

Nos. 34334 & 34335

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

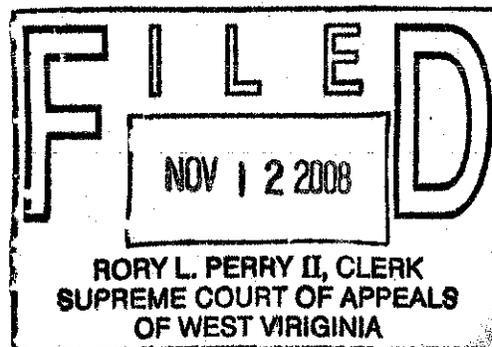
E.I. DU PONT DE NEMOURS AND COMPANY

Appellant,

v.

LENORA PERRINE, et al.

Appellees.



**BRIEF OF AMICUS CURIAE WEST VIRGINIA STATE MEDICAL ASSOCIATION
IN SUPPORT OF APPELLANT E.I. DU PONT DE NEMOURS AND COMPANY**

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

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KIND OF PROCEEDING AND NATURE OF THE RULING BELOW

This matter is before the Court on an appeal filed by Defendant E.I. du Pont de Nemours and Company ("DuPont") following a trial on the merits, a verdict in favor of the plaintiff class, and the Circuit Court's entry of the final judgment order, which ordered DuPont to fund a medical monitoring program for the plaintiffs' benefit.

Amicus Curiae The West Virginia State Medical Association ("WVSMA") supports DuPont in urging this Court to reverse the trial court's order. This brief is limited to the public health issues raised by the medical monitoring plan ordered by the Circuit Court. WVSMA is concerned that this plan places the plaintiff class in unnecessary danger by approving biennial computed tomography ("CT") scans that will likely cause more cancer than they will ever find. Review is warranted because the trial court failed to appropriately weigh the health risks involved in the medical monitoring program when it considered whether the proposed testing was "reasonably necessary."

INTRODUCTION

This case directly implicates the core mission of the WVSMA to protect the public health of all West Virginians because the medical monitoring plan ordered by the trial court is a "cure" that is far worse than the disease it seeks to remedy. The goal of the plan is to detect whether members of the plaintiff class will experience lung cancer over the next four decades as a result of environmental contamination caused by a smelter previously owned by DuPont. But if it is allowed to go into effect, the plan will inflict a far higher increased risk of cancer on these 8,528 West Virginians than the environmental contamination ever would. According to the plaintiffs' own expert, the medical monitoring plan will provide early detection of cancer in up to ten people if there is full participation for 40 years. Yet there is no consensus in the medical

community that early detection will result in increased survival. And whatever benefits this early detection may provide are far outweighed by the harm the screening will likely cause to class members. The medical monitoring plan contemplates providing class members with biennial chest CT scans to screen for lung cancer. Yet medical evidence showed that such mass screening is likely to cause cancer in up to 70 class members if they fully participate for 40 years. Thus, for every cancer detected early by the medical monitoring program, the lung screening aspect alone will have caused seven more.

One of the central tenets of medicine is to do no harm. Although some aspects of medical monitoring plans are open to reasonable debate, one fundamental principle is not: a medical monitoring plan should protect public health, not harm it. WVSMA therefore urges this Court to reverse a decision of the trial court that endorses unnecessary radiation screening which will endanger the health of West Virginians. The court did not adequately perform its duty under this Court's precedents to determine whether all of the tests in the plaintiffs' proposed medical monitoring program were "'reasonably necessary' in the sense that [they] must be something that a qualified physician would prescribe." Bower v. Westinghouse Elec. Corp., 206 W. Va. 133, 141, 522 S.E.2d 424 (1999). As a result, it is likely that many more West Virginians will contract cancer and potentially face an early and severely painful death than they would have faced in the absence of the trial court's plan. Reversal is therefore warranted.

RELIEF SOUGHT BY AMICUS CURIAE

WVSMA urges this Court to reverse the trial court's judgment with directions to strike lung cancer screening by CT scans from its medical monitoring plan.

