**THE STATE OF NEW HAMPSHIRE**
**SUPREME COURT**

**Case No. 2022-0132**

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**Kevin Brown, *et al.***

**v.**

**Saint-Gobain Performance Plastics Corp., *et. al.***

On Review of Certified Questions from the United States District Court for the District of New Hampshire Pursuant to Rule 34

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# PLAINTIFFS' OPENING BRIEF ON CERTIFIED QUESTIONS

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Kevin S. Hannon*
NH Bar. No. 269896
The Hannon Law Firm, LLC
1641 N. Downing Street
Denver, CO 80218
(303) 861-8800
khannon@hannonlaw.com
* *Arguing Attorney*

Paul M. DeCarolis
NH Bar No. 596
Gottesman & Hollis, P.A.
39 East Pearl Street
Nashua, NH 03060
(603) 318-0445
pdecarolis@nh-lawyers.com

Kenneth J. Rumelt, Esq.
Morgan & Morgan Complex
Litigation Group
1641 N. Downing Street
Denver, CO 80218
(303) 861-8800
krumelt@forthepeople.com

John Yanchunis, Esq.
Morgan & Morgan Complex
Litigation Group
201 N. Franklin Street, 7th Fl.
Tampa, FL 33602
(813) 223-5505
jyanchunis@forthepeople.com

*Attorneys for Plaintiffs and the Class*

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## QUESTIONS PRESENTED FOR REVIEW

The Questions presented for review, identified in the District Court's March 9, 2022 Order Certifying Questions to the Supreme Court, attached in the Appendix ("Apx.") at 7[1], are as follows:

A. Does New Hampshire recognize a claim for the costs of medical monitoring as a remedy or as a cause of action in the context of plaintiffs who were tortiously exposed to a toxic substance?

B. If the answer to question A is yes, what are the requirements and elements of a remedy or cause of action for medical monitoring under New Hampshire law? Inparticular,

1) Must a plaintiff prove a present physical injury caused by the toxic substance as a prerequisite for medical monitoring? Or, may a plaintiff bring a claim or seek a remedy for medical monitoring without proof of a present physical injury and, if so, what are the requirements or elements of that cause of action or remedy?

2) What, if anything, must a plaintiff establish regarding the following or other pertinent factors?

- the toxicity of the substance
- exposure to the substance
- the causal link between the defendant's activity and exposure
- health risks associated with exposure to the substance
- the availability, effectiveness, or other characteristics of medical testing.

[1] Page references to the Appendix refer to the numbers in the bottom right of each Appendix page, prefaced with "Appendix."

## STATEMENT OF THE CASE AND THE FACTS

Plaintiffs brought class actions for harms and losses caused by releases of toxic PFAS substances from the Saint-Gobain Performance Plastics Corporation ("Saint-Gobain") manufacturing facility in Merrimack. Plaintiffs bring claims for trespass, nuisance, negligence, negligent failure to warn, and *respondeat superior*. Apx. 30-35, Plaintiffs' Third Amended Master Consolidated Class Action and Individual Complaint, ¶¶77-100. At issue here, Plaintiffs seek as a remedy an award of the costs of a program for diagnostic testing for the early detection of latent or unidentified illness, disease process or disease, also called medical monitoring. *Id.* 24 (¶54), 30 (¶80), 31 (¶83), 32-33 (¶¶91, 95). This monitoring had been made reasonably medically necessary by Plaintiffs' exposure to toxic PFOA caused by the Defendants. *Id.* Plaintiffs alternatively seek injunctive relief for the funding and implementation of a medical monitoring program. *Id*. 29 (¶¶75, 76).

Plaintiffs Brown, Blundon, and Peicker own or have owned, and with their children, occupy or occupied, properties in Litchfield and Bedford that have private wells supplying household water that are contaminated with toxic PFOA. *Id*. 10-11 (¶¶2-4), 19-20 (¶38), 21 (¶44); 22 ¶47. Plaintiffs Wilson, Harris, and Golstov own and with their children occupy properties that receive household water from Merrimack Village District Water Works ("MVDWW") municipal water system. *Id*. 11 (¶¶5-6); 19 (¶35); 20-22 (¶¶42, 44, 47). MVDWW provides water to roughly 25,000 residents in Merrimack using groundwater wells near the Saint-Gobain facility that are also contaminated with PFOA. *Id*.

Defendant Saint-Gobain has owned and operated its facility in

Merrimack ("the Saint-Gobain facility") since 2000. *Id*. 12 (¶7). Defendant Gwenael Busnel was at times the General Manager. *Id*. 12 (¶8). Previously, the facility was owned and operated by ChemFab Corporation, Saint-Gobain's predecessor in interest. *Id*. 13 ¶11. Defendants coated woven fiberglass and made other products using materials containing ammonium perfluorooctanoate (APFO) and/or PFOA. *Id*. 13-14 (¶¶12, 13). APFO and PFOA are members of a family of per- and polyfluoroalkyl substances (PFAS) which are known to be highly toxic to humans. *Id.* 13 (¶12). Due to their chemical structures, PFAS are both biologically and chemically stable in the environment and resistant to environmental degradation. *Id.* Because they are water soluble, PFAS can migrate readily from soil to groundwater. *Id.* PFAS remain present in the environment long after they are released. *Id.*

Throughout the course of their operation of the Saint-Gobain facility, Defendants and their predecessors released APFO and/or PFOA into the air. *Id*. 14 (¶14), 19-20 (¶38). The releases by Defendants from the Saint-Gobain site have traveled through the air and deposited on soil and have migrated through soil and into the groundwater that Plaintiffs and class members have used for their domestic water supplies. *Id*. 19-22 (¶¶38, 42, 47). Well tests have identified PFAS released from the Saint-Gobain Factory in the groundwater supplies used by Plaintiffs and Class Members for household water. *Id*. 20-21 (¶¶41, 44).

Exposure through consuming contaminated water causes PFAS to be absorbed into the human body, resulting in an increased risk of illness, disease or disease process associated with the toxicity of PFAS for those so exposed. *Id*. 21 (¶45). Toxicology studies show that PFAS are readily

absorbed after oral exposure and ingestion and bioaccumulate in the human body and persist in the body for many years. *Id*. 21-22 (¶¶45, 46). Exposure to PFOA is associated with increased risk of testicular cancer and kidney cancer, liver function abnormalities, immunotoxicity, endocrine disruption, and of disorders such as thyroid disease, high cholesterol, ulcerative colitis, and pregnancy-induced hypertension, as well as other conditions.[2] *Id*. The U.S. E.P.A. has also advised that exposure to PFAS may result in developmental effects to fetuses during pregnancy or to breast-fed infants. *Id.* Thus PFAS are known and proven hazardous substances. *Id*.

