THE STATE OF NEW HAMPSHIRE
SUPREME COURT

No. 2022-0132

KEVIN BROWN, ET AL.

v

SAINT-GOBAIN PERFORMANCE PLASTICS CORPORATION, ET AL.

DRI, TRI-STATE DEFENSE LAWYERS, AND WASHINGTON LEGAL FOUNDATION'S AMICI CURIAE BRIEF IN SUPPORT OF SAINT-GOBAIN PERFORMANCE PLASTICS

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STATEMENT OF INTEREST [1]

Amicus Curiae DRI, Inc. is an international membership organization of approximately 14,000 attorneys who defend parties in civil litigation. DRI's mission includes enhancing the skills, effectiveness, and professionalism of civil defense lawyers; promoting appreciation for the role of defense lawyers in our legal system; and anticipating and addressing substantive and procedural issues germane to defense lawyers and the clients they represent. DRI has served as a voice in the ongoing effort to make the civil justice system fairer and more efficient. To accomplish these objectives, DRI—through its Center for Law and Public Policy—participates as amicus curiae in cases that raise issues of vital concern to its members, their clients, and the judicial system.

DRI members have extensive experience as inside and outside counsel with litigating claims of toxic exposure. This first-hand experience with how rulings from this and other courts are applied on the ground and the difficulties they may create informs DRI's position on medical monitoring and its view that a new tort for medical monitoring with no present physical injury should not be recognized.

This case is particularly important to DRI's members because it involves a request to transform New Hampshire common-law tort

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[1] No counsel for a party authored this brief in whole or in part. No person or entity other than amici curiae, their members, or their counsel made a monetary contribution intended to fund the preparation or submission of this brief.

litigation in ways that threaten to undermine the integrity of the system and to create potentially limitless liability. DRI has long had an interest in the problems that arise in civil litigation from common-law rules that allow for speculative claims based on faulty science. *See also e.g,* Albert H. Parnell et al., *Medical Monitoring: A Dangerous Trend,* FOR THE DEFENSE (April 1993, at 6). DRI filed an amicus brief in *Henry v. Dow Chemical Co.*, 473 Mich. 63; 701 N.W.2d 684 (2005), a case in which the Michigan Supreme Court held that no claim for medical monitoring costs would be recognized under Michigan law absent a present physical injury. Since that case has been cited by the federal district court and parties, DRI believes that its perspective will be useful to this Court.

The Tri-State Defense Lawyers is a nonprofit association of attorneys from Maine, New Hampshire, and Vermont who devote a substantial portion of their professional practice to the defense of civil lawsuits. Tri-State addresses issues that civil defense attorneys, and business risk managers face in preparing for and engaging in litigation. Tri-State is one of the over-50 independent state and local defense organizations affiliated with DRI and working with it on their common concerns.

Founded in 1977, Washington Legal Foundation is a nonprofit, public-interest law firm and policy center with supporters nationwide, including many in New Hampshire. The Washington Legal Foundation promotes free enterprise, individual rights, limited government, and the rule of law. To advance these principles, the Foundation often

appears as amicus curiae in state courts of last resort. *See, e.g.*, *Dunn v. Genzyme Corp.*, 486 Mass. 713 (2021); *Frlekin v. Apple*, 457 P.3d 526 (Cal. 2020); *Delisle v. Crane Co.*, 258 So.3d 1219 (Fla. 2018).

QUESTION PRESENTED

MUST A PLAINTIFF PROVE A PRESENT PHYSICAL INJURY CAUSED BY A TOXIC SUBSTANCE AS A PREREQUISITE TO OBTAINING THE COSTS OF MEDICAL MONITORING UNDER NEW HAMPSHIRE LAW?

STATEMENT OF FACTS

Amici Curiae DRI, Tri-State Defense Lawyers, and Washington Legal Foundation adopt the statement of facts and proceedings included in the brief of Saint-Gobain Performance Plastics Corporation with these additions. The district court identified several key facts when deciding whether recovery of medical monitoring costs is available absent a present physical injury. (RE 100 Memorandum Opinion, 12/06/17). This case involves plaintiffs who claim to have been injured by chemicals purportedly released into local groundwater. Memorandum Opinion, p. 1. They seek recovery for "costs associated with monitoring for potential injuries caused by ingesting the chemicals at issue." *Id.* at p. 2. According to the district court, "the plaintiffs seek to recover the costs of monitoring for injuries related to exposure to PFOA in light of their 'significant increased risk of illness, disease or disease process….'" *Id. (*quoting Complaint, RE 80, ¶¶ 55, 59, 62). The district court certified questions to this Court about "monitoring for potential medical conditions arising out of their exposure to PFOA through its presence in the air and soil and through consumption of contaminated water." (RE 100, Memorandum Opinion, p. 16). According to the district court, the plaintiffs allege that exposure to PFOA "creates a 'significant increased risk of illness, disease, or disease process … requiring an award of a program for medical monitoring for detection of such illness, disease process or disease.'" *Id.* at pp. 16-17 (quoting Complaint, RE 80, ¶ 55). Saint-Gobain sought dismissal of the claims because plaintiff did not allege "any present

