STATE OF MICHIGAN

IN THE SUPREME COURT

APPEAL FROM THE MICHIGAN COURT OF APPEALS,
HON. RICHARD ALLEN GRIFFIN PRESIDING

GARY AND KATHY HENRY, et al,

Plaintiffs-Appellees,

v.

THE DOW CHEMICAL COMPANY,

Defendant-Appellant.

Docket No. 125205

Court of Appeals No. 251234

Saginaw County Circuit Court
No. 94-410338-NH

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AMICUS CURIAE BRIEF OF THE ECOLOGY CENTER, AMERICAN PUBLIC HEALTH ASSOCIATION, ENDOMETRIOSIS ASSOCIATION, AMERICAN LUNG ASSOCIATION OF MICHIGAN, GENESEE COUNTY MEDICAL SOCIETY, PHYSICIANS FOR SOCIAL RESPONSIBILITY, SCIENCE AND ENVIRONMENTAL HEALTH NETWORK, LONE TREE COUNCIL, PUBLIC INTEREST RESEARCH GROUP IN MICHIGAN, SIERRA CLUB, and THE CENTER FOR CIVIL JUSTICE, IN SUPPORT OF PLAINTIFFS-APPELLEES

_____/

ROBERT B. JUNE (P51149)
LAW OFFICES OF ROBERT JUNE, P.C.
ATTORNEY FOR AMICI CURIAE
124 Pearl Street, Suite 201
Ypsilanti, Michigan 48197-5374
(734) 481-1000

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III. STATEMENT OF JURISDICTION

This Court has jurisdiction over this appeal pursuant to MCR 7.301(A)(2).

IV. QUESTION INVOLVED

1. Did the Trial Court properly deny Defendant-Appellant's motion for partial summary disposition pursuant to MCR 2.116(C)(8) regarding Plaintiffs-Appellees' claim for medical monitoring relief?

Defendant-Appellant's Answer:	No.
Plaintiffs-Appellees' Answer:	Yes.
Trial Court's Answer:	Yes.
Court of Appeals' Answer:	Yes (application for leave to appeal denied).
Amici Curiae' Answer:	Yes.

V. INTEREST OF AMICI CURIAE

Amici Curiae are eleven organizations committed to effective public health and environmental policy, including:

1. **The Ecology Center.** The Ecology Center is a Michigan non-profit charitable corporation based in Ann Arbor with 2,500 members across the state, including members residing, owning property, or recreating in the city of Midland, Midland County, and the Tittabawassee River floodplain. The Ecology Center works for a just and healthy environment through organizing, advocacy, research, education, and demonstration projects.
2. **American Public Health Association.** The American Public Health Association, the oldest and largest organization of public health professionals, represents more than 50,000 members from over 50 public health occupations.
3. **Endometriosis Association.** The Endometriosis Association is a non-profit international self-help organization, focusing on support, education, and research. Membership includes women and girls with endometriosis, and their families, along with healthcare practitioners, scientists, and others interested in understanding the causes of endometriosis, improving treatment methods and prevention options, and finding a cure. Endometriosis is a hormonal and immune disease that affects 5.5 million women and girls in Canada and the United States and millions more worldwide. Endometriosis can be debilitating, as well as create a high risk of developing cancers (ovarian, breast, melanoma, brain, thyroid, and non-Hodgkins Lymphoma) and autoimmune diseases (systemic lupus erythematosus, Sjögren's syndrome, rheumatoid arthritis,

hypothyroidism, fibromyalgia, chronic fatigue syndrome, and allergies including asthma and eczema). Research has shown that dioxin can cause endometriosis in animals. Women and girls exposed to dioxin should be tested and monitored for endometriosis. Early detection is critical in managing this chronic, painful disease that affects women and girls from eight to eighty.

4. **American Lung Association of Michigan.** Celebrating its 100th anniversary, the American Lung Association works to prevent lung disease and promote lung health. Lung diseases and breathing problems are the leading causes of infant deaths in the United States today, and asthma is the leading serious chronic childhood illness. The American Lung Association has long funded vital research on the causes of and treatments for lung disease. It educates children and adults living with lung diseases on managing their condition. The American Lung Association is "Improving life, one breath at a time."

5. **Genesee County Medical Society.** The Genesee County Medical Society has 819 physician members treating patients in the Mid-Michigan region. The mission of Genesee County Medical Society is leadership, advocacy, education, and service on behalf of its members and their patients.

