SUPREME COURT
OCT 2004
TERM

STATE OF MICHIGAN

IN THE SUPREME COURT

GARY AND KATHY HENRY, et al,

Plaintiffs, Appellees,

-vs-

THE DOW CHEMICAL COMPANY,

Defendant-Appellant,

_____/

Supreme Court
No. 125205

Court of Appeals
No. 251234

Saginaw County Circuit Court
No. 03-047775 NZ

THE DEFENSE RESEARCH INSTITUTE AND THE MICHIGAN DEFENSE TRIAL COUNSEL'S AMICUS BRIEF

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STATEMENT OF THE QUESTION PRESENTED

DID THE TRIAL COURT ERR IN RECOGNIZING A CAUSE OF ACTION RESULTING IN DAMAGE FOR MEDICAL MONITORING WHERE THE PLAINTIFFS HAVE NOT YET SUFFERED PHYSICAL ILLNESS OR A PHYSICAL INJURY?

Plaintiffs-Appellees answer "No"

Defendant-Appellant the Dow Chemical Company answers "Yes."

Amicus Curiae the Defense Research Institute and the Michigan Defense Trial Counsel answer "Yes."

The trial court did not answer this question but would presumably answer "No."

STATEMENT OF FACTS

Amicus Curiae Defense Research Institute and the Michigan Defense Trial Counsel adopt the statement of facts and proceedings set forth in the brief on appeal of the defendant-appellant the Dow Chemical Company.

STATEMENT OF THE STANDARD OF REVIEW

This Court reviews *de novo* questions of law. *Cardinal Mooney High School v Michigan High School Athletic Ass'n,* 437 Mich 75, 80; 467 NW2d 21 (1991). A trial court's ruling on a motion for summary disposition is also reviewed *de novo*, *Maskery v Board of Regents of the University of Michigan,* 468 Mich 609; 664 NW2d 165, 167 (2003); *Hinkle v Wayne County Clerk,* 467 Mich 337, 340; 654 NW2d 315 (2002); and *Maiden v Rozwood,* 461 Mich 109; 597 NW2d 817 (2000). In engaging in such review, the appellate court must study the record to determine if the movant was entitled to judgment as a matter of law, *Groncki v Detroit Edison Co,* 453 Mich 644, 649; 557 NW2d 289 (1996) and *Adkins v Thomas Solvent Co,* 440 Mich 293, 302; 487 NW2d 715 (1992). Stated otherwise, giving the benefit of doubt to the non-movant, an appellate court is charged with independently determining whether the movant would have been entitled to judgment as a matter of law.

In the court below, the Dow Chemical Company moved for summary disposition pursuant to MCR 2.116(C)(8). A motion under MCR 2.116(C)(8) tests the legal sufficiency of a complaint on the basis of the pleadings alone, *Beaudrie v Henderson*, 465 Mich 124, 129-130; 631 NW2d 308 (2001). The purpose of such a motion is to determine whether the plaintiff has stated a claim upon which relief can be granted. *Id.* A motion brought under (C)(8) is properly granted if no factual development could justify recovery, *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998) and *MacDonald v PKT, Inc*, 464 Mich 322; 628 NW2d 33 (2001).

ARGUMENT

THE TRIAL COURT ERRED IN RECOGNIZING A CAUSE OF ACTION RESULTING IN DAMAGE FOR MEDICAL MONITORING WHERE PLAINTIFF HAS NOT YET SUFFERED PHYSICAL ILLNESS OR A PHYSICAL INJURY

A. MEDICAL MONITORING ABSENT A PRESENT INJURY INVOLVES A SIGNIFICANT DEPARTURE FROM MICHIGAN'S COMMON-LAW.

The trial court's August 18, 2003 order recognizing medical monitoring as a cause of action absent a present injury is contrary to Michigan common law. The error in the trial court's order is clear and is contrary to the rulings of this court. The trial court erred by misinterpreting this Court's decision in *Meyerhoff v Turner Construction Co*, 456 Mich 933; 575 NW2d 550 (1998), which vacated a prior court of appeals ruling on medical monitoring, *Meyerhoff v Turner Construction Co*, 210 Mich App 491; 534 NW2d 204 (1995). See also, *Meyerhoff v Turner Construction Co*, 202 Mich App 449; 509 NW2d 847 (1993) vacated by 447 Mich 1022; 527 NW2d 513 (1994).

A decision that has been vacated has no effect or precedential value. *Graves v American Acceptance Mortgage Corp*, 469 Mich 608, 619; 677 NW2d 829 (2004) (Weaver, J, concurring). Other precedent from this Court establishes that future damages must be reasonably certain to result from the original injury. *See, e.g. Adkins v Thomas Solvent Co,* 440 Mich 293; 319; 487 NW2d 715 (1992); *Larson v Johns-Manville,* 427 Mich 301, 317; 399 NW2d 1 (1986); *Prince v Lott,* 369 Mich 606, 609; 120 NW2d 780 (1963); *King v Neller,* 228 Mich 15, 22; 199 NW 674 (1924); *Brininstool v Michigan United Ry Co,* 157 Mich 172, 180; 121 NW 728 (1909). Based upon this Court's decision in *Meyerhoff,* 456 Mich 933, *Meyerhoff*, 447 Mich 1022, and Michigan common law, the trial court's order recognizing medical monitoring as a cognizable claim absent a present injury constitutes reversible error.

1. THIS COURT'S DECISIONS IN *MEYERHOFF* DO NOT SUPPORT THE TRIAL COURT'S AUGUST 18, 2003 ORDER.

The trial court's order denying Dow's motion for summary disposition is based on a fundamental misinterpretation of this Court's decision in *Meyerhoff v Turner Construction Co,* 456 Mich 933; 575 NW2d 550 (1998). In *Meyerhoff,* this Court vacated a Court of Appeals' decision that had recognized medical monitoring claims as actionable. See, *Meyerhoff v Turner Construction Co,* 202 Mich App 449; 509 NW2d 847 (1993) vacated by 447 Mich 1022; 527 NW2d 513 (1994).[1] In vacating the Court of Appeals' decision in *Meyerhoff,* this Court, in part, explained that "... [t]he factual record is not sufficiently developed to allow... medical monitoring damages." *Meyerhoff,* 456 Mich at 933.

