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IN THE SUPREME COURT OF THE STATE OF MISSOURI

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No. SC87771

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LANI MEYER, by and through her Next Friend, Rebecca Coplin,  
Plaintiff-Appellant,

v.

FLUOR CORPORATION, et al.,  
Defendants-Respondents.

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Transfer from the Missouri Court of Appeals for the Eastern District,  
No. ED86616

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**BRIEF AMICUS CURIAE OF PACIFIC LEGAL  
FOUNDATION IN SUPPORT OF DEFENDANTS-RESPONDENTS**

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## **INTRODUCTION AND INTEREST OF *AMICUS CURIAE***

Pacific Legal Foundation respectfully seeks the leave of the Court to file this brief *amicus curiae* pursuant to Rule 84.05(f)(2) of the Missouri Rules of Civil Procedure.

Pacific Legal Foundation (“PLF”) is the oldest and largest public interest law foundation of its kind in America. Founded in 1973, PLF is an advocate of limited government, private property rights, individual freedom, and free enterprise. PLF has numerous supporters and contributors nationwide, including in the State of Missouri.

In furtherance of PLF’s continuing mission to defend individual and economic liberties, through its Free Enterprise Project, the PLF seeks to protect the free enterprise system from abusive regulation, excessive liability awards, and barriers to the freedom of contract. PLF’s attorneys are familiar with the legal issues raised by this case and the briefs on file in this Court. Amicus believes that its public policy perspective and litigation experience will provide a necessary additional viewpoint on the issues presented in this case.

## **SUMMARY OF ARGUMENT**

Plaintiff-Appellant Lani Meyer, by and through her next friend, Rebecca Coplin, seeks to certify a class action to assert a claim for medical monitoring for the asymptomatic children of Herculaneum . The Plaintiff-Appellant’s claim raises an issue of first impression in Missouri as to whether an action for medical monitoring based on exposure to lead and other chemicals may be maintained in the absence of a present physical injury.

Because free blood testing is already offered to the residents of Herculaneum, *Meyer v. Fluor Corp.*, No. ED 86616, 2006 WL 996540 \*1 (Mo. App. E.D. June 1, 2006), this case does not present an adequate basis for the adoption of a new tort action for medical monitoring in the absence of present physical injury. What is more, given the inherent complexities and significant public policy concerns that attend a medical monitoring award in the absence of present physical injury, the legislature rather than the judiciary should determine whether it is in the public interest to recognize such a claim. The legislature is the only institution that has the capability to weigh social benefits and costs of recognizing such an action. It bears emphasis, moreover, that a legislative change would have prospective application.

For the reasons set forth below, the decision of the Court of Appeals should be affirmed.

## **ARGUMENT**

### **I MISSOURI LAW SHOULD NOT PERMIT A MEDICAL MONITORING CAUSE OF ACTION TO PROCEED WITHOUT MANIFESTATION OF INJURY**

#### **A. This Court Should Not Adopt A Medical Monitoring Claim In The Absence Of A Present Physical Injury**

Traditionally, tort liability was based on harm to the plaintiff. *See generally* Thomas C. Grey, *Accidental Torts*, 54 Vand. L. Rev. 1225, 1272 (2001) (noting that historically, “the evil against which tort law was directed was the doing of harm, rather than the infringement of rights or the violation of duties.”). As tort law expanded from intentional to negligent torts, “‘injury’ has been synonymous with ‘harm’ and denotes

physical impairment or dysfunction, or mental upset, pain and suffering resulting from such harm.” James A. Henderson, Jr. & Aaron D. Twerski, *Asbestos Litigation Gone Mad: Exposure-Based Recovery for Increased Risk, Mental Distress, and Medical Monitoring*, 53 S.C. L. Rev. 815, 842 (2002) (citing Restatement (Second) of Torts § 282 (1965)). What is more, harm does not include apprehension of harm or potential, inchoate harm, but rather denotes tactual, manifested, measurable harm. See Matthew D. Hamrick, Comment, *Theories of Injury and Recovery for Post-Exposure, Pre-Symptom Plaintiffs: The Supreme Court Takes a Critical Look*, 29 Cumb. L. Rev. 461, 463 (1999).

