

MISSOURI SUPREME COURT

SC87771

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

Plaintiff-Appellant,

v.

FLUOR CORPORATION, et al.,

Defendants-Respondents.

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

SUBSTITUTE BRIEF OF APPELLANT

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JURISDICTIONAL STATEMENT

This is an appeal by Appellant Lani Meyer, a minor, by and through her Next Friend, Rebecca Coplin, of an Order in favor of Defendants, Fluor Corporation, et al., rendered in the Circuit Court of the City of St. Louis, regarding class certification of claims for medical monitoring arising out of exposure to lead and other toxins released by Defendants' lead smelter in Herculaneum, Missouri. Appellant appealed pursuant to §512.020(3), RSMo 2004 and Rule 411, Rules of the Court of Appeals Eastern District. After the Eastern District issued its opinion affirming the trial Court and denying Defendants' motion to supplement the record, Appellant moved for transfer to this Court. Pursuant to this Court's Order of August 22, 2006 and pursuant to Rule 83.04 and *Mo. Const. Art. V secs. 3 and 10*, jurisdiction is proper in this Court.

STATEMENT OF FACTS

INTRODUCTION

Children living in the vicinity of the Doe Run Lead Smelter in Herculaneum, Missouri, are exposed to lead and other toxic emissions released from the smelter. Annually, the Doe Run Lead Smelter emits over one hundred thousand pounds of lead, arsenic and cadmium through the air into the local environment. As a result, the children in Herculaneum are exposed to 10 to 100 fold greater lead air contamination than children in other communities in Missouri. Those children aged six years and under are particularly vulnerable to lead's toxic properties and are at risk of injury to the brain, kidney and cardiovascular system to name a few. There is elevated exposure for all children who were conceived who have lived, and who have gone to school or day care in Herculaneum. The biological mechanism of damage from exposure to lead and other toxic substances does not always produce obvious injury immediately after exposure. Much like exposure to other toxins, the manifestation of injury from lead exposure is latent and subtle in nature and becomes manifest well after the damage is advanced.

It is for these reasons that the children of Herculaneum, chronically exposed to lead and other toxins from the Doe Run Smelter, require diagnostic examinations and testing in order to detect injuries as they manifest and before they worsen. Early detection of the effects of exposure to lead can limit, treat and/or ameliorate the damage caused by the exposure. Because the effects of lead and the other toxins are subtle, without diagnostic testing, which few in this modest community can afford, the damage

will go undetected unaddressed and untreated for years.

Lani Meyer, the class representative, is one of the children living near the Doe Run smelter. She brings this claim for herself and on behalf of those exposed and put at risk by Doe Run's emissions. She seeks compensation for the cost of diagnostic examinations and testing for early detection and identification of injury resulting from exposure to the Smelter's toxins. Without this testing, the subtle effects from exposure are likely to go unnoticed until long after these children's injuries have taken hold and cause deep, irreparable harm. Importantly, Lani has not brought this claim seeking damages for personal injury.

Such a program of diagnostic examinations and testing is often called a medical monitoring or medical surveillance program. A claim for medical monitoring such as Plaintiff brings in this action seeks the cost of diagnostic testing to determine whether injury from exposure is present, not compensation for present physical injury.

Commentators have noted the propriety of class actions for medical monitoring claims based on the distinct relief Lani Meyer and class members seek:

1) medical monitoring is a specific remedy fundamentally intended to prevent future harm; 2) as the claim arises from exposure, it does not preclude any future claim for damages; and 3) in the class action context, as each plaintiff stands in the same position as another, a medical monitoring claim is best characterized as a groupwide, rather than an individual, claim.

Pankaj Venugopal, *The Class Certification of Medical Monitoring Claims*, 102 COLUM.

L.REV. 1659 (October 2002).

In medical monitoring cases, the defendant has tortiously exposed the plaintiff or plaintiffs to a risk of suffering harm in the future. ... The duty is imposed on the defendant who has placed another in a position of danger.

So understood, liability for medical monitoring is an exception to the no duty to rescue rule.

Kenneth Abraham, *Liability for Medical Monitoring and the Problem of Limits*, 88

Va.L.Rev. 1975, 1977 (2002).

Thus, rather than a personal injury claim, Plaintiff's claim for medical monitoring is a claim for economic injury: the cost of diagnostic testing to determine whether a present physical injury exists as a result of exposure to Defendants' lead emissions. If an automobile driver negligently caused an accident, no Missouri court would deny recovery for the cost of the driver's victim's x-ray taken to determine whether there are broken bones, even after the x-rays revealed no broken bones. The cost of the diagnostic x-ray is a harm that the defendant's act caused and for which the law provides a remedy.

Similarly, a medical monitoring action arising out of exposure to toxic substances does not seek to address damages resulting from physical injury, but the economic damages in the form of the cost of diagnostic testing necessitated by the exposure to the defendant's toxic emissions. These damages, which naturally and consequentially flow from such exposure, are the dollar cost of establishing, maintaining and administering a medical monitoring program for the purpose of testing and monitoring for the early detection of

disease, so that the harm from exposure can be detected, then known, limited, treated, or ameliorated.

In considering the class certification of the medical monitoring claim of Lani Meyer and the children of Herculaneum, the trial court erroneously analyzed the case as though it were a personal injury action. The trial court evaluated Plaintiff's claim for medical monitoring as if proof of present physical injury was a required element of the claim. Because it erroneously considered physical injury as part of the claim, it in turn did the wrong analysis of the predominance issue under Rule 52.08(c)(3). The trial court relied on cases not cited by either party in the class certification papers, and, for reasons unknown, failed even to discuss or availing itself of the guidance of appellate precedent, including *Elam v. Alcolac, Inc.*, 765 S.W.2d. 42, 209 (Mo. App. 1988). As a result, 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. The trial court relied on the wrong law – and from that error – made its erroneous class certification decision.

The Court of Appeals affirmed, announcing that a class certification motion in a medical monitoring class action can be defeated if the defendant convinces the trial court that more than exposure to toxins is required – that differences in proof of actual present harm make individual issues predominate. By sanctioning the trial court's use of the wrong standard, the Court of Appeals' decision adopted an actual harm standard for medical monitoring in Missouri.

I. PROCEDURAL HISTORY

On July 9, 2001, Plaintiff filed her petition seeking the costs of a program of medical monitoring, or diagnostic testing, for a class of children who have been exposed to lead and other toxic emissions from the Doe Run Lead Smelter in Herculaneum, Missouri. Plaintiff filed her Third Amended Petition on December 11, 2001. PSupp. 000008-000039.¹ Plaintiff filed her Motion for Class Certification on August 27, 2004 seeking certification under Rule 52.08(b)(3). PSupp. 00040-000145. The Circuit Court held an evidentiary hearing on November 15 and 16, 2004. PSupp. 000146-000332. On June 30, 2005, the court entered an order denying class certification. App. A-1-7. On July 20, 2005, Plaintiff filed her Petition for Permission to Appeal. The Court of Appeals granted Plaintiff permission to appeal on September 7, 2005. *See* Section 512.020(3), RSMo 2004, Local Rule 411. On September, 14, 2005, Defendants filed a motion to supplement the record on appeal. Oral Argument was had on March 14, 2006 and on April 18, 2006, the Court of Appeals affirmed the trial Court's ruling and denied Defendants' Motion to Supplement the Record. *Meyer v. Fluor Corporation, et al.*, ___ S.W.3d ___, 2006 WL 996540 (Mo. App. ED.). Plaintiff then filed permission to transfer with the Court of Appeals and was denied such on June 1, 2006. On June 16, 2006, this Court sustained Plaintiff's request for transfer which was filed pursuant to Rule 83.04 and

¹The reference "App." refers to the Appendix to this Opening Brief. The reference "PSupp." refers to Petitioner's Supplemental Record filed August 4, 2005.

Mo. Const. Art. V secs. 3 and 10.

II. THE BACKGROUND OF DOE RUN'S CONTAMINATION OF THE CHILDREN OF HERCULANEUM

The lead released by the Doe Run Smelter is well recognized as hazardous to children who are exposed at the age of 72 months or less. Lead is a poison that affects virtually every system in the body. *See* United States Centers for Disease Control (CDC), Preventing Lead Poisoning in Young Children (1991) at 7. There is no biologic function or need for lead in the human body. *Id.* Lead is particularly harmful to the developing brain and nervous system of fetuses and young children. *Id.* Doe Run executives have known without question that “Lead is rightly regarded as a chronic, cumulative toxin, capable of causing damage to several organs of the body as well as to the central nervous system.” PSupp. 000054.

The U.S. Centers for Disease Control has acknowledged the adverse affects of lead at decreasing blood lead levels. Preventing Lead Poisoning in Young Children, (1991) at 7. One action level of lead in blood for children, now over 15 years old, is 10 µg/dl (micrograms per deciliter). *Id.* Past government guidance acknowledges that blood lead levels as low as 10 µg/dl, which do not cause distinctive symptoms, are associated with decreased intelligence and impaired neurobehavioral development. *Id.* at 9. Many other effects begin at these low blood levels, including decreased stature or growth, decreased hearing acuity, and decreased ability top maintain steady posture. *Id.* The risks of lead exposure are not based on theoretical calculations. Preventing Lead Poisoning in Young

Children, at 7. They are well known from studies of children themselves and are not extrapolated from data on laboratory animals or high dose occupational exposure. *Id.*

Recent peer-reviewed medical studies demonstrate that the damaging effects of lead can occur at blood lead levels below 10 µg/dl, the current federal government action level. App. A-34-36, A-49-57. The preponderance of experimental and human data indicates that there are deleterious and persistent effects of low level lead exposure on brain function such as lower intelligence, behavior problems and poor school performance. A-50. Deficits in cognitive and academic skills associated with lead exposure occur at blood lead concentrations lower than 5 µg/dl. A-49. There is no detectable threshold for the adverse effects of lead exposure on cognitive development or academic abilities. A-49-57, at A-54. In recent studies the effect of lead appeared to persist at concentrations below 5 µg/dl. A-55, A-35 at ¶¶26-27.

