IN THE SUPREME COURT OF THE STATE OF OREGON

PATRICIA LOWE, individually and on behalf of all similarly-situated persons,

Plaintiff-Appellant,
Petitioner on Review,

v.

PHILIP MORRIS USA INC., RJ REYNOLDS TOBACCO COMPANY, BROWN & WILLIAMSON TOBACCO CORPORATION; LORILLARD TOBACCO COMPANY, AND LIGGETT GROUP, INC.,

Defendants-Respondents,
Respondents on Review.

Supreme Court
No. 054378

Court of Appeals
No. A123025

Multnomah County Circuit Court
No. 0111-11895

BRIEF OF *AMICI CURIAE* COALITION FOR LITIGATION JUSTICE, INC.; CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA; NATIONAL ASSOCIATION OF MUTUAL INSURANCE COMPANIES; PROPERTY CASUALTY INSURERS ASSOCIATION OF AMERICA; AMERICAN INSURANCE ASSOCIATION; AMERICAN CHEMISTRY COUNCIL; NATIONAL ASSOCIATION OF MANUFACTURERS; AND AMERICAN TORT REFORM ASSOCIATION

Review of the Decision of the Oregon Court of Appeals on Appeal from the Multnomah County Circuit Court

---

Opinion Filed:	September 6, 2006
Author of Opinion:	Landau, P.J.
Joined by:	Linder, J.; Ortega, J.

Names and Addresses of Counsel on Inside Cover

June 2007

James N. Westwood 743392
STOEL RIVES LLP
900 SW Fifth Avenue, Suite 2600
Portland, OR 97204
Telephone: (503) 294-9187

Jerome A. Murphy *pro hac vice**
Natalia R. Medley *pro hac vice**
CROWELL & MORING LLP
1001 Pennsylvania Avenue, NW
Washington, DC 20004
Telephone: (202) 624-2985

Attorneys for *Amici Curiae*

William F. Gary 770325
HARRANG LONG GARY RUDNICK PC
360 E Tenth Ave., Suite 300
Eugene, OR 97401
Telephone: (541) 485-0220

Attorneys for Philip Morris USA Inc.

Thomas H. Tongue 681676
DUNN CARNEY ALLEN HIGGINS & TONGUE
851 SW Sixth Avenue, Suite 1500
Portland OR 97204
Telephone: (503) 224-6440

Attorneys for RJ Reynolds Tobacco Company and Brown & Williamson Tobacco Corporation

James S. Coon 771450
Raymond F. Thomas 794160
SWANSON THOMAS & COON
820 SW Second Avenue, Suite 200
Portland, OR 97404
Telephone: (503) 228-5222

William A. Gaylord 731043
GAYLORD EYERMAN & BRADLEY
1400 SW Montgomery Street
Portland OR 97201
Telephone: (503) 222-3526

David F. Sugerman 862984
PAUL & SUGERMAN PC
520 SW Sixth Avenue, Suite 920
Portland OR 97204
Telephone: (503) 224-6602

Charles S. Tauman 773710
CHARLES S. TAUMAN PC
PO Box 19631
Portland OR 97280
Telephone: (503) 849-9281

Attorneys for Plantiff-Appellant, Petitioner on Review

*Application pending

Roy E. Pulvers 833570
HINSHAW & CULBERTSON LLP
1000 SW Broadway, Suite 1250
Portland, OR 97205
Telephone: (503) 243-3243

Attorneys for Philip Morris USA and Lorillard Tobacco Company

Kathryn H. Clarke 791890
Attorney at Law
PO Box 11960
Portland, OR 97211
Telephone: (503) 460-2870

Brian S. Campf 922480
Brian S. Campf, P.C.
818 SW Third Avenue
Portland, OR 97204

Attorneys for *Amicus Curiae* Oregon Trial Lawyers Association

Jonathan M. Hoffman 754180
MARTIN BISCHOFF LANGSLET TEMPLETON & HOFFMAN LLP
888 SW Fifth Avenue, Suite 900
Portland, OR 97204
Telephone: (503) 224-3113

Attorneys for Liggett Group, Inc.

INDEX TO THE BRIEF

INDEX OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

STATEMENT OF INTEREST

The Coalition for Litigation Justice, Inc. (Coalition) is a nonprofit association formed by insurers to address and improve the asbestos litigation environment.[1] The Coalition's mission is to encourage fair and prompt compensation to deserving current and future litigants by seeking to reduce or eliminate the abuses and inequities that exist under the current civil justice system. The Coalition files *amicus curiae* briefs in important cases that may have a significant impact on the asbestos litigation environment.

The Chamber of Commerce of the United States of America (U.S. Chamber) is the world's largest business federation. The U.S. Chamber represents an underlying membership of more than three million businesses and organizations of every size, in every business sector, and from every region of the country. An important function of the U.S. Chamber is to represent the interests of its members in court on issues of national concern to the business community. Accordingly, the U.S. Chamber has filed more than 1,000 *amicus curiae* briefs in state and federal courts.

Founded in 1895, National Association of Mutual Insurance Companies (NAMIC) is a full-service, national trade association with more than 1,400 member companies that underwrite more than forty percent of the property/casualty insurance premium in the United States. NAMIC members account for forty-seven percent of

---

[1] The Coalition for Litigation Justice includes Century Indemnity Company, Chubb & Son, a division of Federal Insurance Company, CNA service mark companies, Fireman's Fund Insurance Company, Liberty Mutual Insurance Group, and the Great American Insurance Company.

the homeowners market, thirty-nine percent of the automobile market, thirty-nine percent of the workers' compensation market, and thirty-four percent of the commercial property and liability market. NAMIC benefits its member companies through public policy development, advocacy, and member services.

The Property Casualty Insurers Association of America (PCI) is a trade group representing more than 1,000 property and casualty insurance companies. PCI members are domiciled in and transact business in all fifty states, plus the District of Columbia and Puerto Rico. Its member companies account for $184 billion in direct written premiums. They account for 52% of all personal auto premiums written in the United States, and 39.6% of all homeowners' premiums, with personal lines writers of commercial and miscellaneous property/casualty lines. In addition to the diversified product lines they write, PCI members include all types of insurance companies, including stocks, mutuals, and companies that write on a non-admitted basis. The PCI membership is literally a cross-section of the United States property and casualty insurance industry. In light of its involvement in Oregon, the PCI is particularly interested in the resolution of the issue before the Court on behalf of its members and their interests.

The American Insurance Association (AIA), founded in 1866 as the National Board of Fire Underwriters, is a national trade association representing major property and casualty insurers writing business across the country and around the world. AIA promotes the economic, legislative, and public standing of its members; it provides a forum for discussion of policy problems of common concern to its members and the insurance industry; and it keeps members informed of regulatory and legislative

developments. Among its other activities, AIA files amicus briefs in cases before state and federal courts on issues of importance to the insurance industry.

