Docket No. 33380

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

CHEMTALL, INCORPORATED, *ET AL.*,

Petitioners/Defendants,

v.

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

Respondents.

AMICI CURIAE BRIEF OF THE WEST VIRGINIA ROUNDTABLE, WEST VIRGINIA MANUFACTURERS ASSOCIATION, CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, NATIONAL ASSOCIATION OF MANUFACTURERS, AND AMERICAN CHEMISTRY COUNCIL IN SUPPORT OF PETITIONERS/DEFENDANTS

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Civil Action No. 03-C-49M,

Respondents.

The West Virginia Roundtable, West Virginia Manufacturers Association, Chamber of Commerce of the United States of America, National Association of Manufacturers, and American Chemistry Council — collectively "*amici*" — request that this Court grant the subject Petition and issue a writ of prohibition or vacate the trial plan in this action .

STATEMENT OF THE QUESTION PRESENTED

This brief addresses the question of whether a trial plan violates due process by requiring a determination of punitive damages liability and a punitive damages "multiplier" before certification of a medical monitoring class, before a full determination of the defendants' liability for medical monitoring, and before any medical monitoring damages have been determined.[1]

INTEREST OF *AMICI CURIAE*

As organizations that represent West Virginia companies, *amici* have a significant interest in ensuring that punitive damages awards comport with due process and are not meted out in an arbitrary manner. The Circuit Court's trial plan in this action runs afoul of these

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[1] This brief does not address the question of whether punitive damages are available for class treatment or in a medical monitoring case seeking equitable relief.

fundamental principles. *Amici*'s views were considered when this case previously came before the Court on an appeal regarding an earlier plan by the trial court to certify a seven state medical monitoring class. *See State ex rel. Chemtall, Inc. v. Madden*, 216 W.Va. 443, 607 S.E.2d 772 (2004).

The West Virginia Roundtable ("Roundtable") is an association of Chief Executive Officers of West Virginia's leading commercial and educational enterprises, representing the larger employers in the State. The Roundtable is an independent, nonprofit, and nonpartisan organization committed to advocating public policies that create economic opportunities for all West Virginians. The West Virginia Roundtable's efforts to develop public policy seek to place the interests of the State above self interests of its members.

The West Virginia Manufacturers Association ("WVMA"), founded in 1915, represents the interests of manufacturers through advocacy and educational effort to policy makers at both the state and federal levels of government. WVMA's membership represents thousands of employees and all segments of manufacturing throughout the state. WVMA's primary goal is to focus on protecting West Virginia's manufacturing base and work toward a business climate that stimulates investment and job growth.

The Chamber of Commerce of the United States of America ("U.S. Chamber") is the world's largest business federation. The U.S. Chamber represents an underlying membership of more than three million businesses and organizations of every size, in every business sector, and from every region of the country. An important function of the U.S. Chamber is to represent the interests of its members in court on issues of national concern to the business community. Accordingly, the U.S. Chamber has filed more than 1,000 *amicus curiae* briefs in state and federal courts.

The National Association of Manufacturers ("NAM") is the nation's largest industrial trade association, representing small and large manufacturers in every industrial sector and in all fifty states. NAM's mission is to enhance the competitiveness of manufacturers and improve American living standards by shaping a legislative and regulatory environment conducive to U.S. economic growth and to increase understanding among policymakers, the media, and the general public about the importance of manufacturing to America's economic strength.

The American Chemistry Council ("ACC") represents the leading companies engaged in the business of chemistry. The business of chemistry is a key element of the nation's economy, accounting for ten cents out of every dollar in U.S. exports. Chemistry companies invest more in research and development than any other business sector.

STATEMENT OF FACTS

Amici adopt the Statement of Facts of Defendants/Petitioners.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

The Circuit Court of Marshall County adopted an unconstitutional and highly prejudicial "reverse bifurcation" procedure. The plan, which was proposed by plaintiffs and approved wholesale by the trial court, would allow a jury to determine the liability of Defendants/Petitioners for punitive damages and set a punitive damages "multiplier" prior to class certification, before a full determination of the defendants' liability for medical monitoring, and before any medical monitoring damages have been determined. In a nutshell, the trial plan puts the cart before the horse. As we will show, the trial plan is constitutionally infirm for at least two reasons.