Critical to issue now before the Court, lead poisoning is often silent. Lead Poisoning In Young Children, at 7. Many poisoned children have no overt symptoms, and so go undiagnosed and untreated if untested. *Id.* The U.S. CDC ATSDR has concluded in studying Herculaneum that any effects of lead at the lead levels found there are likely to be subtle. P.Supp. A-27. Therefore, blood lead levels alone are not an indicator of adverse health effects. *Id.*

Defendants have all owned and/or operated the Doe Run Smelter. The Doe Run Smelter treats lead ores and turns them into lead product. The Smelter's capacity makes it the largest lead smelter in the United States, and the second largest in the world. The

Smelter is bounded by the Mississippi River on the east, and residential neighborhoods and schools of Herculaneum on the north, west and south.

The Smelter has for years released a variety of heavy metal toxins into the air and onto property within Herculaneum, a portion of which forms the class area defined in Plaintiff's petition. Doe Run's records identify lead, arsenic, and cadmium among other toxins released. *See e.g.* PSupp. 000051. The amounts of the toxins released are dramatic. Doe Run's records identify admitted amounts of lead releases from the smelter stack and fugitive emissions greater than 190,000 pounds in the years 1993 - 2001; and 117,626 pounds in 2002. PSupp. 000051-52. For example, in the year 2000 alone, the Doe Run Smelter released over 270,000 pounds of lead into the air. Plaintiff, Lani Meyer was born in February, 1998.

Lead is classified as a hazardous substance, hazardous waste constituent, and priority toxic pollutant by Environmental Protection Agency (U.S. E.P.A.). PSupp. 000053. In the 23 years after the national standard for lead in ambient air was put into effect in 1978, Doe Run had not met the standard at all of its air pollution monitors in Herculaneum for any year. PSupp. 000052. Herculaneum, therefore, remained a U.S. E.P.A. non-attainment area for the U.S. ambient air lead standard. *Id.* At the Broad Street monitor in the class area, the Smelter had violated the national lead standard in every quarter, except one, from 1978 through 2000. *Id.* As of 2001, the emissions from the Smelter still violated the national standard at several locations in Herculaneum. *Id.* Monitoring by Doe Run and the Missouri D.N.R. shows a 10 to 100 fold greater level of

lead in ambient air in Herculaneum compared to levels measured in other cities around metropolitan St. Louis. PSupp. 000053.

Pollutants released by the Doe Run Smelter have been dispersed throughout the class area and beyond its boundaries. P.Supp. A-12, Affidavit of David Sullivan. This dispersion has occurred into the breathing zone of children, and has resulted in the depositing of contamination on property in the class area in amounts in excess of the normal background. *Id.* In the 2000 Consent Decree it entered into with U.S. E.P.A. and the Missouri Department of Natural Resources, Doe Run acknowledged that the average concentration of lead in residential soils within one quarter mile of the smelter is 3,014 ppm, compared to concentrations in soils not contaminated by the smelter of 25 to 40 ppm. *Id.* Environmental sampling has indicated that there is lead contamination throughout the community. A-72. One hundred families were proposed to be relocated in 2002 because of the lead contamination. PSupp. 000055.

In 1992, a Doe Run sponsored a limited blood lead study which demonstrated that the average blood lead for children in Herculaneum was 11.8 µg/dl, above the CDC action level, and that neighboring communities had significantly lower average blood lead levels. PSupp. 000055. In January 1993, the Missouri Department of Health concluded that there “is a long term threat to public health around [the Doe Run Smelter].” *Id.*

The toxic emissions from the Doe Run Smelter continued for the next decade, and after. The U. S. Agency for Toxic Substances and Disease Registry (ATSDR) 2001 Health Consultation documents some of the impacts of the emissions from the Doe Run

Smelter. App. A-60-A-71. It notes that “[The Herculaneum] community is faced with widespread environmental contamination.” App. A-65. In the first blood lead study in almost a decade, the ATSDR also notes that when blood lead levels (BLLs) for children residing in the Class Geographic Area are examined, 30 of 67 children, approximately 45%, had BLLs of 10 µg/dl or higher (the current federal action level). App. A-64. A map produced by the Missouri Department of Health documents concentric rings of elevated blood lead levels in children up to a mile and a quarter from the Doe Run Smelter to locations well outside the Class Geographic Area. App. A-84.

The ATSDR Health Consultation notes that this percentage of lead poisoned children is significantly higher than the national prevalence rate of 7.6% and the Missouri prevalence rate of 8%. App. A-64. The ATSDR Health Consultation concludes that the average BLLs for children less than 72 months, regardless of how close they live to the smelter, was 4 times the national mean BLL in the United States of 2. App. A-64-65. The ATSDR concluded that significant blood lead elevations have been documented in the Herculaneum community. A-64. The ATSDR concludes that it is likely that adverse health effects may be occurring in a considerable portion of the children in this community, and it classified the site as “an urgent public health hazard.” *Id.* In a follow-up study in 2002, the ATSDR determined that although the average blood lead levels had lowered, they remained unacceptably high. App. A-79-A-80.

Class representative and named Plaintiff Lani Meyer, now 7 years old, seeks to represent a class of over 300 children that were exposed the emissions from the Doe Run

Smelter, for a defined minimum period of exposure, during gestation, residence or attendance at school or day care in Herculaneum. P.Supp. 000081. Ms. Meyer lived in and went to day care in the geographic area of the class, and her mother's pregnancy occurred while living in Herculaneum. P.Supp. 000058-59. Plaintiff's Third Amended Petition seeks damages in the form of the cost of a medical monitoring program for the identification of injury and disease so that early intervention and treatment to limit the damaging effects of the toxic releases from the Smelter can occur. P.Supp. 000023, 000024. The class is narrowly defined as:

- 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.

P.Supp. 000024. The Class Geographic Area consists of the substantial majority of the City of Herculaneum, including that which abuts the Doe Run Smelter. P.Supp. 000023.

Studies have shown that there is no ‘safe’ threshold for exposure to lead and even relatively low lead levels in the blood are associated with intellectual deficits in children. App. A-26-A-48. Affidavit of Bruce Lanphear, A-31 at ¶17. Cognitive deficits resulting from lead exposure occur in humans with blood lead levels below 10 µg/dl, the current CDC action level. App. A-28 at ¶8. Impaired motor development and growth retardation are also linked to lead poisoning. App. A-37 at ¶32. Significant scientific evidence documents that lead-associated cognitive deficits occur at blood lead levels below 10 µg/dl. App. A-35 at ¶26. Lead-related cognitive deficits occur among children who have had blood lead levels below 5 µg/dl. *Id.* Collectively, these data suggest that there is no minimum threshold above which blood lead levels must reach for a child to suffer the adverse consequences of childhood lead exposure. *Id.* Moreover, epidemiologic studies show persistent, deleterious effects of low-level lead exposure on brain function. App. A-34 at ¶24. Lead is also a systemic toxic that is associated with cardiovascular, renal, dental and prenatal damage in humans with chronic exposure. App. A-31 at ¶17. This damage does not cease at the end of childhood. *Id.*

Children living in former or active mining, milling and smelter communities, such as Herculaneum, are at particular risk for lead exposure via lead-contaminated soil. App. A-32 at ¶20. The emissions from the Doe Run smelter, smelting wastes, contaminated soil and contaminated house dust, and re-entrainment from these sources, provide a persistent set of pathways for lead absorption. App. A-31 at ¶17. The pathways for exposure include inhalation of contaminated air, ingestion of contaminated soil, ingestion

of contaminated house dust and particulates in the geographic area described above. App. A-29 at ¶12. As a result of exposure to the emissions from the Doe Run Smelter, the medical monitoring class has 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. App. A-30 at ¶13.

Because the air, soil, and dust carry heavy metals which have a tendency to accumulate in the body, the *Meyer* petition's class definition defines a class of children for which medical monitoring is reasonably necessary according to contemporary scientific principles. *Id.* Well established monitoring exists that makes early detection of disease, disability and/or injury possible for those children in the defined Medical Monitoring Class. App. A-31 at ¶16. This monitoring and testing is different from what would be normally recommended in the absence of this exposure. *Id.* With early detection, a child can often be referred for appropriate intervention, prevention and/or treatment. *Id.* Such efforts may alter, slow or reverse the effects of the disease. *Id.* Thus, the goal of the medical monitoring program Plaintiff seeks is for early detection of the damage from exposure to the Doe Run Smelter emissions so that children can receive prompt attention to minimize the damage.

In sum, Plaintiff's class definition sets a minimum baseline of exposure for every child that is a member of the class. In turn, this baseline of exposure, creates a significant increase risk of lead related disease because of the inherent toxicity of lead and the elevated exposure the children of Herculaneum are subjected to compared with their

counterparts in other Missouri communities, indeed other U.S. communities face. If not irrefutable, these are common issues which along with the liability fo the smelter operators which predominate. Whether some class children are exposed to higher levels than the minimum is not at issue. Whether there could be additional sources of lead for any individual child, is not at issue. And, contrary to the trial court’s and Court of Appeals analysis, whether a class member is presently suffering lead related illness, or whether there is a probability that such injury will occur in the future is simply not an issue in Plaintiff’s claim.

