IN THE SUPREME COURT OF THE STATE OF MICHIGAN
(ON APPEAL FROM THE COURT OF APPEALS)

GARY AND KATHY HENRY, et al.,	)	
	)	
Plaintiffs-Appellees,	)	
	)	**S.C. No.**
	)	
v.	)	
	)	**C.A. No. 251234**
THE DOW CHEMICAL COMPANY	)	
	)	
	)	**Saginaw County Circuit**
Defendant-Appellant.	)	**Court No. 03-47775-NZ**
	)	**Hon. Leopold P. Borrello**
	)	

****

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES, AMERICAN TORT REFORM ASSOCIATION, NATIONAL ASSOCIATION OF MANUFACTURERS, AMERICAN CHEMISTRY COUNCIL, AND COALITION FOR LITIGATION JUSTICE, INC. AS *AMICI CURIAE* IN SUPPORT OF DEFENDANT-APPELLANT

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The Chamber of Commerce of the United States ("Chamber"), American Tort Reform Association ("ATRA"), National Association of Manufacturers ("NAM"), American Chemistry Council ("ACC"); and the Coalition for Litigation Justice, Inc. ("Coalition") (collectively "*Amici*") hereby move for leave to file the accompanying brief as *Amici Curiae* in support of Defendant-Appellant in the above-captioned case and, in the event leave to appeal is granted, to file a brief *Amici Curiae* in support of the Defendant-Appellant's position on appeal. In support of their motion, *Amici* state as follows:

1. *Amici* seek to address the practical and public policy implications as to why this Court should grant review in the above-captioned case to determine whether the circuit court

erred in recognizing Plaintiffs' claims for medical monitoring damages and in directing the litigants to proceed with discovery as to those claims when Plaintiffs do not allege that they have sustained any present physical injury.

2. The Chamber is the world's largest business federation. The 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 Chamber is to represent the interests of its members in court on issues of national concern to the business community. Accordingly, the Chamber has filed more than 800 *amicus curiae* briefs in federal and state courts.

3. Founded in 1986, ATRA is a broad-based coalition of more than 300 businesses, corporations, municipalities, associations, and professional firms that have pooled their resources to promote reform of the civil justice system with the goal of ensuring fairness, balance, and predictability in civil litigation. For more than a decade, ATRA has filed *amicus curiae* briefs in cases before federal and state courts that have addressed important liability issues.

4. The National Association of Manufacturers ("NAM") is the nation's largest industrial trade association. The NAM represents 14,000 members (including 10,000 small and mid-sized companies) and 350 member associations serving manufacturers and employees in every industrial sector and all 50 states. The 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.

5. ACC represents the leading companies engaged in the business of chemistry. ACC members apply the science of chemistry to make innovative products and services that make people's lives better, healthier and safer. ACC is committed to improved environmental, health and safety performance through Responsible Care®, common sense advocacy designed to address major public policy issues, and health and environmental research and product testing. The business of chemistry is a $460 billion enterprise and a key element of the nation's economy. It is the nation's largest exporter, 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.

6. The Coalition was formed by insurers as a nonprofit association to address and improve the toxic tort litigation environment. The Coalition's mission is to encourage fair and prompt compensation to deserving current and future toxic tort litigants by seeking to reduce or eliminate the abuses and inequities that exist under the current civil justice system.[1] The Coalition files *amicus curiae* briefs in important cases before state courts of last resort and the United States Supreme Court that may have a significant impact on the toxic tort litigation environment.

7. *Amici* seek leave to file the accompanying Brief in Support of Defendant-Appellant to address the vital need for this Court to clarify the state of the law in Michigan with regard to medical monitoring. For more than 200 years, a basic tenet of recovery in tort has been that liability should only be imposed when an individual has sustained an injury. Despite the fact

[1] The Coalition includes the following: ACE-USA companies, Chubb & Son, a division of Federal Insurance Company; CNA service mark companies, Fireman's Fund Insurance Company, The Hartford Financial Services Group, Inc., Argonaut Insurance Co., General

(Footnote continued on next page)

that this Court ruled in 1998 that plaintiffs are not entitled to medical monitoring if they have no present physical injury, *see Meyerhoff v. Turner Constr. Co.*, 456 Mich. 933, 575 N.W.2d 550 (1998), the circuit court below and other courts in Michigan appear to be confused as to the import of that decision. These courts have disregarded this Court's guidance in *Meyerhoff* and have chosen instead to interpret Michigan law as providing **some** sort of medical monitoring relief – although they disagree on what the nature and scope of that relief is. This Court should resolve this confusion. Otherwise, the adverse legal and public policy consequences will reach far beyond the parties in this case to the state court system, to potentially adversely affect truly injured state residents, and to others who rely on clear statements of the law as they order their affairs.

8. The accompanying brief will show that, as a matter of Michigan law and sound public policy, this Court should grant the Defendant-Appellant's motion for leave to appeal. Should this Court allow this case to proceed through discovery and trial before reviewing this decision, this Court would be permitting the *de facto* creation of a cause of action for medical monitoring without constraints.

9. Additionally, if this Court grants Defendants-Appellant's applications for leave to appeal, *Amici* wishes to file an *Amici Curiae* brief in support of Defendants-Appellant's position on appeal, pursuant to MCR 7.306(C).

WHEREFORE, the Chamber, ATRA, NAM, ACC, and the Coalition respectfully request that this Court grant their motion for leave to file the accompanying *Amici Curiae* brief and, in

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Cologne Re, Liberty Mutual Insurance Group, the St. Paul Fire and Marine Insurance Company, and the Great American Insurance Company.

the event leave to appeal is granted, to allow *Amici* to file an additional brief in support of Defendant-Appellant's position on appeal.

Respectfully submitted,

_____

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Of Counsel

Dated: December 12, 2003

IN THE SUPREME COURT OF THE STATE OF MICHIGAN
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QUESTION PRESENTED

DID THE CIRCUIT COURT ERR IN RECOGNIZING PLAINTIFFS' CLAIMS FOR MEDICAL MONITORING DAMAGES AND IN DIRECTING THE LITIGANTS TO PROCEED WITH DISCOVERY AS TO THOSE CLAIMS WHEN PLAINTIFFS DO NOT ALLEGE THAT THEY HAVE SUSTAINED ANY PHYSICAL INJURY?

The Saginaw County Circuit Court answered "NO."

The Court of Appeals did not answer.

Defendant-Appellant, The Dow Chemical Company, answered "YES."

Plaintiffs-Appellees presumably will answer "NO."

Amici answer "YES."

STATEMENT OF INTEREST

The Chamber of Commerce of the United States ("Chamber") is the world's largest business federation. The 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 Chamber is to represent the interests of its members in court on issues of national concern to the business community. Accordingly, the Chamber has filed more than 800 *amicus curiae* briefs in federal and state courts.