First, the determination of whether, and to what extent, punitive damages may be awarded cannot occur in a vacuum, unanchored to any actual class that has been shown to be

eligible for medical monitoring, and before determination of the amount of any medical monitoring recovery. The Due Process Clause of the Fourteenth Amendment precludes such arbitrary imposition of punishment. The United States Supreme Court has held that punitive damages can only be awarded to punish a defendant for harm to those before the court, and the punishment must be proportional to the offense. *See Philip Morris USA v. Williams*, 127 S. Ct. 1057, 1063 (2007); *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 422-23 (2003); *BMW of North Am., Inc. v. Gore*, 517 U.S. 559, 575-76 (1996). These constitutional principles cannot be satisfied when, as here, a jury determines liability for punitive damages and a multiplier before knowing precisely what claimants are before the court, before knowing the level of reprehensibility of the defendants' conduct toward *those* plaintiffs, and before knowing the harm incurred by *those* plaintiffs.

Second, the trial plan will make it impossible for Defendants/Petitioners to receive a fair trial once the jury considers issues relevant to punitive damages. If punitive damages evidence is paraded before the jury at the initial phase of the trial, then Defendants/Petitioners will be painted as "bad actors" before the jury even considers whether (and to what extent) Defendants/Petitioners are legally responsible for medical monitoring. Quite clearly, the intended impact is to maximize the potential for jury bias and an excessive award by only hearing half the case. This Court should make clear that West Virginia will respect the rule of law and not permit the trial court's unjust "reverse bifurcation" scheme.

Finally, allowing the Circuit Court's trial plan to proceed in this action will create a troubling precedent that could jeopardize any class action punitive damages defendant's ability to receive a fair trial in West Virginia. The decision would fuel even more medical monitoring

claims in West Virginia, further challenging the State's ability to attract corporate job creators and taxpayers.

Accordingly, *amici* ask this Court to grant the subject Petition and issue a writ of prohibition or vacate the trial plan in this action.

ARGUMENT

Plaintiffs seek medical monitoring for diseases they claim may develop in the future because of their exposure to polyacrylamide flocculants (products used to treat coal wash water at coal preparation plants). The Circuit Court of Marshall County earlier certified a class action in this case on behalf of residents of seven states. This Court vacated that decision. *See State ex rel. Chemtall, Inc. v. Madden*, 216 W. Va. 443, 607 S.E.2d 772 (2004).

The case now comes back to this Court as a result of the Circuit Court's January 2007 adoption of a "reverse bifurcation" trial plan. In the first phase, the jury would consider whether a defendant's conduct warrants punitive damages as well as specific liability issues suggested by Plaintiffs. If the jury determines that the defendant's conduct justifies imposition of punitive damages, then the jury may set a "multiplier" that the court would later apply to any medical monitoring recovery. Not until the second phase of the trial would the court and jury consider class certification and medical monitoring issues.

As explained below, the trial plan contravenes due process safeguards in the United States Constitution, which protect civil defendants from the arbitrary imposition of punishment. The highly unorthodox "reverse bifurcation" procedure devised by the plaintiffs and adopted by the Circuit Court is also extraordinarily prejudicial to the defendants and would deny them a fair trial. It should be vacated.

I. THE TRIAL PLAN VIOLATES THE UNITED STATES SUPREME COURT'S RECENT PUNITIVE DAMAGES JURISPRUDENCE

In a series of important decisions, the United States Supreme Court has held that the Due Process Clause of the Fourteenth Amendment places procedural and substantive limits on punitive damages awards to protect civil defendants from arbitrary or excessive punishment. *See Williams*, 127 S. Ct. at 1062; *Campbell*, 538 U.S. at 416; *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 433 (2002); *Gore*, 517 U.S. at 562; *Honda Motor Co. v. Oberg*, 512 U.S. 415, 430 (1994); *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 456 (1993); *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 31 (1991). The trial plan at issue here violates due process because it does not include adequate procedural safeguards, leaves the jury to determine a punitive damages ratio without a nexus to the defendants' conduct toward any particular plaintiff or group of plaintiffs, and would find a defendants' conduct worthy of punishment even before they are found to be liable for medical monitoring.

