

MISSOURI SUPREME COURT

SC87771

LANI MEYER, by and through her Next Friend, REBECCA COPLIN,

Plaintiff-Appellant,

v.

FLUOR CORPORATION, et al.,

Defendants-Respondents.

Appeal from the Circuit Court of the City of St. Louis, Missouri
Honorable Michael P. David

SUBSTITUTE REPLY BRIEF OF APPELLANT

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POINTS RELIED ON

THE TRIAL COURT ERRED IN DENYING CLASS CERTIFICATION OF THIS MEDICAL MONITORING CLASS BECAUSE IT REQUIRED PRESENT PHYSICAL INJURY AS AN ELEMENT OF MEDICAL MONITORING IN THAT IT AS AN ABUSE OF DISCRETION TO DETERMINE THAT MISSOURI LAW REQUIRES PRESENT PHYSICAL INJURY AS AN ELEMENT OF A MEDICAL MONITORING CAUSE OF ACTION AND IT WAS AN ABUSE OF DISCRETION FOR THE TRIAL COURT TO FIND THAT COMMON ISSUES OF FACT DID NOT PREDOMINATE AS A RESULT OF ITS ERRONEOUS APPLICATION OF THE LAW.

Bower v. Westinghouse, 522 S.E.2d 424 (W.Va. 1999)

I.

THE TRIAL COURT ERRED IN DENYING CLASS CERTIFICATION OF THIS MEDICAL MONITORING CLASS BECAUSE IT REQUIRED PRESENT PHYSICAL INJURY AS AN ELEMENT OF MEDICAL MONITORING IN THAT IT IS AN ABUSE OF DISCRETION TO DETERMINE THAT MISSOURI LAW REQUIRES PRESENT PHYSICAL INJURY AS AN ELEMENT OF A MEDICAL MONITORING CAUSE OF ACTION AND IT WAS AN ABUSE OF DISCRETION FOR THE TRIAL COURT TO FIND THAT COMMON ISSUES OF FACT DID NOT PREDOMINATE AS A RESULT OF ITS ERRONEOUS APPLICATION OF THE LAW.

A. INTRODUCTION.

Respondents' brief states: "The trial court nowhere [expressly] addressed Defendants' argument that Missouri law does not recognize a cause of action for medical monitoring by a person who does not claim to suffer present physical injury." (Resp. Br. at 25). This statement is true only if the word "expressly" is added as shown.

It is not true, however, that the trial court did not require present physical injury as an element of a medical monitoring cause of action. The trial court expressly held that it considered "whether the individuals are presently suffering from any lead related injuries" in its determination that common issues did not predominate. (R. at 5-6.) (emphasis added). All nine of the factors listed by the trial court as reasons for a failure of predominance either misunderstand or misapply the law relating to medical monitoring, unless present physical injury is an element of that cause of action. *Please see*, App. Br. 53-57.

Respondents' misunderstanding of the medical monitoring cause of action is exemplified by their assertion that even if present physical injury is removed from the trial court's analysis, individual issues still predominate, to wit: "[1] the extent of a plaintiff's exposure, [2] the plaintiff's increased risk of disease, and [3] the plaintiff's need for medical monitoring". (Resp. Br. 29.) Carefully considered, Respondents' arguments make Miss Meyer's point. The fact of exposure in this case is not disputed. CDC's ATSDR has shown it. The Missouri Department of Health has confirmed it. And the Defendants have admitted it in their EPA Administrative Order on Consent.¹ Please see A-1 through A-3.

Plaintiff does not simply rely upon the fact of exposure, but exposure of a minimum duration to a known set of toxins during a critical period of development as specified in the class definition. Unless this Court determines that present physical injury is required as an element of medical monitoring, (1) the need for medical monitoring arises from the fact of exposure to known toxins as defined in the class definition. (2) It is the fact of exposure as defined in the Petition that creates the increased risk of disease. (3) It is the fact of the increased risk of disease that results in the need for medical monitoring, which is intended to determine whether that increased risk has become actual disease. Requiring present physical injury is completely illogical because medical monitoring is designed to discover the early stages of latent injury

¹Documents contained in the Appendix of this brief and earlier brief previously filed were submitted to the trial court but inadvertently not made part of the record on appeal. Rule 81.12(e)Rule 81.12(e). In addition, this is a interlocutory appeal pursuant to §512.010(3), RSMo 2004§512.010(3), RSMo 2004.

resulting from toxic exposure and permit early treatment.