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The Coalition for Litigation Justice, Inc. ("Coalition") was formed by insurers as a nonprofit association to address and improve the toxic tort litigation environment. The Coalition's mission is to encourage fair and prompt compensation to deserving current and future toxic tort litigants by seeking to reduce or eliminate the abuses and inequities that exist under the current civil justice system.[2] The Coalition files *amicus curiae* briefs in important cases before state courts of last resort and the United States Supreme Court that may have a significant impact on the toxic tort litigation environment.

STATEMENT OF THE CASE

Amici adopt by reference the Statement of the Case of Defendant-Appellant.

[2] The Coalition includes the following: ACE-USA companies, Chubb & Son, a division of Federal Insurance Company; CNA service mark companies, Fireman's Fund Insurance Company, The Hartford Financial Services Group, Inc., Argonaut Insurance Co., General Cologne Re, Liberty Mutual Insurance Group, the St. Paul Fire and Marine Insurance Company, and the Great American Insurance Company.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

For more than forty years, a basic tenet of recovery in tort has been that liability should be imposed only when an individual has sustained an injury. *See* William L. Prosser, *Handbook on the Law of Torts* § 54, at 330-33 (4th ed. 1971). This basic rule was created for a reason. In order to determine whether money should be transferred from a defendant to a plaintiff, a jury needs some objective showing that an individual has been harmed. Medical monitoring claims, as proposed in the case at bar, would do away with this time-honored rule, allowing plaintiffs to recover damages based on the mere subjective guess about the *possibility* of a future injury.

This Court already has rejected medical monitoring in the absence of a physical injury as a viable theory of relief under Michigan law. In the 1990s, in a case involving medical monitoring claims brought by uninjured construction workers exposed to asbestos, this Court twice rejected attempts by the Court of Appeals to establish medical monitoring as a compensable claim. *See Meyerhoff v. Turner Constr. Co*., 447 Mich. 1022, 527 N.W.2d 513 (1994) (vacating 202 Mich. App. 499, 509 N.W.2d 847 (1993)), *reconsideration denied*, -- Mich. -- , 530 N.W.2d 751 (1995); *Meyerhoff v. Turner Constr. Co.*, 456 Mich. 933, 575 N.W.2d 550 (1998) (vacating in pertinent part 210 Mich. App. 491 534 N.W.2d 204 (1995)). The impact of this Court's *Meyerhoff* rulings is that medical monitoring in any form has not been judicially authorized in Michigan.

Despite the clarity and brevity with which this Court spoke in its *Meyerhoff* rulings, there remains some confusion about the effect of those decisions, as is evidenced in the case at bar. For example, a Michigan Court of Appeals panel recently indicated that it was not sure whether medical monitoring is a "viable" cause of action in Michigan. *Taylor v. Am. Tobacco Co*, No.

97715975, 2000 WL 34159708, at *1 (Mich. Cir. Ct. Jan. 10, 2000) (unpublished opinion). Similarly, courts and commentators around the country have arrived at different interpretations of these rulings as to whether medical monitoring is allowed in Michigan, and, if so, whether injury is required and whether it is a cause of action or simply an item of damages.

The confusion appears to stem from three factors. First, this Court did not offer its own analysis and holding specifically stating the status of medical monitoring in Michigan. Second, even though this Court struck down medical monitoring as compensable, it upheld the portion of the Court of Appeals ruling that overturned the initial summary disposition ruling because of an evidentiary issue. 447 Mich. at 1022, 527 N.W.2d at 513; 456 Mich. at 933, 575 N.W.2d at 550. And third, in *dicta* the Court stated that the "factual record is not sufficiently developed to allow a medical monitoring damages [sic]." *Id*. at 933, 575 N.W.2d at 550 (emphasis added). This statement has been misinterpreted by some, including the circuit court in the instant case, as suggesting that there is a cause of action for medical monitoring dependent on the facts of a case, even if plaintiff sustains no injury – despite this Court's express words to the contrary. In the instant case, the circuit court, mistakenly, chose to allow this case to proceed so plaintiffs could create such a "factual record." *Henry v. Dow Chem. Co.,* No. 03-047775-NZ-5, at 4 (Saginaw County Cir. Ct. Aug. 18, 2003) (denying summary disposition, Def.-App.'s Br., Exh. 1).

The legal and public policy implications of not granting review in the petition at bar are dire not only for the litigants before the Court, but also for Michigan's judicial system and injured citizens. If this Court allows this case to proceed through discovery and trial before reviewing this decision, it would permit the *de facto* judicial creation of a cause of action for medical monitoring without constraints. Such a cause of action would radically alter a principle

that has been integral to the historic fiber of tort actions nationally and in Michigan – that a plaintiff may not bring a cause of action absent a showing of present physical injury. From a practical perspective, denying this appeal would foster widespread litigation with potentially crippling liability, leaving no defendant whose products are used by society safe from medical monitoring claims. Almost everyone either ingests as food or medicine or otherwise comes into contact with a potentially limitless number of materials that, arguably, may warrant medical monitoring relief. This snowballing effect would lead to a monumental diversion of resources from the truly injured.

Amici realize that this Court cannot review every incorrect decision made by a lower court. Indeed, the grant of review, particularly in the case of an interlocutory appeal, should be granted judiciously, to provide guidance where guidance is truly needed, and to correct those errors of law that, if allowed to stand, will have serious repercussions for litigants, the courts, and the public. *See* Mich. Ct. Rules of 1985, R. 7.205(b) (providing that the appellant to an interlocutory appeal must set forth facts showing how would it would suffer substantial harm), 7.205(e) (providing that an appellant requesting emergency consideration must concisely state facts showing why an immediate hearing is required). This is such a case. Medical monitoring is a novel claim. There should not be any confusion as to whether Michigan allows medical monitoring, and if so, under what conditions. Changing the tort system so dramatically should not be done lightly or because of an ill-conceived misinterpretation of existing law. *Amici* offer this brief to illustrate why permitting the decision of the Court of Appeals to stand would have significant negative consequences in Michigan and beyond.

ARGUMENT

I.

THE COURT SHOULD GRANT THIS LEAVE TO APPEAL TO CLARIFY PERCEIVED AMBIGUITY IN ITS RULINGS IN *MEYERHOFF* REJECTING A MEDICAL MONITORING CAUSE OF ACTION IN THE ABSENCE OF INJURY.

