

IN THE  
SUPREME COURT OF MISSOURI

---

NO. 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 FOR THE CITY OF ST. LOUIS  
HONORABLE MICHAEL P. DAVID  
CIRCUIT COURT JUDGE

---

**BRIEF OF THE PRODUCT LIABILITY ADVISORY COUNCIL, INC. AS  
*AMICUS CURIAE* IN SUPPORT OF RESPONDENTS**

---

Jordan B. Cherrick, # 30995  
jbc@greensfelder.com  
Kirsten M. Ahmad, # 52886  
km@greensfelder.com  
GREENSFELDER, HEMKER & GALE, P.C.  
10 S. Broadway, Suite 2000  
St. Louis, Missouri 63102  
Telephone: (314) 241-9090  
Facsimile: (314) 241-8624

Of Counsel:

Hugh F. Young, Jr. (*pro hac vice pending*)  
Product Liability Advisory Council, Inc.  
185 Centennial Park Drive, Suite 510  
Reston, Virginia 20191  
Telephone: (703) 264-5300  
Facsimile: (703) 264-5301

*Counsel for Amicus Curiae The Product  
Liability Advisory Council, Inc.*

**TABLE OF CONTENTS**

TABLE OF AUTHORITIES .....4

INTEREST OF *AMICUS CURIAE*.....8

CONSENT OF THE PARTIES .....9

STATEMENT OF FACTS .....9

INTRODUCTION .....10

STANDARD OF REVIEW .....12

ARGUMENT .....13

    I.    This Court Should Decline Appellant’s Invitation To Create A  
          New Common Law Claim For Medical Monitoring. ....13

        A.    Creation Of A Cause Of Action For Medical Monitoring  
              Is Fraught With Complex And Controversial Public  
              Policy Issues Best Left To The Legislature. ....13

        B.    These Significant Policy Issues Mandate That The  
              Decision To Recognize A Claim For Medical Monitoring  
              Should Be Made Only By The Missouri General  
              Assembly.....24

        C.    Experience Demonstrates The Prudence Of This Court  
              Exercising Restraint. ....28

II.	Court Decisions Involving Both Individual And Class Actions Counsel Against The Recognition Of A New Missouri Cause Of Action For Medical Monitoring.....	29
A.	Missouri Courts Have Wisely Never Recognized A Claim For Medical Monitoring.....	29
B.	The United States Supreme Court Has Rejected Medical Monitoring. ....	32
C.	Courts In Other States Have Likewise Rejected Medical Monitoring. ....	35
D.	Appellant’s Reliance On <i>Friends For All Children</i> And Its Progeny Is Misplaced In The Context Of Environmental Exposure Cases. ....	40
E.	Since Adoption Of Medical Monitoring In <i>Bower v.</i> <i>Westinghouse Electric Corp.</i> , The West Virginia Supreme Court’s Decision Has Been The Subject Of Intense Criticism And Has Led To Meritless Lawsuits.....	43
	CONCLUSION.....	47
	CERTIFICATION OF SERVICE AND COMPLIANCE WITH MO. SUP. CT. R. 84.06.....	48
	APPENDIX.....	49

TABLE OF CONTENTS TO APPENDIX .....50

## TABLE OF AUTHORITIES

### Cases

<i>Amchem Prods., Inc. v. Windsor</i> , 521 U.S. 591 (1997).....	19
<i>Ball v. Joy Mfg. Co.</i> , 755 F. Supp. 1344 (S.D. W. Va. 1990) .....	18
<i>Bass v. Nooney</i> , 646 S.W.2d 765 (Mo. banc 1983).....	14
<i>Bourgeois v. AP Green Industries</i> , 716 So. 2d 355 (La. 1998) .....	28
<i>Bower v. Westinghouse Electric Corporation</i> , 522 S.E.2d 424 (W. Va. 1999).....	43, 44, 45, 46
<i>Carroll v. Litton Sys., Inc.</i> , 1990 WL 312969 (W.D.N.C. Oct. 29, 1990), <i>aff'd in part and rev'd in part</i> , 47 F.3d 1164 (4th Cir.), <i>cert. denied</i> , 516 U.S. 816 (1995).....	15
<i>Dragon v. Cooper/T Smith Stevedoring Co.</i> , 726 So. 2d 1006 (La. Ct. App. 1999) .....	18
<i>Drannek Realty Co. v. Nathan Frank, Inc.</i> , 139 S.W.2d 926 (Mo. 1940).....	12
<i>Duisen v. State</i> , 441 S.W.2d 688 (Mo. banc 1969) .....	10, 24
<i>Elam v. Alcolac</i> , 765 S.W.2d 42 (Mo. Ct. App. W.D. 1988) .....	30, 31, 32
<i>Foster v. Foster</i> , 38 S.W.3d 523 (Mo. Ct. App. 2001).....	23
<i>Friends For All Children, Incorporated v. Lockheed Aircraft Corporation</i> , 746 F.2d 816 (D.C. Cir. 1984).....	40, 41
<i>Henry v. Dow Chemical Company</i> , 701 N.W.2d 684 (Mich. 2005) .....	35, 36, 37

<i>Hinton v. Monsanto Co.</i> , 813 So.2d 827 (Ala. 2001) .....	38, 39, 40
<i>In re Mary Nell Collins</i> , 233 F.3d 809 (3d Cir. 2000).....	20
<i>In re Patenaude</i> , 210 F.3d 135 (3d Cir. 2000).....	17
<i>Jackson v. Johns-Manville Sales Corp.</i> , 750 F.2d 1314 (5th Cir. 1985).....	16
<i>Lilley v. Bd. of Supervisors of La. State Univ.</i> , 735 So. 2d 696 (La. Ct. App. 1999).....	18
<i>Menorah Med. Ctr. v. Health &amp; Educ. Facilities Auth.</i> , 584 S.W.2d 73 (Mo. banc 1979).....	24
<i>Metro-North Commuter Railroad Co. v. Buckley</i> , 521 U.S. 424 (1997).....	14, 15, 16, 22, 32, 33, 34, 35, 43
<i>Ortiz v. Fibreboard Corporation</i> , 527 U.S. 815 (1999) .....	20
<i>Powell v. Am. Motors Corp.</i> , 834 S.W.2d 184 (Mo. banc 1992) ...	24, 25, 26, 27, 28
<i>Scott v. Am. Tobacco Co.</i> , 725 So. 2d 10 (La. Ct. App. 1998).....	18
<i>State ex rel. Dean v. Cunningham</i> , 182 S.W.3d 561 (Mo. banc 2006) .....	13
<i>State v. Dunbar</i> , 230 S.W.2d 845 (Mo. 1950).....	24
<i>Thomas v. FAG Bearings</i> , 846 F. Supp. 1400 (W.D. Mo. 1994) .....	31, 32
<i>Wilson v. Kuenzi</i> , 751 S.W.2d 741 (Mo. banc 1988).....	24
<i>Witherspoon v. Philip Morris, Inc.</i> , 964 F. Supp. 455 (D.D.C. 1997) .....	42
<i>Wood v. Wyeth-Ayerst Laboratories</i> , 82 S.W.3d 849 (Ky. 2002) .....	37, 38
<i>Wyatt v. A-Best Prods. Co.</i> , 924 S.W.2d 98 (Tenn. Ct. App. 1995).....	16