The sole issue before this Court is whether the trial court abused its discretion in requiring present physical injury as an element of a medical monitoring cause of action, and so in turn abused its discretion in finding common issues did not predominate.

The correct course given the trial court's clear requirement of present physical injury is for this Court to determine whether present physical injury is required under Missouri law for a medical monitoring cause of action. If this Court follows well-settled Missouri tort law concepts of .

This appeal does not ask this Court to issue an advisory opinion. Respondents' argument in this regard patently ignores the trial court's clear statement that a critical element in its predominance calculation was "whether the individuals *are presently suffering from any lead related injuries.*" (R. at A-6.)

A trial court cannot make the requisite Rule 52.08 determinations if it requires an element of a cause of action that the law does not require. "[A] court must understand the ... applicable substantive law in order to make a meaningful determination of the certification issues." *See* Manual for Complex Litigation § 30.11 (3d ed. 1995); *Castano v. American Tobacco Co.*, 84 F.3d 734, 744 (5th Cir. 1996).

Where the court applies the wrong law, an abuse of discretion exists. "An abuse of discretion is not merely an error of judgment; but consists of a conclusion where the law is overridden or misapplied." Rule 52.08(b)(3) *Craft v. Philip Morris Cos.*, 190 S.W.3d 368, 377 (Mo. App. E.D. 2005) MANUAL FOR COMPLEX LITIGATION FOURTH § 21.142 (2004). This admits that the elements of the cause of action determine the predominance issue. If common

proof does not require a showing of present physical injury, then the trial court had no basis for using that factual criteria for its predominance analysis.

Here the trial court found that certain listed questions of fact were individualized and thus did not predominate. Of legal necessity, the trial court's predominance decision turned on the predicate elements of the cause of action – that is, what the plaintiff must prove in order to prevail at trial. The trial court's predominance assessment thus – of logical necessity – determined that present physical injury was a legal issue that must be proved by the facts or else the presence or absence of physical injury would not have been relevant either to the common questions of fact or the predominance assessment.

All of this is made more undeniable by the precedent upon which the trial court relied. Neither *In re Agent Orange Product Liability Litigation*, 818 F.2d 145, 165 (2nd Cir. 1987) nor *Owner-Operator Indep. Drivers' Ass'n. v. New Prime*, 213 F.R.D 537, 547 (W.D. Mo. 2002) are medical monitoring cases; they are present injury cases. In both cases, the pleaded causes of action (the common issues of law) required proof of actual injury (the issues of fact). The predominance analysis in each of these cases applied the proof required to those causes of action and, because proof of present injury differed for each class member, predominance failed. The trial court cited *Owner-Operator* to explain its rationale - a rationale that requires proof of present physical injury.

The trial court's logic is clear. It determined that proof of present physical injury was required for a medical monitoring cause of action and, for that reason, listed the existence of present injury as one of the facts that was not common to the class. But if Miss Meyer and the class do not have to prove present physical injury to prevail on a medical monitoring claim, the

fact that some have it and some do not is not relevant to either the common fact or predominance inquiry.

Respondents next assert that the issue whether the trial court properly applied the law in this case has not been properly preserved and that an opinion on this issue would be advisory. Miss Meyer's brief to the Court of Appeals went directly to the issue of the trial court's error in its predominance analysis. The relevant argument is set out at Appendix A1-3. The argument, made in the Court of Appeals, and repeated here, does "not alter the basis for the claim of error raised in the court of appeals brief" in violation of Rule 83.08(b).

Respondents next assert: "A child with a diagnosed present physical injury from lead exposure does not need medical monitoring to watch for the onset of that injury." (Resp. Br. 40.) Not so. Lead is a multifaceted toxin whose multiple affects are broad and latent at multiple stages. By Respondents' analysis, there is never a need for medical monitoring. If there is no proof of present physical injury, Respondents insist that the elements of the medical monitoring cause of action (to include present physical injury) are not met; if there is present physical injury, there is no need for medical monitoring because the physical injury which medical monitoring is designed to discover has already been discovered. Lani Meyer nowhere pled present physical injury in her Petition. There is no proof of an already diagnosed present physical injury in the record. Any individual claim, filed as a protective measure before certain tort changes, was not part of the trial court record, and remains so. Nor for that matter are the cases identified in Footnote 12 of Respondents' brief. This court, as with the court of appeals, can only consider facts before the trial court. 8182 Maryland Associates, Ltd. Partnership v. Sheean, 14 S.W.3d 576, 587 (Mo. banc. 2000). The Court of Appeals so ruled. Meyer v. Fluor Corp., No. ED.

