SUPREME COURT OF NEW HAMPSHIRE

KEVIN BROWN, ET AL. individually and on behalf of all others similarly situated,	)	**Case Number: 2022-0132**
Plaintiff(s),	)	**REVIEW OF CERTIFIED QUESTIONS FROM THE U.S. DISTRICT COURT FOR THE DISTRICT OF NEW HAMPSHIRE PURSUANT TO RULE 34**
v.	)	
SAINT-GOBAIN PERFORMANCE PLASTICS AND GWENAEL BUSNEL,	)	
Defendants.	)	

PLAINTIFFS' REPLY BRIEF ON CERTIFIED QUESTIONS

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I. THIS COURT MUST DISREGARD THE MERITS ARGUMENTS OF DEFENDANTS AND AMICI

The referring court has asked this Court to decide a question of New Hampshire law, not the merits of the underlying case. Apx. 3-6, Sup. Ct. R. 34. Defendants and amici nevertheless argue the merits of Plaintiffs' claims throughout their briefs, *see, e.g.*, Def.Br. 12, 13, 15, 30, 33-36, 43-46, based on Defendants' motions to exclude Plaintiffs' experts, omitting Plaintiffs' motions, *id.* 16 n.3. This Court is addressing a common law remedy for tortious conduct that meets elements the Court determines, to be later applied to the facts of each case. The merits of Plaintiffs' claims will be weighed by the referring court and the jury with the benefit of a complete record based on the Court's determination here. This Court must disregard the merits arguments of Defendants and amici on this incomplete record.

II. MEDICALLY NECESSARY DIAGNOSTIC TESTING IS INJURY

Plaintiffs do not seek medical monitoring based on mere exposure, but due to their reasonably foreseeable present need to incur the cost of medically necessary diagnostic testing due to their past tortious exposure. Apx. 21 (¶¶45, 47-8, 54). That foreseeable past significant exposure was proximately caused by Plaintiffs' consumption of PFOA tortiously released by Defendants. *Id*. Plaintiffs have the legal detriment of the present need for reasonably necessary medical monitoring.

Defendants wrongly claim that no study or organization has concluded that PFOA causes disease in humans, Def.Br. 12-14, 34, when as one example, studies have determined that PFOA is a renal carcinogen.

Apx.IX.147-53. That people are exposed to a wide variety of chemicals, Def.Br. 17, is irrelevant to whether common law allows recovery for diagnostic testing due to foreseeable tortious exposure. Any plaintiff seeking medical monitoring will have to prove sufficient past tortious exposure to increase the risk of disease such that diagnostic testing is presently medically necessary, proof few exposures will satisfy. The present need for medical monitoring, arising from past tortious exposure to known toxins, constitutes injury as defined by this Court. *Smith v. Cote*, 128 N.H. 231, 248 (1986), citing RESTATEMENT (SECOND) OF TORTS §7(1) (1965) (RESTATEMENT).

Defendants cite Henderson &Twerski for the claim that injury connotes physical impairment or harm. Def.Br. 22. Their view is wrong: RESTATEMENT §7(3) distinguishes physical injury as only one form of injury, as *Sadler* and *Bower* recognize. *Sadler v. PacifiCare of Nev., Inc.*, 340 P.3d 1264 (Nev. 2014); *Bower v. Westinghouse Elec. Corp.*, 522 S.E.2d 424 (W.Va. 1999). Defendants and amici do not deny that "injury" is used throughout the RESTATEMENT to denote the invasion of any legally protected interest of another. RESTATEMENT §7. Nor do they deny that "harm" is used to denote "the existence of loss or detriment in fact of any kind to a person resulting from any cause," and "physical harm" is used to denote "the physical impairment of the human body, or of land or chattels." *Id.* (emphasis added). Defendants cite RESTATEMENT §7 once, claiming it is "tautological," but never dispute that it distinguishes "physical harm" as just one type of injury. Def.Br. 29. RESTATEMENT (THIRD) OF TORTS: PHYS. & EMOT. HARM (2010) §4 and cmt. c define physical harm without changing the distinction. RESTATEMENT (THIRD) states, "Since [cases

seeking medical monitoring] do not involve claims for physical harm, they are beyond the scope of the physical-harm Chapters in [the] Restatement." *Id*. cmt c.[1]

