pl. Br. 6-7.) The record again contradicts Plaintiffs’ charge.

The evidence shows that in 1980 DuPont personnel visited this playground, which DuPont had donated to the Spelter Board of Education decades earlier, and in which DuPont had a reversionary real estate interest. (Binder 41, 9/18/07 Tr. 2216; Binder 42, 9/24/07 Tr. 2937; DX 480.) The evidence also shows that, after the visit, the Spelter Board of Education discussed with DuPont the leasing of the playground property to the Harrison County Planning Commission. (DX 5086, 5091.) The Harrison County Planning Commission then arranged for an environmental assessment of the playground. (DX 5091.) After the environmental assessment, officials from Harrison County, the State of West Virginia, and the United States Department of the Interior all approved various upgrades to the playground and were aware that the parcel would continue to be used as a playground. (Binder 42, 9/24/07 Tr. 2944-48; DX 5088.)

IV. DuPont’s Remediation: “A very good example of taking a highly-contaminated site, remediating it and putting it back into useful service”²

A. EPA Never Found that the Site Represented an “Imminent Endangerment”

Plaintiffs claim that the EPA determined that the plant site constituted an “imminent endangerment,” and quote at length from a February 1996 EPA memorandum they say notifies DuPont of this finding. (Pl. Br. 7-8.) But the EPA made no such finding or notification.

² (Binder 40, 9/13/07 Tr. 1085-86 (Plaintiffs’ expert Dr. Flowers).)

The document Plaintiffs quote is an internal EPA memo. (PX 8797.) After the memo was written, the EPA evaluated off-site risks. It asked the public health experts in the ATSDR to review EPA and DEP sampling data and to evaluate potential health risks in Spelter. (DX 636.) ATSDR then performed its survey of blood-lead levels of children in the Spelter area. (DX 648.) Based on the blood-lead testing results, ATSDR found that “it does not appear that children in Spelter are being exposed to hazardous levels of lead” and concluded that “[f]urther community-wide screening for lead poisoning in Spelter is not indicated at this time.” (*Id.* at 3.) Contrary to Plaintiffs’ representations, at no time did the EPA conclude that there was an “imminent endangerment.”

In March 1996, the EPA sent a notice to Diamond (the then-current plant owner) and to former plant owners, including DuPont. (DX 635.) The notice said nothing about any “imminent endangerment,” but identified steps to prevent trespassing on the site and to sample and dispose of waste at the site, which DuPont had not owned or operated for 46 years. (*Id.* at DPZ0270384.) In 1997, the EPA issued an Administrative Order concerning site remediation (but requiring no off-site remediation of the Spelter community). (DX 690; Binder 41, 9/18/07 Tr. 2206-07.) DuPont accepted primary responsibility for the site, and worked closely with the EPA to stabilize and to begin cleaning up the 112-acre site. (Binder 41, 9/18/07 Tr. 2230-34.) DuPont completed and paid for these projects (DX 694) even though Diamond continued to own and operate the smelter until 2001.

B. The DEP Remediation Program Is Not Inferior to the EPA Superfund Program

Plaintiffs argue that DuPont sought to bring the site under the jurisdiction of the State’s Voluntary Remediation and Redevelopment Program (“VRRP”) because the State program is less protective of human health than its federal counterpart. (Pl. Br. 8-10.) But the record shows

otherwise. Ken Ellison, Director of the DEP Division of Land Restoration, testified without contradiction that the VRRP and Superfund “follow the same principles,” and that the VRRP is no less protective of health. (Binder 50, 10/17/07 Tr. 5457-60.) Plaintiffs can point to no evidence to support their charge that the State program is inferior to the EPA Superfund program.

Plaintiffs’ theory that DuPont manipulated the DEP in order to move the site into the State program is supported only by their rhetoric and is contradicted by Ellison’s undisputed testimony. Ellison testified that the EPA controlled whether or not to release the site to the State’s jurisdiction. (*Id.* 5464-65.) Before the site was transferred into the VRRP, the EPA confirmed in writing that DuPont had satisfied all EPA requests and orders. (DX 5037.)

In their efforts to demonize DuPont, Plaintiffs distort the evidence. For example, in a 1998 internal email discussing possible Spelter plant remediation options, a DuPont remediation team member suggested a containment remedy for site remediation, and contended that containment would be both the lowest cost and “protective” option. (PX 47686 at DPZ0221494.) In quoting this document, Plaintiffs insert “[to DuPont]” after “protective” so that it reads “protective [to DuPont].” (Pl. Br. 78.) A review of the document reveals the distortion. By “protective,” DuPont clearly meant that containment would “protect[] human health and environment,” as stated elsewhere on the same page of the document. (PX 47686 at DPZ0221494.)

DuPont was not alone in its view that the containment option would protect human health and the environment. This view was shared by the DEP, the EPA, and other responsible agencies, all of which approved containment as the appropriate remediation option for the site.

(Binder 41, 9/18/07 Tr. 2274-75; Binder 41, 9/19/07 Tr. 2326-28, 2353; DX 678 at DPX0031294; DX 749 at DPZ0097828; DX 813 at DPZ0022946; DX 5039.)

C. DuPont's Air Testing Was Approved and Supervised by the EPA, and Evaluated by the ATSDR

In criticizing DuPont's air testing during the site remediation, Plaintiffs do not disclose that DuPont's air monitoring was part of a detailed work plan approved and supervised by the EPA, that the sampling was performed according to pre-approved sampling and analysis procedures (including the use of the EPA's own risk-based concentration levels), and that both the EPA and the ATSDR received and reviewed the results. (Binder 40, 9/14/07 Tr. 1500-01; Binder 41, 9/18/07 Tr. 2243-51; DX 5063, 3405.)

ATSDR issued a complete "Health Consultation" on DuPont's remediation air testing data and found "no apparent public health hazard" as a result of DuPont's activities. (DX 3405 at TPD0000393.)

D. Plaintiffs' "Misrepresentation" Allegation Is Based on an Internal Draft That No Plaintiff Claimed to Have Seen or Heard

Plaintiffs attack a draft set of written answers to possible community questions as misleading because the draft does not reference certain contaminants or certain potential health effects. (Pl. Br. 13.) But there was no evidence that anyone from DuPont ever communicated this draft information to any class member. No class representative or other class member testified that DuPont provided him or her with any misleading information.

Plaintiffs cite the so-called "Connecting the Dots" document as "[t]he most significant piece of evidence" for their assertion that DuPont tried to "avoid disclosure." (*Id.* 77.) But this document does not show that DuPont concealed anything at Spelter. (DuPont Br. 71.) The DuPont project manager at Spelter, who was responsible for DuPont's communications with the community, had never even seen the document before trial. (Binder 41, 9/19/07 Tr. 2441, 2449.)

On the other hand, there was abundant, undisputed evidence of communications about the Spelter site that DuPont did make to the community, including evidence that:

- DuPont established a community advisory board of local elected officials and residents to help provide information to the public about the Spelter site and cleanup (Binder 41, 9/18/07 Tr. 2234-37);
- DuPont held community meetings, with the DEP's participation, to answer questions and provide progress reports on the remediation (Binder 41, 9/19/07 Tr. 2310-11);
- DuPont maintained a public repository of documents relating to the site cleanup (Binder 41, 9/18/07 Tr. 2280-83; Binder 41, 9/19/07 Tr. 2305-07);
- DuPont published public notices in the local newspapers, including notice that "sampling results [from the smelter site] indicate the potential contaminants of concern for the site are antimony, arsenic, cadmium, copper, lead, manganese, silver, selenium and zinc" (Binder 41, 9/18/07 Tr. 2278-80; DX 5040); and
- DuPont distributed a community newsletter describing the Spelter residue pile: "The material is up to 80 to 115 feet thick in some places and has significantly elevated levels of heavy metals, including arsenic, lead, cadmium and zinc" (Binder 41, 9/18/07 Tr. 2285-86; DX 783).

E. DEP Concluded that "There Is No Unacceptable Risk to Off-Site Residents"

Plaintiffs do not dispute that the EPA and the DEP (1) considered potential off-site risks when they evaluated the smelter site, (2) never found significant risk to residents, and (3) never required or recommended further off-site testing or any off-site remediation of the surrounding community. Indeed, the DEP concluded, in a 2001 letter to the Harrison County Planning Commission, that "there is no unacceptable risk to off-site residents due to off-site soil contaminants and . . . there is no further need for off-site soil sampling." (DX 837.)

Plaintiffs attack the DEP's conclusion, falsely claiming that DuPont, not the DEP, wrote this letter. But Plaintiffs again disregard the record. At trial, the author of the letter, DEP Director Ellison, testified that he, not DuPont, drafted the letter, including its conclusion:

“[T]hat is my letter.” (Binder 50, 10/17/07 Tr. 5481; *see also id.* 5471-72, 5479-80.) Plaintiffs have no contrary evidence.

Plaintiffs cannot dispute that DuPont’s cleanup of the site benefited the community. They avoid any mention of the testimony of their expert Dr. Flowers about DuPont’s remediation: “This smelter site is a very good example of taking a highly-contaminated site, remediating it and putting it back into useful service.” (Binder 40, 9/13/07 Tr. 1085-86.)

ARGUMENT

I. **The Circuit Court Permitted Plaintiffs to Infect the Trial with Prohibited Evidence and Argument**

The Circuit Court, through a series of errors, enabled Plaintiffs to overcome the absence of evidence of class-wide health risks and property damage.

A. **The Circuit Court Allowed Plaintiffs to Present Highly Prejudicial “Other Acts” Evidence and Argument in Disregard of Rule 404(b) and Without Following Required Procedures**

Plaintiffs’ trial strategy was obvious from the start: distract the jury from weak scientific evidence by smearing DuPont as a bad company. A crucial part of this strategy was Plaintiffs’ use of improper evidence regarding DuPont’s alleged misconduct at other sites. Plaintiffs’ inflammatory rhetoric—they claimed that DuPont caused birth defects in Parkersburg and put profits over community health at plant sites around the country—eliminated any possibility of a fair trial. The Circuit Court’s failure to follow the required procedures for evaluating Rule 404(b) evidence entitles DuPont to a new trial.

Plaintiffs do not contest the stringent requirements that this Court has laid out for the admission of 404(b) evidence. *See* Syl. Pt. 2, *State v. McGinnis*, 193 W. Va. 147, 455 S.E.2d 516 (1994). Nor do they deny that the failure to abide by these procedures is a *per se* abuse of discretion. *Stafford v. Rocky Hollow Coal Co.*, 198 W. Va. 593, 600, 482 S.E.2d 210, 217

(1996). Instead, Plaintiffs argue that (1) DuPont waived any 404(b) objections until the final phase of trial; (2) even if DuPont preserved its objections, the evidence regarding other sites was impeachment rather than improper character evidence; and (3) the Circuit Court properly admitted Parkersburg evidence during the punitive damages phase. They are wrong on each point.

The Forte videotape deposition. Plaintiffs' efforts to inject improper character evidence into the trial began with the testimony of the first fact witness, Kathy Forte. Plaintiffs used Forte's testimony to suggest that DuPont had contaminated communities around the country. (Binder 40, 9/13/07 Tr. 1305-14.) Plaintiffs do not dispute that the Circuit Court failed to follow the *McGinnis* procedures before admitting the Forte evidence.

Plaintiffs argue that DuPont waived its 404(b) objections to Kathy Forte's testimony by failing "to refer specifically to Rule 404(b)." (Pl. Br. 20.) Plaintiffs also claim that "DuPont did not make any specific objections to the Circuit Court referencing Rule 404(b) . . . until after the jury heard Forte's testimony." (*Id.*) But their own lengthy rendition of the Forte procedural history demonstrates that both of these assertions are false. Plaintiffs admit that, *the day before* Forte's testimony was played for the jury, DuPont objected to her testimony by a motion that specifically "made reference to Rule 404(b)." (*Id.* 21; *see also* Binder 40, p. 18040, DuPont's Supp. Objs., Counter-Desigs. re Forte 4, 8 (9/12/07).) The Circuit Court heard argument on the motion and overruled DuPont's 404(b) objections. (Binder 40, 9/13/07 Tr. 1203-12.) Nothing more was needed to preserve this reversible error. *See* W. Va. R. Evid. 103(a).³

³ In describing the 404(b) procedural history, Plaintiffs also assert that DuPont failed to raise 404(b) objections as required by the Circuit Court's case management orders. (Pl. Br. 20.) But Plaintiffs omit that DuPont moved in limine to exclude evidence of DuPont's alleged misconduct at other plant sites under Rule 404(b). (Binder 29, p. 12329, DuPont's Mot. in Limine re Other Lawsuits, Chemicals, Plants etc. at 2, 5 (7/25/07).) A motion in limine is the preferred method for alerting the Circuit Court to "potentially troublesome [evidentiary] issues prior to trial." *Wimer v. Hinkle*, 180 W. Va. 660, 662, 379

Plaintiffs argue that, even though DuPont objected to Forte's testimony by written motion specifically referencing Rule 404(b), DuPont somehow waived those objections by failing to utter the magic words "404(b)" during the short oral argument on its motion. (Pl. Br. 22.) Plaintiffs appear to take the position that a party waives any objections contained in a written motion unless the party repeats the same points during oral argument. Not surprisingly, Plaintiffs cite no West Virginia authority for this absurd proposition. Even if DuPont was required to repeat its objections orally, there would be no waiver: DuPont objected during oral argument to "testimony or questioning with regard to other sites which are not the subject of this litigation, including Parkersburg and Pompton Lakes." (Binder 40, 9/13/07 Tr. 1204-05.)⁴

Perhaps recognizing the weakness of their waiver argument, Plaintiffs argue in the alternative that their questioning of Forte about alleged contamination at other DuPont sites was proper impeachment, not impermissible character evidence under Rule 404(b). (Pl. Br. 23-24.) But this impeachment rationale is an obvious pretext for using this inadmissible and

S.E.2d 383, 385 (1989); *see also* W. Va. R. Evid. 103(c). That was particularly true in this case, where the Circuit Court acknowledged that it did not even review the initial deposition designations and corresponding objections because of their volume. (Binder 40, 9/13/07 Tr. 1211.)

⁴ Plaintiffs suggest that by this statement DuPont was raising only a relevance objection to the other-sites evidence. (Pl. Br. 22 n.39.) This claim is not supported by the record. Prior to oral argument, DuPont had objected to evidence regarding its other facilities on 404(b) grounds in both its pretrial motion in limine and again in its Forte motion. (Binder 29, p. 12329, DuPont's Mot. in Limine re Other Lawsuits, Chemicals, Plants etc. at 2, 5 (7/25/07); Binder 40, p. 18040, DuPont's Supp. Objs., Counter-Designs. re Forte at 4, 8 (9/12/07).) Given this background, DuPont's reference to "sites which are not the subject of this litigation" was more than enough to alert the Circuit Court to the nature of DuPont's objections.

In a footnote, Plaintiffs also say that DuPont's 404(b) objection to Forte's testimony was "buried" in a lengthy pleading. (*Id.* 21 n.38.) The entire text of DuPont's motion is four pages long. (Binder 40, p. 18040, DuPont's Supp. Objs., Counter-Designs. re Forte (9/12/07).) Citing Rule 404(b), DuPont contended that the "extended line of questioning about sites other than Spelter is a transparent attempt to create the impermissible inference that DuPont's acts at sites other than Spelter show how it acted at Spelter." (*Id.* 4.) The text of the motion is followed by six pages of line-by-line objections and counter-designations (*id.* 5-11); the line-by-line objections identify for the Circuit Court the specific questions about other DuPont locations that were "improper character evidence under 404(b)" (*id.* 8). The Circuit Court acknowledged that it had an opportunity to read Forte's deposition before it heard argument on DuPont's motion. (Binder 40, 9/13/07 Tr. 1214-15.)

inflammatory evidence. See *Young v. Saldanha*, 189 W. Va. 330, 337, 431 S.E.2d 669, 676 (1993) (holding that “[t]he rules of evidence simply do not permit [a party] to prove her case by introducing evidence of prior allegations of negligence” under the guise of impeachment).