A. *MEYERHOFF v. TURNER CONSTRUCTION: THE FACTS.*

In *Meyerhoff*, just as in the case at bar, the central issue focused on the limited question of whether a plaintiff, who is not physically injured, can bring a claim for medical monitoring under Michigan law. In *Meyerhoff*, twenty-one construction workers sought damages for medical monitoring due to their exposure to asbestos and asbestos-containing products. *See Meyerhoff v. Turner Constr. Co.*, 202 Mich. App. 499, 501, 509 N.W.2d 847, 848 (1993). None of the plaintiffs had sustained any identifiable physical injuries as a result of the alleged exposure. *Id.* The circuit court granted the defendants' motion for summary disposition, saying that there certainly can be no claim for medical monitoring without allegations of an underlying injury. *Id.* In doing so, the circuit court stated, "inasmuch as there is no allegation that they [plaintiffs] have an injury now, I feel that their claim is premature." *Id.*

On appeal in 1993, the Court of Appeals reversed the order granting summary disposition, stating, "We disagree with the trial court's conclusion" that "there must exist some underlying injury or manifestation of disease in order to advance a claim for medical monitoring damages." 202 Mich. App. 499, 502, 509 N.W.2d 847, 849 (1993). The Court of Appeals instead held that "medical monitoring expenses are a compensable item of damages where the

proofs demonstrate that such surveillance to monitor the effect of exposure to toxic substances, such as asbestosis, is reasonable and necessary." 202 Mich. App. at 505, 509 N.W.2d at 850. The court also set forth five factors to be considered in determining whether medical monitoring damages would be reasonable and necessary: (1) the significance and extent of the exposure; (2) the toxicity of the substance; (3) the seriousness of the diseases for which the individuals are at risk; (4) the relative increase in the chance of onset of disease in those exposed; and (5) the value of early diagnosis. *Id*. In 1994, this Court unambiguously vacated the Court of Appeals' entire opinion. 477 Mich. at 1022, 527 N.W.2d at 513.

The next year, on remand, the Court of Appeals tried to reinstate its previous medical monitoring decision, again stating that the lower court "erred in requiring the presence of an underlying injury or manifestation of disease before recognizing a claim for medical monitoring or surveillance." *Meyerhoff v. Turner Constr. Co.*, 210 Mich. App. 491, 495, 534 N.W.2d 204, 206 (1995). The Court of Appeals set forth the same five factors as before. *Id.* While this Court first denied appeal of this ruling, on reconsideration it specifically granted appeal to consider whether "the Court of Appeals erred in recognizing a cause of action resulting in damages for medical monitoring where plaintiff has not yet sustained physical illness or physical injury." *Meyerhoff v. Turner Constr. Co.*, 454 Mich. 873, 873, 562 N.W.2d 781, 781 (1997) (order granting leave to appeal medical monitoring issue), *vacated* 456 Mich. 933, 575 N.W.2d 550 (1998).

In 1998, this Court reaffirmed its rejection of medical monitoring, once again unambiguously vacating "that portion of the Court of Appeals decision which holds that medical monitoring expenses are a compensable item of damages." 456 Mich. at 933, 575 N.W.2d at

550. That should have ended any questions about the availability of a medical monitoring remedy for plaintiffs who have no actual injury. It did not.

B. THE CIRCUIT COURT MISAPPLIED THIS COURT'S *MEYERHOFF* RULINGS.

Despite the fact that plaintiffs in the instant case do not claim physical injury (Second Amend. Complaint at 37-39, *see* Def.-App.'s Br., Exh. 8), the circuit court allowed the medical monitoring claims to proceed and the Court of Appeals failed to enforce this Court's *Meyerhoff* rulings rejecting medical monitoring in such circumstances. *Henry*, No. 03-047775-NZ-5; *Henry v. Dow Chem. Co.*, No. 251234 (Mich. Ct. App. Oct. 29, 2003). In fact, the plaintiffs have conceded that they "do not allege that they are injured for purposes of this claim." (Pls.' Brief in Opp'n to Dow Chem. Co.'s Mot. for Summ. Disp. at p. 13, *quoted in* Def.-App.'s Brief at p. 6). Nevertheless, the circuit court rejected Dow's Motion of Summary Disposition and scheduled ambitious discovery and a hearing to determine whether a medical monitoring class should be certified. *Henry*, No. 03-047775-NZ-5.

The circuit court in *Henry v. Dow Chem. Co.* apparently misunderstood and misapplied this Court's 1994 and 1998 *Meyerhoff* decisions. Based on its opinion, the circuit court appears to believe that medical monitoring has been judicially created in Michigan, that there is no injury requirement for such a claim to be considered, that the criteria laid out by the Court of Appeals in its vacated 1993 and 1995 opinions remain valid, and that plaintiffs are permitted to build a factual record to meet those criteria. Citing the Court of Appeals' 1993 *Meyerhoff* decision, the circuit court ruled that plaintiffs' medical monitoring claims would remain in the case. *Henry*, No. 03 047775 NZ 5 at 4. In lieu of a discussion about plaintiffs' lack of a present physical

injury, however, the circuit court suggested that this Court's *dicta* from the 1998 *Meyerhoff* ruling stating that the "factual record" in *Meyerhoff* was not "sufficiently developed" meant that the circuit court should grant the opportunity for the current plaintiffs to create "a record regarding medical monitoring damages." *Id.*

What the circuit court apparently misunderstood was that, in vacating the Court of Appeals' efforts to create a medical monitoring claim for plaintiffs who do not allege a present physical injury, this Court ruled that plaintiffs without a present physical injury cannot bring medical monitoring claims in Michigan. This Court's use of the term "factual record" in its 1998 *Meyerhoff* ruling clearly refers to whether the facts show that plaintiffs sustained "physical illness or physical injury." While neither the phrase "physical illness" nor "physical injury" appears in the short opinion issued by this Court in 1998, it was the sole reason provided by this Court in 1997 when it agreed to review the issue, and the 1998 decision must be viewed in that context. 454 Mich. at 873; 562 N.W.2d at 781. In this case, where plaintiffs have specifically conceded they have no physical injury, a factual record should not be permitted.

C. MICHIGAN COURTS NEED DIRECTION IN INTERPRETING *MEYERHOFF*.

The fact that this Court vacated the Court of Appeals decisions, rather than offering its own analysis and holding specifically addressing the status of medical monitoring in Michigan, appears to have led to confusion beyond this circuit court and, ultimately, to the unequal application of this new area of tort law in Michigan.