A negligence claim does not limit damages once liability is proven; the plaintiff is entitled to be fully compensated for the harm resulting from defendant's legal fault. N.H. CIVIL JURY INSTRUCTION § 9.3. Defendants' cited authorities do not support that a negligence claim requires present physical injury. Def.Br. 18-19. Although Defendants' cases involved physical injuries, the Court did not consider, discuss, or hold that all negligence cases require such injuries. PROSSER & KEETON ON THE LAW OF TORTS § 92 (5th ed. 1984) does not list physical injury as an element of negligence; rather, it lists loss or damage to another's interest, consistent with RESTATEMENT §7. *Id.* 165. Furthermore, medical monitoring plaintiffs assert present, not future, harm. Nor does PROSSER support Defendants' claimed physical injury requirement; rather, the cited pages address the boundary between tort and contract law, and the contours of duty of care, not legally cognizable injuries. *Id.* 656-57. Defendants' cases addressing the "possibility of injury," or future harm, are also inapposite, because medical monitoring damages are compensation for present harm. Def.Br. 20.

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[1] That ALI has not adopted a provision on medical monitoring is not persuasive, since the cases arose after publication of RESTATEMENT (SECOND) in 1965. ALI states that medical monitoring should be consistent with substantive law. PRINCIPLES LAW AGG. LIT. §2.04 (ALI 2010).

Medical monitoring is distinct from emotional distress. *See, e.g.*, *Hansen v. Mountain Fuel Supply*, 858 P.2d 970, 975-82 (Utah 1993) (denying recovery for fear of illness without bodily injury but allowing medical monitoring). In *Corso*, this Court required evidence of physical injury so that the parents' injury was susceptible to objective medical determination. *Corso v. Merrill*, 119 N.H. 647, 158 (1979). The requirement that past exposure be significant enough to require medically necessary diagnostic testing provides that objective medical determination.

Nor does the economic loss rule apply. The doctrine bars plaintiffs who have an existing remedy in contract from recovering for economic losses in tort. *Plourde Sand & Gravel Co. v. J&I Eastern, Inc.*, 154 N.H. 791, 794 (2007). *Schaefer* addressed additional claimed duties arising out of a contract. *Schaefer v. IndyMac Mortg. Servs.*, 731 F.3d 98, 100 (1st Cir. 2013). *Wyle* addressed misrepresentation arising out of performance of a contract. *Wyle v. Lees*, 162 N.H. 406, 409 (2011). In *Border Brook*, the Court determined that the economic loss rule did not bar plaintiffs' negligence clam. *Border Brook Terrace Condo Ass'n v. Gladstone*, 137 N.H. 11, 19 (1993); *see also Lempke v. Dagenais*, 130 N.H. 782, 793 (1988); *Sadler*, 340 P.3d at 1268.

III. MEDICAL MONITORING IS A REMEDY FOR TRESPASS AND NUISANCE

Defendants claim without citation that nuisance and trespass claims are irrelevant to medical monitoring. Def.Br. 14 n.2. Defendants are wrong. A medical monitoring plaintiff can establish tortious exposure based on trespass and nuisance. *Bower*, 522 S.E.2d at 433; *Ayers v. Jackson*, 525 A.2d 287, 291 (N.J. 1987). Remedies for trespass include all

damages resulting from the trespass. *Brackett v. Bellows Falls Hydro-Elec. Corp.*, 87 N.H. 173, 175 (1934); N.H. CIVIL JURY INSTRUCTION §18.1 (2022).

Defendants correctly note that *Exxon Mobil* involved a present physical injury to groundwater. *State v. Exxon Mobil Corp.*, 168 N.H. 211 (2015). Plaintiffs here have similarly suffered injury to their property. Apx.22-23 ¶¶47-48. *Caronia* allows monitoring damages for either physical injury or property damage that amounts to some "already existing tort cause of action"; it rejected monitoring only as an independent cause of action. *See Baker v. Saint-Gobain Performance Plastics Corp*., 232 F.Supp.3d 233, 252 (N.D.N.Y. 2017), aff'd in part, dismissed in part, 959 F.3d 70 (2d Cir. 2020) (citing *Caronia*).