Plaintiffs still cannot explain how their inflammatory questions “impeached” Forte’s testimony.

The only example they offer—that Forte did not recall specific statements made at a meeting regarding the “Connecting the Dots” presentation—does not hold up to scrutiny. Forte testified that she was familiar with the “Connecting the Dots” document and was questioned extensively by Plaintiffs’ counsel about it. (Binder 40, 9/13/07 Tr. 1277-87, 1296-1301.) But nothing she said was “impeached” by Plaintiffs’ claims that DuPont contaminated sites around the country (*id.* 1302, 1309), allegedly resulting in “property devaluation” in Barksdale, Wisconsin (*id.* 1309) and “mercury contamination” in Pompton Lakes, New Jersey (*id.*).

Plaintiffs never argued during trial that the questioning of Forte about other sites was used for impeachment. Just after Forte’s testimony was finished, DuPont requested a limiting instruction for the other-sites evidence under Rule 404(b), and Plaintiffs agreed that such an instruction was appropriate. (*Id.* 1348-51.) DuPont filed its proposed 404(b) limiting instruction, which required Plaintiffs to identify the purpose for which they contended the Forte evidence was admitted. (Binder 20, p. 18339, DuPont’s Supp. Req. for a Limiting Instr. on 404(b) Evid. (9/14/07).) Plaintiffs responded with their own “limiting instruction on certain *WVRE 404(b) evidence*.” (Binder 20, p. 18391, Pls.’ Resp. to DuPont’s Limiting Instr. on 404(b) Evid. (9/17/07) (emphasis added).)⁵ Plaintiffs did not argue, as they do now, that the other-sites evidence was used to impeach Forte. Plaintiffs’ post-hoc impeachment explanation cannot save

⁵ DuPont objected to Plaintiffs’ proposed instruction because it failed to identify a proper 404(b) purpose for the Forte testimony. (Binder 20, p. 18400, DuPont’s Objs. to Pls.’ Limiting Instr. on 404(b) Evid. (9/17/07).) The Circuit Court never ruled on DuPont’s objection. DuPont’s renewed request for a proper 404(b) instruction at the end of Phase I was denied. (Binder 42, p. 19349, DuPont’s Obj. to Instr., Nos. 3A & 3B (9/28/07).)

them from the automatic reversal that should result from the Circuit Court's failure to follow the *McGinnis* procedures.

The cross-examination of Dr. Rodricks. Dr. Rodricks is a distinguished toxicologist who DuPont called as an expert witness. During cross-examination, Plaintiffs were allowed to accuse him of knowingly distorting cancer risk to children in Parkersburg in a research monograph that was submitted to the EPA. (Binder 42, 9/25/07 Tr. 3353; *see also id.* 3372.) The Circuit Court allowed this line of questioning without requiring Plaintiffs to comply with the procedural requirements for using Rule 404(b) evidence.

DuPont preserved its 404(b) objections to the Rodricks testimony. Almost immediately following Plaintiffs' first question about Parkersburg, DuPont objected and argued that Plaintiffs were trying to make this a "trial about C8," a chemical used at the Parkersburg facility. (*Id.* 3353-63.) Although counsel for DuPont did not specifically cite Rule 404(b) at sidebar, the basis for DuPont's objection was "apparent from the context," as Rule of Evidence 103(a) requires. DuPont filed a pretrial motion in limine arguing that Plaintiffs would try to introduce evidence regarding Parkersburg and C8 in violation of Rule 404(b). (Binder 29, p. 12329, DuPont's Mot. in Limine re Other Lawsuits, Chemicals, Plants etc. at 2, 5 (7/25/07).) DuPont raised the same 404(b) objection to other-sites evidence before the testimony of Kathy Forte. (Binder 40, p. 18040, DuPont's Supp. Objs., Counter-Desigs. re Forte (9/12/07).) Finally, DuPont's request for a Rule 404(b) curative instruction for the Forte testimony was still pending at the time Dr. Rodricks testified. (Binder 20, p. 18339, DuPont's Supp. Req. for a Limiting Instr. on 404(b) Evid. (9/14/07).)

Given this context, the Circuit Court understood the basis of DuPont's objections to the Parkersburg evidence. *See Humphries v. Mack Trucks, Inc.*, 1999 WL 815067, at *2 (4th Cir.

1999) (unpublished) (holding that grounds for a trial objection were clear when the objecting party had previously filed a pretrial motion in limine on the issue); *Werner v. Upjohn Co.*, 628 F.2d 848, 853 (4th Cir. 1980) (same). Indeed, the day after the initial Rodricks objection, DuPont moved for a mistrial arguing that the Parkersburg line of questioning was “barred by 404(b).” (Binder 42, 9/26/07 Tr. 3499.) The Circuit Court denied DuPont’s motion, but “preserve[d] the objections of DuPont for all purposes.” (*Id.* 3503.) Neither the Circuit Court nor Plaintiffs’ counsel suggested that they had not understood the basis for DuPont’s objection the day before. (*Id.* 3498-3503.)

As with Forte, Plaintiffs’ fallback position is that the cross-examination of Dr. Rodricks was proper impeachment under Rule 608(b). But Plaintiffs offer no impeachment rationale for questions about whether there was a medical-monitoring program at Parkersburg (Binder 42, 9/25/07 Tr. 3366-67) or whether “the people in Parkersburg were concerned about . . . getting liver cancer” (*id.* 3368-69). Nor can Plaintiffs explain their questions about DuPont’s C8 litigation strategy based on an email that Dr. Rodricks had never seen. (*Id.* 3376-78.) The only purpose of these questions was to inflame and taint the jury.

Plaintiffs do try to justify their questions about the C8 research monograph (Pl. Br. 26-27), but their justification falls short. Even if these questions were legitimate impeachment of Dr. Rodricks, they were improper character evidence as to DuPont because, with the same brush, Plaintiffs also accused the company of trying to mislead the EPA. (Binder 42, 9/25/07 Tr. 3352-78.)

More fundamentally, the charges leveled against Dr. Rodricks and DuPont were false. Neither the testimony nor the exhibits relied upon by Plaintiffs supports Plaintiffs’ counsel’s statement to the jury that Dr. Rodricks and DuPont “phonied up—I mean, absolutely phonied

up—information to the EPA about the dangers of cancer for those kids in Parkersburg.” (*Id.* 3353.) The exhibit upon which this allegation was based shows only that a revision was made to an initial draft monograph at the suggestion of a DuPont scientist. (PX 47771.) Plaintiffs have no support for their allegation that the final monograph, which was forwarded to the EPA, was false or misleading in any way. This underscores the prejudice that resulted from the Circuit Court’s failure to follow the *McGinnis* procedures.⁶ Instead of poisoning the jury with their improper 404(b) allegations, Plaintiffs should have been required to prove their inflammatory charges at an *in camera* hearing—something they did not and could not do.

The Phase II “other sites” closing argument. During closing arguments on medical monitoring, Plaintiffs’ counsel argued that at facilities around the country DuPont took the approach that “sometimes it’s okay to hurt people because it’s better for the economy.” (Binder 46, 10/9/07 Tr. 4666; *see also* DuPont Br. 21-22.)

Plaintiffs’ only defense of these inflammatory allegations is that DuPont waived its objection by failing to object on Rule 404(b) grounds to a document that includes the list of plant sites that Plaintiffs’ counsel relied upon. But it is not the document itself that creates the 404(b)

⁶ Plaintiffs claim that “the Circuit Court applied Rule 404(b) safeguards to the monograph evidence.” (Pl. Br. 25.) They are wrong. First, DuPont was provided with no notice of the character evidence that Plaintiffs used to attack Dr. Rodricks. (Binder 42, 9/25/07 Tr. 3361 (DuPont objecting to the inadequate time to respond to Plaintiffs’ claims); *id.* (Plaintiffs’ counsel acknowledging that DuPont “didn’t know we have these documents”). Second, before allowing Plaintiffs’ cross-examination, the court never made any finding that Plaintiffs proved, by a preponderance of evidence, that Dr. Rodricks and DuPont misled the EPA regarding Parkersburg. (*Id.* 3362-63.) The court allowed Plaintiffs to inflame the jury with their unproven charges with the empty caveat that DuPont could “rehabilitate [Dr. Rodricks] in these areas” if it wanted to. (*Id.* 3363.)

Plaintiffs also say that DuPont did not request a limiting instruction for the Rodricks evidence. But they ignore the fact that DuPont’s request for a 404(b) limiting instruction was still pending when Dr. Rodricks testified. (Binder 20, p. 18339, DuPont’s Supp. Req. for a Limiting Instr. on 404(b) Evid. (9/14/07).) When Plaintiffs responded with their own 404(b) limiting instruction—before Dr. Rodricks testified—they foreshadowed their improper cross-examination by noting that evidence regarding “DuPont sites of environmental contamination other than Spelter” “will continue to be presented during trial.” (Binder 20, p. 18391, Pls.’ Resp. to DuPont’s Limiting Instr. on 404(b) Evid. at 1-2 (9/17/07).)

problem. The exhibit lists locations around the country (not all of them even belonging to DuPont) that are potentially subject to environmental assessments under the Superfund program. (PX 71759.) Plaintiffs' counsel created the Rule 404(b) violation by arguing, with no basis in the record, that DuPont put the health of these various communities at risk to make a buck. (Binder 46, 10/9/07 Tr. 4664-66.) It was this argument that prompted DuPont's motion for a mistrial based explicitly on Rule 404(b). (*Id.* 4722-26.)

It is telling that Plaintiffs offer no defense of the substance of their improper closing argument. This error requires a new trial.

The belated and inadequate Phase IV McGinnis "review" and Parkersburg evidence.

Plaintiffs' efforts to smear DuPont with other bad acts evidence reached their peak during the punitive damages phase of trial. Anticipating Plaintiffs' attacks, DuPont again raised its Rule 404(b) concerns with the Circuit Court before this phase of trial began. (Binder 50, 10/16/07 Tr. 5135-40.) The Circuit Court finally acknowledged that DuPont was entitled to an *in camera* hearing on Plaintiffs' character evidence.

The resulting "hearing," however, did not come close to protecting DuPont's rights under *McGinnis*. DuPont was provided no advance notice of either the hearing itself or the specific character evidence Plaintiffs intended to introduce in Phase IV. (*Id.* 5138.) Although Plaintiffs state that "the Circuit Court reviewed the documents at issue for an hour before hearing the parties' arguments on the matter" (Pl. Br. 30), that claim is false. The transcript page Plaintiffs cite shows only that the Circuit Court mentioned the possibility of reviewing the Parkersburg evidence, not that it actually did so. (Binder 50, 10/16/07 Tr. 5161.) The Circuit Court later admitted that it had not reviewed Plaintiffs' Parkersburg documents, explaining that the 404(b) hearing was done "in general," "by proffer or representation." (*Id.* 5181.) The "hearing" was

over in a matter of minutes and, in the end, the Circuit Court simply chose to credit Plaintiffs' unsupported claims about DuPont's conduct at Parkersburg. (*Id.* 5162-82.) The *in camera* hearing was rendered "meaningless" by Plaintiffs' failure to present evidence of specific claims of wrongdoing that DuPont could challenge and rebut. See *State v. Dolin*, 176 W. Va. 688, 693-94, 347 S.E.2d 208, 214 (1986).

In defending the admissibility of the Parkersburg allegations, Plaintiffs avoid mention of the specific claims of wrongdoing and simply assert that DuPont engaged in similar misconduct in Parkersburg and Spelter. (Pl. Br. 30-31.) But Plaintiffs offer no legitimate 404(b) purpose for their allegations. For example, they make no effort to defend the admissibility of their inflammatory, unproven charges that DuPont had caused "birth defects" in the unborn child of a Parkersburg employee and was "killing monkeys" with C8. These baseless, poisonous charges that had nothing to do with Spelter were focal points of Plaintiffs' opening and closing statements in the punitive phase of the trial. (Binder 50, 10/16/07 Tr. 5202-04, 5224; Binder 50, 10/18/07 Tr. 5779-80.) Such over-the-top rhetoric fatally compromised the fairness of the trial.

* * *

Plaintiffs injected improper character evidence into every phase of trial. Instead of acting as a gatekeeper for this evidence, the Circuit Court brushed DuPont's objections aside while failing to follow the mandatory procedures set forth in *McGinnis*. These errors entitle DuPont to a new trial.

B. The Circuit Court Erroneously Allowed Dr. Brown, a Soil Scientist, to Offer Medical and Toxicology Opinions That He Was Unqualified to Provide

Plaintiffs claim to have suffered a significantly increased risk of disease as a result of environmental contaminants, but called no medical doctor or toxicologist to assess these risks. The Circuit Court instead allowed Dr. Brown, Plaintiffs' expert soil scientist, to give the central

medical and toxicology opinions that form the foundation of Plaintiffs' medical monitoring and property remediation claims. Plaintiffs do not dispute that their case depends on Brown's opinions. Instead, they contend that Brown was qualified to give them. The Circuit Court's error—one in a series of highly prejudicial rulings—enabled Plaintiffs to overcome profound weaknesses in their case.⁷

West Virginia law limits expert testimony to the expert's area of expertise.⁸ Plaintiffs do not dispute this.

Brown provided medical and toxicology opinions central to Plaintiffs' case. (DuPont Br. 27.) He performed the health-risk assessment that was the indispensable premise for Plaintiffs' claims that medical monitoring and property remediation are necessary. (*Id.* 28-29.) Plaintiffs dispute none of this.

Brown lacks the expertise necessary to give medical and toxicology opinions. His degrees are all in agronomy. (Binder 41, 9/19/07 Tr. 2484.) Plaintiffs contend that Brown taught and researched "environmental science" for twenty years. (Pl. Br. 32.) But they do not mention that his teaching and research focused on soil. "Throughout," says Brown, "I specialized in soils." (Binder 41, 9/19/07 Tr. 2464.) "I taught courses on the reclamation of . . . soils. I also taught courses on waste disposal, . . . the deliberate spreading of waste on soils."

⁷ Plaintiffs emphasize that the standard of review is abuse of discretion. This Court has made clear, however, that the abuse-of-discretion standard is not a blank check. *See Lipscomb v. Tucker County Comm'n*, 206 W. Va. 627, 630, 527 S.E.2d 171, 174 (1999) (stating that circuit courts' "latitude in conducting the business of their courts . . . does not go unchecked" and that "when we find that the lower court has abused its discretion, we will not hesitate to right the wrong") (internal quotation marks omitted); *see also, e.g., Ventura v. Winegardner*, 178 W. Va. 82, 87, 357 S.E.2d 764, 769 (1987) (holding that a trial court abused its discretion by permitting a vocational expert to testify to tennis salaries).

⁸ *See DuPont Br. 26-27; see also Kiser v. Caudill*, 210 W. Va. 191, 195, 557 S.E.2d 245, 249 (2001) (per curiam) (affirming the circuit court's decision to preclude a neurologist from giving neurosurgery opinions, and holding that even a "medical expert" "may not testify about any medical subject without limitation") (internal quotation marks omitted); *Shreve v. Sears, Roebuck & Co.*, 166 F. Supp. 2d 378, 391 (D. Md. 2001) ("The fact that a proposed witness is an expert in one area, does not *ipso facto* qualify him to testify as an expert in all related areas.").

(*Id.* 2465-66.) Brown researched “what happened to metals that were put on the soil” (*id.* 2470) and how to conduct “waste disposal” that protects “soil” (*id.* 2471).

Brown is not a medical doctor, and he has no medical training. (*Id.* 2484.) Brown testified that he is not a toxicologist, and that he has no experience in human toxicology. (*Id.* 2485-87.) He has testified under oath that he does not “have any experience, training or education in cancer or what causes cancer.” (*Id.* 2488.)