A. Inadequate Procedural Protections Render Punitive Damage Awards Unconstitutional

The United States Supreme Court has repeatedly emphasized the importance of procedural protections for defendants as essential to sustaining a punitive damage award. *See Williams*, 127 S. Ct. at 1057 (finding that jury instruction did not properly cabin jury discretion and led to arbitrary punishment); *Cooper Indus., Inc.*, 532 U.S. at 443 (holding that review of punitive damage award must be *de novo*); *Oberg.*, 512 U.S. at 421 (finding unconstitutional the limited authority of Oregon appellate courts to review punitive damages awards). The Court has recognized that unlimited judicial or jury discretion, "may invite extreme results that jar one's constitutional sensibilities." *Haslip,* 499 U.S. at 19. Such is the case with the reverse punitive damage bifurcation procedure adopted by the Circuit Court here.

In determining whether a court's method of determining punitive damages violates due process, a benchmark is whether the court's plan departs from traditional procedures. *See Oberg,* 512 U.S. at 421. "When absent procedures would have provided protection against arbitrary and inaccurate adjudication, this Court has not hesitated to find the proceedings to violate due process." *Id.* at 430. The adequacy of procedural protections is particularly important when they involve punitive damages because, such awards "pose an acute danger of arbitrary deprivation of property" and come with "the potential that juries will use their verdicts to express biases against big business, particularly those without strong local presences." *Id.* at 432.

In this case, the Circuit Court has adopted an unusual and extraordinary route for deciding punitive damages. This trial plan is assuredly not a time-tested common law procedure; instead, it places a defendant at great risk of an arbitrary result.

B. Punitive Damages Must Reflect the Harm to the Individual Before the Court and Conduct at Issue in the Case

A theme of the United States Supreme Court's recent jurisprudence is that punitive damages may only punish a defendant for conduct directed toward those before the court, and the harm to those parties. *See Williams,* 127 S. Ct. at 1063; *Campbell,* 538 U.S. at 422-23. The Supreme Court could not be more clear on this point than in its recent decision in *Philip Morris USA v. Williams*, 127 S. Ct. 1057 (2007). In that case, a lawsuit for negligence and deceit brought by the widow of a smoker, an Oregon court refused to instruct the jury that it could not punish the defendant for injuries of persons not before the court. The result, a $79.5 million punitive damage award, was reduced by the trial court to $32 million, but fully reinstated by the intermediate appellate court. *See* 127 S. Ct. at 1061-62. In vacating the award, the Supreme Court did not consider the excessiveness of the punitive damage award, but focused its inquiry

on whether the procedures used were sufficient to avoid an arbitrary result. *See id.* at 1062-63. The basis of its finding that punitive damages cannot be awarded based on harm to "strangers in the litigation," is salient in this case:

> For one thing, the Due Process Clause prohibits a State from punishing an individual without first providing an individual with an opportunity to present every available defense. Yet a defendant threatened with punishment for injuring a nonparty victim has no opportunity to defend against the charge, by showing . . . that the other victim was not entitled to damages. . . .
>
> For another, to permit punishment for injuring a nonparty victim would add a near standardless dimension to the punitive damages equation. How many such victims are there? How seriously were they injured? Under what circumstances did the injury occur? The trial will not likely answer such questions as to nonparty victims. The jury will be left to speculate. And the fundamental due process concerns to which our punitive damages cases refer—risks of arbitrariness, uncertainty, and lack of notice—will be magnified.
>
> Finally, we can find no authority supporting the use of punitive damages awards for the purpose of punishing a defendant for harming others. We have said that it may be appropriate to consider the reasonableness of a punitive damages award in light of the *potential* harm the defendant's conduct could have caused. But we have made clear that the potential harm at issue was harm potentially caused *the plaintiff*.