The American Chemistry Council (ACC) represents the leading companies engaged in the business of chemistry. The business of chemistry is a key element of the nation's economy, accounting for ten cents out of every dollar in U.S. exports. Chemistry companies invest more in research and development than any other business sector.

The National Association of Manufacturers (NAM) is the nation's largest industrial trade association, representing small and large manufacturers in every industrial sector and in all fifty states. NAM's mission is to enhance the competitiveness of manufacturers and improve American living standards by shaping a legislative and regulatory environment conducive to U.S. economic growth and to increase understanding among policymakers, the media, and the general public about the importance of manufacturing to America's economic strength.

Founded in 1986, the American Tort Reform Association (ATRA) is a broad-based coalition of more than 300 businesses, corporations, municipalities, associations, and professional firms that have pooled their resources to promote reform of the civil justice system with the goal of ensuring fairness, balance, and predictability in civil litigation. For more than a decade, ATRA has filed *amicus curiae* briefs in cases before state and federal courts that have addressed important liability issues.

SUMMARY OF ARGUMENT

For more than 200 years, a basic tenet of recovery in tort has been that liability should be imposed only when an individual has sustained a physical injury. This rule requires an objective showing that the plaintiff has been harmed in order to support the transfer of resources to that plaintiff from the defendant. Medical monitoring cases brought by plaintiffs with no present physical injury cannot be reconciled with the traditional tort law rule. Without this traditional rule, it is virtually impossible to make an objective determination that a plaintiff has suffered actual harm. The creation of a medical monitoring claim as proposed by Plaintiff-Petitioner would eliminate the long-established injury requirement by permitting plaintiffs to recover based on the mere *possibility* of a future injury.

The Supreme Court of the United States, five of the last six state courts of last resort to consider the issue — the Alabama, Nevada, Kentucky, Michigan, and Mississippi Supreme Courts — and numerous other state and federal courts have rejected medical monitoring absent physical injury.

The recognition of medical monitoring absent present physical injury should be rejected in Oregon for several reasons. First and foremost, such a decision would mark a major substantive change in fundamental tort law. Such radical and widespread changes in tort law are best left to the Legislature, which is better equipped to make far-reaching changes in the substantive law because of its information-gathering ability and prospective treatment of new laws.

Moreover, in order to fashion a medical monitoring remedy, courts would be faced with the monumental task of developing a system for the fair and equitable

administration of these claims, a function that would consume judicial resources. Recognition of a medical monitoring claim also may threaten payment to the truly injured, who are in greater need of adequate and timely relief. Further, medical monitoring would foster widespread litigation with potentially enormous liability. On a daily basis, almost everyone comes into contact with a large number of substances that, arguably, may warrant medical monitoring relief.

This Court's recognition of a claim for medical monitoring absent physical injury would also have significant negative consequences in Oregon and beyond when future courts consider whether to allow medical monitoring claims for mere exposure in their own jurisdictions. This Court should neither recognize nor endorse novel new claims involving such a substantial departure from fundamental tort law and sound public policy.

ARGUMENT

I. TRADITIONAL TORT LAW AND SOUND PUBLIC POLICY DO NOT SUPPORT THE RECOGNITION OF MEDICAL MONITORING ABSENT PHYSICAL INJURY

For over 200 years, one of the fundamental principles of tort law has been that a plaintiff cannot recover without proof of a physical injury. *See* William L. Prosser, *Handbook on the Law of Torts* § 54, at 330- 33 (4th ed. 1971).[2] At times, this bright line rule may seem harsh, but it is the best filter the courts have been able to develop

---

[2] *See Lowe v. Philip Morris USA, Inc.*, 207 Or App 532, 544-45, 142 P3d 1079, 1086 (2006). Oregon law follows this traditional physical injury rule. *See, e.g., Gaston v. Parsons*, 318 Or 247, 253, 864 P2d 1319, 1322 (1994); *Hall v. Cornett.*, 193 Or 634, 643, 240 P2d 231 (1952).

to prevent a flood of claims, to provide faster access to courts for those with "reliable and serious" claims, *Metro-North Commuter R.R. Co. v. Buckley*, 521 US 424, 444 (1997), and to ensure that defendants are held liable only for objectively verifiable, genuine harm. Medical monitoring cases brought by plaintiffs with no present manifest injury cannot be reconciled with the traditional "physical injury" rule in tort law.

Courts may be tempted to permit recovery for medical monitoring because the claims have "emotional and political appeal" and our society has developed a "heightened sensitivity to environmental issues." Susan L. Martin & Jonathan D. Martin, *Tort Actions for Medical Monitoring: Warranted or Wasteful?*, 20 Colum J Envtl L 121, 121 (1995) ("Martin & Martin"). Nevertheless, the significant problems surrounding medical monitoring awards absent physical injury show the law should not be stretched to recognize such claims. *See* Victor E. Schwartz et al., *Medical Monitoring – Should Tort Law Say Yes?*, 34 Wake Forest L Rev 1057 (1999) ("Schwartz et al."); Victor E. Schwartz et al., *Medical Monitoring: The Right Way and the Wrong Way*, 70 Mo L Rev 349 (2005).

A. Medical Monitoring Will Lead To A Flood Of Litigation, Clogging Access To Courts And Depleting Resources That Would Be Better Used To Compensate The Truly Injured

Allowing a claim for medical monitoring for asymptomatic plaintiffs would likely attract a flood of new lawsuits to the state. This concern, among others, was a primary reason for the United States Supreme Court to reject medical monitoring claims in *Metro-North*, *supra*, where the Court noted, "tens of millions of individuals may have suffered exposure to substances that might justify some form of substance-

exposure-related medical monitoring." *Metro-North*, 521 US at 442 (rejecting medical monitoring claims under the Federal Employers' Liability Act (FELA), 45 USC §§ 51 *et seq.*).

Aligning with the U.S. Supreme Court, commentators have noted that allowing medical monitoring claims for asymptomatic plaintiffs will impose astronomical costs on defendants, because "we may all have reasonable grounds to allege that some negligent business exposed us to hazardous substances." Martin & Martin, *supra,* at 131; Schwartz et al., *supra* at 1071 ("[C]ourts awarding medical monitoring produce results that can allow for unfettered recoveries and lead to an avalanche of claims."). An example of the "enormity of the universe of potential medical monitoring plaintiffs" is the amount of potentially hazardous substances with which the public comes into contact. 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, 528 (2000) ("Maskin et al.").[3]

Because so many individuals may qualify as potential medical monitoring claimants, plaintiffs' attorneys could basically recruit people off the street to serve as plaintiffs. No longer would plaintiffs' attorneys have to wait for injury to file suit. The familiar advertisement, "Have you been injured?" could become, "Don't wait