<i>Zueck v. Oppenheimer Gateway Props., Inc.</i> , 809 S.W.2d 384 (Mo. banc 1991).....	13
<b>Statutes and Rules</b>	
La. Civ. Code Ann. art. 2315 .....	21
Mo. Sup. Ct. R. 84.06 .....	48
<b>Other Authorities</b>	
American Law Institute, <i>2 Enterprise Responsibility for Personal Injury -- Reporters' Study</i> , 379 (1991).....	14
Andrew R. Klein, <i>Rethinking Medical Monitoring</i> , 64 Brook. L. Rev. 1, 13 (1998).....	13
Ann vom Eigen, <i>Legislative Highlights: Long-Term Costs of Federal Liability Defeat Asbestos Reform Legislation; More Bankruptcies Likely</i> , 25-3 Am. Bankr. Inst. J. 8 (2006) .....	13
Arvin Maskin, et al., <i>Medical Monitoring: A Viable Remedy for Deserving Plaintiffs or Tort Law's Most Expensive Consolation Prize?</i> , 27 Wm. Mitchell L. Rev. 521 (2000) .....	16
Carey C. Jordan, Comment, <i>Medical Monitoring in Toxic Tort Cases: Another Windfall for Texas Plaintiffs?</i> , 33 Hous. L. Rev. 473 (1996).....	14
Christopher F. Edley, Jr. & Paul C. Weiler, <i>Asbestos: A Multi-Billion-Dollar Crisis</i> , 30 Harv. J. On Legis. 383, 393 (1993) .....	12, 13

George W.C. McCarter, <i>Medical Sue-Veillance: A History and Critique of the Medical Monitoring Remedy In Toxic Tort Litigation</i> , 45 Rutgers L. Rev. 227 n.158 (1993).....	17
James R. Thomas, II, <i>High Court Ruling Makes A Game Of It For Potential Victims</i> , Charleston Gazette, Sept. 3, 1999, at 5A .....	38
Lester Brickman, <i>The Asbestos Litigation Crisis: Is There A Need for an Administrative Alternative?</i> , 13 Cardozo L. Rev. 1819, 1853 (1992) .....	12
<i>Monitoring: With Bad Law, The Supreme Court Is Threatening The State's Economy</i> , Charleston Daily Mail, Oct. 19, 1999, at 4A.....	38
Paul Owens, <i>Opportunity Without Injury</i> , Charleston Daily Mail, Feb. 4, 2000, at 4A.....	38
Victor E. Schwartz, et al., <i>Medical Monitoring: The Right Way and the Wrong Way</i> , 70 Mo. L. Rev. 349 (2005).....	38
Victor E. Schwartz, et al., <i>Medical Monitoring-Should Tort Law Say Yes?</i> , 34 Wake Forest L. Rev. 1057 (1999) .....	31
Victor F. Schwartz, et al., <i>Prosser, Wade and Schwartz's Cases and Materials On Torts</i> (10th ed. 2000).....	6

## **INTEREST OF AMICUS CURIAE**

The Product Liability Advisory Council, Inc. (“PLAC”) is a non-profit association with over 125 corporate members representing a broad cross-section of American and international product manufacturers. These companies seek to contribute to the improvement and reform of law in the United States and elsewhere, with emphasis on the law governing the liability of manufacturers of products. PLAC’s perspective is derived from the experiences of a corporate membership that spans a diverse group of industries in various facets of the manufacturing sector. In addition, several hundred of the leading product liability defense attorneys in the country are sustaining (non-voting) members of PLAC. Since 1983, PLAC has filed over 725 briefs as *amicus curiae* in both state and federal courts, including this court, presenting the broad perspective of product manufacturers seeking fairness and balance in the application and development of the law as it affects product liability. A list of PLAC’s corporate members is attached in the Appendix at A1 to A7.

### **CONSENT OF THE PARTIES**

Amicus Curiae PLAC has received written consent from Defendants/Respondents to file this Brief. (See e-mail correspondence from Mr. Richard Ahrens, dated November 17, 2006, attached in the Appendix at A8). Plaintiff/Appellant did not consent to the filing of this Brief. (See e-mail correspondence from Mr. Kevin Hannon, dated November 20, 2006, attached in the Appendix at A9). PLAC therefore files concurrently with this Brief a motion for leave pursuant to Mo. Sup. Ct. R. 84.05(f)(3).

### **STATEMENT OF FACTS**

PLAC adopts the Statement of Facts of Defendants/Respondents.

## INTRODUCTION

Appellant urges this Court to create a new claim that has never before existed in this Court’s jurisprudence—a tort claim for medical monitoring. Neither this Court nor the Missouri General Assembly has ever recognized an independent cause of action for medical monitoring. Allowing such a claim would radically alter a principle that has been well accepted in tort law for over 200 years – that a plaintiff may not bring a cause of action without a showing of present physical injury. The creation of a cause of action for medical monitoring in Missouri would foster widespread litigation with potentially crippling liability to many defendants and potentially divert limited compensation funds from the truly injured to those without injury.

As this Court has wisely recognized, fundamental changes in public policy are best “left to the legislative branch whose members, directly responsible to the people, have an authority this court does not have.” *Duisen v. State*, 441 S.W.2d 688, 692-93 (Mo. banc 1969). The legislature has greater access to social and medical information, and it is particularly well-suited to receive testimony concerning the multitude of perspectives that are essential to balance and resolve complex social policies. Because of the broad variety of public policy considerations and complex social consequences raised by creation of a medical monitoring cause of action, this Court should avoid judicial legislation and instead

leave this policy question to the Missouri General Assembly. PLAC, therefore, respectfully requests that this Court decline Appellant's invitation to create a new cause of action in Missouri for medical monitoring, affirm the trial court's refusal to certify a putative medical monitoring class of uninjured plaintiffs, and dismiss Appellant's underlying Petition for failure to state a claim.

## **STANDARD OF REVIEW**

Respondents contend that the question of whether a claim for medical monitoring costs may be brought without a showing of present physical injury is not before the Court in this case, and that resolving the question is unnecessary to the disposition of this appeal. This Court, nevertheless, may affirm a trial court's order on any alternative ground supported by the record. *Drannek Realty Co. v. Nathan Frank, Inc.*, 139 S.W.2d 926 (Mo. 1940).

The trial court implicitly assumed in its order that Missouri recognizes a claim for medical monitoring even though this Court has never addressed this important question. Whether a claim for medical monitoring exists in Missouri is thus the threshold question before this Court, because if Missouri does not recognize such a claim, Plaintiff's Petition should be dismissed. The Court would then not have any need to reach the issues about the impropriety of a class. PLAC respectfully submits that this Court should affirm the trial court's order on the ground that Missouri does not recognize a medical monitoring claim. The Court's standard for reviewing this issue is *de novo* because the question presents a question of law. *Schottel v. State*, 159 S.W.3d 836, 840 (Mo. banc 2005).

## ARGUMENT

### **I. This Court Should Decline Appellant’s Invitation To Create A New Common Law Claim For Medical Monitoring.**

#### **A. Creation Of A Cause Of Action For Medical Monitoring Is Fraught With Complex And Controversial Public Policy Issues Best Left To The Legislature.**

A court’s recognition of a cause of action for medical monitoring implicates a number of complex and controversial policy issues.