6. **Physicians for Social Responsibility.** Physicians for Social Responsibility is a membership-based education and public policy organization with a long history of working to protect public health and the environment. PSR was founded in 1961 by a group of Boston physicians concerned about the potentially irreversible and devastating health and environmental impact of this country's preparation for nuclear war. PSR's work throughout the Cold War was done as part of an international network of physicians

led to its sharing in the 1985 Nobel Peace Prize. In 1993, PSR formally expanded its environmental health program beyond nuclear issues. PSR has since become a major force in mobilizing the medical and public health communities around human health threats posed by toxic exposures, drinking water quality, climate change and air quality, global climate change, and environmentally-influenced chronic diseases.

7. **Science and Environmental Health Network.** The Science and Environmental Health Network engages citizens and governments in the effective application of science to restore and protect the health of communities and ecosystems. The Network encourages the practice of science in the public interest and the accurate interpretation of scientific information; identifies information, ethical concepts, and logic that have the potential to provoke important change; and helps communities, organizations, and governments use these intellectual tools to develop sound policies.

8. **Lone Tree Council.** The Lone Tree Council is a Michigan non-profit charitable corporation based in Bay City with members across the state, including members residing, owning property, and enjoying recreation in the city of Midland, Midland County, and the Tittabawassee River floodplain. The Lone Tree Council has existed for 24 years and is devoted to clean water, clean air, the preservation of Michigan's natural resources, and environmental justice for the citizens of our watershed.

9. **Public Interest Research Group in Michigan.** PIRGIM is a Michigan non-profit charitable corporation based in Ann Arbor with 10,000 members across the state, including members residing, owning property, and recreating in the city of Midland, Midland County, and the Tittabawassee River floodplain. PIRGIM is devoted to Michigan's public interest through research, advocacy and public education.

10. **Sierra Club.** The Sierra Club was founded in 1892 and is the nation's oldest grassroots environmental organization. The Sierra Club is incorporated in California, and has its headquarters in San Francisco, California. It has more than 700,000 members nationwide, including over 21,000 members in Michigan. The Sierra Club's purpose is to explore, enjoy and protect the wild places of the earth; to practice and promote the responsible use of the earth's ecosystems and resources; and to educate and enlist humanity to protect and restore the quality of the natural and human environments.

11. **The Center for Civil Justice.** The Center for Civil Justice is a non-profit law firm serving low-income clients in a 14-county region of mid-Michigan and the Thumb. The Center focuses its work on issues and problems that impact a large number of low-income persons, and/or for which representation is not available through federally funded, civil legal services providers. As a provider of direct legal representation to low income persons, the Center has a significant interest in ensuring that meaningful remedies are available to low-income individuals who suffer legal injuries. Because low-income individuals and families frequently live in the neighborhoods closest to industrial sites, many of the clients served by the Center are more likely than higher income individuals to suffer exposure to industrial pollutants or contaminants. Many low-income individuals are uninsured or lack health care coverage to pay for medical monitoring to ensure the early detection and preventive care that is needed to forestall or ameliorate the adverse health consequences of exposure to toxic industrial contaminants. Accordingly, the Center is interested in ensuring that medical monitoring may be an available remedy when the facts of an industrial contamination case warrant such relief.

VI. STATEMENT OF FACTS

Amici Curiae adopt the statement of facts and proceedings presented by Plaintiffs-Appellees in their brief on appeal.

VII. ARGUMENT

A. The Trial Court Properly Denied Defendant-Appellant's Motion For Partial Summary Disposition Pursuant To MCR 2.116(C)(8) Regarding Plaintiffs-Appellees' Claim For Medical Monitoring Relief.

> Standard of Review: This Court reviews the grant or denial of summary disposition de novo to determine if the moving party is entitled to judgment as a matter of law. *Maiden v. Rozwood*, 461 Mich 109, 118 (1999). A motion under MCR 2.116(C)(8) tests the legal sufficiency of the complaint. *Id*., at 119. All well-pleaded factual allegations are accepted as true and construed in a light most favorable to the nonmovant. *Id*. A motion under MCR 2.116(C)(8) may be granted only where the claims alleged are "so clearly unenforceable as a matter of law that no factual development could possibly justify recovery." *Id*., quoting *Wade v. Dep't of Corrections*, 439 Mich 158, 163 (1992). When deciding a motion brought under MCR 2.116(C)(8), a court considers only the pleadings. *Maiden*, at 119-120.