Id. at 1063 (internal quotations and citations omitted). Where, as here, a jury is to consider punitive damages before certification of the class, and before a full determination of liability and damages, the defendant does not have "an opportunity to present every available defense" before such a decision is made. Moreover, consideration of punitive damages before class certification leaves the same crucial questions unanswered as in *Williams*: how many victims are there, how serious are their injuries, and how did their injuries occur? *Williams* does not permit a jury to decide whether a defendant's conduct warrants punitive damages, and the appropriate amount or multiplier for such damages, in absence of answers to these questions. There is no need in the

case before this Court to wait until the jury returns a punitive damage award and then consider whether it is constitutionally excessive. The procedures provided by the trial plan alone, if implemented, would violate the Supreme Court's mandate and create an unacceptable risk of an arbitrary award.

The Supreme Court's earlier decision in *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003), further illustrates the need for a punitive damage determination to focus on the defendant's conduct directed toward the individual or individuals before the court. In *Campbell*, the Court ruled that the Utah Supreme Court erred finding that State Farm's nationwide policies, rather than the conduct directed toward the plaintiffs, could support a punitive damage award. *See id.* at 420. While the Court's decision was rooted in a violation of principles of federalism that would effectively allow a local court in one state to set regulatory policy in a sister state, "a more fundamental reason" for its invalidation of the award was the lack of a nexus between the punishment and the Campbells' harm. *Id.* at 422. The Court held:

> A defendant's dissimilar acts, independent from the acts upon which liability is premised, may not serve as the basis for punitive damages. A defendant should be punished for the conduct that harmed the plaintiff, not for being an unsavory individual or business. Due process does not permit the courts, in the calculation of punitive damages, to adjudicate the merits of other parties' hypothetical claims against a defendant in the guise of the reprehensibility analysis, but we have no doubt the Utah Supreme Court did that here. Punishment on these bases creates the possibility of multiple punitive damages awards for the same conduct; for in the usual case nonparties are not bound by the judgment some other plaintiff obtains.

Id. at 422-23; *see also Haslip,* 499 U.S. at 18-20 (instructing that punitive damage awards must take into consideration "the character and degree of the wrong shown by the evidence" and be based on "a meaningful *individualized* assessment of appropriate deterrence and retribution") (emphasis added). The trial plan at issue, however, would have a jury reach a punitive damage

"multiplier" before knowing who is before the court, the extent of harm they experienced, and whether the defendants are responsible for their injuries. It is the same type of "hypothetical claim" that the Supreme Court found impermissible in *Campbell*.

C. A Ratio Cannot be Reached in a Vacuum

The ratio between punitive damages and the actual harm inflicted on the plaintiff "is perhaps the most commonly cited indicium of an unreasonable or excessive punitive damages award." *Gore*, 517 U.S. at 580. The trial plan here violates this fundamental principle because there is simply no way a jury can non-arbitrarily determine a multiplier without first knowing the extent of the alleged harm at issue.

The United States Supreme Court's consistent refusal to adopt a "bright line" test for determining the constitutional propriety of the ratio between punitive damages and the actual or even potential damage to the plaintiff reaffirms the need for the fact finder to determine liability and economic damages before considering punitive damages. *See id.* at 582. Instead of a mathematical formula, the Supreme Court has provided specific guidance to courts for evaluating the excessiveness of punitive damages that greatly exceed compensatory damages. The constitutionally permissible size of the ratio varies based on the reprehensibility of the conduct and harm to the particular individual or individuals before the court.

For instance, in ordinary cases, a punitive damage award of four times compensatory damages "may be close to the line" of constitutional permissibility. *Haslip*, 499 U.S. at 23. In some cases, the Court has suggested that low awards of compensatory damages may justify a higher ratio if the act is particularly egregious, results in a small amount of economic damages, or the monetary value of the harm is difficult to measure. *See Gore*, 517 U.S. at 582-83. On the other hand, a substantial compensatory award, which may itself include a punitive element, may

permit no more than a 1:1 ratio between punitive and compensatory damages. *See Campbell*, 538 U.S. at 424-26.

These constitutional principles cannot be satisfied where, as here, a jury determines a punitive damages multiplier before knowing precisely what claimants are before the court, before knowing the level of reprehensibility of the defendants conduct toward *those* plaintiffs, and before knowing the economic damages incurred by *those* plaintiffs. Thus, while the plaintiffs in this case might contend that a single digit punitive damages multiplier is presumptively constitutional, such reasoning is fatally flawed.