physical injury," and theirs was a "speculative, future injury" for which they could not recover under New Hampshire law. (RE 100, Memorandum Opinion, p. 17).

SUMMARY OF ARGUMENT

New Hampshire has long required an actual present injury to recover in tort. This litigation boundary assures that claims allow recovery only for injuries more probably than not caused by the defendant's conduct. This Court is presented with the question whether it should weaken or abolish this longstanding requirement to permit recovery of medical monitoring costs when the plaintiffs have not, and cannot, show an actual present injury or even that a future injury is more likely than not. What they seek is a broad new right to recover for a speculative increased risk of future injury. This Court should resist that request because it poses serious problems to the state's jurisprudence and is unlikely to solve the problem that the plaintiffs purportedly seek to rectify.

Allowing litigation absent an actual present injury conflicts with multiple decisions of this Court. It would allow for highly speculative claims based on complex scientific evidence, much of which cannot satisfy the requirement that experts use reliable methodology reliably applied to the facts. Given the virtually limitless exposures of everyone in the modern world to toxic substances of all sorts, tracing those

exposures to show causation of any injury between a specific plaintiff and specific defendant in the absence of actual present injury will entangle the courts in difficult if not impossible scientific inquiries.

Medical monitoring is also not a failsafe remedy but poses potential risks and adverse consequences for those undergoing extra testing. And the huge expenditure of funds, if merely provided in a lump sum to the plaintiffs, may not even be used for medical monitoring. At the same time, these expenditures have the potential to exhaust the available funds from some entities. When those who are actually injured by the toxic substances eventually seek to recover, the defendant entities may have spent all their resources or become bankrupt.

Multiple state courts of last resort and the United States Supreme Court have rejected claims for medical monitoring absent an actual present injury because of the serious public policies concerns with doing so. These decisions provide guidance for this Court and support Amici's position that medical monitoring costs should not be available under New Hampshire law absent an actual present injury.

ARGUMENT

UNDER NEW HAMPSHIRE LAW, A PLAINTIFF SHOULD BE REQUIRED TO PROVE A PRESENT PHYSICAL INJURY CAUSED BY A TOXIC SUBSTANCE AS A PREREQUISITE TO OBTAINING THE COSTS OF MEDICAL MONITORING AS A REMEDY OR BY AN INDEPENDENT CAUSE OF ACTION

A. Allowing recovery of medical monitoring costs absent a present injury significantly departs from New Hampshire's common law

New Hampshire common law has traditionally required a plaintiff to prove actual present injury before he or she receives an award in tort. Even when New Hampshire recognizes a claim for emotional distress, the plaintiff must show that a physical injury resulted from the negligent or intentional infliction of that emotional distress. *In re: Bayview Crematory*, LLC, 155 N.H. 781, 786 (2007). *See also Palmer v. Nan King Restaurant*, 147 N.H. 681, 683 (2002). Expert testimony must connect the physical symptoms to the claimed emotional distress. *Thorpe v. State, Dep't. of Correction*, 133 N.H. 299, 302-303 (1990).

These requirements avoid limitless liability and guard against speculative claims based on junk science. As this Court explained in *Wilder v. City of Keene*, 131 N.H. 599, 603-604 (1989), the physical injury requirement is one way not to let the "genie out of the bottle." *Id.* at 605 citing *Corso v. Merrill*, 119 N.H. 647, 654-661 (1979).