---

[3] The Environmental Protection Agency reported in 1992 that nearly 20 percent of the U.S. population, or approximately 40 million people, live within four miles of a hazardous waste site on the National Priority List. *See* Paul J. Komyatte, *Medical Monitoring Damages: An Evolution of Environmental Tort Law*, 23 Colo Law 1533, 1533 (1994) (citing U.S. Department of Health and Human Services, Hazardous Substances & Public Health (Atlanta: Agency for Toxic Substances and Disease Registry, Vol. 2, No. 2, May/June 1992) at 1)).

until you're hurt, call now!" Victor Schwartz, *Some Lawyers Ask, Why Wait for Injury? Sue Now*!, USA Today, July 5, 1999, at A17. The Texas Supreme Court also has observed, "[i]f recovery were allowed in the absence of present disease, individuals might feel obliged to bring suit for such recovery prophylactically, against the possibility of future consequences from what is now an inchoate risk." *Temple-Inland Forest Prods. Corp. v. Carter*, 993 SW2d 88, 93 (Tex 1999). As a result, Oregon courts could become clogged with speculative medical monitoring claims. Access to justice for those with present, serious, physical injuries may be delayed or denied. As one 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 (SD W Va 1990) (emphasis added) (applying Virginia law), *aff'd*, 958 F2d 36 (4th Cir 1991), *cert. denied*, 502 US 1033 (1992).

The practical effect would be to facilitate recoveries for individuals who have no injury and may never become sick at the expense of the sick and dying and their families. *See id.* The asbestos litigation environment vividly illustrates this problem. Even though claimants are supposed to have an injury to bring a claim, the standards have become so permissive in many jurisdictions that at one point up to ninety percent

of asbestos claimants were not impaired. *See* Mark A. Behrens, *Some Proposals for Courts Interested in Helping Sick Claimants and Solving Serious Problems in Asbestos Litigation*, 54 Baylor L Rev 331, 342 (2002).[4] Mass filings by the non-sick have pushed an estimated eighty-five employers into bankruptcy and threaten payments to the sick. *See* Paul F. Rothstein, *What Courts Can Do in the Face of the Never-Ending Asbestos Crisis*, 71 Miss LJ 1 (2001); Victor E. Schwartz & Rochelle M. Tedesco, *The Law of Unintended Consequences in Asbestos Litigation: How Efforts to Streamline the Litigation Have Fueled More Claims*, 71 Miss LJ 531 (2001); Martha Neil, *Backing Away from the Abyss*, ABA J, Sept 2006, at 26, 29; *see also In re Combustion Eng'g, Inc.*, 391 F3d 190, 201 (3d Cir 2005) ("For some time now, mounting asbestos liabilities have pushed otherwise viable companies into bankruptcy."). If medical monitoring could be obtained by the "[t]ens of millions of Americans [who] were exposed to asbestos in the workplace over the past several decades," the result could be devastating for the courts, defendant businesses, and deserving claimants with real injuries. Stephen J. Carroll et al., *Asbestos Litigation* 2 (RAND Inst. for Civil Justice 2005). Adoption of medical monitoring would exacerbate these problems to the detriment of the sick.

There is also little need for a medical monitoring cause of action because other established sources of payment exist to cover these costs, like employer-provided

---

[4] Professor Lester Brickman has said, "the 'asbestos litigation crisis' would never have arisen and would not exist today" if not for the claims filed by the unimpaired. Lester Brickman, *Lawyers' Ethics and Fiduciary Obligation in the Brave New World of Aggregative Litigation*, 26 Wm & Mary Envtl L & Pol'y Rev 243, 273 (2001).

health insurance plans. As the U.S. Supreme Court recognized, recovery based on medical monitoring without present injury "would ignore the presence of existing alternative sources of payment, thereby leaving a court uncertain about how much of the potentially large recoveries would pay for otherwise unavailable medical testing and how much would accrue to plaintiffs for whom employers or other sources (say, insurance now or in the future) might provide monitoring in any event." *Metro-North*, 521 US at 442. In addition, medical monitoring claims in the workplace setting could fall outside of the workers' compensation system, which could subject employers to endless liability. Generally, workers' compensation systems afford the exclusive remedy for an injured worker. *See* Arthur Larson & Lex K. Larson, *Larson's Worker's Compensation Desk Edition* § 100.01 (2000). One exception to this rule is that an employee may sue an employer for injuries not within the scope of the worker's compensation statute. This is logical as a general proposition, because to hold otherwise would mean that no recovery is available for injuries falling outside of the worker's compensation system.

It is not hard to imagine a situation in which, more than a year after a plaintiff was last exposed to a substance, a report is issued indicating that the substance may increase the plaintiff's risk of disease by a minimal 1-in-100,000 (equating to a 99,999-in-100,000 chance that the plaintiff will **never** develop the disease), which is all that some state courts require for medical monitoring claims to proceed. The employer could then be liable for the cost of monitoring for the onset of the disease in which there is a 99,999-in-100,000 chance that plaintiff will **never** contract the "feared" medical condition, because worker's compensation claimants face a one year

statute of limitations in Oregon. *See* ORS, § 656.265(2) (2007). Examples of situations in which this could happen abound: gas station attendants exposed to gasoline fumes, or barbers and beauticians exposed to chemical fumes from hair products, to name just two. Virtually every employer could be at risk of being responsible for employee health care costs indefinitely, even though there is virtually no chance – *i.e.*, only 1-in-100,000 – that the plaintiff will contract the disease.

B. The Enforcement of Remedies for Medical Monitoring Absent Physical Injury Is Unworkable

There are two potential methods to dispense a medical monitoring remedy: as a lump sum payment or by a court-administered fund. Both of these options may cause serious problems for the Court and create doubt about the availability of a suitable remedy for medical monitoring claims.

1. Lump Sum Awards For Medical Monitoring Create the Opportunity for Abuse

Courts cannot dictate how recipients will spend a lump-sum award. "Since the medical monitoring award itself is not appropriately monitored, there is no assurance that the award, however large, will be used to help a person detect the onset of treatable disease." Schwartz et al., *supra*, at 1077-78.[5] Any person who was even momentarily exposed to a toxic substance will be able to recover damages. "[T]he

---

[5] *See, e.g., Lilley v. Bd. of Supervisors of La. State Univ.*, 735 So 2d 696 (La App), *writ denied*, 744 So 2d 629 (La 1999). Merely one year after the Louisiana Supreme Court recognized medical monitoring as a cause of action, the trial court awarded $12,000 per plaintiff for medical monitoring *despite the fact the Bourgeois court expressly declined to extend its holding to claims for lump sum damages. See Bourgeois v. A.P. Green Indus., Inc.*, 716 So 2d 355, 357 n.3 (La 1998). The award was overturned on appeal.

potential for abuse is apparent." 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, 283 (1993) ("McCarter").