##### **1. Allowing Recovery In The Absence Of Present Injury Is Contrary To Well Established Principles Of Tort Law.**

For over 200 years, a basic tenet of recovery in tort has been that liability should be imposed only when an individual has suffered an injury. *See* Victor E. Schwartz, et al., *Prosser, Wade and Schwartz’s Cases and Materials On Torts* (10th ed. 2000); *Zueck v. Oppenheimer Gateway Props., Inc.*, 809 S.W.2d 384, 388 (Mo. banc 1991) (“The purpose of the law of torts is to adjust [ ] losses, and to afford compensation for injuries sustained by one person as a result of the negligent conduct of another.” (internal citations omitted)). *See State ex rel. Dean v. Cunningham*, 182 S.W.3d 561, 568 (Mo. banc 2006) (noting that, even for claims for negligent infliction of emotional distress, plaintiff must show a medically diagnosed condition that resulted from the negligent act). This basic

rule was created for a reason. To determine whether money should be transferred from a defendant to a plaintiff, a jury or judge needs some objective manifestation that an individual has been harmed. Allowing an award where a plaintiff (or putative class members) currently suffers no harm and no symptoms of harm, as with medical monitoring, is an abrupt change to this fundamental, centuries-old principle.

When our courts have made changes to longstanding common law tort rules, such as the development of strict products liability in tort, the removal of the privity barrier, and the evolution from contributory negligence to comparative fault, they have done so gradually over many years. The same reasoned and meticulous process has been true with other tort law developments, such as the modification of traditional immunities, permitting recovery for a child who had been injured in the womb, or modification of the assumption of risk defense. *See, e.g., Bass v. Nooney*, 646 S.W.2d 765, 772 (Mo. banc 1983) (“A painstaking review of [the over twenty year evolution of the law on] 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 [in emotional distress cases].”) The history of medical monitoring does not fit this pattern.

Moreover, the Supreme Court’s holding in *Metro-North Commuter Railroad Co. v. Buckley*, 521 U.S. 424 (1997), which is discussed in detail *supra*, reinforces

the conclusion that, if a cause of action is to be allowed for medical monitoring, it should only be recognized (if at all) after careful consideration of its tremendous impact on traditional tort principles. *See also Carroll v. Litton Sys., Inc.*, 1990 WL 312969, \*51 (W.D.N.C. Oct. 29, 1990) (“If a North Carolina court were faced with the question of whether to create a tort . . . for medical monitoring costs, the undersigned has concluded that it would decline to create such a tort. Instead, it would look to the legislature for guidance. In the absence of an [sic] legislative directive creating such a tort, the North Carolina courts would refuse to countenance such a claim.”), *aff’d in part and rev’d in part*, 47 F.3d 1164 (4th Cir.), *cert. denied*, 516 U.S. 816 (1995).

**2. Medical Monitoring Will Lead To A Flood Of Litigation, Clogging Access To Courts And Depleting Funds That Should Be Used Instead To Compensate Truly Injured Individuals.**

One of the primary concerns of the U.S. Supreme Court in *Metro-North*, *supra*, was that medical monitoring would permit literally “tens of millions of individuals” to justify “some form of substance-exposure-related medical monitoring.” *Id.* at 442. As a result, defendants would be exposed to 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.* The

Court rejected the argument that medical monitoring awards are not costly and feared that allowing medical monitoring claims could create double recoveries because alternative collateral sources of payment are often available. The Court concluded:

[W]e are more troubled than is the dissent by 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 who depend on a tort system that can distinguish between reliable and serious claims on the one hand, and unreliable and relatively trivial claims on the other.

*Id.*

If this Court chooses to recognize a cause of action for medical monitoring without requiring a showing of present physical injury, waves of new litigation will inevitably follow. The U.S. Supreme Court in *Metro-North* recognized that “tens of millions of individuals may have suffered exposure to substances that might justify some form of substance-exposure related monitoring.” 521 U.S. at 440. *See also Jackson v. Johns-Manville Sales Corp.*, 750 F.2d 1314, 1337 (5th Cir. 1985) (One commonly cited estimate for the population that has experienced significant occupational exposure to asbestos is 21 million individuals.); *Wyatt v. A-Best Prods. Co.*, 924 S.W.2d 98, 106 (Tenn. Ct. App. 1995) (Over the years, asbestos

was used in some “3000 different products,” including “tooth brushes, ironing board covers, brake linings, roofing shingles, fireproofing and insulating material.”).

Court sanctioned testing of all those exposed will inevitably lead to monitoring mania. The tragedy of this result is that courts become clogged with medical monitoring claims, denying access to justice and funds for those who are truly injured. As the Third Circuit Court of Appeals has recognized, the practical effect of making a medical monitoring cause of action available to the countless persons in our society who can claim some exposure to toxic substances, such as asbestos, could well be to facilitate tort recoveries for individuals who have no present injury and may never become sick at the expense of “the sick and dying, their widows and survivors[, who] should have their claims addressed first.” *In re Patenaude*, 210 F.3d 135, 139 (3d Cir. 2000), *cert. denied*, 2000 WL 1210673 (Nov. 27, 2000). As another court rejecting medical monitoring noted,

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 . . . . There 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 plaintiff's [sic] being remediless.

*Ball v. Joy Mfg. Co.* 755 F. Supp. 1344, 1372 (S.D. W. Va. 1990), *aff'd*, 958 F.2d 36 (4th Cir. 1981), *cert. denied*, 502 U.S. 1033 (1992).

The prediction that recognition of medical monitoring will lead to a flood of litigation is not merely a matter of conjecture; experience in Louisiana since the 1998 *Bourgeois* decision (before the legislature's amendment of La. Civ. Code. Ann. art. 2315) showed this to be true. *See, e.g., Dragon v. Cooper/T Smith Stevedoring Co., Inc.*, 726 So. 2d 1006 (La. Ct. App. 1999) (permitting a class action for medical monitoring for seamen exposed to asbestos); *Lilley v. Bd. of Supervisors of La. State Univ.*, 735 So. 2d 696 (La. Ct. App. 1999) (reversing an award for medical monitoring in an action by firefighters for exposure to asbestos); *Scott v. Am. Tobacco Co.*, 725 So. 2d 10 (La. Ct. App. 1998) (certifying as a class *all Louisiana residents* who were cigarette smokers on or before May 24, 1990, provided each claimant started smoking on or before Sept 1, 1988).

The asbestos story vividly illustrates what happens when resources are used to compensate the uninjured. Early in the asbestos litigation, courts empathetic to the claims of asbestos plaintiffs deviated from accepted legal principles to permit recoveries that traditionally would have been barred. While the courts in such

cases surely had good intentions, the litigation turned into a judicial “disaster of major proportions.” Judicial Conference Ad Hoc Committee on Asbestos Litigation, *Report of the Ad Hoc Committee 2* (1991).