By vacating the Court of Appeals' decision in *Meyerhoff,* this Court, in its 1998 opinion and order, nullified the only authority in Michigan that has ever recognized medical monitoring claims as actionable. In its 1998 opinion and order, this Court rejected plaintiffs' medical monitoring claims based on the legal deficiency of the factual allegations in the plaintiffs' pleadings. The trial court here misinterpreted the Court's order believing that the Court's decision went to the kind and weight of the factual evidence. Yet, in *Meyerhoff,* no "factual evidence" had ever been "developed" at the time this Court rejected plaintiffs' medical monitoring claims. Therefore, the Court's reference to the insufficiency of the factual record was directed to the absence of any allegations in the record below describing manifest physical injuries for which medical monitoring damages were sought.

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[1]This Court first vacated the 1993 decision on another ground. See, *Meyerhoff v Turner Construction Co,* 447 Mich 1022; 527 NW2d 513 (1994). When the Court of Appeals persisted in recognizing the cause of action on remand, see 210 Mich App 491, this Court granted review for a second time and again vacated the Court of Appeals' decision. *Meyerhoff,* 456 Mich at 933.

Had this Court in *Meyerhoff* found the legal deficiency in plaintiff's medical monitoring claims to be a lack of *factual* evidence to support the allegations, the Court would have remanded the case to the trial court with instructions to allow plaintiffs to "develop" a "record" of factual evidence to support their claims. Instead, this Court vacated the Court of Appeals' decision in *Meyerhoff* because, even if a "factual record" were developed, the plaintiffs' pleadings based upon medical monitoring were insufficient as a matter of law.

In the present case, the trial court's misinterpretation of the Court's order vacating and nullifying the Court of Appeals' decision recognizing medical monitoring claims, led the trial court to enter its manifestly erroneous order of August 18, 2003. The trial court's conclusion that plaintiffs should be permitted the opportunity to develop a factual record in support of their medical monitoring claims is a fundamental misunderstanding of the state of the law in Michigan on medical monitoring after this Court's decision in *Meyerhoff.*

2. MICHIGAN COMMON LAW DOES NOT SUPPORT A CAUSE OF ACTION FOR MEDICAL MONITORING ABSENT A PRESENT INJURY.

The trial court's recognition of a cause of action for medical monitoring absent a present injury is contrary to Michigan common law. Well-established principles of Michigan law make clear that a claim for potential injuries (such as a claim for medical monitoring expenses associated with the risk of, but not the fact of, suffering a compensable injury) is not actionable. See, *Adkins v Thomas Solvent Co,* 440 Mich 293; 487 NW2d 715 (1992); *Larson v Johns-Manville Sales Corp,* 427 Mich 301; 399 NW2d 1 (1987). More recent decisions from this Court further confirm that actionable claims are limited to suits alleging physically manifest injuries actually sustained before the suit was filed. See *Wickens v Oakwood Healthcare System,* 465 Mich 53; 631 NW2d 686 (2001); *Weymers v Khera*, 454 Mich 639; 563 NW2d 647 (1997); *Adkins, supra,* 440 Mich at 310. Invoking the traditional concept of *damnum absque injuria,* a

loss without an injury, this Court distinguished between a proper element of damages and a legally cognizable injury. This argument undercuts plaintiffs' contention that because future medical monitoring costs may be recoverable in a negligence action, such damages constitute a claim for recovery in and of themselves. To be sure, the *Adkins* court did not deal with plaintiffs who were alleging an increased risk of illness, *Adkins, supra,* 440 Mich at 318. But the rationale that persuaded the majority of this Court to refuse to expand nuisance recovery is equally applicable in this case.

The *Adkins* court cautioned that recognizing the plaintiffs' theory would permit numerous individuals a cause of action even absent a traditionally cognizable injury. Further, the Court emphasized that the ultimate effect might be a reordering of polluters' resources for the benefit of persons who have suffered no cognizable harm at the expenses of those claimants who have been subjected to a substantial and unreasonable interference in the use and enjoyment of property. *Id.* The Court noted that corporations engaging in conduct causing environmental contamination or exposure often seek protection in bankruptcy court, and thus, not all claimants will recover. Given this fact, coupled with the existence of numerous federal and state statutes providing remedies, the Court concluded that "the significant interests involved appear to be within the realm of those more appropriate for the Legislature." *Id.*

This Court's decision in *Larson*, *supra,* 427 Mich 301 also provides support for the conclusion that an existing injury is a predicate to tort recovery. In *Larson, supra*, the Court examined the accrual of causes of action by a group of plaintiffs who developed asbestosis[2] and by a group of plaintiffs who developed asbestosis and later cancer, but who had not previously

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[2]Asbestosis, the most common of asbestos-related diseases, is the nonmalignant scarring of lung tissue which can lead to reduced pulmonary function.

brought an action for their asbestosis. This Court was asked to determine whether the actionable injury occurred at the time of the exposure (the inhalation of asbestos) or when the resultant harm (disease) was discovered.

The Court noted that the plaintiffs in asbestos cases are normally exposed to asbestos many years before they suffer "measurable harm" from the exposure. *Larson, supra*, at 311. Acknowledging that the time lag between exposure to asbestos and the onset of asbestosis ranges from ten to forty years, this Court stated:

> [I]f a worker files suit on the day he commences or terminates employment which involves breathing asbestos dust, he may as yet have no signs of developing asbestosis. *Such a suit would be readily dismissed since there has been no injury*, and thus, "no cause of action shall have accrued. . . ."