The New Jersey Supreme Court's decision in *Ayers v. Township of Jackson*, 525 A2d 287 (NJ 1987), illustrates the fact that awards for medical monitoring often may not lead to any medical monitoring whatsoever. In *Ayers*, 339 plaintiffs, all without present physical injury, were awarded over $8 million as a lump sum for medical monitoring. *See id.* at 291. One author conducted an informal survey of the plaintiffs after the lawsuit. While the survey garnered only three responses, they may be telling: one plaintiff noted that he used his recovery to buy a home and that, after receiving his award, he had not seen his doctor any more than in prior years. The two other respondents, who could not even remember if the damages they received were for medical monitoring, reported they did not see their doctors more frequently as a result of the award. *See* McCarter, *supra*, at 257-58 n.158. The testimony of some plaintiffs who have sought medical monitoring damages is an indicator of the level of their unwillingness to use any funds for monitoring and lack of desire to be tested. In *Ironbound Health Rights Advisory Board Commission v. Diamond Shamrock Chemical Co.*, 578 A2d 1248 (NJ Super Ct App Div 1990), motion practice left medical monitoring as the only damage claim remaining for most of the ninety-seven plaintiffs in a dioxin exposure suit. *See* McCarter, *supra*, at 270 n.212. In one plaintiff's deposition, the defense attorney asked the plaintiff if he had ever been or ever wanted to be tested to discover if he had any toxic substance in his body. The plaintiff seeking medical monitoring replied, "I don't know. I don't know if I want to

know." *Ironbound*, 578 A2d at 1249. At trial, the plaintiffs were cross-examined about whether they had ever expressed their concerns about their exposures to their doctors during doctor visits in the time leading up to trial. Time and time again, plaintiffs responded they had not mentioned any such concerns, though they knew of the exposures at the time of the visits. *See* McCarter, *supra*, at 270-71 n.212. The fact that these plaintiffs did not alert their doctors to their exposures during routine visits may suggest other plaintiffs will not be quick to do so either if they are allowed to bring medical monitoring claims under Oregon law.

Similarly, in *Hansen v. Mountain Fuel Supply Co.*, 858 P2d 970 (Utah 1993), workers sought medical monitoring because of asbestos exposure. Nearly seven years after learning of their exposure, the plaintiffs participated in only preliminary examinations revealing no asbestos-related illness. Other than the preliminary tests, the plaintiffs underwent no further testing. As one commentator remarked, "[t]he fact that none had undergone testing over a period of almost seven years casts grave suspicion over their assertions that they would use any medical monitoring sums awarded for their stated purpose." Maskin et al., *supra,* at 541-42.

These examples show that medical monitoring awards may not result in the plaintiff actually being monitored. As one group of commentators noted:

> The incentive for healthy plaintiffs to carefully hoard their award, and faithfully spend it on periodic medical examinations to detect an illness they will in all likelihood never contract, seems negligible. The far more enticing alternative, in most cases, will be to put the money towards a new home, car or vacation. Visiting a physician is not something many people wish they could do more often.

Maskin et al., *supra*, at 540-41. If plaintiffs do not wish to use the money they receive from medical monitoring awards for actual medical monitoring because they do not believe there is a significant risk of the onset of disease, courts should not require defendants to allocate scarce resources for such speculative claims.

2. A Court Administered Fund Will Be Overly Burdensome For Courts and Will Tie Up Judicial Resources

The alternative to lump-sum damages awards, a court-administered fund, would seemingly mitigate the potential for abuse, but even this solution would be likely to create high, ongoing administrative costs for the court system and its personnel.

Devising a sound medical monitoring plan would require, at a minimum, specifying the nature and amount of benefits available, the source of funding and funding allotments, the procedures for determining eligibility for monitoring, the payment mechanism for the provider and the percentage of provider reimbursement, when eligible parties may join the program, the length of time the program should last, the frequency of any periodic monitoring and the circumstances in which the frequency can be changed to allow special monitoring, the content of the monitoring exams, whether the facility testing will be formal or informal, and whether the service provider is to be designated by the court or chosen by the claimant. *See* Jesse R. Lee, *Medical Monitoring Damages: Issues Concerning the Administration of Medical Monitoring Programs*, 20 Am JL & Med 251, 267-72 (1994); Gary R. Krieger et al., *Medical Surveillance and Medical Screening for Toxic Exposure*, *in* Clinical Envtl. Health & Toxic Exposures 108, 113-15 (John B. Sullivan, Jr. & Gary R. Krieger eds.,

2d ed. 2001); Myrton F. Beeler & Robert Sappenfield, *Medical Monitoring: What Is it, How Can it Be Improved?*, 87:2 Am J of Clinical Pathology 285, 286-87 (Myrton F. Beeler et al., eds. 1987) ("Beeler & Sappenfield"); David M. Studdert et al., *Medical Monitoring for Pharmaceutical Injuries: Tort Law for the Public's Health?*, JAMA, Feb 19, 2003, at 890 ("Studdert").

Additionally, as a medical monitoring program matures, its scope and administrative operation will inevitably require adjustments, particularly if the program's designers erroneously estimate funding needs or the number of eligible participants. Administrative intricacies compound in the instance of medical monitoring class actions, where courts would have to manage each class member's monitoring program, a task that would place "additional strains on courts that should be hesitant to undertake such a costly and time-consuming responsibility." Laurel J. Harbour & Angela Splittgerber, *Making the Case Against Medical Monitoring: Has the Shine Faded on this Trend?*, 70 Def Counsel J 315, 320 (2003).

II. THE DECISION WHETHER TO RECOGNIZE MEDICAL MONITORING IS BEST LEFT TO THE LEGISLATURE

Medical monitoring absent present physical injury presents an about-face to 200 years of substantive tort law. Medical monitoring claims "reject[] the prerequisite of palpable harm," eschewing "several time-honored tenets of personal injury litigation." Studdert, *supra,* at 890, 894.

Whether Oregon should permit a claim for medical monitoring absent physical injury should be decided by the Legislature, if it is to be adopted at all. The questions raised by medical monitoring claims are difficult and complex, presenting great

changes to traditional tort law concepts. *See* Patricia E. Lin, Note, *Opening the Gates to Scientific Evidence in Toxic Exposure Cases: Medical Monitoring and Daubert*, 17 Rev Litig 551, 568 (1998) ("Lin"). This Court has recognized limited circumstances under which a common law doctrine will be reconsidered,[6] none of which are present here. There is no dispute that the judiciary has the power to alter the common law, but this Court has definitively restricted the conditions under which this type of change may occur in Oregon. *See G.L. v. Kaiser Found. Hosps.*, 306 Or 54, 58, 757 P2d 1347, 1349 (1988). The Court "has not embraced freewheeling judicial policy declarations in other cases," and will not "reverse a well-established rule [based on] judicial fashion or personal policy preference, which are not sufficient grounds for such a change." 306 Or at 58-9, 757 P2d at 1349-50.

Because the recognition of a medical monitoring tort absent physical injury would be a sea change from the current state of the law and would involve the consideration of a vast array of concerns and interests in order to implement this remedy properly, it is a task more suitable for the Legislature. The limitations on the Court, inherent to the judiciary, prohibit it from adequately considering all of the intricacies of this substantive issue and the widespread effect it would have on the general population. The Court should therefore leave this decision to the Legislature.