This Court has rejected the mere possibility of injury as the basis for liability in tort for more than 100 years. *White v. Schnoebelen*, 91 N.H. 273, 274 (1941). This Court explained that "possibility is

insufficient to impose any liability or give rise to a cause of action…." *Id.* at 274. In line with that rule, under New Hampshire law "there can be no recovery for future damages unless there is evidence from which it can be found to be more probable than not that they will occur." *Jolicoeur v. Conrad*, 106 N.H. 496, 498 (1965). Future damages are "not to include any award for pain and suffering, the experiencing of which by the plaintiff is merely possible, conjectural or speculative." *Dunham v. Stone*, 96 N.H. 138, 140-41 (1950). *See also Urie v. Thompson,* 337 US 163, 170 (1949). In the Federal Employers' Liability Act context, for example, a compensable injury occurs only when "the accumulated effects of the deleterious substance manifest themselves."

Without the manifestation of a present injury, claims are not allowed. And in like manner, in a personal injury claim seeking compensation for future injuries, New Hampshire permits such recovery only when the plaintiff shows that such the future injuries are more likely than not. *Dunham v. Stone*, 96 N.H. 138, 139 (1950). If reasonable persons can only reach a conclusion about future injuries based on "conjecture, chance, or doubtful and unsatisfactory speculation," then recovery is not allowed. *Id.* The plaintiff must prove that the defendant's conduct probably caused the harm, that is, that it was more likely than not. *Deckles v. Madden*, 160 N.H. 118, 123-125 (2010). That showing has not been made when the claim is based on speculative future injury.

B. This court should not deviate from traditional tort principles to allow recovery of medical monitoring

A decision allowing recovery of medical monitoring costs without proof of actual physical injury would deviate from a basic tenet of tort law: an existing injury is a predicate to the recovery of damages. Restatement of Torts, 2d, § 902, (1965) Comment a. A decision allowing recovery of medical monitoring costs without proof that the future injury is more probable than not would also deviate from another basic tenet of tort law: liability is proved only when the plaintiff shows that the defendant's tortious conduct, more likely than not, caused the claimed injuries. *Stachulski v. Apple New England, LLC*, 171 N.H. 158, 165-166 (2018).

In their opening brief to this Court, plaintiffs assert that "they do not seek to create a new cause of action." Plaintiffs' Opening Brief on Certified Questions, p. 12. They insist that their claim is based on "longstanding New Hampshire tort law." *Id.* In seeking to place their case within the confines of New Hampshire law, plaintiffs argue that their purported exposure to toxic substances "is an invasion of a legally protected interest." *Id.* They argue that "the exposure, the increased risk of illness or disease and the inherent latency of visible harm caused by Defendants' toxins that creates the present medical need for the testing, not an already diagnosed physical injury…." is enough. *Id.* They also argue that their claim is not based on a "fear of future illness," but on the purported "present harm of medically necessary diagnostic testing." *Id.* at p. 13.

But in support of their contention that this claim is currently recognized under New Hampshire law, plaintiffs cannot cite any decisions permitting recovery for this type of harm. And however artfully they try to define the claim, they do not allege a present physical injury but seek to recover medical monitoring costs for a speculative increased risk of a future illness. New Hampshire has not recognized such a claim. Nor should it.

This suit seeks to exponentially expand the boundaries of traditional common law tort theory to encompass a vastly increased number of lawsuits for toxic torts or environmental exposure of various kinds and in various circumstances. *See* Lindheim, *Self-Insurers & Risk Managers: Annual Survey*, 27 Tort & Insurance Law Journal, pp. 445-449 (1992). Allowing recovery here would undermine traditional tort law and recognize potentially limitless liability in lawsuits based on speculative proofs of possible future harm. Numerous courts have relied on basic principles of traditional tort law to reject medical monitoring as a cause of action absent a present injury. And that view is most consistent with New Hampshire's longstanding approach to the common law.

1. Under traditional tort law, damages may not be recovered for the mere possibility of a future harm

Under common law principles, the mere possibility of future harm is not a sufficient basis for recovery. Prosser & Keeton on the Law of Torts (5th ed. 1984), § 30, p. 165. Present injury is the "proof of tangible recognition that the tort has occurred, which becomes a

touchstone for future damages. Present injury is concrete and does not require speculation. The requirement of a present injury ensures a fair assessment of beneficial medical treatment, is a standard for certainty, and safeguards against speculative and fraudulent claims. *See* Farber, *Toxic Causation,* 71 Minn. L. R. 1219 (1987); Parnell, Curia, & Bridges, *Medical Monitoring: A Dangerous Trend, For the Defense,* p. 6 (April 1992). Since plaintiffs in this putative class action do not have present injuries, it is a quantum leap to assume that future damages will incur. The plaintiffs have not argued that future illness is reasonably certain to occur or even that it is more probable than not. Thus, to grant plaintiffs' relief, the common law must be altered.