With respect to Brown’s medical and toxicology opinions concerning the health effects of arsenic, cadmium, and lead at varying doses, Plaintiffs say only that these opinions are “universally accepted.” (Pl. Br. 32.) Plaintiffs provide no record citation for this false assertion. Nor do they provide any legal support for their implicit claim that a soil scientist may render expert toxicology and medical opinions so long as the opinions are claimed to be “universally accepted.” (*Id.*)

Other courts have excluded the testimony of non-medical doctors who try to offer human-disease-causation opinions based on “epidemiological studies” and “world-wide consensus statement[s].” *In re Diet Drugs Prods. Liab. Litig.*, 2000 WL 962545, at *13 (E.D. Pa. June 28, 2000) (unpublished) (barring a pharmacologist and a psychologist from offering opinions on the medical effects of a chemical in humans). This Court should do the same.

Plaintiffs say that Brown worked with the EPA “to develop the methodology for risk assessments.” (Pl. Br. 32.) But they do not disclose that Brown’s risk-assessment work with the EPA involved “plant uptake of metals” from the soil, not human-health risk. (Binder 41, 9/19/07 Tr. 2466.)

Plaintiffs also assert that Brown worked with the ATSDR “as a reviewer of epidemiological studies . . . to update literature published by ATSDR on the toxicity of certain

chemicals.” (Pl. Br. 32.) Plaintiffs again fail to provide support from the record. Brown’s ATSDR work involved creosote, a substance not at issue in this case. (Binder 41, 9/19/07 Tr. 2467.) And his job was to review other people’s research, not to conduct his own. (*Id.*) Brown’s review of others’ research on the toxicity of *creosote* does not qualify him to opine on the health effects of arsenic, cadmium, and lead in humans:

Finally, Plaintiffs assert that DuPont hired Brown to perform an “ecological risk assessment” at its Victoria facility. (Pl. Br. 32.) But this was an “ecological” assessment dealing with land disposal, not a human-health-risk assessment. (Binder 41, 9/19/07 Tr. 2477.)

Plaintiffs do not dispute that their case depends on Brown. Because Brown testified outside of his area of expertise, the Circuit Court should have excluded his testimony. The Circuit Court’s error requires judgment for DuPont or, at a minimum, a new trial.

C. The Circuit Court Violated the *Noerr-Pennington* Doctrine by Permitting Plaintiffs to Urge the Jury to Punish DuPont for Petitioning the Government

Plaintiffs concede that both the federal and West Virginia constitutions insulate legitimate lobbying activities from liability. (Pl. Br. 34.) And they do not contend that there was anything illegal about DuPont’s communications with federal and state regulators. Those petitioning activities thus are constitutionally protected and cannot serve as the basis for civil liability. *See NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 916-17 (1982) (observing that “the presence of activity protected by the First Amendment imposes restraints on the grounds that may give rise to damages liability”).

Unable to dispute that central point, Plaintiffs defend their extensive reliance on DuPont’s First Amendment activity as mere “impeachment.” (Pl. Br. 37.) But Plaintiffs cannot square this account with what actually happened at trial, where they mounted a frontal attack on DuPont’s cooperation with the DEP to clean up the Spelter site under West Virginia’s voluntary

remediation program. (DuPont Br. 31-33.) Even in their brief in this Court, Plaintiffs continue to expressly rely on DuPont's interactions with the DEP as a basis for punitive damages, claiming that DuPont should be punished for "successfully minimiz[ing] the remediation efforts at the site itself by influencing government agencies" (Pl. Br. 72; *see also id.* 78-79.) And Plaintiffs' assertion that they were merely rebutting DuPont's reliance on regulatory agencies' findings regarding Spelter (*id.* 37) does nothing to explain Plaintiffs' far broader attacks on all DuPont lobbying. For example, during the Phase II closing, Plaintiffs' launched a broadside on alleged DuPont efforts "to change the laws of the land" to be more favorable to corporations (Binder 46, 10/9/07 Tr. 4663; *see also id.* 4664).

It is well settled that there "simply is no exception to the *Noerr-Pennington* doctrine" for political activity aimed at achieving an objective that a litigant does not favor. *Harrah's Vicksburg Corp. v. Pennebaker*, 812 So. 2d 163, 173 (Miss. 2001). This is so regardless of whether one characterizes the lobbying efforts as "manipulation and distortion of the process." (Pl. Br. 36.) The Circuit Court, however, impermissibly allowed Plaintiffs to create and exploit such an exception throughout trial.

Even if Plaintiffs had confined their use of DuPont's petitioning activity to the limited purpose they assert, a new trial still would be required. Because significant constitutional interests are at stake, admitting evidence of protected conduct, even for a narrow purpose, requires a carefully drawn limiting instruction to guard against the risk that the jury will use the evidence impermissibly. *See Claiborne Hardware*, 458 U.S. at 916. DuPont requested such an instruction, but the Circuit Court erroneously refused to give one. (*See* DuPont Br. 33.) Plaintiffs do not even attempt to defend that refusal. Nor do they attempt to explain how, without a limiting instruction, the jury could have distinguished between the supposedly

permissible and the plainly impermissible uses of evidence relating to DuPont's petitioning, especially in light of Plaintiffs' indiscriminate use of the evidence.

Because of the absence of a limiting instruction, this Court has no basis to presume that the jury used the evidence only in the limited manner that Plaintiffs now hypothesize. Contrary to Plaintiffs' characterization of what happened at trial, their counsel, unencumbered by any limiting instruction, repeatedly went beyond anything that one could plausibly characterize as rebuttal or impeachment to urge the jury to punish DuPont directly for its petitioning conduct. The *Noerr-Pennington* doctrine plainly prohibits that.

II. The Circuit Court Erroneously Impaired DuPont's Defense

In addition to allowing Plaintiffs to present inadmissible evidence and improper attacks, the Circuit Court erroneously impaired DuPont's trial defense. Through a series of errors, the Circuit Court forced DuPont to defend itself with one hand tied behind its back. The result was that Plaintiffs were able to prevail not because of the facts, but despite them.

A. The Circuit Court Improperly Took DuPont's Statute-of-Limitations Defense from the Jury

Substantial evidence shows that Plaintiffs' claims are time barred. Yet the Circuit Court, *sua sponte*, granted summary judgment for Plaintiffs, preventing DuPont from ever presenting one of its central defenses at trial. Plaintiffs cite no West Virginia case granting or affirming summary judgment for a plaintiff on a statute-of-limitations defense. Instead, Plaintiffs dispute the facts, thereby confirming the Circuit Court's error in taking this fact-bound issue from the jury. When Plaintiffs briefed this issue to the trial court, they conceded that the evidence raised "a question of fact." (Binder 27, p. 11440, Pls.' Resp. to DuPont's Mot. for Summ. J. at 8 (7/23/07).)

The Circuit Court erred unless “it is clear that there is no genuine issue of fact.” Syl. Pt. 3, *Aetna Cas. & Sur. Co. v. Fed. Ins. Co. of New York*, 148 W. Va. 160, 160, 133 S.E.2d 770, 771 (1963); *see also* W. Va. R. Civ. P. 56(c). “[A]ny doubt as to the existence of such issue is resolved against [Plaintiffs].” Syl. Pt. 6, *Aetna Cas. & Sur. Co.*, 148 W. Va. at 161, 133 S.E.2d at 772. Plaintiffs were “not entitled to summary judgment unless the facts established show a right to judgment with such clarity as to leave no room for controversy and show affirmatively that” DuPont “can not prevail under any circumstances.” *Id.*, 148 W. Va. at 171, 133 S.E.2d at 777.

This Court accords the Circuit Court’s summary judgment ruling no deference, and reviews it de novo. Syl. Pt. 1, *Kelley v. City of Williamson*, 221 W. Va. 506, 507, 655 S.E.2d 528, 529 (2007).

1. **There was substantial evidence that Plaintiffs knew or should have known of their claims more than two years before they sued**

Plaintiffs insist that the federally required commencement date (“FRCD”), not West Virginia’s commencement date, governs the start of the two-year limitations period. DuPont has explained why this is not so. (DuPont Br. 35 n.8.) But even under the FRCD, the Circuit Court erred in granting summary judgment. Although Plaintiffs say that, under the FRCD, the statute of limitations did not begin to run until they had actual “knowledge” of their claims (Pl. Br. 39-40), the FRCD provides that the statute of limitations began to run when Plaintiffs “knew (*or reasonably should have known*).” 42 U.S.C. § 9658(b)(4)(A) (emphasis added); *see also* DuPont Br. 39 & n.10.

Plaintiffs assert that the evidence at best gave them mere suspicion of their claims. (Pl. Br. 39-40.) But DuPont’s evidence shows much more.

Extensive media coverage creates an issue of fact. Extensive media coverage of allegations that waste from the Spelter facility had migrated to surrounding properties provided Plaintiffs actual or constructive knowledge of their claims before 2002. (DuPont Br. 35-36.) For instance, in 1997, lead class representative Lenora Perrine read a *Clarksburg Exponent* article (Binder 41, p. 18684, 11/16/05 Perrine Dep. Tr. 198-99, 207, Ex. B to DuPont Proffer (9/26/07)) describing the Spelter site as containing a “70 foot hazardous waste pile,” which “all” residents agree is “a health hazard” (*id.*, Ex. V to DuPont’s Proffer (9/26/07)). She also admitted that she long believed that the smelter reduced local property values. (*Id.*, 11/16/05 Perrine Dep. Tr. 204, Ex. B to DuPont’s Proffer (9/26/07).)

Plaintiffs assert that “[t]he circumstances are identical to those in *Freierer* [sic].” (Pl. Br. 41.) But *Freier* reversed summary judgment on the statute of limitations, finding that there were “triable issues of fact.” *Freier v. Westinghouse Elec. Corp.*, 303 F.3d 176, 182 (2d Cir. 2002).

Plaintiffs also rely on *O’Connor v. Boeing North American, Inc.*, 311 F.3d 1139 (9th Cir. 2002). (Pl. Br. 42.) But *O’Connor*, too, held that “summary judgment was improper because there are genuine issues of material fact regarding whether Plaintiffs knew or should have known of their claims.” 311 F.3d at 1144. Because it reasonably can be inferred from the media coverage that Plaintiffs knew or should have known of their claims, whether Plaintiffs in fact were on notice of their claims “on the basis of these media reports . . . is fundamentally a question of fact.” *Id.* at 1154.

DuPont proffered the testimony of eleven witnesses to show that the class members knew or should have known about their claims more than two years before they filed suit. (Binder 41, p. 18684, DuPont’s Proffer (9/26/07).) Plaintiffs cherry pick testimony of three community members (none of whom were class representatives) out of the dozens of fact witnesses who the

parties deposed and out of the more than sixty people on DuPont's witness list. (Pl. Br. 42.)

This testimony does not show that Plaintiffs are entitled to summary judgment. At best, it shows a factual dispute for a jury to resolve.

Community meetings with lawyers create an issue of fact. More than two years before Plaintiffs filed their lawsuit, they and their lawyers organized a series of community meetings to discuss alleged contamination from the smelter site and possible legal action. (DuPont Br. 36-37.) Plaintiffs who are "actively seeking legal counsel" and attending group seminars "to explore available options" are "[p]lainly" and "squarely on inquiry notice that [their] property was contaminated." *LaBauve v. Olin Corp.*, 231 F.R.D. 632, 660 (S.D. Ala. 2005).

Plaintiffs assert that the "[c]oncerns" raised at these meetings "did not rise to the level of knowledge." (Pl. Br. 43.) They cite no case to support that assertion. (*See id.* 43-44.) And "knowledge" is not the relevant legal standard. *See p. 27 supra.* Even if it were, whether the attendees had knowledge is an issue for the jury, not for the Circuit Court.

Plaintiffs rely upon a single document, a "written report" of an April 2001 meeting. (Pl. Br. 43.) That report states that "[s]ome of the residents think that their health problems are related to living near the slag pile." (*See* Binder 41, p. 18684, 4/30/01 Notes, Ex. Y to DuPont's Proffer (9/26/07).) It describes "data" "indicating the presence of Pb [lead], Cd [cadmium], and As [arsenic]." (*Id.*) Although Plaintiffs assert that this report shows that the meeting did not give the residents knowledge of their claims, it expressly says that "[t]he purpose of the meeting was information and preliminary fact finding," and it purports to describe "[e]vidence," including a "soil sample" showing elevated lead levels. (*Id.*)

At the very least, this evidence can support competing inferences. Because it does not unambiguously establish a lack of knowledge, it cannot support granting summary judgment

against DuPont; to the contrary, it precludes summary judgment. “[E]valuation of the awareness in Plaintiffs’ various communities of a specific fact or event” is “uniquely an issue for the jury to resolve.” *O’Connor*, 311 F.3d at 1152. This is why, “[i]n the great majority of cases, the issue of whether a claim is barred by the statute of limitations is a question of fact for the jury.” *Gaither v. City Hosp., Inc.*, 199 W. Va. 706, 714-15, 487 S.E.2d 901, 909-10 (1997).

2. DuPont’s public statements did not toll the statute of limitations

Plaintiffs allege that because DuPont “reassured the community” (Pl. Br. 38), the statute of limitations was tolled. But the evidence shows that DuPont kept the community informed. *See pp. 11-12 supra*. And even if DuPont had reassured the community as Plaintiffs claim, such reassurances would not toll the statute of limitations. “To toll the limitations period because a prospective defendant denies its liability . . . would circumvent the purpose of the statute of limitations.” *Village of Milford v. K-H Holding Corp.*, 390 F.3d 926, 932 (6th Cir. 2004); *see also* DuPont Br. 36 n.9.

Plaintiffs cite *LaBauve* in arguing that they were not on notice of their claims. (Pl. Br. 38.) *LaBauve*, however, held that a defendant’s “persistent denials (both in public and in this litigation) that plaintiffs’ claims have merit or that [plant] contamination has spread offsite. . . . fall well short” of tolling the statute of limitations. 231 F.R.D. at 654. It concluded that plaintiffs’ claims subject to a two-year limitations period were time barred. *Id.* at 661. And it held that where, as here, the plaintiff “believed” that the defendant had caused her damages, the defendant’s reassurances did not stop the statute of limitations from running, *LaBauve*, 231 F.R.D. at 660 n.58.

3. Plaintiffs' alleged lack of "resources" and "know-how" did not toll the statute of limitations

More than two years before they filed suit, Plaintiffs hired lawyers and attended community meetings about alleged contamination from the smelter site. (DuPont Br. 36-38.)

That Plaintiffs, and the lawyers they hired to represent them, waited more than two years to obtain sample results from the experts they hired does not mean that the statute of limitations was somehow tolled. As explained in *LaBauve*, a case Plaintiffs rely upon, the fact that a plaintiff "opted not to engage in [a reasonable] inquiry until her lawyers conducted testing on her behalf" years later "does not excuse her from being charged much earlier with the knowledge that such inquiry would reasonably have obtained, had it been done in a reasonably prompt manner." 231 F.R.D. at 660-61.

Plaintiffs rely on only one case, *O'Connor*, for the proposition that their alleged lack of "resources" and "know-how" stopped the statute of limitations from running. (Pl. Br. 44.) But *O'Connor* held that whether plaintiffs "could have discovered their claims through reasonable investigation" "raises issues of fact." 311 F.3d at 1156. "A jury," held *O'Connor*, "must decide . . . when Plaintiffs had the means to discover the facts." *Id.* at 1157.

4. The lack of an expert report did not toll the statute of limitations

Courts have rejected "the date [plaintiffs'] counsel received test results" as the commencement date for the statute of limitations. *LaBauve*, 231 F.R.D. at 659.

Plaintiffs rely on one case, *Kleen Laundry & Dry Cleaning Servs., Inc. v. Total Waste Mgmt. Corp.*, 817 F. Supp. 225 (D.N.H. 1993), for the proposition that the CERCLA statute of limitations begins to run on the date of an expert's report pinpointing the cause of the contamination. (Pl. Br. 40.) First, *Kleen Laundry* involved "the New Hampshire statute of limitations," 817 F. Supp. at 227, and the New Hampshire discovery rule, *id.* at 234. It has

nothing to do with CERCLA's commencement date. Second, in *Kleen Laundry* the court *denied* summary judgment on the statute of limitations. *Id.* at 235. Third, *Kleen Laundry* held that the statute of limitations commenced upon a consultant's initial report showing "[t]he possibility of a link" between the defendant's conduct and contamination, *id.*, and that a subsequent report that "conclusively established that the defendant's conduct was linked to the contamination" was not necessary to start the statute running, *id.* at 234 n.3.