Id., quoting *Strickland v Johns-Manville Int'l Corp.* 461 F Supp 215 (SD Tex, 1978) (emphasis added). The Court adopted the "discovery rule" for asbestosis claim accrual, in part because it did not want to encourage plaintiffs to pursue claims when they would be unable to determine whether they had been injured. *Larson, supra*, 427 Mich at 311-12.

The Court next examined the claims of plaintiffs who developed asbestosis but did not pursue a cause of action until they later developed cancer. The Court reasoned that asbestos claims involve special needs for several reasons:

- since the beginning of World War II, between eleven to thirteen million workers have been exposed to asbestos;
- since the early 1970's, over 30,000 claims have been filed against asbestos manufacturers;
- concern over the ability of future claimants to receive adequate compensation because of recent bankruptcy filings . . . and the growing numbers and costs of the claims.

427 Mich at 316-317. The Court also examined the fairness to the plaintiffs, determining that if the plaintiffs' causes of action accrued at the onset of asbestosis, they would not have been able to prove future damages for the possibility of contracting cancer. The Court stated:

> [I]n order to recover damages on the basis of future consequences, it is necessary for a plaintiff to demonstrate with "reasonable certainty" that the future consequences will occur. *Prince v Lott,* 369 Mich 606, 609; 120 NW2d 780 (1963); *King v Neller,* 228 Mich 15, 22; 199 NW 674 (1924) ("only such future damages can be recovered as the evidence makes reasonably certain will necessarily result from the injury sustained.")

Larson, supra at 317. The Court stated that the plaintiffs could not have proven with a reasonable certainty that they would develop cancer because only fifteen percent of people with asbestosis later develop cancer. *Id.*

The *Larson* court concluded that the discovery rule of claim accrual applied to cases where a plaintiff with asbestosis later developed cancer, limited to those plaintiffs who did not earlier bring a cause of action for asbestosis. The Court noted that allowing victims to wait for the appearance of cancer before suing was "infinitely preferable," and that it wanted to:

> [D]iscourag[e] suits for relatively minor consequences of asbestos exposure [, which] will lead to a fairer allocation of resources to those victims who develop cancers. Rather than encouraging every plaintiff who develops asbestosis to recover an amount of money as compensation for the chance of getting cancer, we prefer to allow those who actually do develop cancer to obtain a full recovery.

Larson, supra, 427 Mich at 319 (emphasis added).

Thus, the *Larson* court determined that in the timeline of a plaintiff's life, the plaintiff was not injured at the time of the inhalation of the asbestos; was injured and could sue upon the discovery of asbestosis; or, preferably, could wait to see if cancer later developed and sue upon its occurrence. The *Larson* court, in characterizing asbestosis as a "relatively minor consequence" of asbestos exposure, emphasized that it preferred that the defendants' resources be more fairly allocated to those who later develop cancer. *Larson, supra,* 427 Mich at 311, 319.

The *Larson* court plainly stated that a plaintiff who has yet to suffer from an asbestos-related disease has not suffered an injury. 427 Mich at 311, 312. The Court further stated that even plaintiffs with asbestosis could not prove with reasonable certainty that they would contract cancer since the relationship between exposure to asbestos and cancer was so small. *Id.* at 317. This analysis is consistent with traditional tort principles.

Michigan common law, like the common law of other jurisdictions, has been that a plaintiff must suffer actual injury before he or she will receive an award in tort. *Brininstool v Michigan United Ry Co,* 157 Mich 172; 121 NW 728 (1909). *See also Urie v Thompson,* 337 US 163, 170; 69 S Ct 1018 (1949) (in FELA context, court holds that there is a compensable injury only when "the accumulated effects of the deleterious substance manifest themselves"). The actual injury requirement flows from the notion that tort law needs some basic boundaries. Indeed, this Court's decisions in *Larson* and *Adkins* reflect the Court's predisposition for leaving intact the basic boundaries of tort law.

B. THIS COURT SHOULD NOT DEVIATE FROM TRADITIONAL TORT PRINCIPLES TO ACCOMMODATE MEDICAL MONITORING.

The trial court's August 18, 2003 order constitutes reversible error because it is a departure from a basic tenet of tort law: an existing injury is a predicate to the recovery of damages. Restatement of Torts, 2d, § 902, (1965) Comment a . This suit is an attempt to exponentially expand the boundaries of traditional common law tort theory to encompass a vastly increased number of lawsuits for toxic torts or environmental exposure of various kinds and in various circumstances. *See* Lindheim, Self-Insurers & Risk Managers: Annual Survey, 27 Tort & Insurance Law Journal, pp 445-449 (1992). The trial court's order undermines traditional tort law. Furthermore, numerous courts have rejected medical monitoring as a cause of action, absent a present injury, based upon the principles of traditional tort law.

1. UNDER TRADITIONAL TORT LAW THE MERE POSSIBILITY OF A FUTURE HARM IS INSUFFICIENT TO RECOVER DAMAGES.

Under common law principles, the mere possibility of future harm is not a sufficient basis for recovery. Prosser & Keeton on the Law of Torts (5th ed 1984), § 30, p 165 . Present injury is the "proof"—a tangible recognition that the tort has occurred, which becomes a touchstone for future damages. Present injury is concrete and does not require speculation. The requirement of a present injury ensures a fair assessment of beneficial medical treatment, is a standard for certainty, and safeguards against speculative and fraudulent claims. *See* Farber, *Toxic Causation*, 71 Minn L R 1219 (1987); Parnell, Curia, & Bridges, *Medical Monitoring: A Dangerous Trend, For the Defense*, p 6 (April 1992). Since plaintiffs do not have present injuries, it is a quantum leap to assume that future damages will incur. In other words, the absence of a present injury rules out a finding that future damages are " reasonably certain" to occur. Thus, to grant plaintiffs' relief, the common-law must be drastically altered.