IV. DEFENDANTS' AUTHORITIES DO NOT ADDRESS INJURY

Defendants and amici misconstrue *Metro-North Commuter R.R. v. Buckley*, 521 U.S. 424 (1997). *Buckley* did not preclude asymptomatic plaintiffs' recovery for medical monitoring. *See Bell v. 3M Co.*, 344 F.Supp.3d 1207, 1222 (D. Colo. 2018). In *Buckley*, the question was whether the plaintiff could recover under the Federal Employers' Liability Act (FELA) for negligently inflicted emotional distress. 521 U.S. at 426-27, 440-41. The availability of medical monitoring under FELA is distinct from recoverability in tort, and this portion of *Buckley* is dicta. *See Petito v. A.H. Robins Co., Inc.*, 750 So.2d 103, 106 (Fla. App. (3 Dist.) 1999). Discussing medical monitoring, the Court relied on a now 25-year-old canvasing of state law, did not try to balance competing interests in establishing a tort law cause of action, and did not express any view about

the extent to which FELA might accommodate a more finely tailored remedy. 521 U.S. at 444. *Sadler* rejected *Buckley's* "floodgates" observation. 340 P.3d at 1271. In the 25 years since, there has been no evidence of excessive litigation.

Defendants cite cases from Illinois, New York, Oregon, Mississippi, Michigan, Kentucky, and Alabama, all of which fail to analyze whether the present need to incur medical monitoring costs constitutes an injury under the RESTATEMENT and New Hampshire common law. *Compare* Def.Br. 88 *with* Pl.Br. 27-28.

Defendants try distinguishing *Friends*, claiming there was physical impact, yet that played no part in the court's analysis. *Friends for All Children, Inc. v. Lockheed Aircraft Corp.*, 746 F.2d 816, 819 (D.C. Cir. 1984). Defendants' speculation that the victims likely had contusions is not found in the court's analogy, because it analyzed diagnostic testing in the absence of physical injury. *Id*. at 824-25.

V. PLAINTIFFS' INJURY WARRANTS COMMON LAW REMEDIES

The failure to pass legislation or amend existing legislation is not properly considered by this Court. *See Appeal of the House Legislative Facilities Subcommittee*, 141 N.H. 443, 449 (1996). While amici urge this Court to defer to the legislature, the legislature has opined that medical monitoring is consistent with common law. HB1375, N.H. 2020 Sess.

Defendants note that the State constitution demands a remedy that conforms to statutory and common law rights at the time. Def.Br. 18. "Every subject of this state is entitled to a certain remedy … for all injuries he may receive in his person, property, or character." N.H. CONST. part I,

art. 14. That right includes a remedy for invasion of a legally protected interest.

VI. THE COURT SHOULD REJECT DEFENDANTS' VAGUE AND UNNECESSARY ELEMENTS

A. "Above-Background" Exposure and "General Causation"

Defendants propose vague additional elements to create unneeded hurdles for recovery of medical monitoring costs. They are not supported by this Court's evidentiary rulings or medical monitoring law.

Defendants seek an undefined and unnecessary "above-background" requirement for exposure using PFAS, which is not naturally occurring, as their basis. Because medical monitoring requires proof of exposure that is tortiously caused by a defendant, that exposure inherently differs from any exposure the general population may already have.

Defendants would also add a "general causation" element to medical monitoring. Defendants' proposed element lacks any basis. The question is whether a person was tortiously exposed at a level sufficient to warrant medical monitoring. At issue is whether the risks created by the tortious exposure warrant medical monitoring. These are all questions for the appropriate scientific experts. This Court has properly refused to wade into such scientific issues, recognizing they are best left for the trial courts. *See Moscicki v. Leno*, 173 N.H. 121 (2020) (refusing to require a specific methodology; leaving to each individual case the determination of whether a particular principle or method is reliable); *Bronson v. Hitchcock Clinic*, 140 N.H. 798 (1996) (in a personal injury case, "no single acceptable means" by which a plaintiff must prove cause-in-fact).