New asbestos plaintiffs, most of whom are unimpaired, are flooding into the tort system. See Quenna Sook Kim, *G-I Holdings’ Bankruptcy Filing Cites Exposure in Asbestos Cases*, Wall St. J., Jan. 8, 2001, at B12 (G-I Holdings, formerly GAF Corp., reported that “as many as 80% of its asbestos settlements are paid to unimpaired people.”); *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 629 (1997) (Breyer, J., concurring in part and dissenting in part) (“Up to one half of asbestos claims are now filed by people who have little or no physical impairment.”) (quoting Christopher F. Edley, Jr. & Paul C. Weiler, *Asbestos: A Multi-Billion-Dollar Crisis*, 30 Harv. J. On Legis. 383, 393 (1993)); Lester Brickman, *The Asbestos Litigation Crisis: Is There A Need for an Administrative Alternative?*, 13 Cardozo L. Rev. 1819, 1853 (1992) (In 1992, claims by the unimpaired “account[ed] for sixty to seventy percent of new asbestos claims filed.”). The number of pending asbestos cases doubled in the six years from 1993 to 1999, from 100,000 to more than 200,000 cases throughout the country. See Professor Christopher Edley, Jr., Harvard Law School, *Prepared Statement Concerning H.R. 1283: The Fairness in Asbestos Compensation Act*, Before the House Comm. on the Judiciary, at 4 (July 1, 1999). The ever-growing

“elephantine mass of asbestos cases,” *see Ortiz v. Fibreboard Corporation*, 527 U.S. 815, 821 (1999), has forced over seventy companies to file for bankruptcy protection. Ann vom Eigen, *Legislative Highlights: Long-Term Costs of Federal Liability Defeat Asbestos Reform Legislation; More Bankruptcies Likely*, 25-3 Am. Bankr. Inst. J. 8 (2006). Other companies are likely to follow their lead. *Id.*

These bankruptcies put “mounting and cumulative” financial pressure on the “remaining defendants, whose resources are limited.” Edley & Weiler, *supra*, at 392. They also jeopardize the ability of current and future claimants to obtain full and prompt compensation for their injuries. As the United States Court of Appeals for the Third Circuit wrote: “The resources available to persons injured by asbestos are steadily being depleted. The continuing filings of bankruptcy by asbestos defendants disclose that the process is accelerating. \* \* \* The continued hemorrhaging of available funds deprives current and future victims of rightful compensation.” *In re Mary Nell Collins*, 233 F.3d 809, 812 (3d Cir. 2000). The same result is likely to happen in other industries if defendants are forced to pay for medical screening of persons with no present physical injury. *See* Andrew R. Klein, *Rethinking Medical Monitoring*, 64 Brook. L. Rev. 1, 13 (1998) (“According to the United States Environmental Protection Agency (“EPA”), billions of pounds of hazardous chemicals are emitted into the air each year, and nearly twenty percent of the U.S. population (approximately 40 million people)

live within four miles of a hazardous waste site that the EPA has placed on its National Priority List.”) (citations omitted).

In sum, before this Court endorses a rule that would facilitate the class action treatment of medical monitoring claims, it should carefully assess its potential impact on our judicial system’s practical ability to deliver prompt justice and resources to those who need them – the truly injured. *See* Carey C. Jordan, Comment, *Medical Monitoring in Toxic Tort Cases: Another Windfall for Texas Plaintiffs?*, 33 Hous. L. Rev. 473, 496 (1996) (concluding that consideration of medical monitoring requires a “balancing act” that “may be better suited for the . . . legislature, as it is the voice of the people”).

**3. Medical Monitoring Is Often Unnecessary Because, As In This Case, Costs Are Covered By Other Sources.**

Claims for medical monitoring raise yet another administrative complexity if third-party payment plans overlap with a medical monitoring program. *See* American Law Institute, 2 *Enterprise Responsibility for Personal Injury -- Reporters’ Study* 379 (1991) (stating that approximately eighty percent of all standard medical testing is paid for by third party insurance). In a substantial number of situations, either through employment or other sources, medical monitoring is already provided. If basic fundamentals of tort law are to be changed and liability is to be extended into uncharted waters, there must be an absolute

need to do so. That need does not exist in the area of medical monitoring. It is, therefore, inappropriate to make such a radical change in the law.

As the United States Supreme Court noted in *Metro-North*, “where state and federal regulations already provide the relief that a [medical monitoring] plaintiff seeks, creating a full-blown tort remedy could entail systemic costs without corresponding benefits” because recovery would be allowed “irrespective of the presence of a ‘collateral source.’” *Id.* at 443-44.

Here, blood lead testing is “one of the diagnostic tests that the medical monitoring program seeks to obtain.” (Brief of Appellant at 38, *Meyer v. Fluor Corp.*, No. ED 86616 (Mo. Ct. App. E.D. Nov. 21, 2005). It is undisputed, however, that free blood lead testing is already available to all children in Herculaneum. (R. 284, 686.) This is a prime example of why allowing recovery of costs for medical monitoring would offer no compensable medical benefit to plaintiffs.

**4. Allowing An Uninjured Plaintiff To Recover Medical Monitoring Damages Allows A Plaintiff To Sue And Recover Twice For The Same Tort.**

If an uninjured plaintiff prevails in a medical monitoring action and is tested, what happens when some disease is found? Or later develops? Surely, we should not allow plaintiffs to sue and recover again for the same tort because they have

already recovered. Rather, principles of fairness suggest plaintiffs should be barred from suing the same defendant again for the same tort. *See Foster v. Foster*, 38 S.W.3d 523, 528 (Mo. Ct. App. 2001) (“A cause of action that is single may not be split and filed or tried piecemeal, the penalty for which is that an adjudication on the first suit is a bar to the second suit.”). Thus, while an injury may have been discovered through monitoring, plaintiff will be barred from pursuing a recovery for that injury.

#### **5. Medical Monitoring Awards Are Often Used Improperly.**

The potential for abuse of lump-sum medical monitoring awards is great. As one commentator has noted, “[t]he 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.” 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 (2000).

In one instance, a researcher attempted to contact plaintiffs in a medical monitoring settlement to learn what became of the lump-sum payments. Although only three plaintiffs responded, their responses are telling: one plaintiff used his award to purchase a house, and all three plaintiffs stated that he or she did not consult a physician any more often as a result of the award. *See* George W.C.

McCarter, *Medical Sue-Veillance: A History and Critique of the Medical Monitoring Remedy In Toxic Tort Litigation*, 45 Rutgers L. Rev. 227, 257 n.158 (1993).

These anecdotes confirm what logic and intuition would suggest: lump-sums of damages to uninjured plaintiffs are no more than a windfall recovery. And, this is even more likely to be true in the vast majority of cases where monitoring is already provided by a collateral source. “[T]he potential for abuse is apparent.” McCarter, *supra*, at 283. These concerns strongly counsel against the adoption of a medical monitoring cause of action.

**B. These Significant Policy Issues Mandate That The Decision To Recognize A Claim For Medical Monitoring Should Be Made Only By The Missouri General Assembly.**

This Court has repeatedly held that it is the legislature that determines public policy for the State of Missouri. *Powell v. Am. Motors Corp.*, 834 S.W.2d 184, 191 (Mo. banc 1992) (citing *State v. Dunbar*, 230 S.W.2d 845, 849 (Mo. 1950) (“Questions of public policy are to be determined by the legislature.”)); *Wilson v. Kuenzi*, 751 S.W.2d 741, 746-47 (Mo. banc 1988) (J. Robertson, concurring); *Menorah Med. Ctr. v. Health & Educ. Facilities Auth.*, 584 S.W.2d 73, 89 (Mo. banc 1979) (“Formulation of policy is a legislature’s primary responsibility, entrusted to it by the electorate . . . .”). In *Duisen v. State*, 441 S.W.2d 688, 692-93

(Mo. banc 1969), the Missouri Supreme Court recognized the importance of leaving policy questions to the legislature:

If [ ] policy is to be changed . . . , that is the function of the legislature; not the court. The genius and constitution of such rules and standards as might be established and, more important, the determination of whether they are necessary, desirable and practical is a public policy question which should and will be left to the legislative branch whose members, directly responsible to the people, have an authority this court does not have.