III. THE QUESTION PRESENTED.

The questions presented are:

(1) When there is a claim that children have been exposed over a significant period of time to toxic emissions, whether Missouri law requires present physical injury as an element of a medical monitoring¹ cause of action.

(2) Whether the Circuit Court’s reliance on cases requiring present physical injury as an element of a medical monitoring cause of action was error under the law of Missouri and that error resulted in the Circuit Court applying an incorrect

¹ A claim for medical monitoring seeks to obtain compensation for the cost of a regimen of tests conducted in a systematic manner over time to determine whether latent disease processes known to be caused by the emitted toxins have become patent, i.e. medically diagnosable, so that treatment of the previously latent disease can begin.

legal standard and thus abusing its discretion in determining whether common issues of fact predominated for purpose of class certification under Rule 52.08?

These questions must be resolved before the trial court can correctly determine whether common issues of law or fact predominate as required by Rule 52.08(b)(3).

POINTS RELIED ON

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 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.

Elam v. Alcolac, 765 S.W.2d 42 (Mo. App. W.D. 1988)

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

Petito v. A.H. Robins Company, Inc., 750 So.2d 103 (Fla. App. 1999)

Friends for All Children v. Lockheed Aircraft Corp., 241 U.S. App. D.C. 83, 746

F.2d 816 (D.C. 1984)

ARGUMENT

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 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.

“It is essential for the Court to understand the substantive law ... to properly assess whether the certification criteria are met.”

Castano v. American Tobacco Co., 84 F.3d 734 (5th Cir. 1996).

A. STANDARD OF REVIEW.

Review of a trial court’s decision to deny class certification is for abuse of discretion. *State ex rel. American Family Ins. Co. v. Clark*, 106 S.W.3d 483, 486 (Mo. banc 2003). “An abuse of discretion is not merely an error of judgment; but consists of a conclusion where the law is overridden or misapplied.” *Fritzche v. East Texas Motor Freight Lines*, 405 S.W.2d 541, 545 (Mo. App. E.D. 1966). However, where as here the trial court misstates or

misapplies the law, *Murphy v. Carron*, 536 S.W.2d 30, 32 (Mo. banc 1976) requires that this Court engage in de novo review.

B. INTRODUCTION TO ARGUMENT.

This is a case seeking class certification of a medical monitoring claim. Medical monitoring is designed to require a defendant who exposed persons to dangerous toxins to provide funding for tests to determine whether an illness has developed as a result of the toxic exposure. A claim for medical monitoring recognizes that exposure to toxins does not result in immediately apparent physical injury. Some toxins, including lead, take time to work their devastation on the human body. Medical monitoring allows physicians to monitor the body's reaction to the exposure, permits early detection of the results of exposure and enables implementation of early treatment to minimize the effects of the once latent disease process caused by exposure to toxic chemicals.

A claim for medical monitoring seeks to recover only the costs of periodic diagnostic testing and examinations necessary to detect the existence of physical harm from exposure to hazardous chemicals. The claim does not seek compensation for the existence of present physical injury; rather an award for medical monitoring provides funding to determine whether the latent effects of the exposure have or are in the process of creating injury. It is the exposure and the inherent latency of the injury caused by toxins that creates the need for the testing, not the presence of known physical injury (which the testing is designed to identify).

Medical monitoring is particularly appropriate in this case. There are proven methods of monitoring for and detecting the illness and injury for which these children are at greater risk because of their exposure to lead from the Doe Run smelter.

In ruling on class certification under Rule 52.08, the trial court found that joinder would be impracticable and that the numerosity requirement of 52.08(a)(1) was satisfied. App. A-4. Without ruling on the commonality and typicality requirements of Rule 52.08(a), the court denied class certification, stating that Plaintiffs failed to meet the Rule 52.08(b)(3) requirement that common issues predominate. PSupp. 000005-6.

In so ruling, the Circuit Court relied on two cases that neither the Plaintiffs nor the Defendants cited in their class certification briefing. They were not cited by the parties for an important reason – they have nothing to do with a medical monitoring cause of action.

The two cases upon which the trial court relied as a legal basis for its determination that common issues of fact or law did not predominate were *In re Agent Orange Product Liability Litigation*, 818 F.2d 145, 165 (2nd Cir. 1987) and *Owner-Operator Indep. Drivers' Ass'n. v. New Prime*, 213 F.R.D 537, 547 (W.D. Mo. 2002), App. A-6. Neither *Agent Orange* nor *Owner-Operator Indep. Drivers' Ass'n* involved a medical monitoring claim. *Agent Orange*, 818 F.2d at 152, 153; *Owner-Operator*, 213 F.R.D. at 539-42. In both cases, the pleaded causes of action required a showing of actual injury. Neither case holds any precedential value for a medical monitoring claim.¹ As the

¹Further, *Agent Orange* relied on a now repudiated comment to Fed. R. Civ. P. 23(b) cautioning against use of the class action device in mass tort cases. *See In re: School Asbestos Litigation Matter*, Master File 830268 (E.D. Pa.) Class Action Argument, July 30, 1984, Tr. 106, quoted in *NEWBURG ON CLASS ACTIONS* (3d ed.) §

trial court relied on actual injury cases to determine whether common issues of fact predominate in a cause of action that does not require present physical injury, the trial court erred as a matter of law in its legal analysis.

For the reasons that follow, this Court should use this opportunity to state the law of Missouri regarding medical monitoring; should declare as the law of Missouri that persons exposed to toxic substances because of a defendant's tortious conduct may obtain a judgment requiring the defendant to provide the cost of medical screening to determine whether the exposure has begun a disease process over time; should conclude that present physical injury is not a necessary element of a claim for medical monitoring; and should remand to the Circuit Court for reconsideration of its denial of class certification consistent with the law of Missouri announced by this Court.

C. PRESENT PHYSICAL INJURY IS NOT AN ELEMENT OF A MEDICAL MONITORING CAUSE OF ACTION UNDER MISSOURI LAW.

The trial court did not rely on case law cited by the parties. Nor did the trial court rely on Missouri law in making its decision. Yet, a Missouri appellate court has considered generally the viability of a cause of action for medical monitoring (in a non-class action setting) and concluded that present physical injury is not an element of the cause of action.

17.07 at 17-20 (Professor Charles Alan Wright testifying). Nevertheless, *Agent Orange* court did uphold class certification based on a common defense. 818 F.2d at 166-167.

Elam v. Alcolac, 765 S.W.2d 42 (Mo. App. W.D. 1988) held that a claim for a medical monitoring will lie if it is shown that a significant, albeit unquantified risk of disease exists. *Id.* at 208-209. Under *Elam*, medical monitoring is appropriate where the members of the class have suffered only exposure to a toxic substance. In evaluating whether the cost of medical monitoring could be recovered based on exposure, *Elam* concluded that "(c)ompensation for necessary medical expenses reasonably certain to be incurred in the future rests on well-accepted legal principles." 765 S.W.2d at 209.

Elam drew an important distinction between claims of enhanced risk of disease, which Missouri law has not recognized absent clear evidence, and medical surveillance (monitoring). *Elam* first rejected a claim for *enhanced risk* of disease: "We agree with Alcolac that the acknowledged inability ... to quantify the risk rendered the medical opinion that all of the plaintiffs were at extraordinary risk of cancer nonprobative - as that evidence impinged upon the recovery of damages for increased risk of cancer." *Id.* at 208.

Elam did not reject a claim for medical monitoring damages, however:

The evidence of significant, albeit unquantified, ***risk of cancer*** from exposure to the toxic Alcolac shown, ***however***, was competent to prove, as a separate element of damage, the need for medical surveillance of the immune system and other organs. ...

Id. at 209 (emphasis added).

That *Elam* did not require present physical injury to establish a claim for the cost of monitoring is made clear from the cases *Elam* cites. *Id.* at 209. *Elam* cites *Ayers v. Jackson Township*, 106 N.J. 557, 525 A.2d 287, 315 (N.J. 1987) and *Askey v. Occidental Chem. Corp.*, 102 A.D.2d 130, 477 N.Y.S.2d 242, 247 (N.Y. App. Div. 1984). These cases hold that increased risk of disease due to exposure is a sufficient basis for a claim for medical monitoring. Both *Ayers* and *Askey* expressly do not require a present physical injury as a predicate for a claim for medical monitoring. *Ayers*, 525 A.D.2d at 312; *Askey*, 102 A.D.2d at 135-36.²

Elam understands that costs incurred because of the need for medical surveillance in the face of exposure to toxic chemicals supply the damages element of the claim. 765 S.W.2d at 209. The need to incur these costs is the invasion of Plaintiff's legally protected interest that tort law protects. *Elam* expressly noted that two of the plaintiffs were asymptomatic on the critical medical issue for which monitoring was sought. *Id.* at 208, n. 89. That *Elam* allowed recovery for medical surveillance in the face of this evidence is fully consistent with the precedent it cites and its conclusion that evidence of unquantified risk from exposure was sufficient to make a medical monitoring claim. *Id.*

²*Elam* cites a third case to conclude that an increased risk of disease is a sufficient basis for a claim for medical monitoring. *Hegarty v. L & L Marine Servs., Inc.*, 788 F.2d 315, 319 (5th Cir 1986) does not discuss the issue whether present physical injury is required for a medical monitoring claim.

Also revealing on the issue of whether present physical injury is required for a medical monitoring claim in Missouri is the law review article upon which *Elam* relies in discussing medical monitoring. *Elam*, 765 S.W.2d at 209, citing Note, *Medical Surveillance Damages: A Solution to the Inadequate Compensation of Toxic Tort Victims*, 63 IND. L.J. 849 (1988). The article states:

Prior to manifestation of a latent disease, the courts should recognize toxic tort victims' rights to recover expenses incurred in monitoring their health for the development of exposure related ailments. ... Medical surveillance damages provide the victims of toxic torts with a ***pre-manifestation recovery for their injuries.***"

Id. at 862, 876 (emphasis added).