With its appeal, Defendant-Appellant Dow Chemical Company seeks a broad judicial rule prohibiting lower courts from requiring medical monitoring as a remedy in any kind of case under any circumstances in Michigan. Such a broad restriction on the equitable powers of Michigan courts would be unsound, and in cases such as this one, an equitably fashioned program for medical monitoring may be the most effective remedy in protecting citizens from latent development of disease as a result of excessive exposure to toxic contaminants.

Amici Curiae support the position taken by Plaintiffs-Appellees in this case as a reasonable remedy to prevent a potentially significant harm. Recognizing the extent of the dioxin contamination at issue in this case, and the severity of the risk of latent development of disease, the construction of an equitable program for medical monitoring is simply prudent. Plaintiffs propose a remedy that can be tailored by the trial court to the specific facts developed in evidence. It is a proposal that will not produce a financial windfall for any plaintiff, but it may well save lives while helping to target resources where they are needed most.

We certainly should not discard such a proposal before permitting factual development at the trial court level, and it would be a terrible mistake for us to discard this remedial concept completely in a fashion that eliminates any possibility of such a remedy under any circumstances as suggested by Defendant-Appellant Dow. Rather, we should embrace medical monitoring as an equitable remedy subject to the direct control of the trial court and available in cases where the evidence demonstrates a substantial risk of latent disease that may be prevented by appropriate monitoring and detection. The facts alleged by Plaintiffs would support adoption of medical monitoring as an equitable remedy, and therefore, it would be appropriate for this Court to remand this action to the trial court for further proceedings.

1. Plaintiffs-Appellees seek medical monitoring as an equitable remedy in the form of a mandatory injunction.

There can be no doubt that Plaintiffs have formulated their request for a medical monitoring program as an equitable remedy in the form of injunctive relief. Plaintiffs have specifically proposed: "the creation of a court-supervised medical monitoring trust fund." (Third Amended Complaint, p. 38, ¶ 216.) Plaintiffs properly requested this relief in the form of an injunction, recognizing that they have no adequate remedy at law and that there is a substantial risk of irreparable harm if the injunctive relief is not granted. (Third Amended Complaint, p. 39, ¶¶ 218-19.) On this basis, Plaintiffs ultimately requested the following relief with regard to medical monitoring:

> "Plaintiffs seek equitable/injunctive relief in the form of a medical monitoring program to be funded by Defendant for the benefit of all persons in the Medical Monitoring Class. Specifically, Plaintiff seeks a comprehensive medical monitoring program that:
>
> "(i) Notifies Medical Monitoring Class members of the potential harm from Dioxin Exposure;

> "(ii) Aids them in the early diagnosis and treatment of resulting injuries through ongoing testing and monitoring associated with and caused by Dioxin exposure;
>
> "(iii) Provides for the accumulation and analysis of relevant medical and demographic information from class members including, but not limited to the results of mammograms and echocardiograms performed on Medical Monitoring Class members;
>
> "(iv) Provides for the creation, maintenance, and operation of a 'registry' in which relevant demographic and medical information concerning all Medical Monitoring Class members is gathered, maintained, and analyzed;
>
> "(v) Provides for medical research concerning the incidence, prevalence, natural course and history, diagnosis and treatment of Dioxin exposure related diseases and illnesses; and
>
> "(vi) Publishes and otherwise disseminates all such information to members of the Medical Monitoring Class and their physicians."
>
> (Third Amended Complaint, pp. 40-41, ¶ (g).)

This is clearly a request for the trial court to order Defendant to take an affirmative course of conduct in creating a medical monitoring fund. Importantly, this request does not demand the payment of money damages to Plaintiffs for medical monitoring. Rather, Plaintiffs request compulsory action in creating a fund in the nature of a trust to be administered under the control of the court with the assistance of qualified physicians and experts.

As such, Plaintiffs' proposal is properly characterized as a mandatory or reparative injunction, requiring the Defendant to take action to preserve the status quo and restore Plaintiff to a preexisting entitlement. 1 Dobbs, Law of Remedies (2nd ed.), § 2.9, pp. 224-25. Courts may be reluctant to award a mandatory injunction because it may be especially intrusive, "but the mandatory form of the injunction is not often a good measure of that intrusion and in any event

the intrusion effected must be weighed against the intrusion required to provide a suitable remedy." *Id*.