Courts are often challenged by litigants to be progressive and to adjust the lines of liability to accommodate new theories under notions of social justice or policy. *See, e.g. Falcon v Memorial Hospital*, 436 Mich 443; 462 NW2d 44 (1990) (loss of opportunity to survive elevated to compensable item of damage in a wrongful death case).[3] Those urging for a change in the law, especially tort law, often suggest that the existing boundaries of liability are arbitrary and should not stand as an obstacle to expanding liability. The proponents of change argue forcefully that it is the essence of judicial function to draw lines, and to redraw such lines when necessary. The emphasis on expanding liability should not outweigh policy considerations for retaining the existing law:

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[3]In 1994, the Michigan legislature abrogated the *Falcon* opinion. A lost opportunity is not now a compensable item of damage in Michigan. MCL 600.2912a(2); MSA 27A.2912a(2).

> Characterizing a rule limiting liability as "unprincipled" or "arbitrary" is often the result of overemphasizing the policy considerations favoring imposition of liability, while at the same time failing to acknowledge any countervailing policies and the necessary compromise between competing and inconsistent policies informing the rule.

Consolidated Rail Corp v Gottshall, 114 S Ct 2396, 2411; 512 US 532; 129 L Ed 2d 427 (1994), quoting with approval *Cameron v Pepin,* 610 A2d 279, 283 (Me, 1992).

Medical monitoring creates the real possibility of nearly infinite and unpredictable liability for defendants. Medical monitoring, if adopted, is the first step in overcoming historic reticence to common law recognition of emotional and fear claims as the equivalent of traditional tort claims. Furthermore, the adoption of medical monitoring for asymptomatic patients does not assist the Court in developing clarity, logic, and stability in the law. Medical monitoring cannot, in any sense of the word, be considered an incremental development from the traditional law of torts. Prosser stated: "Some boundaries must be set to liability for the consequence of any act, upon the basis of some social idea of justice or policy." Prosser & Keeton on the Law of Torts (5th ed 1984), § 41, p 264 . One of those boundaries in the law of damage is the rule of certainty, by which proof of damages must be based on factual evidence, not on mere speculation. This is the cornerstone of this Court's opinions in *Larson* and *Adkins.* The Court should not wander beyond the basic boundary of the law of damages to accommodate the vagaries suggested as beneficial to potential medical monitoring plaintiffs.

2. NUMEROUS COURTS HAVE REJECTED MEDICAL MONITORING AS A CAUSE OF ACTION ABSENT A PRESENT INJURY.

In numerous jurisdictions, the courts have specifically required a physical injury before recognizing medical monitoring as an element of damage (and thus rejected an independent medical monitoring tort). See *Metro-North Commuter RR Co v Buckley,* 521 US 424, 442; 117 S Ct 2113; 138 L Ed 2d 560 (1997) (where the court rejected medical monitoring claims under

FELA and noting that "tens of millions of individuals may have suffered exposure to substances that might justify some form of substance exposure related medical monitoring"); *Hinton v Monsanto Co*, 813 So 2d 827, 828-829 (Ala, 2001) (the court answered a certified question by rejecting medical claims under Alabama's requirement that claimants allege a "manifest, present injury before [they] recover in tort"); *Badillo v American Brands, Inc,* 16 P3d 435, 441 (Nev, 2001) (the Court answered a certified question and held that "Nevada common law does not recognize a cause of action for medical monitoring"); *Wood v Wyeth-Ayerst Labs*, 82 SW3d 849, 852 (Ky, 2002) (granting discretionary review and rejecting a medical monitoring cause of action because "a cause of action in tort requires a present physical injury to the plaintiff") (applying Kansas law); *Haggerty v L&L Marine Services, Inc*, 788 F2d 315, 319 (CA 5, 1986) (applying Lousiana law).

Other courts have specifically rejected recovery for medical monitoring where the plaintiff has not suffered physical injury or physical illness, thus retaining the tradition of common-law present injury rule. *See, e.g. Thomas v FAG Berrings Corp*, 846 F Supp 1400, 1410 (WD Mo, 1994) (applying Missouri law); *Carrol v Litton Systems, Inc*, 1990 US Dist LEXIS 16833 at 148-153 (WD NC, 10/29/90) (North Carolina law); *Mergenthaler v Asbestos Corp of America*, 480 A2d 647, 651 (De,l 1984); *Hayes v AC & S, Inc*, Docket No. 94-CH 1835, opinion, pp 12-14 (Circuit Court for Cook County, Illinois, rel'd 10/30/96); *Purjet v Hess Oil Virgin Island Corp*, 1986 WL 1200, p 4 (Dist VI 1/8/86) (Virgin Island law) and *Ball v Joy Mfg Co*, 755 F Supp 1344 (SD W Va, 1990) *aff'd* 958 F2d 36 (CA 4, 1991) (Virginia and West Virginia law).

The United States Supreme Court recently declined to take such a drastic step in *Consolidated Rail Corp v Gottshall*, 512 US 532; 114 S Ct 2396; 129 L Ed 2d 427 (1994)

(standard for evaluating claims under Federal Employer's Liability Act [FELA]) (for negligent infliction of emotional distress must be derived from the applicable statute *and* from relevant common-law doctrine). The *Gottshall* majority worked from the premise that "policy considerations mandate that infinite liability be avoided by restrictions that . . . narrow the class of potential plaintiffs." 114 S Ct at 2405-2406, quoting *Thing v La Chusa*, 48 Cal 3d 644; 771 P2d 814, 819 (Cal, 1989). Holding that the court would not take the "radical step of reading FELA as compensating for stress arising in the ordinary course of employment," 114 S Ct at 2412, the *Gottshall* majority refused to cross the uncharted waters of infinite liability which had not yet been fully developed in the common-law:

> Every injury has ramifying consequences, like the ripplings of the waters, without end. The problem for the law is to limit the legal consequences of wrongs to a controllable degree. [Quoting *Tobin v Grossman*, 301 NYS2d 554, 560; 249 NE2d 419, 424 (1969)] . . . [T]here are clear judicial days on which a court can foresee forever and thus determine liability but not on which that foresight alone provides a socially and judicially acceptable limit on recovery. [Quoting *Thing, supra,* 771 P2d at 830].