ARGUMENT

Reversal of the trial court's medical monitoring plan is warranted in light of the potential risks to public health from the plan and the dictates of this Court's precedents. Repeated, long-term CT scans for asymptomatic individuals are dangerous and there is no consensus within the medical community on whether they are even effective to screen for lung cancer, which is the sole purpose for their inclusion within the medical monitoring program here. The trial court misconstrued the jury's verdict to erroneously find that the jury had rejected DuPont's experts' opinions on the danger of repeated CT scans in asymptomatic patients. The jury did not reject their opinions; indeed, it specifically asked whether it could eliminate a specific test from the plan and the trial court told it to leave exclusion of particular tests in the court's hands. Then, the trial court misapplied the test for medical monitoring this Court set out in Bower and declined to exclude CT scans from the medical monitoring plan. As a result, over 8,000 West Virginians face an increased cancer risk unless this Court clarifies that medical monitoring tests may not be ordered unless their benefits outweigh their risks.

I. THE CIRCUIT COURT'S MEDICAL MONITORING PLAN UNNECESSARILY ENDANGERS THE PLAINTIFFS' HEALTH.

A. CT Scans Put The Plaintiffs At Greater Risk For Cancer Than The Underlying Toxic Exposure.

In furtherance of its mission to safeguard the health of all West Virginians, the WVSMA urges this Court to vacate the misguided medical monitoring plan ordered by the trial court. That plan calls for each participant to receive biennial CT scans for forty years. According to Dr. Werntz, the plaintiffs' medical monitoring expert, long-term CT scans are needed for early diagnosis for lung cancer. 10/02/07 Tr. 4114-15. A single scan, however, will not allow a physician to diagnose lung cancer because upwards of 40% of patients will have scar tissue in

their lungs that can look like cancer. 10/02/07 Tr. 4115, 4121. The patients' initial scans will have to be compared to all subsequent scans to detect any growth in any lung irregularities. 10/02/07 Tr. 4115. But as Dr. Kelly Nelson, a defense expert in primary care, noted at trial, the "whole time that [a physician is] layering CT upon CT, [she is] also layering ionizing radiation on top of ionizing radiation, which can potentially cause you cancer." 10/03/07 Tr. 4423. Dr. Wertz admits that the use of CT scans in lung cancer screening is an area of "controversy," 10/02/07 Tr. 4116, yet he never accounted for the risks of those scans. There should have been no controversy that exposing a large plaintiff class to repeated radiation scans for 40 years is not justified by its purported benefits. First, the efficacy of these long term scans is doubtful at best. Second—and most importantly—CT scans introduce ionizing radiation, which increases the patient's cancer risk especially when the patient is subjected to multiple scans over time.

1. *There is no consensus within the medical community on the efficacy of CT scans for lung cancer screening.*

Using CT scans to screen for early signs of lung cancer is far from a routine medical procedure. The only article Dr. Wertz cited in his report in support of including CT scans to screen for lung cancer admits that it is "an experimental procedure based on an uncorroborated premise." Peter B. Bach, et al., Computed Tomography Screening and Lung Cancer Outcomes, 297 J. Am. Med. Ass'n 953, 960 (2007) (Appx. A). Dr. Wertz did not disagree, 10/02/07 Tr. 4164, nor could he have. The United States Preventative Services Task Force Guidelines state that no one has established any benefit from utilizing CT scans to screen for lung cancer. DuPont Exh. 2286 (Appx. B). That holds true even for high risk groups, such as smokers, who Dr. Wertz admits have a greater lung cancer risk than the class members here. *Id.*; 10/02/07 Tr. 4156-58.