Defendants misstate "general causation" as requiring a plaintiff alleging disease from tortious exposure to prove that the exposure "causes" the disease at a specific dose. Def.Br. 38. But medical monitoring does not allege that disease has occurred in any individual, and Defendants conflate general with specific causation, *i.e.*, whether the toxin "cause[d] disease in a particular individual." REFERENCE MANUAL ON SCIENTIFIC EVIDENCE, 552 (Fed. Jud. Ctr. 3d ed. 2011) ("RMSE"). General causation does not require proof that the exposure causes the disease at a corresponding dose. *Id*. Defendants also claim without support that the law requires quantification of dose to show increased risk. *See* Def.Br. 41-42 (conflating dose and risk). There is no basis for a causation standard unique to medical monitoring cases.

Even in personal injury cases, courts frequently do not require the quantification of dose or exposure that Defendants seek. *See, e.g.*, *Westberry v. Gislaved Gummi AB*, 178 F.3d 257, 264 (4th Cir. 1999); *see also* RMSE at 639 ("only rarely are humans exposed to environmental chemicals in a manner that permits a quantitative determination of adverse outcomes"). And experts in personal injury cases requiring proof of specific causation are not required to identify a study that says X causes Y before they can reliably opine as to causation; causation is a judgment made by epidemiologists interpreting epidemiological data. RMSE 598 (citing RESTATEMENT (THIRD) OF TORTS: PHYS. & EMOT. HARM § 28, cmt. c); *see also* RMSE 553 (explaining the specialized expertise required to evaluate epidemiological evidence and draw a conclusion); *Milward v. Acuity Spec. Prod. Grp. Inc.*, 639 F.3d 11, 19 n.8, 23 (1st Cir. 2011) (same); *King v. Burlington N. Santa Fe Ry. Co.*, 762 N.W.2d 24, 35 (Neb. 2009) (individual

epidemiological studies need not definitively conclude as to causation before experts can conclude that the agent causes a disease). An expert does not even have to rely on epidemiological data to reach a reliable causation opinion. *Milward*, 639 F.3d at 24-25.

Medical monitoring claims do not amount to treating "any level of exposure as harm." Def.Br. 42. If an expert cannot opine that monitoring is a medical necessity, the remedy will not be proved. Defendants ignore that "increased risk" and "causation" are scientifically different. *See, e.g.*, RMSE 24 (epidemiological studies showing an "increased risk" can help shed light on "general causation"); *In re Lipitor (Atorvastatin Calcium) Mktg., Sales Prac. & Prod. Liab. Litig.*, 227 F.Supp.3d 452, 482-83 (D.S.C. 2017) (an "increased risk" is an "increased probability that an event will occur" and constitutes an association, not causation). The Fourth Circuit's subsequent reference to dose was for individual personal injury cases, not medical monitoring. *Lipitor (Atorvastatin Calcium) Mktg. v. Pfizer, Inc.*, 892 F.3d 624, 639 (4th Cir. 2018). So too *McClain v. Metabolife Int'l, Inc.*, 401 F.3d 1233 (11th Cir. 2005). *Lipitor* recognized that not every claim of personal injury from a drug will require dose analysis, and in toxic tort cases, it is sufficient for the plaintiff to introduce evidence of "substantial exposure." 892 F.3d at 639. Analysis will depend on the facts of the case and the capacity of current scientific methods. *Id.* at 640.

Defendants wrongly claim that medical monitoring cases incorporate "general causation" as Defendants articulate it. Though Defendants pick references to the word "cause" in *Ayers*, *Hansen*, *Bower*, and *Meyer*, not one of those courts discussed levels of scientific causation, let alone included "general causation" as an element of medical monitoring;

Defendants conflate legal with scientific cause. No medical monitoring case "bakes in" a "general causation" burden of proof. Def.Br. 39. New Hampshire law already requires proof that the defendant was at fault, and that the legal fault was the cause of the event and a substantial factor in bringing about the harm. N.H. CIVIL JURY INSTRUCTION §7.1, 7.2.