Requiring an opinion from a retained expert as a prerequisite to the accrual of a cause of action for environmental harm would eviscerate the statute of limitations. (DuPont Br. 40.) Plaintiffs could delay indefinitely, and defendants would be vulnerable to suit in perpetuity, until plaintiffs initiate and complete an expert investigation that supports their allegations.

* * *

Despite the above evidence, and more, the Circuit Court granted summary judgment against DuPont. (*Id.* 38.) It did so *sua sponte*—Plaintiffs never moved for summary judgment. (*Id.*) And it did so with respect to all claims of all Plaintiffs. (*Id.*) By foreclosing DuPont's statute-of-limitations defense, the Circuit Court usurped the jury's proper function and deprived DuPont of a central defense. This error entitles DuPont to a new trial.

B. The Circuit Court Erroneously Required DuPont to Indemnify Diamond in Connection with Plaintiffs' Claims

The Circuit Court also short-circuited DuPont's defense by granting summary judgment against DuPont on indemnification. This ruling was based on a flawed interpretation of an agreement concerning DuPont's purchase of the smelter property from Diamond ("Sale Agreement").

When read in the context of the whole Sale Agreement, as it must be, Paragraph 5, the only operative provision of the Agreement, does not require DuPont to indemnify Diamond in

connection with Plaintiffs' claims. And it certainly does not contain the kind of definite and unambiguous language necessary to create a duty to indemnify Diamond for its own negligence. Neither Plaintiffs nor Diamond offers any persuasive defense of the Circuit Court's contrary and erroneous conclusion.

1. DuPont's challenge to the Circuit Court's interpretation of the Sale Agreement is a live controversy

As a direct result of the Circuit Court's erroneous interpretation, it ordered DuPont to pay over \$800,000 in fees and expenses to Diamond. (Binder 54, p. 24916, Final J. Order re Diamond (2/15/08).) If this Court reverses the Circuit Court's erroneous interpretation of the Agreement, then the remedy would include vacating the fees and expenses order. That is plainly a live controversy—over \$800,000 turns on it.⁹

Also as a direct result of the Circuit Court's erroneous interpretation, DuPont's trial defense was upended. (DuPont Br. 49.) Faced with a broad duty to take responsibility for Diamond's conduct, DuPont could not pursue a strategy of arguing to the jury that (1) the smelter did not cause health risks or need for remediation, but, to any extent that it did, then (2) Diamond, the party that operated the smelter for thirty years and that, unlike DuPont, received numerous emissions complaints and regulatory violations, was responsible. Plaintiffs featured Diamond's culpability at trial (*see, e.g.*, PX 362, 364, 373-74, 379; Binder 42, 9/24/07 Tr. 2986-3069 (testimony of James Nelson, Diamond's former operating superintendent), but the Circuit Court's erroneous ruling prevented DuPont from capitalizing on it.

Plaintiffs assert that DuPont could still have maintained its strategy of contrasting its conduct with Diamond's, despite the Circuit Court's ruling that DuPont would be liable for

⁹ Unlike *West Virginia Education Association v. Consolidated Public Retirement Board*, 194 W. Va. 501, 460 S.E.2d 747 (1995), on which Plaintiffs rely (Pl. Br. 47), DuPont's liability to pay Diamond's fees and expenses arises out of the Circuit Court's indemnification ruling. It is a direct consequence of that ruling, not a collateral one.

Diamond's conduct. (Pl. Br. 45.) They go so far as to say that DuPont should have blamed Diamond, despite the trial court's indemnity ruling: "DuPont could have attempted to place all blame on Diamond and then . . . appealed the Circuit Court's indemnification ruling." (*Id.* 18 n.36.) Plaintiffs cite no authority for their view that DuPont was required to adopt a trial strategy that would guarantee an adverse jury verdict on liability in order to preserve its challenge to the Circuit Court's erroneous indemnification ruling.

Plaintiffs devote an entire heading to claiming that "DuPont's counsel invited the jury to find solely against DuPont." (Pl. Br. 45.) This mischaracterizes what occurred at trial by taking DuPont's counsel's words out of context. Mr. Thomas was explaining to the jury the Circuit Court's indemnification ruling: "the Court has already ruled that DuPont is responsible for the actions of T.L. Diamond, for Graselli [sic] and for DuPont." (Binder 42, 9/28/07 Tr. 3802.) In that context, he explained to the jury that "if any of these companies are found" liable, "then DuPont is liable for all of those companies." (*Id.*) He did so in order to prevent the jury from assigning responsibility to Diamond with the intent of absolving DuPont but inadvertently saddling DuPont with liability. Had the indemnification ruling been different, DuPont's counsel would have taken a different approach.

2. DuPont did not "invite error"

Diamond asserts that DuPont, by seeking a pre-trial ruling that it was *not* required to indemnify Diamond, waived its right to have this Court correct the Circuit Court's erroneous conclusion that DuPont *was* required to indemnify. (Diamond Br. 18-20.) Diamond's argument has nothing to do with the actual invited-error doctrine, which provides that a party may not "induc[e]" an erroneous ruling and then "later seek[] to profit from that error," *see Roberts v. Consol. Coal Co.*, 208 W. Va. 218, 228, 539 S.E.2d 478, 488 (2000) (internal quotation marks omitted). Here, DuPont did not induce the Circuit Court's erroneous ruling that DuPont must

indemnify Diamond. DuPont urged the Circuit Court to rule that DuPont has no indemnification obligations. None of the cases Diamond cites support the absurd conclusion that the invited-error rule applies, and bars an appeal, whenever a party asks a lower court to rule on a motion and the lower court decides that motion against the party. That is not the law.

Diamond also proceeds from a faulty premise: DuPont has *never* contended that “it was error for the court to consider” the indemnification issue before trial. (Diamond Br. 18.)

Nothing in DuPont’s Petition or Appellant’s Brief suggests that. DuPont has consistently objected to the merits of the Circuit Court’s indemnification ruling, not to the timing. And that error was in no way invited by DuPont, which argued below that the Sale Agreement did not require indemnification of Diamond in this case. (Binder 24, p. 9998, DuPont’s Mot. for Summ. J. on Express Indemnity (7/6/07).)

3. The Circuit Court’s indemnification ruling disregarded West Virginia law and the parties’ Agreement

“[T]o relieve a party from liability for his own negligence by contract, language to that effect must be clear and definite.” *Sellers v. Owens-Illinois Glass Co.*, 156 W. Va. 87, 93, 191 S.E.2d 166, 170 (1972) (quoting *Bowlby-Harmon Lumber Co. v. Commodore Servs., Inc.*, 144 W. Va. 239, 248, 107 S.E.2d 602, 607 (1959)). Neither Plaintiffs nor Diamond disputes this. To the contrary, both concede the more general principle that to indemnify, contract language “must clearly and definitely show an intention to” do so. (Pl. Br. 52 (quoting *Sellers*, 156 W. Va. at 92, 191 S.E.2d at 170); *see also* Diamond Br. 16.) But neither can make the necessary showing that Paragraph 5, the only paragraph in the Agreement that actually is an indemnification provision, “clearly and definitely” requires DuPont to assume responsibility for Diamond’s negligence.¹⁰

¹⁰ It is irrelevant that this case does not involve Diamond’s *sole* negligence. Neither *Sellers* nor any other case that Diamond cites turns on whether the indemnitee was solely negligent. (Diamond Br. 16.) To the contrary, “it is nearly a universal rule that there can be no recovery *where there was concurrent*

Plaintiffs ignore the many cases DuPont cited in its Appellant's Brief and in its Petition that have expressly found that contract language as or more definite than the language in the Sale Agreement was insufficient to require indemnification for negligence. (DuPont Br. 44; DuPont Pet. 20.) Several recent decisions further confirm that the language in Paragraph 5 is insufficient to require indemnification for negligence.¹¹

Citing pages 96-97 of *Sellers*, Plaintiffs assert that "West Virginia courts have extended indemnification agreements with broad language to include situations where the indemnitee was negligent." (Pl. Br. 52.) But Plaintiffs do not reveal that none of the cases cited on pages 96-97 were West Virginia cases, or that this Court recited the facts of these cases without approving or disapproving of their reasoning. Plaintiffs also cite *Dalton* (*id.* 53), but that case has nothing to do with the issue here. *Dalton* said that the "so-called 'indemnity' clause" at issue "is really only an agreement to purchase insurance." *Dalton v. Childress Serv. Corp.*, 189 W. Va. 428, 432, 432 S.E.2d 98, 102 (1993). Accordingly, *Dalton* did not discuss or apply the presumption against reading indemnification agreements to cover an indemnitee's own negligence.

The cases DuPont cites in its Appellant's Brief and in its Petition also dispose of the only textual argument that Plaintiffs and Diamond make. (DuPont Br. 44; DuPont Pet. 20.) This argument focuses on the word "liable" in Paragraph 5. (Pl. Br. 53; Diamond Br. 17.) These

negligence of both indemnitor and indemnitee unless the indemnity contract provides for indemnification in such case by 'clear and unequivocal terms.'" *Kroger Co. v. Glem*, 215 Tenn. 459, 472, 387 S.W.2d 620, 626 (1965), (emphasis added).

¹¹ For example, a Tennessee court recently confronted a provision in which a tenant agreed to indemnify a landlord against "all expenses, liabilities and claims of every kind." *Phoenix Ins. Co. v. Estate of Gainer*, 2008 WL 5330493, at *6 (Tenn. Ct. App. Dec. 19, 2008) (emphasis added). Although the court considered this language to be "general, broad, and seemingly all inclusive," the court—applying the same rule of construction applicable here—held that "we cannot see any intent, express or implied, to indemnify the Landlord for its own negligence." *Id.* at *7-8. Similarly, a California appellate court recently found an obligation to indemnify "from any and all costs, expenses, attorney's fees, suits, liabilities, damages" insufficiently clear to "cover active negligence by the indemnitee." *Edmondson Prop. Mgmt. v. Kwock*, 156 Cal. App. 4th 197, 207-08 (2007).

cases show that a generic reference to “liability” or “sole liability” is not enough to require indemnification for negligence. *See also, e.g., n.11 supra; Sutton v. A.O. Smith Co.*, 165 F.3d 561, 563-64 (7th Cir. 1999); *Shoup v. Higgins Rental Ctr., Inc.*, 991 F. Supp. 1265, 1267 (D. Kan. 1998). The premise of Plaintiffs’ argument is that the word “liability” invariably points to negligence. But liability can exist without negligence, as the doctrine of strict liability illustrates. At most, Plaintiffs’ argument may show that Paragraph 5 could be read to cover Diamond’s negligence, but that is not the question. The question is whether the agreement unequivocally encompasses negligence. It most certainly does not.

Plaintiffs also assert that if DuPont wanted to exclude Diamond’s negligence from Paragraph 5, it “could have done so.” (Pl. Br. 53.) This inverts the *Sellers* rule, which presumes that an indemnification agreement does *not* cover an indemnitee’s own negligence, unless it contains some unmistakable indication to the contrary. Under settled law, DuPont need not show that Diamond’s negligence was excluded; rather, Diamond must show that its negligence was clearly covered.

The Agreement’s release provision confirms that its indemnification provision does not require DuPont to indemnify Diamond. Diamond argues that Paragraph 6 requires DuPont to indemnify. But, by its terms, Paragraph 6 is a release. DuPont has explained the fundamental difference between a release and a sole liability provision. (DuPont Br. 44-46.)

Diamond focuses on the word “against,” which it contends “connotes protection, not merely relinquishment.” (Diamond Br. 10.) But such language, common in release provisions, does not transform a release into an indemnification. (DuPont Br. 45.) Giving the phrase “from and against” its standard meaning does not read it out of the agreement. Instead, it simply interprets that language as the parties likely understood it. In the cases Diamond cites, the word

“against” appears in a provision that was clearly an *indemnification*, and in none of them was that word given any special interpretive significance. (Diamond Br. 11.) These cases do not support the assertion that the word “against” can transform a release into an indemnification.

Both Diamond and Plaintiffs ignore other significant differences between Paragraphs 5 and 6. Paragraph 6 releases Diamond from “claims,” “causes of action,” “damages,” “costs,” “expenses,” and “attorney and consultant fees.” Paragraph 5, in contrast, omits all of those. And Paragraph 5 makes DuPont “solely liable for the . . . environmental condition of the Real Property,” but Paragraph 6 uses a far broader formulation, releasing Diamond from “*any and all . . . claims . . . arising out of the . . . environmental condition of the Real Property.*” (Emphasis added.)¹² That the parties included “causes of action” and “fees” and “expenses” in Paragraph 6’s release, but not in Paragraph 5’s indemnification shows that the parties did not intend Paragraph 5 to require DuPont to indemnify Diamond in connection with the causes of action, fees, and expenses here.

Paragraph 8 confirms that Paragraph 5 does not require DuPont to indemnify Diamond. Attacking a straw man, Plaintiffs refute the claim that DuPont’s duty of indemnification is “only activated under the circumstances articulated in Paragraph 8.” (Pl. Br. 51). DuPont’s argument is that the Court must interpret the Agreement as a unified whole, and so paragraph 5’s omission of Paragraph 8’s language covering “the defense” of Diamond and the “payment of judgment entered against” Diamond confirms that the parties decided not to include those same obligations in Paragraph 5. (DuPont Br. 46-47.)

¹² Plaintiffs’ claims do not, as Diamond asserts, “depend[] on proof of the past environmental condition of the Spelter site.” (Diamond Br. 13.) Even if Plaintiffs’ claims “arise out” of the condition of the Spelter site, these claims are outside the scope of Paragraph 5, which omits the “arising out” language found in Paragraph 6.

DuPont's cross-claim for contribution from its co-defendants, including Diamond, did not invoke Paragraph 8's sole-liability obligation. This contribution claim was not, as Paragraph 8 requires, an "action to include" Diamond in this litigation. By the time DuPont filed its contribution claim (as part of its Answer), Plaintiffs had already sued Diamond, and so Diamond was *already* included in the case. The contribution claim did nothing to prolong Diamond's involvement in the case or to increase its costs. And the condition precedent for the contribution claim never materialized. By its terms, the contribution claim would have sprung into existence only "[i]n the event that Plaintiffs" were to obtain a judgment "against DuPont and one or more of the other Defendants, jointly and severally," and then "attempt to collect from DuPont a portion of the total judgment which exceeds DuPont's *pro rata* or comparative share." (Ans. of Def. DuPont at 20-21 (10/4/04); *see also* Binder 1, p. 98, Ans. of Def. DuPont at 20 (6/3/05).) That never happened.

This case did not involve migration of soil, sediment, or water. The Circuit Court's indemnification ruling was wrong for an additional, independent reason. (DuPont Br. 47-48.) It was dependent on the incorrect premise that this case involves "the off-site migration of soil, sediment, groundwater or surface water." (Binder 40, p. 18362, Diamond Order at 8 (9/14/07).) This clause relates to the off-site movement of the natural features of the property (earth and water). Plaintiffs' claims, however, are based on the *airborne* transmission of certain chemical byproducts of the zinc smelting process that formerly occurred on that property. The Sale Agreement does not cover such airborne emissions from the smelter.

The clause's reference to migration "from the Real Property," rather than from "the Business," confirms DuPont's interpretation. "The Business" is not a "legal fiction." (Diamond Br. 14.) It is a defined term in the Agreement that expressly refers to the operation of a smelter

that “manufacturers zinc dust and zinc co-products using secondary materials.” (Preamble.) Plaintiffs’ claims are about contamination associated with those manufacturing processes.¹³ If the parties had wanted to include in the off-site migration clause liabilities relating to those processes, they would have referred to “the Business” rather than (or in addition to) “the Real Property.” But they did not. By forgoing that term, the parties excluded such liabilities.

