

**IN THE
MISSOURI SUPREME COURT**

No. SC87771

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

Plaintiff/Appellant,

vs.

FLUOR CORPORATION, et al.,

Defendants/Respondents.

APPEAL FROM THE CIRCUIT COURT
OF THE CITY OF ST. LOUIS
HONORABLE MICHAEL P. DAVID, CIRCUIT JUDGE, DIVISION 1

JOINT SUBSTITUTE RESPONDENTS' BRIEF

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STATEMENT OF FACTS

A Statement of Facts must be a “fair and concise statement of the facts relevant to the questions presented for determination without argument.” Mo. S. Ct. R. 84.04(c). Plaintiff’s Statement of Facts does not satisfy this requirement. It presents only Plaintiff’s evidence. Plaintiff omits entirely the evidence that Defendants offered and that the trial court received and relied on in denying class certification. Defendants submit this complete Statement of Facts pursuant to Rule 84.04(f).

Plaintiff’s Claims

This putative class action arises from operation of the Doe Run lead smelter in Herculaneum, Missouri. Plaintiff Lani Meyer alleges that Defendants, in operating the smelter, have exposed her and the class members to lead and other hazardous substances. (R. at 8-35.) She claims that this exposure has given rise to a need for “medical monitoring services” for which, Plaintiff asserts, Defendants should pay. (R. at 28.)

Plaintiff asks for money damages to be paid to her and to the class members to cover the cost of what she asserts is necessary medical testing. (*See* R. at 42.) Unlike plaintiffs in some medical monitoring cases from other jurisdictions,¹ Plaintiff does not ask the court to establish a court-supervised medical monitoring program as a form of classwide equitable relief. Rather, Plaintiff prays only for damages, and seeks class certification under Mo. S. Ct. R. 52.08(b)(3) rather than Rule 52.08(b)(2), which would

¹ *See infra*, at 78.

apply if equitable relief were sought. Plaintiff seeks to recover under four causes of action: (1) negligence and negligence per se; (2) absolute or strict liability; (3) private nuisance; and (4) trespass. (R. at 26-32.)

In her Motion for Class Certification, Plaintiff asked the trial court to certify the following class of children:

- a. All minors who have lived within the Class Geographic Area for at least twelve (12) months when they were 72 months old or less and are currently 168 months old or less.
- b. All minors who have gone to school or day care within the Class Geographic Area for at least twelve (12) months when they were 72 months old or less and who are not members of (a) above, and who are currently 168 months old or less;
- c. All minors who were born to mothers who lived within the Class Geographic Area for more than seven (7) months during their pregnancies and who are not members of (a) or (b) above and who are currently 168 months old or less.

(R. at 43.) Plaintiff defined the Class Geographic Area as “[t]he area within the city limits of Herculaneum, Missouri except that area west of Commercial Boulevard.” *Id.*

Plaintiff’s class (as proposed) is composed primarily of children who do not suffer any present, physical injury from lead exposure. However, Plaintiff’s class also includes those children who do claim to suffer physical injury from lead exposure (including

Plaintiff herself, who does assert such a claim). (See R. at 377, 388, 480-81, 496, 500, 538, 543.)

On November 15 and 16, 2004, the trial court held an evidentiary hearing on class certification. (See R. at 146-321.) The hearing covered both the Motion for Class Certification in this case and a motion for class certification filed in *Doyle v. Fluor Corporation*, No. 012-8641. *Doyle* is a property damage case in which the plaintiffs are represented by the same counsel who represent Plaintiff Lani Meyer here.

Following post-hearing briefing, the trial court denied class certification in this case. (R. at 6.)² Plaintiff petitioned to the Missouri Court of Appeals Eastern District for permission to appeal. That Court granted her petition on September 7, 2005. On April 18, 2006, the Court of Appeals affirmed the trial court's order denying certification of a medical monitoring class. See *Meyer v. Fluor Corp.*, No. ED86616, 2006 WL 996540, *6 (Mo. App. E.D. April 18, 2006). On Plaintiff's application, this Court granted transfer on August 22, 2006.

Plaintiff's Arguments and Evidence Before the Trial Court

In her briefing and argument on class certification before the trial court, Plaintiff asserted that operation of the smelter has resulted in air and soil chemical levels

² The trial court certified a property damage class in *Doyle*, which certification was affirmed on appeal. *Doyle v. Fluor Corp.*, 199 S.W.3d 784 (Mo. App. E.D. 2006), application for transfer denied on September 26, 2006.

throughout the Class Geographic Area that exceed background levels present in communities without lead smelters, and that as a result of exposure to those contaminants all of the class members need medical monitoring. (*See, e.g.*, R. at 87-88.) Plaintiff relied primarily on the affidavits of two expert witnesses, David A. Sullivan, a meteorologist, and Dr. Bruce Lanphear, a medical doctor. She also relied on a number of documents addressing environmental conditions in Herculaneum, including certain Health Consultations performed by the U.S. Department of Health and Human Services, Agency for Toxic Substances and Disease Registry (“ATSDR”).³

In his Affidavit, Mr. Sullivan stated, based on his review of air modeling and soil data, that pollutants released by the smelter have been dispersed both throughout the Class Geographic Area and beyond it (Plaintiff’s Appendix (“App.”) at 12); that contaminants have been deposited on the properties within the Class Area in amounts in

³ The Affidavits of Mr. Sullivan and Dr. Lanphear and the documents Plaintiff relied on before the trial court were not part of the Record on Appeal before the Court of Appeals. They were not included in Plaintiff’s Petition for Permission to Appeal, or in a Supplemental Record that Plaintiff filed, with leave of court, on July 25, 2005. The two affidavits and certain exhibits were only included in Appellant’s Appendix. Respondents do not understand the inclusion of exhibits in the Appendix to be a substitute for inclusion in the Record on Appeal. Most of the documents that Plaintiff submitted to the trial court are not included in either the Record on Appeal or in Appellant’s Appendix.

excess of normal background (*id.*); that dispersion and deposition of emissions from the smelter occur on an area-wide basis (*id.*); that it is neither necessary nor typical to study dispersion or deposition on an individual person or property basis (*id.*); and that “the source, the chemicals emitted, the emissions data, emissions pathways, meteorological data, and other factors in the study of the dispersion and deposition of pollutants from the Doe Run Smelter are common to the properties and to persons in the Class Geographic Area.” (*Id.* at 12-13). Mr. Sullivan’s Affidavit contained no data supporting these conclusions. *See id.*

In his Affidavit, Dr. Lanphear stated that lead is a toxin associated with various illnesses including cognitive and behavioral deficits, cardiovascular disease, renal disease, dental problems and even prenatal damage in humans with chronic exposure. (*App.* at 31.) He further stated that the children in the proposed class “have been significantly exposed to lead and other heavy metals that are proven hazardous substances,” and that they “have a significantly higher risk of developing serious latent disease, disability, and/or injury as a result of this past and ongoing exposure above the general population.” *Id.* at 29-30. Dr. Lanphear concluded that the class “should be offered a battery of testing to include, at a minimum, neuropsychological testing to diagnose any existing or developing cognitive deficits.” *Id.* at 37-38.

At deposition, Dr. Lanphear recognized that a child's risk of contracting lead-related illness changes depending on blood lead levels. (*See* R. at 578.)⁴

He also acknowledged that there is variability in blood lead levels among the class members. (R. at 559.) According to Dr. Lanphear, some class members might have blood lead levels lower than children outside Herculaneum. (R. at 559.)

When asked questions at his deposition regarding his proposed medical monitoring program for the class, Dr. Lanphear testified, in part, as follows:

⁴ Articles co-authored by Dr. Lanphear are in accord with this testimony. In an article published in the Public Health Reports in 2000, Dr. Lanphear and his colleagues examined cognitive function of children with blood lead levels less than 10 micrograms per deciliter (ug/dl) and concluded:

the data showed an inverse relationship between blood lead concentration and scores on four measures of cognitive functioning. For every 1 ug/dl increase in blood lead concentration there was a 0.7-point decrement in mean arithmetic scores, an approximately 1-point decrement in mean reading scores, a 0.1-point decrement in mean scores on a measure of nonverbal reasoning, and a 0.5 point decrement in mean scores on a measure of nonverbal reasoning.

(App. at 49.)

Q: What type of neuropsychological testing battery are we talking about here as you are proposing in your affidavit?

A: What I would propose for the medical monitoring is a developmental behavior pediatrician essentially to act as the coordinator. There would be psychologists conducting the intellectual testing, some of the behavioral tests

Q: Do you have a specific battery of tests that you are advocating in connection with this sort of general recommendation for neuropsychological testing?

A: At this point, what I've done is laid out the general outline of a medical monitoring program. Once the medical monitoring program was approved, then at that point I would reach out to experts in a variety of domains, including developmental behavioral pediatrician, perhaps a psychologist to work with that individual, and develop or identify those specific tests that we would use.

(R. at 583.)

The 2001 and 2002 Health Consultations prepared by the ATSDR discussed blood lead test results for the 2001 and 2002 Calendar years for the children of Herculaneum. The 2001 Health Consultation concluded that the average blood lead level for children under 72 months who were tested in that year was 8.0 micrograms per deciliter (ug/dl), which was higher than the national and Missouri averages. (App. at 64.) The report noted that there was considerable variability among those children. (See App. at 65)

(reporting that blood lead levels of children under 72 months ranged from 2 to 31 ug/dl). The 2002 Health Consultation reported a notable reduction in blood lead levels among children in Herculaneum, but found that the “prevalence of elevated [Blood Lead Levels] remains unacceptably high.” (App. at 79.) That study reported that 17% of the children tested who reside in the Class Geographic Area had a blood lead level of 10 ug/dl or higher. (App. at 78.)

The 2002 Health Consultation then stated:

Any effects of lead at these levels on the health of the children are likely to be subtle. Therefore, blood lead levels alone are not an indicator of adverse effects for an individual child. However, in considering populations (groups of individuals) exposed to lead, adverse health effects can be seen in groups with elevated blood lead levels.

(App. at 79.)

Defendants’ Arguments and Evidence in Opposition to Class Certification

In the trial court, Defendants asserted: (1) that class certification is not proper because there are not numerous children who need the relief Plaintiff is seeking (R. at 116-19); (2) that Lani Meyer is not a suitable class representative because she claims to have suffered personal injury from lead exposure whereas most class members have not suffered such injury (R. at 376-384); (3) that certifying a class would be futile because only persons with present injury can recover medical monitoring damages under Missouri law and most of Plaintiff’s proposed class is composed principally of persons with no present injuries (*see* R. at 103-06, 372-76, 452-55); and (4) that regardless of whether

physical injury is required to recover damages for medical monitoring, the right to recover medical monitoring can only be determined on an individual basis because of the wide variation in circumstances among class members (*see, e.g.*, R. at 128-43). Thus, Defendants contended, certification should be denied because individual questions rather than common questions predominate.

Defendants presented blood-lead data collected from Herculaneum children for 2000, 2001, and 2002, including data from the same Health Consultations relied on by Plaintiff. That data shows that in those years the majority of children tested had blood lead levels less than 10 ug/dl. (R. at 117-18, 715, 718, 755.) The Centers for Disease Control (“CDC”) only recommends follow up blood lead testing for children with blood lead levels greater than 10 ug/dL. (R. at 750-51.) Neither the CDC nor any other government agency recommends individual medical examination (beyond blood lead testing) for children with blood lead levels below 20 ug/dL. (*See* R. at 750-51, 753, 754.) In 2002, only two of the children tested under six years old had blood lead levels above 19 ug/dl. (R. at 943.) Defendants contended that joinder as plaintiffs of the relatively few children who have blood lead levels that warrant medical monitoring is entirely practicable, so that the numerosity requirement was not satisfied.

In support of their typicality and adequacy of representation arguments, Defendants offered the deposition testimony of Plaintiff’s mother and grandmother. That testimony showed that Plaintiff is claiming she is suffering actual physical injury from lead exposure. (*See* R. at 377, 480-81, 496, 500, 538, 543.) Most members of the

proposed class, however, are not suffering any injury. Defendants argued this creates conflicting interests between Plaintiff and the class.

Finally, in support of their arguments that this case requires substantial individual proof making class certification under (b)(3) improper, Defendants presented extensive evidence concerning environmental conditions in Herculaneum. This evidence included affidavits and expert reports of a meteorologist, Mr. Gale Hoffnagle (R. at 805-909); a toxicologist/risk assessor, Dr. Teresa Bowers (R. at 756-804); a pediatrician, Dr. William Banner (R. at 677-755); and a physician specializing in preventative medicine, Dr. William Nassetta (R. at 910-1175). All of these affidavits and reports discussed the extensive environmental data from Herculaneum on which the experts relied to support their opinions. Drs. Bowers, Banner, and Nassetta testified at the class certification hearing.

Dr. Bowers and Mr. Hoffnagle testified that the concentrations of lead and other contaminants in the air, dust and soil vary widely throughout Herculaneum. (R. at 267-68). As a result, the amounts of lead ingested by children also varies widely. (*See, e.g.*, R. at 267-68; *see also* R. at 808.) In 2002, dust samples were taken from 31 different locations in Herculaneum. (R. at 761.) The lead levels in those samples ranged from 241

parts per million (ppm) to 17,778 ppm. *Id.*⁵ To illustrate the variations in contaminant levels in the class area, Dr. Bowers attached a series of maps to her report which were based on actual data showing dust lead concentrations (R. at 793), air lead concentrations (R. at 796), soil arsenic concentrations (R. at 798), soil cadmium concentrations (R. at 799), and soil lead concentrations (R. at 800).