---

[6] "Ordinarily this [C]ourt reconsiders a nonstatutory rule or doctrine upon one of three premises: (1) that an earlier case was inadequately considered or wrong when it was decided; (2) that surrounding statutory law or regulations have altered some essential legal element assumed in the earlier case; or (3) that the earlier rule was grounded in and tailored to specific factual conditions, and that some essential factual assumptions of the rule have changed." *Kaiser Found. Hosps.*, 306 Or at 59, 757 P2d at 1349 (1988) (internal quotations omitted).

See David C. Campbell, Comment, *Medical Monitoring: The Viability of a New Cause of Action in Oregon*, 82 Or L Rev 529, 547–49 (2003) (concluding that the "creation of a medical monitoring tort is based largely, if not exclusively, on public policy considerations" and that the "Oregon Legislative Assembly is better suited than the courts to revise our tort system by eliminating the physical injury requirement.").

A. The Recognition of Medical Monitoring Absent Physical Injury Would Be a Sweeping Change In The Current Law and Should Be Established By the Legislature

For much of this nation's history, the role of courts has been to develop tort law in a slow, incremental fashion. In recent years, however, some courts have abandoned this incremental approach. This has resulted in potentially large adverse consequences to the nation's civil justice system and to those who must abide by its rules.

Allowing an award for medical monitoring where a plaintiff currently suffers no harm and has no symptoms of harm is an abrupt change from a fundamental principle of tort law, with the enormous potential for expense for defendants and harm to future claimants. As Professors Henderson and Twerski, the Reporters for the Restatement Third, Torts: Products Liability (1997), note:

> any attempt to embrace [medical monitoring] within the mainstream of traditional tort law is manifestly unwise. In truth, [medical monitoring claims] constitute radical departures from longstanding norms of tort law, advanced in recent years to bludgeon a disfavored group of defendants. But the wrongdoing of a defendant, or defendants, does not justify creating legal doctrine that is substantively unfair, especially when doing so strikes mercilessly at another group of plaintiffs who, when the funds to pay damages run dry, will be denied recovery for real, rather than anticipated, ills.

James A. Henderson, Jr. & Aaron D. Twerski, *Asbestos Litigation Gone Mad: Exposure-based Recovery for Increased Risk, Mental Distress, and Medical Monitoring, 53* SC L Rev 815, 818 (2002).

Furthermore, the creation of a new medical monitoring cause of action is a distinctly legislative function. The recognition of medical monitoring would mark a severe departure from past practice and, as such, it would be inappropriate for the courts, to implement such a change. The Legislature, however, possesses the resources and expertise necessary to consider and enact a medical monitoring cause of action if, after careful deliberation, it determines the need for such relief.

B. The Legislature is Better Positioned to Consider Information and Balance the Competing Interests Involved in Medical Monitoring

The effect of recognizing medical monitoring would extend far beyond the confines of Plaintiff-Petitioner's case and would involve the consideration of many issues other than those presently before the Court. The questions raised by medical monitoring claims are difficult and complex, presenting great changes to traditional tort law concepts. *See* Lin, *supra*, 17 Rev Litig at 568. For example, consideration must be given to the types of health conditions that may be monitored; the likelihood that monitoring will detect the existence of disease and the adverse consequences that false positives may bring; the types of substances and the level of exposure to those substances that may trigger the need for medical monitoring; the level of increased risk of developing an adverse health condition that may trigger monitoring and the measure of that increase; the types of tests to be used in monitoring; and the potential

medical, scientific, and economic downsides to medical monitoring; as well as how to structure the continuing administration of each patient's monitoring program.

Medical monitoring claims necessarily include scientific and medical decisions about which treatment is proper for specific plaintiffs. The U.S. Supreme Court recognized these difficult considerations, noting that "[t]hose difficulties can reflect uncertainty among medical professionals about just which tests are most usefully administered and when." *Metro-North*, 521 US at 441. Adding complexity, this determination may change over time with emerging cures and treatments for current diseases and with the introduction of new types of diseases. *See* Beeler & Sappenfield, *supra,* at 287.

The Legislature would also be best suited to establish the circumstances under which a medical monitoring cause of action would be available. The scope of this issue is exceedingly broad and may encompass many different types of exposure that do not require legal protection. As the Supreme Court stated,

> [T]ens of millions of individuals may have suffered exposure to substances that might justify some form of substance-exposure-related medical monitoring . . . . [T]hat fact, along with uncertainty as to the amount of liability, could threaten both a "flood" of less important cases . . . and the systemic harms that can accompany "unlimited and unpredictable liability."

Metro-North, 521 US at 442. Only the Legislature, with its ability and experience in considering the different angles of an issue, is able to adequately craft a medical monitoring cause of action that properly addresses the perceived problem while minimizing other unwanted effects. Indeed, in an attempt to confine claims, courts that have permitted recovery for medical monitoring have not demonstrated an ability

to articulate consistent eligibility requirements for medical monitoring, and have produced results permitting unlimited recoveries.

It is perilous for courts to attempt to fashion a bright-line rule allowing medical monitoring of all types of health conditions, due to the depth and complexity of the issues involved. This type of decision requires access to a substantial amount of complicated, scientific information and the resources to appropriately consider this information. This is precisely the type of decision making process that falls within the legislative function and thus the Court should leave medical monitoring to be established, if at all, to the Legislature.[7]

Finally, there are many policy concerns on both sides of this issue that the Legislature is best equipped to balance and consider. All interested persons and entities will be able to actively engage in the political process and voice their concerns. This type of involvement is vital to the resolution of the medical monitoring issue. Moreover, the legislative process will provide potential defendants with adequate notice of the law, thereby enabling them to conform their behavior.

---

[7] One state legislature, in Louisiana, has disagreed with that state's supreme court and has overruled its recognition of medical monitoring claims absent physical injury. By a 1999 Amendment, Louisiana Civil Code Art 2315 now disallows civil damages "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."

III. MOST OTHER JURISDICTIONS THAT HAVE RECENTLY CONSIDERED THIS ISSUE HAVE REJECTED MEDICAL MONITORING ABSENT PRESENT PHYSICAL INJURY

This Court's decision to reject medical monitoring claims would be in line with most other jurisdictions that have considered this issue. Other courts have rejected medical monitoring based on exposure to a wide range of substances, including asbestos, cigarette smoke, water pollution, and prescription drugs.