Plaintiffs and class members who 1) live within a defined geographic area and 2) have consumed household water from private wells or MVDWW water at specified PFOA levels for one year or more, have suffered an increased risk of illness, disease or disease process as a result of that exposure, requiring an award of the cost of a program for medical monitoring for early detection of such illness, disease or disease process. *Id.* 24-26 (¶¶54, 58-59, 61). Early detection of illness, disease or disease process will benefit Plaintiffs and class members. *Id.* 24 (¶54).

## SUMMARY OF ARGUMENT

As a remedy for Defendants' tortious conduct, Plaintiffs seek the cost of diagnostic testing for the early detection of illness, disease and disease process that is medically necessary because of Plaintiffs' exposure

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[2] https://www.epa.gov/sites/production/files/2016-06/documents/drinkingwaterhealthadvisories_pfoa_pfos_updated_5.31.16.pdf, last accessed 05.2.22.

to a known toxin, PFOA, and the increase in risk of illness, disease and disease process resulting from that exposure. Plaintiffs do not seek to create a new cause of action. They do not have to. Plaintiffs' claim for medical monitoring costs is based on longstanding New Hampshire tort law. A tortfeasor is liable for all consequences which are the natural and direct result of his conduct. The consequence of Defendants' conduct here is that Plaintiffs have the medical need for diagnostic testing for the early detection of PFOA related illness, disease and disease process.

This state's common law, supported by and consistent with the RESTATEMENT (SECOND) OF TORTS, recognizes that an invasion of any legally protected interest of another is injury. The tortiously caused need to incur medically necessary costs for early detection of illness or disease due to exposure to toxic substances is an invasion of a legally protected interest. It is 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 (which the testing is designed to identify, and which can occur years later than the exposure). Allowing recovery of the costs of diagnostic testing for the early detection of illness or disease that is medically necessary because of tortious exposure to a toxin is no more novel than allowing the recovery of the cost of an x-ray to determine harm from a tortiously caused auto collision, without regard to whether that x-ray is positive or negative, as long as that x-ray was medical necessary because of the tortious act.

A claim for medical monitoring costs does not seek to recover for fear of future illness. Nor does a claim for medical monitoring does not

seek the cost of treatment for illness or disease. A claim for medical monitoring costs recognizes that exposure to toxic chemicals does not result in immediately visible or recognizable physical injury. The claim is not based on the "possibility" that the plaintiff will suffer future injury or harm, but instead the present harm of medically necessary diagnostic testing. A claim for medical monitoring costs is not a claim for future harm because the harm—the exposure, increased risk and resulting present medical need for diagnostic testing—have already occurred. By pleading exposure to toxic contamination causing increased risk and medical necessity of incurring the cost of diagnostic testing, Plaintiffs have pleaded a cognizable present injury under New Hampshire common law.

Medical monitoring permits early detection of the unrecognized signs of toxic exposure through diagnostic testing that can identify the damage that has occurred so that early treatment can be implemented to minimize the effects of the once latent or unrecognized illness or disease. Early detection benefits the exposed person both by early detection and early treatment, reducing harm to the tortiously exposed individual. Recovery of tortiously caused medical monitoring costs places the responsibility for the costs of necessary testing on those that caused the need for those expenditures, rather than the injured person or medical providers. Early diagnosis leads to reduced medical costs for the individual and the medical system.

Other states have recognized the recovery of medical monitoring costs for tortious toxic exposure as a proper remedy. They recognize, consistent with the RESTATEMENT, that toxic exposure and the medical need to incur the costs of diagnostic testing for the early detection of illness

and disease is an invasion of a legally protected interest caused by an underlying tort. Those states that have not allowed recovery of the cost of medical monitoring for an underlying tort often claim that tortiously exposed persons must first prove a present physical injury, ignoring that toxic harm is often latent or unrecognized, and disregarding the injury of the present need for early detection. A present physical injury requirement nullifies the remedy. The very purpose of the monitoring is to identify latent or unrecognized illness or disease so that treatment can occur. If testing can only occur after demonstrable present physical injury such as advanced kidney cancer exists, then the benefits of early detection for the person and the medical system are lost. The law is not such a fool as to force latent injury to advance so far that it becomes obvious and potentially life-altering, negating the very purpose of the remedy: the benefits of early detection.

## ARGUMENT

## I. PLAINTIFFS' PRESENT MEDICAL NEED FOR DIAGNOSTIC TESTING FOR THE EARLY DETECTION OF ILLNESS OR DISEASE RESULTING FROM THEIR TORTIOUS EXPOSURE TO A KNOWN TOXIN IS A COMPENSABLE INJURY *(Questions A, B.1)*

### A. The Need to Incur the Cost of Medically Necessary Diagnostic Testing for the Early Detection of Illness or Disease Is a Compensable Injury

The foundation of New Hampshire tort law, and of the RESTATEMENT (SECOND) OF TORTS to which this Court often turns, is one's right to recover for another's invasion of a legally protected interest. As this Court has held, injury denotes an invasion of any legally protected

interest of another. *Smith v. Cote*, 128 N.H. 231, 248, 513 A.2d 341, 352 (1986), citing RESTATEMENT (SECOND) OF TORTS § 7(1) (1965) (RESTATEMENT). Tort actions protect the interest in freedom from various kinds of harm. *Porter v. City of Manchester*, 151 N.H. 30, 38, 849 A.2d 103, 114 (2004). The plaintiff is entitled to be fully compensated for the harm resulting from defendant's legal fault. New Hampshire Civil Jury Instructions § 9.2, 9.3 (2021-22 ed.). Plaintiffs and class members have suffered the present injury of the need to incur the costs of medically necessary diagnostic testing for the early detection of illness and disease, caused by the increased risk from their significant exposure to Defendants' toxins. Apx. 24-26 ¶¶ 54, 58-59, 61.

Section 7(2) of the RESTATEMENT defines the word "harm" to denote the existence of loss or detriment to a person including detriment resulting to him from acts or conditions which impair his physical, emotional, or aesthetic well-being, his pecuniary advantage, or other legally recognized interests. RESTATEMENT § 7(2). The RESTATEMENT independently defines physical harm to denote the physical impairment of the human body, or of land or chattels. RESTATEMENT § 7(3). Comment a provides as an example that the mere apprehension of an intentional and immediate contact, whether harmful or merely offensive, is as much an "injury" as a blow which breaks an arm. RESTATEMENT § 7, cmt. a. Tortiously caused present medical necessity to incur the cost of diagnostic testing for the early detection of illness or disease constitutes legal detriment and injury that does not require proof of present physical injury.

This Court's decisions consistently follow the RESTATEMENT's definition of injury in holding that tortiously caused harm is recoverable.