Dr. Bowers testified that the extent to which ingestion of lead results in an increased risk of disease differs from child to child because whether a child's blood lead content is affected by ingestion of lead depends entirely on the bioavailability of the lead that the child came into contact with. (*See* R. at 254-56.) "Bioavailability" is defined as the amount of lead that is absorbed into a person's bloodstream versus the amount of lead that passes through the body without harm. *Id.* at 255. Bioavailability "varies depending on an individual's food intake, lead intake, and the chemical properties of the lead itself." (R. at 767; *see also* R. at 922.) In Herculaneum, lead comes from many sources, including lead-based paint (R. at 760), a source for which Defendants have no responsibility. As Dr. Bowers said, "[t]he bioavailability of lead differs for ore concentrate, smelter emissions, and lead based paint." (R. at 767.)

⁵ Soil and dust lead levels are important in this case because the primary route of lead exposure for children is hand to mouth activity. (R. at 913.) Younger children crawl around on the ground, gather dust and dirt on their hands, and then put their hands in their mouths.

Dr. William Banner, a pediatrician and advisor to the CDC's Advisory Committee on Childhood Lead Poisoning Prevention, supported Dr. Bowers' conclusions. He testified that whether a child has ingested an appreciable amount of lead and whether that ingestion has caused the need for monitoring is entirely dependent on individual circumstances like the amount of lead a child was in contact with, age when that contact occurred, and amount of time spent in the Class Geographic Area. (R. at 302-04.) As stated by Dr. Banner:

Obviously this is the kind of exposure that is time dependent. It's how much is present, what time you're exposed to it, and what the characteristics are of the material that you're exposed to. You know, as we mentioned earlier, what specific assault it is, what particle size it is, you know, is it in the dust or in a more robust environment, all of those things would be variable. And yes, if you're appearing much later during that 72-month period when you get past most of that hand-to-mouth activity, your exposure is going to be very limited.

(R. at 304)

In their reports and at the hearing, Dr. Bowers and Dr. Banner also stated that there are many different possible sources of lead exposure for the class. Those sources include: lead in paint, lead in food cans, lead in gasoline, lead in toys, lead in herbal remedies, and lead received from cigarettes while *in utero*. (See R. at 260, 302, 760-61, 808.) Testing done for the ATSDR revealed that lead based paint was found in every district school in the Class Geographic Area. (R. at 741.) In their briefs, Defendants

argued that the existence of alternative sources like lead based paint showed that source of exposure (causation) could not be established with common proof. (*See, e.g.*, R. at 394-95.)

Finally, both Dr. Banner and Dr. Nassetta testified that whether a doctor should prescribe medical screening tests is an issue that can only be decided on a case by case basis, after considering each child's particular circumstances. (*See, e.g.*, R. at 682-83.) In support of their testimony, Dr. Banner and Dr. Nassetta cited the *Guide to Clinical Preventive Services: Report of the U.S. Preventive Services Task Force*, at xxxi (2d Ed. 1996) (located at R. 628-76). (R. at 278, 683.) During his deposition, Plaintiff's expert, Dr. Lanphear, agreed that the Guide is the primary authority on the prescription of medical screening tests (*See* R. 556-57.)

The *Guide* states:

In addition to weighing evidence for effectiveness, selecting appropriate screening tests requires considering age, gender, and other individual risk factors of the patient in order to minimize adverse effects and unnecessary expenditures (*see* Chapters ii and iii). An appreciation of the risk profile of the patient is also necessary to set priorities for preventive interventions. The need for assessing individual risks underscores a time-honored principle of medical practice: the importance of a complete medical history and detailed discussion with patients regarding their personal health practices, focused on identifying risk factors for developing disease.

(R. at 648.)

Drs. Banner and Nassetta testified, consistent with the *Guide*, that administering tests to the entire class without first examining each child's individual blood lead levels and personal medical histories is improper because it risks mislabeling children as ill when they are, in fact, healthy. (R. at 280-81, 681.) This can lead to unnecessary fear and anxiety, and unneeded follow-up testing. *Id.* at 681.

Dr. Nassetta testified that Plaintiff's expert, Dr. Lanphear, in proposing that the entire class receive some form of medical monitoring, did not consider the monitoring that is already in place in Herculaneum. (R. at 926.) Jefferson County and the Missouri Department of Health and Senior Services already offer blood lead testing to children in the proposed class free of charge. (*See* R. at 284; *see also* R. at 686.) At any time, parents of Herculaneum children can take their children in and have their blood tested. (R. at 284.) In Missouri, blood lead testing is required for children at 12 and 24 months. *Id.* If a child has an elevated blood lead level (20 ug/dl or above) he or she then receives individual case management/examination. (R. at 926.)

The Trial Court's Order

On June 30, 2005, the trial court entered its Order denying Plaintiff's Motion. (R. at 1-7.) The trial court stated that Defendants had advanced a number of arguments in opposition to class certification:

Defendants oppose class certification contending courts generally deny certification in toxic tort cases involving claims for personal injuries because individual issues such as exposure, causation, injury and damage must necessarily be determined on an individual basis; the proposed

class here would consist mostly of children, who unlike plaintiff, do not claim any present injury and thus plaintiff's claims are not typical; parents of other children claiming medical problems have already filed individual lawsuits; and Missouri law has never recognized a cause of action for medical monitoring by a person who does not claim to suffer present injury. Defendants also argue that the levels of emissions from the smelter have been reduced over the last ten years, and that there are variations in the level of exposure for members of the proposed class.

Id. at 2.

The court rejected some of these arguments, did not address some, and accepted others. Rejecting Defendants' arguments on numerosity, the court found that the numerosity requirement of Missouri Rule 52.08(a)(1) was satisfied. *Id.* at 4. According to the court, "[h]ere, joinder of all children who suffered exposure in Herculaneum would be impracticable and the Court finds that the numerosity requirement is satisfied." *Id.*

The court did not address Defendants' arguments on the remaining elements of Rule 52.08(a)--commonality, typicality, and adequacy of representation. The trial court nowhere 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 injury.

The court did accept, however, Defendants' arguments on the issue of predominance of individual over common questions. The court found that Plaintiff had failed to meet the requirement of Rule 52.08(b)(3) that common questions predominate over any individual issues. *Id.* at 5. The court stated that class certification is not proper

here because individual issues “will necessarily predominate over common issues in this case.” *Id.* According to the court, those issues include:

[t]he age at which exposure occurred, the nature of the exposure, the time period over which the exposure occurred, the blood lead level, the existence of other sources such as lead paint for any presence of lead, whether the individuals are presently suffering from any lead related injuries, whether the individuals are still being exposed or whether such exposure terminated, if the exposure to lead in Herculaneum has terminated how long ago it terminated, and whether there is any need for a particular individual to be monitored.

Id. at 5-6. The trial court continued:

The Court believes that Rule 52.08(b)(3) is not satisfied because there is a need for individual rather than common proof. *See In re Agent Orange Product Liability Litigation*, 818 F.2d 145, 165 (2nd Cir. 1987), in which the court stated that the relevant question is not whether agent orange has the capacity to cause harm, but whether it did cause harm and to whom, which is a highly individualistic determination. *See also Owner-Operator Indep. Drivers Ass’n. v. New Prime*, 213 F.R.D. 537, 547 (W.D. Mo. 2002), in which the court noted that “[w]here proof of fact of damage requires evidence concerning individual class members, the common questions of fact become subordinate to the individual issues.” Due to the

predominance of individualized issues, the Court does not believe this case can be efficiently addressed on a class-wide basis.

Id. at 6.

The Court of Appeals' Opinion Affirming the Trial Court

Plaintiff appealed the trial court's ruling. In the brief she filed in the Court of Appeals, the only issue Plaintiff presented was whether the trial court had erroneously found that present injury is an essential element of a medical monitoring claim. (Appellant's Court of Appeals Brief at 18, appendix hereto ("Defendants' App.") at A-2.) Plaintiff did not otherwise challenge the trial court's class certification order.

The Court of Appeals affirmed the trial court's ruling. *Meyer*, 2006 WL 996540 at *6. In its Opinion, the Court of Appeals rejected Plaintiff's argument that the trial court had based its ruling on a presumption that physical injury is required to recover medical surveillance damages. *Id.* at *4-5. According to the Court of Appeals:

The issues detailed by the trial court do not reflect that it considered present injury to be a requirement. Instead the trial court considered what would be relevant to determining how significant the probability was that each individual member of the purported class would incur future injuries as a result of operation of the Doe Run smelter. The trial court also considered the fact that some purported class members had already suffered injuries, and consequently the need for medical monitoring and whether the individual issues or the common ones predominated.

Id. at *5.

The Court of Appeals acknowledged that Plaintiff's Point Relied On did not preserve any appeal of whether the trial court abused its discretion in finding that individual issues predominated. *Id.* at *3. However, the Court of Appeals decided to review that issue *ex gratia*. *Id.* After discussing much of the evidence that was presented on the predominance issue, the Court of Appeals held that the trial court did not abuse its discretion in denying class certification. *Id.* at *6.

Plaintiff filed an Application for Transfer in this Court, which was granted on August 22, 2006.

ARGUMENT

Introduction

The order denying class certification should be affirmed. In her only assignment of error, Plaintiff accuses the trial court of an “error” it did not commit: holding that present physical injury is a necessary element of a medical monitoring claim. As shown in Section I of this Argument and as found by the Court of Appeals, the trial court simply did not so hold. Resolving whether present physical injury is a necessary element of a medical monitoring claim is thus not necessary to deciding this appeal. Plaintiff’s only preserved assignment of error, which raises only this issue, is without merit.

The trial court’s key finding was that individual rather than common issues predominate here, so that class certification under Rule 52.08(b)(3) is inappropriate. Given the record before the trial court, this finding was well within the broad range of discretion that a trial judge has in deciding whether or not to certify a class. As shown in Section II of this Argument, individual issues predominate here regardless of whether present injury is a necessary element of a medical monitoring claim. Those individual issues relate to the extent of a plaintiff’s exposure, the plaintiff’s increased risk of disease, and the plaintiff’s need for medical monitoring. All of these are individual questions that predominate over any common issues, as the trial court (like many other courts that have refused to certify medical monitoring classes) properly found.

Moreover, even if the trial court had found that physical injury is required to recover medical monitoring damages, the appropriate course for this Court would be to affirm the trial court’s order. Consistent with existing Missouri precedent and the better-

reasoned decisions from other jurisdictions, present physical injury should be required to recover medical monitoring damages, as shown in Section III.

Finally, even if Plaintiffs' appeal were otherwise meritorious, the order below should be affirmed for reasons of atypicality of the class representative's claim and inadequacy of representation that were not addressed by the trial court, as shown in Section IV. The only named plaintiff, Lani Meyer, unquestionably is asserting a claim of present personal injury. That makes her claim atypical of the claims of the class and causes her to be an inadequate class representative.

Standard Of Review

Class certification determinations under Rule 52.08 lie within the sound discretion of the trial court. *State ex rel. Union Planters Bank, N.A. v. Kendrick*, 142 S.W.3d 729, 735 (Mo. banc 2004); *State ex rel. Am. Family Mut. Ins. Co. v. Clark*, 106 S.W.3d 483, 486 (Mo. banc 2003). This Court reviews orders granting or denying class action certification solely for an abuse of discretion. *Craft v. Philip Morris Cos.*, 190 S.W.3d 368, 376 (Mo. App. E.D. 2005) (citing *Koger v. Hartford Life Ins. Co.*, 28 S.W.3d 405, 410 (Mo. App. W.D. 2000)). A trial court abuses its discretion "only if its ruling is so arbitrary and unreasonable as to shock one's sense of justice and indicate a lack of careful consideration. It cannot be said that the trial court abused its discretion where reasonable persons could differ with the propriety of its ruling." *Koger*, 28 S.W.3d at 410 (quoting *Duckett v. Troester*, 996 S.W.2d 641, 646 (Mo. App. 1999) (internal quotations omitted)).

Plaintiff acknowledges the applicability of an abuse of discretion standard to class certification decisions. (Appellants' Substitute Brief at 24.) However, she also invokes

the *Murphy v. Carron*, 536 S.W.2d 30, 32 (Mo. 1976), standard of *de novo* review that applies when it is claimed that a trial court has misstated the law. (Appellant's Substitute Brief at 24.) The *de novo* review standard does not apply here. Plaintiff's invocation of that standard apparently refers to Plaintiff's only preserved claim of error: that the trial court erroneously concluded that Missouri law requires present injury as a precondition to a suit for medical monitoring. As shown below, however, the trial court simply did not reach the conclusion that Plaintiff attributes to it. The court did not decide whether present injury is a necessary precondition to a suit for medical monitoring, and instead denied class certification on the traditional Rule 52.08(b) basis that individual rather than common questions predominate. There was no error of law. The abuse of discretion standard applies. On the entire record before the trial court, the conclusion that individual questions predominate was well within the court's discretion. Its order denying class certification should be affirmed.

I. THE TRIAL COURT DID NOT ERR IN DENYING CLASS CERTIFICATION BY REQUIRING PRESENT PHYSICAL INJURY AS A NECESSARY ELEMENT OF A CLAIM FOR MEDICAL MONITORING, BECAUSE, CONTRARY TO PLAINTIFF’S ASSERTION, THE TRIAL COURT DID NOT DENY CERTIFICATION FOR THAT REASON; RATHER, THE TRIAL COURT DENIED CLASS CERTIFICATION ON PREDOMINANCE GROUNDS THAT ARE NOWHERE CHALLENGED IN PLAINTIFF’S POINT RELIED ON. [RESPONDS TO PLAINTIFF’S POINT I].

This is a straightforward Rule 52.08(b)(3) case in which the trial court found, after careful analysis, that individual issues predominate over common ones, so that class certification was inappropriate. The trial court’s analysis was correct and its order should be affirmed, particularly in light of the applicable “abuse of discretion” standard of review. Throughout the appellate process, Plaintiff has tried to make this appeal something more: a vehicle for resolution of the question whether present physical injury is a necessary element of a medical monitoring claim under Missouri law. This Court should reject the attempt, because the appeal does not fairly present that question. Plaintiff is asking for an impermissible advisory opinion on the issue.