The plaintiffs conceded the lack of consensus over whether CT scans will increase survival rates for the plaintiffs, arguing instead that early diagnosis “permits the patient to explore treatment options and prepare business and family matters.” Pl. Feb. 2008 Submissions at 6. Dr. Werntz stated that a patient needs to know as early as possible that she has a disease, even if it is incurable, “because having that advanced knowledge allows people to put their affairs in order.” 10/02/07 Tr. 4176. And the plaintiffs estimate that the entire medical monitoring program will provide early detection of cancer resulting from the smelter in only five to ten of the more than 8,000 class members if all members fully participate for 40 years. 10/02/07 Tr. 4167.¹ Allowing five to ten people—at best—more time to put their affairs in order is helpful, but it is beyond cavil that this benefit does not outweigh the suffering and deaths that the screening program will likely cause.

2. *Repeated scans are inadvisable for asymptomatic patients and will increase class members' cancer risk.*

CT scans are far from riskless, particularly when performed repeatedly on a mass scale over many years. To perform a CT scan, an apparatus produces and emits a narrow beam of X-rays as it rotates around the body. David J. Brenner & Eric J. Hall, Computed Tomography—An Increasing Source of Radiation Exposure, 357 New Eng. J. Med. 2277, 2279 fig.1 (2007) (“Brenner & Hall”) (Appx. C). Sensors on the other side then develop a picture of the structures inside the body by determining how many of the X-rays were absorbed. 10/04/07 Tr. 4533. The exposure to radiation from a CT scan is significantly greater than from a regular X-ray. 10/02/07 Tr. 4166. Indeed, “a CT scan of the chest typically gives an . . . equivalent exposure to 400 plain chest x-rays.” Graham Simpson and Garry S. Hartrick, Use of Thoracic Computed Tomography

¹ DuPont’s risk assessment expert, Dr. Peter Valberg, estimates that the medical monitoring plan will result in only two or three cancers caused by the smelter being detected early. 10/04/07 Tr. 4548-49.

by General Practitioners, 187 *Med. J. of Australia* 43, 45 (2007) (Appx. D). “For lung CT scans, the thymus, lungs, and breasts receive most of the radiation dose.” Amy Berrington de Gonzalez & Jonathan Samet, What Are the Cancer Risks from Using Chest Computed Tomography to Manage Cystic Fibrosis, 173 *Am. J. Respir. Crit. Care Med.* 139, 140 (2006) (“Gonzalez & Samet”) (Appx. E). “Consequently, increased risk for lung cancer mortality would be the primary concern.” Id.

There is sound scientific evidence that the radiation emitted by repeated CT scans will cause the kind of lung cancers that the medical monitoring plan is intended to detect. “Radiation exposure is an established cause of most cancers, and there is direct evidence from observational studies of excess risks from fractionated exposures in the dose range that would be received from repeated CT scans.” Id. at 139. The dangers in performing multiple CT scans result from the introduction of ionizing radiation into the body. 10/03/07 Tr. 4422; E. Cardis, et al., The 15-Country Collaborative Study of Cancer Risk Among Radiation Workers in the Nuclear Industry: Estimates of Radiation-Related Cancer Risks, 167 *Radiation Research* 396, 397 (2007) (“Ionizing radiation is a well-established risk factor for human cancer”) (Appx. F). The ionizing radiation causes breaks in DNA strands. 10/04/07 Tr. 4534. These breaks are usually repaired without event, but “occasional misrepair can lead to induction of point mutations, chromosomal translocations, and gene fusions, all of which are linked to the induction of cancer.” Brenner & Hall, supra, at 2279-80.