86616, 206 WL 996540 at *6 n.4 (Mo. App. E.D. Apr. 18, 2006). Next, at page 41 of their brief, Respondents contend that because the trial court found that sufficient children in Herculaneum were *exposed* to satisfy the numerosity requirement, the trial court could not have required present physical injury as an element of the cause of action. That the trial court found the common fact of a specified duration of exposure to known toxins during a limited age period *insufficient* to establish a medical monitoring cause of action is but further proof that the trial court required something more -- and that something more was proof of present physical injury.

In sum, the trial court's order required proof of present physical injury as an element of a medical monitoring case and found that the individualized levels of injury defeated predominance. The trial court erred -- and that error is properly before the trial court.

C. PLAINTIFF'S EVIDENCE SHOWED THAT THE CLASS FACES A SIGNIFICANTLY HIGHER RISK OF DEVELOPING SERIOUS DISEASE AS A RESULT EXPOSURE.

The trial court is to review the evidence, not with a view toward which party might ultimately prevail, but merely to determine whether, in a medical monitoring class action there is "sufficient evidence to warrant the trial court's concluding that they are likely to be able to make that demonstration [that "the need for future monitoring is a reasonably certain consequence of [the] toxic exposure"] with common proof." *Lockheed Martin Corp. v. Carrillo*, 63 P.3d 913, 921 (Cal. 2003) (citation omitted). Respondents' Point II admits that the trial court may not consider the merits of a cause of action in making the class certification decision, then attempts to persuade this Court to ignore Plaintiff's pleadings and factual presentation and accept their factual defenses.

Respondents ignore the facts presented by Plaintiff simply to establish she can make a prima facie case for her medical monitoring cause of action. *Please see* App. Sub. Br. at 15 - 21. That Doe Run claims to have a factual defense is no surprise. But the existence of a factual defense cannot defeat class certification on a predominance basis. Predominance means that “each [class] member must not be required to individually litigate numerous and substantial questions to determine his [or her] right to recover following [liability] the class judgment... .” *Washington Mutual Bank v. Superior Court*, 15 P.3d 1071, 1076 (Cal. 2001).

Respondents’ quantity-of-exposure argument attempts to deny the teaching of *Hansen v. Mountain Fuel Supply Co.*, 858 P.2d 970 (Utah 1993). “[N]o particular level of quantification is necessary to satisfy this requirement.” *Id.* at 979. This is “[b]ecause the injury in question is the increase in risk that requires one to incur the cost of monitoring. ... It is sufficient that the plaintiff show the requisite increased risk.” *Id.* Moreover, “the appropriate inquiry is not whether it is reasonably probable that plaintiffs will suffer [physical] harm in the future, but rather whether medical monitoring is, to a reasonable degree of medical certainty, necessary in order to diagnose properly the warning signs of disease.” *In Re Paoli R. Yard PCB Litigation*, 916 F.2d 829 (3rd Cir. 1990), *cert den.* 513 U.S. 1190 S. Ct.1253 (1995) (*Paoli I*). And, as Respondents’ brief admits, whether the level of exposure is sufficient “is a decision for the trier of fact.” (Resp. Br. at 39.)

Second, Respondents argue that plaintiff must show that the particular disease is “serious.” (Resp. Br. at 49.) The cognitive and motor deficits caused by lead exposure is, by unassailed evidence, serious. *See also*, App. Sub. Br. at A-26. Third, Respondents assert that there must be some proof that medical monitoring is reasonably necessary. (Resp. Br. at 49.)

The Guide to Clinical Preventative Services, on which Respondents rely, states "recommendations regarding community or population-based interventions for the primary prevention of lead poisoning [or] assessment of community lead contamination ... are beyond the scope of this document." (R. at 557.) Yet it also acknowledges that "screening for elevated lead levels in asymptomatic children at increased risk for lead exposure will improve clinical outcomes." (R. at 666.) This supports the predominance of the issue of the need for medical monitoring in this community at increased risk from exposure to lead from the largest operating lead smelter in the United States.