A. This Court Does Not Issue Advisory Opinions; It Decides Only Those Issues Fairly Presented by an Appeal and Necessary to Its Disposition.

It is outside this Court’s authority to issue advisory opinions. *City of Springfield v. Sprint Spectrum, L.P.*, 203 S.W.3d 177, 188 (Mo. banc 2006); *Schottel v. State*, 159

S.W.3d 836, 841 n.4 (Mo. banc 2005). “It is not this Court's prerogative to offer advisory opinions on hypothetical issues that are not necessary to the resolution of cases before it.” *State v. Self*, 155 S.W.3d 756, 761 (Mo. banc 2005). Under our Constitution, the Court’s jurisdiction is to decide cases, not issues. Constitution of Missouri, Art. V, §§ 3, 10. If an issue is not fairly presented by an appeal, the Court is without power to decide it.

As a court of review, this Court’s function is to determine if the trial court erred, and to correct any trial court error properly presented on appeal that materially affected the rights of the parties. As the Court stated in *Thummel v. King*, 570 S.W.2d 679 (Mo. banc 1978):

Ordinarily, an appellate court sits as a court of review. Its function is not to hear evidence and, based thereon, to make an original determination. Instead, it provides an opportunity to examine asserted error in the trial court which is of such a nature that the complaining party is entitled to a new trial or outright reversal or some modification of the judgment rendered.

570 S.W.2d at 686.

In the present case, Plaintiff asks the Court to reach an issue that the trial court did not decide, and that is not necessary to resolution of the appeal: whether present physical injury is an essential element of a medical monitoring claim. She thus requests an impermissible advisory opinion.

B. As She Did in the Court of Appeals, Plaintiff Rests Her Entire Appeal on the Present Injury Issue.

One of the most hotly debated issues in American tort law is whether present physical injury is an essential element of a claim for medical monitoring. Courts throughout the United States, including the United States Supreme Court in a case involving federal law, *Metro-North Commuter R.R. Co. v. Buckley*, 521 U.S. 424, 440-43 (1997), have addressed this issue. They have reached conflicting results. (See Section III.D., *infra*).⁶ In her Application for Transfer and in her Substitute Brief, Plaintiff asks the Court to use the present appeal to decide this issue for Missouri. Plaintiff earlier made the same request in the Court of Appeals. It is the only issue she has chosen to present to the appellate courts.

To determine what issues it must decide to resolve an appeal, the Court looks to the points relied on. The function of a point relied on “is to give notice to the opposing party of the precise matters which must be contended with and to inform the court of the issues presented for review.” *Wilkerson v. Prelutsky*, 943 S.W.2d 643, 647 (Mo. banc 1997). A point relied on must “(A) identify the trial court ruling or action that the appellant challenges; (B) state concisely the legal reasons for the appellant's claim of

⁶ For a recent collection of the reported decisions, see *Note, A Fifty-State Survey of Medical Monitoring and the Approach the Minnesota Supreme Court Should Take When Confronted With the Issue*, 32 Wm. Mitchell L.Rev. 1095 (2006).

reversible error; and (C) explain in summary fashion why, in the context of the case, those legal reasons support the claim of reversible error.” Mo. S. Ct. R. 84.04(d).

In her Point Relied On, Plaintiff asserts that the trial court, in its order denying class certification, found that present physical injury is a necessary element of a medical monitoring claim. Plaintiff contends that this finding was error, and has chosen to assign it as the only trial court error to be reviewed, both in the Court of Appeals and in this Court.

The point relied on in the brief Plaintiff filed in the Court of Appeals was as follows:

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 MISSOURI LAW DOES NOT NOW AND OUGHT NOT TO REQUIRE PRESENT PHYSICAL INJURY AS AN ELEMENT OF A MEDICAL MONITORING CAUSE OF ACTION.

(Defendants’ App. at A-2.)

Defendants argued to the Court of Appeals that this Point Relied On was without merit, because the trial court did not find that present physical injury is a necessary element of medical monitoring, and so did not commit the only error of which it was accused. The Court of Appeals agreed. The appellate court set out the substance of the Point Relied On, *see Meyer*, 2006 WL 996540, at *3, and noted Defendants’ argument

that the trial court simply did not base its decision on the ground described by Plaintiff. The Court of Appeals agreed with Defendants on this point: “On its face, plaintiff’s point relied on seemingly lacks merit, and this appeal could be resolved by denying it on that ground.” *Id.* at *4. The Court stated, “The issues detailed by the trial court do not reflect that it considered present injury to be a requirement.” (The Court of Appeals chose to review *ex gratia* whether the trial court otherwise erred in its predominance analysis, and found that it did not).

In her Substitute Brief filed in this Court, Plaintiff has changed the language of her Point Relied On. Plaintiff’s new Point Relied On reads:

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 AS [SIC] 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.

(Appellant’s Substitute Brief at 23.)

Under Mo. S. Ct. R. 83.08(b), substitute briefs may be filed in this Court; however, any brief “shall not alter the basis of any claim that was raised in the court of

appeals brief.” *See Lane v. Lensmeyer*, 158 S.W.3d 218, 229 (Mo. 2005) (finding that plaintiffs’ brief violated Rule 83.08(b) when it altered the basis for their claim on appeal).

Defendants do not understand Plaintiff’s new Point Relied On to change the basis of her claim on appeal. Although she has added language stating that the trial court abused its discretion by not finding that common issues predominate, she has qualified that assertion by stating that the only reason the court so erred was “as a result of its erroneous application of the law.” Plaintiff alleges that the trial court erred in denying certification “because it required present physical injury as an element of medical monitoring.” She is thus not asking this Court to order the trial court to review the trial court’s overall predominance analysis or to certify a class. Plaintiff is only asking this Court to declare the law of medical monitoring in Missouri and remand the case to the trial court for reconsideration of its class certification denial. (Appellant’s Substitute Brief at 27.) Therefore, the only preserved claim of error, and the only legal argument that Defendants must respond to, remains Plaintiff’s assertion that the trial court found that present physical injury is a necessary element of a medical monitoring claim and erred in so finding.

To the extent Plaintiff’s new point relied on might be read as expanding the basis of her claim on appeal, this court should disregard it. Under Rule 83.08(b), it is not proper for Plaintiff to expand the basis for her appeal at this late hour. Plaintiff’s appeal should be limited to the sole allegation of error that she raised before the Court of Appeals--that the trial court erred by finding that physical injury is a necessary element of a medical monitoring claim.

Counsel for Plaintiff are not guilty of the imprecision in drafting a Point Relied On that underlies most decisions applying Rule 84.04(d), and from which appellate courts sometimes grant relief. Rather, Plaintiff has made a conscious choice to present only this one claim of error. She should be held to that choice.

C. The Trial Court Did Not Decide the Present Injury Issue.

There is a short and complete response to Plaintiff's only preserved claim of error. While the trial court would not have erred had it done so,⁷ it did not require present physical injury as an element of medical monitoring. Nowhere in its order denying class certification did the trial court refer to a requirement that present injury be proven as a condition to recovery of damages for medical monitoring. Nowhere in Plaintiff's brief does she point to specific language in the order below so holding.

Plaintiff does not contend that the trial court made an express finding on this issue. She argues, rather, that a requirement of present physical injury as a precondition to medical monitoring is implicit in the trial court's order (1) because the court cited *In re Agent Orange Prod. Liab. Litig.*, 818 F.2d 145, 165 (2d Cir. 1987) and *Owner-Operator Indep. Drivers Ass'n*, 213 F.R.D. at 547, in support of its conclusion that individual issues predominate (Appellant's Substitute Brief at 26-27), and (2) because the trial court denied class certification relying "on factors that at best would be related to claims for

⁷ See Section III, below.

present physical injury” (Appellant’s Substitute Brief at 11). Plaintiff’s strained reading of the trial court’s order is in error.

First, that the trial court cited to *In re Agent Orange* and *Owner-Operator Indep. Drivers Ass’n* does not mean the trial court thought present physical injury is required for a plaintiff to recover medical monitoring costs. As Appellant points out, neither of those decisions was a medical monitoring case. The *Agent Orange* case involved personal injury claims. The *Owner-Operator Indep. Drivers Ass’n* case was a class action brought by truck lessees under federal “Truth in Leasing” regulations. As the Court of Appeals recognized, the trial court cited those cases, not on any issue related to the elements of a medical monitoring claim, but for the general proposition that class certification is not proper when individualized proof is required to show that a plaintiff has suffered legal harm. *See Meyer*, 2006 WL 996540 at *6. Here, Plaintiff’s claimed legal harm is the need for medical monitoring services. As the trial court found and as is shown in Section II, below, individualized proof is necessary to determine whether any plaintiff needs medical monitoring and so has suffered that legal harm. Class certification is therefore inappropriate.

Plaintiff argues that a present physical injury requirement is implicit in the trial court’s order because of the particular issues that the trial court identified as predominant. According to Plaintiff, “the trial court decided the predominance issue by relying on factors that ignore the common fact and harm of exposure, relying instead on factors that at best would be related to claims for present physical injury . . .” (Plaintiff’s Substitute Brief at 11.) Contrary to Plaintiff’s argument, as also shown in Section II, below, all of

the issues that the trial court listed as predominant individual issues are important to the Plaintiff's and class members' right to relief, even if physical injury is not an element of a medical monitoring claim. The trial court did identify, as one of the many predominant individual issues, "whether the individuals are presently suffering from any lead related injuries." (R. at 6.) That does not mean, however, that the trial court found that the presence of lead related injury is an essential element of a medical monitoring claim.

Even if a present physical injury is not required for recovery of medical monitoring costs, the existence of present injury remains highly relevant to an individual's claim for such costs. A child with a diagnosed present injury from lead exposure does not need medical monitoring to watch for the onset of that injury. Such a child might not benefit from monitoring, or might need monitoring of a wholly different kind from that needed by a child with no present injury. The presence or absence of a diagnosed lead-related injury is thus relevant to a medical monitoring claim, even if it is not an essential element of such a claim. The listing of this question, and the other individual questions identified by the trial court, does not mean that the court found present physical injury to be an essential element of a medical monitoring claim.

If anything, the trial court's order suggests that the court did not decide the present injury issue adversely to Plaintiff. This is shown by the court's numerosity analysis. The trial court pointed out that Plaintiff had alleged there were more than 300 children in their proposed class. (R. at 1-2.) Plaintiffs' count of children in the class was not limited to children who had suffered present injury. (*See* R. at 337.) The court held that Plaintiff's case for numerosity was sufficient, stating that "joinder of all children *who suffered*

exposure in Herculaneum would be impracticable and the court finds that the numerosity requirement is satisfied.” (R. at 4) (emphasis supplied). If the court had thought that present physical injury was a necessary condition to recover for medical monitoring, it would have analyzed numerosity in terms of the number of children in Herculaneum claiming such injury. Instead, the court analyzed numerosity by considering the number of children who merely “suffered exposure.” This belies any implication that the trial court found present injury to be a predicate to recovery of medical monitoring.

D. This Court Thus Need Not Decide the Present Injury Issue To Resolve This Appeal.

Plaintiff’s sole preserved allegation of error thus rests on a misconception of the basis for the trial court’s ruling. The trial court simply did not find that present injury is a precondition for recovery of medical monitoring damages. Rather, the trial court held that individual questions predominate over any common questions. That finding is not only correct, as shown in Section II; it is unchallenged in Plaintiff’s point relied on.

Plaintiff appears to contend that this Court should reach the present injury issue because, even if the trial court and the Court of Appeals did not decide the question, they erred because they should have. According to Plaintiff, the Court of Appeals should have decided whether present physical injury is an element of a medical monitoring claim “because the fundamental substantive law determines the predominance analysis.” (Appellant’s Substitute Brief at 66.) This argument is contrary to established class action law. *See Craft*, 190 S.W.3d at 377.

In *Craft*, the Court of Appeals stated that it is improper at the class certification stage to determine the elements of a cause of action or whether the allegations pleaded are sufficient to state a claim. *See id.* at 377, 385. Rather, in deciding whether class certification is proper under (b)(3), a trial court should look only to the allegations in the plaintiff's petition and determine whether common proof will be sufficient to make a prima facie case for the class on the elements pled. *Id.* at 382. A trial court should not consider "what proof may be required under a cause of action defendant thinks plaintiff should have pleaded." *Id.*

Under the principles articulated in *Craft*, it would have been improper for the trial court to decide the present injury issue at the class certification stage. Plaintiff did not allege present physical injury as an element of her claim in this case. (*See R.* at 8-39.) The trial court's order did not decide whether it was. Rather, the trial court in effect assumed *arguendo* that Plaintiff's identification of the elements of a claim was correct and determined that substantial individual proof will be required to litigate the elements that Plaintiff agreed she must prove to sustain a claim for medical monitoring. (*R.* at 5-6.)

Plaintiff's only preserved claim of error is thus without merit. The trial court did not decide (and did not have to decide) whether present physical injury is a precondition to medical monitoring. It thus did not commit the only error with which it is charged. This Court should affirm the trial court's order denying class certification on that basis.

II. THE TRIAL COURT PROPERLY FOUND THAT INDIVIDUAL QUESTIONS PREDOMINATE, BECAUSE ISSUES SUCH AS EXPOSURE, INCREASED RISK OF CONTRACTING DISEASE, AND THE NEED FOR MEDICAL MONITORING SERVICES CAN ONLY BE DETERMINED ON AN INDIVIDUAL BASIS AND THESE ISSUES PREDOMINATE OVER ANY COMMON QUESTIONS. [ADDITIONAL ARGUMENT IN SUPPORT OF TRIAL COURT’S ORDER.]