Courts are often challenged by litigants to accommodate new theories under notions of social justice or policy. Those urging for a change in the law, especially tort law, often suggest that the existing boundaries of liability are arbitrary and should not stand as an obstacle to recovery. But the emphasis on expanding liability urged by the plaintiffs should not outweigh long-accepted considerations for retaining existing law:

> Characterizing a rule limiting liability as "unprincipled" or "arbitrary" is often the result of overemphasizing the policy considerations favoring imposition of liability, while at the same time failing to acknowledge any countervailing policies and the necessary compromise between competing and inconsistent policies informing the rule.

Consolidated Rail Corp. v. Gottshall, 114 S. Ct. 2396, 2411 (1994), quoting *Cameron v. Pepin,* 610 A.2d 279, 283 (Me., 1992). *See, e.g.*, Mark

A. Behrens & Christopher E. Appel, *Medical Monitoring in Missouri After Meyer ex rel. Coplin v. Fluor Corp.: Sound Policy Should be Restored to a Vague and Unsound Directive,* 27 St. Louis U. Pub. L. Rev. 135, 152–53 (2007); James A. Henderson & Aaron D. Twerski, *Asbestos Litigation Gone Mad: Exposure-Based Recovery for Increased Risk, Mental Distress, and Medical Monitoring,* 53 S.C. L. Rev. 815, 842–43 (2002) (criticizing decision for assuming that "courts are equipped to resolve the issues" raised by medical monitoring claims; noting "the possibility of significant overdeterrence"; and questioning "why justice is necessarily served by allowing, through the back door, recoveries that courts will not allow in through the front").

Medical monitoring creates the real possibility of nearly infinite and unpredictable liability. If adopted, it will be one more step in overcoming the historical reticence to common-law recognition of emotional and fear claims as the equivalent of traditional tort claims. New Hampshire courts have long resisted these requests by requiring a plaintiff to show a physical injury caused by the claimed event and supported by expert testimony. *Corso*, supra. *See also Tobin v. Grossman*, 24 N.Y.2d 609, 619; 249 N.E.2d 419 (1969).

"Every injury has ramifying consequences, like the ripplings of the waters, without end. The problem for the law is to limit the legal consequences of wrongs to a controllable degree." *Nutter v. Frisbie Memorial Hospital,* 124 N.H. 791, 794 (1984) (quoting *Tobin v. Grossman,* 24 N.Y.2d 609, 619; 249 N.E.2d 419 (1969)). This Court is here asked once more to draw a boundary that avoids infinite liability

and uncertainty in the law:

> It is still inconceivable that any defendant should be held liable to infinity for all of the consequences which flow from his act, and some boundary must be set. If nothing more than 'common sense' or a 'rough sense of justice' is to be relied on, the law becomes to that extent unpredictable, and at the mercy of whatever the court, or even the jury, may decide to do with it.

W. Prosser, Law of Torts § 43, at 263 (4th ed. 1971) (quoting *Palsgraf v. Long Island R.. Co.,* 248 N.Y. 339, 352 and 354; 162 N.E. 99 (1928) (Andrews, J, dissenting)). *See also, Nutter v. Frisbie Mem'l Hosp*, 124 N.H. 791, 795 (1984).

Adopting medical monitoring for asymptomatic persons who cannot show present physical injury threatens New Hampshire law's clarity, logic, and stability. Medical monitoring cannot, in any sense of the word, be considered an incremental development from the traditional law of torts. If adopted, it amounts to a dramatic and fundamental change—one that exchanges the clarity of a current injury for speculation about possible future injuries.

2. Many courts have rejected medical monitoring as a cause of action absent a present injury

In many jurisdictions, courts have required a physical injury before allowing medical monitoring as an element of damage, rather than an independent cause of action. Justice Breyer's opinion in *Metro-North Commuter R.R. Co. v. Buckley,* 521 U.S. 424, 442 (1997) rejected medical monitoring claims under FELA noting that "tens of millions of individuals may have suffered exposure to substances that might

justify some form of substance exposure related medical monitoring." *Id.* Many states have found the Supreme Court's reasoning persuasive:

> Since *Buckley,* the Supreme Courts of Alabama, Kentucky, Michigan, Mississippi, Nevada, and Oregon have all relied on the public policy considerations discussed in Justice Breyer's opinion in rejecting medical monitoring claims for asymptomatic plaintiffs. Several states' lower courts and federal courts predicting state law have relied on similar public policy considerations in rejecting medical monitoring claims. Taken together, these cases show that *Buckley* ushered in a "recent trend of rejecting medical monitoring" for asymptomatic plaintiffs.