In *Lalonde v. Citizens Bank*, contrary to the case at bar, the appellate judges correctly recognized that the "factual record" mentioned in *Meyerhoff* is supposed to establish the

existence of such injuries. No. 228202, 2002 WL 551100 (Mich. Ct. App. Apr. 12, 2002) (unpublished opinion). While the plaintiffs in *Lalonde* did allege physical injuries from asbestos exposure, the Court of Appeals upheld the circuit court's order granting summary disposition to the defendants on the medical monitoring issue because the plaintiffs failed to establish such a factual record. The three-judge panel noted that the plaintiffs only "presented the cursory and conclusory affidavit of their expert that was unsupported by underlying facts." *Id.* at *1. The court then held that the plaintiffs "failed to establish that a genuine issue of material fact existed regarding their alleged asbestos-related injuries." *Id.* While the Court of Appeals panel did not indicate whether medical monitoring could have been available had the plaintiffs proven such injuries, it did say that without injury, the plaintiffs could not pursue these claims. *Id.*

In requiring injury before a claim even can be considered, the *Lalonde* ruling is consistent with this Court's handling of claims for emotional distress – a nontraditional tort claim for which recovery is not available absent physical injury. *See Bogaerts v. Multiplex Home Corp. of Mich*, 423 Mich. 851, 851, 376 N.W.2d 113, 113 (1985) (reinstating trial court order vacating emotional damages award where plaintiffs "failed to allege and prove a sufficient physical injury"); *Daley v. LaCroix*, 384 Mich. 4, 12-13, 179 N.W.2d 390, 395 (1970) (ruling that recovery is available only where a "definite and objective physical injury is produced as a result of emotional distress proximately caused by defendant's negligent conduct"); *see also Larson v. Johns-Manville Sales Corp.*, 427 Mich. 301, 399 N.W.2d 1 (1987) (cause of action for cancer-related claims does not accrue until "the discoverable appearance of cancer"). Medical monitoring allows plaintiffs to recover for alleged exposure to a toxic substance – without even

showing fear or emotional distress, let alone a physical injury. Treating medical monitoring differently from these other types of claims is certain to create additional confusion.

There also seems to be a disagreement over the nature of the medical monitoring debate in Michigan, such as whether medical monitoring would be viewed as a distinct cause of action or solely an element of damages. In its opinions vacating medical monitoring claims, this Court specifically referred to medical monitoring as an "item of damages." 456 Mich. at 933, 575 N.W.2d at 550. In both its 1993 and 1995 opinions in *Meyerhoff*, the Court of Appeals also referred to it as an "item of damages." 202 Mich. App. at 505, 509 N.W.2d at 850; 210 Mich. App. at 495, 534 N.W.2d at 206. Yet, in the instant case, both the Plaintiffs' Second Amended Complaint and the Circuit Court's opinion rejecting summary disposition refer to medical monitoring as the Plaintiffs' sixth claim for relief. (Op. & Order, at 2, *see* Def.-App.'s Br., Exh. 1; Second Am. Compl., at 37). Further, the Plaintiffs state that they are seeking "injunctive relief in the form of a medical monitoring program." (Second Am. Compl., at 40). Hence, medical monitoring is not being treated as an item of damages, but on par with traditional tort causes of action, such as nuisance, trespass, negligence, public nuisance, and strict liability on abnormally dangerous activity.

Another Michigan circuit court reached the opposite conclusion, saying medical monitoring could only be viewed as an element of damages. In *Taylor v. Am. Tobacco Co.*, plaintiffs sought class treatment of their claims for injuries they alleged resulted from smoking cigarettes. No. 97715975, 2000 WL 34159708, at *1 (Mich. Cir. Ct. Jan. 10, 2000) (unpublished opinion). The circuit court ruled that medical monitoring is solely "an element of damages" and is not appropriate in "the award of injunctive relief." *Id.* at *12. Since medical monitoring did

not constitute "final equitable or declaratory relief," the court found that such a claim was not appropriate for class certification under Michigan Court Rules. *Id*. (citing Mich. Ct. R. 3.501(A)(2)(b)). In fact, the *Taylor* court said that it was unsure of the entire status of medical monitoring claims in the State of Michigan, noting that this Court vacated the Court of Appeals' *Meyerhoff* rulings which sought to establish guidelines for such claims. *See id.* (citing this Court's 1998 language in *Meyerhoff* that the "portion of the Court of Appeals decision which holds that medical monitoring expenses are a compensable item of damages is vacated"). Because this Court did not offer its own analysis or direction in its 1998 opinion in *Meyerhoff*, the *Taylor* court was left to speculate "whether medical monitoring claims are still viable in Michigan." *Id*. While the *Taylor* court dispensed of the claims without issuing a judgment on that broad issue, the confusion of that court speaks to the ambiguity that remains among circuit courts and appellate panels in implementing the series of decisions in the *Meyerhoff* case.

D. COURTS IN OTHER JURISDICTIONS AND LEGAL SCHOLARS LOOK TO MICHIGAN FOR GUIDANCE.

The importance of clarifying where Michigan stands on the issue of medical monitoring extends beyond clarifying the record so Michigan courts can provide equal justice within the state. Medical monitoring is a relatively new issue for the courts of this country; the first significant cases appeared in 1984 in New York,[3] Delaware[4] and the District of Columbia.[5]

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[3] *Askey v. Occidental Chem. Corp*., 477 N.Y.S.2d 242 (N.Y. App. Div. 1984) (acknowledging medical monitoring as a recoverable damage).

[4] *Mergenthaller v. Asbestos Corp. of Am.*, 480 A.2d 647, 651 (Del. 1984) (explicitly holding that a claim for medically required surveillance expenses is not maintainable in the absence of a present physical disease).

When faced with this issue as a matter of first impression, courts usually assess how other state and federal courts have analyzed the issues when they consider whether to adopt medical monitoring in their own jurisdictions, and if so, under what conditions and procedures.[6] The two courts outside of Michigan that have considered Michigan's approach to medical monitoring since this Court's 1998 decision in *Meyerhoff* have reached different conclusions about what that approach actually is. Does Michigan recognize medical monitoring as an independent tort, or as a damage remedy? (Interestingly, in answering this question, neither court acknowledged this Court's 1998 ruling in *Meyerhoff* vacating the Court of Appeals' opinion that adopted medical monitoring.)

In *Duncan v. Northwest Airlines, Inc.*, which involved second-hand smoke claims by flight attendants, a federal district court found that "Michigan has recognized [medical monitoring] as a remedy only." 203 F.R.D. 601, 607 (W.D. Wash. 2001). In issuing its opinion, the court cited to the Michigan Court of Appeals 1995 *Meyerhoff* decision, indicating that it was that decision that defined the law in Michigan, not this Court's 1998 *Meyerhoff* ruling vacating that Court of Appeals decision. *Id.* The federal court granted the defendant's motion for summary judgment on medical monitoring, saying, "In light of Washington's hesitation to recognize new torts, its reluctance to allow damages for enhanced risk without an accompanying

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[5] *Friends for All Children, Inc. v. Lockheed Aircraft Corp.*, 746 F.2d 816 (D.C. Cir. 1984) (anticipating, in *dicta*, that the Court of Appeals of the District of Columbia would recognize a cause of action for medical monitoring absent physical injury; case involved plaintiffs who had sustained present physical injury). *But see Witherspoon v. Philip Morris, Inc.*, 964 F. Supp. 455, 467 (D.D.C. 1997) (determining, with no reference to D.C. law, that medical monitoring requires that the plaintiff sustain a present injury).

present injury, and the ambiguity in case law from other states, this Court holds that there is no cause of action for medical monitoring as an independent tort" in Washington. *Id.* at 614-15.