Plaintiffs cite the “waste pile” as an additional source of contamination. Plaintiffs say that the pile consisted of “dust containing fine metal particles.” (Pl. Br. 54-55.) But metallic dust emitted from a zinc smelter is not “soil” or “sediment,” and DuPont never agreed to assume Diamond’s liabilities in connection with the airborne movement of dust from the pile onto adjoining properties. (DuPont Pet. 25-26.)

Finally, Plaintiffs try to minimize the significance of the omission of “air” from the off-site migration clause. They assert that, had DuPont wanted to exclude airborne emissions, “the parties would surely have expressly articulated such an exception.” (Pl. Br. 55 n.59.) But the agreement, as written, makes that intent clear. Whereas the clause otherwise tracks West Virginia’s voluntary-remediation statute—which defines “contaminant” as “alteration of the chemical, physical or biological integrity of soils, sediments, air and surface water or groundwater,” W. Va. Code § 22-22-2(d)—it conspicuously excludes the word “air.” This omission shows that the parties intended to exclude airborne migration. And given that the clause represents a narrow exception to the Agreement’s overarching focus on the condition of the plant site itself, established law requires the Court to construe it narrowly. *E.g., Powell v. Time Ins. Co.*, 181 W. Va. 289, 295, 382 S.E.2d 342, 348 (1989).

¹³ Diamond incorrectly states that Plaintiffs’ claims were based on the “environmental conditional of the Real Property.” (Diamond Br. 15.) The claims were based on the environmental conditions of Plaintiffs’ own properties. And Plaintiffs alleged that those conditions were caused by industrial operations carried out at the Spelter site—activities of “the Business.”

C. Trying this Case as a Class Action Violated Due Process by Preventing DuPont from Presenting Individualized Defenses

To maintain this case as a class action, the Circuit Court barred DuPont from offering individualized defenses, and relieved Plaintiffs of their burden of class-wide proof. This violated DuPont's due process right to present a defense at trial.

1. The Circuit Court maintained class treatment at the expense of a fair trial by excluding class-representative-specific evidence

The Circuit Court erroneously excluded all evidence of lead class representative

Lenora Perrine's normal blood-lead test. Plaintiffs do not dispute the central facts concerning the excluded blood-lead test of Mrs. Perrine, the lead class representative, including that (a) she has lived next to the Spelter plant for decades, (b) she claimed that she, and the class she was supposed to represent, were at risk of health problems as a result of ongoing exposure to elevated lead levels, and (c) her 2005 blood-lead test showed normal blood-lead levels, below any level of concern.

Mrs. Perrine's normal blood-lead test would have directly refuted Brown's testimony that the community "continue[d] to be exposed" (Binder 41, 9/20/07 Tr. 2609), that ongoing exposure "continue[d] to put people at risk" (*id.*), and that "it was not safe to live in Spelter" (Binder 41, 9/19/07 Tr. 2518). If any of this were true, then Mrs. Perrine's blood-lead levels would have been significantly elevated, not normal. (Binder 42, 9/25/07 Tr. 3294; *see also id.* 3289-90.)

Mrs. Perrine's blood-lead test is relevant regardless of whether it can be "extrapolated" to the whole class. Plaintiffs cite no authority to the contrary. The class's case depended on the class representatives' case. *Thorn v. Jefferson-Pilot Life Ins. Co.*, 445 F.3d 311, 318 (4th Cir. 2006); *Avery v. State Farm Mut. Auto Ins. Co.*, 216 Ill. 2d 100, 139, 835 N.E.2d 801, 827 (2005). Mrs. Perrine was the lead class representative. DuPont had a "right . . . to challenge the

allegations of individual plaintiffs” and a “right to raise individual defenses against each class member.” *McLaughlin v. Am. Tobacco Co.*, 522 F.3d 215, 232 (2d Cir. 2008); *see also Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 192 (3d Cir. 2001) (“[D]efendants have the right to raise individual defenses against each class member.”); *Guillory v. Am. Tobacco Co.*, 2001 WL 290603, *9 (N.D. Ill. Mar. 20, 2001) (mem.) (“[I]f defendants were not able to individually probe into the peculiarities of each class member’s case, the result would be that they would be denied the opportunity to prepare a defense.”).¹⁴

Mrs. Perrine’s blood-lead test was relevant because it showed *Mrs. Perrine’s* normal blood-lead level. Mrs. Perrine may not use the class she claims to represent to mask the weaknesses in her own individual claim. (DuPont Br. 57.)

That the court allowed DuPont to introduce the results of the ATSDR’s 1996 blood-lead tests of children in the Spelter area changes nothing. Mrs. Perrine’s test proves something different from the ATSDR’s tests. *See State v. O’Donnell*, 189 W. Va. 628, 633, 433 S.E.2d 566, 571 (1993) (“[E]vidence is cumulative only when, by its nature, it is so substantially similar in kind that it is almost identical to evidence already admitted to the same point.”). Mrs. Perrine’s test was the only measurement of any class representative’s blood. Mrs. Perrine’s test was almost a decade more recent than the ATSDR’s tests. And Mrs. Perrine, unlike the children who the ATSDR tested, had lived next to the smelter for decades. The jury apparently discounted the ATSDR tests; it would have been impossible for the jury to discount Mrs. Perrine’s.

¹⁴ Amicus West Virginia Citizen Action Group (“CAG”) concedes that it has reviewed none of the record. (CAG Br. 1 n.1.) Nevertheless, CAG asserts that DuPont’s trial strategy was “contrary to the settled law,” which, according to CAG, prohibits adjudicating a class’s claims by adjudicating the class representatives’ claims. But CAG cites no settled law that supports its assertion, much less any case that has upheld class-wide liability in the face of evidence showing that there is no liability to the class representative.

The Circuit Court erroneously precluded DuPont from introducing the testimony of eight of the ten class representatives. At trial, Plaintiffs called only two of the ten class representatives to testify. Yet when DuPont sought to introduce testimony of the other eight class representatives that none ever sought or received tests for the presence of arsenic, cadmium, or lead in their bodies, and that none ever expressed concerns to a doctor about any alleged exposure, the Circuit Court prohibited DuPont from doing so. (DuPont Br. 54-55.)

Plaintiffs only response is to assert that this testimony would not have aided the jury “in deciding the ultimate issue in the liability phase” of the trial. (Pl. Br. 58.) But, during the liability phase, Plaintiffs showcased the argument that the class members’ worried about smelter contamination. (DuPont Br. 54-55.) The excluded testimony would have rebutted that argument.

2. The Circuit Court maintained class treatment at the expense of a fair trial by ignoring individual variations that emerged at trial

The Circuit Court should have decertified the property class when Plaintiffs abandoned their “diminished value” theory. (DuPont Br. 55-56.) The Circuit Court certified the property class based on Plaintiffs’ representation that they could prove class-wide “diminution in value.” But when Plaintiffs abandoned this theory at trial, the Circuit Court refused to decertify the property class.

The class certification order provides that Plaintiffs’ “damages for injuries to their properties” raises the common factual issue of “property valuation” through “mass-appraisal.” (Binder 16, p. 7316, Class Cert. Order at 31-32 (9/14/06).) “Property damage,” held the Circuit Court, “is a common issue that can be determined on a class-wide basis using the mass appraisal technique.” (*Id.* 32.) The Circuit Court concluded that “mass appraisal” “satisf[ie]d the commonality requirement.” (*Id.* 33.) Contrary to Plaintiffs’ suggestion (Pl. Br. 59), the Circuit

Court never determined that remediation costs are common. Nor could it have, because remediation costs necessarily vary from property to property.

* * *

The Circuit Court relieved Plaintiffs of their obligation to prove all elements of their claims and barred DuPont from advancing individual defenses to those claims. The Circuit Court allowed the class action device to diminish DuPont's substantive rights. This violated Due Process. (DuPont Br. 57.)

III. The Circuit Court's Errors Resulted in Verdicts Against DuPont Even Though the Evidence Shows that the Spelter Community Is Not at Increased Risk

A. The Property Class Recovered the Cost of Property Remediation Without Proof of Harm to Property

The Circuit Court adopted a verdict form in Phase I that created liability for DuPont if it was found to have "exposed" the Plaintiffs or their properties to arsenic, cadmium, or lead. The term "exposure" was not defined in either the verdict form or the jury instructions. Nothing about the term implies or requires a *level* of exposure that resulted in property damage. After the jury returned a verdict against DuPont in Phase I, the jury was asked to consider in Phase III whether the Property Class was "entitled" to remediation. The jury was given no guidance as to what creates this entitlement. Plaintiffs do not dispute this. (Pl. Br. 61.) The verdict forms and instructions for Phases I and III allowed the Property Class to recover \$55 million in damages based solely on the Phase I "exposure" verdict; over DuPont's objections, the Property Class was never required to prove that the levels of arsenic, cadmium, or lead "caused harm to Plaintiffs' properties." (Binder 45, p. 20710, DuPont's Objs. to Phase III Jury Instr., No. 1A (10/12/07).)

Plaintiffs defend this outcome by claiming that the Phase I jury instructions required proof that DuPont caused an unreasonable risk of harm to Plaintiffs. (Pl. Br. 61.) But the jury instruction they cite merely defined the standard of care for negligence; it did not explain the

degree of harm or damage necessary for an award of property damages. (Binder 42, 9/28/07 Tr. 3684-85.) In other words, the jury was asked only to decide whether DuPont created a *risk* of harm, not whether that harm to property actually came to pass.

More importantly, Plaintiffs do not explain how the instructions were adequate when “exposure”—the key, ambiguous term of the verdict form—was left undefined. *See Lively v. Rufus*, 207 W. Va. 436, 445, 533 S.E.2d 662, 671 (2000) (holding that a verdict form “was fatally flawed in that it utilized the term ‘value’ when that term was not defined in the interrogatory itself or in the jury instructions”).¹⁵

Finally, it is Plaintiffs, not DuPont, who seek to alter West Virginia law. While Plaintiffs now invoke *Browning v. Halle*, 219 W. Va. 89, 632 S.E.2d 29 (2005), at trial they successfully objected to instructions based on that very case, which would have required them to prove that the arsenic, cadmium, and lead emissions from the smelter caused harm to their properties.¹⁶ (See Binder 42, p. 19349, DuPont’s Obj. to Instr., No. 15A (9/28/07); Binder 45, p. 20710, DuPont’s Objs. to Phase III Jury Instr., No. 1A (10/12/07).) The failure to give these instructions requires a new trial.

B. The Circuit Court Adopted an Unjustified Medical-Monitoring Program

The Circuit Court adopted a dangerous and unjustified medical-monitoring program. The program presents more health risks to the class than the plant allegedly did. No meaningful

¹⁵ Plaintiffs also defend the outcome below by arguing that they “proved that the smelter’s ‘activities materially increased’ carcinogens and toxins in the soils and homes of the class area.” (Pl. Br. 62 (citing *Browning v. Halle*, 219 W. Va. 89, 632 S.E.2d 29 (2005).) But Plaintiffs’ own testing disproves this assertion. *See pp. 1-4 supra*.

¹⁶ DuPont does not seek to change the West Virginia law of trespass, as Plaintiffs claim. (Pl. Br. 62.) This Court has not addressed the standard for trespass claims based on the release of *de minimis* airborne pollutants from an industrial operation onto surrounding properties. As other courts have recognized, public policy weighs against allowing massive recoveries based on such trespass claims. (DuPont Br. 60-61.)

showing of “increased risk” is required for admission into the medical-monitoring program. And no evidence justifies the forty-year program duration.

1. No meaningful showing of “increased risk” is required for admission into the medical-monitoring program

Dr. Wertz’s justification for his dangerous program is that there has been “significant exposure.” (Binder 46, 10/2/07 Tr. 4039.) Dr. Wertz’s testimony about the need for medical monitoring was based entirely on “adopting” the exposure and risk assessment of Dr. Brown (*id.* 4143), the soil scientist with no medical expertise, *see p. 22 supra*. Although Plaintiffs claim that “Dr. Wertz did not *assume*” significant class-wide exposure to arsenic, cadmium, and lead (Pl. Br. 63), he admitted just that at trial:

Q. And so you answered the question that you were sort of asking yourself— “Do we want to test for exposure or assume it”— your answer, your recommendation, is to assume exposure, right?

A. Yes. Ultimately, that was my recommendation, yes.

(Binder 46, 10/2/07 Tr. 4143; *see also id.* 4149-51.)

Plaintiffs have never disputed that the “increased risk” sufficient for admission into their medical-monitoring program is equal to the risk from smoking a *single* pack of cigarettes over an entire *lifetime* (that is, one cigarette about every three or four years). (Binder 46, 10/4/07 Tr. 4511-15.) As a matter of law, such an infinitesimally small risk cannot qualify as “significant” under *Bower*.

2. The program’s CT scans would cause more cancers than the former smelter allegedly has caused

On one side of the CT scan debate stand: (a) the United States Preventive Services Task Force, the preeminent preventive health body in the country, which has concluded that the benefit of screening asymptomatic patients “has not been established” and that CT scans pose risks of “significant harms” (Binder 46, 10/2/07 Tr. 4153, 4156-58); (b) the authors of a

November 2007 *New England Journal of Medicine* article, who have concluded that “there is direct evidence from epidemiologic studies” that radiation doses corresponding to “two or three scans” result in “an increased risk of cancer” (1/15/08 Hr’g DX 1 at 4) (emphasis added); (c) the authors of a March 2007 *Journal of the American Medical Association* article, who have concluded that CT screening for lung cancer is “an experimental procedure, based on an uncorroborated premise” (Binder 46, 10/2/07 Tr. 4161-64); and (d) West Virginia’s largest and preeminent physician membership organization, the West Virginia State Medical Association (“WVSMA”), which has stated categorically in its amicus brief that these CT scans “will likely cause more cancer than they will ever find.” (WVSMA Br. 1.)

On the other side of the CT scan debate stand: (a) Dr. Werntz, who admitted that he “didn’t actually do any calculation of the amount of radiation people would be getting undergoing these CT scans” (Binder 46, 10/2/07 Tr. 4167); and (b) Plaintiffs’ counsel, whose fee award was substantially increased by the \$50 million value assigned to CT scans by the Circuit Court (Binder 50, p. 23315, Pet. for Approval of Attorneys’ Fees (11/19/07); Binder 54, p. 24935, Order re Fees (2/25/08)).

In addition to failing to estimate the radiation doses associated with his plan (Binder 46, 10/2/07 Tr. 4165-67), Dr. Werntz also admitted that he never quantified the radiation risk, or the number of cancers among the class members, that his radiation doses would cause (*id.* 4170). Plaintiffs’ description of Dr. Werntz’s supposed “risk-benefit analysis” contains not a word about what Dr. Werntz actually did to analyze risk. (Pl. Resp. to WVSMA 5-7.)

By contrast, Dr. Valberg, a professor who taught at the Harvard School of Public Health for twenty-three years, calculated that Dr. Werntz’s CT scans would cause *an additional seventy expected cancers among class members*. (Binder 46, 10/4/07 Tr. 4503, 4550-53.) The medical-

monitoring program would thus cause many times more cancers than the former smelter allegedly has caused.¹⁷ As the WVSMA concluded with respect to this “mass screening,” “for every cancer detected early by the medical monitoring program, the lung screening aspect alone will have caused seven more.” (WVSMA Br. 2.)

As they did at trial, Plaintiffs dismiss the conclusions of the medical community by asserting that they are based on “old atomic bomb studies” and higher doses than will be needed for Dr. Werntz’s chest CT scans. (Pl. Br. 68.) But the trial record shows that the National Academy of Sciences, the International Commission on Radiation Protection, and other agencies rely on data from a variety of well-accepted sources, including data from Japanese survivors, to assess the risks of x-rays and CT scans. (Binder 46, 10/4/07 Tr. 4608-11.) Modern studies like the recent *New England Journal of Medicine* article make sophisticated “dose response assessments” for radiation exposure, and scientific knowledge about increased risks accordingly runs “very far and deep.” (*Id.*) Many well-known and respected medical and public health organizations, including the American College of Chest Physicians, criticize and specifically “do not recommend” precisely the kind of “low-dose CT” scans Dr. Werntz prescribes. (*Id.* 4538-39.)