The recognition of a claim for medical monitoring in the absence of a present physical injury would precipitate a broad, fundamental change in Missouri tort law.<sup>1</sup>

See *Metro-North Commuter R. Co. v. Buckley*, 521 U.S. 424, 436 117 S.Ct. 2113(1997) (in refusing to recognize a claim for emotional harm based on the plaintiffs’ fears of contracting asbestos-related illness under the Federal Employers’ Liability Act, the Court cited the “potential systemic effects of creating a new, full-blown tort law cause of action – for example, the effects upon interests of other potential plaintiffs who are not before the court and depend on a tort system that can distinguish between reliable and serious

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<sup>1</sup> One example is the effect of such a change on the limitations periods applicable to tort actions. The statute of limitations for actions involving injury to a person is five years. MO. REV. Stat. § 516.120(4). Actions for injuries under this statute of limitations shall be deemed to have accrued “when the damage resulting therefrom is sustained and is capable of ascertainment...” MO. REV. STAT. § 516.100. It is fundamental that “[f]or the purposes of this statute, damages are capable of being ascertained when a plaintiff having a recognized theory of recovery sustains compensable damages. Damages are ascertained when the fact of damage appears rather than when the extent or amount of damage occurs.” *Grady v. Amrep, Inc.*, 139 S.W.3d 585, 588 (Mo. App. E.D. 2004) (citations omitted).

claims on the one hand, and unreliable and relatively trivial claims on the other hand”). The recognition of an action for medical monitoring in the absence of present physical injury would represent an incremental change in Missouri tort law, but rather a sudden, dramatic change that would throw over a fundamental principle of tort law. It is this circumstance that should give this Court pause. *See* Victor E. Schwartz, et al., *Medical Monitoring: The Right Way and the Wrong Way*, 70 Mo. L. Rev. 349, 375 (2005).

Missouri courts have generally been cautious in changing Missouri tort law. *See, e.g., Spuhl v. Shiley, Inc.*, 795 S.W.2d 573, 580 (Mo. App. 1990) (actual - not feared - product malfunction or failure is an essential element of a claim for negligent failure to warn.). Even in a case involving highly sympathetic plaintiffs, this Court has refused to abandon “so fundamental a concept of tort law as the requirement that a plaintiff prove, at a minimum, some nexus between wrongdoing and injury.” *Zafft v. Eli Lilly & Co.*, 676 S.W.2d 241, 247 (Mo. 1984) (declining to adopt “enterprise” or “market share” liability against hundreds of manufacturers of DES, a drug taken by expectant mothers later found to harm their daughters exposed to it *in utero*). What is more, Missouri courts recognize that changes in the law extend beyond the facts of the original cases in which they are announced. *See, e.g., Williams v. Ford Motor Co.*, 454 S.W.2d 611, 617 (Mo. App. 1970) (noting “[t]he evolution of products liability law in Missouri from warranty to ‘strict liability in tort’”) (citing sources).

The circumspection demonstrated by legislative approaches to medical monitoring are instructive. For example, in the context of toxic tort litigation arising under

CERCLA, Congress created the Agency for Toxic Substances and Disease Registry as part of the Superfund Amendments and Reauthorization Act to provide medical care and testing to exposed individuals, including tissue sampling, chromosomal testing, epidemiological studies, or any other assistance appropriate under the circumstances. 42 U.S.C. § 9604(i)(1)(D).<sup>2</sup> The federal government's criteria for establishing medical monitoring programs are:

- Evidence of exposure at a sufficient level of risk is documented.
- A well-defined population is at risk.
- A scientific basis exists for an association between exposure and health effects.
- *The health effects are detectable* and amenable to prevention/intervention.
- Medical screening requirements should be satisfied.
- Accepted treatment/intervention exists and a referral system is available.