Herbert L. Zarov et al., *A Medical Monitoring Claim for Asymptomatic Plaintiffs: Should Illinois Take the Plunge?* 12 DePaul J. Health Care L. 1, 9 (2009). *See also, Hinton v. Monsanto Co.,* 813 So.2d 827, 828-829 (Ala., 2001) (rejecting medical monitoring claims under Alabama's requirement that claimants allege a "manifest, present injury before [they] recover in tort"); *Lowe v. Philip Morris USA, Inc.,* 344 Or. 403, 410; 183 P.3d 181 (2008) ("Oregon law has long recognized that the fact that a defendant's negligence poses a threat of future physical harm is not sufficient, standing alone, to constitute an actionable injury"); *Badillo v. American Brands, Inc.,* 16 P.3d 435, 441 (Nev., 2001) ("Nevada common law does not recognize a cause of action for medical monitoring"); *Wood v. Wyeth-Ayerst Labs,* 82 S.W.3d 849, 852 (Ky., 2002) (rejecting a medical monitoring cause of action because "a cause of action in tort requires a present physical injury to the plaintiff") (applying Kansas law); *Caronia v. Philip Morris USA, Inc.*, 22 N.Y.3d 439 (2013)(refusing to create a new tort for medical monitoring absent

present physical injury because of the difficulties in implementing a medical monitoring system when the judiciary lacks the technical expertise and the legislative branch is better suited to study the impact, consequences and costs of such an action and because it would "constitute a significant deviation for our tort jurisprudence").

Courts have repeatedly rejected recovery for medical monitoring when the plaintiff has not suffered physical injury or physical illness, thus retaining the traditional common-law present injury rule. *See, e.g. Wood v. Wyeth-Ayerst Laboratories,* 82 S.W.3d 849 (Ky., 2002); *Thomas v. FAG Berrings Corp.,* 846 F Supp 1400, 1410 (W.D. Mo., 1994) (applying Missouri law); *Carrol v. Litton Systems, Inc.,* 1990 US Dist. LEXIS 16833 at 148-153 (W.D. N.C., Oct. 29 1990) (North Carolina law); *Mergenthaler v. Asbestos Corp. of America,* 480 A.2d 647, 651 (Del., 1984); *Hayes v. AC & S, Inc.,* Docket No. 94-CH 1835, pp. 12-14 (Circuit Court for Cook County, Illinois, rel'd Oct. 30, 1996); *Purjet v. Hess Oil Virgin Island Corp.,* 1986 WL 1200, p. 4 (Dist. VI, Jan. 8, 1986) (Virgin Island law) and *Ball v. Joy Mfg. Co.,* 755 F. Supp. 1344 (S.D. W. Va., 1990) *aff'd.* 958 F.2d 36 (4th Cir. 1991) (Virginia and West Virginia law) *Haggerty v. L&I Marine Services, Inc.,* 788 F.2d 315, 319 (5th Cir. 1986) (applying Louisiana law).

One instructive decision rejecting arguments like those tbat the plaintiffs offer to this Court is *Henry v. Dow Chemical Co.*, 473 Mich. 63; 701 N.W.2d 684 (2005). The Michigan Supreme Court "decline[d] plaintiffs' invitation to alter the common law of negligence to encompass a cause of action for medical monitoring." *Id.* at 686. As

here, the plaintiffs had established no present physical injuries, which meant that they could not recover for negligence under Michigan law. *Id.* at 688. The Michigan Supreme Court also explained that they could not recover for future injuries because "Michigan law requires more than a merely speculative injury." *Id.* The court explained that a financial injury, that is, a claim seeking recovery for medical monitoring when no present injury or illness exists, is not cognizable under Michigan tort law. 701 N.W.2d at 691-692. The court recognized their claim blurred the concepts of injury and damages:

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

Henry v. Dow Chem Co., 473 Mich. 63; 701 N.W.2d 684, 691(2005)(emphasis in original).