D. A Similar Trial Plan Was Rejected in Florida

The Circuit Court's trial plan to permit consideration of punitive damages before class certification and a full determination of liability is similar to an approach that was rejected by a Florida appellate court and the Florida Supreme Court in *Engle v. Liggett Group, Inc.*, 853 So. 2d 434 (Fla. Ct. App. 2003), *aff'd*, 945 So. 2d 1246 (Fla. 2006), *pet. for cert. filed*, 75 U.S.L.W. 3638 (May 21, 2007). *Engle* involved a class action composed of all Florida smokers seeking damages against cigarette companies and industry organizations for alleged smoking-related injuries. The proposed *Engle* trial plan was divided into three phases. In Phase 1, the jury was to consider general issues related to the defendant's conducts and health effects of smoking, reach findings of fact, and determine entitlement to punitive damages for the class as a whole. In Phase 2, the jury would consider compensatory damages to three individual class representatives and the amount of punitive damages for the entire class. Phase 3 would involve new juries that would decide individual liability and compensatory damages for the estimated 700,000 class members. The result of the first two phases of the trial was a $145 *billion* punitive damage award for the class before a determination of individual liability or compensatory damages for all but the three class representatives. *See id.*

The appellate court described the plan as putting the "cart before the horse." 853 So. 2d at 450. The court found that determining class-wide punitive damages before the necessary findings of liability and determination of compensatory damages was not permitted under the Florida Constitution because the plan:

> a) improperly require[ed] the defendants to pay punitive damages for theoretical injuries to hundreds of thousands of class members, without a determination that defendants are liable for such injuries; b) preclude[ed] the constitutionally required comparison of punitive damages and compensatory damages; and c) eliminate[ed] the jury's discretion to assess punitive damages based upon the individual class members' varying circumstances.

Id. The court also found it improper to decide punitive damages based on a fictional composite – a generalized "perfect plaintiff" – that supplanted all real class members whose knowledge, conduct, and other circumstances varied, and that allowed the introduction of evidence of years of conduct that was "untethered to any individual plaintiff." *Id.* at 456, 467 n.48.

The Florida Supreme Court unanimously affirmed the appellate court's decision to vacate the punitive damage award. *See* 945 So. 2d. at 1262. The Florida Supreme Court held, "[a]s a matter of law, the punitive damages award violates due process because there is no way to evaluate the reasonableness of the punitive damages award without the amount of compensatory damages having been fixed. *Id.* A majority of the *Engle* court further concluded that the trial court erred in allowing the jury to consider entitlement to punitive damages during Phase 1 of the trial. *See id.* at 1262-63. The court said that "a finding of liability is required before entitlement to punitive damages can be determined, and that liability is more than a breach of duty." *Id.* at 1262 (citing *Ault v. Lohr*, 538 So. 2d 454, 456 (Fla. 1989)). The *Engle* court recognized that the jury's general findings on certain factual issues and elements of liability were insufficient to support a punitive damage award when the jury had not determined crucial elements of the case,

such as whether any of the class members relied upon the defendants' representations or were injured by the defendants' conduct. *See id.* at 1263. In other words, the trial court erred in permitting the jury in Phase 1 to consider punitive damages when that jury "did not determine whether the defendants were liable to anyone." *Id.* at 1263 (quoting 853 So. 2d at 450). This Court should invalidate the Circuit Court's trial plan here for the same reasons.

II. CONSIDERATION OF PUNITIVE DAMAGES BEFORE MEDICAL MONITORING LIABILITY AND DAMAGES WOULD INJECT BIAS INTO THE PROCEEDING AND JEOPARDIZE DEFENDANTS' ABILITY TO RECEIVE A FAIR TRIAL

The trial court's plan will make it impossible for Defendants/Petitioners to receive a fair trial once the jury considers issues relevant to punitive damages. Defendants/Petitioners will be branded as "bad actors" before the jury even considers whether they are legally responsible for medical monitoring.