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<sup>2</sup> Section 9641 (d),(e) empowers the Agency for Toxic Substances and Disease Registry to:

. . . conduct periodic survey and screening programs to determine relationships between exposure to toxic substances and illness. In cases of public health emergency, exposed persons shall be eligible for admission to hospitals and other facilities and services operated or provided by the public health service.

42 U.S.C. § 9641(d), (e)

- Logistics must be resolved prior to program implementation.

U.S. Dept. of Health & Human Services, Agency for Toxic Substances and Disease Registry, *Summary of ATSDR's Criteria for Medical Monitoring*, 60 Fed. Reg. 38840-4 (July 1995) (emphasis added). All seven criteria - including manifestation of injury - must be met before a medical monitoring program is recommended. *Id.* See also LA. CIV. CODE art. 2315(B) (“Damages do not include costs for future medical treatment, services, surveillance, or procedures of any kind unless such treatment, services, surveillance, or procedures are directly related to a manifest physical or mental injury or disease.”).

Especially where, as here, the remedy sought already is freely available to the plaintiffs, this Court should not recognize a new, expansive tort cause of action. See, e.g., *Brown v. Hamid*, 856 S.W.2d 51, 57 (Mo. 1993) (where plaintiff was able to pursue medical malpractice action, that there was no justification to create a new, independent tort of negligent maintenance of medical records.).

### **B. The Court Should Impose Limitations On Medical Monitoring Damage Awards**

“We do not favor awarding damages under the label of ‘medical monitoring’ and having the money paid directly to plaintiffs to be spent on additional medical attention only if they are so inclined,” for “(t)his was reportedly the eventual outcome of the litigation in *Ayers v. Township of Jackson* [525 A.2d 287 (N.J. 1987)].” 2 Victor E. Schwartz, et al., *Medical Monitoring: The Right Way and the Wrong Way*, 70 Mo. L. Rev. 349, 371 (2005) (quoting A.L.I., Reporter’s Study: Enterprise Responsibility for

Personal Injury 379, 381-82 (1991)). As one scholar has observed:

The incentive for healthy plaintiffs to carefully hoard their award, and faithfully spend it on periodic medical examinations to detect an illness they will in all likelihood never contract, seems negligible.... [L]ogic dictates that the risk that plaintiff will spend a medical monitoring award on something other than medical monitoring increases as his or her enhanced risk decreases. The far more enticing alternative, in most cases, will be to put the money towards a new home, car or vacation. Visiting a physician is not something many people wish they could afford to do more often.

Arvin Maskin, et al., *Medical Monitoring: A Viable Remedy for Deserving Plaintiffs or Tort Law's Most Expensive Consolation Prize?*, 27 Wm. Mitchell L. Rev. 521, 540-41 (2000) (citation omitted).

In the instant case, the court of appeals noted that the children who would be members of the putative class already have access to free blood testing. *Meyer v. Fluor Corp.*, No. ED 86616, 2006 WL 996540 \*1 (Mo. App. E.D. 2006) (“Currently free blood testing is offered to anyone in the Herculaneum area, and this is an accepted method of medical screening for lead levels”). Under these circumstances, the award would absorb resources that are better allocated to those persons who actually become sick or to repair property that has actually been damaged. *See Doyle v. Fluor Corp.*, 199 S.W.3d 784 (Mo. App. E.D. 2006).

In the asbestos context, permitting uninjured plaintiffs to proceed with their lawsuits has allowed the number of such claims to dwarf the number of claims made by those who are actually suffering illness. *See* Stephen J. Carroll et al., RAND Inst. for Civil Justice, *Asbestos Litigation Costs and Compensation* 20, 65 (2002), available at [http://www.rand.org/pubs/documented\\_briefings/DB397/DB397.pdf](http://www.rand.org/pubs/documented_briefings/DB397/DB397.pdf) (last visited Nov.