Dr. Werntz did not investigate the potential harms brought on by the proposed CT scans. 10/02/07 Tr. 4169. He recognized that there would be some radiation risk, but he did not attempt to quantify it. 10/02/07 Tr. 4170. However, “it is possible to estimate the cancer risks associated with the radiation exposure from any given CT scan by estimating the organ doses involved and

applying organ-specific cancer incidence or mortality data that were derived from studies of atomic-bomb survivors.” Brenner & Hall, supra, at 2280. And “there is little evidence that the risks for a specific organ are substantially influenced by exposure of other organs to radiation.” Id. Unlike the plaintiffs’ expert, the defendant’s expert in human health risk assessment, Dr. Peter Valberg, did quantify the risks to the plaintiff class from repeated CT scans over many years. Based on the number of class members and the cancer risks associated with the plan’s multiple CT scans, Dr. Valberg calculated that full participation in Dr. Wertz’ medical monitoring program would introduce cancer into 70 class members. 10/04/07 Tr. 4550. Based on this rate of cancer induction, he concluded that including regular chest CT scans in the medical monitoring program is not appropriate. 10/04/07 Tr. 4552. Dr. Nelson agreed. 10/03/07 Tr. 4478. He stated on cross-examination that he likely would not be comfortable participating in class members’ care if CT scans remained in the program. Id. (“I can’t tell you, if this goes through, would I be comfortable participating in [it]. Because those CT scans scare me to death. We’re going to hurt people, we’re going to kill people. That’s not what I’m supposed to do”).

WVMSA likewise opposes this court-ordered mass radiation screening of asymptomatic patients, which cannot be justified based on any medical benefits. There is myriad authority advising against using CT scans “in the practice of defensive medicine.” Brenner & Hall, supra, at 2282. And no one in the medical monitoring class has exhibited any symptoms of disease. Yet the medical monitoring plan would layer all of this radiation on top of any radiation received from normal, advisable medical radiation, such as x-rays for kidney stones, infections, or traumas. The most recent review of the evidence indicates that there is “no threshold” for radiation exposure because “any ionizing radiation conveys some cancer risk.” Gonzalez &

Samet, supra, at 139. The medical monitoring plan raises the class members' radiation exposure by vast proportions. Dr. Werntz challenged the body of research on cancer induction by CT scanning by claiming that most of it is based on studying atomic bomb survivors, whom he claims cannot be compared to patients undergoing CT scans. 1/15/08 Tr. 39. But "[o]rgan doses associated with routine diagnostic and elective CT scans are similar to the low-dose range of radiation received by atomic-bomb survivors." Richard C. Semelka, et al., Imaging Strategies to Reduce the Risk of Radiation in CT Studies, Including Selective Substitution With MRI, 25 J. Magnetic Resonance Imaging 900, 901 (2007) ("Semelka") (Appx. G). Moreover, Dr. Werntz did not confront the fact that "there are other supporting studies, including a recent large-scale study of 400,000 radiation workers in the nuclear industry," that corroborated the bomb survivor studies' findings. Brenner & Hall, supra, at 2280. Such studies can control to a large degree for the differences between the studied population and the atomic bomb survivors. And the bottom line is that "there is direct evidence from epidemiologic studies that the organ doses corresponding to a common CT study . . . result in an increased risk of cancer." Id.

Weighing the risk against the benefit reveals only one reasonable outcome: excluding CT scans from the medical monitoring plan. Even taking the top end of the plaintiffs' estimate, the proposed medical monitoring plan would result in early detection of ten additional cancers if every plaintiff participates for 40 years. 10/02/07 Tr. 4167. And the main benefit would be to allow those ten plaintiffs to put their affairs in order, since there is no agreement in the medical community that the early detection will make a difference in long-term survival. While that is no small benefit, it is obviously outweighed by the 70 new cancers that would be created by full participation. And even if participation decreases as expected, the ratio will remain the same.

Under the current medical monitoring plan, for every one person who gets advance notice of her illness, seven people will get cancer just from the attempt to find that out.

At trial, Dr. Werntz used an example of a patient under his medical monitoring plan undergoing biennial CT scans to screen for lung cancer and receiving a lung cancer diagnosis 15 years into the program. 10/02/07 Tr. 4122. By that point, the patient will have been scanned at least eight times, and no one will know whether the lung cancer resulted from the multiple CT scans or the emissions from DuPont's smelter. That merely demonstrates the inadvisability of subjecting asymptomatic individuals to repeated radiation scans. The plaintiffs here are suing DuPont because of the risk of cancer—rather than any actual cancer—they say was caused by the smelter that DuPont once owned. But the CT scans themselves increase the risk of cancer, so including them defeats the medical monitoring plan's purpose and could result in a second medical monitoring class to screen for the additional cancers the CT scans themselves will cause.