Gottshall, supra, 114 S Ct at 2409 (citations omitted).

Only a handful of jurisdictions have recognized a medical monitoring tort absent present physical injury. *See, e.g.* New Jersey, *Ayers v Jackson Twp*, 106 NJ 557; 525 A2d 287 (1987)[4]; California, *Potter v Firestone Tire & Rubber Co*, 25 Cal Rptr 2d 550; 863 P2d 795 (1993); Utah, *Hansen v Mountain Fuel Supply Co,* 858 P2d 970 (Utah, 1993); Arizona, *Burns v Jaquays Mining Corp*, 752 P2d 28 (Ariz App, 1987) and New York *Askey v Occidental Chemical Corp*,

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[4]The *Ayers* opinion has been significantly undercut by a 1993 New Jersey Supreme Court opinion, entitled *Theer v Philip Carey Co*, 133 NJ 610; 628 A2d 724 (NJ, 1993), in which the court held that medical monitoring may be pursued only by persons who have experienced a "direct" exposure to a hazardous substance or have suffered a physical injury as a result of the exposure. 628 A2d at 733.

477 NYS 2d 242; 102 AD2d 130 (App Div, 1984). *See also Simmons v Pacor, Inc*, 543 Pa 664; 674 A2d 232 (Penn, 1996) (court requires physical injury in asbestos context, but concludes that plural thickening is sufficient as an identifiable physical consequence of asbestos exposure; holding subsequently interpreted to mean that recovery from medical monitoring requires proof of "demonstrable physical consequence" caused by exposure. *Fried v Sungard Recovery Services*, 936 F Supp 310, 311 [ED Penn, 1996]).[5]

Yet, in this case, the plaintiffs have failed to make a compelling case why Michigan courts should abandon one of the basic boundaries of tort liability, namely the need for a present injury. A claim for medical monitoring where a plaintiff has suffered no present physical injury or physical illness is a novel theory of damages, or a new cause of action, that is contrary to the traditional common-law principles of this state. *See Larson, supra; Adkins, supra.* While medical monitoring may be recognized in a small minority of jurisdictions, but the plaintiffs fail to adequately address the inappropriateness of allowing medical monitoring for asymptomatic patients. This is especially true when the issue presented transcends so many public policy and highly debated healthcare and insurance-related issues.

Medical monitoring, absent a present injury carries, at best, a speculative value. The accuracy of screening tests and the efficacy of early detection bode against recognition of the doctrine. The existing medical science suggests that inappropriate medical monitoring is not benign: it carries a cost to the tested claimant.

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[5]There are some federal cases in which the courts have attempted to predict state law jurisprudence and determined, absent any controlling authority, that medical monitoring would be recognized in those states. See, e.g. *Cook v Rockwell Int'l Corp*, 755 F Supp 1468, 1476-1477 (Dist Colo, 1991) (Colorado law); *Day v NLO, Inc*, 851 F Supp 869, 879-882 (SD Ohio, 1994) (Ohio law); *Bocoock v Ashland Oil, Inc*, 819 F Supp 530 (SD W Va, 1993) (Kentucky law).

Furthermore, this Court should actively consider the impact on the civil judicial system in this state if asymptomatic medical monitoring is allowed. The volume, scope, and speculative nature of the litigation warrant judicial abstention. The asymptomatic medical monitoring claimant is not unfairly treated because, once symptomatic, the existing system exists to address the claim.

The case against monitoring for asymptomatic plaintiffs was best made by the court in *Ball, supra,* in which it stated:

> 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. Again, this is not to say that defendants who have caused such exposure should not pay the price. Certainly, theoretically both justice and common sense dictate that they should, however, practically, 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 to tomorrow's generation of exposed and injured plaintiff's [sic] being remediless. Thus to prevent one injustice from arising from another, the finite resources available must be spent both cautiously and wisely. This basic dilemma has plagued tort law since its inception. Because of it, lines, sometimes arbitrary, have been drawn, and will continue to be drawn, to limit and delineate the when's and if's individuals will be allowed recovery for a wrong committed against them.

755 F Supp at 1372.

C. THE COST/BENEFIT CALCULUS DOES NOT SUPPORT A CAUSE OF ACTION FOR MEDICAL MONITORING ABSENT A PRESENT INJURY.

Recognition of a cause of action for medical monitoring absent a present injury would create the type of speculative claim that would be costly to the claimants, severely hamper the limited resources of the judicial system, and limit the monetary amount defendants could potentially pay plaintiff's who have suffered an actual injury.

1. THE COSTS OF TESTING TO THE CLAIMANT.

It is wrong to conclude that ineffective medical screening carries no cost to the claimant. The use of inaccurate screening test carries a high price. Those persons who receive a false-negative result[6] "may experience important delays in diagnosis and treatment . . . [and may] develop a false sense of security, resulting in inadequate attention to risk-reducing behaviors and delays in seeking medical care when warning symptoms become present." Task Force Guide, *supra*, p xliii.

Persons who receive false-positive results[7] may be subject to follow-up testing, with this accompanying expense, inconvenience, and possibly deleterious effect, as well as unnecessary treatment. False-positive results may understandably lead persons to experience "unnecessary anxiety until the error is corrected." Task Force Guide, *supra*, p xliv.

It is not only the inaccuracy of screening tests that may result in harm to the patient, but also the pure ineffectiveness of early detection. As explained in the Task Force Guide, *supra*:

> Potential adverse effects of interventions must also be considered in assessing overall health impact, but often these effects receive inadequate attention when effectiveness is evaluation. For example, the widely held belief that early detection of disease is beneficial leads many to advocate screening even in the absence of definitive evidence of benefit. Some may discount the clinical significance of potential adverse effects. A critical examination will often reveal that many kinds of testing, especially among ostensibly healthy persons, have potential direct and indirect adverse effects. Direct physical complications from test procedures (e.g. colonic perforation during sigmoidoscopy), labeling and diagnostic errors based on test results (see above), and increased economic costs are all potential consequences of screening tests. Resources devoted to costly screening programs of uncertain effectiveness may consume time, personnel, or money needed for other more effective health care services.