When faced with requests by plaintiffs to create new causes of action that, by their very nature implicate a multitude of public policy concerns and complex social consequences, this Court has repeatedly recognized the importance of leaving such decisions to the legislature.

In *Powell v. American Motors Corporation*, 834 S.W.2d 184, 185-86 (Mo. banc 1992), for example, plaintiffs asked that the court change the common law of Missouri to recognize a civil action for loss of parental or filial consortium. Noting that “Missouri has never recognized a common law cause of action by a child for injuries sustained by a parent,” this Court rejected plaintiff’s request, holding:

After careful consideration of the thorough briefs filed by the parties herein and the extensive authorities relied on therein, we conclude

that if Missouri is to recognize a cause of action for loss of consortium by the children or the parents of an injured party, the decision to do so should be made by the legislature and not by this Court.

*Id.* at 185.

This Court based its deference to the legislature on a number of grounds. First, it wrestled with the issue of where to draw the line of liability (as, obviously, the law cannot redress every injury), finding that an equally valid argument could be made for allowing spouses, children and parents to recover for loss of consortium as for allowing only spouses to recover for such a loss. *Id.*

Second, this Court noted that, as here, each party extensively briefed the current state of the law in jurisdictions across the nation. The Court declined to attribute any significance to “the details [ ] or the numerical results of these score cards,” finding instead that:

The important point is 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. We view this as further evidence that there are meritorious policy arguments on opposing sides of these issues and as further support for our conclusion that this Court should defer to the Missouri legislature.

*Id.*

The *Powell* Court also recognized that, if it chose to establish a new cause of action, it would be forced to deal with the additional separate, but related, questions that a new cause of action would create, as well as the ensuing legal issues that would develop in connection with the new claim. Thus, the Court stated:

This leads us to comment on a final and important reason as to why this should be a legislative decision. The decision to establish the consortium causes of action sought by appellants carries with it a vast array of ancillary issues as to how these separate claims will proceed.

\* \* \* If Missouri were to recognize these additional causes of action, their adoption should be accompanied by a carefully planned and well-thought-out scheme for handling the additional separate, but related, questions that will be created and the ensuing legal issues that will develop in connection with those claims.

*Id.* at 189-90. In light of the three concerns articulated by the *Powell* Court, it concluded that “[e]mbarking into a new area of litigation such as this lends itself better to prospective legislative enactment than to the case-by-case, issue-by-issue approach that this Court would be required to undertake if these causes of action were to be recognized by common law decision.” *Id.* at 190.

All of the reasons this Court articulated for deferring to the legislature on questions of policy-making apply here. Like the asserted loss of consortium claim in *Powell*, it is impossible for this Court to draw a meaningful liability line in medical monitoring cases without engaging in judicial legislation. The question here is undoubtedly one of public policy. And the institution endowed with the right and responsibility of deciding policy questions is the Missouri General Assembly. If a change of this magnitude is established in the State of Missouri, it should come through the most democratic branch, the branch best suited for hearing all stakeholders, balancing all interests, and producing a comprehensive solution.

**C. Experience Demonstrates The Prudence Of This Court Exercising Restraint.**

In *Bourgeois v. AP Green Industries*, 716 So. 2d 355 (La. 1998), the Louisiana Supreme Court took upon itself the resolution of the many sensitive and complex medical and social issues that medical monitoring claims raise. The Louisiana legislature responded in predictable fashion; less than one year later, it effectively overruled *Bourgeois* by passing a statute requiring physical injury before allowing plaintiffs to pursue medical monitoring claims. La. Civ. Code Ann. art. 2315 (excluding costs for medical treatment or surveillance unless directly related to a “manifest physical or mental injury or disease”). The court,

the parties, and, more importantly, Louisiana citizens all would have been better served had the court simply stayed its hand and allowed the legislative process to take its course. This Court should likewise defer to the Missouri General Assembly on an issue of such obvious public debate.

## **II. Court Decisions Involving Both Individual And Class Actions Counsel Against The Recognition Of A New Missouri Cause Of Action For Medical Monitoring.**

Wholly aside from the wisdom of allowing the legislature to address the admittedly complex competing policies implicated by a medical monitoring cause of action, there are additional and independent reasons for rejecting the doctrine entirely, as numerous courts have held.

### **A. Missouri Courts Have Wisely Never Recognized A Claim For Medical Monitoring.**

Appellant asks that this Court “use this opportunity to state the law of Missouri regarding medical monitoring,” urging the Court to “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.” (Appellant’s Substitute Brief (hereinafter “App. Br.”) at 34).

Appellant, therefore, implicitly acknowledges that this Court has never recognized a separate and independent cause of action for medical monitoring.

Throughout her Substitute Brief, Appellant relies heavily on *Elam v. Alcolac*, 765 S.W.2d 42 (Mo. Ct. App. W.D. 1988), in asserting not only that a Missouri court has recognized a medical monitoring cause of action, but further that such a cause of action may exist without the need for present physical injury. (App. Br. at 33-41). While *Elam* is not controlling, and therefore should not be afforded any deference by this Court, it is important to note that *Elam* does not support either of Appellant's arguments.

*Elam* involved thirteen consolidated toxic tort actions brought by thirty-two plaintiffs against Alcolac, Inc. and its plant manager for an array of present injuries to their persons and property from toxic spills and emissions at a chemical facility in Sedalia, Missouri. All thirty-two plaintiffs in *Elam* sought to recover for *actual physical injury to their persons*, injuries that were discussed at length throughout the court's over 200-page opinion. *Id.* at 173 ("The plaintiffs pleaded . . . the incurrence of personal injury to them caused by the breach of the duty."). Contrary to Appellant's suggestion, nothing in *Elam* supports monetary relief for medical monitoring on behalf of an uninjured plaintiff.

Second, the Western District Court of Appeals in *Elam* did not recognize medical monitoring as an independent cause of action. Rather, the court discussed

whether the evidence submitted by the thirty-two plaintiffs supported recovery for a claim of “increased risk of cancer.” *Id.* at 207. In analyzing this issue, the court discussed two theories--one which allows recovery for increased risk of cancer upon proof that a toxic exposure has induced some biological manifestation from which cancer is reasonably certain to occur, and another which treats increased risk of cancer as a present invasion of a legally protected interest, finding it actionable even without any manifestation of injury. *Id.* at 208. The *Elam* Court did not adopt either theory. Rather, the Western District instead stated that “the evidence of significant, albeit unquantified, risk of cancer . . . was competent to prove, *as a separate element of damage*, the need for medical surveillance of the immune system and other organs, and hence was admissible for that purpose.” *Id.* at 208-09 (emphasis added). The *Elam* court, therefore, did not recognize a separate, independent tort cause of action for medical monitoring. At most, the Western District recognized that, with appropriate proofs, an *injured* plaintiff may recover for the cost of medical monitoring as a *separate element of damage*.