The lives and health of over 8,000 West Virginians should not be risked by encouraging them to take repeated CT scans, which have not been proven effective for the purpose of lung cancer screening even for long term smokers. That the risks here outweigh the benefits is not susceptible to reasonable debate. The medical monitoring program most likely will end significantly more lives than it saves. This Court should not allow it to stand.

B. The Circuit Court Did Not Adequately Consider The Risk To Plaintiffs Of Undergoing Regular CT Scans.

The trial court accepted this dangerous medical monitoring plan only by erroneously disregarding the expert testimony about its risks, in favor of a purported jury finding on the issue that did not exist. The court rejected Dr. Valberg and Dr. Nelson's testimony based on the jury's award of medical monitoring. Order 8 n.8 ("[t]he jury rejected the opinions of [Drs. Nelson and

Valberg] after hearing extensive testimony on the use of CT scans”). But the verdict does not support that conclusion. The jury only found that it would be “reasonably necessary” for class members to undergo “periodic medical examinations.” See Phase II jury verdict form. Thus, it only endorsed medical monitoring in principle. It did not endorse the plaintiffs’ specific plan or provide any insight as to whether the periodic examinations should include dangerous CT scans.

In fact, at the plaintiffs’ own insistence, the jury was not presented with that question. 10/09/07 Tr. at 4714. In the face of incontrovertible evidence that CT scans would create new cancer risks for the plaintiffs, plaintiffs’ counsel told the jury that it need not be concerned with the issue because the court could exclude any dangerous test. *Id.* The court adopted this view as well. The jury specifically asked whether it could exclude a particular test from the monitoring program, thereby showing that it was contemplating excluding CT scans or some other test from medical monitoring. Jury Exh. 1. The court, however, responded that “[w]hether an individual test is made available to the medical monitoring class will be subject to the Court’s oversight of the medical monitoring program.” Jury Exh. 2. Accordingly, the jury was instructed not to determine the credibility of the doctors’ opinions on CT scans.

When Dr. Valberg and Dr. Nelson’s observations are considered, the preponderance of the evidence clearly points to excluding CT scans from the medical monitoring plan. And although WVSMA does not advocate entrusting such medical judgments to juries, when one West Virginia jury was squarely presented with the question of whether CT scans should be part of a medical monitoring program for lung cancer screening, the jury rejected it for a group—smokers—that is at a far higher risk for lung cancer than the plaintiffs here. See In re Tobacco Litigation, 215 W. Va. 476, 481, 600 S.E.2d 188 (2004); see also 10/02/07 Tr. 4156 (Dr. Werntz testimony that the plaintiffs here are at a lower risk for lung cancer than smokers). The trial

court should not have rejected Dr. Valberg and Dr. Nelson's opinions on the basis of a non-existent jury finding on the issue.

Having erroneously excluded these opinions, in considering the issue of medical monitoring the trial court was left with only the testimony of the plaintiffs' expert and one called by DuPont, whom the court admitted was not tendered as an expert in medical monitoring. Opn. 7-8. As a result, the court displayed unjustified confidence in the opinions of Dr. Werntz, even though he admitted that he had never investigated the cancer induction risks of his lung cancer screening program. Opn. at 7; 10/02/07 Tr. at 4169. The court recited Dr. Werntz' conjecture on the unreliability of the many studies on cancer induction through CT scanning, Order at 7, but these objections are not well founded in science. Had the trial court appropriately considered all of the medical evidence, it would have been unable to credit this speculation. As discussed above, the experiences of atomic bomb survivors can be extrapolated to CT patients by using controls and by recognizing that their experiences have been corroborated through studies of employees at nuclear facilities. Moreover, the basic underlying principle—that exposure to ionizing radiation causes cancer—is not at all dependent upon observation of one subset of people. It follows from the way that radiation interacts with human DNA and the process by which the body repairs broken strands. See Brenner & Hall, supra, at 2280.