Task Force Guide, *supra*, p xlvi.

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[6]A false-negative result occurs when a test with poor sensitivity will miss cases (persons actually have the condition) and who are told incorrectly that they are free of disease.

[7]False-positive result reflects when a healthy person is told that they have a condition that does not exist. Task Force Guide, *supra*, p xliii.

2. COSTS TO THE CIVIL JUDICIAL SYSTEM.

There are many deleterious effects to the civil judicial system if medical monitoring is approved for asymptomatic patients. The first is the sheer volume of potential medical monitoring claims. Exposure to potentially toxic substances is immeasurable. There is "little doubt that millions of people have suffered exposure to hazardous substances." *Ball, supra*, 755 F Supp at 1372. The quality of the environment transcends any one category of exposure. Potentially toxic substances are in the air, the land, the water, the food, are man-made, are natural, are aggregated in specific areas, are otherwise virtually universal, affect city dwellers, affect suburbanites, affect rural dwellers, transcend socio-economic lines, are encountered involuntarily and voluntarily, and inevitably result in aggregate exposure to any one claimant. Asbestos alone represents a single, voluminous category of potential medical monitoring plaintiffs. As noted by this Court in *Larson, supra*, it is estimated that between eleven and thirteen million workers have been exposed to asbestos since World War II. *Larson, supra*, 327 Mich at 316. Exposure goes beyond workers and could include simple residents (See *Eagle-Pitcher Indus, Inc v Liberty Mutual Ins Co*, 682 F2d 12, 19 [CA 1, 1982]) (one expert testified that "over 90% of all urban city dwellers have asbestos-related scarring"). The sheer volume of symptomatic asbestos claimants has "burdened the dockets of many state and federal courts, and has particularly challenged the capacity of the federal judicial system." *Georgine v Amchem Products*, 83 F3d 610, 617 (CA 3, 1996) cert granted 117 S Ct 379 (1996). One can only imagine the exponential increase in litigation if asymptomatic claimants are given the keys to the courthouse doors.

Second, given the exposure to diverse potentially toxic substances that can trigger a claim if medical monitoring is recognized, the scope of the litigation will be expansive. Testimony regarding the accuracy of tests and the efficacy of early testing will vary from substance to

substance. The evolution of science will undoubtedly prevent a static portfolio of scientific information upon which to evaluate the claims.

Third, such medical monitoring claims as proposed by the plaintiffs may be subject to jury consideration. Whether surveillance is reasonable and necessary will turn on the significance and extent of exposure, the toxicity of the substance, the seriousness of the disease, the relative increase in the chance of onset of the disease, the value of early diagnosis, and the need for medical diagnostic examinations. These questions are highly technical, difficult for a lay jury to sort out, and costly to litigate because of the need for experts.

Fourth, medical monitoring claims lend themselves to speculative testimony. By its very nature, medical monitoring requires testimony as to causation between the toxic substance and the monitored-for disease, as well as expert testimony on the accuracy of screening and efficacy of early detection. The prospect for "junk science" testimony in such circumstances is strong.[8] This Court has recently recognized the importance of excluding unreliable expert testimony. See *Craig v Oakwood Hospital*, __ Mich __; 684 NW2d 296; 2004 LEXIS 1561 (2004); *Gilbert v DaimlerChrysler*, 470 Mich 749; __ NW2d __; 2004 Mich LEXIS 1555 (2004).

Fifth, for medical monitoring damages to be used effectively and as intended, some court administration program must be put into place to ensure that plaintiffs do not spend the medical monitoring award on items other than monitoring. Examine the court-administered funds for

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[8]*In re Paoli II*, 35 F3d 717, 793-795 (3d Cir Pa, 1994), one of the experts testified that anyone who has been exposed to even a single molecule of a hazardous substance should receive medical monitoring, an opinion that the Third Circuit found admissible under FRE 702 and under the U. S. Supreme Court's decision of *Daubert v Merrill Laboratories*, 509 US 579; 113 S Ct 2786; 125 L Ed 2d 469 (1993). Thus, despite the recent efforts taken by this Court to prevent claims from reaching the jury on the basis of speculative testimony (see *Skinner v Square D*, 445 Mich 153; 516 NW2d 475 [1994]), a certain percentage of such claims will nonetheless be subject to full judicial and jury scrutiny.

items such as asbestos. Judicial Conference Ad Hoc Committee On Asbestos Litigation, Report of the Ad Hoc Committee, p 2, 1991. See also administration of silicone breast implant claims in both state court (Administrative Order 1993-2) and the federal court (see, e.g. *In re Breast Implant Cases*, 942 F Supp 958 (ED SD NY, 1996); *In re Silicone Breast Implants Products Liability Litigation*, 887 F Supp 1997 (ND Ala, 1995). Absent a court-administered fund, there are no assurances that a damage award will be used to help a person learn about the onset of avoidable disease, which, after all, is the alleged synchronon of medical monitoring.

Finally, and more generally, this is an unwise use of judicial resources. The claimant is not presently ill, most likely will never develop the exposure-related illness, and should be entitled to an award, if at all, only for testing above and beyond what normally would have occurred. These factors, together with the questionable accuracy of screening in the efficacy of early detection, suggest that Michigan courts should decline to cross the precipice into fear cases.

3. REQUIRING THAT A CLAIMANT HAVE A PRESENT INJURY IS NOT UNFAIR TO POTENTIAL MEDICAL MONITORING PLAINTIFFS.

If a person exposed to a hazardous substance eventually does develop an injury or a disease that he or she can prove is caused by the exposure, then that person is entitled to pursue a traditional tort claim under the law of Michigan. Any difficulties with the statute of limitations or claim-splitting can be addressed in such a suit. This Court has already lent a willing ear to alleviate such potential problems. See, e.g. *Larson*. The medical monitoring which may have taken place through the years through the time of injury may represent an item of past damage for the injured claimant.