In other words, a claim for medical monitoring permits a recovery of an economic loss that is incurred before the physical injuries are known. And for what injury is the recovery permitted? The recovery is not for physical injuries. Rather, the injury is the invasion of an individual's interest in avoiding the cost of needed medical surveillance examinations. In other words, because of the tortfeasor's actions, the plaintiff must undergo diagnostic tests which she would not have needed *but for* her exposure to the toxic substance. The burden of the economic cost of testing is no less an invasion of a legally protected interest justifying compensation. Absent those tests, the plaintiff will discover the physical manifestation of the exposure too late for any treatment to ameliorate the effects of the exposure.

The rationale for the recognition of medical surveillance claims in the absence of a manifested physical injury is simply that

[I]t is difficult to dispute that an individual has an interest in avoiding expensive diagnostic examinations just as he or she has an interest in avoiding physical injury. When a defendant negligently invades this interest, the injury to which is neither speculative nor resistant to proof, it is elementary that the defendant should make the plaintiff whole by paying for the examinations.

Bower, et al. v. Westinghouse, 522 S.E.2d. 424, 430 (W.Va. 1999), citing *Friends for All Children v. Lockheed Aircraft Corp.*, 241 U.S.App. D.C. 83, 746 F.2d 816, 826 (D.C. Cir. 1984). Although the physical manifestations of an injury may not appear for years, those exposed have suffered some legal detriment: the exposure itself and the concomitant cost of the needed for medical testing constitute the injury. *Bower*, 522 S.E.2d at 431, citing *Hansen v. Mountain Fuel Supply*, 858 P.2d 970, 977 (Utah 1993) (citations omitted) (“Because the ***injury*** in question ***is the increase in risk*** that requires one to incur the cost of monitoring, the plaintiff need not prove that he or she has a probability of actually experiencing the toxic consequence of the exposure. It is sufficient that the plaintiff show the requisite increased risk.”) (emphasis added).

Nor is the plaintiff required to demonstrate the probable likelihood that a serious disease will result from the exposure. *Bower*, 522 S.E.2d at 431. As the Third Circuit has indicated, "the appropriate inquiry is not whether it is reasonably probable that plaintiffs

will suffer [physical] harm in the future, but rather whether medical monitoring is, to a reasonable degree of medical certainty, necessary in order to diagnose properly the warning signs of disease." *In Re Paoli R. Yard PCB Litigation*, 916 F.2d 829 (3rd Cir. 1990), *cert den.* 513 U.S. 1190 S. Ct.1253 (1995) (*Paoli I*). See also 2 Dan B. Dobbs, *Law of Remedies* § 8.1(3), at 380 n. 30 (2d ed. 1993) ("diagnosis expenses--medical monitoring--may be both reasonable and reasonably certain to occur in the future, even if the disease it is intended to diagnose is not reasonably certain to occur"). Importantly, "no particular level of quantification is necessary to satisfy this requirement." *Hansen*, 858 P.2d at 979. All that must be demonstrated is that the plaintiff has a significantly increased risk of contracting a particular disease relative to what would be the case in the absence of exposure. *Bower*, 522 S.E.2d at 433.

Applying pre- *Bass v. Nooney Co.*, 646 S.W.2d 765 (Mo. banc 1983) principles, defendants argued to the trial court, and the trial court accepted, the idea that physical injury must be present in order to obtain a recovery. But just as Missouri abandoned the "impact rule" in *Bass*, so too should this Court confirm *Elam*'s abandonment of the rigid, now-discredited precedent requiring that present physical injury is necessary to justify medical monitoring, which does no more than diagnose the presence of now patent, but formerly latent disease resulting from exposure to toxins.

Bass involved a person trapped in an elevator who claimed severe emotional distress as a result of the defendant's negligence. Under prior law, negligent infliction of

emotional distress required present physical injury. This Court abandoned that approach stating:

A painstaking review of this whole subject has convinced this court that the time has come for Missouri to join the mainstream of Anglo-American jurisprudence by abandoning the classic impact rule. We are further of the opinion that logic and practicality argue in favor of avoiding any requirement that “physical injury” result from the emotional distress.

Instead of the old impact rule, a plaintiff will be permitted to recover for emotional distress provided: (1) the defendant should have realized that his conduct involved an unreasonable risk of causing the distress; and (2) the emotional distress or mental injury must be medically diagnosable and must be of sufficient severity so as to be medically significant. Former decisions holding to the contrary are no longer to be followed.

Id. at 772-73 (footnote omitted).

Like the impact rule in *Bass*, any requirement that physical injury be present in order to justify recovery for medical monitoring suffers from the same fundamental flaw. It ignores the reality that compensable injury can be inflicted in the absence of evident physical injuries.

In *Bass*, the fact that the plaintiff was trapped in the elevator and suffered severe emotional trauma rendered irrelevant the requirement of physical injury so long as the emotional trauma was medically diagnosable and medically significant. *Id.* at 772-73.

Here the exposure to a chemical agent that causes severe pervasive injury over time, that results in a need for medical surveillance as a result of the increased likelihood of disease caused by the exposure, and for which tests are available to diagnose future illness obviate the requirement of present physical injury supplies the necessary legal predicate for medical monitoring damages.

Bass understands that the law draws careful distinctions between harm and injury.

RESTATEMENT (SECOND) OF TORTS §7(1), comment(a) states:

a. "Injury" and "harm" contrasted. The word "injury" is used throughout the Restatement of this subject to denote the fact that there has been an invasion of a legally protected interest which, if it were the legal consequence of a tortious act, would entitle the person suffering the invasion to maintain an action of tort. It differs from the word "harm" ... "harm" implies the existence of loss or detriment in fact, which may not necessarily be the invasion of a legally protected interest.

Bass is consistent with the RESTATEMENT. Indeed, *Bass* is consistent with *Elam* and is consistent with the cause of action Plaintiff asks this Court to reaffirm. *Bass* permits recovery for the invasion of a legally protected interest; it does not require a showing of physical injury. 646 S.W.2d at 772.

By the language of *Elam* and by the authority on which it relies, as well as modern authority that knows the difference between injury and harm, Missouri law does not

presently require a present physical injury as an element of medical monitoring.

D. A SUBSTANTIAL NUMBER OF COURTS THAT HAVE CONSIDERED THE ISSUE HAVE DETERMINED THAT PRESENT PHYSICAL INJURY IS NOT AN ELEMENT OF A CLAIM FOR MEDICAL MONITORING.

Courts that have been presented with a claim for medical monitoring in a case of first impression have recognized that the very nature of a medical monitoring action presupposes the absence of a present physical harm. Thus, *Elam* is consistent with the prevailing modern view of state courts recognizing damages for medical monitoring.

For example, *Bower et al. v. Westinghouse et al.*, 522 S.E.2d 424, 430, 431 (W.Va. 1999) concludes that a plaintiff asserting a claim for medical monitoring is not required to prove present physical harm resulting from tortious exposure to toxic substances. In *Bower*, plaintiffs were exposed to toxic substances as a result of defendants maintaining debris from the manufacture of light bulbs. *Id.* at 426. None of the plaintiffs presently exhibited symptoms of any disease related to the alleged exposure. *Id.* at 427. A federal district court certified the question "whether West Virginia law permits an independent cause of action to recover future medical monitoring costs absent physical injury" to the West Virginia Supreme Court. *Id.* at 428. That Court concluded "[i]t is difficult to dispute that an individual has an interest in avoiding expensive diagnostic testing just as he or she has an interest in avoiding physical injury. When a defendant negligently invades this interest, the injury to which is neither speculative nor resistant to proof, it is elementary that the defendant should make the plaintiff whole by paying for the

examination.” *Bower*, 522 S.E.2d at 430, citing *Friends for All Children, Inc. v. Lockheed Aircraft Corp.*, 241 U.S. App. D.C. 83, 746 F.2d 816, 826 (D.C. Cir. 1984).

Bower defined a medical monitoring claim as one “seek[ing] to recover the anticipated costs of long-term diagnostic testing necessary to detect latent diseases that may develop as a result of tortious exposure to toxic substances.” *Bower*, 522 S.E.2d at 429. *Bower* noted that appellate courts in several other states, including Missouri, had “recognized this cause of action as a well-grounded extension of traditional common-law tort principles.” *Id.* The Court expressly “reject[ed] the contention that a claim for future medical expenses must rest upon the existence of present physical harm. The ‘injury’ that underlies a claim for medical monitoring--just as with any other cause of action sounding in tort--is ‘the invasion of any legally protected interest.’” *Id.* at 430, quoting RESTATEMENT (SECOND) OF TORTS § 7(1) (1964).

Friends For All Children illustrates how a compensable damages can arise without a present physical injury:

Jones is knocked down by a motorbike which Smith is riding through a red light. Jones lands on his head with some force. Understandably shaken, Jones enters a hospital where doctors recommend that he undergo a battery of tests to determine whether he has suffered any internal head injuries. The tests prove negative, but Jones sues Smith solely for what turns out to be the substantial cost of the diagnostic examinations.

Friends For All Children, 746 F.2d at 825. In such circumstances:

[i]t is clear that even in the absence of physical injury Jones ought to be able to recover the cost for the various diagnostic examinations proximately caused by Smith's negligent action. ... The motorbike rider, through his negligence, caused the plaintiff, in the opinion of medical experts, to need specific medical services--a cost that is neither inconsequential nor of a kind the community generally accepts as part of the wear and tear of daily life. Under these principles of tort law, the motorbiker should pay.