For these reasons, the trial court erred in approving a medical monitoring program whose demonstrated risks to human health far outweigh its benefits. This Court should reverse that judgment and ensure that the health of West Virginia's citizens is not needlessly endangered in this manner.

II. THIS COURT SHOULD CLARIFY BOWER AND REQUIRE THAT CIRCUIT COURTS WEIGHT THE HEALTH RISKS OF MEDICAL MONITORING PLANS AGAINST THEIR BENEFITS.

The trial court's erroneous and dangerous medical monitoring order demonstrates the need for this Court to clarify the standards for protecting West Virginians' safety in developing the parameters of a medical monitoring plan. Although the Court in Bower v. Westinghouse Elec. Corp., 206 W. Va. 133, 142, 522 S.E.2d 424 (1999), required that any medical monitoring award be reasonably necessary in the sense that a qualified physician would prescribe it, courts have erroneously interpreted that decision as permitting medical monitoring tests even where, as here, the medical risks outweigh the medical benefits.

A. Bower Did Not Hold That A Medical Monitoring Test Can Be Ordered Without Regard To Whether Its Risks Outweigh Its Benefits.

This Court has determined, in its landmark Bower decision, that medical monitoring is an appropriate claim for future damages under West Virginia law, even absent physical injury. The Court also laid out the elements of a medical monitoring claim. Id. at 141-42. One of the elements is that "testing must be 'reasonably necessary' in the sense that it must be something that a qualified physician would prescribe based upon the demonstrated exposure to a particular toxic agent." Id. at 142. But the Court also noted that this "reasonably necessary" requirement "does not necessarily preclude the situation where such a determination is based, at least in part, upon the subjective desires of a plaintiff for information concerning the state of his or her health." Id. The breadth of that latter language is unclear and has led to confusion as to whether a plaintiff's subjective desire for information could ever support an award of medical monitoring where the objective risks of a test outweigh its benefits. In Amici's view, such an outcome is inconsistent with Bower and would unnecessarily endanger public health.

When this Court decided Bower, medical monitoring was in its infancy as a tort claim. Foster v. St. Jude Medical, Inc., 229 F.R.D. 599, 602 (D. Minn. 2005) (“[m]edical monitoring claims are a fairly recent development in tort law”). Since then, states have generally taken a narrower approach to medical monitoring. Mark A. Behrens & Christopher E. Appel, Medical Monitoring in Missouri After Meyer ex rel. Coplin v. Fluor Corp.: Sound Policy Should be Restored to a Vague and Unsound Directive, 27 St. Louis U. Pub. L. Rev. 135, 141 (2007). Some courts and commentators have mistaken Bower for a veritable blank check to allow any test that a plaintiff may subjectively desire, regardless of whether its risks outweigh its benefits. See, e.g., Victor E. Schwartz, Medical Monitoring: The Right Way and the Wrong Way, 70 Mo. L. Rev. 349, 366-67 (2005) (claiming that the current regime is not “guided by principles of effective treatment or cure of disease” because it allows courts to weigh “the subjective desires of a plaintiff”); Arvin Maskin, et al., Medical Monitoring: A Viable Remedy For Deserving Plaintiffs Or Tort Law’s Most Expensive Consolation Prize?, 27 Wm. Mitchell L. Rev. 521, 535 (2000) (stating that while there is a general consensus among states to disallow medical monitoring where the testing is “too burdensome or dangerous,” West Virginia “branched out from the path of ‘relative consensus’ on this issue, expressly permitting courts to take the subjective concerns of the plaintiff into account”); see also Lowe v. Philip Morris USA, Inc., 142 P.3d 1079, 1091 (Ore. Ct. App. 2006) (suggesting that “potentially limitless liability” in West Virginia is only reigned in by the “reasonably necessary” requirement), aff’d, 183 P.3d 181 (Ore. 2008); Henry v. Dow Chem. Co., 701 N.W.2d 684, 694 (Mich. 2005) (stating that Bower “create[d] a potentially limitless pool of plaintiffs” without injury). Indeed, one court has interpreted Bower’s necessity requirement to mean that the court need only determine whether the proposed test is necessary to diagnose a disease, without considering the risks the test poses.

