STATE OF MICHIGAN
IN THE SUPREME COURT
(On Appeal From the Michigan Court Of Appeals)

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 Circuit No. 94-410338-NH

/

NOTICE OF HEARING

MOTION OF MICHIGAN MANUFACTURERS ASSOCIATION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

BRIEF OF AMICUS CURIAE MICHIGAN MANUFACTURERS ASSOCIATION

PROOF OF SERVICE

/

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STATEMENT OF THE QUESTION INVOLVED

Where recognition of a new cause of action for recovery of medical monitoring expenses would (1) change the tort law definition of the damage element of a negligence claim, (2) violate the separation of powers principle under which the legislative—not the judicial branch—makes new law, and (3) create an unwieldy cause of action for having no administrable standards, should this Court REVERSE the decision of the lower court and re-affirm that no cause of action for medical monitoring exists in Michigan until the Legislature creates one?

Plaintiffs answer "No"

Defendant answers "Yes"

MMA answers "Yes"

STATEMENT OF FACTS

MMA adopts the statement of facts set forth in Defendant-Appellant's brief.

ARGUMENT

MMA agrees with and endorses all of the arguments put forward by Defendant-Appellant and by *amici curiae* The Chamber of Commerce of the United States, American Tort Reform Association, National Association of Manufacturers, American Chemistry Council, Coalition for Litigation Justice, Inc., and Property Casualty Insurers Association of America.

In particular, MMA shares the view that recognizing a new cause of action for recovery of medical monitoring damages (or broadening the damages element of common law tort liability to allow for recovery of medical monitoring damages), would contradict one of the bedrock principles of Michigan tort law: The injury requirement. Moreover, because the decision to allow medical monitoring claims would be such a major departure from the current state of Michigan tort law, and because such a change would likely have a significant economic impact on our state, it cannot and should not be undertaken by the judiciary, but must occur, if at all, through proper legislative enactment.

These points have been well presented by Defendant-Appellant and the other *amicus curiae* brief supporting Defendant-Appellant's position on appeal. Accordingly, it would be wasteful to restate those arguments, at length, here. MMA simply wishes to voice its agreement and to provide one additional thought for this Court's consideration: Even if this Court had constitutional authority to "re-write" tort law to encompass medical monitoring claims, the decision to do so would be so fraught with practical complications that the system would be unworkable.

One of the reasons that negligence law permits recovery upon proof of duty, breach, causation, and damages, is that these elements, when considered together, provide a workable

system of compensation that is within the expertise and ability of the court system to administer. A radical change to the meaning of the damage component would necessarily require corresponding adjustments to the causation and duty elements as well. Practically speaking, if a plaintiff were allowed to recover based on a showing of exposure rather than disease or injury, the causation inquiry would shift from a relatively simple question to a more complex inquiry. Instead of considering whether the defendant's breach *caused the specific, tangible physical injury alleged*, courts and juries would have to consider whether the defendant's breach *caused the plaintiff to require a degree or kind of medical monitoring different from that which a reasonable unexposed person in the plaintiff's position would normally "require."*

The typical duty question, whether the defendant owed the plaintiff a duty to avoid an unreasonable risk of *harm*, would become: Whether the defendant owed the plaintiff a duty to avoid an unreasonable risk of *exposure*. Because exposure is so much more amorphous than harm, the likely effect of adopting a medical monitoring rule would be to create de facto strict liability, under which all exposure attributable to a particular defendant would be compensable. In sum, while it is one thing to ask a court or a jury to determine whether an alleged breach more likely than not caused a specific, tangible inquiry, it would be quite another to ask a court or jury to determine whether the defendants conduct caused the plaintiff to require some kind or degree of medical monitoring that would not otherwise be required.

Often times, medical conditions are caused by a number of intertwined risk factors. When a smoker who has been exposed to asbestos, or some other allegedly dangerous dust, has a chest X-ray, is the procedure attributable to the asbestos exposure, the smoking, his or her family history, or the patient's unnecessarily cautious nature? Is this a subjective inquiry or an objective inquiry? Would it be sufficient to have the smoker testify that he or she underwent the procedure specifically because of his or her fear brought about by the asbestos exposure, or would a public

health expert be necessary to testify, objectively, as to what procedures a reasonable person would "need" to undergo based on the patient's age, habits, general health, history, and all potential exposures. If a chest X-ray would be medically advisable based on the patient's age and lifestyle apart from the asbestos exposure, could it be fairly said that the asbestos exposure *caused* the patient to incur the medical monitoring expense? If so, would the plaintiff also be comparatively negligent to the extent that his or her own lifestyle (i.e., weight, alcohol intake, eating habits, etc.) also contributed to the reasonable medical need for monitoring? If the defendant could point to other exposures potentially responsible for the plaintiff's need for medical monitoring, would a jury be required and able to separately assess the degree of "responsibility" for each non-party at fault? How could it do this without a tangible injury to weigh?