As set forth in Section I, Plaintiff has chosen not to preserve any challenge to the trial court’s order other than her claim that the trial court erroneously found that physical injury is an element of a medical monitoring claim. This Court should affirm the trial court’s order because the trial court did not so find. However, even if this Court chooses to reach the predominance issue in its entirety, the Court should affirm the order denying class certification.

A. If Individual Issues Predominate in a Case, it is Not One “Where There Can Be Advantages Of Economy Of Effort And Uniformity Of Result Without Undue Dilution Of Procedural Safeguards,” and Class Certification Should be Denied.

A plaintiff seeking class certification has the burden of establishing that all of the requirements of Rule 52.08(a) are met and that the case falls within one of the categories where certification is permissible under Rule 52.08(b). *Craft*, 190 S.W.3d at 378-79. Plaintiff here relied on Rule 52.08(b)(3). That rule states:

(b) **Class Actions Maintainable.** An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

As this Court has held, the object of Rule 52.08(b)(3) “‘is to get at the cases where a class action promises important advantages of economy of effort and uniformity of result without undue dilution of procedural safeguards for members of the class or for the opposing party.’” *Clark*, 106 S.W.3d at 489 (quoting *Conte & Newberg* § 4:24, at 155).

The Court of Appeals has held that in deciding whether the predominance requirement of Rule 52.08(b)(3) is satisfied, a trial court should “determine whether, given the factual setting of the case, if the plaintiff’s general allegations are true, common evidence could suffice to make out a prima facie case for the class.” *Craft*, 190 S.W.3d at 377 (quoting *Blades v. Monsanto Co.*, 400 F.3d 562, 566 (8th Cir. 2005)). “The predominance requirement does not demand that every single issue in the case be common” *State ex rel Am. Family Ins. v. Clark*, 106 S.W.3d 483, 488 (Mo. banc 2003) (quoting *South Carolina Nat’l Bank v. Stone*, 139 F.R.D. 325, 331 (D. S.C. 1991)). However, there must be “substantial common issues which ‘predominate’ over the individual issues.” *Id.* To determine whether an issue is common, a trial court looks to “the nature of the evidence that will suffice to resolve [the] question.” *Craft*, 190 S.W.3d at 382 (quoting *Blades*, 400 F.3d at 566).

Common issues do not predominate simply because plaintiffs say they do. If that were the case, the predominance requirement would be satisfied in every Rule 52.08(b)(3) case. Plaintiffs invariably claim that common issues predominate. In resolving predominance issues, the courts are not to blindly accept the arguments of either plaintiffs or defendants. *Szabo v. Bridgeport Mach., Inc.*, 249 F.3d 672, 676-77 (7th Cir. 2001). Rather, the trial court is to conduct “an independent judicial review of the plaintiff’s allegations” in determining whether the class action rule’s requirements are met. *Id.* at 677. That judicial review is to be conducted with “the exercise of judgment and the application of sound discretion.” *Id.* at 676. As noted in *Craft*, “[t]he preliminary inquiry at the class certification stage may require the court to resolve disputes going to the factual setting of the case, and such disputes may overlap the merits of the case.” *Craft*, 190 S.W.3d at 377 (quoting *Blades*, 400 F.3d at 567).

In ruling on class certification a court may not decide the merits of the case. *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177-78 (1974). The court is required to consider, however, *how* the merits will be decided by the trier of fact. If the only way to fairly decide the merits is to look closely at the circumstances of each individual plaintiff and resolve a number of issues to determine whether that plaintiff has a right to recover, common questions do not predominate, and class certification should be denied.

Here, the trial court was presented by both parties with an extensive evidentiary record. The trial court subjected the evidence that Plaintiff presented in support of her Motion for Class Certification to the type of judicial review approved by the courts in *Craft* and *Szabo*. It found that the predominance requirement was not met because

individual proof on a number of issues would be required to establish each claimant's right to relief. (*See* R. at 6.) This finding was supported by substantial evidence and thus was not an abuse of the court's discretion.

B. There is Little Dispute About the Elements of a Medical Monitoring Claim in Those Jurisdictions Where Physical Injury Is Not Required

As Plaintiff correctly notes, the jurisdictions that allow plaintiffs to recover medical monitoring damages in the absence of present physical injury have achieved a relative consensus regarding the elements for such a claim. (*See* Appellant's Substitute Brief at 47) (citing *Bower v. Westinghouse Elec. Corp.*, 522 S.E.2d 424, 432 (W. Va. 1999)). One formulation of those elements was set out by the Utah Supreme Court in *Hansen v. Mountain Fuel Supply Co.*, 858 P.2d 970 (Utah 1993):

- 1) exposure
- 2) to a toxic substance,
- 3) which exposure was caused by the defendant's negligence,
- 4) resulting in a increased risk
- 5) of a serious disease, illness, or injury
- 6) for which a medical test for early detection exists
- 7) and for which early detection is beneficial, meaning that a treatment exists that can alter the course of the illness,
- 8) and which test has been prescribed as medically advisable by a qualified physician according to contemporary scientific principles.

Hansen, 858 P.2d at 979.

The only significant difference among those jurisdictions is that some courts require a plaintiff to show that early detection is “beneficial,” meaning that a treatment exists that can alter the course of the illness. Other courts do not include such a requirement as a precondition to relief. Compare *Hansen v. Mountain Fuel Supply Co.*, 858 P.2d 970, 979-80 (Utah 1993) (beneficial effect from monitoring is required) with *Bower*, 522 S.E.424 at 433-34 (no beneficial effect necessary).

Plaintiff asks this Court to adopt the same elements adopted by the jurisdictions that do not require present physical injury, and further asks this Court to adopt *Bower*’s holding that a medical monitoring plaintiff should not have to show that early detection is beneficial. (Appellant’s Substitute Brief at 47-48.) For purposes of resolving this appeal, the Court can accept *arguendo* Plaintiff’s list of the elements of a medical monitoring claim. Even using those elements as the basis for analysis, it is clear that individual rather than common issues predominate.

C. Substantial Individualized Proof is Required to Recover Medical Monitoring Costs Even in Jurisdictions Where No Present Physical Injury is Required.

While Plaintiff identifies the elements of a claim for medical monitoring costs that she would like the Court to recognize (Appellant’s Substitute Brief at 47), her brief does not discuss these elements at any length. This was not an accident. Examination of the elements of a medical monitoring claim, as identified by Plaintiff, shows that significant individual proof is necessary to prove each of the elements of such a claim. This is true even in those jurisdictions where physical injury is not required to recover.

To recover medical monitoring costs in any jurisdiction, a plaintiff cannot recover without showing that the defendant has “exposed” the plaintiff to a hazardous substance. To prove exposure, an individual cannot, as Plaintiff suggests, merely show residence in a contaminated area. Rather, a plaintiff must show that she has actually ingested, inhaled, injected, or otherwise absorbed the substance into her body. *See, e.g., Hansen*, 858 P.2d at 979; *see also Askey v. Occidental Chem. Corp.*, 102 A.D.2d 130, 138 (N.Y. App. Div. 1984) (denying class certification where Plaintiff’s only evidence that there was an exposed class was a map showing the area affected; according to the court, the map did not “identify with any degree of specificity those persons within that area whose bodies have been invaded by a toxic substance”).

Proving exposure alone, however, is not enough. A plaintiff must also show that the exposure has resulted in a significant increased risk of serious disease. This is a two-pronged test. First, the plaintiff must show that the exposure “*was of sufficient intensity and/or duration to increase his or her risk of the anticipated harm significantly over the plaintiff’s risk prior to exposure.*” *Hansen*, 858 P.2d at 979 (emphasis added); *see also Potter v. Firestone Tire & Rubber Co.*, 863 P.2d 795, 816 (Cal. 1993); *Ayers v. Jackson Twp.*, 525 A.2d 287, 312 (N.J. 1987). Second, the plaintiff must show that the particular disease the individual is at risk of contracting is “serious,” meaning that it may “result in significant impairment or death.” *Hansen*, 858 P.2d at 979; *see also Ayers*, 525 A.2d at 312 (weighing “the seriousness of the diseases for which individuals are at risk” in deciding whether medical monitoring costs should be awarded).

No particular level of quantification is required to show that a plaintiff has a significantly increased risk of serious disease. *Hansen*, 858 P.2d at 979. Rather, this is a decision for the trier of fact. *Potter*, 863 P.2d at 825 (“[I]t is for the trier of fact to decide, on the basis of competent medical testimony, whether and to what extent the particular plaintiff’s exposure to toxic chemicals in a given situation justifies future periodic medical monitoring.”)

Finally, to sustain the ultimate burden, a plaintiff must show that medical screening tests are reasonably necessary. *See Bower*, 522 S.E.2d at 433. This means that a plaintiff must not only show theoretical value to a medical screening test, but also must show that the plaintiff’s physician would actually prescribe the test. As stated in *Hansen*:

To illustrate, a monitoring regime might be of theoretical value in detecting and treating a particular illness, but if a reasonable physician would not prescribe it for a particular plaintiff because the benefits of the monitoring would be outweighed by the costs, which may include, among other things, the burdensome frequency of the monitoring procedure, its excessive price, or its risk of harm to the patient, then recovery would not be allowed. This conforms with the fact that the substantive injury being remedied is the defendant’s significantly increasing the plaintiff’s risk of harm so that the plaintiff must incur medical monitoring expenses. Absent the advisability of monitoring for that particular plaintiff, the injury is not complete and no cause of action exists.

858 P.2d at 980; *but see Bower*, 522 S.E.2d at 433 (holding that a plaintiff must show that screening tests would be prescribed by a qualified physician, but stating that factors like how expensive a test is and frequency of testing should not be given significant weight).

All of the decisions just cited arise from jurisdictions that have recognized claims for medical monitoring absent present injury. They are decisions on which Plaintiff relies. Plaintiff ignores a key teaching of all of them: that deciding whether a plaintiff may recover medical monitoring requires considering the circumstances of the individual plaintiff.

Plaintiff appears to argue that a plaintiff can sustain a claim for medical monitoring without providing any evidence that goes to the extent of her exposure or her relative increased chance of contracting particular disease. On page 59 of her Brief, Plaintiff argues that “the need for medical monitoring flows from the fact of exposure, not the amount of exposure or the certainty that injury will result.” Then, on page 61, Plaintiff argues that “how significant the probability [is] that each individual member of the purported class would incur future injuries” is irrelevant to a medical monitoring

claim. These arguments are at variance with all decided medical monitoring cases, including those cited above.⁸

Liability in a medical monitoring case does not “flow from the fact of exposure” as Plaintiff contends; rather, it flows from exposure that is sufficient in amount and/or duration to increase the plaintiff’s chances of contracting a particular disease significantly over their risk prior to exposure. *Hansen*, 858 P.2d at 979. Proving such exposure requires proof of individualized facts.

D. The Individual Issues the Trial Court Identified Are Relevant, Predominating Issues Even if Physical Injury Is not Required to Recover Medical Monitoring Damages.

The trial court held the following individual issues predominate in this case:

[T]he age at which exposure occurred, the nature of the exposure, the time period over which the exposure occurred, the blood lead level, the existence of other sources such as lead paint for any presence of lead, whether the individuals are presently suffering from any lead related

⁸ Admittedly, in those jurisdictions that allow a plaintiff to sue for medical monitoring damages without present injury, a Plaintiff does not have to show that disease is more-likely-than-not or “probable” to recover. *See, e.g., Bower*, 522 S.E.2d at 433. However, the plaintiff still must show that the probability of contracting a disease has been increased significantly because of the exposure. *Potter*, 863 P.2d at 824.

injuries, whether the individuals are still being exposed or whether such exposure terminated, if the exposure to lead in Herculaneum has terminated how long ago it terminated, and whether there is any need for a particular individual to be monitored.

(R. at 5-6.)

Plaintiff argues that these issues, while relevant to a personal injury claim, are not relevant to her medical monitoring claim. (*See, e.g.*, Appellants' Substitute Brief at 11.) This argument is incorrect. Each of the issues that the trial court identified relates directly to the elements of a medical monitoring claim as forth in *Hansen* and the other cases cited above. The trial court correctly found that these individual issues are relevant and predominate over any common questions.

1. The Age at Which Exposure Occurred

Age of exposure relates to a number of the agreed elements of a medical monitoring claim, including whether the child has been exposed, the extent of that exposure, the significance of the exposure, and the need for medical monitoring as a result. Young children swallow dirt as a result of hand to mouth activity. If the dirt contains lead, the child who ingests it can have an elevated blood lead level. Ingestion of contaminated dirt is the primary source of elevated blood lead levels in children. (R. at 913.)

How much dirt a child eats, and thus how much lead he or she consumes, is directly related to a child's age. Younger children between 18 and 24 months have greater hand-to-mouth activity than older children. They therefore have a greater risk of

eating more dirt and being significantly exposed to lead. (*See* R. at 302-304.)⁹ As Defendants' expert Dr. Banner testified, if a class member's time in the Class Geographic Area occurred after the age when hand-to-mouth activity is most prevalent the "exposure is going to be very limited." (R. at 304.)

The age at which a child was exposed is necessarily an individual question. Some members of the proposed class first moved into Herculaneum after age twenty-four months. If a child who lives outside Herculaneum is a class member solely because of school attendance, the child would have had no exposure before reaching school age. Age at which exposure occurred is an individual issue directly relevant to a medical monitoring claim.

2. The Nature Of The Exposure

"Nature of exposure" is relevant because the extent to which a child has actually ingested lead and the resulting risk of disease depends, in part, on the amount and type of lead the child is exposed to. Defendants presented substantial evidence that children in the class are exposed to differing amounts of lead. Levels of lead in the soil, air and dust in Herculaneum vary from property to property. (R. at 268 & 808.) A class member who has spent time at a property having low soil lead levels has a lesser chance of ingesting lead, a lesser chance of contracting disease, and, therefore, a lesser need for medical monitoring, if any. (*See* R. at 304 & 258.)