For example, in *Smith v. Cote*, this Court noted that the injury in a claim for wrongful birth is not a "claim arising from physical injury. It is instead based on a negligent invasion of the parental right to decide whether to avoid the birth of a child with congenital defects." *Smith*, 128 N.H. at 242, 513 A.2d at 348. In *Smith*, this Court allowed recovery of future extraordinary costs. *Id*. at 243-44, 513 A.2d at 348-50. In *Porter v. City of Manchester*, this Court adopted the tort of wrongful termination and allowed recovery of emotional distress damages and loss of future earnings damages. *Porter*, 151 N.H. at 38, 43-45, 849 A.2d at 114, 118-19. In *State v. Exxon Mobil Corp.*, this Court allowed the State's claims for future testing and treatment, as the harm from MTBE had already occurred, and over 5000 wells had yet to be tested. *Exxon Mobil*, 168 N.H. 211, 263, 126 A.3d 266, 308 (2015). These and other decisions of this Court analyze injury consistent with the RESTATEMENT § 7.

Moreover, one whose legally protected interests have been endangered by the tortious conduct of another is entitled to recover for expenditures reasonably made or harm suffered in a reasonable effort to avert the harm threatened. RESTATEMENT § 919(1); *see also Kelleher v. Marvin Lumber & Cedar Co.*, 152 N.H. 813, 837, 891 A.2d 477, 497 (2005) (plaintiff is entitled to recover reasonable expenditures incurred to avert further property damage). Plaintiffs' need to incur the cost of medically necessary diagnostic testing because of their toxic exposure is a compensable injury under this state's law.

### B. Courts that Follow the RESTATEMENT Have Determined that the Medical Need of Diagnostic Testing for the Early Detection of Disease is an Invasion of a Legally Protected Interest

Other courts that allow the recovery of medical monitoring costs as a remedy determine that the medical need for diagnostic testing caused by toxic exposure is an invasion of a legally protected interest consistent with the definition of injury found in the RESTATEMENT. The present burden of the cost of diagnostic testing is no less an invasion of a legally protected interest justifying compensation than is a physical injury. *Hansen v. Mountain Fuel Supply*, 858 P.2d 970, 977 (Utah 1993).[3] This conclusion is consistent with the definition of "injury" in the RESTATEMENT. *Id*. Although the obvious manifestations of a toxic exposure may not appear for years, those exposed have suffered legal detriment: the exposure to the toxin itself, the risk of disease and the concomitant cost of the needed medical testing. *Bower v. Westinghouse Elec. Corp.*, 522 S.E.2d 424, 430 (W.Va. 1999), citing *Hansen*, 858 P.2d at 977.

The Nevada Supreme Court, evaluating whether the present need to incur the cost of diagnostic testing is injury, analyzed Section 7 of the

[3] While there are numerous federal court decisions on medical monitoring, Plaintiffs cite for this Court's guidance only state court decisions, recognizing that federal court decisions seek to interpret state law but are not binding authority. *Cf. State v. Ball*, 124 N.H. 226, 233, 471 A.2d 347, 352 (1983). Plaintiffs cite one federal case for its illustration only.

RESTATEMENT. *Sadler v. PacifiCare of Nev., Inc.*, 340 P.3d 1264, 1269-72 (Nev. 2014). The court noted that Section 7

> broadly defines an injury for the purpose of tort law as 'the invasion of any legally protected interest of another.' Not only is this definition not limited to physical injury, the same section separately defines 'harm' as 'the existence of loss or detriment in fact of any kind to a person resulting from any cause,' and 'physical harm' as 'the physical impairment of the human body, or of land or chattels.' Thus . . . injury is generally not limited to physical injury.

*Id*. at 1269. *Sadler* rejected a requirement for proof of present physical injury, reasoning that "the RESTATEMENT separately defines 'physical harm,' indicating that physical harm is not necessarily implicated by the term 'injury.'" *Id*. at 1270-71.

In *Bower*, plaintiffs were exposed to toxic substances released by defendants; none exhibited immediate symptoms of disease related to the exposure. *Bower*, 522 S.E.2d at 426-27. The West Virginia Supreme Court concluded:

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

*Id*. at 430. "The 'injury' that underlies a claim for medical monitoring—just as with any other cause of action in tort—is the 'invasion of any legally protected interest.'" *Id.*, citing RESTATEMENT § 7(1).

*Ayers v. Jackson* also analyzed the injury in a claim for medical monitoring damages as the invasion of any legally protected interest of another. *Ayers v. Jackson*, 525 A.2d 287, 304-05 (N.J. 1987), citing RESTATEMENT § 7(1) (1965). The New Jersey Supreme Court held that an enhanced risk of disease caused by significant exposure to toxic chemicals is clearly an injury. *Id.* Compensation for reasonable and necessary medical expenses is consistent with well-accepted legal principles. *Id*. at 311. It is also consistent with public interest in fostering access to medical testing for individuals whose exposure to toxic chemicals creates an enhanced risk of disease. *Id.*

In *Meyer v. Fluor*, the Missouri Supreme Court held that the injury underlying a medical monitoring claim is the invasion of a legally protected interest. *Meyer v. Fluor Corp.*, 220 S.W.3d 712, 717 (Mo. 2007). Just as an individual has a legally protected interest in avoiding physical injury, so too does an individual have an interest in avoiding expensive medical evaluations caused by tortious conduct. *Id.* Plaintiff is entitled, upon proper proof, to obtain compensation for an injury to the legally protected interest in avoiding the cost of reasonably necessary medical monitoring occasioned by the defendant's actions. *Id.* at 718, citing *Bower*, 522 S.E.2d at 429-30. Medical monitoring damages compensate the plaintiff for the quantifiable costs of periodic medical examinations reasonably necessary for the early detection and treatment of latent injuries caused by the plaintiff's exposure to toxic substances. *Id.*

In *Exxon Mobil Corp. v. Albright*, the Maryland Court of Appeals (the state's highest court) held that exposure itself and the concomitant need for medical testing is the compensable injury for which recovery of damages for medical monitoring is permitted, because such exposure constitutes an invasion of a legally protected interest. *Exxon Mobil Corp. v. Albright*, 71 A.3d 30, 75-76 (Md. 2013), citing *Bower*, 522 S.E.2d at 430 (quoting RESTATEMENT § 7(1)). *Albright* recognized that the injury giving rise to an alleged need for medical monitoring costs is the exposure to toxic substances, and that this exposure is an invasion of a legally-protected interest. *Id.* at 76, 79. *Albright* recognized a right to recover medical monitoring costs. *Id*.