The evidence cited in Appellant's Substitute Brief shows that the children's exposure was substantial and increased the likelihood of disease in the children who fall within the class definition. (App. Sub. Br. at 15 - 21.) This evidence is sufficient to meet even the standards Respondents would impose.

Nowhere in the list of the legal elements of a claim for medical monitoring that Respondents identify on page 46 of their brief are the trial court's "individualized" issues (which Respondents number as 1 through 8 on page 52), most particularly whether the class children must prove they are presently suffering any lead-related injuries. Plaintiff's class definition eliminates the factors Respondents number 1 through 3 as individualized issues. Issue number 7, whether exposure is still occurring, is irrelevant given that the definition defines a minimum exposure no matter whether it is continuing or not. These elements, all grounded in exposure of a defined period during a defined susceptibility, rather than in present proof of physical injury, are common to the class. The blood lead level (Issue 4) is not determinative of whether there has been sufficient exposure to create increased risk, but could only relate to whether there has been

sufficient exposure to cause a specific physical injury. The existence of other sources (Issue 5) is irrelevant to whether these Respondents' toxic releases caused the need for medical monitoring. Lead paint may be relevant to whether exposure from the Smelter caused a specific present physical injury; it is not relevant to whether class members have incurred the need for costly diagnostic tests as a result of *exposure* caused by the Smelter's pollution to determine if lead related injury is even present. Respondents argue that present physical injury is relevant to whether screening tests are reasonably necessary. (Resp. Sub. Br. at 59.) This does not explain away the trial court's reliance on present physical injury in medical monitoring claims. It considered the need for medical monitoring as a separate issue (Issue 8).

Thus, Respondents support the trial court's error with merits arguments that fall into two categories 1) issues which are common to each child in the class, and 2) issues relevant to personal injury but not medical monitoring claims. Respondents' arguments on the merits, including, for example, the government standards for medical monitoring and whether monitoring is already available, are common for every child in the class. This in turn highlights why the issue of "whether any individual is suffering from any lead-related injury" is the focal error of the trial court's predominance analysis. Once one removes present physical injury from the elements of liability in a medical monitoring case, and understands that the evidence shows that the duration of the type of exposure for each class member created significant increases in risk of disease, individual issues disappear. The class liability decision applies to all class children; nothing is left to litigation individually.

That it is neither this Court's nor the trial court's role to address the merits of Plaintiff's claims is best evidenced by the discussion about whether there is a significant increased risk

based on randomly measured blood lead levels compared to the CDC standard. (Resp. Br. at 30.) Respondents claim that Plaintiff cannot meet her proof of significant increased risk because the measured average blood lead levels are below 10 ug/l. Yet there is evidence, presented to the trial court, that there are risks with blood lead levels well below 10 ug/l, and that there is no minimum threshold for risk. (R. at 54, 559-60.)

Finally, on this point, Respondents list a number of cases that are simply irrelevant to class certification in this case. For example, *Amchem Products, Inc. v. Windsor*, 521 U.S. 591,

609-10, 610 n. 14 (1997)*In re St. Jude Medical, Inc.*, 425 F.3d 1116, 1122

(8th Cir. 2005)*In re St. Jude* nowhere states that medical monitoring is not an allowable claim because of the absence of proof of present physical injury. *Ball v. Union Carbide Corp.*, 385 F.3d 713, 728 (6th Cir. 2004) supports Miss Meyer's claim. "[W]here the [one] defendant's liability can be determined on a class-wide basis because the cause of the disaster is a single course of conduct which is identical for each of the plaintiffs, a class action may be the best suited vehicle to resolve such a controversy." *Id.* This is a single defendant, single course of action case. *Barnes v. Am. Tobacco Co.*, 161 F.3d 127 (3rd Cir. 1998) *Amchem*, plaintiffs were exposed to different products, for different amounts of time, in different ways, and over different periods." *Id.* at 143. (quoting *Perez v. Metabolife Int., Inc.*, 218 F.R.D. 262, (S.D. Fla. 2003)*Zehel-Miller v. Astazeneca Pharm.*, 223 F.R.D. 659,

(M.D. Fla. 2004)*In re Prempro Prod. Liab. Litig.*, 230 F.R.D. 555,

(E.D. Ark. 2005)*In Re Prempro*, 230 F.R.D. at 566, 568, 569; *Perez*, 218 F.R.D. at 267;