A. The United States Supreme Court Has Rejected Medical Monitoring

In *Metro-North Commuter R.R. Co. v. Buckley*, 521 US 424 (1997), the United States Supreme Court ruled 7-2 against allowing a medical monitoring claim brought by a pipefitter against his employer for occupational exposure to asbestos under the Federal Employers' Liability Act (FELA), a statute that has often been construed in favor of plaintiffs.[8] The Supreme Court closely considered the policy concerns militating against adoption of a medical monitoring cause of action, including the difficulty in identifying which medical monitoring costs are over and above the preventative medicine ordinarily recommended for everyone, conflicting testimony from medical professionals as to the benefit and appropriate timing of particular tests or treatments, and each plaintiff's unique medical needs. *See Metro-North*, 521 US at 441-42. The Court appreciated that medical monitoring would permit literally "tens

---

[8] *See, e.g., Beeber v. Norfolk S. Corp.*, 754 F Supp 1364, 1372 (ND Ind 1990) ("If the defendant's negligence, however slight, plays any part in producing plaintiff's injury, the defendant is liable."); *Pry v. Alton & S. Ry. Co.*, 698 NE2d 484, 499 (Ill App 1992) (under FELA "[o]nly slight negligence of the defendant needs to be proved").

of millions of individuals" to justify "some form of substance-exposure-related medical monitoring." *Id.* at 442. 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 monitoring are often available, such as through employer-provided health insurance plans.[9] Further, the Court said that "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' of payment." *Id.* at 443.

B. Most States Considering Medical Monitoring Absent Physical Injury Have Refused To Recognize It As A Viable Claim

In accordance with *Metro-North*, traditional principles of tort law, and sound public policy, most state courts of last resort recently presented with the issue have rejected medical monitoring. For instance, in *Badillo v. American Brands, Inc.*, 16 P3d 435 (Nev 2001), the Nevada Supreme Court rejected claims by smokers and casino workers who brought class actions seeking the establishment of a court-supervised medical monitoring program to aid in the early diagnosis and treatment of alleged tobacco-related illnesses. The court held that "Nevada common law does not

---

[9] Medical monitoring "may be an extremely redundant remedy for those who already have health insurance." Maskin et al., *supra,* at 528. Approximately 80 percent of all standard medical testing is paid for by third party insurance. *See* Am Law Inst, 2 *Enter. Responsibility for Pers. Injury – Reporters' Study* 379 (1991).

recognize a cause of action for medical monitoring," *id.* at 438, observing that medical monitoring is "a novel, non-traditional tort and remedy." *Id.* at 441. The court stated that "[a]ltering common law rights, creating new causes of action, and providing new remedies, for wrongs is generally a legislative, not a judicial function." *Id.* at 440.

The Alabama Supreme Court considered medical monitoring in *Hinton v. Monsanto Co.*, 813 So 2d 827, 828 (Ala 2001), which involved a claim by a citizen who alleged that he had been exposed to polychlorinated biphenyls ("PCBs") that were reportedly released into the environment by the defendant. The Alabama Supreme Court refused to recognize a medical monitoring cause of action in the absence of a "manifest, present injury." *Id.* at 829. The court stated that "[t]o recognize medical monitoring as a distinct cause of action . . . would require this court to completely rewrite Alabama's tort-law system, a task akin to traveling in uncharted waters, without the benefit of a seasoned guide" – a voyage on which the court was "unprepared to embark." *Id.* at 830. The court also discussed a number of public policy concerns, such as a potential never-ending avalanche of claims and the unlimited liability exposure for defendants. It realized that "a 'flood' of less important cases" would drain the pool of resources available for meritorious claims by plaintiffs with serious, present injury and adversely affect the allocation of scarce medical resources. *Id.* at 831 (quoting *Metro-North*, 521 US at 442 (internal citations omitted)). The court concluded: "we find it inappropriate . . . to stand Alabama tort law on its head in an attempt to alleviate [plaintiffs'] concerns about what *might* occur in the future. . . . That law provides no redress for a plaintiff who has no present injury

or illness." *Id.* at 831-32.

The highest court in Kentucky has also rejected medical monitoring in *Wood v. Wyeth-Ayerst Laboratories*, 82 SW3d 849 (Ky 2002). There, the plaintiff sought the creation of a court-supervised medical monitoring fund, for herself and as representative for a class of patients, to detect the possible onset of primary pulmonary hypertension from ingesting the "Fen-Phen" diet drug combination. The Kentucky Supreme Court, citing cases dating as far back as 1925, stated: "This Court has consistently held that a cause of action in tort requires a present physical injury to the plaintiff." *Id.* at 852. The court concluded that "all of these cases lead to the conclusion that a plaintiff must have sustained some physical injury before a cause of action can accrue. To find otherwise would force us to stretch the limits of logic and ignore a long line of legal precedent." *Id.* at 853-54.

Additionally, the Supreme Court of Michigan decided not to recognize medical monitoring in *Henry v. Dow Chem. Co.*, 701 NW2d 684 (Mich 2005). Plaintiffs there brought a claim based on the negligent release of dioxin by a chemical company, alleging no claims of present injury but sought to recover for harm resulting from the potential health effects of the exposure. The court concluded that the recognition of a medical monitoring cause of action would "depart[] drastically from [the] traditional notions of a valid negligence claim" and that "judicial recognition of plaintiffs' claim may also have undesirable effects that neither [the court] nor the parties can satisfactorily predict." *Id.* at 694. The court further opined that this type of claim would "drain resources needed to compensate those with manifest physical injuries

and a more immediate need for medical care," and that this was a change that "ought to be made, if at all, by the Legislature." *Id.* at 686, 694.

More recently, Mississippi's highest court rejected medical monitoring in *Paz v. Brush Engineered Materials, Inc.*, 949 So 2d 1 (Miss 2007) (en banc), where a class of workers exposed to beryllium sought the establishment of a medical monitoring fund. *Id.* at 2. The court held that "[t]he possibility of a future injury is insufficient to maintain a tort claim," and that "it would be contrary to current Mississippi law to recognize a claim for medical monitoring costs for mere exposure to a harmful substance without proof of current physical or emotional injury from that exposure." *Id.* at 5. The court noted that it had "continuously rejected the proposition that within tort law there exists a cause of action or a general category of injury consisting solely of potential future injury," and that it "continues to decline to recognize such a cause of action." *Id.* at 9.[10]

Several federal courts have also addressed medical monitoring and have expressed concerns similar to those of many of the state courts. For instance, in *Carroll v. Litton Systs., Inc.,* No. B-C-88-253, 1990 WL 312969 (WDNC Oct 29,

---

[10] In contrast, the Missouri Supreme Court recently sided with West Virginia, reaching the opposite conclusion and choosing to recognize medical monitoring in *Meyer ex rel. Coplin v. Fluor Corp.*, 2007 WL 827762 (Mo Mar 20, 2007) (en banc). The Court's opinion relies upon pre-*Metro-North* authority and does not address any of the concerns identified by the Supreme Court and other states that have rejected medical monitoring. Moreover, unlike Oregon, Missouri case law did not require a present physical injury in order to recover under a tort theory. *Id.* at *4. Like other courts, the Missouri Supreme Court also declined to establish any parameters for the new tort it created, leaving litigants and its lower courts unguided to find their way in the tangle of medical, scientific, and policy issues involved in implementing the court's vague directive. *Id.* at *5 n.7.