In *Petito*, the Florida Third District Court of Appeals reasoned that where plaintiff have suffered toxic exposure, "[a]lthough it is true that plaintiffs in cases such as these have yet to suffer physical injuries, it is not accurate to say that no injury has arisen at all." *Petito v. A.H. Robins Co.*, 750 So.2d 103, 105 (Fla. Ct. App. 1999). The injury is "the invasion of any legally protected interest of another." *Id.* (quoting RESTATEMENT § 7). *Petito* noted that one can hardly dispute that an individual has just as great an interest in avoiding expensive diagnostic examinations as in avoiding physical injury. *Id.*

In *Burns v. Jaquays*, the Arizona Court of Appeals determined, in spite of the absence of physical manifestation of any asbestos-related diseases, that the plaintiffs should be entitled to such regular medical testing and evaluation as is reasonably necessary and consistent with contemporary scientific principles applied by physicians experienced in the diagnosis and treatment of these types of injuries. *Burns v. Jaquays Mining*

*Corp.*, 752 P.2d 28, 33 (Az. App. 1987) (medical monitoring for exposure to asbestos fibers even though none of the plaintiffs had been diagnosed as having asbestosis). In *Potter v. Firestone*, the California Supreme Court found that expenditures for prospective medical testing and evaluation, which would be unnecessary if the particular plaintiff had not been wrongfully exposed to pollutants, are a detriment. *Potter v. Firestone Tire & Rubber Co.*, 863 P.2d 795, 822 (Cal. 1993). The court approved recovery for medical monitoring damages analyzing the RESTATEMENT § 7, and it recognized that medical monitoring does not require creation of a new tort. *Id*.

*Askey v. Occidental* addressed medical monitoring as an aspect of consequential damages in an action at law. *Askey v. Occidental Chemical Corp.*, 102 A.D.2d 130, 135 (N.Y. App. Div. 1984). In affirming denial of a motion to dismiss the plaintiffs' claim, the Appellate Division emphasized that "[t]he defendant is liable for 'reasonably anticipated' consequential damages which may flow later from that [toxic] invasion although the invasion itself is 'an injury too slight to be noticed at the time it is inflicted.'" *Id.* at 136.[4]

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[4] Later, *Caronia v. Philip Morris* held against a judicially-created independent equitable cause of action for medical monitoring absent any evidence of present physical injury or damage to property. *Caronia v. Philip Morris USA, Inc.*, 5 N.E.3d 11, 14, 18 (N.Y. App. Div. 2013). In *Caronia*, Plaintiffs were smokers who alleged no physical injury or property damage. *Id*. at 14. *Caronia* did not analyze injury under RESTATEMENT or medical monitoring as a remedy. *Id.* at 18.

A claim for the costs of medical monitoring is not a claim for enhanced risk of disease or a claim for fear of future illness. A claim for the costs of medical monitoring seeks to recover only the quantifiable costs of periodic medical examinations necessary to detect the onset of physical harm, whereas an enhanced risk claim seeks compensation for the anticipated harm itself, proportionately reduced to reflect the chance that it will not occur. *See Redland Soccer Club v. Dep't of the Army*, 696 A.2d 137, 144 (Pa. 1997) (distinguishing a medical monitoring claim from fear of cancer and increased risk claims); *see also Petito*, 750 So.2d at 105-06; *Ayers*, 525 A.2d at 304. A claim for medical monitoring costs does not seek compensation for an unquantifiable injury, but rather seeks specific monetary damages measured by the cost of periodic medical examinations. *Ayers*, 525 A.2d at 304. A claim for fear of future illness is also distinct from medical monitoring. *See Potter*, 863 P.2d at 800 (establishing standards for recovery of damages for fear of cancer in a negligence action, and separately establishing a standard for recovery of damages for medical monitoring costs); *and compare Hansen*, 858 P.2d at 975 (discussing emotional distress resulting from fear of developing a disease in the future, and concluding that plaintiffs failed to meet the above standards as a matter of law.") *with id.* at 979, 981 (establishing elements for recovery of medical monitoring damages).

The courts above uniformly acknowledge that significant economic harm can be inflicted on those exposed to toxic substances, notwithstanding the fact that the physical harm resulting from such exposure is often latent. *Bower*, 522 S.E.2d at 429; *Meyer*, 220 S.W.3d at 716-17. They recognize that the present medical need to incur the cost of diagnostic testing caused

by tortious toxic exposure constitutes injury, without a requirement of proof of present physical injury.

### C. Important Public Interests Support the Remedy of Medical Monitoring Costs

Medical monitoring damages promote early diagnosis and treatment of disease or illness resulting from exposure to toxic substances caused by a tortfeasor's negligence. *Hansen*, 858 P.2d at 976, citing *Ayers*, 525 A.2d at 311. As *Bower* noted:

> First, there is an important public health interest in fostering access to medical testing for individuals whose exposure to toxic chemicals creates an enhanced risk of disease, particularly in light of the value of early diagnosis and treatment for many cancer patients. (*Ayers*, *supra*, [106 N.J. at 604,] 525 A.2d at 311; *Miranda* [*v. Shell Oil Co.*,] 17 Cal. App. 4th [1651,] 1660, 15 Cal. Rptr. 2d 569 [(1993)].) Second, there is a deterrence value in recognizing medical surveillance claims—"allowing plaintiffs to recover the cost of this care deters irresponsible discharge of toxic chemicals by defendants . . . ." (... *Miranda*, *supra*, 17 Cal. App. 4th at 1660, 15 Cal. Rptr. 2d 569; *Ayers*, *supra*, [106 N.J. at 604,] 525 A.2d at 311-312; *cf. Friends for All Children* [*Inc. v. Lockheed Aircraft Corp.*], 746 F.2d [816,] 825 [(D.C. Cir. 1984)].) Third, "the availability of a substantial remedy before the consequences of the plaintiffs' exposure are manifest may also have the beneficial effect of preventing or mitigating serious future illnesses and thus reduce the overall

> costs to the responsible parties." (*Ayers*, *supra*, [106 N.J. at 604,] 525 A.2d at 312; *Miranda*, *supra*, 17 Cal. App. 4th at 1660, 15 Cal. Rptr. 2d 569.) In this regard, the early detection of cancer may improve the prospects for cure, treatment, prolongation of life and minimization of pain and disability. Finally, societal notions of fairness and elemental justice are better served by allowing recovery of medical monitoring costs. That is, it would be inequitable for an individual wrongfully exposed to dangerous toxins, but unable to prove that cancer or disease is likely, to have to pay the expense of medical monitoring when such intervention is clearly reasonable and necessary. (*Ayers*, *supra*, [106 N.J. at 604,] 525 A.2d at 312; *Miranda*, *supra*, 17 Cal. App. 4th at 1660, 15 Cal. Rptr. 2d 569).

*Bower*, 522 S.E.2d at 431, citing *Potter*, 863 P.2d at 824.

*Hansen* also noted that allowing recovery of the cost of medical monitoring

> avoids the potential injustice of forcing an economically disadvantaged person to pay for expensive diagnostic examinations necessitated by another's negligence. Indeed, in many cases a person will not be able to afford such tests, and refusing to allow medical monitoring damages would in effect deny him or her access to potentially life-saving treatment. … Additionally, it furthers the deterrent function of the tort system by compelling those who expose others to toxic substances to minimize risks and costs of exposure.