Meyer v. Fluor Corp., 220 S.W.3d 712, 718 (Mo. 2007) (noting that Bower requires proof that testing is “necessary in order to diagnose properly the warning signs of disease,” but failing to address any requirement that the court consider the health hazards inherent in the tests).

In West Virginia, this confusion quickly led to two cases that sought to exploit the “limitless pool of plaintiffs” potentially authorized by Bower. Henry, 701 N.W.2d at 695 n.12 (noting that “[s]hortly after the Bower decision,” two medical monitoring class actions were quickly filed in West Virginia) (citing In re Tobacco Litigation, No. 00-C-6000 (W. Va., Ohio County Cir. Ct. 2001) and Stern v. Chemtall, Inc., No. 03-C-49M (W. Va., Kanawha County Cir. Ct. 2001)). In both of these cited cases, this Court had to intervene to reign in the claims. In Stern, this Court clarified claim accrual for a medical monitoring cause of action and ruled that the circuit court could not create subclasses based on the states in which plaintiffs reside. State ex rel. Chemtall, Inc. v. Madden, 216 W. Va. 443, 455-56 (2004). And in In re Tobacco Litigation, 215 W. Va. 476, 481 (2004), the Court rejected plaintiffs’ challenge to a jury’s finding that medical monitoring for lung cancer by CT scans was not “reasonably necessary.”

These cases clarified that Bower is not a blank check. Thus, in In re Tobacco Litigation, 215 W. Va. at 482, the Court explained that Bower places substantive requirements on medical monitoring cases and establishes a “high bar” for a plaintiff to overcome before there can be any recovery for medical monitoring. In this case, the Court should similarly clarify that Bower does not create an open-ended entitlement on the part of plaintiffs to any medical test that might conceivably detect problems, without regard to whether the risks of the test far outweigh its benefits. As noted, Bower also holds that “[d]iagnostic testing must be ‘reasonably necessary’ in the sense that it must be something that a qualified physician would prescribe based upon the demonstrated exposure to a particular toxic agent.” 206 W. Va. at 142. But the Court did not

hold, and has never held, that an award of medical monitoring tests can be justified as reasonably necessary based on plaintiffs' "subjective desires" for information, *id.*, where the risks of the tests outweigh their benefits.

In In re West Virginia Rezulin Litigation, 214 W. Va. 52, 60 n.6, 585 S.E.2d 52 (2003), this Court suggested, but did not hold, that a trial court erred by requiring plaintiffs to show that their proposed medical monitoring tests were not "too invasive and risky," without explaining whether risks must be weighed against benefits. The decision below amply demonstrates the need for this Court to clarify that Bower does not permit medical monitoring whose risks outweighs its benefits. The trial court authorized a medical monitoring plan that subjects thousands of asymptomatic West Virginians to extensive, long-term radiation scanning even though the benefits of such scans cannot possibly outweigh their risks. Nothing in Bower authorizes, much less mandates, that dangerous result.