Id. Thus,

[i]f a defendant's breach of duty makes it necessary for a plaintiff to incur expenses to determine if he or she has been physically injured, [there is] no reason why the expense of such an examination is any less a present injury compensable in a tort action than the medical expenses that might be incurred to treat an actual physical injury caused by such a breach of duty.

Lewis v. Lead Industries Ass 'n, Inc., 342 Ill. App. 3d 95, 101-2, 793 N.E.2d 869, 874 (Ill. App. Ct. 1st Dist. 2003).

In *Ayers* (as noted, one of the cases *Elam* cited), several hundred plaintiffs' sued claiming their well water was contaminated by toxic pollutants leaching into a aquifer from a landfill. 527 A.2d. at 291. Among their causes of action, the plaintiffs sought damages for medical surveillance. *Id.* at 308-09. *Ayers* recognized that the claim for medical surveillance does not seek compensation for an unquantifiable injury, but rather seeks specific monetary damages measured by the cost of periodic medical examinations.

Id. at 308-09. *Ayers* noted that the invasion for which redress is sought is the fact that plaintiffs had been advised to spend money for medical tests, a cost they would not have incurred absent their exposure to toxic chemicals. *Id.* at 304. The court found support for the plaintiffs' medical monitoring cause of action in well-accepted tort concepts:

Compensation for reasonable and necessary medical expenses is consistent with well-accepted legal principles. *See* C. McCormick, *Handbook on the Law of Damages* §90 at 323-27 (1935). It is also consistent with the important public health interest in fostering access to medical testing for individuals whose exposure to toxic chemicals creates an enhanced risk of disease. ...

Id. at 311. The Court also found that permitting recovery for medical monitoring furthered the policy of tort law:

[P]ermitting recovery for reasonable *pre-symptom*, medical-surveillance expenses subjects polluters to significant liability when proof of the causal connection between the tortious conduct and the plaintiffs' exposure to chemicals is likely to be most readily available. The availability of a substantial remedy before the consequences of the plaintiffs' exposure are manifest may also have the beneficial effect of preventing or mitigating serious future illnesses and thus reduce the overall costs to the responsible parties. ... It is inequitable for an individual, wrongfully exposed to dangerous toxic chemicals but unable to prove that disease

is likely, to have to pay his own expenses when medical intervention is clearly reasonable and necessary.

Id. at 312 (emphasis added). Distinguishing a medical surveillance claim from a cause of action for damages for enhanced risk of disease (which the court (and *Elam*) did not permit), *Ayers* reasoned that the causes of action were different because “medical surveillance claim seeks reimbursement for the specific dollar costs of periodic examinations that are medically necessary notwithstanding the fact that the extent of plaintiffs' impaired health is unquantified.” *Id.* at 313.

In *Petito v. A.H. Robins*, 750 So.2d 103 (Fla. App. 2000), *cert. den.* 780 So.2d 912 (2001), the Florida Court of Appeals confronted the issue of “whether or not Florida recognizes a cause of action for medical monitoring when the party seeking relief has yet to develop any identifiable physical injuries or symptoms.” *Petito v. A.H. Robins*, 750 So.2d 103 (Fla. App. 2000), *cert. den.* 780 So.2d 912 (2001). *Id.* at 104. The Court reasoned “[a]lthough it is true that plaintiffs in cases such as these have yet to suffer physical injuries, it is not accurate to say that no injury has arisen at all.” *Id.* at 105. Further, the Court recognized that denying recovery for medical monitoring “would foreclose countless economically disadvantaged individuals from obtaining the supervision that they need, and, regardless of financial need, simply force the victims, rather than the wrongdoers, to initially bear these great expenses.” *Id.* The Court found no reason in law or equity, common sense or decisions from other jurisdictions that a

cause of action for medical monitoring should not be recognized. *Id.* at 108. “[S]uch a claim is viable and necessary to do justice.” *Id.*

A substantial number of courts have agreed with this analysis. *See also, Redland Soccer Club v. Department of the Army*, 696 A.2d 137, 145-46 (Pa. 1997); *Burns v. Jaquays Mining Corp.*, 752 P.2d 28, 31-33 (Ariz. App. 1987) (medical monitoring for exposure to asbestos fibers even though none of the plaintiffs had been diagnosed as having asbestosis); *Hansen v. Mountain Fuel Supply*, 858 P.2d 970, 977-8 (Utah 1993); *Betts v. Manville Personal Injury Settlement Trust*, 225 Ill. App.3d 882, 588 N.E.2d 1193, 1217-18, 16 S. Ill. Dec. 1063 (Ill. App. Ct. 1992); *Doe v. City of Stamford*, 699 A.2d 52, 55 (Conn. 1997) (allowing a medical monitoring claim under Connecticut's workers' compensation system), *Lamping v. American Home Products*, No. DV097-85786 2000 Mont. Dist. Lexis 2580 (Mont. 4th Dist., Feb 2, 2000).

Numerous federal courts interpreting state law have also found that a cause of action for medical monitoring does not require proof of a current physical injury. *In Re Paoli R. Yard PCB Litigation*, 916 F.2d 829, 852 (3rd Cir. 1990), *cert den.* 513 U.S. 1190, 115 S. Ct.1253, 131 L. Ed. 2d 134 (1995) (*Paoli I*); *Patton v. General Signal Corp.* 984 F.Supp. 666, 674 (W.D. N.Y. 1997); *Carey v. Kerr-McGee Chem. Corp.*, 999 F.Supp. 1109, 1119 (N.D. Ill.1998) (predicting Illinois law); *Muniz et al. v. Rexnord Corp.*, 2006 WL 1519571 (N.D. Ill. May 26, 2006) (predicting Illinois law); *Burton v. R.J. Reynolds Tobacco Co.*, 884 F.Supp. 1515, 1522-23 (D. Kan. 1995) (predicting Kansas law); *Day v. NLO*, 851 F.Supp. 869, 880-81 (S.D. Ohio 1994) (predicting Ohio

law); *Cook v. Rockwell Int'l Corp.*, 755 F.Supp. 1468, 1477 (D. Colo. 1991) (predicting Colorado law); *Allgood v. General Motors*, 2005 WL 2218371 (S.D. Ind. Sep. 12, 2005) (predicting Indiana law); *Martin v. Shell*, 180 F.Supp.2d 313, 323 (D. Conn. 2002) (noting favorable citation by Connecticut Supreme Court in *Doe*).

These cases have found that the medical need to incur the cost of diagnostic testing is a compensable injury and, as noted, have based their decisions on well-accepted common law principles and tort theories regarding deterring injurious conduct by defendants.

The state supreme court decisions that have refused to recognize a cause of action for medical monitoring without present physical injury ignore the presence of economic injury, for which the law has historically permitted recovery. See *Henry v. The Dow Chemical Company*, 473 Mich. 63, 701 N.W.2d 684, 688-89 (Mich. 2005); *Hinton ex rel. Monsanto Co.*, 813 So. 2d 827, 829 (Ala. 2001); *Mergenthaler v. Asbestos Corp.*, 480 A.2d 647, 651 (Del. 1984) (distinguishing *Ayers* based on direct contact with groundwater in *Ayers*, no evidence of exposure in *Mergenthaler*); *Wood v. Wyeth-Ayerst Labs.*, 82 S.W.3d 849, 853-54 (Ky. 2002). In other words, these cases simply fail to provide a remedy for the cost of diagnostic testing to determine whether current injury is present, ignoring the plain common sense of *Elam*, the cases previously described, and *Friends for All Children*, 746 F.2d at 825.

The cases requiring proof of present physical injury as an element of medical monitoring also ignore the fundamental fact of the latent nature of disease that results

from exposure to toxins. If diagnosed physical injury is required, the injury that medical monitoring addresses – the circumstance in which the injury is latent, or undiagnosed – and the economic injury that results from the need to determine whether damage is present- go unaddressed and unredressed by the law

Recognition of a medical monitoring claim without physical injury

“accommodate[s] a society with an increasing awareness of the danger and potential injury caused by the widespread use of toxic substances, ... [and] allow[s] plaintiffs some relief even absent present manifestations of physical injury.” *Paoli I*, 916 F.2d at 850.

In many instances, the cost of diagnostic testing of an individual who is a putative member of the class may well be insufficient economically (through exceedingly important from a medical standpoint) to support a legal action for medical monitoring in an individual action without class action status. Here, as previously noted, exposure to toxic levels of lead imposes significant risks to the children who are the potential members of the class, including the potential of severely compromised intellectual and behavior development later in life. Without the remedy of a claim for medical monitoring the latent effects of disease may well go unknown and untreated for decades, harming the child. In turn, without imposing the cost caused by Defendants’ tortious conduct on the tortfeasors, many instances of damage will go undiagnosed or untreated because most families cannot afford the cost of the diagnostic testing necessary to determine the subtle damage caused by lead.

Doe Run has consistently cited *Thomas v. FAG Bearings Corp., Inc.*, 846 F.Supp. 1400 (W.D. Mo. 1994), as authority for the proposition that Missouri does not recognize medical monitoring as a cause of action absent present physical injury. *Thomas v. FAG Bearings Corp., Inc.*, 846 F.Supp. 1400 (W.D. Mo. 1994), *FAG Bearings*, 846 F. Supp at 1410. *FAG Bearings* is no more than the guess, and a bad one at that, of a lone federal district judge concerning Missouri law. Remarkably, the judge in *FAG Bearings* ignores *Elam* altogether.