> Allowing such recovery is also in harmony with "the important public health interest in fostering access to medical testing for individuals whose exposure to toxic chemicals creates an enhanced risk of disease."

*Hansen*, 858 P.2d at 976-77 (citation omitted) (footnote omitted), citing *Ayers*, 525 A.2d at 311. *See also Redland*, 696 A.2d at 145 (allowing a remedy of medical monitoring expenses, citing *Hansen*, 858 P.2d at 976-77); *Potter*, 863 P.2d at 824 (citing the benefits of medical monitoring); *Petito*, 750 So.2d at 105 (it is "untenable" for plaintiffs to wait until after the expenses of monitoring have been incurred before a cognizable claim arises, as such a holding would foreclose countless economically disadvantaged individuals from obtaining the supervision that they need, and, regardless of financial need, simply force the victims, rather than the wrongdoers, to initially bear these great expenses).

Medical monitoring programs are recognized as a critical remedy for toxic exposures. Moreover, medical monitoring exists in the workplace, and for other contaminants, and is recognized by the Agency for Toxic Substances and Disease Registry in the context of the federal Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), all based on elevated exposure.[5] A plaintiff's claim for

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[5] *See* Department of Environmental Health, *Fernald Medical Monitoring Program*, UNIVERSITY OF CINCINNATI COLLEGE OF MEDICINE, https://med.uc.edu/eh/research/projects/fcc/fmmp-history, last accessed May 22, 2022; World Trade Center Health Program, *About the Program*, CENTERS FOR DISEASE CONTROL AND PREVENTION,

medical monitoring costs is concrete because it is the present need to incur the costs of diagnostic testing which can be specified, and it is actual and imminent. The medical monitoring program resulting from toxic PFOA pollution in West Virginia arising out of *Leach v. E.I. Du Pont de Nemours & Co., et al.*, 2002 WL 1270121 at *1 (W. Va. Cir. Ct. April 10, 2002), is evidence of the concreteness, actuality, and imminent need for medical monitoring.[6]

Recognizing that a defendant's conduct has created the present need for medical monitoring does not create a new tort. *See Meyer*, 220 S.W.3d at 717. It is simply a compensable item of damage when liability is established under traditional tort theories of recovery. *Id*. Because exposure to a toxic substance at sufficient levels to create an increased risk causing the medical necessity of incurring the cost of diagnostic testing is

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https://www.cdc.gov/wtc/about.html, last accessed May 22, 2022; NIOSH: Occupational Respiratory Disease Surveillance, CENTERS FOR DISEASE CONTROL, https://www.cdc.gov/niosh/topics/surveillance/ords/default.html ("Worker Medical Monitoring" and "Coal Workers' Health Surveillance Program", last accessed May 22, 2022; ATSDR's Final Criteria for Determining the Appropriateness of a Medical Monitoring Program Under CERCLA, 60 Fed. Reg. 38840 (July 28, 1995).

[6] Information on the C-8 (PFOA) Medical Monitoring Program Screening Tests, http://www.c-8medicalmonitoringprogram.com/docs/med_panel_education_doc.pdf, last accessed May 22, 2022.

an invasion of legally protected interest, Plaintiffs have suffered a present, compensable injury.

### D. State Courts That Have Not Allowed Recovery of Medical Monitoring Costs Failed to Consider the RESTATEMENT Definition of Injury

State courts that decline to allow recovery for the cost of medical monitoring most often do not analyze the necessity of incurring medical costs as an invasion of a legally protected interest as injury under the RESTATEMENT, contrary to the law of New Hampshire. Alternatively, they analyze the remedy as creating a new cause of action, which is not necessary to allow recovery, and which the Brown Plaintiffs do not seek to create here. For example, in *Henry*, the court focused on "potential" exposure rather than actual exposure as Plaintiffs claim here, failed to analyze injury according to the RESTATEMENT § 7, analyzed the claim as presenting a cause of action, and incorrectly characterized the claim as "fear of future illness[.]" *See Henry v. Dow Chem. Co.*, 701 N.W.2d 684, 689, 691-92 (Mich. 2005). *See also Curl v. Am. Multimedia, Inc.*, 654 S.E.2d 76, 81 (N.C. Ct. App. 2007) (analyzing medical monitoring as a new cause of action, which is a policy decision in the province of the legislature; not analyzing injury under the RESTATEMENT § 7 or medical monitoring precedent); *Paz v. Brush Engineered Materials, Inc.*, 949 So.2d 1, 4-5 (Miss. 2007) (analyzing medical monitoring as a claim for the possibility of a future injury akin to recognizing a cause of action for fear of future illness or emotional distress claim, without considering whether medically necessary diagnostic testing constitute present injury under the RESTATEMENT § 7); *Hinton v. Monsanto Co.*, 813 So.2d 827, 829-31 (Ala.

2001) (analyzing medical monitoring as a claim for future injury, not as injury under the RESTATEMENT § 7); *Wood v. Wyeth-Ayerst Labs.*, 82 S.W.3d 849, 855 (Ky. 2002) (citing § 7(3) of the RESTATEMENT defining physical harm, rejecting § 7(2) defining injury to include pecuniary loss, not analyzing whether the present medical necessity of diagnostic testing constitutes present injury); *Berry v. City of Chi.*, 181 N.E.3d 679, 686-88 (Ill. 2020) (evaluating the claim as an increased risk claim where plaintiffs pled that the city's actions in replacing water mains and meters created an increased risk that lead will be dislodged or leach from the residents' individual service lines, not analyzing injury under the RESTATEMENT § 7); *Lowe v. Philip Morris USA, Inc.*, 183 P.3d 181, 182-83 (Or. 2008) (analyzing the claim as an enhanced risk of future disease case, not the costs of medical care to determine the extent of harm, and not evaluating RESTATEMENT § 7).

Plaintiffs' injury is the medically necessary present need to incur costs of diagnostic testing. Apx. 24 (¶54); 29 (¶¶75-76); 30 (¶80); 31 (¶83); 32-33 (¶¶91, 95). None of the cases rejecting the remedy analyzes whether the necessity of incurring medical monitoring costs is an invasion of a legally protected interest under the RESTATEMENT and common law, and so are inconsistent with New Hampshire law.

**Answer to Certified Question A:**

This Court should answer Certified Question A in the affirmative: New Hampshire recognizes a claim for the costs of medical monitoring as a remedy in the context of plaintiffs who were tortiously exposed to a toxic substance.