Plaintiffs assert that Dr. Valberg, an expert called by DuPont, was, “[d]uring cross-examination,” “forced to acknowledge” (Pl. Br. 68) that “CT scans use[d] 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” (*id.* (quoting Binder 46, 10/4/07 Tr. 4615)). What really happened is that Plaintiffs’ counsel handed Dr. Valberg a document not in evidence, and asked

¹⁷ Dr. Valberg calculated that, even accepting Dr. Brown’s risk assessment, the smelter would cause no more than “two to three” additional cancers among all class members. (Binder 46, 10/4/07 Tr. 4623-24; *see also* Expert Report of Peter Valberg (May 2007) at 2, 31-33, 40, attached to DuPont’s Resp. to Pl. Notice of Filing Med. Mon. Plan (12/10/07) as Ex. G.)

him to “read” the mammogram statement that Plaintiffs now quote. (Binder 46, 10/4/07 Tr. 4615.) Dr. Valberg complied, but testified that it is “a totally empty statement” because it does not describe “dose” (*id.*), does not “refer to any particular device or exposure” (*id.* 4615-16), and does not conclude “that these scans are safe” (*id.* 4616).*

Plaintiffs emphasize that the program’s CT scans are voluntary. (Pl. Br. 1-2, 66-71; Pl. Resp. to WVSMA 1-14.) But patient consent, under *Bower*, is not enough to transform a medically unjustified test into something “that a qualified physician would prescribe based upon the demonstrated exposure to a particular toxic agent.” *Bower v. Westinghouse Elec. Corp.*, 206 W. Va. 133, 142, 522 S.E.2d 424, 433 (1999). Whether or not CT scans are voluntary, the State of West Virginia should not place its imprimatur on a program containing these unjustified and dangerous tests. Dr. Werntz has previously assumed that every class member who participates in the medical-monitoring program and is eligible for a CT scan will get one at least every other year for forty years. (*See* 1/15/08 Hr’g PX 2.) Plaintiffs, too, have adopted this assumption (when the magnitude of their attorneys’ fees depended on it), though they now try to disclaim it. (*See* Notice of Filing Med. Mon. Plan 3-4, 6 (11/19/07); Binder 50, p. 23315, Pet. for Approval of Attorneys’ Fees (11/19/07); 1/15/08 Hr’g PX 5 at i.)

That the Circuit Court is supposed to review the medical-monitoring plan every five years (Pl. Br. 69-70) provides little comfort. The Circuit Court’s wholesale adoption of Plaintiffs’ proposed order, and its gratuitous, unfair attacks on witnesses (*see, e.g.*, Pl. Br. 68 n.69) shows that meaningful, unbiased review is unlikely.

3. The evidence does not support a forty-year program duration

Dr. Werntz testified that the forty-year duration was based entirely on a single lung-cancer study of Japanese men completed in 1976. (4/12/07 Werntz Dep. Tr. 302-03, attached to DuPont’s Post-Hr’g Sub. on Med. Mon. (2/1/08) as Ex. F.) He also admitted that other diseases

included in his medical-monitoring program have much shorter latency periods. (*See, e.g., id.* 188.) For example, Dr. Werntz acknowledged that the latency period for decreased renal function is “not more than five years.” (*Id.*) The Circuit Court acted as if there was a single latency period of forty years even though the evidence contradicted that conclusion. “[A]dministrative convenience” cannot justify years of unnecessary medical procedures. (Pl. Br. 71.)

* * *

This Court should reverse the medical-monitoring judgment and decline to put the State’s seal of approval on this unnecessary and irresponsible program.

C. The Punitive Damages Award Should Be Vacated

The punitive damages award is the product of the Circuit Court’s numerous errors and its repeated refusal to curb Plaintiffs’ counsel’s inflammatory rhetoric in every phase of the trial.

1. DuPont’s conduct does not support punitive liability

To support liability for punitive damages, Plaintiffs rely on DuPont’s conduct during two time periods: 1928-1950, when DuPont owned and operated the smelter; and 1980-2004, during the last part of which DuPont voluntarily returned to the site, purchased it, and cleaned it up. Plaintiffs fail to identify evidence of conduct from either time period that can support an award of punitive damages against DuPont under West Virginia law, which requires a showing that the defendant “consciously and intentionally did some wrongful act or omitted some known duty.” *Groves v. Groves*, 152 W. Va. 1, 7, 158 S.E.2d 710, 713 (1968); *see also Bowyer v. Hi-Lad, Inc.*, 216 W. Va. 634, 648, 609 S.E.2d 895, 909 (2004) (requiring “gross fraud, malice, oppression, or wanton, willful, or reckless conduct or criminal indifference to civil obligations affecting the rights of others”) (internal quotation marks omitted).

a. **DuPont's 1928-1950 conduct cannot support punitive damages**

DuPont's operation of the smelter—beginning during the Coolidge administration and ending during Truman's—cannot support punitive damages.

First, it is irrational and unfair to punish for conduct occurring more than a half-century ago: irrational because it does nothing to punish any actual, culpable decision-maker; unfair—and, here, unconstitutional—because it applies modern standards and sensibilities post hoc, *see E. Enters. v. Apfel*, 524 U.S. 498 (1998); *Landgraf v. USI Film Prods.*, 511 U.S. 244, 281 (1994) (“Retroactive imposition of punitive damages would raise a serious constitutional question.”).

This is especially so in the environmental context, in which today's standards are far more restrictive than those that applied when DuPont operated the plant. Today's juries are unlikely to discard their twenty-first-century attitudes about the environment when judging conduct from sixty or eighty years ago.

Second, even if it were acceptable to punish DuPont for decades-old conduct, Plaintiffs focus on conduct that does not satisfy West Virginia's legal standard for punitive damages.

DuPont's operation of the smelter was both lawful and in accord with industry standards.

Plaintiffs rely on three aspects of DuPont's pre-1950 behavior: (1) the choice of technology used in the plant; (2) the accumulation of waste at the plant site; and (3) the sale of the plant in 1950.

None of these decisions was even negligent, much less wanton, willful, or reckless.

The choice of plant technology cannot support punitive damages. DuPont transformed the plant shortly after purchasing it in 1928, replacing dirty horizontal retort furnaces with cleaner vertical retorts. (DuPont Br. 7, 68.) Plaintiffs' expert, Flowers, agreed that vertical retorts are “cleaner” (Binder 40, 9/13/07 Tr. 1165) and “a better operation than horizontal retorts” (*id.*; *see also* Pl. Br. 74). And Plaintiffs' expert, Amter, acknowledged that community lawsuits ceased after the switch to vertical retorts. (Binder 42, 9/24/07 Tr. 2926.)

Plaintiffs assert that the shift to the cleaner technology was wanton, willful, or reckless because the new design also increased production, which, they speculate, “le[d] to an even greater environmental impact.” (Pl. Br. 74.) But Plaintiffs cite no record evidence that emissions, waste, or the “environmental impact” increased. (*Id.*) Nor do Plaintiffs suggest that the supposed increase in pollution was disproportionate to the increase in production, economic activity, and taxes. To find punitive liability on this basis would require this Court to hold that an increase in manufacturing activity in West Virginia that results in *any* increase in pollution subjects the manufacturer to punitive damages, even when the manufacturer simultaneously adopts cleaner technology. Such a rule would deter beneficial behavior and be devastating to the State’s economy.

That DuPont did not use a “bag house” does not support punitive damages. Plaintiffs assert that a bag house would have “control[led] emissions.” (Pl. Br. 74 (citing Binder 41, 9/20/07 Tr. 2761-62).) But Plaintiffs’ own expert admitted that no vertical retort zinc smelter in the country actually used a bag house before 1950. (Binder 42, 9/24/07 Tr. 2926-27.)

Grasselli’s decision in 1913-1914, fourteen years before DuPont bought the smelter and more than ninety years before trial, not to purchase a technology called a Cottrell Precipitator does not support imposing punitive damages against DuPont. There is no evidence that the Cottrell process worked with the vertical retort furnaces that DuPont installed. Nor is there any evidence quantifying the reduction in emissions that the process might have produced. Plaintiffs’ expert, Amter, admitted that he knew of no company anywhere that used a Cottrell Precipitator on retort furnaces before the 1930s. (*Id.*) Plaintiffs did not establish that DuPont (through its predecessor, Grasselli) was negligent, much less reckless, in failing to incorporate the Cottrell process at Spelter. *Cf. United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d

Cir. 1947) (Hand, J.) (defining negligence as the failure to adopt precautions that would cost less than the harm they can avert).¹⁸

The accumulation of waste at the plant site cannot support punitive damages.

Plaintiffs attack “DuPont’s choice to store its waste onsite,” suggesting that DuPont should be punished for not shipping it elsewhere or burning it. (Pl. Br. 74.) Plaintiffs point to *no evidence* supporting the wisdom of either alternative. Indeed, the option of burning the waste was considered in connection with the remediation, and rejected as being not “proven” and as having a potential negative “[i]mpact[] on [the] Community.” (DX 749 at DPZ0097828; *see also* Binder 41, 9/18/07 Tr. 2252-57, 2271-74.)

DuPont’s sale of the plant in 1950 also cannot support punitive damages. Plaintiffs assert that DuPont was reckless in selling the facility to another company rather than paying \$325,000 “to abate air pollution.” (Pl. Br. 75.) But they cite no evidence that DuPont’s sale was in response to concern about air pollution, and the trial evidence contradicts this claim. *See pp. 7-8 supra.* Even if Plaintiffs’ assertion were correct, the sale would have breached no tort duty and caused no harm. DuPont had no duty to continue to own the facility. And there is nothing tortious about deciding to sell a facility rather than to outfit that facility with expensive new equipment.

DuPont’s record of complying with contemporary standards, upgrading the plant’s operations to make it a cleaner operation, and resolving community environmental complaints makes a finding of reckless disregard unsustainable.

¹⁸ Grasselli’s alleged conduct, whether it relates to the Cottrell Precipitator or the 1919 report, is irrelevant to the punitive damages analysis for a more fundamental reason. The jury did not return a verdict of liability against Grasselli. (Binder 42, p. 19451A, Verdict Form—Phase I (10/1/07).) Without an underlying finding of liability and compensatory damages, Grasselli (and, by extension, DuPont as its predecessor) cannot be liable for punitive damages related to the 1911-1928 operation of the smelter. *Syl. Pt. 1, Garnes v. Fleming Landfill, Inc.*, 186 W. Va. 656, 413 S.E.2d 897 (1992).

b. DuPont's post-1950 conduct cannot support punitive damages

A half-century after selling the plant, DuPont returned to the site, repurchased it, and voluntarily and successfully remediated it. (DuPont Br. 7-10.) During this process, neither the EPA nor the DEP ever found DuPont in violation of any regulations or requirements. (*Id.*)

That DuPont, in connection with its successful remediation of the site, did not test and remediate the class members' properties cannot support punitive liability. Plaintiffs ignore the undisputed evidence that both federal and state environmental agencies evaluated potential off-site contamination and concluded, respectively, that “[f]urther community-wide screening for lead poisoning in Spelter is not indicated at this time” (DX 648 at DPZ002357) and that “there is no unacceptable risk to off-site residents due to off-site soil contaminants and . . . there is no further need for off-site soil sampling” (DX 837). Plaintiffs cannot point to a single other case holding a defendant liable for failing to conduct off-site testing, let alone in the face of the expert regulators’ determinations that such testing is unnecessary. Thus, DuPont’s decision to rely on EPA and DEP off-site testing, rather than to conduct its own redundant tests, cannot have amounted to a “conscious disregard of a known duty,” much less malicious or wanton conduct.

As DuPont argued in its opening brief (DuPont Br. 70-71), the federal Due Process Clause forbids punishing a defendant for “doing what the law plainly allows him to do.” *Bordenkircher v. Hayes*, 434 U.S. 357, 363 (1978) (quoted in *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 573 n.19 (1996)). Plaintiffs do not dispute that “the law plainly allow[ed]” DuPont’s remediation plan. *Id.* The regulatory approval gave DuPont a “bona fide claim of right,” rendering the award improper under state law as well. *See Warden v. Bank of Mingo*, 176 W. Va. 60, 65, 341 S.E.2d 679, 684 (1985) (“A wrongful act done under a bona fide claim of right and without malice in any form constitutes no basis for punitive damages.”). Accordingly, the

choices made by DuPont in conducting the remediation cannot be the basis for imposing punitive damages.

DuPont's interactions with state and federal officials in connection with the remediation also cannot support punitive damages. Plaintiffs state that DuPont “subverted the administrative process” (Pl. Br. 78), but they do not describe any actual wrongdoing: They note that DuPont “work[ed] closely with the WVDEP,” “spoke with officials at the WVDEP,” and hired a consultant who had “close ties to the WVDEP.” (Pl. Br. 79.) None of those allegations describe wrongful conduct. Moreover, Plaintiffs cite no evidence of any interactions with the EPA, which deemed the voluntary remediation adequate and chose not to place the site on the Superfund list. (Binder 50, 10/17/07 Tr. 5464-65.) Even if, in spite of the regulatory agencies’ approval, the remediation could somehow be deemed negligent, evidence that DuPont “work[ed] closely” with a regulator does not demonstrate willfulness, wantonness, or recklessness.

Plaintiffs again ignore that DuPont had a constitutional right to petition state and federal regulators. (See DuPont Br. 30-31.) Their heavy reliance on “working closely” with the DEP (Pl. Br. 79) contradicts their argument elsewhere that they relied on this evidence solely for impeachment (*id.* 37).

DuPont's communications with area residents cannot support punitive damages. Plaintiffs allege that DuPont made misrepresentations to the class members. (Pl. Br. 80.) These allegations are false. See pp. 11-12 *supra*. The trial evidence shows that DuPont went to great lengths to keep the community informed about the smelter remediation. See *id.*

In any event, the alleged misrepresentations were not the basis of liability: Plaintiffs never presented a fraud claim to the jury; nor did they establish that any alleged misrepresentations caused their alleged injuries. Although Plaintiffs used this evidence to

inflame the jury, their legal claim was that their injuries resulted from smelter emissions and the failure to remediate off-site. Because the alleged misrepresentations did not cause Plaintiffs' claimed injuries, the alleged misrepresentations cannot support punitive liability. *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 422 (2003) ("A defendant's dissimilar acts, independent from the acts upon which liability was premised, may not serve as the basis for punitive damages."); *Burke v. Deere & Co.*, 6 F.3d 497, 511 (8th Cir. 1993) ("Only evidence which is relevant to the conduct for which liability is imposed can support an award of punitive damages.").

In a footnote, Plaintiffs cite three cases, involving fraud and defamation by a bank, failure to warn of product hazards, and "failure to secure an area around a hole in the floor." (Pl. Br. 80 n.94.) Those cases shed no light on this one. None of them imposed liability for a state-approved remediation, and none based punitive liability on conduct that was not the basis of compensatory liability.

Imposing punitive damages for failing to go beyond what the State required is against public policy. Plaintiffs do not respond to DuPont's argument that imposing punitive damages based on DuPont's participation, at a cost of over \$20 million, in a state-approved environmental remediation is against public policy. (DuPont Br. 72-73.)

Plaintiffs' own expert, Dr. Flowers, testified that the "smelter site is a very good example of taking a highly-contaminated site, remediating it and putting it back into useful service." (Binder 40, 9/13/07 Tr. 1085-86.) Imposing punitive damages against DuPont—the only one of the plant's owners willing to step up to the plate and remediate—for failing to extend the cleanup off-site will serve only to cause companies to think twice before voluntarily undertaking an environmental cleanup in West Virginia.