That same year, the Nevada Supreme Court considered a similar case involving medical monitoring claims brought by casino workers exposed to secondhand smoke. *See Badillo v. Am. Brands, Inc.*, 16 P.3d 435, 438 (Nev. 2001). Unlike the court in *Duncan*, the Nevada court characterized Michigan as among those states that recognize medical monitoring as an independent cause of action, as opposed to merely a damage remedy. *Id.* at 440 nn.3, 4. The Nevada court also cited the 1995 Court of Appeals *Meyerhoff* decision in noting that Michigan is one of a handful of states that allow medical monitoring in the absence of present physical injury. *Id.* at 441. Nevertheless, the Nevada court, as discussed *infra*, held that its common law "does not recognize a medical monitoring cause of action" and that creating such a novel cause of action should be left to the legislature. *Id.* at 437, 440.

Similar confusion is evident among practitioners and scholars who follow developments in toxic tort law.[7] In addition, some court followers believe that medical monitoring can be a separate cause of action in Michigan,[8] while others suggest that it is only an element of damages.[9] And despite the repeatedly clear language by this Court in *Meyerhoff* vacating the

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6 *See, e.g.*, *Meyerhoff*, 202 Mich. App. at 502-505, 509 N.W.2d at 849-850; *Duncan v. Northwest Airlines*, 203 F.R.D. 601 (W.D. Wash. 2001).

7 *See, e.g.*, J. Douglas Peters & David R. Parker, *The History, Law, and Future of State Class Actions in Michigan*, 44 Wayne L. Rev. 135, n.293 (1998).

8 *See, e.g.*, Joseph C. Kearfott & D. Alan Rudlin, *Case Management And Health Claims In Toxic Tort Litigation*, SE73 ALI-ABA 111, 155 n.178 (2000).

9 *See, e.g.*, Michael Dore, *Law of Toxic Torts*, 1 L. of Toxic Torts § 7:10, n. 9 (2003); Lawrence G. Cetrulo, *Toxic Torts Litigation Guide*, 1 Toxic Torts Litig. Guide § 4:15,

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Court of Appeals decisions that medical monitoring is available for plaintiffs who have no actual injury, most practitioners and scholars continue to cite to this Court of Appeals' ruling as reflecting the current state of the law in Michigan.[10]

II.

FAILURE TO GRANT THIS APPEAL WILL FOSTER CONFUSION AND RESULT IN POOR PUBLIC POLICY.

Should this Court decline to review this case and permit the trial to continue on the medical monitoring claim, misinterpretation of *Meyerhoff* will be reaffirmed and the Michigan judiciary can expect to see many more such cases. Permitting medical monitoring claims is poor public policy. We will state some of the most important reasons why this is so.

A. MEDICAL MONITORING WILL LEAD TO A FLOOD OF LITIGATION, CLOGGING ACCESS TO COURTS AND DEPLETING RESOURCES THAT WOULD BE BETTER USED TO COMPENSATE TRULY INJURED INDIVIDUALS.

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n.4 (2003); Dianne M. Nast, *Managing Mass Tort Cases*, 1 Sedona Conf. J. 43, 53 (2000); Craig A. Stevens, *Redland Soccer Club, Inc. v. Department of the Army: The Recovery of Medical Monitoring Costs Under HSCA's Citizen Suit Provision*, 10 Vill. Envtl. L. J. 201, n.48 (1999).

10 *See, e.g.*, Lawrence G. Cetrulo, *Toxic Torts Litigation Guide*, 1 Toxic Torts Litig. Guide § 4:15, n. 4 (2003); Martha A. Churchill, J.D., *Toxic Torts: Proof of Medical Monitoring Damages for Exposure to Toxic Substances,* 25 Am. Jur. Proof of Facts 3d 313 § 23 (2003); Samuel Goldblatt & Laurie Styka Bloom, *A Primer on Medical Monitoring*, SH048 ALI-ABA 499, 508 (2003); Jacob A. Stein, *Stein on Personal Injury Damages*, Stein Treatise § 7:27, n. 56 (2003); *Conning the IADC Newsletters*, 68 Def. Couns. J. 485, 493 (2001); John J. Weinholtz, *Defending "No Injury ... Yet" Medical Monitoring Claims in Class Action Settings*, 30-SPG Brief 17, 19 (2001), Elizabeth J. Cabraser & Fabrice N. Vincent, *Class Certification of Medical Monitoring Claims in Mass Tort Product Liability Litigation*, SE01 ALI-ABA 1, 105 (1999).

If this Court allows the appellate court decision to stand, it will further solidify the view that Michigan courts permit a claim for medical monitoring. The result is likely to attract a flood of new lawsuits to the state. As the United States Supreme Court has recognized in rejecting medical monitoring claims under the Federal Employers' Liability Act (FELA),[11] "tens of millions of individuals may have suffered exposure to substances that might justify some form of substance-exposure related monitoring." *Metro-North Commuter R.R. Co. v. Buckley*, 521 U.S. 424, 440 (1997). Because so many individuals may qualify as potential medical monitoring claimants, contingency fee attorneys will be able to recruit people off the street to serve as plaintiffs. No longer would plaintiffs' attorneys have to wait for injury to file suit. The familiar advertisement, "Have you been injured?" could become, "Don't wait until you're hurt, call now!" *See* Victor Schwartz, *Some Lawyers Ask, Why Wait for Injury? Sue Now*!, USA Today, July 5, 1999, at A17.

As a result, Michigan courts are likely to become clogged with speculative medical monitoring claims. Access to justice for those with present, serious, physical injuries may be delayed or denied. As one court rejecting medical monitoring noted,

> There is little doubt that millions of people have suffered exposure to hazardous substances. Obviously, allowing individuals who have not suffered any demonstrable injury from such exposure to recover the costs of future medical monitoring in a civil action could potentially devastate the court system as well as defendants. . . . There must be a realization that such defendants' pockets or bank accounts do not contain infinite resources. Allowing today's generation of exposed but uninjured plaintiffs to recover may lead

[11] *See* 45 U.S.C. §§ 51 *et seq.* FELA is a federal statute that defines rights and duties in personal injury cases brought by railroad workers against their employer railroads. FELA is the tort equivalent of workers' compensation in the railroad field.