1990), the U.S. District Court for the Western District of North Carolina dismissed plaintiffs' medical monitoring claims because "[n]o statute or case in North Carolina creates causes of action based upon claims of increased risk of disease or for medical monitoring costs." *Id.* at 87. The court went on to say that "[t]he creation of such causes of action implicates policy issues that should be left to the legislature in the first instance." *Id.*

The U.S. District Court for the Western District of Texas, in *Norwood v. Raytheon Co.*, 414 F Supp 2d 659 (WD Tex 2006), similarly objected to the recognition of medical monitoring as a separate cause of action, chiefly citing the U.S. Supreme Court's reasoning in *Metro-North*. *Id.* at 666-67. The court observed that "medical monitoring as an independent cause of action in the absence of a present physical injury is neither universally rejected nor accepted," and that "[t]he majority of states considering medical monitoring as a cause of action since *Metro-North* have rejected the claims." *Id.* at 666. Many other state and federal courts have come to the same conclusion and have declined to recognize medical monitoring.[11]

---

[11] *See Goodall v. United Illuminating*, 1998 WL 914274, *7-10 (Conn Super Ct Dec 15, 1998) (unreported); *Mergenthaler v. Asbestos Corp. of Am.*, 480 A2d 647, 651 (Del 1984); *Johnson v. Abbott Laboratories*, 2004 WL 3245947, *6 (Ind Cir Ct Dec 31, 2004) (unreported) ("Indiana does not recognize medical monitoring as a cause of action."); *Abusio v. Consol. Edison Co. of N.Y., Inc.*, 656 NYS2d 371, 372 (NY App Div) (requiring a showing of clinically demonstrable presence of toxins in the plaintiff's body or some indication of exposure-related disease to establish "reasonable basis" for recovery of future medical monitoring costs), *lv. denied*, 686 NE2d 1363 (NY 1997); *see also Parker v. Brush Wellman, Inc.*, 377 F Supp 2d 1290, 1302 (ND Ga 2005) ("[N]o Georgia court has ever indicated an inclination to recognize such a remedy."); *Ball v. Joy Technologies, Inc.*, 958 F2d 36, 39 (4th Cir 1991) (dismissing claim for medical monitoring damages because Virginia law

(continued...)

These jurisdictions demonstrate careful analysis and prudent decision making when faced with the same question pressed before this Court now. In accordance with these jurisdictions, and for the reasons discussed herein, this Court should refuse to recognize medical monitoring without present physical injury as a viable cause of action in Oregon.

(continued)

requires a present, physical injury prior to recovery for negligence), *cert. denied*, 502 US 1033 (1992); *Thompson v. Am. Tobacco Co., Inc.*, 189 FRD 544, 552 (D Minn 1999) ("Given the novelty of the tort of medical monitoring and that the Minnesota Supreme Court has yet to recognize it as an independent theory of recovery, this Court is not inclined at this time to find that such a tort exists under Minnesota law."); *Trimble v. Asarco, Inc.*, 232 F3d 946, 963 (8th Cir 2000) (holding Nebraska law has not recognized a cause of action or damages for medical monitoring and predicting that Nebraska courts would not judicially adopt such a right or remedy), *abrogated on other grounds by Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 US 546 (2005); *Mehl v. Canadian Pac. Ry.*, 227 FRD 505, 518 (DND 2005) ("a plaintiff [in North Dakota] would be required to demonstrate a legally cognizable injury to recover any type of damages in a newly recognized tort, including a medical monitoring claim."); *Rosmer v. Pfizer*, 2001 WL 34010613, *5 (DSC Mar 30, 2001) (unreported) (noting that South Carolina has not recognized such a claim); *Jones v. Brush Wellman, Inc.*, 2000 WL 33727733, *8 (ND Ohio 2000) (unreported) ("It is clear that under Tennessee law, a plaintiff must allege a present injury or loss to maintain an action in tort. No Tennessee cases support a cause of action for medical monitoring in the absence of a present injury."); *Bostick v. St. Jude Med., Inc.*, 2004 WL 3313614, *14 (WD Tenn Aug 17, 2004) (unreported) ("[A] review of the applicable case law reveals that Tennessee does require a present injury.") (interpreting Tennessee law); *Duncan v. Northwest Airlines, Inc.*, 203 FRD 601, 606 (WD Wash 2001) (anticipating that Washington courts would not recognize a cause of action for medical monitoring because Washington law requires existing injury in order to pursue a negligence claim); *Purjet v. Hess Oil Virgin Islands Corp.*, 1986 WL 1200, *4 (DVI Jan 08, 1986) (rejecting medical monitoring claim absent physical injury under Virgin Islands law); *cf.* La Civ Code Ann art 2315 (West 2005).

C. The States That Have Adopted Medical Monitoring Demonstrate Why It Should Not Be Recognized By This Court

Although several states have decided to adopt medical monitoring, their experiences demonstrate why this Court should not follow suit. Most states that have adopted medical monitoring did so prior to the Supreme Court's *Metro-North* decision. Their subsequent experience serves as a cautionary tale. West Virginia is perhaps the best illustration of adverse impacts of why not to permit medical monitoring claims for asymptomatic plaintiffs. In *Bower v. Westinghouse Elec. Corp.*, 522 SE2d 424, 432-33 (W Va 1999), the Supreme Court of Appeals of West Virginia established an independent cause of action for an individual to recover future medical monitoring costs absent physical injury, stating that the amount of exposure to a toxic substance required to file a suit does not have to correlate with a level sufficient to cause injury. *See id.* at 433-34. In other words, West Virginia permits uninjured plaintiffs to sue for medical monitoring even when testing is not medically necessary or beneficial, and does not require plaintiffs to spend any of the award on actual monitoring.

As a result, thousands of uninjured people from other states have sought to have their medical monitoring claims adjudicated en masse in West Virginia as well which has caused a great deal of concern. *See, e.g.*, Robert D. Mauk, *McGraw Ruling Harms State's Reputation in Law, Medical Monitoring*, Charleston Gazette, Mar. 1, 2003, at 5A ("[T]he *Bower* medical-monitoring ruling has cast a shadow over our state's reputation in the legal field. It affects West Virginia's jobs, taxes, health care and the public credibility of our courts."). *Bower* contributed to West Virginia being

roundly criticized by the American Tort Reform Association for several years running. Several recent U.S. Chamber of Commerce studies also ranked West Virginia close to the bottom among all states for creating a fair and reasonable litigation environment.