2. **The Circuit Court violated DuPont's due process rights by refusing to instruct the jury that it could not punish DuPont for dissimilar conduct**

The jury instruction that DuPont proposed and that the Circuit Court refused was taken virtually verbatim from *State Farm*, as quoted in *Boyd v. Goffoli*, 216 W. Va. 552, 560, 608 S.E.2d 169, 177 (2004). Plaintiffs do not dispute that the instruction correctly states the law.

Plaintiffs assert that the instruction to the jury that it could “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**” “accomplishes the same purpose as DuPont’s requested instruction.” (Pl. Br. 82-83 (emphasis added by Plaintiffs).) Not so. The evidence of unrelated conduct in this case went far beyond conduct that was alleged to have harmed non-parties. It included conduct that Plaintiffs painted as nefarious, but did not link to any actual injuries to others. For example, Plaintiffs sought to inflame the jury with allegations of document destruction at Parkersburg (*e.g.*, Binder 50, 10/16/07 Tr. 5366-75), *ex parte* contacts with a member of this Court (*e.g.*, Binder 40, 9/13/07 Tr. 1292-96; Binder 50, 10/17/07 Tr. 5595-96), and “killing monkeys” with C8 (*e.g.*, Binder 50, 10/16/07 Tr. 5384; Binder 50, 10/18/07 Tr. 5779). DuPont was entitled to an instruction informing the jury that it could not base punitive damages upon “dissimilar acts, independent from the acts upon which [it] based [its] previous findings of liability.” (Binder 50, p. 23140, DuPont’s Obj. to Phase IV Instr., No. 5 (10/18/07).)

Plaintiffs’ assertion that the conduct relating to Parkersburg and the conduct at Spelter were not dissimilar (Pl. Br. 83), besides being wrong, misses the point. DuPont still had a right to try to persuade the jury that the evidence was too dissimilar to be a basis for punishment. The evidence should not have been admitted in the first place, but, once admitted, the Circuit Court’s refusal to instruct the jury on this principle undermined DuPont’s defense.

3. Plaintiffs' arguments were impermissible and highly prejudicial

The Circuit Court abused its discretion by allowing Plaintiffs' counsel to repeatedly urge the jury to "send a message" to large, out-of-state corporations. (DuPont Br. 75-76.) The proposed "message" was that mountaintop mining—an industry that has nothing to do with this case, but that a West Virginia jury could be expected to feel strongly about—would not be tolerated, and that "carpetbaggers" who "rap[e] the natural resources" of West Virginia would be punished. (Binder 50, 10/18/07 Tr. 5783.)

Plaintiffs' only response is that in *Skibo v. Shamrock Co.*, 202 W. Va. 361, 504 S.E.2d 188 (1998), this Court declined to reverse a judgment for compensatory damages based on half a sentence of argument. There, the plaintiff's lawyer told the jury: "If you're going to make [the defendant] 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, 504 S.E.2d at 191. Before the plaintiff's lawyer could even finish his sentence, there was a sidebar and the plaintiff's lawyer "then abandoned that line of argument." *Id.* This Court did not condone or endorse the argument; it held merely that, in context, the argument "[did] not warrant reversal." *Id.* at 365, 504 S.E.2d at 192.

Plaintiffs' improper arguments in this case were far more extensive and prejudicial than the isolated and quickly abandoned sentence fragment in *Skibo*. Here, Plaintiffs' counsel engaged in inflammatory, baseless rhetoric throughout the entire trial:

- During Phase I, counsel suggested, falsely, that DuPont had "phonied up—information to the EPA about the dangers of cancer for those kids in Parkersburg." (Binder 42, 9/25/07 Tr. 3353.)
- During the Phase II closing argument, counsel stated that "[n]obody in this courtroom has a right to hurt anybody. Even if it's a small risk, you can't do it. But a corporation has a different analysis in their minds. The corporation is, 'Well, we can hurt some—we can hurt a few people—we can hurt a few people when we start looking at the numbers.'" (Binder 46, 10/9/07 Tr. 4664.)

- During the same closing, Plaintiffs' counsel also stated, without any basis in the evidence, that medical monitoring would reveal "disease clusters . . . in this community." (*Id.* 4696.) He also stated, falsely, that DuPont's expert "violated the law," "lied," and was "a fraud." (*Id.* 4779.)
- During the Phase IV closing argument, counsel told the jurors that they were the "first jury that's gonna have to make a decision about West Virginia." (Binder 50, 10/18/07 Tr. 5783-84.) He urged the jury to award an amount that would end all pollution in West Virginia and stop "carpetbaggers" from "blowing tops off of mountains," "polluting your rivers," and "raping the natural resources of this area." (*Id.* 5783.)
- The Phase IV closing argument also featured a video of a burglar breaking into a home. Counsel compared DuPont to that burglar: "He's breaking into the house, and he's stealing your most prized possession. . . . Is there any more possession that's more important to you than your health . . . the health of your family and the welfare of your community?" (*Id.* 5788-89.)

Such "persistence . . . could not fail in making its impression on the minds of the jurors."

Hendricks v. Monongahela W. Penn. Pub. Serv. Co., 111 W. Va. 576, 586-87, 163 S.E. 411, 416 (1932).

The availability of punitive damages rendered the prejudicial impact of such improper argument greater here than it was in *Skibo*. In *Skibo*, the jury was instructed to award an amount of damages that would compensate the plaintiff for his injuries. No matter how offended the jury may have been by the defendant's conduct, its verdict was cabined by the extent of the harm suffered by the plaintiff. The *Skibo* jury awarded only \$50,000, an amount that demonstrated the absence of prejudice resulting from the plaintiff's closing argument. 202 W. Va. at 363, 504 S.E.2d at 190. Here, the award of punitive damages provided an unfettered outlet for the jury to respond to Plaintiffs' inflammatory arguments—and the jury took advantage of that outlet to the tune of nearly \$200 million. That outrage may well have been directed at practices that had nothing to do with this case.

Plaintiffs contend that their lawyer's closing argument was acceptable because one of the primary purposes of punitive damages is to "deter others from pursuing a similar course." (Pl.

Br. 84 (quoting *Davis v. Celotex Corp.*, 187 W. Va. 566, 569, 420 S.E.2d 557, 560 (1992).) But there was nothing “similar” about the conduct targeted by counsel’s inflammatory appeals. A new trial is the only adequate remedy for this constitutional violation.

4. **The punitive damages are grossly excessive**¹⁹

This Court has recognized that “local juries and local courts naturally will favor local plaintiffs over out-of-state (often faceless, publicly held) corporations when awarding punitive damages” in order to “redistribute wealth from without the state to within.” *Garnes v. Fleming Landfill, Inc.*, 186 W. Va. 656, 665, 413 S.E.2d 897, 906 (1992). The U.S. Supreme Court has expressed similar concerns. *Honda Motor Co. v. Oberg*, 512 U.S. 415, 432 (1994). In part for those reasons, the Supreme Court has imposed both procedural and substantive limits on punitive damages, including “exacting appellate review” to ensure that the punitive damages are not “grossly excessive.” *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 417-18 (2003).

This case shows why these safeguards are critical. All of the named plaintiffs and most of the class members are local residents. Those who no longer live in Harrison County once did. And all of the jurors know members of the class.

DuPont, by contrast, is the quintessential “out-of-state (often faceless, publicly held) corporation[.]” *Garnes*, 186 W. Va. at 665, 413 S.E.2d at 906, that lacks a “strong local presence[.]” in *Spelter*, *Honda*, 512 U.S. at 432. At trial, counsel for Plaintiffs repeatedly appealed to the jurors’ bias against out-of-state corporations—going so far as to call DuPont and other industrial companies “carpetbaggers” who have been “raping the natural resources of this area.” (Binder 50, 10/18/07 Tr. 5783.) And after trial, the Circuit Court rubberstamped the

¹⁹ In the eleven pages Plaintiffs’ brief devotes to the excessiveness of the punitive damages award, Plaintiffs cite the record not once. (Pl. Br. 84-94.)

outcome, signing lengthy proposed orders drafted by Plaintiffs' counsel with minimal alteration. This Court should provide the exacting review that the Circuit Court did not.

Though Plaintiffs assert that it was not the Circuit Court's place "to arbitrarily decide whether the compensatory award itself was sufficient punishment and replace the jury's verdict with its own" (Pl. Br. 85), they ignore the U.S. Supreme Court's repeated warning that state courts must ensure that the amount of punitive damages is no more than reasonably necessary to "satisf[y] the State's legitimate objectives" and "go[es] no further," *State Farm*, 538 U.S. at 419-20; *see also BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 584-85 (1996) (ordering remittitur of \$2 million punitive award because "there is no basis for assuming that a more modest sanction would not have been sufficient" to serve Alabama's interests and noting that courts had an obligation to "consider[] whether less drastic remedies could be expected to achieve" deterrence). A punitive award that goes beyond what is necessary to punish and deter "furthers no legitimate purpose" and, accordingly, is the very definition of "an arbitrary deprivation of property." *State Farm*, 538 U.S. at 417. "[P]unitive damages should only be awarded if the defendant's culpability, *after having paid compensatory damages*, is so reprehensible as to warrant the imposition of further sanctions to achieve punishment or deterrence." *Id.* at 419 (emphasis added).

The punitive award goes beyond what is necessary to punish and deter. The jury awarded, and the Circuit Court approved, a forty-year medical monitoring program for a class whose members evidenced no increased health risk, and a \$55 million damages award for the cleanup of thousands of properties in the five-by-seven-mile class area where the overwhelming majority of contaminant measurements are below cleanup levels. Plaintiffs make no showing that these awards are insufficient to deter companies from failing to take precautions to prevent

harmful emissions in the future. Given the massive disparity between the amount of compensatory damages and the allegedly avoided costs, no amount of punitive damages is necessary, and certainly nothing close to \$200 million.²⁰

Plaintiffs' arguments regarding the Supreme Court's three guideposts and this Court's *Garnes* factors do nothing to contradict that conclusion.

The degree of reprehensibility of the conduct. Plaintiffs try to shoehorn this case into each of the five reprehensibility factors identified in *State Farm*, but the question is not whether one, two, or five *State Farm* factors are present, but instead whether DuPont's conduct "was sufficiently egregious to justify a punitive sanction" of \$196.2 million. *BMW*, 517 U.S. at 585; *see also id.* at 575 ("exemplary damages imposed on a defendant should reflect the enormity of his offense") (internal quotation marks omitted). In other words, the Court must determine whether "the extraordinary size of the award . . . is explained by the extraordinary wrongfulness of the defendant's behavior." *Id.* at 595 (Breyer, J., concurring).

The evaluation of whether the conduct in this case is so heinous as to warrant a punishment of \$196.2 cannot be conducted in a vacuum. Instead, the Court must place the conduct at issue on a spectrum of reprehensibility by comparing it to the conduct in other cases in which punitive damages have been imposed. Such a comparative inquiry compels the

²⁰ See, e.g., *Chicago Title Ins. Corp. v. Magnuson*, 487 F.3d 985, 998-1001 (6th Cir. 2007) (barring punitive damages in a retrial on a claim for tortious interference with a contract because plaintiff could not prove that "the defendant's culpability, after having paid compensatory damages, is so reprehensible as to warrant the imposition of further sanctions to achieve punishment or deterrence") (quoting *State Farm*, 538 U.S. at 419); *Inter Med. Supplies, Ltd. v. EBI Med. Sys., Inc.*, 181 F.3d 446, 467-70 (3d Cir. 1999) (reducing \$50 million punitive award for breach of contract and fraud to \$1 million because "large compensatory damages [\$48 million] have been awarded" and "high, easily calculable compensatory damages may more appropriately be accompanied by a lower punitive damages ratio").

conclusion that DuPont's conduct does not warrant one of the largest punitive exactions in West Virginia's history.²¹

Whatever adjectives Plaintiffs may use to describe DuPont's conduct, they cannot deny that throughout DuPont's tenure operating the plant, it operated lawfully and in accordance with industry standards. Nor can Plaintiffs deny that during the period it operated the smelter, DuPont upgraded the plant's operations, resolved community complaints, and provided the country with a needed product and the residents of Spelter with paying jobs. During the period after it returned to the site, DuPont, alone among the prior owners, took responsibility for remediating the grounds, spending \$20 million to restore the property to a green, useable space. (Binder 41, 9/17/07 Tr. 1958.) These facts show that DuPont's conduct does not warrant one of the largest punishments in the State's history.

Plaintiffs' claim that all five *State Farm* reprehensibility factors are present here is unpersuasive.

First, despite Plaintiffs' present attempt to characterize this as a case in which their "persons and properties were injured" (Pl. Br. 86), Plaintiffs' counsel has previously conceded that, "[i]f you have an illness and you think it's related to the smelter, then you have to file an individual lawsuit. This class action does not address those personal injuries." (Binder 40, 9/12/07 Tr. 855; *see also* Binder 42, 9/24/07 Tr. 3077 (concession of Plaintiffs' counsel that "we

²¹ DuPont's conduct does not even compare to conduct that has been found to justify substantial punitive damages. *See, e.g., Hilao v. Estate of Marcos*, 103 F.3d 767 (9th Cir. 1996) (affirming punitive award of \$1.2 billion in class action on behalf of thousands of plaintiffs in case involving kidnapping, torture, and murder); *Planned Parenthood of Columbia/Willamette, Inc. v. Am. Coal. of Life Activists*, 422 F.3d 949 (9th Cir. 2005) (reducing aggregate punitive award against multiple defendants from \$108.5 million to \$4.7 million in case involving death threats and similar acts of physical intimidation), *cert. denied*, 547 U.S. 1111 (2006); *Licea v. Curaçao Drydock Co.*, 584 F. Supp. 2d 1355, 2008 WL 4808725 (S.D. Fla. Oct. 31, 2008) (setting compensatory damages at \$50 million and punitive damages at \$30 million in case involving enslaving three individuals and forcing them to work sixteen-hour days at a shipyard in Curacao for fifteen years).

have no personal injury claims”); Binder 46, 10/2/07 Tr. 3947 (concession of Plaintiffs’ counsel that “this isn’t a personal injury claim”).)

Second, the evidence does not show a reckless disregard for the health or safety of the class. Plaintiffs cite no record evidence at all. (See Pl. Br. 84-94.) They merely assert that “DuPont did nothing to warn the residents” (*id.* 87), but the facts are otherwise, *see pp.* 11-12 *supra*.

Third, Plaintiffs’ assertion that “[t]he targets of DuPont’s conduct were financially vulnerable” (*id.*) is mistaken. This factor focuses on whether plaintiffs were targeted *because of* their financial vulnerability, not merely on whether they are vulnerable. *See BMW*, 517 U.S. at 576 (“infliction of economic injury, especially when . . . *the target* is financially vulnerable, can warrant a substantial penalty”) (emphasis added); *In re Exxon Valdez*, 490 F.3d 1066, 1087 (9th Cir. 2007) (“there must be some kind of intentional aiming or targeting of the vulnerable”), *vacated and remanded on other grounds sub nom. Exxon Shipping Co. v. Baker*, 128 S. Ct. 2605 (2008). Plaintiffs conceded below that “there was no evidence that DuPont intentionally sought to expose Plaintiffs to emissions from the smelter,” much less that DuPont targeted them because of their financial position. (Binder 52, p. 24136, Pls.’ Resp. to DuPont’s Mot. to Vacate Under *Garnes* at 7 (12/17/07).)

Fourth, Plaintiffs’ assertion that “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” also is misguided. (Pl. Br. 88.) They base this assertion on evidence relating to Parkersburg, which they seek to tie to Spelter through the so-called “Connecting the Dots” document. (*Id.*) The reprehensibility guidepost, however, “does not permit courts to expand the scope of the case so that a defendant may be punished for any malfeasance.” *State Farm*, 538 U.S. at 424. To the

contrary, in determining whether a defendant should be treated as a recidivist, “courts must ensure [that] the conduct in question *replicates* the prior transgressions.” *Id.* at 423. “By defining [their] harm at a sufficiently high level of abstraction”—such as minimizing information made available to people—Plaintiffs “can make virtually any prior bad acts of the defendant into evidence of recidivism.” *Williams v. ConAgra Poultry Co.*, 378 F.3d 790, 797 (8th Cir. 2004).