FAG Bearings cites two federal cases and no Missouri law in making its guess. One of the federal cases, *Werlein v. United States*, 746 F.Supp. 887, 904 (D. Minn. 1990), *vacated* 793 F.Supp. 898 (1992), is a 1990 Minnesota federal case in which a lone federal trial judge attempted to guess Minnesota law. *Werlein* has been vacated. It is no longer an accurate statement of Minnesota law. *Id.* at 793 F.Supp. 898.

The other, *Ball v. Joy Technologies, Inc.*, 958 F.2d 36, 39 (4th Cir. 1991), is a Fourth Circuit case (mis)interpreting West Virginia and Virginia law.

That *Ball* misstates the law of West Virginia is clear from the West Virginia Supreme's Court's treatment of it. . . When the West Virginia Supreme Court examined the federal court's guess as to West Virginia law set out in *Ball*, the West Virginia Supreme Court expressly rejected *Ball*, holding that present physical injury is not an element of a claim for medical monitoring. *Bower*, 522 S.E.2d at 430, 431 (W.Va. 1999). *FAG Bearings* thus relies on a rejected interpretation of West Virginia law by a similarly misinformed federal judge as the basis for its decision about Missouri law.

There is no kind way to say it. *FAG Bearings* is simply wrong.

E. PERMITTING RECOVERY FOR THE COSTS OF MEDICAL MONITORING WITHOUT REQUIRING PRESENT PHYSICAL INJURY FURTHERS THE POLICY OF THE LAW OF TORTS EXPRESSED IN *ZUECK V. OPPENHEIMER GATEWAY PROPERTIES, INC.*, 809 S.W.2D 384(MO. BANC 1991).

Recognition of a cause of action for pre-symptom medical monitoring is also consistent with the policy of Missouri Tort law:

Tort law is “concerned with the allocation of losses arising out of human activities. ... 'The purpose of the law of torts is to adjust these losses, and to afford compensation for injuries sustained by one person as a result of the [negligent] conduct of another.’” W. Keeton, Prosser and Keeton on the Law of Torts 6 (5th ed. 1984) (*quoting* Wright, *Introduction to the Law of Torts*, 8 Cambridge L.J. 238 (1944)). To achieve this objective, courts and legislatures have established rules of liability. These rules ought to function to promote care and punish neglect by placing the burden of their breach on the person who can best avoid the harm. *Zueck v. Oppenheimer Gateway Properties, Inc.*, 809 S.W.2d 384, 388 (Mo. banc 1991).

Ayers stated the policy rationale for allowing pre-injury medical monitoring, consistent with the principle recognized in *Zueck*:

[P]ermitting recovery for reasonable pre-symptom, medical surveillance expenses subjects polluters to significant liability when proof

of the causal connection between the tortious conduct and the plaintiffs' exposure to chemicals is likely to be most readily available. The availability of a substantial remedy before the consequences of the plaintiffs' exposure are manifest may also have the beneficial effect of preventing or mitigating serious future illnesses and thus reduce the overall costs to the responsible parties. ... It is inequitable for an individual, wrongfully exposed to dangerous toxic chemicals but unable to prove that disease is likely, to have to pay his own expense when medical intervention is clearly reasonable and necessary.

Ayers, 527 A.2d at 312.

Permitting recovery for the costs of medical monitoring without requiring present physical injury furthers the policy of the law of torts expressed in *Zueck*. Medical monitoring adopts the maxim, "an ounce of prevention is worth a pound of cure." Waiting for injury to manifest itself as a condition of a medical monitoring claim is tantamount to the law preferring devastating loss to careful diagnosis and early treatment. The law is not such a fool. The law knows and ought to say that a pound of cure is not better than an ounce of prevention.

F. THE STANDARDS FOR MEDICAL MONITORING IN MISSOURI.

The court should declare the following as standards for medical monitoring in Missouri:

- 1) Exposure;

- 2) To a hazardous substance;
- 3) Through the tortious conduct of the defendant;
- 4) Resulting in a significant increased risk;
- 5) Of serious disease, illness or injury;
- 6) Which increased risk makes it reasonably necessary to perform diagnostic monitoring and testing;
- 7) And such procedures exist that make early detection of disease illness or injury possible.

These standards comport with the holding in *Elam* and the standards of *Bower*, which in turn, as it notes, is consistent with standards adopted by other state courts. *Bower*, 522 S.E.2d at 432 (courts addressing this issue have moved toward a relative consensus on the elements necessary to establish a claim for medical monitoring). These elements do not require that Plaintiff prove that the disease is treatable: “[a] plaintiff should not be required to show that a treatment currently exists for the disease that is the subject of medical monitoring.” *Bower*, 522 S.E.2d at 433-43, citing *Redland*, 548 Pa. at 196 n.8, 696 A.2d at 146 n.8; see also *Petito*, 750 So.2d at 106-07. Such a requirement would unfairly prevent a plaintiff from taking advantage of advances in medical science. *Redland Soccer*, 696 A.2d at 146.

G. THE TRIAL COURT ERRED AS A MATTER OF LAW IN FAILING TO CERTIFY THE CLASS BASED ON FACTORS THAT ARE NOT AT ISSUE IN THE ELEMENTS OF A MEDICAL MONITORING CLAIM UNLESS PRESENT PHYSICAL INJURY IS AN ELEMENT OF THE CLAIM.

The need for a class member to be monitored is a function of a single predominate common fact – whether the child was exposed to Defendants’ toxic releases during the class period. The trial court and the Court of Appeals completely misunderstood the proper standard to apply in making and affirming the class certification decision.

As previously discussed, the trial court overruled Plaintiff’s Motion for Class Certification because, in the trial court’s flawed legal analysis, common issues of law and fact existed but did not predominate. The trial court relied on two cases, *In re Agent Orange Product Liability Litigation*, 818 F.2d 145, 165 (2nd Cir. 1987) and *Owner-Operator Indep. Drivers’ Ass’n. v. New Prime*, 213 F.R.D 537 (W.D. Mo. 2002).

Agent Orange involved a settlement of a class action involving Vietnam veterans exposed to dioxin. *Agent Orange*, 818 F.2d at 148. Several injured veterans and their families, who felt the settlement shorted them, objected to the settlement. *Id.* at 156. As this Court is aware, in determining whether a class action settlement is fair, reasonable and adequate, a court may consider the likelihood of a the plaintiffs prevailing on the merits. *Id.* at 171. In the course of the merits discussion, the Second Circuit concluded that the case could not have been won at all; this factor counseled in favor of approving the settlement. *Id.* at 171-73. But the court’s dicta about the propriety of the class

certification at all is what has made its way into Judge David's order denying class certification.

A detailed background of *Agent Orange* confirms the error of Judge David's analysis. The case sought recovery for personal injuries – and made no claim for medical monitoring. “The case is viewed as a legal action for personal injury sounding in tort.” *Id.* “Proving that the ailments of a particular individual were caused by Agent Orange is also extremely difficult.” *Id.* “The first evidentiary hurdle for such an individual is to prove exposure to Agent Orange.” *Id.* “The second and, in the view of the district court, insurmountable hurdle is to prove that the individual's exposure to Agent Orange caused the particular ailment later encountered.” *Id.* Further, “[t]he illnesses claimants now attribute to Agent Orange include not only heart disease, cancer, and birth defects, but also confusion, fatigue, anxiety, and spotty tanning.” *Id.* All of these are personal injury claims. For this reason, the settlement class certified was a personal injury class. *Id.*

The *Agent Orange* plaintiffs' claims were further complicated by the fact that an individual's exposure to Agent Orange cannot be traced to a particular defendant because the military mixed the Agent Orange produced by various companies in identical, unlabeled barrels. *Id.* at 149-50. No one can determine, therefore, whether a particular instance of spraying involved a particular defendant's product. *Id.* at 150. It also was conceivable that if Agent Orange did cause injury, only the products of certain companies could have done so. *Id.* Despite these obvious differences, the settlement class certified consisted of:

“[t]hose persons who were in the United States, New Zealand or Australian Armed Forces at any time from 1961 to 1972 who were injured while in or near Vietnam by exposure to Agent Orange... .”

Id. at 154.

In its discussion of the propriety of certifying a personal injury class, the Second Circuit relied on comments to Rule 23(b)(3) that militated against class certification in a mass tort personal injury case:

The comment to Rule 23(b)(3) explicitly cautions against use of the class action device in mass tort cases. *See* Advisory Committee Note to 1966 Revision of Rule 23(b)(3) (“A ‘mass accident’ *resulting in injuries* to numerous persons is ordinarily not appropriate for a class action because of the likelihood that significant questions, not only of damages but of liability and defenses of liability, would be present, affecting the individuals in different ways.”).

Id. at 164. (emphasis added). As noted, these comments have now been repudiated. Section B, *supra* at 26-27, fn. 1.

The pinpoint cite provided by the trial court shows that Judge David analyzed this case as though it were similar to *Agent Orange*, that is, a personal injury class. His list of individual issues clearly follows the *Agent Orange* personal injury list. As has been clearly shown by the words of the Second Circuit itself above and here, *Agent Orange* is a personal injury action.

The relevant question, therefore, is not whether Agent Orange has the capacity to cause harm, the generic causation issue, but whether it *did* cause harm and to whom. That determination is highly individualistic, and depends upon the characteristics of individual plaintiffs (*e.g.* state of health, lifestyle) and the nature of their exposure to Agent Orange.

Id. at 167. (emphasis original).

The difficulties presented for class certification in a toxic exposure mass tort seeking damages for personal injury listed by the Second Circuit are those to which Judge David expressly referred in his Order. But to repeat: This is not a personal injury case. Proof of present physical injury has no part in a medical monitoring case.