16, 2006) (reporting studies through the end of 2000 that estimate the percentage of unimpaired plaintiffs to be between 66% and 90%, and consuming about 65% of the compensation for claims of nonmalignant mesothelioma).

Moreover, if a party's costs for medical monitoring are already covered by an employer or health care insurer and there is no proof of injury, a basic public policy question arises as to whether the collateral source rule should apply. Under this rule, a claimant's insurance benefits, workers' compensation benefits, and government benefits are not deducted when calculating the amount of the claimant's damages owed by the tortfeasor, since the tortfeasor did not pay for those benefits. *See, e.g., Smith v. Shaw*, 159 S.W.3d 830, 832 (Mo. 2005). A plaintiff, however, does not necessarily receive double recovery when the collateral source rule is applied. Health insurance contracts, for example, may provide that the insurer is to be subrogated to the insured's tort claim. *See* Victor E. Schwartz et al., *Prosser, Wade and Schwartz on the Law of Torts* 542 (10th ed. 2000). But when the "collateral source rule" applies, the plaintiff may claim funds from the insurance company as well as damages from the defendants, allowing essentially a double-recovery. *Right Way and Wrong Way*, 70 Mo. L. Rev. at 384.

In *Metro-North Commuter Railroad. Co. v. Buckley*, 521 U.S. at 444, the United States Supreme Court appreciated that medical monitoring absent actual physical injury could permit literally "tens of millions of individuals" to "justify some form of substance-exposure-related medical monitoring." *Id.* at 442. Defendants, in turn, would be exposed to potentially unlimited liability, and a "'flood' of less important cases" would drain the

pool of resources available for meritorious claims by plaintiffs with serious, present injury. *Id.*<sup>3</sup> Further, the Court rejected the argument that medical monitoring awards are not costly. *Id.* The Court also feared that allowing medical monitoring claims could create double recoveries because alternative sources of payment, such as health insurance, often are available to those seeking money for medical monitoring. *Id.* at 442-43. *See also Friends For All Children v. Lockheed Aircraft*, 746 F.2d 816, 822 n.7 (D.C. Cir. 1984)(limiting medical monitoring relief to the children adopted in countries that did not have public health systems that would pay for the children’s medical examinations).

In *Hansen v. Mountain Fuel Supply Co.*, 858 P.2d 970, 972-73 (Utah 1993), renovation workers sought medical monitoring costs following their exposure to asbestos at a jobsite. Between the exposure in 1986 and the Utah Supreme Court’s decision in 1993, the plaintiffs had sought medical advice related to the exposure only once - prior to filing their complaint. At the time of the Utah court’s decision, none of the plaintiffs had

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<sup>3</sup> *See Ball v. Joy Mfg. Co.*, 755 F. Supp. 1344, 1372 (S.D. W. Va. 1990) (applying Virginia law), *aff’d sub nom. Ball v. Joy Techs. Inc.*, 958 F.2d 36 (4th Cir. 1991):

There is little doubt that millions of people have suffered exposure to hazardous substances. Obviously, allowing individuals who have not suffered any demonstrable injury from such exposure to recover the costs of future medical monitoring in a civil action could potentially devastate the court system as well as defendants. . . . [T]here must be a realization that such defendants’ pockets or bank accounts do not contain infinite resources. Allowing today’s generation of exposed but uninjured plaintiffs to recover may lead to tomorrow’s generation of exposed and injured plaintiffs being remediless.