“The Supreme Court has therefore emphasized that the relevant behavior must be defined at a low level of generality.” *Id.* “Due process does not permit courts, in the calculation of punitive damages, to adjudicate the merits of other parties’ hypothetical claims against a defendant under the guise of the reprehensibility analysis.” *State Farm*, 538 U.S. at 423.

That both Parkersburg and Spelter are listed in the “Connecting the Dots” document changes nothing. The two sites appear on a list on a single page of a 39-page document. (PX 71769 at DPZ0332764.) Nothing else in the document sheds any light on whether the two sites are similar in any way. And the conduct on which the punitive award in this case was based could not have involved the alleged “minimiz[ing]” of information, which Plaintiffs do not allege was a tort. Accordingly, even if it were a fair inference from the “Connecting the Dots” document that DuPont sought to “minimize information” (Pl. Br. 88) about both Spelter and Parkersburg, that is insufficient to justify treating Parkersburg and Spelter as being two instances of identical conduct without a greater showing of similarity.

Finally, even Plaintiffs don’t contend that this case involves “intentional malice.” Although they do assert that “DuPont intentionally misled the Plaintiffs concerning the extent of the contamination to their property and the substantial health risks resulting from the Defendant’s acts” (*id.*)—an assertion that is contrary to the record, *see pp. 11-12 supra*—they ignore that this factor focuses on whether “the harm *was the result of* intentional malice, trickery,

or deceit,” *State Farm*, 538 U.S. at 419 (emphasis added). Plaintiffs have never claimed, much less proven, that they were injured in any way by the misrepresentations they have alleged. Accordingly, the fifth *State Farm* factor is not present in this case.

Whether DuPont’s conduct is compared to punishable conduct in other cases or measured against the five *State Farm* factors, it does not warrant one of the largest punitive awards in the State’s history. This first and most important guidepost accordingly shows that the \$196.2 million punitive award is grossly excessive.

Ratio. There is no safe harbor for all punitive awards that are less than five times the compensatory damages. U.S. Supreme Court precedent bars that reading of this Court’s cases. The Supreme Court explained in *State Farm* that “[w]hen compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee.” 538 U.S. at 425. The Court twice reiterated this admonition just last year in *Exxon Shipping*. See 128 S. Ct. at 2626, 2634. It observed that because the class recovery of \$500 million in that case was “substantial,” “the constitutional outer limit may well be 1:1.” *Id.* at 2634 n.28. Applying these Supreme Court precedents, a federal appeals court recently held that a ratio of 3.13:1 would amount to an unconstitutional punishment and reduced the punitive damages to bear a 1:1 ratio to the compensatory damages. *Jurinko v. Med. Protective Co.*, 2008 WL 5378011, at *11-13 (3d Cir. Dec. 24, 2008) (unpublished). Many other courts have drawn the line at 1:1 or lower.²²

²² See, e.g., *Bach v. First Union Nat’l Bank*, 486 F.3d 150, 154-56 (6th Cir. 2007) (reducing 5.6:1 ratio to 1:1 where compensatory damages were \$400,000); *Boerner v. Brown & Williamson Tobacco Co.*, 394 F.3d 594, 602 (8th Cir. 2005) (reducing ratio from 3:1 to 1:1, notwithstanding that conduct was “highly reprehensible”—deceiving the public about the health risks of smoking and thereby causing the painful, lingering death of the plaintiff’s decedent) (internal quotation marks omitted); *Williams*, 378 F.3d at 799 (reducing punitive award from \$6 million to \$600,000 because \$600,000 compensatory award “is a lot of money”); *Martinez v. Thompson*, 2008 WL 5157395 (N.D.N.Y. Dec. 8, 2008) (reducing aggregate ratio from 2:1 to 0.5:1 where compensatory damages were \$450,000); *Licea v. Curacao Drydock Co.*,

Here, the \$55 million remediation award is “substantial.” Although Plaintiffs contend that the compensatory damages are not substantial because they are being divided among a class of thousands (Pl. Br. 88), the Supreme Court has definitively rejected this reasoning. In *Exxon Shipping*, the plaintiffs argued that the \$500 million aggregate compensatory damages should not be treated as substantial because, on average, each class member received only approximately \$15,500. (Resp. Br. 60, *Exxon Shipping Co. v. Baker*, 128 S. Ct. 2605 (2008) (No. 07-219).)

The Court rejected this argument, explaining:

The criterion of “substantial” takes into account the role of punitive damages to induce legal action when pure compensation may not be enough to encourage suit, a concern addressed by the opportunity for a class action when large numbers of potential plaintiffs are involved: in such cases, individual awards are not the touchstone, for it is the class option that facilitates suit

Exxon Shipping, 128 S. Ct. at 2634 n.28.

Plaintiffs also contend that the estimated value of the medical monitoring should be included in the compensatory damages for ratio purposes. (Pl. Br. 89-90.) But they elsewhere

2008 WL 4808725, at *3-8 (S.D. Fla. Oct. 31, 2008) (in bench trial, setting ratio at 0.6:1 where compensatory damages were \$60 million); *Adidas Am., Inc. v. Payless Shoesource, Inc.*, 2008 WL 4279812, at *16 (D. Or. Sept. 12, 2008) (reducing ratio from 4.5:1 to 0.5:1 where compensatory damages were \$30 million); *Zakre v. Norddeutsche Landesbank Girozentrale*, 541 F. Supp. 2d 555, 563-67 (S.D.N.Y. 2008) (reducing punitive award from \$2.5 million to \$600,000 where compensatory damages were roughly \$1.5 million); *Slip-N-Slide Records, Inc. v. TVT Records, LLC*, 2007 WL 3232274, at *30 (S.D. Fla. Oct. 31, 2007) (reducing ratio from 3:1 to 1:1 under state law); *Thomas v. iStar Fin., Inc.*, 508 F. Supp. 2d 252, 263 (S.D.N.Y. 2007) (reducing \$1.6 million punitive award to \$190,000 because the plaintiff “was awarded a very substantial amount in compensatory damages, making a punitive award equal to the compensatory damage award more appropriate”); *Kent v. United of Omaha Life Ins. Co.*, 430 F. Supp. 2d 946, 957-60 (D.S.D. 2006) (reducing 3:1 ratio to 1:1 where compensatory damages were \$2,400,000), *aff’d in part, rev’d in part on other grounds*, 484 F.3d 988, 998 (8th Cir. 2007); *Casumpang v. Int’l Longshore & Warehouse Union*, 411 F. Supp. 2d 1201, 1219-21 (D. Haw. 2005) (reducing ratio from 4.2:1 to 1:1 where compensatory damages were \$240,000 and conduct entailed “a moderate degree of reprehensibility”); *Watson v. E.S. Sutton, Inc.*, 2005 WL 2170659, at *19 (S.D.N.Y. Sept. 6, 2005) (suggesting that 1:1 was the constitutional maximum in employment discrimination case where compensatory damages were \$1,554,000, but ordering a remittitur to less than half of the compensatory damages under Fed. R. Civ. P. 59), *aff’d*, 225 F. App’x 3 (2d Cir. 2006); *Hudgins v. Sw. Airlines, Co.*, 2009 WL 73251 (Az. Ct. App. Jan. 13, 2009) (reducing ratio from 8:1 to 1:1 in false arrest/malicious prosecution case in which compensatory damages were \$500,000 per plaintiff); *Stevens v. Vons Cos.*, 2009 WL 117902 (Cal. Ct. App. Jan. 20, 2009) (affirming reduction of ratio to 1:1 in retaliatory discharge/sexual harassment case in which compensatory damages were \$1.2 million).

argue that class members are not required to undergo testing and that periodic reassessments of the program could result in elimination of CT scans from the program. (*Id.* 66-70.) Indeed, their own expert admitted that the participation rates supporting this estimate are at best a guess. (*See* Binder 54, p. 24676, Werntz Med. Mon. Econ. Rep. at 1 (3/30/07), Ex. I to DuPont's Post-Hr'g Sub. re Med. Mon. (2/1/08).) This estimated value is far too speculative to be included in any ratio. *See Garnes*, 186 W. Va. at 668, 413 S.E.2d at 909 (potential harm must be "likely" to occur); *BMW*, 517 U.S. at 581 (same); *Pulla v. Amoco Oil Co.*, 72 F.3d 648, 659 n.17 (8th Cir. 1995) (retired Supreme Court Justice White, sitting by designation) ("The [Supreme] Court further underscored its commitment to the fact that the potential harm must be 'likely,' by highlighting that West Virginia similarly imposes a likelihood requirement.").

Fines for Comparable Conduct. The punitive damages far exceed the highest fines ever imposed by the relevant environmental agencies. (DuPont Br. 81-82.) Plaintiffs do not deny that. They assert that "[t]here is no comparable fine for the decades of deceit displayed by DuPont." (Pl. Br. 90.) Leaving aside the flimsiness of the claim that DuPont engaged in "decades of deceit," Plaintiffs' assertion ignores that neither the EPA nor the DEP deemed DuPont's conduct to warrant any punishment *at all*. Moreover, the exhibit cited in DuPont's opening brief confirms that the conduct resulting in record EPA fines was much more egregious than the conduct for which the jury in this case imposed \$196.2 million in punitive damages. (*See* Binder 51, p. 23428, Memo re Mot. to Vacate, Ex. A & Ex. B, Tab 18. (12/4/07).)²³

²³ For example, the record \$12 million fine was imposed after a catastrophic explosion that killed one employee, injured several others, and caused a massive discharge of sulfuric acid. Another company was fined \$2,375,000 for unlawfully discharging oil and toxic pollutants, including chromium, copper, zinc, and nickel. These violations occurred decades after the emissions for which DuPont is being punished in this case, making it clearer still that DuPont lacked fair notice that it could suffer a \$196.2 million penalty.

Plaintiffs also say that the \$184.2 million disparity between the punitive award and the record EPA fine does not show excessiveness because the Supreme Court supposedly indicated in *State Farm* that a punitive award 100 times the applicable fine would be permissible. (Pl. Br. 91.) But the third guidepost measures the “disparity,” *State Farm*, 538 U.S. at 428—meaning the difference—between the punitive award and the comparable fine, not the ratio. The disparity produced by the punitive award that the *State Farm* court suggested was allowable and the applicable fine was less than \$1 million. 538 U.S. at 425, 428. *State Farm* in no way supports Plaintiffs’ assertion that a disparity of \$184.2 million is acceptable.

The Garnes Factors. The first, second, and fourth *Garnes* factors replicate the first and second due process guideposts, so DuPont does not separately address them here.

DuPont has also addressed the third factor, profits, in its opening brief. (See DuPont Br. 82.) As to that factor, Plaintiffs make no effort to quantify the “indirect” profits that they claim DuPont reaped. (Pl. Br. 92.) Nor do Plaintiffs explain why the \$55 million in remediation damages and the obligation to pay for medical monitoring are not sufficient to erase those “indirect” profits and to fully deter anyone from seeking such cost savings in the future.

Plaintiffs assert that the fifth *Garnes* factor, DuPont’s wealth, supports upholding the full amount of the punitive award. (*Id.* 93.) But they have no response to DuPont’s showing (DuPont Br. 83) that the Supreme Court treated Exxon’s wealth as irrelevant in *Exxon Shipping*, thus confirming that wealth, as the Supreme Court said in *State Farm*, “bear[s] no relation to the award’s reasonableness or proportionality to the harm,” 538 U.S. at 427.

As to the sixth factor, Plaintiffs point out that their costs exceeded \$8 million. (Pl. Br. 93.) But they fail to explain how that can possibly justify a punitive award of \$196.2 million. Instead, they attack an argument that DuPont did not make.

With respect to the seventh and eight factors—criminal sanctions and civil actions arising out of the same conduct—Plaintiffs again attack straw men. DuPont’s position is that these factors don’t cut in either direction.

Finally, as to the ninth factor, Plaintiffs assert that “[a] large punitive award will encourage companies like DuPont to resolve disputes like this one when . . . a clear wrong has been committed” (*Id.* 94.) They do not respond to DuPont’s argument that justifying a large punitive award on the basis of a defendant’s failure to settle would violate both the First Amendment and the Due Process Clause. (DuPont Br. 83-84.) Nor do they respond to DuPont’s argument that allowing a nine-figure punitive award would actually reduce settlement prospects by vastly increasing settlement demands. (*Id.*)

* * *

The Court should either eliminate the punitive award entirely or reduce it to a fraction of the remediation award.

5. The Court should hold punitive damages are unavailable to plaintiffs who seek only medical monitoring

The Circuit Court erred in allowing the medical-monitoring class to recover punitive damages. This Court has left open whether or not punitive damages are available “in cases in which only medical monitoring damages are sought.” *State ex rel. Chemtall Inc. v. Madden*, 221 W. Va. 415, 421, 655 S.E.2d 161, 167 (2007).

Having chosen to extend the scope of tort recovery by permitting plaintiffs with no current personal injury to receive medical-monitoring relief, the Court should draw the line there. As this Court has recognized, “[u]nchecked punitive damages awards . . . can have effects that are detrimental to society as a whole” by, for example, “chilling” beneficial activities, such as “new product research and development.” *Garnes*, 186 W. Va. at 661, 413 S.E.2d at 902. That

is all the more true when punitive damages are imposed on top of a novel, malleable remedy like medical monitoring for people who have suffered no present personal injury. This Court should not expand medical monitoring further by allowing the harsh and often arbitrary remedy of punitive damages.

Even if public policy does not categorically preclude punitive damages for plaintiffs awarded only medical monitoring, West Virginia law precludes punitive damages where, as here, the medical-monitoring award is equitable relief. It is long settled law in West Virginia that there is “[n]o authority for jurisdiction in equity to award punitive damages. *Given v. United Fuel Gas Co.*, 84 W. Va. 301, 306, 99 S.E. 476, 478 (1919). And this Court has more recently reaffirmed that “[a] finding of compensatory damages by a jury is an indispensable predicate to a finding of . . . punitive damages [under] the current law in West Virginia.” *LaPlaca v. Odeh*, 189 W. Va. 99, 101, 428 S.E.2d 322, 324 (1993). Plaintiffs do not dispute this.

The medical-monitoring class in this case has not been awarded compensatory damages. The jury’s verdict, the Circuit Court’s plan, and Plaintiffs’ counsel’s previous concessions all show that the medical monitoring awarded in this case is an equitable remedy, not compensatory damages. (DuPont Br. 85.) Regardless of whether medical monitoring may, under circumstances not present here, constitute compensatory damages, courts have recognized that medical monitoring plans like the one here are equitable relief. *See, e.g., Day v. NLO, Inc.*, 811 F. Supp. 1271, 1275 (S.D. Ohio 1992) (“Because of ongoing court supervision, any medical monitoring awarded by this Court would constitute equitable relief.”), *vacated in part on other grounds in In re NLO, Inc.*, 5 F.3d 154 (6th Cir. 1997); *Yslava v. Hughes Aircraft Co.*, 845 F. Supp. 705, 713 (D. Ariz. 1993) (Because “plaintiffs do not merely seek money from” the defendant but instead “seek to implement a court-supervised program requiring ongoing,

elaborate medical monitoring . . . plaintiffs' relief qualifies as injunctive relief."'). Accordingly, whether or not it is ever appropriate to award punitive damages to a plaintiff who seeks only medical monitoring, under the circumstances of this case the punitive award to the medical-monitoring class is unsustainable.

CONCLUSION

The Court should reverse and render judgment for DuPont on all claims. Alternatively, the Court should order a new trial because of the Circuit Court's many errors. At a minimum, the Court should either eliminate or drastically reduce the punitive damages and remand with instructions to re-evaluate the medical-monitoring program.

Respectfully submitted,

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Nos. 34334 & 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.

CERTIFICATE OF SERVICE

I, JAMES S. ARNOLD, counsel for Appellant E.I. du Pont de Nemours and Company, hereby certify that service of DuPont's Reply Brief has been made upon the parties herein via Federal Express, on this 28th day of January, 2009, as follows:

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