Consequently, the specific form of the medical monitoring program to be fashioned as a mandatory injunction by the trial court will require the development of an evidentiary record enabling the court to weigh the equities involved in creating such a program. Therefore, Amici request the Court to remand this action to the trial court for further proceedings so that the parties can develop a proper evidentiary record.

2. <u>Michigan law has long allowed mandatory injunctions.</u>

The mandatory injunction is nothing new to Michigan. "Court orders which require mandatory affirmative action, necessary to the preservation of the status quo, have consistently been allowed in this state." *Van Buren Public School Dist v. Wayne Circuit Judge, et al*, 61 Mich App 6, 20 (1975), citing *Gates v. Detroit & Mackinac Railway Co*, 151 Mich 548 (1908), *Steggles v. National Discount Corp*, 326 Mich 44 (1949); *L & L Concession Co v. Goldhar-Zimner Theatre Enterprises, Inc*, 332 Mich 382 (1952). As noted in the *Van Buren Public School* case, the following quotation from the *Gates* Court is instructive:

> "Courts look with disfavor upon mandatory injunctions and will only grant them when it is necessary to preserve the status quo. Usually an order restraining action will accomplish this result, but the status quo is not always 'a condition of rest, but of action.' **Whenever courts have found a mandatory injunction essential to the preservation of the status quo, and serious inconvenience and loss would result if not preserved, they have not hesitated to grant it**."
>
> *Gates*, supra, 151 Mich at 551-52 (emphasis added) (citing 4 Pomeroy on Equity Jurisprudence (3d Ed.), § 1359; 1 High on Injunctions (4th Ed.), § 621a; 2 High on Injunctions (4th Ed.), § 1415k), quoted in *Van Buren Public School Dist*, supra, 61 Mich App at 20-21.

This premise is equally applicable to the present case. Here, Plaintiffs seek to preserve the status quo with regard to their health from latent disease caused by excessive exposure to toxic dioxin. To preserve this status quo, Plaintiffs seek a mandatory injunction compelling Defendant to establish a medical monitoring program aimed at detecting the emergence of diseases caused by dioxin exposure. This is precisely how a mandatory injunction should work. The facts alleged in Plaintiffs' complaint demonstrate that injunctive relief is essential to the preservation of the status quo, and serious inconvenience and illness will result if the status quo is not preserved. If the evidentiary record supports these facts, then the trial court should not hesitate to grant an appropriate mandatory injunction tailored to the circumstances of the case in the interest of preserving the status quo and preventing irreparable harm. *Gates*, supra.

3. As an equitable remedy, a medical monitoring program can be fashioned to fit the particular facts of the case.

Amici are mindful of the stated worries that establishment of a medical monitoring program may lead to abuse, particularly if the remedy were formulated as a direct payment of money damages to individual plaintiffs. See, e.g., Brief of the Chamber of Commerce of the United States, et al, pp. 4-14. Such concerns can be overstated, however, and unless we are to take the inadvisable position that our courts are incompetent to perform equity, it is also helpful to remember the axiom that: "Equity eschews mechanical rules; it depends on flexibility." *Holmberg v. Armbrecht*, 327 U.S. 392, 396 (1946).

This flexibility of the trial court's equitable powers makes Plaintiffs' proposed medical monitoring program workable. Obviously, the trial court will need to develop the factual record in order to tailor the precise scope of the mandatory injunction, maintaining vigilance and expecting the cooperation of Plaintiffs in preventing any potential abuses. We should fairly

expect that the program will be designed to take into consideration any excessive impact on Defendant while ensuring that it meets the reasonable monitoring needs of the Plaintiffs.

In addition to equitable flexibility, the trial court will also have at its disposal several other tools that will make it possible to target resources where they are needed. The trial court can control the discovery process for the express purpose of determining the appropriate extent of the injunctive relief to be granted, for example, including the range of expert testimony, and special masters may be particularly useful in cases such as this one. By fashioning the medical monitoring program as an equitable trust, the trial court can exert control over the program that prevents abuses and ensures that funds are used for their intended purposes. Such controls can make such a program viable in providing the desired equitable remedy that aids in detecting and preventing the onset of the diseases for which Plaintiffs have been placed at risk.