*See also Hinton v. Monsanto Co.*, 813 So. 2d 827, 831 (Ala. 2001) (expressing the concern *Buckley* that “a ‘flood’ of less important cases” would drain the pool of resources available for meritorious claims by plaintiffs with serious, present injury and would adversely affect the allocation of scarce medical resources).

contracted asbestos-related illness. *Id.* at 973. Given that none had continued monitoring their health with available screening during the more than six years of litigation, one might question whether they would use any medical monitoring sums awarded for their stated purpose. This is one of the frequently considered policy problems with unrestricted damages for medical monitoring - it appears likely to be considered a windfall to the plaintiffs, especially when collateral source payments are available. *See Maskin, Consolation Prize?*, 27 Wm. Mitchell L. Rev. at 541-42; *Anderson v. W.G. Grace & Co.*, 628 F. Supp. 1291, 1232 (D. Mass. 1986) (“To award damages based on a mere mathematical probability would significantly undercompensate those who actually do develop cancer and would be a windfall to those who do not.”) (citation omitted).

Even courts that favor a medical monitoring tort in principle have expressed a preference for equitable remedies as opposed to traditional damage awards. *See, e.g., Day v. NLO*, 851 F. Supp. 869, 886 (S.D. Ohio 1994) (“The use of the Courts injunctive powers to oversee and direct medical surveillance is vastly superior to a lump sum monetary payment.”) (citation omitted); *Ayers*, 525 A.2d at 313-14 (“[T]he use of court-supervised funds... rather than lump-sum verdicts, may provide a more efficient mechanism for compensating plaintiffs.... Although there may be administrative and procedural questions in the establishment and operation of [a medical monitoring fund], we encourage its use by trial courts in managing mass-exposure cases.”).

## II

## **The LEGISLATURE SHOULD ESTABLISH NEW TORT CAUSES OF ACTION**

New tort causes of action should be created by the legislature. *See, e.g., Goldschmidt v. Pevely Dairy Co.*, 341 Mo. 982, 988, 111 S.W.2d 1 (1937) (statute created a new wrongful death action for widow and children of deceased; court declined to extend the action to employer of deceased). This Court traditionally has tread cautiously in matters best left to the Legislature. For example, this Court declined to recognize new causes of action for “wrongful birth” and “wrongful life,” relying in large part on the role of the Legislature in weighing the benefits and burdens inherent in adopting such new torts. *See Wilson v. Kuenzi*, 751 S.W.2d 741, 746 (Mo.1988), *cert. denied*, 488 U.S. 893 (1988) (“A finding by this Court today that we will not create and will not recognize either a new tort for wrongful life or for wrongful birth is in our opinion totally compatible with the policy considerations expressed by our legislature in attempting to limit the statute of limitations for malpractice actions, attempting to place a cap or limit on malpractice recoveries; and attempting legislative tort reform in general” (citations omitted)); 747 (Robertson, J., concurring):

Courts are ill-equipped to render the policy decisions which the adoption of these causes of action require. Courts unquestionably possess the authority under the common law to recognize new causes of action. That some courts have stepped into the void and allowed such actions is no reason for this Court to follow. Authority is but the threshold consideration. The more critical question is this: Should judges decide this issue? I adhere to the view that choices which dramatically alter the landscape of societal relationships are best made in the crucible of the free-ranging debate and broad fact-gathering capacity in which representative assemblies regularly indulge. Unlike judges, members of legislatures are directly accountable to an attentive electorate. The people are the ultimate arbiters of societal policy; their elected representatives should make such momentous choices,

not judges.

This Court similarly refused to recognize a cause of action for loss of consortium by the children or the parents of an injured party, unanimously declaring that “the decision to do so should be made by the legislature and not by this Court.” *Powell v. American Motors Corp.*, 834 S.W.2d 184, 185 (Mo. 1992). As in the current case, the *Powell* court noted that “these issues are currently and regularly being considered by other courts and are being decided both for and against the recognition of the causes of action sought by appellants.” *Id.* at 189. But “wary of increased costs as a result of adopting the new cause of action, whether in the form of damages or the multiplication of litigation,” the only conclusion that the Court drew from the competing scorecards of decisions in other jurisdictions offered by both sides was that the “meritorious policy arguments on opposing sides of these issues” were “further support for our conclusion that this Court should defer to the Missouri legislature.” *Id.*

In addition to those noted above, there are many more public policy considerations presented by medical monitoring causes of action. For example, would a court-ordered monitoring program for individuals with no manifested harm be compatible with the state’s system of workers’ compensation? Missouri’s workers’ compensation law was established to provide a remedy for *injuries*. *State ex rel. Taylor v. Wallace*, 73 S.W.3d 620, 621 (Mo. 2002) (“The Workers’ Compensation Law provides the exclusive remedy against employers for injuries covered by its provisions”) (citing Mo. REV. STAT § 287.120.2). An injury is defined as something physical or as some type of disease. Mo.