Typically in a bifurcated trial, juries determine punitive damages issues only *after* compensatory liability and damages have been determined. This procedure prevents evidence that is highly prejudicial and relevant only to the issue of punishment from being heard by jurors and improperly considered when they are determining basic liability. Such evidence may include inflammatory documents or the net worth of the defendant. While juries may be instructed to ignore such evidence in determining liability, it is difficult, as a practical matter, for jurors to do so. By deferring consideration of evidence relevant only to punitive damages, the standard approach to a bifurcated punitive damages trial is intended to limit the potential for bias. *See* Victor E. Schwartz *et al.*, *Reining in Punitive Damages "Run Wild": Proposals for Reform by Courts and Legislatures*, 65 Brook. L. Rev. 1003, 1018-19 (1999). This "straight bifurcation" procedure is the precise opposite of the unusual approach adopted in the Circuit Court here. The

Circuit Court's plan is clearly intended to maximize, rather than minimize, the likelihood of bias and prejudice. It jeopardizes the due process right of Defendants/Petitioners to a fair trial.

In some complex cases, courts have even trifurcated trials – allowing the jury to first decide compensatory liability and damages, then punitive damages liability, then the amount of any punitive damages - to further reduce the potential that the jury may improperly consider irrelevant and highly prejudicial evidence. *See Webster v. Boyett*, 496 S.E.2d 459, 462-64 (Ga. 1998).

The Supreme Court of Mississippi in *Bradfield v. Schwartz*, 936 So. 2d 931 (Miss. 2006), recently explained the importance of separating presentation of liability *before* punitive damages. The court recognized, "without an evidentiary buffer at trial, juries will ultimately confuse the basic issue of fault or liability and compensatory damages with the contingent issue of wanton and reckless conduct which may or may not ultimately justify an award of punitive damages." *Id.* at 938. A trial court plan that allows a jury to consider punitive damages at the same time as compensatory liability and damages,

> is a troubling scenario when one considers that under such procedure, not only is the jury subject to possibly returning an inflated compensatory damage award based on consideration of the wrong evidence, it may also forego a finding for the defendant altogether in those situations where the jury may have otherwise seriously considered finding for the defendant, by considering only the appropriate evidence as to fault/liability.

Id.

Many other courts have agreed that evidence related to punitive damages should be removed from the jury's determination of liability and compensatory damages to the "extent humanly possible" to avoid the "taint and suspicion" would otherwise pervade the verdict. *Campolongo v. Celotex Corp.*, 681 F. Supp. 261, 264 (D. N.J. 1988) (upholding trial court plan

in which jury considered strict liability and compensatory damages before negligence claims and punitive damages). Yet, in this case, the trial plan provides for a form of "reverse bifurcation" proposed by the plaintiffs that will certainly maximize the potential for jury bias and an excessive award, rather than minimize it.

This Court itself has criticized and invalidated the use of reverse bifurcation, where a trial plan in a negligence and wrongful death action involving exposure to chemical substances would have tried damages and causation prior to the liability of the defendants. *See State ex rel. Atkins*, 212 W.Va. 74, 80, 569 S.E.2d 150, 156 (2002). In *Atkins*, the Court found that such a procedure would result in "significant confusion" of the issues and not permit the parties to present evidence in an organized and effective manner. *Id.* at 85, 569 S.E.2d at 161. Reverse bifurcation, the Court found, is potentially appropriate "only for a fairly narrow category of cases" in which the court anticipates a short damages trial and lengthy determination of liability. *Id.* at 80 n.2, 528 S.E.2d at 156 n.2 (quoting *State ex rel. Crafton v. Burnside*, 207 W.Va. 74, 76 n.1, 528 S.E.2d 768, 770 n.1 (2000)). Such a procedure is a rare and "drastic" technique. *Crafton*, 207 W.Va. at 79 n.5, 528 S.E.2d at 773 n.5) (quoting *Walker Drug Co. v. La Sal Oil. Co.*, 972 P.2d 1238, 1245 (Utah 1998), in which the Utah Supreme Court found reverse bifurcation an abuse of discretion)). In *Atkins*, as well as *Crafton*, this Court granted the writ of prohibition, as it should here. In fact, the trial plan in this case, by placing *punitive* damages before class certification and liability, is an even more fundamental violation of due process.

III. WEST VIRGINIA SHOULD NOT EXPAND THE POTENTIAL FOR ABUSE OF MEDICAL MONITORING CLAIMS

In *Bower v. Westinghouse Elec. Corp.*, 206 W.Va. 133, 522 S.E.2d 424 (1999), this Court recognized a medical monitoring claim that is among the most permissive in the nation. *See* Victor E. Schwartz *et al., Medical Monitoring: The Right Way and the Wrong Way*, 70 Mo. L.