4. <u>The facts to be taken as true in this case are quite compelling.</u>

It is important in this case to remember that a motion under MCR 2.116(C)(8) tests the legal sufficiency of the complaint, and all well-pleaded factual allegations are accepted as true and construed in a light most favorable to the nonmovant. *Maiden*, *supra*, 461 Mich at 119. Here, Defendant's motion was brought under MCR 2.116(C)(8), which permits the trial court to grant the motion only where the claims alleged are "so clearly unenforceable as a matter of law that no factual development could possibly justify recovery." *Id*., quoting *Wade v. Dep't of Corrections*, 439 Mich 158, 163 (1992). When deciding this type of motion, a court considers only the pleadings. *Maiden*, at 119-120.

Among other things, the facts to be taken as true from Plaintiffs' Third-Amended Complaint include:

- In early 2002, families living in the area of the Tittabawassee River and its flood plain learned shocking news from the Michigan Department of Environmental Quality: that their homes and yards have been polluted with dioxin; that they are at risk to suffer from many deadly and life-altering diseases such as cancer, immune deficiencies, and birth defects, to name but a few; and worst of all, they learned that their children suffer the greatest risk. (Third Amended Complaint, ¶ 2.)

- Exposure to dioxin is associated with cancer, liver damage, hormone changes, reproductive damage, miscarriages, birth defects, and decreased ability to fight infection. (Third Amended Complaint, ¶ 128.)

- Birth defects associated with dioxin include skeleton and kidney defects, lowered immune responses, and effects on the development of the brain and nervous system. (Third Amended Complaint, ¶ 128.)

- People exposed to dioxin have more skin and respiratory system infections, middle ear infections, and exhibit more immune system damage than people who are not exposed, and children are more likely to be affected than adults. (Third Amended Complaint, ¶ 129.)

- Dioxin is a potent carcinogen, causing many kinds of cancers. (Third Amended Complaint, ¶ 130.)

- Dioxin has been associated with lowered fertility, increased prenatal mortality, birth defects, and increased risk of endometriosis. (Third Amended Complaint, ¶ 131.)

- Dioxin is particularly toxic to children, potentially affecting the developing immune, reproductive, nervous, and lymph systems. (Third Amended Complaint, ¶ 132.)

- Dioxin has been linked to cleft palate, hemorrhage and edema, impaired hearing, and retarded growth. (Third Amended Complaint, ¶ 132.)

- Dioxin lodges in the fatty tissues of animals and humans that consume contaminated water, plants, and soil, and that inhale contaminated soil and dust. (Third Amended Complaint, ¶ 135.)

- Dioxin accumulates through the food chain. (Third Amended Complaint, ¶ 135.)

- The Michigan Department of Environmental Quality (MDEQ) has identified concentrations of dioxin as high as 7,300 parts per trillion (ppt) in the affected area. (Third Amended Complaint, ¶ 137.)

- In 2002, MDEQ established conclusively that there were dangerous levels of dioxin in the Tittabawassee River and flood plain downstream from Dow's facilities in Midland, and MDEQ established conclusively that Dow was the source of the dioxin pollution. (Third Amended Complaint, ¶ 139.)

- Testing revealed very high levels of dioxin at Freeland Festival Park and at Imerman Park, where signs now warn visitors about the presence of dioxin and that, "children may be especially sensitive to dioxin." (Third Amended Complaint, ¶ 140.)

- MDEQ, together with the Michigan Department of Community Health and the Michigan Department of Agriculture have widely circulated a "Dioxins Fact Sheet" to area residents, warning among other things that: "Children should not play in soil or sediment near sites of known or suspected dioxin contamination." (Third Amended Complaint, ¶ 141.)

- Testing has confirmed that dioxin has contaminated the eggs of local, free-range chickens. (Third Amended Complaint, ¶ 142.)

- MDEQ has concluded that "elevated dioxin concentrations were pervasive" in the affected flood plain, and that Dow "is the principal source of dioxin contamination" in the area. (Third Amended Complaint, ¶ 143.)

- As a result of the dioxin contamination, MDEQ has invoked the provisions of Michigan's Natural Resources and Environmental Protection Act to restrict Plaintiffs' outdoor activities on their own property; to require Plaintiffs to obtain state permits for all household soil movement activities; and to compel Plaintiffs to make adverse disclosures about dioxin contamination to potential real estate buyers. (Third Amended Complaint, ¶ 145.)

- Recent testing confirms that dangerous levels of dioxin are present as deep as four feet beneath the surface of the flood plain. (Third Amended Complaint, ¶ 146.)