REV. STAT. § 287.150(3)(b)(5) (“The terms “injury” and “personal injuries” shall mean violence to the physical structure of the body and to the personal property which is used to make up the physical structure of the body, ...and such disease or infection as naturally results therefrom.”).

In the absence of manifested harm, medical monitoring is an economic injury, not a physical one. Therefore, it would not covered by workers’ compensation. Moreover, even if the Legislature determined that medical monitoring should nevertheless be covered, one could argue that an employer that intentionally exposed employees to a dangerous work constitutes an intentional tort, a classic exception to compensation immunity. *See State ex rel. Tri-County Elec. Co-op. Ass’n v. Dial*, 192 S.W.3d 708, 711 (Mo. 2006). Such conundrums are best resolved by the Legislature, not the courts.

Other states have recognized that it is the province of the legislature to determine whether it is in the public interest to recognize a new medical monitoring tort in the absence of present physical injury. For example, one year after the Louisiana Supreme Court recognized medical monitoring as a cause of action in *Bourgeois v. A.P. Green Industries, Inc. (Bourgeois I)*, 716 So. 2d 355 (La. 1998, the Louisiana legislature enacted legislation to eliminate medical monitoring as a compensable item of damage in the absence of a manifest physical or mental injury or disease. *See Bourgeois v. A.P. Green Indus., Inc.*, 783 So. 2d 1251, 1255 (La. 2003) (*Bourgeois II*);

Other states have exercised similar caution. *See Badillo v. American Brands, Inc.*,

16 P.3d 435, 440-41 (Nev. 2001) (rejecting medical monitoring for casino workers exposed to cigarette smoke to diagnose the onset of allegedly related illnesses because “[a]ltering common law rights, creating new causes of action, and providing new remedies, for wrongs is generally a legislative, not a judicial function.”); *Wood v. Wyeth-Ayerst Laboratories*, 82 S.W.3d 849, 859 (Ky. 2002) (refusing medical monitoring claim absent manifestation of injury for plaintiffs who ingested diet drugs because it was “not prepared to step into the legislative role and mutate otherwise sound legal principles.”); *Henry v. The Dow Chemical Co.*, 701 N.W. 2d 684, 689 (Mich. 2005) (recognizing that a medical monitoring cause of action was not properly established by the judiciary). This Court should follow their example. Even where “appealing public policy arguments can be made both for and against” imposing a new theory of tort liability, “when the legislature has spoken on the subject, the courts must defer to its determinations of public policy.” *Budding v. SSM Healthcare System*, 19 S.W.3d 678, 682 (Mo. 2000).

## CONCLUSION

For the reasons set forth above, the decision of the Court of Appeal should be affirmed.

DATED: November 30, 2006.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on this 30<sup>th</sup> day of November, 2006, I forwarded two copies of the foregoing Brief Amicus Curiae of Pacific Legal Foundation by first-class mail, postage prepaid, to the parties listed below.

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## **CERTIFICATE OF COMPLIANCE**

I hereby certify, pursuant to Rule 84.06(c) of the Missouri Rules of Civil Procedure, that this brief (exclusive of the cover and any certificates of counsel) contains 3,477 words, as ascertained by using the word count feature of the Microsoft Word 2003 word-processing software used to prepare this brief.

I further certify, pursuant to Rule 84.06(g) of the Missouri Rules of Civil Procedure, that the enclosed computer diskette has been scanned for viruses and is virus-free.

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