Louisiana provides another clear example as to why the Court should not adopt medical monitoring. The Supreme Court of Louisiana recognized medical monitoring as a cause of action in *Bourgeouis v. A.P. Green Industries, Inc.*, 716 So 2d 355 (La 1998), stating that " a plaintiff who can demonstrate a need for medical monitoring has suffered damage . . . ." *Id.* at 361. Experience in Louisiana since *Bourgeois* has demonstrated that recognition of medical monitoring will lead to more litigation. *See, e.g., Dragon v. Cooper/T. Smith Stevedoring Co., Inc.*, 726 So 2d 1006 (La App 1999) (permitting a class action for medical monitoring for seamen exposed to asbestos); *Scott v. Am. Tobacco Co.*, 725 So 2d 10 (La App 1998) (certifying as a medical monitoring class all Louisiana residents who were cigarette smokers on or before May 24, 1996, provided that each claimant started smoking on or before Sept 1, 1988), *writ denied*, 731 So 2d 189 (La 1999). The state legislature swiftly reversed *Bourgeouis*, amending its statutory law to *exclude* medical monitoring claims as a basis for liability for damages. *See* La Civ Code Ann art 2315. Louisiana's experience strongly demonstrates that this issue is appropriately left to the legislative process and should not be resolved by judicial action.

Moreover, it is also troublesome that these recognizing states are split over the fundamental nature of medical monitoring. Several courts have held that medical monitoring is properly recognized as an independent cause of action,[12] while others have concluded that it is merely a potential remedy.[13] The inability of medical monitoring jurisprudence to even agree on basic theory is yet another reason why the doctrine should not be adopted by this Court. The states recognizing medical monitoring have shown that it is an undesirable outcome and is therefore one that this Court should choose to avoid.

CONCLUSION

For the foregoing reasons, *amici curiae* respectfully request that the Court of Appeals' decision be affirmed.

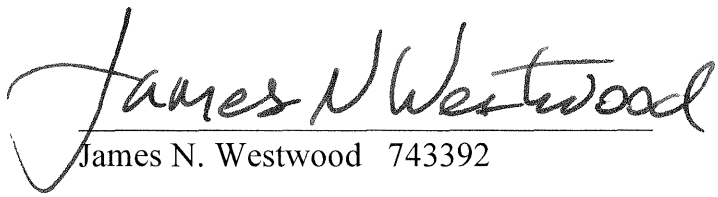
---

[12] *See Potter v. Firestone Tire & Rubber Co.*, 863 P2d 795, 823 (Cal 1993); *Meyer ex rel. Coplin v. Fluor Corp.*, 2007 WL 827762 (Mo Mar 20, 2007) (en banc); *Ayers v. Township of Jackson*, 525 A2d 287, 312 (NJ 1987).

[13] *Redland Soccer Club, Inc. v. Dep't of the Army*, 696 A2d 137, 145-48 (Pa 1997); *Hansen v. Mountain Fuel Supply Co.*, 858 F2d 970, 978 (Utah 1993); *Bower v. Westinghouse Corp.*, 522 SE2d 424, 429 (W Va 1999).

Dated June 19, 2007.

STOEL RIVES LLP



James N. Westwood 743392

- and –

CROWELL & MORING LLP
Jerome A. Murphy (*pro hac vice*)
Natalia R. Medley (*pro hac vice*)

Counsel for *Amici Curiae*

Of Counsel:

Robin S. Conrad
Amar D. Sarwal
NATIONAL CHAMBER
LITIGATION CENTER, INC.
1615 H Street, NW
Washington, DC 20062
(202) 463-5337

Donald D. Evans
AMERICAN CHEMISTRY COUNCIL
1300 Wilson Boulevard
Arlington, VA 22209
(703) 741-5000

Gregg Dykstra
NATIONAL ASSOCIATION OF
MUTUAL INSURANCE COMPANIES
3601 Vincennes Road
Indianapolis, IN 46268
(317) 875-5250

Jan Amundson
Quentin Riegel
NATIONAL ASSOCIATION OF
MANUFACTURERS
1331 Pennsylvania Avenue, NW
Washington, DC 20004
(202) 637-3000

Ann W. Spragens
Robert J. Hurns
PROPERTY CASUALTY INSURERS
ASSOCIATION OF AMERICA
2600 South River Road
Des Plaines, IL 60018
(847) 553-3826

Sherman Joyce
AMERICAN TORT REFORM ASSOCIATION
1101 Connecticut Ave., NW, Suite 400
Washington, DC 20036
(202) 682-1163

Lynda S. Mounts
Kenneth A. Stoller
AMERICAN INSURANCE ASSOCIATION
1130 Connecticut Avenue, NW
Suite 1000
Washington, DC 20036
(202) 828-7100

CERTIFICATE OF FILING AND SERVICE

I hereby certify that I filed the foregoing BRIEF OF *AMICI CURIAE* by mailing the original and 12 copies thereof by first-class mail via the U.S. Postal Service on June 19, 2007, to:

Ms. Kingsley W. Click
State Court Administrator
Supreme Court Building
1163 State Street
Salem, OR 97310

I further certify that I served the foregoing BRIEF OF *AMICI CURIAE* by mailing two correct copies thereof by first-class mail via the U.S. Postal Service on June 19, 2007, to:

William F. Gary
Harrang Long Gary Rudnick PC
360 E Tenth Ave., Suite 300
Eugene, OR 97401

Thomas H. Tongue
Dunn Carney Allen Higgins
& Tongue PC
851 SW Sixth Avenue, Suite 1500
Portland OR 97204

Roy E. Pulvers
Hinshaw & Culbertson LLP
1000 SW Broadway, Suite 1250
Portland, OR 97205

Jonathan M. Hoffman
Martin Bischoff Templeton Langslet
& Hoffman LLP
888 SW Fifth Avenue, Suite 900
Portland, OR 97204

James S. Coon
Raymond F. Thomas
Swanson Thomas & Coon
820 SW Second Avenue, Suite 200
Portland, OR 97404

William A. Gaylord
Gaylord Eyerman & Bradley
1400 SW Montgomery Street
Portland OR 97201

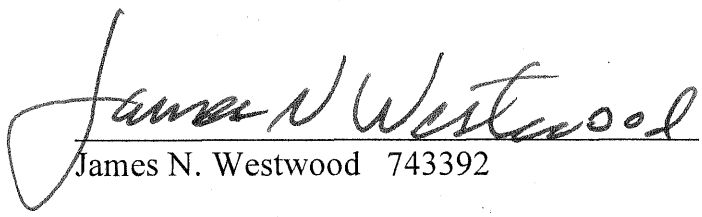
David F. Sugerman
Paul & Sugerman PC
520 SW Sixth Avenue, Suite 920
Portland OR 97204

Charles S. Tauman
Charles S. Tauman PC
PO Box 19631
Portland OR 97280

Kathryn H. Clarke
Attorney at Law
PO Box 11960
Portland, OR 97211

Brian S. Campf
Brian S. Campf, P.C.
818 SW Third Avenue
Portland, OR 97204

DATED: June 19, 2007.



James N. Westwood 743392

Of Attorneys for *Amici Curiae*