This approach is attractive for many reasons. Judicial resources are properly allocated to the symptomatic rather than asymptomatic claimant. The speculative nature of medical monitoring is replaced by the traditional rules of tort liability and the concomitant rules already

governing the propriety of future damages. Monetary resources of the defendant otherwise earmarked for asymptomatic patients will presumably be more available for symptomatic patients. Bankruptcies will not be spawned by the prospect of future injury.[9] Society has always placed a high priority on addressing claims of the truly injured. There is no reason to doubt that such a priority will change if and when medical monitoring plaintiffs become symptomatic.

D. WHETHER TO ALLOW A CAUSE OF ACTION FOR MEDICAL MONITORING ABSENT A PRESENT INJURY IS AN ISSUE FOR THE LEGISLATURE.

1. THE COURT'S ABILITY TO DEVELOP FOUNDATIONAL INFORMATION REGARDING MEDICAL MONITORING IS LIMITED BY THE NATURE OF ITS ABILITY TO EXERCISE ONLY JUDICIAL POWER.

The Michigan courts employ the "actual controversy" requirement similar to the "case or controversy" found in the United States Constitution. US Const, art II, § 2. See also *National Wildlife v Cleveland Cliffs*, __ Mich __; 684 NW2d 800; 2004 LEXIS 1695 (2004); *Lee v Macomb County Board of Comm'rs*, 464 Mich 726; 629 NW2d 900 (2001). Mere hypotheticals are insufficient and when there is no actual controversy, the court lacks subject matter jurisdiction. *Shavers v Kelley*, 402 Mich 554, 588; 267 NW2d 72 (1978). This limitation inheres in the structure of a three branch government, in which the courts decide individual cases by exercising their judicial power while the legislature solves broad social problems, by exercising its legislative power.

Even where strict separation of powers concerns do not bar judicial action, this Court has increasingly deferred to the Michigan legislature when faced with a request to create a new and expansive tort cause of action. See *Adkins, supra*, 440 Mich at 319 (upon this Court's refusal to

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[9]It is reported that traditional asbestos claims have already forced at least sixteen companies into bankruptcy by reason of the cost of mass tort litigation. See New York Law Journal, p 7 (2/6/95).

allow a nuisance claim to proceed in the absence of an interference with the plaintiffs' interests, the Court noted that "the significant interests involved appear to be within the realm of those more appropriate for resolution by the Legislature"); *Sizemore v Smock*, 430 Mich 283; 422 NW2d 666 (1988) (any decision to extend claims for loss of consortium to include a negligent tortfeasor's liability for loss by a parent of a child's society and companionship should be determined by the Legislature).

The governmental principle of separation of powers coupled with the rise of democratic principles and systems has led to increasing recognition that we "live in an age of legislation, and most new law is statutory law." Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law*, p 13 (1977). Judicial lawmaking raises concerns::

> Were the power of judging joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control, for the judge would then be legislator.

The Federalist No. 47, p 326 (James Madison) (Jacob E. Cooke ed, 1961) quoted in Scalia, *supra* at 10. It is the structural limitations on its power that allows the judiciary to retain its legitimacy within our democratic system. See generally Alexander M. Bickel, *The Least Dangerous Branch The Supreme Court at the Bar of Politics*, (1962). And although state courts retain common law powers, they have increasingly deferred to legislatures when asked to create a broad new cause of action. See *Glancy v Roseville*, 457 Mich 580; 577 NW2d 897 (1998); *Beaudrie v Henderson*, 465 Mich 124, 140; 631 NW2d 308 (2001); *Adkins v Thomas Solvent Co*, 440 Mich 293; 487 NW2d 715 (1992).

That deference to a legislative solution is appropriate here. The decision of whether to create a new cause of action for medical monitoring involves acquiring and considering scientific

information on, the efficacy of medical surveillance, the balancing of interests of the toxic exposure litigants, and the burdens on society and judicial administration:

> [T]o prevent one injustice from arising from another, the finite resources available must be spent both cautiously and wisely. This basic dilemma has plagued tort law since its inception. Because of it, lines, sometimes arbitrary, have been drawn, and must be drawn, and will continue to be drawn, to limit and delineate the when's and if's individuals will be allowed recovery for a wrong committed against them.

Ball, supra, 755 F Supp at 1372.

An opinion of this Court, in the area of loss of consortium, supports that the Legislature is best suited to balance the competing interests herein involved. In *Sizemore, supra*, 430 Mich 283, a solid majority of this Court held that any decision to extend claims for loss of consortium to include a negligent tortfeasor's liability for loss by a parent of a child's society and companionship should be determined by the Legislature. In *Sizemore*, the Court acknowledged important public policy considerations such as societal consequences and economic burdens, including the intangible and sentimental elements of the claim, whether the award would deter negligent conduct, and the fact that insurance premiums would likely increase with the resulting increase in litigation. 430 Mich at 292-298. In reversing the Court of Appeals decision recognizing such a claim, this Court stated that:

> [F]urther extension of a negligent tortfeasor's liability involves a variety of complex social policy considerations. In light of these concerns, we believe that the determination of whether this state should further extend a negligent tortfeasor's liability for consortium damages should be deferred to legislative action rather than being resolved by judicial fiat.

430 Mich at 299 (footnote omitted). The same reasoning applies here.

2. UNLIKE THE COURTS, THE LEGISLATURE IS NOT CONFINED TO EXERCISING ITS JUDICIAL POWER TO DECIDE INDIVIDUAL CASES.

The legislative process includes opportunities to arrive at informed value judgments superior to the opportunities afforded judges or jurors. *Zeni v Anderson*, 397 Mich 117, 135; 243 NW2d 270 (1976). In *Barcume v City of Flint*, 638 F Supp 1230 (ED Mich 1986), the federal district court was called upon to rule whether the city's failure to include women in its affirmative action plan violated the equal protection clause and noted this would require the court to engage in:

> [S]ocial engineering - a task which does not lie within judicial competence. This task lies more properly with legislative bodies who are "expected to take action that may benefit one group at the expense of another. . . ."