⁹ Plaintiff's expert admitted this at deposition. (R. at 569.)

Plaintiff has never expressly disputed that lead levels in the Class Geographic Area vary among properties. David Sullivan, Plaintiff's expert meteorologist, stated in his Affidavit that "[d]ispersion and deposition of emissions from the smelter in Herculaneum occurs on an area-wide basis." (App. at 12.) However, Mr. Sullivan never stated that each property's lead (or other chemical) levels are the same or even similar. Actual data collected in Herculaneum refute any such argument. (R. at 760-763, 793, 796, 798, 799 & 800.)

Defendants also presented substantial evidence that children in the proposed class are exposed to different types of lead with different "bioavailabilities." (*See* R. at 254-56 & 767.) "Bioavailability" is defined as the amount of lead that is absorbed in a person's bloodstream versus the amount of lead that passes through the body without harm. *Id.* at 255. In Herculaneum, lead comes from many sources, including lead-based paint, *id.* at 760, for which Defendants are not responsible.. A child who comes into contact with lead with a greater propensity to stay in the blood stream has a greater risk of being significantly exposed and a greater risk of injury. *See Id.* at 304.

Without any record support, Plaintiff claims that "nature of exposure" is not an individual issue in this case because "each proposed class member was exposed in the same manner" (Appellant's Substitute Brief at 54-55.) As shown above, this is simply false. Children in the class have been exposed to varying types and amounts of lead. The nature of a child's exposure is thus necessarily an individual question directly relevant to a number of the elements of a medical monitoring claim.

3. The Time Period Over Which Exposure Occurred

Like nature of exposure, “time period over which exposure occurred” is also relevant to whether a child has ingested sufficient lead to increase his or her risk of injury. Emission levels from the smelter have changed in the Class Geographic Area over time. (*See* R. at 796.) In recent years, they have been greatly reduced. *Id.*; *see also* R. at 249. Additionally, in recent years, there has been extensive remediation of properties in the area to reduce soil lead levels. (R. at 245-246.) If a child was born in Herculaneum after a time when emissions were reduced and after his or her property was remediated, the chance that the child was exposed such that he needs monitoring will be significantly less than a child who was in Herculaneum when emissions were higher and before any remediation.

Also, in 2001 there were reports of spillage of lead concentrate along haul roads. (R. at 761.) The EPA sampled properties along the haul roads and found elevated levels of lead. *Id.* at 761-762. In response, some effected properties were remediated. *Id.* at 762. If a child was at the age when he was most likely to ingest lead (18 to 24 months) at the time of the claimed spillage (and if he lived near a haul road), his exposure and risk of injury are going to be higher than other children in the proposed class.

4. Blood Lead Level

The most commonly used measure of a child’s exposure to lead is the level of lead in the child’s blood. Plaintiff asserts that while blood lead levels are relevant in a personal injury case, they are irrelevant in a medical monitoring case. (Appellant’s Substitute Brief at 56.) Plaintiff is in error.

In 2002, the CDC promulgated recommendations for managing elevated blood lead levels among young children. (*See* R. at 750-751.) These recommendations constitute the current standard of care for managing children exposed to lead. In those recommendations (as in all CDC standards since 1991 and before), the agency’s recommendations for management of childhood lead exposure, including screening for lead-related disease, have been directly keyed to blood lead levels. *See id.* Plaintiff’s own expert recognizes that the risk of lead related disease is directly tied to blood lead levels. (*See, e.g.,* App. at A-49.) Blood lead level is thus direct proof going to several elements of a medical monitoring claim: exposure, the significance of that exposure, the resulting risk of injury, and the need for medical monitoring. Blood lead levels can only be measured individually.

Plaintiff argues that variation in individual blood lead levels should not defeat her argument that common issues predominate because “the non-existence of a known blood lead does not determine a lack of need of monitoring . . .” (Appellant’s Substitute Brief at 56.) She cites a portion of the 2002 Health Consultation stating that “blood lead levels are not an indicator of adverse effects.” *Id.* (citing App. at 79).

Plaintiff reads too much into an isolated excerpt from the ATSDR’s language. Here is the full paragraph from the Consultation:

Any effects of lead at these levels on the health of the children are likely to be subtle. Therefore, blood lead levels alone are not an indicator of adverse effects for an individual child. However, in considering populations (groups of individuals) exposed to lead, adverse health effects can be seen

in groups with elevated blood lead levels. Therefore, it is important that efforts to reduce exposure to lead in Herculaneum continue.

(App. at 79.) This paragraph merely states that one cannot infer that a child has suffered adverse effects because the child has an elevated blood lead level. It does not detract from the central role that blood lead testing plays in determining whether a child needs further monitoring or other medical services, which has long been a cornerstone of CDC-ATSDR recommendations for managing children at risk of elevated lead exposures. (*See* R. at 750-51.) An individual child's blood lead level is medically relevant in determining whether that child needs future services.

Plaintiff argues that blood lead levels cannot defeat predominance because “[t]he blood lead level is one component of what medical monitoring is designed to determine.” (Appellant's Substitute Brief at 55-56.) This argument is misleading. Blood lead testing is already available, by various means (and free of charge), to all the residents of Herculaneum. (*See* R. at 284 & 686.) Many, if not most, of the members of the purported class have already had their blood tested for the presence of lead. Plaintiff is not merely asking for damages sufficient to pay for blood lead testing. Rather, as her expert's testimony shows, Plaintiff is asking for damages to pay for a battery of undefined tests for all class members, including neuropsychological testing. (*See* App. at 37-38.) To perform such testing without looking at individual class members' blood lead levels would be improper. The CDC's guidelines support this; under those guidelines, only children with higher blood lead levels receive additional screening. (*See* R. at 750-751.)

Whether children's blood lead levels are sufficiently high to require further monitoring services is necessarily an issue that can only be determined on an individual basis and is directly relevant to each child's medical monitoring claim.

5. The Existence Of Other Sources Such As Lead Paint For Any Presence of Lead

The existence of other sources of exposure is also relevant to the monitoring claims of Plaintiffs and the class members. In a medical monitoring case, as in a personal injury case, the plaintiff must show that the defendant caused his or her injury (as alleged by Plaintiff, here, the need for medical testing). *See Hansen*, 858 P.2d at 979. The evidence shows that there are possible sources of lead exposure to children in the proposed class that have nothing to do with Defendants or their operation of the Smelter. Those sources include lead paint, lead in food cans, lead in gasoline, lead in toys, lead in herbal remedies, and lead received from cigarettes while *in utero*. (*See R.* at 260, 302, 760-61, & 808.) The existence of these alternative sources is relevant to whether Defendants actually caused a particular child's uptake of lead. If, for a particular child, any elevated blood lead level can be wholly explained by one or more of these other sources, that class member cannot establish a need for medical monitoring resulting from Defendants' activities.

Plaintiff argues that the existence of other sources such as lead paint is not relevant because Plaintiff's claim "is based on whether Defendants' tortious conduct has resulted in sufficient baseline exposure to create the need for monitoring." (Appellant's Substitute Brief at 56.) Plaintiff's argument disregards her burden to show that

Defendants proximately caused her need for medical monitoring. If a Plaintiff or class member has such a need resulting solely from some other exposure, the Defendants are not liable for his or her medical monitoring damages. This is an issue that can be proven only on a plaintiff-by-plaintiff basis.

6. Whether The Individuals Are Presently Suffering From Any Lead Related Injuries

Plaintiff argues that “[w]hether the individual is presently suffering from any lead related injuries” is not relevant in this case because present physical injury is not an element of a medical monitoring claim. (Appellant’s Substitute Brief at 57.) Plaintiff misses the point entirely. Even if a present lead related injury is not a necessary element of a claim for medical monitoring costs, it is nonetheless relevant to such a claim. It is relevant to whether screening tests are reasonably necessary and if so, what tests are appropriate. If, for example, a Plaintiff is already suffering from lead-related disease, he or she does not need monitoring to detect that disease. No competent physician would prescribe a screening test to determine if the child has a lead-related injury that has already been diagnosed.

Alternatively, a child with present physical injury from lead exposure may need more surveillance than a child without injury. This makes an injured child’s damages different. Plaintiff’s expert acknowledged this in his deposition. There he admitted that children with symptoms of lead-related disease would require additional steps. (*See R.* at 592.) Hence, “whether the individuals are presently suffering from any lead related

injuries” is relevant to those individuals’ right to recover for medical monitoring, even if physical injury is not an element of Plaintiff’s cause of action.

7. Whether The Individuals Are Still Being Exposed Or Whether Such Exposure Terminated, If The Exposure To Lead In Herculaneum Has Terminated How Long Ago It Terminated

Whether exposure is continuing and time has elapsed since any last exposure are also relevant issues. Logically, the longer a child spends in an area where there is lead contamination the greater the chance the child is going to ingest greater amounts of lead. This, in turn, leads to a greater chance of contracting lead-related disease.

Plaintiff, in fact, admits that duration of exposure is relevant by defining her class to include only those children that have spent at least 12 months (or 7 months while in utero) in the Class Geographic Area.

8. Whether There Is Any Need For A Particular Individual To Be Monitored.

This is a relevant issue to a medical monitoring claim -- it is one of the elements Plaintiff admits that she must prove to sustain her claim. (*See* Appellant’s Substitute Brief at 47.) Whether a qualified physician would prescribe diagnostic testing depends entirely on the particular circumstances of each class member.

Plaintiff’s and Defendants’ experts agree that the primary authority on the prescription of medical screening tests is the *Guide to Clinical Preventive Services: Report of the U.S. Preventive Services Task Force*, at xxxi (2d Ed. 1996) (located at R. 628 through 676). (*See* R. at 278 & 556-557.) In the *Guide*, the U.S. Preventive Services

Task Force states that individual characteristics of a patient (be they child or adult) must be considered in determining what medical screening tests to administer to that patient. (R. at 648.) Testing without looking at the individual characteristics of each class member is simply not supported by established principles of preventive medicine, as set forth in the *Guide*.

In his Affidavit, Dr. Lanphear asserts that tests should be administered to the entire class. (App. at 37-38.) However, in his deposition he admitted that he has not specifically identified any medical test (other than the already available blood lead testing) that he believes the entire class should receive. (R. at 583.) Rather, he has merely created an outline of a program wherein he plans to consult with other doctors regarding what tests should be administered. *Id.* This is not sufficient to show that the need for testing can be established with common proof. Other doctors might not agree with Dr. Lanphear that medical tests should be administered to every child without at least an initial blood lead screening.

There are very good reasons to not administer screening tests without examining individual blood leads and medical histories. Blindly administering a screening test risks mislabeling children as ill when they are, in fact, healthy. (R. at 280-281 & 681.) If a screening test is administered to a class of children there will likely be some “false positive” results, meaning that the test results indicate the presence of disease when none is present. (R. at 681.) This can lead to unnecessary fear and anxiety, and unneeded follow-up testing. *Id.* at 681.

There was substantial evidence before the trial court that the need for monitoring can only be shown on a case-by-case basis. (*See, e.g.*, R. at 682-683.) The trial court thus did not abuse its discretion in finding that the need for monitoring is a predominant individual issue.

All of the issues identified by the trial court as predominant individual issues are directly relevant (and important) to Plaintiff's medical monitoring claim. They predominate over any common issues. Therefore, the trial court did not abuse its discretion in denying Plaintiff's Motion for Class Action Certification.

E. Plaintiff's "Baseline Exposure" Argument is no Shortcut to Class Certification.

Plaintiff argues that the trial court erred in holding that issues relating to the extent of exposure, relative increased risk of injury, and need for monitoring are individual, rather than common. According to Plaintiff, exposure, risk of injury and need for monitoring are actually common issues because each class member has a "baseline exposure" by virtue of meeting the class definition, and because she believes this baseline exposure necessarily results in a significant increased risk of disease and need for monitoring. (*See* Appellant's Substitute Brief at 54-58 & 60.)

Plaintiff's argument would effectively read Rule 52.08(b)(3) out of the class action rule in toxic exposure cases. The argument is tantamount to saying that exposure, increased risk, and the need for monitoring are common issues because the plaintiff says they are.

That Plaintiff believes everyone who meets the class definition has a significant increased risk of contracting serious lead related disease and a need for monitoring does not make exposure, increased risk and need for monitoring common issues. Defendants presented substantial (and unrefuted) evidence that simply meeting the class definition is not enough to show that a child has a significant increased risk of contracting particular lead-related disease and a need for medical monitoring for that disease. (*See, e.g.*, R. at 303-304.)

Plaintiff's "baseline exposure" argument is similar to an argument made to (and rejected by) the California Supreme Court in *Lockheed Martin Corp. v. Carrillo*, 63 P.3d 913 (Cal. 2003). In that medical monitoring case, the plaintiffs sought certification of a class of people had been exposed to chemicals that had been discharged into a city's drinking water. *Id.* at 916. The trial court certified the class. *Id.* The court of appeals ordered the trial court to vacate that order, and the California Supreme Court granted transfer. *Id.*

In its opinion affirming the denial of class certification, the California Supreme Court summarized plaintiffs' argument stating:

Plaintiffs contend that, on the theory of liability they intend to present, each individual's exact dosage of each discharged chemical will not be relevant. According to expert testimony already in the record, plaintiffs argue, "anyone living or working in the area of contamination for at least six months has a plausible claim for medical monitoring." Class membership, plaintiffs stress, is restricted by definition to person who have

received a specified “medically significant” minimum dosage “for some part of a day, for greater than 50 of a year, for one or more years from 1955 to the present” within specified geographical boundaries. All who meet that definition, plaintiffs propose to prove, “will require a generalized monitoring program for the diseases caused by such exposure.” On such a theory, plaintiffs argue, specific individual dosages above the specified minimum are not relevant and, therefore, “the significance and extent” of toxic exposure will involve largely common proof.