In Re Prempro, 230 F.R.D. 567, *In Re Prempro*, the court found that the medical condition for which diagnostic tests would be applicable would not still exist by the time monitoring would be provided. 230 F.R.D. at 571. *Lockheed Martin Corp. v. Carrillo*, fully supports Plaintiff's claims here. *Lockheed* involved a forty-year period of exposure, 50,000 to 100,000 class members of all ages, and exposure to rocket fuels, heavy metals, solvents and other chemicals at various points in time. 63 P.3d at 916. The court did not reject Plaintiff's minimum-dosage evidence, but found that plaintiffs' experts failed to opine that all who resided in the area for the forty years likely received significant exposure. *Id.* at 921. The court also found that plaintiffs had not put forth sufficient evidence that monitoring was reasonably necessary because of the exposure. *Id.* at 921-22.

In contrast to *Lockheed* found simply does not exist here.

This case is fundamentally different from the cases that Respondents cite. At issue here is simply whether the smelter's emissions alone, not any other source, has created sufficient exposure to cause the need for medical monitoring. Here there is one source, a lead smelter, affecting one town under one state's common law. During the operations at issue here, the same manufacturing process has resulted in one suite of heavy metal emissions, most predominantly the highly toxic lead. This predominant toxin lead has toxicity undisputed by the Environmental Protection Agency, the Centers for Disease Control, and the Missouri Department of Natural Resources. Lead has been an acknowledged toxin during the entire time period applicable to class membership, and it is undisputed that Respondents knew of this toxicity.

The class is limited in time and duration to a single population, children under the age of 12, with the critical time period of exposure under the age of 72 months. As these criteria are all

in the class definition, it is evident they are common issues. Childhood is accepted by government agencies and scientists worldwide as a time period during which lead exposure increases the risk of harm most significantly as children are both more susceptible and more sensitive to the toxic effects of lead. (App. Sub. Br. at A-20 - 23, 26, 64 - 65.) Respondents acknowledge that the limited government screening criteria, inadequate here, applies to all children exposed to lead, without regard to prior medical or social background, because of the known toxicity and accepted increased risk to children under 72 months.

Respondents never deny that Plaintiffs 1) have been exposed, 2) are at increased risk of serious health consequences, 3) have the reasonable need for at least some monitoring. Even the “bioavailability” of the Doe Run toxins is the same for each child. Respondents simply argue that every child is “different”, but it is irrelevant that some children have more risk.

Here too exposure is documented without resort to individual fact-finding. Publically available information about exposure includes at least monthly air lead concentrations measured at five or more monitors around the class area. Respondents have done soil lead testing on virtually every property, and acknowledge lead levels above naturally occurring levels in every instance. (Resp. Sub. Br. at 21). Respondents admit there is “extensive environmental data from Herculaneum.” (Resp. Sub. Br. at 21) And it is the reason why the Center for Disease Control’s Agency for Toxic Substances and Disease Registry concluded in 2001, the year this case was filed, that

Environmental sampling has shown contamination. [I]t has been documented during previous screening that proximity to the smelter appears to be associated with higher blood lead levels (BLL). ... This community is faced with widespread environmental

contamination. The blood lead data reviewed indicate that exposure have occurred, are occurring, and are likely to occur in the future; and short-term exposures are likely to have an adverse impact on human health. Consequently this site has been classified as an urgent public health hazard.

As a result of the narrow class, the identities of class members too are easily discerned from publically available phone, postal, tax and other records.

Both Plaintiff's class definition and the facts they cite show that there is sufficient intensity and duration to increase the risk of harm. Exposure, increased risk, and the need for monitoring are not common issues because Plaintiffs say they are. They are common issues because of Respondents' actions operating a lead smelter, daily spreading toxic lead emission throughout the community, resulting in uncontrolled exposure to children at a critical age in development.

D. NEITHER MISSOURI LAW NOR PUBLIC POLICY REQUIRES PROOF OF PRESENT PERSONAL INJURY TO RECOVER FOR MEDICAL MONITORING DAMAGES.