Appellant also dismisses *Thomas v. FAG Bearings*, 846 F. Supp. 1400 (W.D. Mo. 1994), as a case where a single misinformed federal judge made an incorrect “guess” at Missouri law. (App. Br. at 50). To the contrary, in *Thomas*, as here, the court was asked to recognize a medical monitoring cause of action on behalf of a class of uninjured plaintiffs. In analyzing whether the putative class

could assert a medical monitoring cause of action, Judge Stevens reviewed and discussed the Western District court's holding in *Elam*, appreciating, as did the *Elam* court, that "a claim for increased risk of cancer is *simply an element of damages* seeking compensation for future consequences of *present damage*." *Id.* at 1408. Commenting that the *Elam* court's finding arose in the context of an action where all plaintiffs had "suffered a multitude of present injuries," Judge Stevens correctly found that "entitlement to the costs of future medical monitoring requires plaintiff to prove actual present injury." *Id.* at 1408 n.4, 1410. Finding that no plaintiff presented any evidence of actual present injury, the court granted summary judgment in favor of defendants. *Id.* at 1410.

The courts in *Elam* and *Thomas* both refused to recognize medical monitoring in the absence of present physical injury, and neither court sanctioned medical monitoring as a cause of action. Importantly, both cases show that Missouri has never recognized an independent tort claim for medical monitoring. Regardless of how these lower court cases are interpreted, this is an issue of first impression in this Court.

## **B. The United States Supreme Court Has Rejected Medical Monitoring.**

The United States Supreme Court rejected adoption of medical monitoring as recently as 1997. *See Metro-North Commuter R.R. Co. v. Buckley*, 521 U.S. 424

(1997).

In *Metro-North Commuter Railroad Company v. Buckley*, 521 U.S. 424 (1997), the U.S. Supreme Court ruled 7-2 against a medical monitoring claim brought by a pipefitter against his employer under the Federal Employers' Liability Act ("FELA") for occupational exposure to asbestos. The plaintiff had been exposed to asbestos dust on a daily basis over a period of three years – at times being covered with it – but had no symptoms of disease. *Id.* at 426-27. Defendant argued that plaintiff had suffered no physical harm and that consequently FELA did not permit recovery for medical monitoring. *Id.* at 427. In granting certiorari, the Court agreed to decide whether plaintiff, in the absence of symptoms or disease, could recover the cost of the "extra" medical check-ups plaintiff expected to incur as a result of his asbestos exposure. *Id.* at 438. The Court reviewed Buckley's claim for medical monitoring under three separate theories.

First, the Court addressed Buckley's argument that he should recover medical monitoring as a element of damages under the common law principle that "an exposed plaintiff can recover related reasonable medical monitoring costs if and when he develops symptoms." *Id.* at 438. Because Buckley could not show any present physical injury, the Court rejected recovery under this principle. *See id.* at 439.

Next, the Court examined Buckley's claim under FELA. Because no prior

FELA cases had addressed the issue of medical monitoring and because the federal circuits were divided on the matter, the Court looked to state supreme court cases on medical monitoring. *See id.* at 439. The Court found it significant that many state supreme courts were uneasy with the prospect of awarding damages for medical monitoring. *See id.* at 441. The Court also noted that many state supreme courts imposed special limitations on medical monitoring claims rather than allowing a “new cause of action for lump-sum damages.” *Id.* at 440-41. Consequently, the Court held that Buckley could not recover medical monitoring damages under FELA because he could not demonstrate any then-existing symptoms of disease or injury. *See id.*

The Court also reviewed Buckley’s contention that medical monitoring costs were themselves sufficient to support an independent tort cause of action as an “economic injury,” without proof of physical injury. *Id.* Again, the Court rejected Buckley’s argument, stating that the “evolving common law” did not support the creation of a new cause of action under tort law. *Id.* at 440.

The Supreme Court’s decision is instructive. Even though the Court found that the plaintiff was sympathetic and had “suffered wrong at the hands of a negligent employer,” it ultimately rejected medical monitoring, acknowledging a number of serious policy concerns militating against such a claim. *Id.* at 443. First, the Court observed that identifying the costs at issue could be difficult for

judges and juries, especially because some monitoring costs are “extra,” while others are ordinarily recommended for everyone. *Id.* at 441. Second, the Court noted that medical professionals often offer conflicting testimony as to the benefit and appropriate timing of particular tests or treatments, making it difficult to determine whether and what type of medical surveillance may be needed. *See id.* Third, the Court maintained that plaintiffs have certain unique, individual medical needs, complicating the process of pinpointing the alleged reason for extra monitoring. *See id.* at 442. According to the Supreme Court, “extra” medical monitoring and diagnostic screening is prudent for many people, even those without exposure to alleged toxins. *Id.* at 442.

**C. Courts In Other States Have Likewise Rejected Medical Monitoring.**

As Respondents observe in their Brief, a growing number of state courts and federal courts applying state law have followed *Buckley*, similarly rejecting invitations to create new common law causes of action for medical monitoring. (Resp. Br. at 67-70).

The Michigan Supreme Court in *Henry v. Dow Chemical Company*, 701 N.W.2d 684 (Mich. 2005), recently declined plaintiffs’ invitation to recognize a cause of action for medical monitoring. In *Henry*, 173 plaintiffs who suffered no present physical injury sought to represent a putative class of thousands in an

action against defendant, The Dow Chemical Company, alleging that Dow's plant negligently released dioxin, a potentially hazardous chemical, into the flood plain where the plaintiffs and the putative class members lived and worked. *Id.* at 686. In rejecting plaintiffs' medical monitoring claim, the *Henry* court noted that recognition of such a claim entails numerous policy considerations and is thus best left to the legislature:

Although we recognize that the common law is an instrument that may change as times and circumstances require, we decline plaintiffs' invitation to alter the common law of negligence liability to encompass a cause of action for medical monitoring. Recognition of a medical monitoring claim would involve extensive fact-finding and the weighing of numerous and conflicting policy concerns. We lack sufficient information to assess intelligently and fully the potential consequences of recognizing a medical monitoring claim.

\* \* \* As a matter of prudence, we defer in this case to the people's representatives in the Legislature, who are better suited to undertake the complex task of balancing the competing societal interests at stake.

*Id.* The *Henry* court further found that adopting such a cause of action without a showing of present physical injury is inconsistent with tort law jurisprudence:

Plaintiffs have not cited an exception to the rule that a present physical injury is required in order to state a claim based on negligence. \* \* \* We can therefore reach only one conclusion: if the alleged damages cited by plaintiffs were incurred in anticipation of possible future injury rather than in response to present injuries, these pecuniary losses are not derived from an injury that is cognizable under Michigan tort law.

*Id.* at 689.