B. This Court Should Hold That No Medical Monitoring Test Can Be Justified If It Places Plaintiffs At Greater Risk.

Bower should not be interpreted or applied to permit any award of medical testing whose risks outweigh its benefits. The Court has held that such testing must be "reasonably necessary" in the sense that a "qualified physician" would prescribe it for exposure to a toxic agent. Bower, 206 W. Va. at 142. Inherent in the definition of "reasonably necessary" is the concept that medical monitoring tests must not place the plaintiff in greater danger than she would be in without the tests. The Hippocratic tradition of medical ethics command doctors to "first, do no harm." Robert M. Veatch, A Theory of Medical Ethics: The Hippocratic Tradition, in Law, Science & Medicine 273-274 (Judith Areen et al., eds., 1984). Under this command, a "qualified physician" should not prescribe any test that will do more harm than good. Thus, it is not

surprising that in other jurisdictions authorizing similar medical monitoring claims, courts have held that plaintiffs must establish that their proposed medical monitoring plan will not unnecessarily risk the health of the plaintiffs. See, e.g., Hansen v. CCI Mechanical, Inc., 858 P.2d 970, 980 (1993) (“if a reasonable physician would not prescribe [medical monitoring tests] for a particular plaintiff because the benefits of monitoring would be outweighed by the costs, which may include . . . its risk of harm to the patient, then recovery would not be allowed”); Redlands Soccer Club, Inc. v. Department of Army, 55 F.3d 827, 848 (3rd Cir. 1995) (rejecting lung cancer screening because it “create[s] risks that outweigh potential benefits”); In re Paoli R.R. Yard PCB Litigation, No. 86-2229, 2000 WL 274262 *8 (E.D. Pa. Mar. 7, 2000) (unpublished—Appx. H) (“the physician must first establish that the probable usefulness of those tests outweighs the attendant risks prior to subjecting a healthy person to screening tests”).

This Court should follow suit. Although the Court in Bower noted that a determination that a test is “reasonably necessary” may be based “at least in part” upon the subjective desires of a plaintiff for information about his or her health, 206 W. Va. at 142, that qualifier cannot override the basic premise that the medical benefits of a test must outweigh its risks. Thus, for example, a plaintiff’s subjective desire for information might warrant a medical monitoring test that a physician would not prescribe because its large monetary cost exceeds its negligible medical benefits. Monetary cost is not the issue here. In no circumstances can a test be deemed reasonably necessary when its medical risks outweigh its medical benefits merely because an individual may have a subjective desire to know the results.

A recent study showed that as low as 3% of patients undergoing CT scans are informed about the increased lifetime cancer risk attributable to CT scans. Semelka, supra, at 902. Thus, patients already tend to be uninformed about the dangers involved in CT scans before

undergoing them. Courts should not be similarly blind to the risks of these tests. Even if class members were well-informed of these risks, including regular CT scans in the medical monitoring plan would still be unjustified. This Court has noted that “[c]ommon sense should suggest that . . . the innocent victim of the toxic exposure” should not bear the costs of medical monitoring. In re Tobacco Litigation, 215 W. Va. at 482 n.3. Common sense likewise dictates that medical monitoring should not cost the innocent victim her life or health.

This Court should therefore hold that plaintiffs seeking medical monitoring must first establish that their proposed medical monitoring program does not unnecessarily endanger West Virginians’ well-being. Patients’ “subjective desires for information” should only play a role in determining a medical monitoring program when those desires do not unnecessarily endanger the plaintiffs’ health.

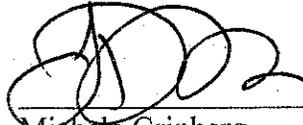
CONCLUSION

For the foregoing reason, Amicus Curiae West Virginia State Medical Association respectfully requests that this Court reverse the trial court's judgment with directions to strike lung cancer screening by CT scans from its medical monitoring plan.

Respectfully submitted,

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November 12, 2008

CERTIFICATE OF SERVICE

This is to hereby certify that on this 12th day of November, 2008, the undersigned have served a true and exact copy of the forgoing "**BRIEF OF AMICUS CURIAE WEST VIRGINIA STATE MEDICAL ASSOCIATION IN SUPPORT OF APPELLANT E.I. DU PONT DE NEMOURS AND COMPANY**" via United States Mail, postage properly paid, upon the following:

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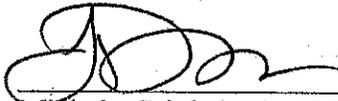
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ON

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