Since *Henry* was decided, multiple courts have embraced its reasoning. *See e.g., Alsteen v. Wauleco, Inc.,* 335 Wis.2d 473; 802 N.W.2d 212 (2011); *Caronia v. Philip Morris USA, Inc*, 22 N.Y.3d 439 (2013). A Wisconsin appellate court explained that *Henry* recognized that

"defining the need for medical monitoring as 'injury' does nothing more than attach a specific item of damages to what is actually a claim for increased risk of future harm." *Id.* The *Alsteen* court rejected the plaintiffs' claims "because Wisconsin tort law does not compensate for increased risk of future harm, actual present injury is required." *Id.*

The United States Supreme Court declined to adopt a similar infinite-liability theory in *Consolidated Rail Corp. v. Gottshall,* 512 U.S. 532 (1994) (standard for evaluating claims under Federal Employer's Liability Act for negligent infliction of emotional distress must stem from the applicable statute *and* from relevant common-law doctrine). The *Gottshall* Court understood that "policy considerations mandate that infinite liability be avoided by restrictions that narrow the class of potential plaintiffs." 114 S. Ct. at 2405-2406, quoting *Thing v. La Chusa,* 48 Cal. 3d 644; 771 P.2d 814 (1989). Holding that the court would not take the "radical step of reading FELA as compensating for stress arising in the ordinary course of employment," 114 S. Ct. at 2412, the *Gottshall* majority refused to cross the uncharted waters of infinite liability:

> [T]here are clear judicial days on which a court can foresee forever and thus determine liability but not on which that foresight alone provides a socially and judicially acceptable limit on recovery.

Gottshall, supra, 114 S. Ct. at 2409 (quotation omitted).

Only a handful of jurisdictions have recognized a medical monitoring tort absent present physical injury. *See, e.g. Ayers v. Jackson Twp.,* 106 N.J. 557; 525 A.2d 287 (1987). And even in those states, some

have already pared back that recognition. For example, the *Ayers* opinion was significantly undercut just a few years later by a 1993 New Jersey Supreme Court opinion, *Theer v. Philip Carey Co.,* 133 N.J. 610; 628 A.2d 724 (1993). There, the court held that medical monitoring may be pursued only by persons who have experienced a "direct" exposure to a hazardous substance or suffered a physical injury as a result of the exposure. 628 A.2d at 733. *See also Potter v. Firestone Tire & Rubber Co.,* 25 Cal. Rptr. 2d 550; 863 P.2d 795 (1993); *Hansen v. Mountain Fuel Supply Co.,* 858 P.2d 970 (Utah, 1993); *Burns v. Jay/lays Mining Corp.,* 752 P.2d 28 (Ariz. App., 1987) and *Askey v. Occidental Chemical Corp.,* 477 N.Y.S.2d 242;102 A.D.2d 130 (App. Div., 1984). *See also Simmons v. Pacor, Inc.,* 543 Pa. 664; 674 A.2d 232 (1996) (physical injury required in asbestos context but pleural thickening is sufficient as an identifiable physical consequence of asbestos exposure; holding later interpreted to mean that recovery from medical monitoring requires proof of "demonstrable physical consequence" caused by exposure. *Fried v. Sungard Recovery Services,* 936 F. Supp. 310, 311(E.D. Penn., 1996). The Louisiana Supreme Court recognized a medical-monitoring claim, *Bourgeois v. A.P. Green Industries, Inc.*, 718 So.2d 355 (La., 1998), only to be legislatively overruled. The Louisiana legislature amended the state's civil code to statutorily define of damages to exclude medical monitoring damages for asymptomatic plaintiffs. La. Civ. Code Ann. Art. 2315(B)2011 (legislation provided that despite *Bourgeois* decision "[d]amages 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"). Some federal district courts have tried to predict state law jurisprudence and determined, with no controlling authority, that medical monitoring would be recognized in those states and at least one was subsequently overruled. *See, e.g. Cook v. Rockwell Int'l. Corp.,* 755 F. Supp. 1468, 1476-1477 (D. Colo., 1991); *Day v. NLO, Inc.,* 851 F. Supp. 869, 879-882 (S.D. Ohio, 1994); *Bocook v. Ashland Oil, Inc.,* 819 F. Supp. 530 (S.D. W. Va., 1993)(Kentucky law) *overruled by Wood v. Wyeth-Ayerst Laboratories,* 82 S.W.3d 849, 853-854 (Ky. Sup. Ct., 2002).

Here, the plaintiffs have failed to make a compelling case why New Hampshire courts should abandon one of the basic boundaries of tort liability, namely the need for a present injury, in favor of a theory of limitless liability that has been rightly rejected by numerous courts.