Defendants' other cases do not support their argument. *Kilpatrick*, *Huss*, *Norris*, *Henrickson*, *Whiting*, *Sutera*, *Hostetler*, and *Mitchell* are all *Daubert* decisions in personal injury cases where the courts evaluated fact-specific evidence of general and specific causation that is not relevant here. Def.Br. 40-42; *Moscicki*, 173 N.H. 121, distinguished *McClain. Hirsh v. CSX Transp., Inc.*, 656 F.3d 359, 364 (6th Cir. 2011), allowed that a "remote" risk could warrant medical monitoring but said plaintiffs' expert's opinion was inadequate. *Hirsh* and *Baker v. Chevron U.S.A. Inc.*, 533 F.App'x 509, 524 (6th Cir. 2013), were based on what the court understood to be Ohio-specific evidentiary requirements that are inapplicable here. Also not at issue are Defendants' argument and cases regarding the role regulatory findings play in a *Daubert* analysis. Def.Br. 43.

Albright addresses quantification of risk in terms of the significance of exposure, not proof of effect at dose, and does not require general causation. *Exxon Mobil Corp. v. Albright*, 71 A.3d 30, 79 (Md. 2013) ("reasonable link to toxic exposure"). No specific quantification should be required. *See Bower*, 522 S.E.2d at 433; *Hansen*, 858 P.2d at 979; *Donovan v. Phillip Morris USA, Inc*., 914 N.E.2d 891, 901 (Mass. 2009); *Ayers*, 525 A.2d at 312. Requiring proof of exposure sufficient to increase risk to a level necessitating medical monitoring, left to the proofs of the

case, is sufficient. This Court should reject Defendants' unspecified causation standard.

B. Defendants' Other Vague Elements

Defendants cite *Hansen*, 858 P.2d at 979, decided in 1993, for the proposition that plaintiffs must prove that early detection changes the prognosis. Def.Br. 44. *Bower* agreed with *Redland* that plaintiffs should not be required to show that treatment exists for the disease to be monitored. *Bower*, 522 S.E.2d at 432 (citing *Redland Soccer Club v. Dep't of the Army*, 696 A.2d 137, 146 n.8 (Pa. 1997)). *Bower* noted that, in an age of rapidly advancing medical science, the court should not impose such a static requirement. *Bower*, 522 S.E.2d at 433-34; *Redland*, 696 A.2d at 146 n.8; Pl.Br. 36-37.

Defendants argue that diagnostic testing must differ from the ordinary care one does or "should receive." Def.Br. 45. This wrongfully creates a value judgment on what one "should receive" and penalizes those who cannot afford medical care. What standard of care is "good sense and foresight" creates a mini-trial on health care when the issue is whether tortious exposure created the need for testing. *Potter v. Firestone Tire & Rubber Co.*, 863 P.2d 795 (Cal. 1993). If there is proof at trial that tortious exposure caused the present need for medically necessary diagnostic testing, plaintiff should recover those costs rather than forcing the costs of defendant's wrongs on insurance or other medical care. *See* Pl.Br. 35-36.

Defendants suggest an additional element that the benefits of the monitoring outweigh the risks. Recovery of medical expenses already requires proof of reasonable medical necessity, so there is no need for

separate proof of risks, benefits, or other factors affecting medical necessity. In *Champion*, there was no stated evidence that the physician determined that the radiation risk of the x-ray outweighed the benefits. *Champion v. Smith*, 113 N.H. 551, 552 (1973). *Champion* shows that medical experts imbed the risk benefit analysis in ordering diagnostic tests and no additional element should be required. Financial cost and the frequency of testing also should not be given significant weight. *Bower*, 522 S.E.2d at 433 (distinguishing *Hansen*, 858 P.2d at 980).

CERTIFICATION OF WORD COUNT

I hereby certify that pursuant to Supreme Court Rule 16 (11), this reply brief does not exceed 3,000 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 Sections I though VI is 2990.

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I hereby certify that I filed the foregoing **Plaintiffs' Reply Brief on Certified Questions** using the Court's Electronic Filing System, thereby causing it to be electronically served on the following counsel of record:

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