Rev. 349, 366-68 (2005); James A. Henderson, Jr. & Aaron D. Twerski, *Asbestos Litigation Gone Mad: Exposure-Based Recovery For Increased Risk, Mental Distress, and Medical Monitoring*, 53 S.C. L. Rev. 815, 842-49 (2002); Victor E. Schwartz *et al.*, *Medical Monitoring – Should Tort Law Say Yes?*, 34 Wake Forest L. Rev. 1057 (1999). "[T]he *Bower* medical-monitoring ruling has cast a shadow over [the] state's reputation in the legal field. It affects West Virginia's jobs, taxes, health care and the public credibility of our courts." Robert D. Mauk, *McGraw Ruling Harms State's Reputation in Law, Medical Monitoring*, Charleston Gazette, Mar. 1, 2003, at 5A.[2] Several recent U.S. Chamber studies have ranked West Virginia close to the bottom among all states for creating a fair and reasonable litigation environment, a reputation contributed to by *Bower*. *See, e.g.*, Harris Interactive, 2007 U.S. Chamber of Commerce State Liability Systems Ranking Study 85 (2007), *available at* http://www.instituteforlegalreform.com/LawsuitClimate2007/index.cfm.

In recent years, this Court has taken positive steps to limit medical monitoring abuse. For instance, when this case previously reached the Court, a clear message was sent by this Court that plaintiffs from states that do not recognize medical monitoring cannot flock to West Virginia; West Virginia trial courts were instructed that they may not overlook such significant differences in law when certifying a class. *See State ex rel. Chemtall, Inc. v. Madden*, 216 W.Va. 443, 607 S.E.2d 772 (2004). In another decision that year, the Court affirmed a jury verdict rejecting the medical monitoring claims of a class of approximately 250,000 West

[2] Since *Bower*, five of the last six state courts of last resort to consider the issue — the Alabama, Nevada, Kentucky, Michigan, and Mississippi Supreme Courts — have rejected medical monitoring absent physical injury. *See Hinton v. Monsanto Co.*, 813 So. 2d 827, 828 (Ala. 2001); *Wood v. Wyeth-Ayerst Laboratories*, 82 S.W.3d 849 (Ky. 2002); *Henry v. Dow Chem. Co.*, 701 N.W.2d 684 (Mich. 2005); *Paz v. Brush Engineered Materials, Inc.*, 949 So. 2d 1 (Miss. 2007); *Badillo v. American Brands, Inc.*, 16 P.3d 435 (Nev. 2001).

Virginia smokers. *See In re Tobacco Litig. (Medical Monitoring Cases)*, 215 W.Va. 476, 600 S.E.2d 188 (2004). The Court emphasized that "*Bower* establishes an extremely high bar for a plaintiff to overcome before there can be any recovery for medical monitoring" and that plaintiffs must prove each and every element of the cause of action. *Id.* at 194, 600 S.E.2d at 482.

Should this Court affirm the trial court's plan to consider punitive damages before class certification, liability, and the extent of actual harm to the plaintiffs, the Court's decision would negate recent progress in constraining the medical monitoring cause of action and upholding the rule of law. The decision also would create a troubling precedent that could jeopardize any class action punitive damages defendant's ability to receive a fair trial in West Virginia. Defendants would face significant pressure settle claims involving speculative future harm to plaintiffs with no physical injuries. The decision would fuel even more medical monitoring claims in West Virginia, further challenging the State's ability to attract corporate job creators and taxpayers.

CONCLUSION

For the reasons stated, *amici* request that this Court grant the subject Petition and issue a writ of prohibition or vacate the trial plan in this action.

Respectfully submitted,

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Of Counsel

Dated: August 13, 2007

CERTIFICATE OF SERVICE

I hereby certify that I served a copy of the foregoing *Amici Curiae* Brief upon counsel by depositing a copy in a first-class postage-prepaid envelope into a depository under the exclusive care and custody of the United States Postal Service this 13th day of August, 2007, addressed to:

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