Respondents argue that two Missouri cases are germane to the issue before the Court, *Lewis v. FAG Bearings Corp.*, 5 S.W.3d 579,

(Mo. App. S.D. 1999) *Lewis*, as it was a personal injury case and the issue never arose; Respondents are incorrect as to *Elam v. Alcolac*, 765 S.W.2d 42 (Mo. App. W.D. 1988) does not conclude that a cause of action for medical monitoring exists in Missouri in the absence of present physical injury. Respondents base this argument on a single sentence, lifted from

context, in *Elam*, refusing to discuss or even acknowledge the case law and scholarly articles on which *Henry v. Dow Chemical Co.*, 701 N.W.2d 684,

(Mich. 2005) *Mergenthaler v. Asbestos Corp.*, 480 A.2d 647,

(Del. 1984) *Ayers* based on direct contact with groundwater in *Ayers v. Jackson Township*, 525 A.2d 287 (N.J. 1987) *Wood v. Wyeth-Ayerst Labs.*, 82 S.W.3d 849, (Ky. 2002) *Parker et al. v. Brush Wellman Inc. et al.*, 377 F. Supp. 2d 1290,

(N.D. Ga. 2005) *Lowe v. Phillip Morris et al.*, 142 P.3d 1079, (Ore. App. 2006) *Bass* and *Henry*, and decisions of the same ilk, ignore the Restatement (Second) Torts, §7, which broadly defines injury as “the invasion of any legally protected interest of another.” Knowing and continued release of toxins invades the legally protected interest of persons to be free from the costs that attend that exposure. The need to bear costs of determining whether latent disease process has become patent is an economic damage resulting from an invasion of a legally protected economic interest.

Alternatively Respondents’ cases are federal court decisions they cannot find a cause of action under the current applicable state law. *See e.g.* *Trimble v. Asarco, Inc.*, 232 F.3d 946, 963 (8th Cir. 2000); *Compare also* *Metro-North Commuter R.R. Co. v. Buckley*, 521 U.S. 424, 117 S. Ct. 2113, 2126 (1997) (not finding sufficient support in common law for lump sum recovery of medical monitoring costs for purposes of FELA; no decision as to other types of medical monitoring).

Henry type of reasoning. *Elam* cites *Ayers v. Jackson Township*, 525 A.2d 287, 312 (N.J. 1987), *Askey v. Occidental Chem. Corp.*, 102 A.D.2d 130, 135, 477 N.Y.S.2d 242, 247 (1984) and *Hagerty v. L & L Marine Services, Inc.*, 788 F.2d 315, 320 (5th Cir. 1986) which expressly do not require a present physical injury as a predicate for a claim for medical

monitoring. *Elam* cites Note, Medical Surveillance Damages: A Solution to the Inadequate Compensation of Toxic Tort Victims, 63 Ind. L.J. 849 (1988) which demonstrates *Elam* permits recovery for medical surveillance damages for plaintiffs who were asymptomatic on the critical medical issue for which monitoring was sought:

The DIAGNOSIS chart meticulously devised by the witness for each plaintiff and explained as to each entry was **devoid of indication of any immune system dysregulation, dysfunction or even abnormality as to plaintiffs John Phillips and Kay Turley.**

Id. at 208, fn. 89 (emphasis added). That *Thomas v. FAG Bearings Corp., Inc.*, 846 F.Supp. 1400,

(W.D. Mo. 1994) *Thomas* followed has been discredited. (App. Sub. Br. at 44.)

Moreover, a decision of a federal district judge is not precedent and has no stare decisis effect. See *Midlock v. Apple Vacations West, Inc.*, 406 F.3d 453, 457 (7th Cir. 2005). *Thomas* is hardly precedent, especially when it misstates Missouri law.

Respondents next assert that permitting medical monitoring causes of action to go forward is contrary to existing tort law principles. (Resp. Sub. Br. at 75.) In her opening brief to this Court, Miss Meyer argued by analogy that both *Zeuck v. Oppenheimer Gateway Prop., Inc.*, 809 S.W.2d 384,

(Mo. banc 1991) *Bass* eliminates the need for proof of present physical injury permitting recovery. *Zueck* not for its holding, but for its explication of the policy of tort law in Missouri that rules of liability “ought to function to promote care and punish neglect by placing

the burden of their breach on the person who can best avoid them.” *Id.* at 388. Liability for pre-injury medical monitoring achieves this important policy objective. “It is inequitable for an individual, wrongfully exposed to dangerous toxic chemicals but unable to prove that disease is likely, to have to pay his own expenses when medical intervention is clearly reasonable and necessary.” *Ayers* addresses that issue and reveals its fallacy. “The availability of a substantial remedy before the consequences of the plaintiffs' exposure are manifest may also have the beneficial effect of preventing or mitigating serious future illnesses and thus reduce the overall costs to the responsible parties.” Rule 52.08(b)(3) class recovery. And that remedy will relieve the state of Missouri of its financial obligations and use of personnel to provide any medical monitoring caused by Respondents’ purposeful acts.