And how would the jury decide when, what kind, and how much medical monitoring is medically necessary in the first place in order to determine the amount of compensation necessary? Would a public health expert be called to testify as to the amount, kind, and cost of the future medical monitoring procedures plaintiff would require due to the defendant's conduct over and above that which plaintiff would otherwise have required but for the defendant's conduct? What standards would be used? Would it be fair to allow a successful medical monitoring plaintiff keep the damage award and take his or her chances without the medical monitoring? Would this be tantamount to compensating the plaintiff for the risk of future injury that might never materialize? And if the injury *did* materialize, after the fact, would the plaintiff start a new action for recovery to compensate for the actual injury? In the subsequent *injury* action what aspects of the medical monitoring action would be res judicata? If a subsequent *injury* action is not permitted, would the state ultimately incur costs of the medical treatment for

the uncompensated plaintiff? In sum, a great number of problems would have to be solved, which, in turn, would require the judicial system to make numerous public policy determinations.

In *Page v Klein Tools*, 461 Mich 703; 610 NW2d 900 (2000), this Court refused to recognize a new tort cause of action for educational malpractice. Many of the factors behind that decision are equally relevant to this case. The reasons for rejecting the educational malpractice cause of action are summarized in this excerpt:

> "Even where the chain of causation is complete and direct, recovery may sometimes be denied on grounds of public policy because (1) **the injury is too remote from the negligence**; or (2) the injury is too wholly out of proportion to the culpability of the negligent tortfeasor; or (3) in retrospect it appears too highly extraordinary that the negligence should have brought about the harm; or (4) because **allowance of recovery would place too unreasonable a burden [on the defendant]**; or (5) because **allowance of recovery would be too likely to open the way for fraudulent claims**; or (6) **allowance of recovery would enter a field that has no sensible or just stopping point.**" [*Page, supra* at 715, quoting *Wilson v Continental Ins Cos*, 87 Wis. 2d 310, 323-324; 274 N.W.2d 679 (1979) (emphasis added).]

The Court also observed that the new cause of action would be impossible to apply in a judicial setting:

> Since education is a collaborative and subjective process whose success is largely reliant on the student, and since the existence of such **outside factors** as a student's attitude and abilities render it impossible to establish any quality or curriculum deficiencies as a proximate cause to any injuries, we rule that **there is no workable standard of care** here and defendant would face an **undue burden** if forced to litigate its selection of curriculum and teaching methods. [*Page, supra* at 713 (emphasis added).]

Finally, the Court recognized public policy reasons for rejecting educational malpractice that had been noted by other state courts:

> Various public policy grounds have been advanced by those courts that have refused to recognize claims of educational malpractice, including:
>
> (1) the **lack of a satisfactory standard of care** by which to evaluate an educator; (2) the **inherent uncertainties about causation and the nature of damages in light of such intervening factors** as a student's attitude, motivation, temperament, past experience, and home environment; (3) the **potential for a flood of litigation** against schools; and (4) the possibility that such claims will

> "embroil the courts into overseeing the day-to-day operations of schools." [*Page, supra* at 712, quoting *Alsides v Brown Institute, Ltd*, 592 N.W.2d 468, 472 (Minn App, 1999) (citation omitted).]

Many of the same problems would be presented by recognizing a new medical monitoring cause of action. That is why it should be left to the Legislature. Only the Legislature would be in a position to consider the conflicting policy considerations and determine the threshold for (1) when medical monitoring expenses are reasonably incurred and (2) how much and what kind of medical monitoring is necessary as a result of the defendant's conduct. Unless and until the Legislature makes these policy determinations—after considering the economic effects on manufacturers, exposed persons, and plaintiffs who *really are* injured—and sets forth clear guidelines for the courts to follow, it would be improper for this Court to do so and impossible for the judicial system to process medical monitoring claims in the absence of such guidance.

CONCLUSION

For the reasons stated in the briefs of Defendant-Appellee and the United States Chamber of Commerce, et. al., as well as for practical reasons similar to those stated in *Page v Klein Tools*, this Court should not recognize a judicially-created cause of action for medical monitoring. The end result would be impossible to administrate without clear legislative guidance as to the governing standards, which necessarily would have to be based on policy determinations beyond the authority of this Court to enact.

Respectfully submitted,

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Date: September 24, 2004

PROOF OF SERVICE

The undersigned declares that a copy of this instrument was served on the Attorneys of record for all parties to the within cause by mailing same to said Attorneys and all parties appearing in pro per at each address as indicated by the pleadings on file with this Court with postage fully pre-paid thereon the 24th day of September

The statement above is true to the best of my information and belief.

Jill M. Beyer

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