Judge David also sought legal justification for his conclusion in *Owner-Operator Indep. Drivers' Ass'n. v. New Prime*, 213 F.R.D 537 (W.D. Mo. 2002). It is curious to find *Owner-Operator* in the midst of a claim for medical monitoring.

Owner-Operator involved a claim by independent truck drivers concerning the fidelity of lease-purchase agreements to the Truth-in-Lending law. Judge Whipple, of the federal district court for the Western District of Missouri, denied class certification because common questions of fact did not predominate.

If the Court were to certify this class, the Court would be required to make individualized determinations **whether a class member suffered damage** due to the lease terms about which Plaintiffs complain. The determination whether an owner-operator has a right to escrow funds **would require an**

examination of individual drivers' accounts in an effort to determine whether, after termination of the lease, there remained a positive balance.

Such an inquiry would necessarily entitle the Defendants to present individualized proof of offsets, advances and maintenance expenses charged to the owner-operators' accounts to determine whether any escrow funds remained to which the owner-operator may be entitled.

Id. at 547 (emphasis added).

The Court further reasoned that “Courts are not bound to certify a class if the *determination of whether class members suffered actual damage requires presentment of individualized proof.*” *Id.* (emphasis added). Further, “[t]he Court finds that determining whether an individual class member *had suffered damage* would require examination of individualized proof and predominates over common issues. As a result, the Court will deny Plaintiffs' motion for class certification.” *Id.*

As the discussion of medical monitoring, *supra*, shows, the harm to plaintiffs in a medical monitoring case is not the diagnosed personal injury, but the economic cost of the need to incur monitoring expenses caused by exposure to toxins that can lead to disease. “The [medical monitoring] claim arises from exposure.” Venugopal, 102 COLUM. L.REV. 1659. The invasion of a protected right (to be free from unwanted exposure to disease producing chemicals) is the legal harm. The duty in the defendant arises from the defendant having “placed another in a position of danger.” Abraham, 88 VA.L.REV. at 1977 (2002).

The trial court's order listed nine issues, which, in the trial court's view, were individual issues and, which taken together, caused common issues of fact not to predominate. App. A-5-A-6. Each of these so-called individual issues fails to comprehend the nature of a medical monitoring cause of action:

1. the age at which exposure occurred. This is a common, not individual factor for each class member for two reasons. First, it is the defined exposure to the same toxins that provides the basis for medical monitoring. Second, the class definition limits the relevant ages from conception to 72 months. It is undisputed that children under 72 months are most at risk from lead exposure. P.Supp. 000024. For purposes of predominance analysis, exposure at any time within the defined ages is common to all class members, Exposure during this age range results in significant increased risk to the children regardless of which age within that range.

2. the nature of the exposure. This factor may be an issue for personal injury claims of soldiers from exposure to a number of different concentrations, manufacturers and dispersion methods as in *Agent Orange*, but it does not apply when each proposed class member was exposed in the same manner – from the same emissions to the same toxins from the same lead smelter. It is the fact of this exposure that determines the propriety of the claim, and the class definition identifying a length of exposure specifies

a common baseline of exposure. For purposes of predominance analysis, the nature of the exposure in this case is common to all class members.

3. the time period over which the exposure occurred. This can only be an individual factor if the court is focusing on causation for personal injury. Here the fact of exposure is common to all proposed class members; plaintiff claims the exposure for the minimum time periods identified in the class definition is sufficient for medical monitoring. The length of exposure may relate to whether a particular disease in fact was caused by the exposure, but the class definition limits membership in the class by setting out a minimum time period of exposure that creates significant increased risk. PSupp. 000024. Because the fact of and minimum length of exposure is common to all proposed class members, it is not an individualized fact, but a common one. That some class members may have been exposed for longer than the baseline does not individualize the issue.

4. the blood lead level. This shows the court's misunderstanding of the nature of a medical monitoring cause of action by the trial court. The blood lead level is one component of what medical monitoring is designed to determine. Because common exposure to common toxins is the cornerstone, the non-existence of a known blood lead does not determine a lack of need of monitoring, nor does the existence of a point-in-time blood level mean that there is not a significant increased risk. As the ATSDR

notes, blood lead levels alone are not an indicator of adverse effects. A-79.

That the court considered the numeric blood lead level, which may be related to whether a particular physical injury was caused by lead, again shows that the court was analyzing Plaintiff's claim as a personal injury claim.

5. the existence of other sources such as lead paint for any presence of lead. The speculated 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. That there could be other sources of lead over and above the substantial exposure and risk created by Doe Run Smelter pollution does not absolve defendants where the lead smelter's emissions have caused a baseline toxic exposure creating the need for medical monitoring. That the court even considered this issue demonstrates that it was analyzing Plaintiff's claim as one for personal injury.

6. whether the individuals are presently suffering from any lead related injuries. This so-called individual factor is a personal injury factor. It has no place in consideration of a medical monitoring cause of action. That the court considered this factor as part of its predominance analysis shows that it considered proof of present physical injury as a predicate to a

claim for medical monitoring. The very purpose of medical monitoring is to determine the presence of injury.

7. whether the individuals are still being exposed or whether such exposure terminated. This so-called individual factor ignores the legal fact that exposure to the Smelter's toxins is the basis for medical monitoring. Each child in the class has in common the fact of exposure at the vulnerable age. Even if the exposure has ceased, that does not eliminate the risk from past exposure, nor does it follow that latent disease processes resulting from the exposure are not at work, undiscovered until brain dysfunction occurs, that is, too late to do any good unless proper medical monitoring can intercept the disease at its early stages. That the court considered this a factor, which may relate to whether there was sufficient exposure to cause a particular present physical injury, shows the court's analysis as if this were a physical injury case.

8. if the exposure to lead in Herculaneum has terminated how long ago it terminated. This so-called individualized factor is logically identical to factor 7 and fails for the same reasons.

9. whether there is any need for a particular individual to be monitored. This so-called individual factor assumes that the need for monitoring arises from something more than a defined period of baseline

exposure to a known toxin. To repeat: the need for monitoring arises from the fact of common exposure to a known toxin which creates the need for early detection by monitoring. There is no requirement that injury manifest itself before determining the need for monitoring to identify the injury.

As the trial court's listed factors show, a finding that individual issues predominate over common issues in this case is the product of the trial court's simply erroneously treatment of the Plaintiff's claim as if it were one for known physical injury, not as a case seeking only the cost of determining whether exposure to Defendants' toxins has begun to manifest as physical injury.

This Court has made clear that the predominance requirement does not demand that every single issue in the case be common to all the class members, but only that there are substantial common issues which predominate over the individual issues. *American Family Insurance Company v. Clark*, 106 S.W.2d 483, 488 (Mo. 2003). The need for individual inquiry as to damages does not preclude a finding of predominance. *Id.*

It is inescapable that the trial court analyzed Plaintiff's medical monitoring claim as one requiring proof of present physical injury.

The court's focus on present physical injury meant it erred in analyzing the factors that could affect the predominance analysis under Rule 52.08(b)(3).

H. THE COURT OF APPEALS ERRED IN ADOPTING THE TRIAL COURT'S PRESENT PHYSICAL INJURY ANALYSIS.

On review, the Court of Appeals' failed carefully to analyze the trial court's decision. Its decision upholding the denial of class certification in the face of the trial court's reliance on issues relating to claims of present physical injury reflects a fundamental misunderstanding of the issue on appeal. Medical monitoring is designed to detect harm that may result from exposure. It is the need for diagnostic testing necessitated by the increased risk of disease caused by exposing the class members to toxins that is the harm, not the "reasonable certainty" of a subsequently developed injury or disease. The need for medical monitoring flows from the fact of exposure, not the amount of exposure or the certainty that injury will result. Thus, *it is not the presence of the actual disease/harm or the reasonable certainty that injury/disease will result from the exposure. Rather it is increased possibility of physical injury/disease that results from exposure to toxins that justifies a program designed to detect the medical monitoring.* Based on this misunderstanding, the Court of Appeals' opinion failed to address the trial court's use of precedent to support its legal conclusions. Moreover, the Court of Appeals ignored evidence that the exposure of the children was consistent over a number of years, and that hundreds of thousands of pounds of lead had fallen on these children's homes, yards, schools and on the children themselves.

Even though recognizing that "the trial court lacks the authority to conduct a preliminary inquiry into the merits of the lawsuit," the Court of Appeals erred in lengthy

merits analysis, adopting Defendants' factual argument. *Meyer v. Fluor Corporation, et al.*, __ S.W.3d. __, 2006 WL 996540, *2. *4 (Mo. App. E.D.). The Court of Appeals adopted wholesale Defendants' affidavits and hearing testimony of Defendant's experts Banner, Nassetta and Bowers, without citations to contrary evidence from Plaintiffs' affidavits submitted to establish that Plaintiffs could make a *prima facie* showing of the elements of Rule 52.08. *Id.* at *4. This factual analysis confirms the error of Court of Appeals in analyzing Plaintiff's case as a personal injury action, mirroring the mistake of the trial court.

The Court of Appeals merits analysis ignores the fundamental premise of a medical monitoring claim: that individual factors are not at issue because the need for monitoring is based on a common baseline exposure to known toxin which baseline creates a significant increased risk. While it may be an issue in a determination of whether a specific present physical injury was caused by lead, it is absolutely irrelevant to a medical monitoring claim that for some children there may be a greater risk than the baseline for some of the children.