Similarly, in *Wood v. Wyeth-Ayerst Laboratories*, the Kentucky Supreme Court unanimously rejected a proposed class action of diet drug users who did not allege any present physical injury, pointing out that the Court has consistently held that “a cause of action in tort requires a present physical injury to the plaintiff.” 82 S.W.3d 849, 851-52 (Ky. 2002). The Court stated that it was “not prepared to part ways with the system of remedies in favor of cash advances.” *Id.* In rejecting the proposed medical monitoring class action, the Court acknowledged competing policy concerns:

We are mindful of the predicament in which our decision places Appellant and others in similar situations. Those . . . in whom no disease is yet manifest, will be forced to either forego medical evaluations or proceed with them at their own cost. Nevertheless, any

other outcome would result in inordinate burdens for both the potential victim and the alleged negligent party. . . . *If each were actually tested, and the results of the tests showed no physical disease, the negligent party will have paid large sums of money despite having caused no physical injury.*

*Id.* at 859 (emphasis added). *See also* Henderson & Twerski, *supra*, at 815 (criticizing medical monitoring damages in the absence of present injury or illness); Victor E. Schwartz, et al., *Medical Monitoring-Should Tort Law Say Yes?*, 34 Wake Forest L. Rev. 1057 (1999) (proposing that development of medical monitoring remedies is properly a legislative function).

Alabama is yet another jurisdiction to reject medical monitoring as inconsistent with long-standing tort principles. In *Hinton v. Monsanto Co.*, 813 So.2d 827 (Ala. 2001), the question certified to the Alabama Supreme Court was as follows: “Does a complaint which does not allege any past or present personal injury to the plaintiff state a cause of action for medical monitoring and study when the plaintiff alleges that he has been exposed to hazardous contamination and pollution by the conduct of the defendant?” *Id.* at 828. As Appellant claims here, Plaintiff Hinton claimed that his need for medical monitoring constituted an injury which resulted from Monsanto’s tortious act of releasing a pollutant into the environment.

In analyzing plaintiff's claim, the *Hinton* court noted that "[t]he most striking aspect of Hinton's claim is the lack of a present physical injury or illness among the putative class members." *Id.* at 828. The court expressed concern that allowing a medical monitoring claim to be brought by a class of uninjured plaintiffs would likely have drastic ill effects on the State economy:

[O]ur recognizing a cause of action based upon nothing more than an increased risk that an injury or an illness might one day occur would result in the courts of this State deciding cases based upon nothing more than speculation and conjecture. Hinton's logic appears to be as follows: if enough people are brought into a medical-monitoring program, an illness will eventually be detected and perhaps some of the more serious effects of the illness can be avoided by early detection. This goal is indisputably laudable. The odds are that such a program would benefit some, although not most, of its participants. But what of the ill effects of such an endeavor? How would such a drastic departure from our traditional tort law requiring a manifest, present injury impact the laws of this State? What other areas of the law would also be affected by such a development? What would be the impact upon our statutes of limitation and the legal doctrines that have developed to guide the courts in the application of these statutes?

These are questions upon which we can only speculate at this juncture.

*Id.* at 830. While the *Hinton* court did recognize that plaintiff Hinton “suffered a wrong at the hands of a negligent manufacturer” and stated that it did not intend to minimize the concerns plaintiff and the putative class members faced, the court ultimately found it “inappropriate, within the confines of this certified question, to stand Alabama tort law on its head in an attempt to alleviate these concerns about what might occur in the future.” *Id.* at 831.

**D. Appellant’s Reliance On *Friends For All Children* And Its Progeny Is Misplaced In The Context Of Environmental Exposure Cases.**

Appellant cites to *Friends for All Children, Incorporated v. Lockheed Aircraft Corporation*, 746 F.2d 816 (D.C. Cir. 1984), to support her argument that present physical injury should not be required in a medical monitoring cause of action. (App. Br. at 43-46). As discussed below, reliance on *Friends* is misplaced in the context of environmental exposure cases.

The policy issues, concerns, and complexities inherent in medical monitoring were not before the court in *Friends for All Children, Inc. v. Lockheed Aircraft Corporation*, 746 F.2d 816 (D.C. Cir. 1984). There, the defendant’s airplane was used in a rescue mission to evacuate Vietnamese children from

Saigon at the end of the Vietnam War. While airborne, the interior compartment decompressed and the plane subsequently crashed. Friends for All Children (“FFAC”), as legal guardian for the surviving children, sought compensation from Lockheed for diagnostic examinations and continued medical monitoring to determine if the decompression or the crash itself caused residual brain dysfunction in the children.

The United States Court of Appeals for the District of Columbia Circuit predicted that courts in the District of Columbia would, if presented with similar circumstances, allow a cause of action for medical monitoring in the absence of present physical injury. Hence, it recognized medical monitoring damages. The court compared the facts in *FFAC* to a hypothetical involving a motorbike crash:

Jones is knocked down by a motorbike which Smith is riding through a red light. Jones lands on his head . . . . [At the] hospital . . . doctors recommend that [Jones] 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 turn out to be the substantial cost of the diagnostic examinations.

*Id.* at 824.

The *FFAC* court noted that even though Jones did not suffer any physical injury, Smith should pay for the cost of the exams because Smith’s negligent

driving proximately caused the need for Jones' medical exam. Likewise, because Lockheed's negligence exposed the children to the risk of brain damage, according to the court, the defendant was responsible for the costs of their examinations. The *FFAC* court affirmed the district court's order creating a fund from which money could be disbursed to the children upon submission of a voucher detailing the expenses anticipated. The same order allowed Lockheed the opportunity to respond to proposed expenses before payment.

The holding in *FFAC* and the court's motorbike hypothetical provide no support whatsoever for the application of medical monitoring in alleged latent harm cases, such as the instant case, where the alleged exposures occurred over an extended period of time to an indefinite number of individuals. First, the medical examinations necessitated by the accident in *FFAC* were required to determine the *extent*, not the *onset*, of injury. *Cf. Witherspoon v. Philip Morris, Inc.*, 964 F. Supp. 455, 467 (D.D.C. 1997) (applying District of Columbia law) ("Whether a cause of action or a part of damages [is] requested, *medical monitoring requires that the plaintiff have a present injury* and a reasonable fear that the present injury could lead to the future occurrence of disease.") (emphasis added). Furthermore, because *FFAC* involved a single event and a discrete, fixed number of plaintiffs, the court did not have to address the serious practical concerns that were central to the U.S.

Supreme Court's holding in *Metro-North* and that are posed in exposure cases such as this one.

For example, the *FFAC* court was not faced with the prospect of thousands of potential claimants, flooded courts, collateral sources of coverage, indeterminable need for surveillance, and the problem of ensuring that awards are actually spent on monitoring. In fact, the *FFAC* court made a point to distinguish the "single event" case before it from alleged latent injury/exposure cases, such as the instant case. *See id.* at 826. Reliance on *FFAC* to support monitoring for anything but the kind of traumatic, physical accident at issue in that case is, therefore, unfounded.

Thus, *FFAC* does not support a cause of action for medical monitoring in latent exposure cases.

**E. Since Adoption Of Medical Monitoring In *Bower v. Westinghouse Electric Corp.*, The West Virginia Supreme Court's Decision Has Been The Subject Of Intense Criticism And Has Led To Meritless Lawsuits.**

When Appellant articulates the elements of a new cause of action for medical monitoring that she proposes this Court adopt, she repeatedly cites *Bower v. Westinghouse Electric Corporation*, 522 S.E.2d 424 (W. Va. 1999). *Bower* is arguably the most radical of all of the medical monitoring cases, and provides an

example of the adverse impacts and intense criticism that result from creation of a medical monitoring claim for persons with no present physical injury.