Id. at 920 (citations omitted). In support of their argument, the *Lockheed Martin* plaintiffs presented general testimony from two medical experts. Those experts testified that everyone who fits the class definition “is at greater risk of developing cancer and other serious illness which is known by medical scientists and toxicologists to be associated with the chemicals at issue in this case” and that “all persons who are at risk should be in a monitoring program.” *Id.* at 922. The plaintiffs’ experts, however, did not categorically state that each person within the class definition needed medical monitoring irrespective of actual chemical dosages received. *Id.*

The California Supreme Court rejected the plaintiffs’ minimum dosage argument. According to the court, the record evidence in support of the plaintiffs’ liability theory was too “qualified, tentative and conclusionary” to support a claim that the plaintiffs could, “by adopting a liability theory that makes actual dosages and variations in individual response irrelevant” show significant increased risk of disease and need for

monitoring with common proof. *See id.* at 922. Accordingly, the Court affirmed the decision to vacate the order certifying a class.

As in *Lockheed Martin Corp.*, the evidence Plaintiff presented to the trial court here was too conclusory to support any finding that exposure, increased risk, and need for medical monitoring can be shown with common proof. The only evidence Plaintiff presented in this regard was an Affidavit from her medical expert, Dr. Lanphear. Dr. Lanphear generally states that the class members have a “significantly higher risk of developing serious latent disease, disability, and/or injury” as a result of their exposure to lead. (App. at A-30.) However, he cites no data in support of this statement. At deposition Dr. Lanphear recognized that the chances that an individual will suffer particular lead related diseases are directly tied to an individual’s blood lead level. (R. at 578.) This testimony was consistent with his own research where he concludes that there is a direct inverse relationship between blood lead level and cognitive function. (App. at 49.)

There is a good reason why Dr. Lanphear did not discuss blood lead data in his Affidavit. The undisputed data refute his contention that the entire class has a significant increased risk of disease. Those data show that in 2002 the average blood lead level of tested children in Herculaneum under the age of six was 6.4 micrograms per deciliter (ug/dL). (R. at 920.) This is less than the level of concern for blood lead levels of 10 ug/dL established by the CDC. (*See* R. at 750-751.) It is also “below the level for which any recognized health organization recommends any action,” including follow up screening (R. at 920.)

In his Affidavit, unlike the experts in *Lockheed Martin Corp.*, Dr. Lanphear does seem to conclude that the entire class needs to receive monitoring for lead related illness regardless of actual dosage. (App. at 30.) However, Dr. Lanphear also admitted that he is not advocating that the entire class receive any particular medical tests (other than the widely available blood lead testing). (R. at 583.) Like the court in *Lockheed Martin Corp.*, the trial court here rejected Plaintiff's "baseline exposure" argument. This was not an abuse of the trial court's discretion.

Accepting the baseline exposure theory might well be unfair both to certain class members and to defendants. If a class were certified and a classwide trial conducted on the plaintiff's theory that the baseline exposure is enough to give rise to liability, the result might disadvantage individual class members who had more than the baseline exposure. The finder of fact would not hear about their individual circumstances showing above-baseline exposures, and might deny relief to them (along with all other class members) on the theory that "baseline exposure" alone is not enough for liability.

Conversely, even if Plaintiff were allowed to proceed to trial presenting only general evidence that all children within the class need monitoring because of their "baseline exposure," trial of this case would still involve substantial individual proof. Defendants have a constitutional right to present every defense they have to Plaintiff and the class members' claims. *See American Sur. Co. v. Baldwin*, 287 U.S. 156, 168 (1932) (noting that "due process requires that there be an opportunity to present every available defense"). Plaintiff's argument ignores this right. One of Defendants' main arguments here is that the various children in the class do not have a significant increased risk of

injury, so that they do not need medical monitoring. Defendants would be deprived of their right to present this defense if they were not allowed to present individual evidence that certain class members' exposure is insufficient to justify monitoring. Hence, Plaintiff's liability theory will not eliminate the substantial individual proof that will necessarily be involved in this case.

This Court, like the trial court, should reject Plaintiff's arguments that exposure, increased risk and need for monitoring are common rather than individual issues. Individual issues predominate here.

F. The Trial Court's Holding Was Consistent With Many Recent Decisions in Which Courts Have Refused To Certify Medical Monitoring Classes.

No Missouri appellate court has addressed the question of class certification in a medical monitoring case. There is, however, abundant case law on the subject from other courts, including the Supreme Court of the United States.¹⁰ Plaintiff ignores this case law, which largely supports the result reached below. *See, e.g., Amchem Prod., Inc. v. Windsor*, 521 U.S. 591, 629 (1997) (affirming the Third Circuit's reversal of certification of a settlement class of asbestos claimants that included medical monitoring plaintiffs); *In*

¹⁰ Case law from other jurisdictions, while not controlling, may be "persuasive," particularly when based on "sound principles and good reason." *United Fire & Cas. Co. v. Tharp*, 46 S.W.3d 99, 105 (Mo. App. S.D. 2001).

re St. Jude Med., Inc., 425 F.3d 1116, 1122-23 (8th Cir. 2005) (holding that the trial court abused its discretion in certifying a medical monitoring class, in part, because each plaintiff's need for medical monitoring is highly individualized); *Ball v. Union Carbide Corp.*, 385 F.3d 713, 728-29 (6th Cir. 2004) (affirming the trial court's denial of class certification where individual issues regarding time and duration of exposure, medical history, diet, sex, age, and a myriad of other factors defeated any argument that the plaintiffs' claims were typical); *Barnes v. Am. Tobacco Co.*, 161 F.3d 127, 146 (3d Cir. 1998) (holding that the "requirement that each class member demonstrate the need for medical monitoring precludes certification"); *In re Prempro Prod. Liab. Litig.*, 230 F.R.D. 555, 570, 573 (E.D. Ark. 2005) (holding that class certification is not proper because negligence and individual causation require individual inquiry); *Zehel-Miller v. Astrazenaca Pharm., LP*, 223 F.R.D. 659, 664 (M.D. Fla. 2004) (denying class certification where individual issues regarding negligence, medical history, physician involvement, causation and comparative or contributory negligence "eviscerate any notion that common issues predominate"); *Perez v. Metabolife Int., Inc.*, 218 F.R.D. 262, 273 (S.D. Fla. 2003) (denying class certification and stating that "[m]ost, if not all, of the elements of the medical monitoring claim will require individualized proof . . ."); *see also Sanders v. Johnson & Johnson, Inc.*, No. 03-2663, 2006 WL 1541033, *5 (D. N.J. June 2, 2006); *Ball v. Union Carbide Corp.*, 212 F.R.D. 380, 391 (E.D. Tenn. 2002); *Rink v. Cheminova, Inc.*, 203 F.R.D. 648, 666-67 (M.D. Fla. 2001); *Reilly v. Gould, Inc.*, 965 F. Supp. 588, 601-06 (M.D. Pa. 1997); *Wilson v. Brush Wellman, Inc.*, 817 N.E.2d 59, 65-66 (Ohio 2004); *Lockheed Martin Corp. v. Carrillo*, 63 P.3d 913, 922 (Cal. 2003);

Wyeth, Inc. v. Gottlieb, 930 So.2d 635, 640-41 (Fla. Ct. App. 2006); *Bourgeois v. A.P. Green Industries, Inc.*, 939 So.2d 478, 492-93 (La. Ct. App. 2006); *Goasdone v. Am. Cyanamid Corp.*, 808 A.2d 159, 173 (N.J. Super. Ct. Law Div. 2002); *Askey v. Occidental Chem. Corp.*, 102 A.D.2d 130, 138 (N.Y. App. Div. 1984).

Amchem illustrates that class certification in a medical monitoring case arising out of toxic exposure is not proper. In that case, the plaintiffs moved to certify for settlement a class of persons defined as those who had been exposed to asbestos or asbestos-containing products attributable to certain defendants. *Amchem*, 521 U.S. at 602. The plaintiffs asserted various state law claims, including claims for medical monitoring. *Id.* at 603. The trial court certified the class, but the Third Circuit vacated the trial court's order. *Id.* at 608. According to the Third Circuit, class certification was not proper, in part, because common issues did not predominate. *Id.* at 609. The court found that “[i]n contrast to mass torts involving a single accident, class members in this case were exposed to different asbestos-containing products, in different ways, over different periods, and for different amounts of time; some suffered no physical injury, others suffered disabling or deadly diseases.” *Id.*

Specifically addressing those class members who had not yet developed physical injury, the Third Circuit held that common issues did not predominate, in part, because those class members “will . . . incur different medical expenses because their monitoring and treatment will depend on singular circumstances and individual medical histories.” *Id.* at 624 (quoting the opinion below, 83 F.3d at 626). The United States Supreme Court

affirmed the Third Circuit's decision, adopting verbatim the Third Circuit's findings that common issues did not predominate. 521 U.S. at 624.

In the case at bar, the trial court properly held that many of the same issues identified by the court in *Amchem* (e.g. nature of exposure, source of exposure, time period over which the exposure occurred, duration of exposure, existence of present injury, and the need for medical monitoring) are predominant individual issues.

Askey v. Occidental Chemical Corp., upon which Plaintiff relies, also shows how class certification is not proper in a case such as this. There the plaintiffs brought an action seeking class certification for a medical monitoring class arising out of discharges from a nearby landfill. 102 A.D.2d at 131. The court held that a plaintiff could recover medical monitoring damages absent present physical injury. *Id.* at 136. However, the court refused to certify a class. *Id.* at 138-39. According to the court:

Not everyone who has lived in the designated area since 1954 when the chemicals were first disposed of in the landfill and who believes or claims that he has been exposed to toxic chemicals is entitled to future medical expenses. The only fact truly common to the proposed class, as established by the record, is that all of its members live or have lived in an area adjacent to the landfill at some time during the last 30 years. There is no proof whatever of the nature and extent of the contamination which resulted from the various chemicals deposited over the years at the landfill. Consequently, there is no way to determine as a threshold matter the identity of those persons who may need medical monitoring.

Id. at 138.

Plaintiff tries to distinguish *Askey* on the grounds that the court in that case denied class certification for lack of an identifiable class. (Appellant's Substitute Brief at 63.) This is a distinction without a difference. One of the main reasons that *Askey* found there was no identifiable class was that the only fact common to the class was that they have lived in an area adjacent to the landfill. Here, there is a similar lack of common issues.

Amchem and *Askey* (along with the other cases cited above) illustrate that the trial court correctly held that certification of a medical monitoring class is not proper even where physical injury is not required. This Court should affirm the trial court's denial of certification as a proper exercise of its discretion.

III. UNDER A PROPER CONSTRUCTION OF MISSOURI LAW, PRESENT PHYSICAL INJURY IS REQUIRED TO RECOVER MEDICAL MONITORING DAMAGES. [RESPONDS TO PLAINTIFF'S POINT I].

As set forth in Section I., *supra*, the trial court did not decide whether physical injury is required to recover medical monitoring damages. Deciding whether Missouri law recognizes a medical monitoring claim absent present physical injury is thus not necessary to resolving this appeal. However, if this Court chooses to reach the question, it should conclude that present physical injury is required to recover medical monitoring costs. This conclusion is consistent with existing Missouri precedent and the better-reasoned decisions from other jurisdictions.

A. No Missouri Appellate Court Has Allowed A Plaintiff To Recover Medical Monitoring Damages Without Physical Injury.

Defendants' research has revealed two Missouri appellate courts that have allowed recovery of costs for medical surveillance from environmental exposure. They are *Elam v. Alcolac, Inc.*, 765 S.W.2d 42, 209 (Mo. App. W.D. 1988) and *Lewis v. FAG Bearings Corp.*, 5 S.W.3d 579, 585-86 (Mo. App. S.D. 1999). In both cases, the plaintiffs claimed to suffer present physical injury from the claimed exposure. *Elam*, 765 S.W.2d at 49; *Lewis*, 5 S.W.3d at 585-86. Therefore, neither case stands for the proposition that medical monitoring costs can be recovered absent such injury. There is no Missouri appellate court that has allowed a plaintiff to recover medical monitoring damages in the absence of present physical injury.

Plaintiff argues at length that *Elam* holds that a plaintiff can recover medical monitoring costs "if it is shown that a significant, albeit unquantified risk of disease exists," even if there is no present disease. (Appellant's Substitute Brief at 28.) Plaintiff misreads *Elam*. As the Court of Appeals correctly stated in this case, *Elam* did not hold that medical monitoring damages are recoverable without actual physical injury. See *Meyer*, 2006 WL 996540, *3. Rather, *Elam* found only that plaintiffs who claim to suffer present injury can recover necessary costs of future medical monitoring as "a separate element of damage." See *id.*; see also *Elam*, 765 S.W.2d at 208-09.

In using the phrase "separate element of damage," the court in *Elam* must have meant to allow medical monitoring costs as an element of damages separate from the damages for the present injury the plaintiffs also claim to have suffered. As the Court

said, “It was the uniform testimony of the plaintiffs that exposure to these Alcolac emissions caused them symptoms--most commonly and recurrently--eye, nose, throat and skin irritations, nausea, vomiting, numbness and tingling of the limbs, heart irregularity, respiratory difficulty, and other afflictions.” *Id.* at 78. The *Elam* Court stated that the future medical costs sought in that case must be “reasonably certain” before they were recoverable under “well-accepted legal principle,” citing *Wilcox v. Swenson*, 324 S.W.2d 664, 673 (Mo. 1959), which held that a plaintiff injured in an automobile accident could recover the anticipated cost of future medical services made necessary by the accident. *Id.* at 209.