The Court of Appeals does not hide its mistaken present physical injury analysis; its decision is replete with references to a requirement of proof of present or future physical injury. The court specifically states "Whether or not any of the proposed class do suffer from a present injury is also an individual issue." 2006 WL 996540 at *4. The Court of Appeals states 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.” *Id.* at *5. Again this is no more relevant to the medical monitoring claim here than it would be that certain post-accident tests were negative if there reasonable need was caused by a neglect automobile driver. Medical monitoring cases specifically reject proof of probability of experiencing the consequence of the toxic exposure. *See e.g. Bower*, 522 S.E.2d at 431; *In Re Paoli*, 916 F.2d at 851.

The Court of Appeals also states that the trial court “also considered the fact that some purported class members had already suffered injuries.” *Id.* at 5. This is not part of Plaintiff’s claim and not relevant to it. The Court also states that the trial court “implicitly” found “that there was not a reasonable certainty that there would be harm from all potential levels and types of exposure.” *Id.* at *6. Not only did the trial court never make this finding, it is a requirement that there is present proof of future harm which is not relevant to a claim for medical monitoring rejected by *Bower* and *Paoli*.

The Court of Appeals stated “Whether any of the proposed class do suffer from a present physical injury ... is also an individual issue.” *Id.* at *8. This is the same improper assumption concerning medical monitoring which the trial court made. Further, it found that the “trial court considered what would be relevant to determining how significant the probability each individual member of the purported class would incur future injuries as a result of the operation of the Doe Run Smelter.” This too is not an element of a medical monitoring claim (and therefore not an element of plaintiffs’ claim), but rather an increased risk of future illness claim, which Plaintiff did not bring. *See*

Elam v. Alcolac, 765 S.W.2d 42, 208-9 (Mo. App. W.D. 1988) (which rejects cause of action for increased risk of future illness and properly distinguishes a claim for increased risk of future illness from a claim for medical surveillance.

The Court of Appeals wrote: “To have allowed the class certification to stand ‘would have allowed ***generic causation*** to be determined without regard to those characteristics and the individual's exposure.’” *Meyer v. Fluor Corp.*, ___ S.W.3d ___, ___ (Mo. App. E.D. 2006) 2006 WL 996540 at *6 (emphasis added), *quoting Agent Orange*, 818 F.2d at 165. The generic causation to which *Agent Orange* refers is causation of actual physical injury, not the proven exposure to toxins that contain the potential for devastating physical injury to develop that permits medical monitoring to proceed under *Elam*.

It is precisely because *Agent Orange* was not a medical monitoring case (as the Court of Appeal’s opinion carefully points out), but an action for damages from actual, present, diagnosable injury resulting from dioxin-laced agent orange (which the Court of Appeals failed to appreciate) that *Agent Orange* is not precedent for a medical monitoring case unless injury is a predicate element for that non-injury cause of action. *Elam* holds otherwise. For this reason, the Court’s decision here is contrary to *Elam*.

The Court of Appeals was no more careful in its analysis of applicable case law. The court stated that this case was “somewhat similar” to *Askey*, 477 N.Y.S.2d at 248, but misread the case. As noted previously, *Askey* concluded that a medical monitoring claim

does not require proof of present physical injury. *Id.* at 247. The court in *Askey* did not deny certification on predominance grounds, but only on the lack of identifiable class. *Id.* at 248. In *Askey*, there was no identification of the nature of the chemicals to which people were exposed or the routes of exposure. *Id.* In contrast, Plaintiffs here have identified a specific source, releasing a known suite of toxic chemicals, and members defined by a specific date and age of exposure easily identifiable through public records.

Yandle v. PPG Industries, Inc., 65 F.R.D. 566, 570-572 (E.D. Tex. 1974), is a 1974 personal injury class action. The claims were specifically for present physical injuries. 65 F.R.D. at 567. The case was analyzed as a personal injury case using other class actions for personal injuries. *Id.* at 569-70. The court noted that the course of conduct of “nine different defendants acting differently at different times” created distinctions in liability. *Id.* at 571. The case never referenced the words medical monitoring, let alone analyzed the facts in light of such a claim. The case has been noted to be disapproved by *Sterling v. Velsicol*, 11 Fed. R. Serv. 3d. 213, *18-20 (6th Cir. 1988), and other cases. Here there is one course of conduct by the same owner applying to all class members for defined period of exposure, and it is simply not a personal injury claim.

Caruso v. Celsius Insulation Resources, Inc., 101 F.R.D. 530, 532 (M.D. Pa. 1984) also sought certification of claims including personal injury claims. In multidistrict litigation concerning area formaldehyde, the court found a lack of common course of conduct for liability, and a concern that the class encompassed overly broad groups of plaintiffs including owners renters workers and others merely transacting business in and

around structures containing the materials. *Id.* at 535, 536. *Caruso* never considered the propriety of a medical monitoring claim in a narrowly defined class. Here plaintiffs have a defined group of children exposed by a common source in one defined geographic area. *Caruso* simply does not apply here.

Goasdone v. American Cyanamid Corp., 354 N.J. Super. 519, 808 A.2d 159, 172, 173 (2002) is a New Jersey appeals court medical monitoring case, but as the court noted is distinguishable as a workplace exposure case. At issue was exposure to multiple products from five different manufacturers in different manufacturing settings for all workers over a 37 year period. 808 A.2d at 170-71. The court also made its determination based on the presence of statute of limitations defenses. *Id.* As *Goasdone* recognized, the New Jersey Supreme Court in *Ayers*, 525 A.2d at 312, approved of a claim for medical monitoring absent present physical injury in an environmental exposure case, on which *Elam* relied. Here there is absolutely no statute of limitations defense for the minors of the class. There is one source and one common route of exposure to a single suite of toxic emissions over a narrowly defined period, and so none of the issues that made the *Goasdone* court distinguish that case as a workplace exposure case founded on different manufactures products in different settings over multiple decades.

None of these cases were cited by the trial court in its analysis. Neither the trial court or the Court of Appeals analyzed *Bower*, *Ayers*, *Friends*, or any of the other case law that specifically holds that present physical injury is not an element of a medical monitoring claim.

The Court of Appeals either ignored *Elam* or determined that proof of personal injury was an element of a medical monitoring claim. Thus, the Court of Appeals clearly misapplied the law because it considered as an individual issue a factor that under Missouri law is not an element of, or relevant to, a medical monitoring claim: whether a class member suffered a present physical injury. If the Court of Appeals correctly applied the law of Missouri, this could not be an element defeating predominance because it is simply not an element of the claim that plaintiff brought. Thus the Court of Appeals' analysis, like that of the trial court, misapplies the law of this state and requires review by this Court.

By focusing its decision on proof of actual harm, rather than the presence of possible harm as a result of scientifically verifiable exposure, the Court of Appeals' opinion fails to follow *Elam*, as did the trial court. It is clear that the trial court required proof of actual present physical injury as an element of the medical monitoring cause of action because it made its predominance decision based on this element. In turn, it based its opinion on non-medical monitoring precedents and denied class certification. If the trial court did not consider proof of present physical injury as an element of the claim, then "whether the individuals are suffering any lead related illness", a factor the trial court relied on, simply could not have been a factor in the court's predominance analysis. The Court of Appeals assumed that medical monitoring did not require present physical injury and yet decided to credit the merits testimony of Defendants' witnesses on the

issue of causation of present physical injury and then determined, apparently, that the “injury” language in *Agent Orange* meant something other than injury.

In short, the Court of Appeals opinion missed the fundamental issue when it stated that it did not need to decide whether Missouri courts require present physical injury to sustain an action for medical monitoring. *Id.* at *3. It did, and this court does, because the fundamental substantive law determines the predominance analysis. When this Court concludes that identified present physical injury is not a required element of a claim for medical monitoring, both the trial court and the Court of Appeals’ analysis of the merits issue relating to a personal injury action fails, as does the logic they used to reject certification. Because the Court applied the wrong legal standard in its class certification decision, this case should be remanded to the trial court for reconsideration of the entire predominance analysis in light of standards of a medical monitoring claim that do not require the presence of physical injury.

Given the stakes, the health and medical future of a substantial cadre of children, a clear statement of Missouri’s law on this important issue is demanded, and a trial court’s assessment of the class actions issues based on this clear statement is the minimum justice requires. Neither had occurred in this case.

CONCLUSION

Recognition of a claim for medical monitoring without known physical injury falls within well-accepted parameters for recovery known by the common law, advances the

recovery and deterrent policies of tort law, and provides an opportunity for early recognition and treatment of latent disease caused by exposure to toxic emissions. Here, Plaintiff on behalf of the children of Herculaneum brings one claim for relief, medical monitoring, that is based on one set of legal standards that apply equally and in common to each child. Here, there is one source, the Doe Run Smelter, releasing known toxic contaminants, including lead, creating exposure to a hazardous substance of the same inherent toxicity for all children. There is one common course of reckless conduct that released this contamination exposing all children in the class through the same routes of exposure, the element of tortious conduct. The class definition identifies a minimum time period for exposure which in turn identifies a significant increased risk of contracting latent disease for all children in the class. That there are common exposures created by the Smelter for all children in the class in turn means that there are the same categories of potential injuries and common monitoring procedures that make early detection possible for all class members. Thus under Missouri standards for a claim for medical monitoring, which rejects proof of present physical injury as a predicate to relief the factors that the court found to defeat predominance are not relevant to the determination of the claim. The trial court erroneously denied certification of the class based on erroneous analysis of the nature of the claim and of the legal elements of a medical monitoring claim.

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

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I hereby certify that this Brief complies with the limitations contained in Rule No. 84.06(b) and that this brief contains 16,194 words according to the word count of Corel Word Perfect Version 9.

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I hereby certify that this disk has been checked for viruses in compliance with Rule No. 84.06(g) and that it is virus free.

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