> to tomorrow's generation of exposed and injured plaintiff's [sic] being remediless.

Ball v. Joy Mfg. Co., 755 F. Supp. 1344, 1372 (S.D. W. Va. 1990) (applying Virginia law), *aff'd*, 958 F.2d 36 (4th Cir. 1991), *cert. denied*, 502 U.S. 1033 (1992).[12] In fact, there is no assurance that healthy plaintiffs will even spend their award on medical monitoring. Plaintiffs could seek lump sum damages that are no more than a windfall recovery.[13] As one commentator has noted, "[t]he incentive for healthy plaintiffs to carefully hoard their award, and faithfully spend it on periodic medical examinations to detect an illness they will in all likelihood never contract, seems negligible." 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, 540 (2000); *see also* George W.C. McCarter, *Medical Sue-Veillance: A History and Critique of the Medical Monitoring Remedy In Toxic Tort Litigation*, 45 Rutgers L. Rev. 227, 283 (1993) ("[T]he potential for abuse is apparent."). When prodded by an entrepreneurial plaintiffs'

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12 The recognition that medical monitoring will lead to a flood of litigation is not merely a matter of conjecture. Experience in Louisiana since *Bourgeois v. A.P. Green Indus., Inc.*, 716 So. 2d 355 (La. 1998), has shown this to be true. *See, e.g., Dragon v. Cooper/T. Smith Stevedoring Co., Inc*., 726 So. 2d 1006 (La. App. 1999) (permitting a class action under Louisiana law for medical monitoring for seamen exposed to asbestos); *Scott v. Am. Tobacco Co*., 725 So. 2d 10 (La. App. 1998) (certifying as a medical monitoring class *all Louisiana residents* who were cigarette smokers on or before May 24, 1996 provided that each claimant started smoking on or before Sept 1, 1988), *writ denied*, 731 So. 2d 189 (La. 1999).

13 *See, e.g., Lilley v. Bd. of Sup'rs of La. State Univ*., 735 So. 2d 696 (La. App. 1999), *writ denied*,744 So. 2d 629 (La. 1999). Merely one year after the Louisiana Supreme Court recognized medical monitoring as a cause of action, the trial court awarded $12,000 per plaintiff for medical monitoring *despite the fact the* Bourgeois *court expressly declined to extend its holding to claims for lump sum damages*. *Bourgeois*, 716 So. 2d at 357 n.3. Fortunately, the award was overturned on appeal.

lawyer, any person who was even momentarily exposed to a toxic substance will have a difficult time turning down a windfall.[14]

The experience of litigating asbestos claims over the past several decades vividly illustrates how filings dramatically rise when requirements for filing suits are significantly diminished. Early in the asbestos litigation, courts empathetic to the claims of asbestos plaintiffs deviated from accepted legal principles to permit recoveries that traditionally would have been barred. *See* Victor E. Schwartz & Leah Lorber, *A Letter to the Nation's Trial Judges: How the Focus on Efficiency Is Hurting You and Innocent Victims in Asbestos Liability Cases*, 24 Am. J. Trial. Advoc. 247 (2000) (discussing how judicial efforts to efficiently process asbestos claims by departing from traditional substantive legal standards and easing procedural rules inadvertently encouraged the filing of numerous additional claims). While the courts in such cases undoubtedly had good intentions, the litigation turned into a judicial "disaster of major proportions." Judicial Conference Ad Hoc Committee on Asbestos Litigation, *Report of the Ad Hoc Committee* 2 (1991). Unimpaired plaintiffs are flooding the tort system, causing seventy-eight employers to file for bankruptcy protection, which has led to peripheral defendants bearing disproportionate financial pressure.[15] As a result of all this, the ability of current and future

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[14] Approximately eighty percent of all standard medical testing is paid for by third party insurance. *See* Am. Law Inst., 2 *Enterprise Responsibility for Personal Injury -- Reporters' Study* 379 (1991).

[15] *See, e.g.* Editorial, *Asbestos Dreams*, WALL ST. J., Oct. 17, 2003, at A10, *available at* 2003 WL-WSJ 3982978; *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 821 (1999); Mark A. Behrens & Rochelle M. Tedesco, *Two Forks in the Road of Asbestos Litigation*, MEALEY'S LITIG. REP.: ASBESTOS, Vol. 18, No. 3, Mar. 7, 2003, at 1; Stephen Carroll et al., *Asbestos Litigation Costs and Compensation: An Interim Report* 20 (RAND Inst. for Civil Justice, Sept. 2002); Jennifer Biggs et al., *Overview of Asbestos Issues and Trends* 3 (Dec. 2001), *available at* <http://www.actuary.org/mono.htm> (last visited Nov. 25,

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claimants to obtain full and prompt compensation for their injuries has been seriously jeopardized.[16]

In addition, medical monitoring claims in the workforce setting could fall outside of the workers' compensation system, which could subject employers to endless liability. Generally, workers' compensation systems afford the exclusive remedy for injury in an action by an employee against an employer. *See* Arthur Larson & Lex K. Larson, *Larson's Worker's Compensation Desk Edition* § 100.01 (2000). One exception to this rule is that an employee may sue an employer for any injuries not within the scope of the workers compensation statute. *Id.* This is logical as a general proposition because to hold otherwise would mean that no recovery is available for injuries falling outside of the worker's compensation system. It is not hard to imagine a situation in which, more than six years after a plaintiff was last exposed to a substance, a report is issued indicating that the substance increases the plaintiff's risk of disease and necessitates medical monitoring. *See* Mich. Comp. Laws Ann. § 600.5813 (2003). The employer would then be liable for the cost of monitoring the development of the disease. The examples of situations in which this could happen abound: gas station attendants exposed to gasoline fumes, or barbers and beauticians exposed to chemical fumes from hair products, to name just two. The

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2003); Christopher F. Edley, Jr. & Paul C. Weiler, *Asbestos: A Multi-Billion-Dollar Crisis*, 30 Harv. J. On Legis. 383, 392 (1993).

[16] *See, e.g. In re Asbestos Prods. Liab. Litig.*, 2002 U.S. Dist. LEXIS 16590, at *1-*2 (J.P.M.D.L. 2002) ("filing of mass screening cases is tantamount to a race to the courthouse and has the effect of depleting funds, some already stretched to the limit, which would otherwise be available for compensation to deserving plaintiffs."), *writ denied sub nom., Patenaude v. Owens-Illinois, Inc.*, 531 U.S. 1011 (2000); Mark A. Behrens, *Some Proposals for Courts Interested in Helping Sick Claimants and Solving Serious Problems in Asbestos Litigation*, 54 BAYLOR L. REV. 331 (2002).

practical effect of such a decision would put every employer at risk of becoming responsible for employee health care costs indefinitely.