In *Bower*, the Supreme Court of Appeals of West Virginia created an independent cause of action allowing a plaintiff to recover costs of future medical monitoring without a showing of physical injury. The *Bower* plaintiffs, who had no symptoms of any disease, alleged that they were exposed to toxic substances as a result of the defendants' maintenance of a cullet pile containing debris from the manufacture of light bulbs. *Id.* at 427. In creating a medical monitoring claim, the *Bower* court held that a plaintiff can recover for medical monitoring even if the plaintiff cannot demonstrate the probable likelihood that a serious disease will result from exposure to a toxic substance and even if there is no effective treatment available for the disease. *Id.* at 431, 433. The court also awarded funds to plaintiffs in a lump sum, expressly rejecting the argument that any funds awarded should be awarded in a court-administered fund. *Id.* at 434.

Since its adoption of medical monitoring in 1999, *Bower* has been heavily criticized both by torts scholars and throughout West Virginia. Victor Schwartz, co-author of the most widely used torts casebook in the United States, *Prosser, Wade and Schwartz's Torts*, has stated that "the court's holding in *Bower* stands in stark contrast to the medical and scientific perspective that medical monitoring programs should only be implemented for patients who have potentially treatable

or curable disease.” Victor E. Schwartz, et al., *Medical Monitoring: The Right Way and the Wrong Way*, 70 Mo. L. Rev. 349, 366 (2005) [hereinafter *The Right Way*]. “Rather than being guided by principles of effective treatment or cure of disease, the court’s ruling unabashedly allows for medical monitoring based on ‘the subjective desires of a plaintiff for information concerning the state of his or her health.’” *Id.* at 367.

Respected torts scholars Professor James A. Henderson, Jr. and Dean Aaron D. Twerski, Reporters for the American Law Institute’s *Restatement (Third) of Torts: Products Liability*, likewise note that *Bower*’s criteria “will not prevent most well-prepared cases from reaching triers of fact. There is no escaping the conclusion that defendants in these medical monitoring cases face potentially crushing liabilities.” *See* Henderson & Twerski, *supra*, at 845.

The majority opinion in *Bower* has also been the subject of numerous negative editorials in West Virginia newspapers. *See, e.g., Monitoring: With Bad Law, The Supreme Court Is Threatening The State’s Economy*, Charleston Daily Mail, Oct. 19, 1999, at 4A; Paul Owens, *Opportunity Without Injury*, Charleston Daily Mail, Feb. 4, 2000, at 4A; James R. Thomas, II, *High Court Ruling Makes A Game Of It For Potential Victims*, Charleston Gazette, Sept. 3, 1999, at 5A. PLAC urges the Court to follow Justice Maynard’s dissent in which he concluded that “West Virginia law does not permit an independent cause of action to recover

future medical monitoring costs absent physical injury, and this Court has no authority to create such a cause of action.” *Id.* at 143.

*Bower* exemplifies the meritless litigation and waste of Missouri’s resources that recognition of an independent cause of action for medical monitoring would bring to the State of Missouri. This Court should follow the decisions of the numerous courts that have refused to recognize a new claim in tort for medical monitoring.

## CONCLUSION

For these reasons, this Court should deny Appellant's request to create a new common law cause of action for medical monitoring and affirm the trial court's order denying class certification to this class of uninjured plaintiffs. This case should be remanded to the trial court with directions to dismiss Plaintiff's Petition.

Date: November 30, 2006

Respectfully submitted,

By \_\_\_\_\_

Jordan B. Cherrick, # 30995  
jbc@greensfelder.com  
Kirsten M. Ahmad, # 52886  
km@greensfelder.com  
Greensfelder, Hemker & Gale, P.C.  
10 S. Broadway, Suite 2000  
St. Louis, Missouri 63102  
Telephone: (314) 241-9090  
Facsimile: (314) 241-8624

Of Counsel:

Hugh F. Young, Jr. (pro hac vice pending)  
Product Liability Advisory Council, Inc.  
185 Centennial Park Drive, Suite 510  
Reston, Virginia 20191  
Telephone: (703) 264-5300  
Facsimile: (703) 264-5301

*Counsel for Amicus Curiae The Product  
Liability Advisory Council, Inc.*

**CERTIFICATION OF SERVICE AND COMPLIANCE**  
**WITH MO. SUP. CT. R. 84.06**

The undersigned hereby certifies that on this 30th day of November, 2006, two true and correct copies of PLAC's Brief, and one disk containing PLAC's Brief, were mailed, postage prepaid, to:

Edward D. Robertson, Jr.  
Mary D. Winter  
Anthony L. DeWitt  
Bartimus, Frickleton, Robertson &  
Gorny, P.C.  
715 Swifts Highway  
Jefferson City, Missouri 65109

Kevin S. Hannon  
The Hannon Law Firm, LLC  
1641 Downing Street  
Denver, Colorado 80218

Robert F. Ritter  
Maurice B. Graham  
Don M. Downing  
Gray, Ritter & Graham, P.C.  
701 Market Street, Suite 800  
St. Louis, Missouri 63101

Andrew Rothschild  
Richard A. Ahrens  
Michael P. Casey  
Lewis, Rice & Fingersh, LLC  
500 North Broadway, Suite 2000  
St. Louis, Missouri 63102

Jeffrey L. Cramer  
Brown & James, P.C.  
705 Olive Street, Suite 1100  
St. Louis, Missouri 63101

Ted L. Perryman  
Roberts, Perryman, Bomkamp &  
Meives, P.C.  
One U.S. Bank Plaza, Suite 2300  
St. Louis, Missouri 63101

John H. Quinn, III  
Armstrong Teasdale L.L.P.  
One Metropolitan Square, Suite 2600  
St. Louis, Missouri 63102

Theodore J. Williams, Jr.  
Thomas L. Orris  
10 South Broadway, Suite 1600  
St. Louis, Missouri 63102

The undersigned further certifies that PLAC's Brief complies with the limitations in Mo. Sup. Ct. R. 84.06(b), and that the Brief contains 9,309 words.

The undersigned further certifies that the labeled disk, simultaneously filed with the hard copies of the brief, has been scanned for viruses and is virus-free.

IN THE  
SUPREME COURT OF MISSOURI

---

NO. 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 FOR THE CITY OF ST. LOUIS  
HONORABLE MICHAEL P. DAVID  
CIRCUIT COURT JUDGE

---

**APPENDIX TO BRIEF OF THE PRODUCT LIABILITY ADVISORY  
COUNCIL, INC. AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS**

---

Jordan B. Cherrick, # 30995  
jbc@greensfelder.com  
Kirsten M. Ahmad, # 52886  
km@greensfelder.com  
GREENSFELDER, HEMKER & GALE, P.C.  
10. S. Broadway, Suite 2000  
St. Louis, Missouri 63102  
Telephone: (314) 241-9090  
Facsimile: (314) 241-8624

Of Counsel:

Hugh F. Young, Jr. (*pro hac vice pending*)  
Product Liability Advisory Council, Inc.  
185 Centennial Park Drive, Suite 510  
Reston, Virginia 20191  
Telephone: (703) 264-5300  
Facsimile: (703) 264-5301

*Counsel for Amicus Curiae The Product  
Liability Advisory Council, Inc.*

**TABLE OF CONTENTS TO APPENDIX**

PLAC Corporate Members List.....	<b>A1</b>
E-Mail Correspondence from Respondents’ Counsel.....	<b>A8</b>
E-Mail Correspondence from Appellant’s Counsel .....	<b>A9</b>