In a case where all the plaintiffs claimed present injury, and where it stated that it was proceeding on the basis of well-accepted legal principle, the *Elam* court could hardly have meant to create an entirely new cause of action or entirely new remedy for medical monitoring damages absent present injury. *Elam*, where present disease was claimed and proven, thus simply cannot be read as holding that future monitoring costs are recoverable absent such claims and proof.

B. The Only Courts that Have Squarely Addressed this Issue Under Missouri Law Have Concluded that Missouri Would Impose a Present Injury Requirement.

Both courts applying Missouri law on the issue have held that physical injury is required to recover medical monitoring damages. *See Thomas v. FAG Bearings Corp., Inc.*, 846 F. Supp. 1400, 1410 (W.D. Mo. 1994); *see also In re St. Jude Med., Inc. Silzone Heart Valves Prod. Liab. Litig.*, No. 01-1396, 2004 U.S. Dist. LEXIS 149, at *26, *29 (D.

Minn. Jan. 5, 2004), *modified by* 2004 U.S. Dist. LEXIS 13965, *reversed on other grounds*, 425 F.3d 1116, 1122 (8th Cir. 2005).

Plaintiff argues that this Court should not be persuaded by *Thomas* because it is the decision of a lone federal district judge. (Appellant's Substitute Brief at 44.) However, as shown, *Thomas* is not the only decision holding that Missouri law requires physical injury to recover medical monitoring damages. Almost ten years after *Thomas* was decided, a Minnesota district court followed *Thomas* and refused to include Missouri residents as part of a multidistrict class for medical monitoring because Missouri law requires present injury to recover medical monitoring costs. *See In re St. Jude Med., Inc. Silzone Heart Valves Prod. Liab. Litiig*, 2004 U.S. Dist. LEXIS 149, at *26, *29 (citing *Thomas* and stating that Missouri law imposes a present injury requirement on plaintiffs in medical monitoring claims).

Plaintiff also argues that this Court should not follow *Thomas* because it "ignore[d] *Elam* altogether" (Appellant's Substitute Brief at 44), referring to *Elam v. Alcolac, Inc.*, 765 S.W.2d 42, 209 (Mo. App. W.D. 1988), which Plaintiff contends resolves this issue. This statement is simply wrong. In determining whether the plaintiffs' claims for medical monitoring could withstand defendant's motion for summary judgment, the court in *Thomas*, in fact, cited *Elam*. *Thomas*, 846 F.Supp. at 1410. This court should follow *Thomas* because it is a well-reasoned, and correct, statement of Missouri law on this point.

C. Accepting Plaintiff's Position Would Be A Substantial Departure From Existing Tort Principles And Against Public Policy.

Holding that Plaintiff and the class can recover medical monitoring costs without present injury would be a significant departure from existing Missouri tort principles and have adverse public policy implications. It is a settled principle of Missouri tort law that a plaintiff cannot recover unless and until the plaintiff has suffered an actual injury. *See Bennett v. Mallinckrodt, Inc.*, 698 S.W.2d 854, 866 (Mo. App. E.D. 1985) (stating that an important element of the plaintiff's negligence and strict liability claims is "a medically diagnosable injury or illness"); *see also Bass v. Nooney Co.*, 646 S.W.2d 765, 772 (Mo. banc 1983) (requiring that plaintiff's emotional distress be "medically diagnosable").

Plaintiff argues that she is asking for relief consistent with *Bass v. Nooney*. (Appellant's Substitute Brief at 33-34.) Plaintiff is in error. In *Bass*, this Court did away with the requirement that a plaintiff's emotional distress produce physical injury. *Id. Bass*, 646 S.W.2d at 866. However, it preserved the requirement of an actual present injury by requiring that a plaintiff's emotional distress be "medically diagnosable." *Id.* Plaintiff wants to recover here without showing an actual present injury. This is contrary to *Bass*.

Plaintiff argues, however, that she does have a present injury because the class members' need for medical surveillance examinations is an injury sufficient to support a tort claim. (Appellant's Substitute Brief at 31.) This need, however, is not an "injury." Some courts have classified the need for medical testing resulting from environmental exposure as an "injury." *See, e.g., Bower v. Westinghouse Elec. Corp.*, 522 S.E.2d 424,

430 (W.Va. 1999). However, Missouri courts have not. As correctly stated by *Elam*, the need for medical testing is a separate element of the plaintiff's *damages*. *Elam*, 765 S.W.2d at 209 (holding that evidence was competent to prove "as a separate element of damage, the need for medical surveillance"). To recover in tort a plaintiff must not only show damages; she must show that the defendant has caused her to suffer an actual injury.

Recently, the Michigan Supreme Court responded to the exact argument Plaintiff makes and held that the need for medical monitoring is not the "injury" that supports a tort claim. *Henry v. Dow Chem. Co.*, 701 N.W.2d 684, 691 (Mich. 2005). In that case, the court stated:

It is no answer to argue, as plaintiffs have, that the need to pay for medical monitoring is *itself* a present injury sufficient to sustain a cause of action for negligence. In so doing, plaintiffs attempt to blur the distinction between "injury" and "damages." While plaintiffs arguably demonstrate economic losses that would otherwise satisfy the "damages" element of a traditional tort claim, the fact remains that these economic losses are wholly derivative of a *possible, future* injury rather than an *actual, present* injury. A financial "injury" is simply not a present physical injury, and thus not cognizable under our tort system.

Id. (emphasis in original).

Plaintiff argues that recognizing a claim for medical monitoring damages absent present physical injury would further the policy behind tort law expressed in *Zueck v.*

Oppenheimer Gateway Prop., Inc., 809 S.W.2d 384, 388 (Mo. banc 1991). (Appellant’s Substitute Brief at 45). *Zueck*, however, has no application to this case. *Zueck* involved a claim by an employee who had actually sustained physical injuries. 809 S.W.2d at 385. The question before the Missouri Supreme Court was not whether the plaintiff’s injuries were sufficient to sustain a tort claim. Rather, the only question in *Zueck* was whether Missouri should continue to recognize an exception to the general rule that a landowner has no vicarious liability for the torts of an independent contractor. *Id.* at 388.

There are significant public policy arguments against recognizing a claim for medical monitoring damages absent present physical injury. Allowing a plaintiff to recover medical monitoring costs without physical injury could deplete resources that should be used to help the presently injured. *Metro-North Commuter R.R. Co. v. Buckley*, 521 U.S. 424, 440-43 (1997) (refusing to recognize a claim for medical monitoring costs absent physical injury in a claim governed by federal law); *see also Hinton v. Monsanto Co.*, 813 So. 2d 827, 831 (Ala. 2001). As the Supreme Court explained in *Buckley*:

tens of millions of individuals may have suffered exposure to substances that might justify some form of substance-exposure medical monitoring . . . [a]nd that fact, along with the uncertainty as to the amount of liability, could threaten both a “flood” of less important cases (potentially absorbing resources better left available to those more seriously harmed) and the systematic harms that can accompany “unlimited and unpredictable liability” (for example, vast testing liability adversely affecting the allocation of scarce medical resources).

Hinton, 813 So.2d at 831 (quoting *Buckley*, 521 U.S. at 441-43.)

In addition, allowing recovery of lump sum medical monitoring damages (which is what Plaintiff seeks) ignores the presence of existing alternative sources of payment for medical testing, a concern particularly applicable here. In *Herculaneum*, blood lead testing and follow up case management, if needed, are provided for the children in the class free of charge. It is far from certain that any money awards to the members of the class would actually go to pay for medical testing.

The concern that damage awards to the class members would not actually be used to pay for medical monitoring expenses has caused many courts that have allowed claims for medical monitoring to criticize the award of lump-sum damages and advocate the use of equitable relief in the form of a court-supervised fund from which monitoring costs are paid. *See, e.g., Hansen*, 858 P.2d at 982; *Petito v. A.H. Robins*, 750 So.2d 103, 106 (Fla. Dist. App. Ct. 2000); *Redland Soccer Club v. Dep't. of the Army*, 696 A.2d 137, 142, n. 6 (Pa. 1997); *Ayers v. Jackson*, 525 A.2d 287 (N.J. 1987); *Burns v. Jaquays Mining Corp.*, 752 P.2d 28, 34 (Ariz. Ct. App. 1987). Plaintiff here has consciously chosen not to request such equitable relief. She omits from her Third Amended Petition any claim for an injunction, seeks only damages in her prayer for relief (*see, e.g., R.* at 33-34), and seeks certification of a damages class under Rule 52.08(b)(3) rather than an injunction class under 52.08(b)(2). (*See Appellant's Substitute Brief at 12*) (acknowledging that her

motion for class certification was brought under Rule 52.08(b)(3)).¹¹ Thus, even if the Court were of the view that creation of a court-supervised monitoring fund might be appropriate in some circumstances, the order below should be affirmed. An injunction for creation of a court-supervised fund is not what Plaintiff seeks here, either on her own behalf or on behalf of the proposed class.

There is an additional reason not to allow a claim for medical monitoring absent present injury. Allowing uninjured plaintiffs to recover medical monitoring damages unnecessarily places them at risk of splitting their claims. *Wood v. Wyeth-Ayerst Lab.*, 82 S.W.3d 849, 855-56 (Ky. 2002). If and when medical monitoring claimants develop actual injury, a court could find that they are precluded from suing for their actual disease because they have already recovered the cost of medical testing. *See Foster v. Foster*, 39 S.W.3d 523, 528 (Mo. App. E.D. 2001) (“A cause of action that is single may not be split and filed or tried piecemeal, the penalty for which is that an adjudication on the first suit

¹¹ Even if Plaintiff were to change course and belatedly seek certification of a (b)(2) class here, there would be insurmountable obstacles to such relief. There is no right to opt out of a (b)(2) class. The large number of plaintiffs who have individual claims (see n. 12, *infra*) might be irreparably affected if they were unable to opt out of the class Plaintiff has defined. The same facts that preclude a finding of predominance under Rule 52.08(b)(3) (*see* Part II, above) indicate that a (b)(2) class here would lack the cohesiveness required under that subsection of the rule.

is a bar to the second suit.”) This is not an insignificant risk in this case. A large number of people who have lived in Herculaneum (some of whom are potential class members here) have filed separate lawsuits in the City of St. Louis seeking recovery for claimed personal injuries.¹²

¹² See *Preston Alexander, et al. v. Fluor Corp., et al.*, Cause No. 052-9567 (8 plaintiffs); *Karl Brown, II v. Fluor Corp., et al.*, Cause No. 052-9604; *Lauren Browning, et al. v. Fluor Corporation, et al.*, Cause No. 032-10108 (9 plaintiffs); *Mary Cross, et al. v. Fluor Corporation, et al.*, Cause No. 032-00118 (2 plaintiffs); *Austin Damazyn, et al. v. Fluor Corp., et al.*, Cause No. 052-9846 (2 plaintiffs); *Thomas Dawson, et al. v. Fluor Corp., et al.*, Cause No. 052-9561 (6 plaintiffs); *Brian Duncan, et al. v. Fluor Corp., et al.*, Cause No. 052-9608 (4 plaintiffs); *Emily Edmond, et al. v. Fluor Corp.*, Cause No. 052-9675 (2 plaintiffs); *Denise Farrow, et al. v. Fluor Corporation, et al.*, Cause No. 052-01583 (2 plaintiffs); *Ryan Figge, et al. v. Fluor Corporation, et al.*, Cause No. 012-8640 (2 plaintiffs); *Jarrod Gross v. Fluor Corporation, et al.*, Cause No. 022-01381; *Brent Hawley, et al. v. Fluor Corp.*, Cause No. 052-10619 (16 plaintiffs); *Matthew Heilig, et al. v. Fluor Corp., et al.*, Cause No. 052-9866 (16 plaintiffs); *Zachary Jarvis v. Fluor Corp., et al.*, Cause No. 052-10300; *Robert Joyner, et al. v. Fluor Corp.*, et al., Cause No. 052-10624 (2 plaintiffs); *Katherine Lucas, et al. v. Fluor Corp.*, Cause No. 052-9676 (2 plaintiffs); *Emily Lynch, et al. v. Fluor Corp., et al.*, Cause No. 052-9601 (2 plaintiffs); *Kisha McCoy v. Fluor Corp., et al.*, Cause No. 052-9845; *Lani Meyer v. Fluor Corp., et al.*, Cause No. 052-9609; *Allie Miller, et al., v. Fluor Corp., et*

For the policy reasons discussed herein, there is very little support in the case law for awarding lump sum damages for medical monitoring costs, or for certifying damages classes for medical monitoring under Rule 52.08(b)(3) or its equivalents in other jurisdictions. The very same academic authors whose work Plaintiff cites in support of her medical monitoring claim caution against paying lump sum damages to monitoring plaintiffs or certifying (b)(3) classes in medical monitoring cases: “Even from the mitigation perspective the argument for payment of lump-sum damages to medical monitoring plaintiffs is not strong. . . .From the evidentiary development perspective the argument for payment of lump-sum damages is even weaker.” K. Abraham, *Liability for Medical Monitoring and the Problem of Limits*, 88 Va. L. Rev. 1975, 1986-87 (2002)(cited in Plaintiff’s Substitute Brief at 10); *see also Note, The Class Certification of Medical Monitoring Claims*, 102 Colum. L. Rev. 1659, 1660 (2002) (cited in

al., Cause No. 052-10616 (16 plaintiffs); *Emily Pedersen, et al. v. Fluor Corp., et al.*, Cause No. 052-9856 (15 plaintiffs); *Adam J. Ruessler, et al. v. Fluor Corp., et al.*, Cause No. 052-10301 (2 plaintiffs); *Hope Wamble, et al. v. Fluor Corp., et al.*, Cause No. 052-10622 (21 plaintiffs); *Grace Warden, et al. v. Fluor Corporation, et al.*, Cause No. 022-10635 (10 plaintiffs); *Tara Whaley, et al. v. Fluor Corp., et al.*, Cause No. 052-09607 (2 plaintiffs); *Chelsea Wren, et al. v. Fluor Corp., et al.*, Cause No. 052-10613 (15 plaintiffs).