### E. Proof of a Present Physical Injury Is Not A Predicate to the Remedy of Medical Monitoring Costs

Neither a physical impact nor a physical injury is a required predicate to injury in tort and neither is a predicate for the remedy of the costs of medical monitoring. This Court has consistently recognized the right to recover for an invasion of a legally protected interest, even without proof of present physical injury. *Smith*, 128 N.H. at 242, 244, 513 A.2d at 348, 349 (holding that the injury in a claim for wrongful birth is not a "claim arising from physical injury"; allowing recovery of future extraordinary costs); *Silva v. Warden*, 150 N.H. 372, 374, 839 A.2d 4, 6 (2003) (recognizing the tort of intentional infliction of emotional distress, allowing emotional distress damages: "Although Silva did not claim physical injury, lost wages, or medical bills, he did provide information that sufficiently describes emotional harm in the form of embarrassment and humiliation as a result of specific events."); *Tessier v. Rockefeller*, 162 N.H. 324, 331-33, 33 A.3d 1118, 1124-26 (2011), citing *Gray v. First NH Banks*, 138 N.H. 279, 283, 640 A.2d 276, 279 (1994) (quoting RESTATEMENT § 525 (1977)) (tort of fraudulent misrepresentation, allowing recovery of pecuniary loss); *Porter*, 151 N.H. at 43-45, 849 A.2d 103, 118-19 (allowing emotional distress and loss of future earnings damages for wrongful termination without proof of physical injury); *Long v. Long*, 136 N.H. 25, 29, 611 A.2d 620, 623 (1992) (adopting the tort of abuse of process, citing RESTATEMENT § 682 (1977)); *Fischer v. Hooper*, 143 N.H. 585, 591-93, 732 A.2d 396, 401-02 (1999) (approving the intentional tort of invasion of privacy, where the court held damages for

mental suffering are recoverable without the necessity of showing actual physical injury or offering expert testimony).

A federal case, *Friends For All Children*, illustrates the basic tort principle supporting recovery even without proof of present physical injury:

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

*Friends for All Children, Inc. v. Lockheed Aircraft Corp.*, 746 F.2d 816, 825 (D.C. Cir. 1984). In such circumstances:

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

*Id*. *Cf. Appeal of Lalime (New Hampshire Comp. Appeals Bd.)*, 141 N.H. 534, 538, 687 A.2d 994, 997 (1996) (in workers' compensation case, the proper analysis is whether the petitioner presented objective evidence showing, that at the time the tests were ordered, it was reasonable to seek further treatment, be it diagnostic or palliative; board's finding that

reimbursement was not warranted because the tests yielded negative results is not sufficient to support their conclusion that the petitioner has failed to meet her burden of proof).

As noted above, a physical injury requirement is inconsistent with the reality of latent injury and with the fact that the purpose of medical monitoring is to facilitate the early diagnosis and treatment of latent injuries caused by exposure to toxins. *Meyer*, 220 S.W.3d at 718. It is antithetical to the remedy; the diagnostic testing seeks to find latent or misidentified illness or disease not already known or understood to exist. Using the *Friends* example, it is like requiring Jones to prove he has a broken arm before he can recover the costs of a medically necessary x-ray to determine whether his arm is broken.

The cases allowing recovery of medical monitoring costs do not require proof of an existing present physical injury as a predicate to recover medical monitoring expenses, but instead proof of significant exposure. *See, e.g.*, *Meyer*, 220 S.W.3d at 719 (no necessity of establishing a present physical injury); *Bower*, 522 S.E.2d at 430-33 (rejecting the contention that a claim for medical monitoring rests on proof of present physical harm; allowing recovery based on exposure); *Sadler*, 340 P.3d at 1270 (a plaintiff may state a cause of action for negligence with medical monitoring as the remedy without asserting that he or she has suffered a present physical injury); *Albright*, 71 A.3d 30 at 80 (rejecting a requirement of proof of present physical injury); *Hansen*, 858 P.2d at 977, 979, 981 (rejecting a requirement of proof of present physical injury; requiring exposure defined as ingesting, inhaling or otherwise absorbing the substance into the body); *Burns*, 752 P.2d at 33 (allowing a remedy for medical monitoring despite

the absence of physical manifestation of any asbestos-related diseases); *Potter*, 863 P.2d at 823 (approving recovery for medical monitoring damages without proof of present physical injury); *Redland*, 696 A.2d at 145-46 (approving a claim for medical monitoring damages based on exposure); *Ayers*, 525 A.2d at 311-12; *Petito*, 750 So.2d at 105-06. The injury is "the invasion of any legally protected interest of another." *Id.* at 105 (quoting RESTATEMENT § 7).

Thus the majority of courts allowing recovery of medical monitoring costs do so based on proof of significant exposure, rather than the biological presence of the known toxin. However, New York courts have held that the physical manifestation of or clinically demonstrable presence of toxins in the plaintiff's body are sufficient to ground a claim for personal injury so that a plaintiff may be awarded, as consequential damages for such injury, the costs of medical monitoring. *Caronia v. Philip Morris USA, Inc.*, 5 N.E.3d 11, 15-16, 18 (N.Y. 2013). Massachusetts has allowed the costs of monitoring for exposure that has caused subcellular or other physiological changes, leaving for another day cases that involve exposure to levels of chemicals known to cause cancer, for which immediate medical monitoring may be necessary although no symptoms or subclinical changes have occurred. *Donovan v. Phillip Morris USA, Inc.*, 914 N.E.2d 891, 901 (Mass. 2009).[7]

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[7] In *Dougan v. Sikorsky*, Plaintiffs asked the court to adopt the legal framework from *Donovan* to govern medical monitoring claims arising from subclinical injuries in Connecticut. *Dougan v. Sikorsky Aircraft Corp.*, 251 A.3d 583, 592 (Conn. 2020). The court assumed, without

The Court should not adopt a physical presence standard. A blood test for PFAS exposure alone will not provide information to diagnose a health problem nor will it provide information for treatment.[8] Moreover, such a standard forces the cost of the exposure on the exposed person rather than the tortfeasor to obtain medical monitoring. Blood testing for PFAS is not a routine test offered by most doctors or health departments.[9] Even an "at home" PFAS blood test retails for $399.[10] Lab tests through medical providers, not including the cost of collection, cost over $500.[11]

The very nature of a remedy for the cost of diagnostic testing presupposes the absence of a currently identified present physical illness or

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deciding, that Connecticut law recognizes a claim for subclinical cellular injury that substantially increased the plaintiffs' risk of cancer and other asbestos related diseases for the purposes of analyzing the evidence in that case. *Id.* at 593.

[8] PFAS Exposure Blood Test, https://empowerdxlab.com/products/product/pfas-exposure-test, last accessed May 22, 2022.

[9] PFAS Blood Testing, https://www.atsdr.cdc.gov/pfas/health-effects/blood-testing.html, last accessed May 22, 2022.

[10] PFAS Exposure Blood Test, https://empowerdxlab.com/products/product/pfas-exposure-test, last accessed May 22, 2022.

[11] Testing Your Blood for PFAS, https://www.health.state.mn.us/communities/environment/hazardous/docs/pfas/indbltest.pdf, last accessed May 22, 2022.

disease, and is fully consistent with New Hampshire tort law.