In sum, this Court should correct the circuit court's misinterpretation of *Meyerhoff* as recognizing the viability of medical monitoring claims absent physical injury. This would stem the widespread filing of medical monitoring claims by unimpaired persons, particularly in the form of class actions. This Court should grant review of this case to carefully assess its potential impact on our judicial system's practical ability to deliver prompt justice to those who need it – the truly injured. *See* Hugh R. Whiting, *Remedy Without Risk: An Overview of Medical Monitoring*, 42 Contemp. Legal Notes Series 29 (Wash. Legal Found., Wash., D.C.), August 2002. Allowing this trial to continue without review will not only waste judicial resources, it will encourage the filing of more claims by healthy plaintiffs for speculative future injuries.

B. OTHER COURTS HAVE WISELY REJECTED MEDICAL MONITORING CLAIMS ABSENT PRESENT, PHYSICAL INJURY.

This Court also should consider a clear trend away from medical monitoring with no injury requirement as an independent cause of action. The Supreme Court of the United States refused to recognize medical monitoring as a cause of action under the very pro-plaintiff-oriented FELA.[17] *See Metro-North*, 521 U.S. 424. Over the past two years, the Supreme Courts of Nevada, Alabama, and Kentucky all have reaffirmed the fundamental principle of the

common law of torts that damages are not recoverable absent a present physical injury; all of these courts rejected medical monitoring claims. These medical monitoring claims related to exposure to a wide range of substances, including asbestos, cigarette smoke, water pollution, and prescription drugs.

1. The United States Supreme Court Has Reviewed and Rejected Medical Monitoring.

In *Metro-North*, the United States Supreme Court ruled 7-2 against allowing a medical monitoring claim brought by a pipefitter against his employer under the FELA for occupational exposure to asbestos. *See* 521 U.S. 424. The case was one which was very sympathetic to the plaintiff. He had literally been covered with asbestos while doing work for the railroad. Yet, the Court closely considered the serious policy concerns militating against adoption of a medical monitoring cause of action. These include the difficulty in identifying which medical monitoring costs are over and above the preventative medicine ordinarily recommended for everyone, conflicting testimony from medical professionals as to the benefit and appropriate timing of particular tests or treatments, and each plaintiff's unique medical needs. *See id.* at 441-42. The Court appreciated that medical monitoring would permit literally "tens of millions of individuals" to justify "some form of substance-exposure-related medical monitoring." *Id*. at 442. Defendants, in turn, would be exposed to unlimited liability; a "flood of less important

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[17] Over the years, FELA has been subject to construction that is very favorable to plaintiffs. *See, e.g*., *Beeber v. Norfolk Southern Corp*., 754 F. Supp. 1364, 1372 (N.D. Ind. 1990) ("If the defendant's negligence, however slight, plays any part in producing plaintiff's injury, the defendant is liable."); *Pry v. Alton & Southern Ry. Co*., 698 N.E.2d 484, 499 (Ill. App. 1992) (stating that under FELA "[o]nly slight negligence of the defendant needs to be proved").

cases" would drain the pool of resources available for meritorious claims by plaintiffs with serious, present injury. *See id*. The Court rejected the argument that medical monitoring awards are not costly and feared that allowing medical monitoring claims could create double recoveries because alternative, collateral sources of payment are often available.

2. The Supreme Court of Nevada Has Refused to Recognize Medical Monitoring.

State supreme courts have considered the policy implications of medical monitoring discussed in *Metro-North* and reached similar conclusions. The Nevada case, *Badillo v. American Brands, Inc.*, involved a collection of smokers and casino workers who brought class actions seeking the establishment of a court-supervised medical monitoring program to aid in the early diagnosis and treatment of alleged tobacco-related illnesses. *See* 16 P.3d 435. The Nevada Supreme Court, responding to a certified question from the United States District Court for the District of Nevada, held that "Nevada common law does not recognize a cause of action for medical monitoring." *Id*. at 438. The court recognized that medical monitoring is "a novel, non-traditional tort and remedy." *Id.* at 441. It understood that changing fundamental tort law rules raises important public policy choices that should be left to legislatures to decide. *See id.* at 440 ("Altering common law rights, creating new causes of action, and providing new remedies, for wrongs is generally a legislative, not a judicial function.").

3. The Supreme Court of Alabama Has Rejected Medical Monitoring Claims in the Absence of a "Manifest, Present Injury."

The Alabama case, *Hinton v. Monsanto Co.*, involved a claim by a citizen who alleged that he had been exposed to polychlorinated biphenyls ("PCBs") that were reportedly released into the environment by the defendant. *See* 813 So. 2d 827, 828 (Ala. 2001). As in Nevada, the

Alabama Supreme Court refused to recognize a medical monitoring cause of action in the absence of a "manifest, present injury." *Id.* at 829. The court stated that "[t]o recognize medical monitoring as a distinct cause of action . . . would require this court to completely rewrite Alabama's tort-law system, a task akin to traveling in uncharted waters, without the benefit of a seasoned guide" – a voyage on which the court was "unprepared to embark." *Id.* at 830. The court also discussed a number of public policy concerns, such as a potential avalanche of claims and the unlimited liability exposure for defendants. *Id.* It realized that "a 'flood' of less important cases" would drain the pool of resources available for meritorious claims by plaintiffs with serious, present injury and adversely affect the allocation of scarce medical resources. *Id.* at 831 (quoting *Metro-North*, 521 U.S. at 442 (internal citations omitted)). The court concluded: "we find it inappropriate . . . to stand Alabama tort law on its head in an attempt to alleviate [plaintiffs'] concerns about what *might* occur in the future. . . . That law provides no redress for a plaintiff who has no present injury or illness." *Id.* at 831-32.

4. The Supreme Court of Kentucky's Recent Ruling Signals a Clear Trend by Courts Away from Medical Monitoring.

Most recently, the highest court in Kentucky joined those in Nevada and Alabama in rejecting medical monitoring claims. In *Wood v. Wyeth-Ayerst Laboratories*, the plaintiff sought the creation of a court-supervised medical monitoring fund, for herself and as representative for a class of patients, to detect the possible onset of primary pulmonary hypertension from ingesting the "Fen-Phen" diet drug combination. 82 S.W.3d 849 (Ky. 2002). The Kentucky Supreme Court, citing cases dating as far back as 1925, recognized that "This Court has consistently held that a cause of action in tort requires a present physical injury to the plaintiff." *Id.* at 852. The

court said the same has been true in recent toxic torts cases: "until such time as the plaintiff can prove some harmful result from the exposure . . . this cause of action has yet to accrue." *Id.* (quoting *Capital Holding Corp. v. Bailey*, 873 S.W.2d 187, 195 (Ky. 1994)). The court then concluded that "all of these cases lead to the conclusion that a plaintiff must have sustained some physical injury before a cause of action can accrue. To find otherwise would force us to stretch the limits of logic and ignore a long line of legal precedent." *Id*. at 853-54.