Plaintiff's Substitute Brief at 10, arguing for class certification of monitoring claims under (b)(2) rather than (b)(3)).

The policy considerations in play here thus weigh heavily against allowing a plaintiff to recover medical monitoring damages absent present physical injury. The Court should not use this appeal to recognize such a claim.

D. The Better-Reasoned Decisions from Other Jurisdictions Do Not Allow A Plaintiff To Recover Medical Monitoring Costs Absent Physical Injury.

Plaintiff states that the “prevailing modern view of state courts” is to permit the recovery of medical monitoring damages without physical injury. (Appellant's Substitute Brief at 36.) What counts in assessing the weight to be given decisions of non-Missouri courts in deciding a question of Missouri law is the persuasiveness of those courts' reasoning, not the number of cases on either side of a question. In any event, Plaintiff's characterization of her position as the “prevailing view” is simply incorrect. According to a very recent survey of the fifty states, “[a] bare majority of courts--16 of 29 jurisdictions--reject medical monitoring as inconsistent with the present physical injury requirement of tort law.” *Lowe v. Philip Morris USA, Inc.*, 207 Ore. App. 532, 539, 142 P.3d 1079 (2006), citing *Note, A Fifty-State Survey of Medical Monitoring and the Approach the Minnesota Supreme Court Should Take When Confronted With the Issue*, 32 Wm. Mitchell L.Rev. 1095, 1114 (2006).

Most recent cases, including decisions from the highest courts of many states and from the United States Supreme Court (in a case governed by federal law) have accepted

the arguments advanced by Defendants in Section III.B. above as representing the better-reasoned view of this issue. They have held that a plaintiff cannot recover medical monitoring costs without present physical injury because such a result is inconsistent with the traditional present injury requirement of tort law and would have the unfortunate policy implications discussed above. *See, e.g., Buckley*, 521 U.S. at 442-43; *Trimble v. Asarco, Inc.*, 232 F.3d 946, 963 (8th Cir. 2000) (interpreting Nebraska law); *Parker v. Brush Wellman, Inc.*, 377 F. Supp. 2d 1290, 1302 (N.D. Ga. 2005) (interpreting Georgia law); *In re Rezulin Prod. Liab. Litig.*, 361 F. Supp. 2d 268, 276, 277-78 (S.D. N.Y. 2005) (interpreting Texas and Louisiana law); *Paz v. Brush Engineered Materials, Inc.*, 351 F. Supp. 2d 580, 586 (S.D. Miss. 2005) (interpreting Mississippi law); *Duncan v. Nw. Airlines, Inc.*, 203 F.R.D. 601, 606-07 (W.D. Wash. 2001) (interpreting Washington law); *Henry v. Dow Chem. Co.*, 701 N.W.2d 684, 686 (Mich. 2005); *Wood v. Wyeth-Ayerst Lab.*, 82 S.W.3d 849, 856-60 (Ky. 2002); *Hinton v. Monsanto Co.*, 813 So.2d 827, 828 (Ala. 2001); *see also* La. Civ. Code Ann. art. 2315 (2005) (stating that medical monitoring costs, by themselves, are a noncompensable injury).

Many other, older decisions also refused to recognize a claim for medical monitoring damages absent allegations of physical injury. *Ball v. Joy Tech., Inc.*, 958 F.2d 36, 39 (4th Cir. 1991) (interpreting Virginia and West Virginia law, disagreed with as to West Virginia law by *Bower v. Westinghouse Elec. Corp.*, 522 S.E.2d 424, 427 (W. Va. 1999)); *Thomas v. FAG Bearings Corp., Inc.*, 846 F. Supp. 1400, 1410 (W.D. Mo. 1994) (interpreting Missouri law); *Mergenthaler v. Asbestos Corp. of Am.*, 480 A.2d 647, 651 (Del. 1984).

Plaintiff cites state court decisions from four states whose highest courts have allowed plaintiffs who assert common law claims to recover medical monitoring costs absent present physical injury. (See Appellant's Substitute Brief) (citing *Bower v. Westinghouse Elec. Corp.*, 522 S.E.2d 424, 430-31 (W. Va. 1999); *Redland Soccer Club v. Dep't of the Army*, 696 A.2d 137, 145-46 (Pa. 1997); *Hansen v. Mountain Fuel Supply Co.*, 858 P.2d 970, 977 (Utah 1993); *Ayers v. Jackson Township*, 525 A.2d 287, 315 (N.J. 1987)).¹³ All three state highest courts that have addressed the issue since these decisions (those of Michigan, Kentucky, and Alabama) have refused to recognize a claim for medical monitoring absent present physical injury. See *Henry*, 701 N.W.2d at 686; *Wood*, 82 S.W.3d at 856-60; *Hinton*, 813 So.2d at 828.

If this Court reaches the issue, the Court should find, as have the better-reasoned decision from other jurisdictions, that present physical injury is required to recover medical monitoring costs.

¹³ There is a fifth such decision, *Potter v. Firestone Tire and Rubber Co.*, 863 P.2d 795 (Cal. 1993). While recognizing claims for medical monitoring absent present injury, the California Supreme Court has also held that class certification should be denied in such a case where common questions do not predominate. *Lockheed Martin Corp. v. Carrillo*, 63 P.3d 913, 922 (Cal. 2003).

IV. THE DENIAL OF CLASS CERTIFICATION SHOULD IN ANY EVENT BE AFFIRMED BECAUSE PLAINTIFF’S CLAIMS ARE NOT TYPICAL OF THE CLASS AND SHE IS NOT AN ADEQUATE CLASS REPRESENTATIVE IN THAT SHE CLAIMS TO SUFFER PRESENT INJURY FROM LEAD EXPOSURE AND MOST CLASS MEMBERS DO NOT. [ADDITIONAL ARGUMENT IN SUPPORT OF JUDGMENT].

The trial court did not decide whether Plaintiff’s claim is typical of the class or whether Plaintiff is an adequate class representative. However, an appellate court can affirm a trial court’s order on any basis, as long as such basis was presented to the trial court and is supported by the record. *Missouri Bd. of Nursing Home Admin. v. Stephens*, 106 S.W.3d 524, 528 (Mo. App. W.D. 2003). Here, the trial court’s decision to refuse class certification was correct for the additional reason that Plaintiff Lani Meyer’s claims are not typical and she is not an adequate class representative under Rule 52.08(a).

Prior to the certification hearing, Lani Meyer claimed to suffer present physical injury resulting from lead exposure. (*See* R. at 377, 480-81, 496, 500, 538 & 543.) After the trial court denied her motion for class certification in this case, Plaintiff filed a separate personal injury lawsuit in the Circuit Court for the City of St. Louis, *Meyer v. Fluor Corporation*, No. 052-9609.¹⁴

¹⁴ This Court can take judicial notice of its filing. Many other individuals have likewise brought personal injury cases. *See* n. 12, *supra*.

Unlike Plaintiff, most or all members of the proposed class are asymptomatic. Thus, Plaintiff's claims are not typical of the class as required by Rule 52.08(a)(3). This is true for both legal and medical reasons.

A symptomatic plaintiff who seeks damages for present disease and medical costs associated therewith, is in a fundamentally different position than a plaintiff who has exhibited no symptoms. No published Missouri state court opinion has allowed an uninjured Plaintiff to recover medical monitoring damages. In contrast, where a plaintiff is claiming physical injury, Missouri courts have expressly allowed a Plaintiff to recover medical monitoring damages. *See Elam v. Alcolac, Inc.*, 765 S.W.2d 42 (Mo. App. W.D. 1988).

Medically, Plaintiff's claims are not typical because the interests of children who manifest injury in receiving follow up medical testing and treatment are different than the interests of those children not manifesting any injury. Plaintiff's expert acknowledged this in his deposition. (R. at 592.) Injured or symptomatic plaintiffs simply need different types of treatment/tests than do non-injured plaintiffs.

The court in *Wall v. Sunoco, Inc.*, 211 F.R.D. 272, 277 (M.D. Pa. 2002), addressed similar facts. In that case, the court denied certification of a medical monitoring class, in part, because the injured plaintiff's claims were not typical. *Id.* at 281. In its Opinion, the court stated:

The fact that the plaintiff claims to be injured, in and of itself, appears to make her atypical of the class. She claims to suffer from the same maladies, neurotoxicity and cardiac abnormalities, for which she seeks to

have the class monitored. The other potential class members have not yet demonstrated symptoms, but allegedly have been exposed to the chemical that can cause medical problems.

Id. at 278.

Because Lani Meyer is already alleging the physical injuries for which she seeks to have the class monitored, Lani Meyer's claims are not typical of those of the purported class.

Plaintiff is not an adequate class representative, for the same reason. An important element of the adequacy of representation requirement is the absence of any conflict of interest between the representative and the class members. *See Union Planters*, 142 S.W.3d at 735 (“In evaluating the adequacy of representation, courts determine whether class counsel or the named representatives have conflicts of interest that will adversely affect the interests of the class.”) That is a serious issue here. Plaintiff is claiming that she has suffered and is suffering injuries that she claims have been caused by lead exposure. (R. at 377, 480-81, 496, 500, 538 & 543.) However, many of the children Plaintiff purports to represent do not have any present injury. Many courts (including the United States Supreme Court) have held that there is an inherent conflict of interest in medical monitoring cases between an injured class representative and uninjured or asymptomatic class members. *See, e.g., Amchem*, 521 U.S. at 625-26; *Wall*, 211 F.R.D. at 279-80; *Rink*, 203 F.R.D. at 658. The United States Supreme Court explained the conflict in *Amchem*:

In significant respects, the interests of those within the single class are not aligned. Most saliently, for the currently injured, the critical goal is generous immediate payments. That goal tugs against the interest of exposure-only plaintiffs in ensuring an ample, inflation-protected fund for the future.

521 U.S. at 626.

There is an additional incurable conflict in this case because Plaintiff, in bringing this action on behalf of injured and uninjured children, risks splitting currently injured class members' causes of action. *See In re MTBE Prod. Liab. Litig.*, 209 F.R.D. 323, 340 (S.D. N.Y. 2002) (finding that class representatives were not adequate where the court could not [e]nsure that its order would preserve the rights of absent class members to bring personal injury or property damage claims); *Thompson v. Am. Tobacco Co.*, 189 F.R.D. 544, 550-51 (D. Minn. 1999) (holding that the attempted reservation of personal injury claims in the certification of a medical monitoring class did not avoid the conflict resulting from possible splitting of class members' causes of action); *see also Small v. Lorillard Tobacco Co.*, 252 A.D.2d 1, 10 (N.Y. App. Div. 1998).

It is fundamental law in Missouri and elsewhere that a plaintiff can bring only one action for a single tort. Successive actions for the same tort constitute the impermissible splitting of a single cause of action. *Foster*, 39 S.W.3d at 528. In general, the test for determining whether a cause of action is single is: (1) whether separate actions brought arise out of the same act, contract, or transaction; or (2) whether the parties, subject

matter, and evidence necessary to sustain the claim are the same in both actions. *Hutnick v. Beil*, 84 S.W.3d 463, 466 (Mo. App. E.D. 2002).

A plaintiff who has suffered injury from a toxic exposure can sue now, and recover in one case compensation for any past damages and compensation for the present value of damages reasonably likely to occur in the future. *Elam*, 765 S.W.2d at 209. The damages recoverable for the present injury and the expected future medical expenses constitute a single cause of action. They arise from the same act, contract or transaction. The parties, subject matter and evidence are the same. By suing now for expected future damages, but omitting a claim for present injury, a plaintiff would forego compensation for the injuries already suffered.

Whether to run these risks is a choice that each named plaintiff and each class member can only make for himself or herself. Plaintiff has apparently made that choice. If her pleaded claims were to remain in their present posture throughout the litigation, and if she were to win or lose a judgment on her medical monitoring claim prior to final adjudication of her personal injury case, that judgment would almost certainly preclude her personal injury claim. The choice that Plaintiff has apparently made for herself is not necessarily the right choice for any other symptomatic class members. Others might value their present personal injury claims more, and their future medical monitoring claims less, than does Plaintiff.

Before the trial court, Plaintiff argued that a solution to this is for the trial court to expressly reserve all existing personal injury claims pursuant to an exception to the rule against splitting a cause of action in the Restatement (Second) of Judgments, Section

26(1)(b) (articulating an exception to the general prohibition on splitting a cause of action where “[t]he court in the first action has expressly reserved the plaintiff’s right to maintain the second action”). However, no Missouri appellate court has ever adopted the Restatement (Second) of Judgments, Section 26(1)(b). Further, in the context of (b)(3) class actions it is generally accepted that “the court conducting the action cannot determine the *res judicata* effect of the judgment; this can be tested only in a subsequent action.” *See* 1966 Advisory Committee Note to then Fed. R.Civ.P. 26(c)(3), which was identical to present Mo. S. Ct. Rule 52.08(c)(3); *Taunton Gardens Co. v. Hills*, 557 F.2d 877, 878 (1st Cir. 1977) (so holding); *see also* 5 Newberg on Class Actions § 16:25 (4th ed. 2005 Supp.) (noting that the class action rule “does not disturb the recognized principle that the court conducting the action cannot predetermine the *res judicata* effect of the judgment.”).

Because the trial court’s ultimate decision to deny class certification was correct for the additional reason that Plaintiff’s claims are not typical and she is not an adequate class representative, this Court should affirm.

CONCLUSION

For the reasons stated, the order of the trial court denying Plaintiff’s Motion for Class Certification should be affirmed.

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The undersigned counsel for Defendants/Respondents state:

- (1) The foregoing brief contains 20,402 words, which is within the applicable limitations in length set forth by Rule 84.06(b); and
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