**Answer to Certified Question B.1:**

This Court should answer Certified Question B1 as follows: A plaintiff does not have to prove a present physical injury caused by the toxic substance as a prerequisite for medical monitoring; a plaintiff may bring a claim or seek a remedy for medical monitoring without proof of a present physical injury.

## II. THE ELEMENTS OF A CLAIM FOR MEDICAL MONITORING DAMAGES *(Question B)*

The Court does not need to define any special standards for plaintiffs to obtain medical monitoring costs. Existing standards for burden of proof for causation and damages in this state are sufficient. Proof of the medical necessity of monitoring damages will inherently require proof of exposure to a toxin that results in an increased risk that makes monitoring necessary. *See Meyer*, 220 S.W.3d at 718; *Sadler*, 340 P.3d at 1271-72 (declining to specify elements). This is no different from the need to prove the medical necessity of any care. Relying on New Hampshire's existing standards of proof ensures that developments in science and medicine are accommodated by common law.

If the Court chooses to specify elements of proof for medical monitoring damages, they should be as follows:

> proof that the Plaintiff (1) has been significantly exposed; (2) to a hazardous substance; (3) through the tortious conduct of the defendant; and (4) as a proximate result of the exposure, plaintiff has suffered an increased risk of contracting illness, disease or disease process relative to what

> would be the case in the absence of exposure; (5) the increased risk of disease makes it reasonably necessary for the plaintiff to undergo periodic diagnostic medical examinations; and (6) monitoring procedures exist that make the early detection of a disease possible.

These are comparable to the criteria set forth in *Hansen*, 858 P.2d at 979 and *Bower*, 522 S.E.2d at 432-33, but not identical.

*Bower*'s requirement that "the increased risk of disease makes it reasonably necessary for the plaintiff to undergo periodic diagnostic medical examinations different from what would be prescribed in the absence of the exposure[,]" *id*. at 432, is a requirement that can be misapplied to deprive exposed persons of justifiable medical monitoring. For example, exposure to PFOA is associated with an increased risk of elevated cholesterol.[12] Persons tortiously exposed may already receive monitoring for cholesterol, which might be construed as not "different," when, because of the tortious exposure, they may require monitoring at a different frequency or duration than the general public. Also, exposed persons may lack medical insurance or financial resources to obtain every periodic examination that is medically recommended. On presenting the required proof, such additional testing should be recoverable. *See Redland*, 696 A.2d at 146-47 (allowing recovery for medical monitoring where the

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[12] Li, Y., *et al.* Associations between perfluoroalkyl substances and serum lipids in a Swedish adult population with contaminated drinking water. Environ Health 19, 33 (2020). https://doi.org/10.1186/s12940-020-00588-9, last accessed May 22, 2022.

expert recommends tests in addition to what may normally be prescribed). In addition, the tortious conduct need not be the sole cause of the injury; the exposure simply has to be a substantial factor in bringing about the harm. *Brookline Sch. Dist. v. Bird, Inc.*, 142 N.H. 352, 354, 703 A.2d 258, 260 (1997).

The fourth element from *Bower*, that "as a proximate result of the exposure, plaintiff has suffered an increased risk of contracting a serious latent disease relative to the general population," 522 S.E.2d at 432, also should be clarified, as above. The *Bower* court recognized this, later stating: "All that must be demonstrated is that the plaintiff has a significantly increased risk of contracting a particular disease relative to what would be the case in the absence of exposure." *Id.* at 433.

Plaintiffs should not be required to show that a treatment currently exists for the disease that is the subject of medical monitoring. *Id.* at 433-34, citing *Redland*, 696 A.2d at 146 n.8. *Bower* noted that "In this age of rapidly advancing medical science, we are hesitant to impose such a static requirement." *Bower*, 522 S.E.2d at 434. The court, citing another case, noted that "even if medical monitoring did detect evidence of an irreversible and untreatable disease, the plaintiff might still achieve some peace of mind through this knowledge by getting his financial affairs in order, making lifestyle changes, and, even perhaps, making peace with estranged loved ones or with his religion. *Id.* Certainly, "those options should be available to the innocent plaintiff who finds himself at an increased risk for a serious latent disease through no fault of his own." *Id*.

**Answer to Certified Question B:**

This Court should not require special standards of proof for the recovery of medical monitoring costs as a remedy. If it does, then it should follow the modified *Hansen* and *Bower* standards above.

## III. THE COURT SHOULD DECLINE TO FURTHER SPECIFY THE EVIDENTIARY REQUIREMENTS OF PROOF FOR THE RECOVERY OF MEDICAL MONITORING COSTS, LEAVING SUCH PROOF TO THE NEEDS OF THE PARTICULAR CASE *(Question B.2)*

In Certified Question B.2, the District Court also asked what, if anything, must a plaintiff establish regarding: 1) the toxicity of the substance, 2) exposure to the substance, 3) the causal link between the defendant's activity and exposure, 4) health risks associated with exposure to the substance, 5) the availability, effectiveness, or other characteristics of medical test. Plaintiff carries the burden of establishing damages and proving that they were caused by the defendant. *Wright v. Dunn*, 134 N.H. 669, 672, 596 A.2d 729, 731 (1991). The Court should decline to define these elements further. They should be left to the needs for proof of the case, likely addressed by expert testimony. *See Moscicki v. Leno*, 173 N.H. 121, 127, 238 A.3d 1036, 1041 (2020) (declining to adopt a rule that would require a particular principle or method to demonstrate the causal connection between the exposure to a toxin and a particular injury, leaving it to the trial court, in each individual case, to determine whether a particular principle or method is reliable under the factors set forth in RSA 516:29-a).

As to the toxicity of the substance (item 1), the proof of the hazardous nature of the substance to human health will likely be proved

through expert testimony. As to the exposure to the substance (item 2), the necessary proof will be determined by whether the exposure to that substance has been sufficient to result in an increased risk of illness or disease. *Hansen*, 858 P.2d at 979. Plaintiffs have to prove that the exposure was a substantial factor in causing the medical need for the diagnostic testing. New Hampshire Civil Jury Instructions § 6.1, 7.1 (2021-22 ed.).

The Court should not adopt special rules for the causal link between the defendant's activity and exposure (item 3). Plaintiffs must prove that more probably than not that the damages sought were caused by the legal fault of the defendant. New Hampshire Civil Jury Instructions § 9.2 (2021-22 ed.). New Hampshire Civil Jury Instructions § 6.1, 7.1 (2021-22 ed.) already define legal cause. The burdens of proof for causation are well established. *See Estate of Joshua T. v. State*, 150 N.H. 405, 407-08, 840 A.2d 768, 771 (2003).