C. The cost/benefit calculus does not support a cause of action for medical monitoring absent a present injury

Recognition of a cause of action for medical monitoring absent a present injury would create a speculative claim that would be costly to the claimants, severely hamper the limited resources of the judicial system, and limit the monetary amount defendants might pay plaintiffs who have suffered an actual injury.

1. Costs of testing to the claimant

Ineffective medical screening carries costs to the claimant. The use of inaccurate screening tests carry a high price. Those who receive a false-negative result "may experience important delays in diagnosis

and treatment . . . [and may] develop a false sense of security, resulting in inadequate attention to risk-reducing behaviors and delays in seeking medical care when warning symptoms become present." United States Preventive Service Task Force's Publication, The Guide to Clinical Preventive Services (2d ed. 1996) ("Task Force Guide"), p. 2. Persons who receive false-positive results may be subject to follow-up testing, with the accompanying expense, inconvenience, and possibly harm, as well as unnecessary treatment. False-positive results may understandably lead persons to experience "unnecessary anxiety until the error is corrected." Task Force Guide, *supra*, p. xliv.

It is not only the inaccuracy of screening tests that may hurt the patient, but also the pure ineffectiveness of early detection. As explained in the Task Force Guide, *supra:*

> [T]he widely held belief that early detection of disease is beneficial leads many to advocate screening even in the absence of definitive evidence of benefit. Some may discount the clinical significance of potential adverse effects. A critical examination will often reveal that many kinds of testing, especially among ostensibly healthy persons, have potential direct and indirect adverse effects. Direct physical complications from test procedures (e.g. colonic perforation during sigmoidoscopy), labeling and diagnostic errors based on test results (see above), and increased economic costs are all potential consequences of screening tests. Resources devoted to costly screening programs of uncertain effectiveness may consume time, personnel, or money needed for other more effective health care services.

Task Force Guide, *supra*, p. xlvi.

2. Costs to the civil judicial system

There are many harms to the civil judicial system if medical monitoring is approved for asymptomatic patients. The first is the sheer volume of potential medical monitoring claims. Exposure to potentially toxic substances is immeasurable. There is "little doubt that millions of people have suffered exposure to hazardous substances." *Ball,* 755 F. Supp. at 1372. Potentially toxic substances are in the air, the land, and the water; can be eaten, inhaled, and absorbed through the skin; are man-made or natural; are aggregated in specific areas or virtually universal; affect primarily city dwellers, suburbanites, or rural dwellers; transcend socio-economic lines; and are encountered involuntarily and voluntarily. Numerous potentially toxic substances inevitably lead to aggregate exposure to any one claimant. Asbestos alone represents a single, large category of potential medical monitoring plaintiffs. As noted by in *Larson v. Johns-Manville Sales Corp.,* 427 Mich. 301, 316; 399 N.W.2d 1 (1986), it is estimated that between eleven and thirteen million workers have been exposed to asbestos since World War II. *Larson, supra*. Exposure goes beyond workers and could include simple residents. *See Eagle-Pitcher Indus., Inc. v. Liberty Mutual Ins. Co.,* 682 F.2d 12, 19 (1st Cir. 1982)("over 90% of all urban city dwellers have asbestos-related scarring"). The sheer volume of asbestos claimants with symptoms and a present physical injury has "burdened the dockets of many state and federal courts and has particularly challenged the capacity of the federal judicial system." *Georgine v. Amchem Products,* 83 F.3d 610, 617 (3rd Cir. 1996) *aff'd*.

521 U.S. 591 (1997). One can only imagine the exponential increase in litigation if asymptomatic claimants exposed to any number of toxic substances are given the keys to the courthouse doors.

Second, given the exposure to diverse potentially toxic substances that can trigger a claim if medical monitoring is recognized, the scope of the litigation will be expansive. Testimony about the accuracy of tests and the efficacy of early testing will vary from substance to substance. The evolution of science will no doubt prevent a static portfolio of scientific information on which to evaluate the claims.

Third, whether surveillance is reasonable and necessary will turn on the significance and extent of exposure, the toxicity of the substance, the seriousness of the disease, the relative increase in the chance of onset of the disease, the value of early diagnosis, and the need for medical diagnostic examinations. These questions are highly technical, difficult for a lay jury to sort out, and costly to litigate because of the need for experts.