638 F Supp at 1236 (citations omitted). See also *Adkins, supra*, 440 Mich at 319 ("[T]he significant interests involved appear to be within the realm of those more appropriate for resolution by the Legislature."). The measurement, estimation, and valuation of medical monitoring for asymptomatic persons is a complex undertaking. The legislature is more adept than the judiciary at resolving the many issues that need to be addressed and create a remedial scheme to provide for medical monitoring.

First, the legislature can commission investigation, studies, and expert testimony on the value of early diagnosis and the efficacy of treatment for early diagnosis. Is a screening test able to detect the target condition earlier than without screening and with sufficient accuracy to avoid producing large numbers of false-positive and false-negative results? If so, does screening for and treatment of persons with early diseases improve the likelihood of favorable health outcomes compared to treating patients when they present manifest signs or symptoms of the disease.[10]

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[10]These rhetoric questions are taken from the United States Preventive Service Task Force's Publication, The Guide to Clinical Preventive Services (2d ed 1996) (hereafter "Task Force Guide"). A screening test must satisfy these two major requirements to be considered effective. Task Force Guide, p xlii.

Second, assuming a particular screening test is "effective," the Legislature can define, if appropriate, a method of monitoring where medical monitoring damages are actually used on a periodic basis for screening. In contrast, the courts cannot dictate how medical monitoring claimants will spend the lump sum award for future screening.[11] The state legislature can pass a statute providing awards through periodic payments to ensure that such damage awards are actually used to pay the expense of medical monitoring. The state legislature has so provided already in the medical malpractice arena. See MCL 600.6309; MSA 27A.6309. When courts are embroiled in the administration of damages in mass tort cases, it is, without question, a draw on the judicial use or resources otherwise used to resolve cases in controversy.

Third, and perhaps most importantly, the legislature can periodically evaluate the continued propriety of medical monitoring to determine whether it confers a benefit upon the medical monitoring claimant, and to re-evaluate the cost-benefit balance through statutory medical monitoring. This evaluation could include efficacy by subject area (for example, cardiovascular, infectious disease, environmental disorders, etc.). The legislature can examine the effect of patient education and counseling on the need for future medical monitoring, above and beyond screening which the patient would normally do in any event. The legislature can re-evaluate without a case in controversy the methodology of medical monitoring, the cost effectiveness of medical monitoring, the efficacy of medical monitoring, and the interplay between medical monitoring and third-party payment plans, such as health insurance and other

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[11]In most medical monitoring cases, lump sum awards are the vehicle of recovery. See, e.g. *Merry v Westinghouse Electric Corp*, 684 F Supp 847 (MD Pa, 1988). See also *Herber v Johns-Manville Corp*, 785 F2d 79 (CA 3, 1986).

collateral sources.[12] The very existence of the Task Force Guide supports the notion that the Legislature, not the judiciary, is more properly involved in considering the propriety and scope of medical monitoring.[13]

Finally, the legislature is the more appropriate body to examine the complex social policy considerations and determine whether this state should further extend liability to include damages for future medical monitoring. Public policy concerns are better presented to and resolved by the legislature. As in *Sizemore, supra*, the determination of whether Michigan should extend a tortfeasor's liability should be deferred to legislative action. See also *In re Manufacturer's Freight Forwarding Co*, 294 Mich 57, 63; 292 NW 678 (1940) ("a judicial inquiry investigates, declares, and enforces liabilities as they stand on present or past facts and under laws supposed to already exist. Legislation, on the other hand, looks to the future and changes existing conditions by making a new rule to be applied thereafter. . . .").

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[12]For example, it is reported that approximately eighty percent of all standard medical tests are presently paid for by third-party insurance. See American Law Institute, 2 Enterprise Responsibility for Personal Injury-Reporters' Study (2d ed 1991), p 379 .

[13]The Guide to Clinical Preventive Services, *supra*, note 13, was prepared under the supervision of the United States Preventive Services Task Force. It has staff support from the United States Department of Health and Human Services. As noted in the Task Force Guide itself:

> The Guide has benefited from unprecedented cooperation - between the U.S. and Canadian Task Forces, between the Federal government and the private sector, and between the Task Force and literally hundreds of reviewers.

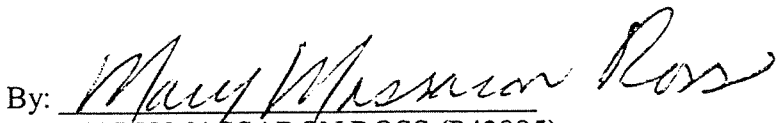
Task Force Guide, p x.

CONCLUSION

WHEREFORE, Amici curiae the Defense Research Institute and the Michigan Defense Trial Counsel respectfully request that this Court reverse the lower court rulings and grant relief as requested by the defendant-appellant.

Respectfully submitted,

PLUNKETT & COONEY, P.C.

By: 

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Detroit.P0117.P0117.975420-1

STATE OF MICHIGAN

IN THE SUPREME COURT

GARY AND KATHY HENRY, et al,

Plaintiffs, Appellees,

-vs-

THE DOW CHEMICAL COMPANY,

Defendant-Appellant,

/

Supreme Court
No. 125205

Court of Appeals
No. 251234

Saginaw County Circuit Court
No. 03-047775 NZ

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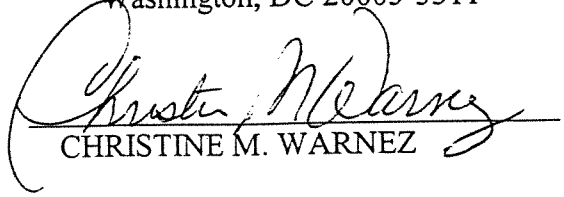

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