Third, Respondents argue that approval of pre-symptom medical monitoring risks splitting a cause of action. Several courts have addressed this issue and have rejected the concerns expressed by Respondents, despite strong state-law restrictions on cause splitting. *See Hagerty*, 788 F.2d at 320 (in permitting a medical monitoring claim noting that should the Plaintiff develop cancer, it would be treated as a separate cause of action, not barred by the medical monitoring case because “the disease of cancer should be treated as a separate cause of action for all purposes.”)

This conclusion is consistent with Missouri law. In *Knight v. M.H. Siegfried Real Estate Inc.*, 647 S.W.2d 811, 813 (Mo. App. 1982) the plaintiff brought a claim for the costs of removing a truck from its property. Subsequently, the defendant in the first action brought a separate, later claim for conversion of the truck. *Id.* The original plaintiff asserted issue preclusion as a defense, arguing that the conversion action was a compulsory counterclaim and

was barred by the failure to counterclaim in the first case. *Id.* The Western District disagreed, reasoning that the conversion claim had not matured at the time of the first action. *Id.* at 814-15. The Court held that issue preclusion did not apply unless that cause of action had matured – and that a cause of action does not mature until “there exists the right of the injured party to bring and maintain a claim in a court of law,” that is, not until “it is within claimant's power to prosecute a suit to successful judgment.” *Id.* at 814. The bringing of the medical monitoring action here, prior to diagnosed injury, will not permit a split cause of action for the reasons expressed in RESTATEMENT (SECOND) JUDGMENTS §26(1)(f) *Foster* does not apply because the elements of the claim that the court ruled was precluded by *res judicata* were known to the wife at the time of the initial action. *Foster v. Foster*, 39 S.W.3d 523, 529 (Mo. Ct. App. 2001).

Respondents’ final Point III argument suggests that the better reasoned cases support Respondents’ position. Miss Meyer makes the opposite argument, as would be expected. In this matter of first impression for the state’s highest court, this Court may decide which group of cases best expresses Missouri law, honors Missouri’s concern for the proper allocation of responsibility between purposeful tortfeasors and innocent children, and advances Missouri’s policy of providing preventive and early treatment remedies for those exposed to toxic chemicals. [OHansen-use](#)

E. THIS COURT SHOULD REMAND FOR A DECISION ON TYPICALITY AND ADEQUACY IF AT ISSUE.

Respondents’ final argument asks this Court to become a fact finder and decide what the trial court did not decide, that is, the typicality and adequacy of representation elements of the class certification decision. As this Court well knows, it is not a fact finder. This Court declares

the law and lets facts be found where they should be found – at the trial court. Remand is the proper course of action if typicality and adequacy of representation issues are at issue.

CONCLUSION

_____Recognition of a claim for medical monitoring without known physical injury falls within well-accepted parameters for recovery known by the common law, advances the recovery and deterrent policies of tort law, and provides an opportunity for early recognition and treatment of latent disease caused by exposure to toxic emissions. Here, Plaintiff on behalf of the children of Herculaneum brings one claim for relief, medical monitoring, that is based on one set of legal standards that apply equally and in common to each child. The class definition identifies a minimum time period of exposure which in turn identifies a significant increased risk of contracting latent disease for all children in the class. That there are common exposures created by the Smelter for all children in the class in turn means that there are the same categories of potential injuries and common monitoring procedures that make early detection possible for all class members. Thus under Missouri standards for a claim for medical monitoring, which rejects proof of present physical injury as a predicate to relief, the factors that the court found to defeat predominance are not relevant to the determination of the claim. The trial court erroneously denied certification of the class based on erroneous analysis of the nature of the claim and of the legal elements of a medical monitoring claim.

This Court should reverse the decision of the trial court and remand for a new determination of whether the medical monitoring class should be certified.

Respectfully Submitted,

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RULE NO. 84.06(b) CERTIFICATE

I hereby certify that this Brief complies with the limitations contained in Rule No. 84.06(b) and that this brief contains 7,696 words according to the word count of Corel Word Perfect Version 9.

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