C. THE UNSOUND ALTERNATIVE: THE WEST VIRGINIA "ANYONE CAN SUE" APPROACH TO MEDICAL MONITORING.

West Virginia provides a practical example of the adverse impacts of allowing medical monitoring claims when the plaintiffs have not been injured. In 1999, the Supreme Court of Appeals of West Virginia established an independent cause of action for an individual to recover future medical monitoring costs absent physical injury. *See Bower v. Westinghouse Elec. Corp.*, 522 S.E.2d 424, 432-33 (W. Va. 1999).[18] In that case, the plaintiffs, who had no present symptoms of any disease, alleged that they were exposed to toxic substances as a result of defendants maintaining a pile of broken glass debris from the manufacture of light bulbs. *Id.* at 426-27. While the court set forth certain factors to guide courts in medical monitoring cases, it also said that the amount of exposure to a toxic substance required to file a suit does not have to correlate with a level sufficient to cause injury. *Id.* at 433-34. As a result, in West Virginia, uninjured plaintiffs can sue under a distinct medical monitoring cause of action even when

[18] In February 2003, the West Virginia Supreme Court of Appeals applied *Bower* to reverse a circuit court order denying class certification to five thousand users of an allegedly defective prescription drug, Rezulin, who sought to recover costs of medical monitoring. *See In re W. Va. Rezulin Litig.*, 585 S.E.2d 52 (W. Va. 2003).

testing is not medically necessary or beneficial, and not have to spend any of the award on medical monitoring. In a dissenting opinion, Justice Maynard asserted, "the practical effect of this decision is to make almost every West Virginian a potential plaintiff in medical monitoring cause of action." *Id*. at 435. And plaintiffs they became.

It used to be that only sick smokers sued cigarette makers. But shortly after the *Bower* decision, plaintiffs' lawyers filed a class-action suit on behalf of approximately 250,000 West Virginia smokers who had not been diagnosed with any smoking-related illnesses against the major cigarette manufacturers. *See In re Tobacco Litig. (Medical Monitoring Cases)*, Civ. Action No. 00-C-6000 (W. Va. Ohio County Cir. Ct. 2001) (also known as "the Blankenship case"). In November 2001, the jury ruled that cigarettes are not a defective product, that cigarette makers were not negligent in designing, making, or selling them, and that medical monitoring was unnecessary. *See* Vicki Smith, *Jury Rejects Smokers' Suits Seeking Free Medical Tests; Case 1st of Kind in U.S.*, Charlotte Observer, Nov. 15, 2001, at 12A.[19] Trying such a case, however, is an extraordinary waste of judicial resources.

Medical monitoring is a primary reason the rulings of courts in West Virginia are considered unfair and imbalanced.[20] West Virginia has held the distinction of being named the

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[19] This verdict occurred after an initial mistrial in January 2001 after a witness made a reference to "addiction," a word banned from testimony by the trial court because it raised issues of individual behavior and reasons for smoking that were not common to the class. *See Smith, supra*. The West Virginia Supreme Court of Appeals is currently considering the plaintiffs' appeal of the verdict and request for another trial. *See* Chris Wetterich, *Smokers Want Another Trial; Evidence Unheard, Lawyers Argue, in Medical Monitoring Lawsuit*, Charleston Gazette, Nov. 6, 2003, at 1C.

[20] See Robert D. Mauk, *McGraw Ruling Harms State's Reputation in Law, Medical Monitoring*, Charleston Gazette, Mar. 1, 2003, at 5A ("[T]he Bower medical-monitoring ruling has cast a shadow over our state's reputation in the legal field. It affects West

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only statewide "Judicial Hellhole" by the American Tort Reform Association[21] for two years running, which some commentators agree is well deserved.[22] The state also ranked second to last among the states in creating a fair and reasonable litigation environment by a U.S. Chamber of Commerce study in both 2002 and 2003. *See* U.S. Chamber of Commerce, *2003 State Liability Systems Ranking Study: Final Report* 15 (Harris Interactive 2003), *available at* <http://www.legalreformnow.com/pdfs/2003Harris.pdf>.

The minority view, as expressed in the West Virginia case and elsewhere, that increased risk of future injury from exposure to a toxin is akin to a physical injury from a car accident is false. 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, 841 (2002). As Professors Henderson and Twerski, who as reporters for the recent Restatement (Third) of Torts are the nation's leading academic tort experts, wrote, "[f]rom the beginning of our negligence jurisprudence, 'injury' has been synonymous with 'harm' and connotes physical impairment or dysfunction, or mental upset, pain and suffering resulting from such harm." *Id.* at 842. It has been the "linchpin in determining the duties of care owed by

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Virginia's jobs, taxes, health care and the public credibility of our courts."); *see also* Editorial, *Legislators Need to Restrict the Legal Industry on This One*, Charleston Gazette, Feb. 19, 2003, at 4A ("People should be compensated for injuries caused by the negligence of others. But lawyers should not profit from imaginary harm.").

[21] Am. Tort Reform Ass'n, Bringing Justice to Judicial Hellholes 9-10, 18 (2003), *available at* <http://www.atra.org/reports/hellholes/report.pdf>.

[22] *See, e.g.*, *Group's Unflattering Picture of State is an Accurate Label*, News & Sentinel (Parkersburg, W. Va.), Nov. 14, 2003, *available at* <http://newsandsentinel.com/edit/story/1114202003_edt01_AccurateLabel.asp> ("One infamous example cited by the association is the state Supreme Court's 'medical monitoring' rule. . . . It's no wonder the

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defendants." *Id.* Allowing a claim without injury should be "neither 'only remedial' nor 'business as usual.'" *Id.* And it certainly should not result from the misapplication of judicial precedent.

CONCLUSION

For these reasons, *Amici Curiae* respectfully request this Court to grant Defendant-Appellant The Dow Chemical Company's emergency application for leave to appeal, enter a stay of the proceedings, and, after reviewing the issues presented, enter an Order dismissing the Plaintiffs' medical monitoring claims as a matter of law. In the alternative, *Amici* respectfully request that this Court enter an order peremptorily revising the trial court's August 18 Order and dismissing Plaintiffs' medical monitoring claims or that this Court remand the case to the Court of Appeals with directions to grant Dow's emergency application and stay all proceedings pending appellate review.

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business world is afraid of West Virginia. And thus, it's no wonder we lag behind other states in creation of new jobs."); Mauk, *supra* note 20, at A5.

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