With regard to the health risks associated with exposure to the substance (item 4), Plaintiffs will have to prove that the exposure is sufficient to result in the health risks claimed, and in turn justify medical monitoring. As *Bower* noted, the plaintiff is not required to show that a particular disease is certain or even likely to occur because of exposure. *Bower*, 522 S.E.2d at 433, citing *Potter*, 863 P.2d at 824 ("We are therefore persuaded that recovery of medical monitoring damages should not be dependent upon a showing that a particular cancer or disease is reasonably certain to occur in the future"). Also, no particular level of quantification is necessary to satisfy the requirement of increased risk. *Bower*, 522 S.E.2d at 433, citing *Hansen*, 858 P.2d at 979. *See also Ayers*, 525 A.2d at 312 (even

if the likelihood that these plaintiffs would contract cancer were only slightly higher than the national average, medical intervention may be completely appropriate in view of the attendant circumstances). It is sufficient for the plaintiff to show that the requisite increased risk; plaintiff need not prove that he or she has a probability of actually experiencing the toxic consequence of exposure. *Hansen*, 858 P.2d at 979.

With regard to the availability, effectiveness, or other characteristics of medical testing (item 5), a plaintiff will have to prove the testing proposed is reasonably medically necessary, just as she would for any other medical expense. *Bower*, 522 S.E.2d at 432; *Ayers*, 525 A.2d at 312-13. Proof of the medical necessity will inherently address the availability, effectiveness and other characteristics of the medical testing. Plaintiffs should be entitled to such regular medical testing and evaluation as is reasonably necessary and consistent with contemporary scientific principles applied by physicians experienced in the diagnosis and treatment of these types of injuries. *Burns*, 752 P.2d at 33. The appropriate inquiry is whether, to a reasonable degree of medical certainty, a test is necessary in order to diagnose properly the warning signs of the disease. *Bower*, 522 S.E.2d 431.

The considerations identified in Certified Question B.2 are met by existing State law on evidentiary standards and burdens of proof for causation and damages. The Court should decline to adopt any new rules that specify a particular principle or evidentiary method to demonstrate the causal connection between the exposure to a toxin and medical necessity of monitoring costs.

## CONCLUSION

Existing New Hampshire law allows the recovery of reasonably necessary medical expenses for diagnostic testing for the early detection of illness, disease or disease process without proof of present physical injury. The medical necessity to incur such costs is an invasion of a legally protected interest under Section 7 of the RESTATEMENT as relied on by this Court. Requiring proof of present physical injury as a predicate for recovery is antithetical to the purpose of allowing the person exposed to determine if he or she has latent or unrecognized harm from toxic exposure and seek early treatment. Early diagnosis leads to early treatment, benefiting the injured person and reducing the cost of treatment. The remedy of medical monitoring costs ensures that the tortfeasor, not the exposed person or the medical system, shoulders the costs. The Court should uphold recovery of medical medical costs as consistent with decades of New Hampshire tort law. The Court should adopt the standards of proof for recovery of these expenses Plaintiffs identify above to the extent the Court determines such standards are necessary. No other special instruction on proof is necessary because the proof depends on the facts of the case and is inherent in Plaintiffs' burden of proving their claim to the jury, as is true for any other tort case.

## PLAINTIFFS REQUEST ORAL ARGUMENT TO THE FULL COURT

Plaintiffs respectfully request 30 minutes per side for oral argument. The additional time is required to fully present not just the common law bases for allowing a remedy for medical monitoring costs, but also to address the potential elements of the remedy. Also, the additional time is

necessary to address the issues raised by the District Court in its certifying Order. Kevin S. Hannon is designated as the lawyer to be heard.

**RULE 16(3)(i) CERTIFICATION**

I hereby certify that the Order Certifying Questions to the New Hampshire Supreme Court is included in the Appendix at pages 3-8.

**CERTIFICATION OF WORD COUNT**

I hereby certify that pursuant to Supreme Court Rule 16 (11), this brief does not exceed 9,500 words, exclusive of pages containing the table of contents, tables of citations, and any addendum containing pertinent texts of constitutions, statutes, rules, regulations, and other such matters. The word count for the Questions Presented, Statement of the Case, Summary, Argument, Conclusion, Oral Argument Request, and Certifications is 8817.

**Dated: May 24, 2022** **Respectfully Submitted,**

*/s/ Kevin S. Hannon*
Kevin S. Hannon*
NH Bar. No. 269896
The Hannon Law Firm, LLC
1641 N Downing Street
Denver, CO 80218
(303) 861-8800
khannon@hannonlaw.com
* *Arguing Attorney*

Paul M. DeCarolis
NH Bar No. 596
Gottesman & Hollis, P.A.
39 East Pearl Street
Nashua, NH 03060
(603) 318-0445
pdecarolis@nh-lawyers.com

John Yanchunis, Esq.
Morgan & Morgan
Complex Litigation Group
201 N. Franklin Street, 7th Fl.
Tampa, FL 33602
(813) 223-5505
jyanchunis@forthepeople.com

Kenneth J. Rumelt, Esq.
Morgan & Morgan
Complex Litigation Group
1641 N. Downing Street
Denver, CO 80218
(303) 861-8800
krumelt@forthepeople.com

*Attorneys for Plaintiffs Brown, Blundon, Peicker, Wilson, Harris, Golstov and the Class*

## CERTIFICATE OF SERVICE

I hereby certify that I filed the foregoing **Plaintiffs' Opening Brief on Certified Questions and Appendix to Plaintiffs' Opening Brief** using the Court's CM/ECF System, thereby causing it to be electronically served on the following counsel of record:

Representing Defendants Saint-Gobain Performance Plastics Corp. and Gwenael Busnel:

Bruce W. Felmly, Esq.
Jeremy T. Walker, Esq.
MCLANE MIDDLETON, P.A.
900 Elm Street
Manchester, NH 03101
Direct: (603) 628-1448
Fax: (603) 625-5650
bruce.felmly@mclane.com
jeremy.walker@mclane.com

Sheila L. Birnbaum, Esq.
Mark Cheffo, Esq.
Rachel B. Passaretti-Wu, Esq.
Lincoln D. Wilson, Esq.
Bert L. Wolff, Esq.
DECHERT LLP
1095 6th Ave.
New York, NY 10036
Telephone: (212) 698-3500
Fax: (212) 698-3599
sheila.birnbaum@dechert.com
mark.cheffo@dechert.com
rachel.passaretti-wu@dechert.com
lincoln.wilson@dechert.com
bert.wolff@dechert.com

Representing Other Plaintiffs:

Kirk C. Simoneau, Esq.
Red Sneaker Law, PLLC
46 Technology Way, Ste 2w7a
Nashua, NH 03060
603-336-2028
603-669-7080 (fax)
kirk@redsneakerlaw.com

Lawrence A. Vogelman
Shaheen & Gordon PA
353 Central Ave, Ste 200
Dover, NH 03821
603-749-5000
603-749-1838 (fax)
lvogelman@shaheengordon.com

*/s/ Kevin S. Hannon*
Kevin S. Hannon