Fourth, medical monitoring claims lend themselves to speculative testimony. By its very nature, medical monitoring requires testimony on causation between the toxic substance and the monitored-for disease, as well as expert testimony on the accuracy of screening and efficacy of early detection. The prospect for "junk science" testimony here is strong. This Court has recognized the importance of excluding unreliable expert testimony. *See Baker Valley Lumber, Inc. v. Ingersoll-Rand Co.,* 148 N.H. 609, 614 (2002)(adopting *Daubert* standards for expert admissibility); *Moscicki v. Leno*, 173 N.H.

121, 126 (2020)(discussing expert methodology in area of toxic torts); *McLain v. Metabolife International, Inc.*, 401 F.3d 1233, 1242 (11th Cir. 2005)(evaluating methodology to determine exposure and causation in area of toxic torts). Medical monitoring claims will create the temptation for litigants to use hired guns as experts, whose testimony lacks the reliability that should be used to help jurors decide the complex scientific questions. One expert testified that anyone exposed to even a single molecule of a hazardous substance should receive medical monitoring, an opinion that the Third Circuit found admissible under Federal Rule of Evidence 702 and under the U.S. Supreme Court's decision of *Daubert v. Merrill Laboratories,* 509 U.S. 579 (1993). *In re: Paoli II,* 35 F.3d 717, 793-795 (3rd Cir. 1994). Courts will be forced to spend time sifting out these technical scientific questions, all of which will be time-consuming and difficult especially in this speculative future-injury context.

Fifth, for medical monitoring damages to be used effectively and as intended, a court administration program must be put into place to ensure that plaintiffs spend the medical monitoring award on monitoring. Compare court-administered funds for items such as asbestos. Judicial Conference Ad Hoc Committee on Asbestos Litigation, Report of the Ad Hoc Committee, p. 2, 1991. *See also* administration of silicone breast implant claims in both state court (Administrative Order 1993-2) and the federal court (*see, e.g. In re: Breast Implant Cases,* 942 F. Supp. 958 (E.D. S.D. N.Y., 1996); *In re: Silicone Breast Implants Products Liability Litigation,* 887 F. Supp. 1997 (N.D. Ma.,

1995). Without a court-administered fund, there are no assurances that a damage award will be used to help a person learn about the onset of avoidable disease, which, after all, is the alleged point of medical monitoring.

Finally, and more generally, this is an unwise use of judicial resources. The claimant is not now ill, most likely will never develop the exposure-related illness, and should be entitled to an award, if at all, only for testing beyond what normally would have occurred. These factors, together with the questionable accuracy of screening in the efficacy of early detection, suggest that New Hampshire courts should decline to plunge over the precipice into this arena.

3. Requiring that a claimant have a present injury is not unfair to potential medical monitoring plaintiffs

Rejecting claims based solely on medical monitoring does no injustice. If a person exposed to a hazardous substance eventually does develop an injury or a disease that he or she can prove is caused by the exposure, then that person may pursue a traditional tort claim under the law of New Hampshire. The medical monitoring that may have taken place during the preceding years may represent an item of past damage for the injured claimant.

This approach is attractive for many reasons. Judicial resources are properly allocated to the symptomatic rather than asymptomatic claimant. The speculative nature of medical monitoring is replaced by the traditional rules of tort liability and the concomitant rules already governing the propriety of future damages. Monetary resources of the

defendant otherwise earmarked for asymptomatic patients will presumably be more available for symptomatic patients. Bankruptcies will not be spawned by the claims seeking recovery based on the uncertain prospect of future injury. (It is reported that traditional asbestos claims forced at least sixteen companies into bankruptcy because of the cost of mass tort litigation. *See* New York Law Journal, p. 7 (Feb. 6, 1995).) There is no reason to doubt that other companies may be forced into bankruptcy or may exhaust funds by paying out huge sums for medical monitoring – and have little or nothing left for those who ultimately suffer illness from the exposure. Society has always sought to address claims of the actually injured. And that approach supports reserving tort recovery for those suffering a present injury as New Hampshire has historically done.

CONCLUSION

WHEREFORE, Amici Curiae DRI, Tri-State Defense Lawyers, and the Washington Legal Foundation respectfully request that this Court decline to recognize medical monitoring absent present injury as a remedy or independent tort.

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CERTIFICATION OF WORD LIMIT

I hereby certify that the total words in this brief do not exceed the maximum of 9,500 words.

Dated: July 8, 2022

/s/ Mary Massaron
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served this 8th day of July 2022 via electronic submission through the Court's electronic filing system to all counsel of record and via U.S. Mail to any counsel not registered to receive electronic copies from the court.

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