- Plaintiffs in this case now live in fear for the health of themselves and their children, and they are seemingly trapped in prison of poison because they cannot sell their homes as a result of the dioxin contamination they confront. (Third Amended Complaint, ¶ 149.)

- Dow has done nothing to abate the dioxin pollution in the affected area. (Third Amended Complaint, ¶ 150.)

- The presence of dioxin in the area has reduced the value of Plaintiffs' homes and real property. (Third Amended Complaint, ¶ 152.)

- The presence of dioxin in the Tittabawassee River and flood plain poses a serious risk to the health of the Plaintiffs and other residents, requiring that they closely monitor their health for many years to come, if not the rest of their lives. (Third Amended Complaint, ¶ 153.)

- Dow's handling and disposal of dioxin has resulted in the long-lasting, significant contamination of Plaintiffs' property and has created a continuing nuisance which

unreasonably and significantly interferes with Plaintiffs' enjoyment of their property. (Third Amended Complaint, ¶ 168.)

- Plaintiffs did not consent to the dioxin contamination of their property. (Third Amended Complaint, ¶ 169.)

- Dow knew or should have known that its handling and disposal of dioxin unreasonably and significantly interfered with Plaintiffs' rights. (Third Amended Complaint, ¶ 172.)

- Dow's handling and disposal of dioxin has created a continuing, private nuisance with respect to Plaintiffs' property. (Third Amended Complaint, ¶ 173.)

- Dow's negligence in handling and disposing dioxin has resulted in the continued contamination of Plaintiffs' property. (Third Amended Complaint, ¶¶ 184-87.)

- Dow demonstrated a substantial lack of concern for whether an injury would result from its handling and disposal of dioxin, amounting to gross negligence. (Third Amended Complaint, ¶ 188.)

- Dow's conduct in handling and disposal of dioxin has created a public nuisance in the affected area. (Third Amended Complaint, ¶¶ 193-98.)

- Plaintiffs have suffered significant exposure to dioxin from living in and near the Tittabawassee River and flood plain. (Third Amended Complaint, ¶ 208.)

- Plaintiffs have a substantially greater risk of suffering the various diseases and conditions associated with dioxin exposure because of their exposure to dioxin as residents of the affected area. (Third Amended Complaint, ¶ 211.)

- The diseases identified as being associated with and caused by dioxin, such as cancer, are more likely to be successfully treated if they are diagnosed early. (Third Amended Complaint, ¶ 212.)

- As a direct and proximate result of the dioxin contamination of the Tittabawassee River and flood plain, as caused by Dow, Plaintiffs were exposed to dioxin, a proven hazardous substance, and as a result, suffer significantly increased risk of contracting a serious latent disease. (Third Amended Complaint, ¶ 213.)

- Monitoring procedures currently exist or can readily be created to detect at an early stage the onset of serious adverse side effects caused by dioxin exposure. (Third Amended Complaint, ¶ 214.)

- An appropriate monitoring program would increase the probability of prolonged life and of reducing suffering that would exist without such responsive measures. (Third Amended Complaint, ¶ 214.)

- The monitoring needed as a result of dioxin exposure is different from health monitoring recommended in the absence of such contamination, and it is reasonably necessary according to contemporary scientific principles. (Third Amended Complaint, ¶ 215.)

These facts demonstrate the extensive dioxin contamination confronted by Plaintiffs in their daily lives, justifying a response that protects the affected individuals from the onset of latent disease resulting from excessive dioxin exposure. Consequently, the prospect of designing an appropriate equitable remedy merits further consideration and factual development.

5. There is no adequate remedy at law, and irreparable harm will result if injunctive relief is not granted.

Defendant-Appellant Dow and its amici spend considerable time arguing against a legal remedy in this case, based in large part on the premise that money damages may not be targeted appropriately to retain the needed monitoring services. (See, e.g., Brief of Defendant-Appellant The Dow Chemical Company, pp. 28-33; Brief of the Chamber of Commerce of the United States, et al, pp. 4-12, 18-20.) There are concerns, for example, about rulings that permit monetary awards for medical monitoring claimants where "the plaintiff does not have to spend any of the award on actual monitoring." (Brief of the Chamber of Commerce of the United States, et al, p. 19.) Citing their own opinion pieces for support, Dow's amici even go to the extreme of labeling a state where such relief is granted as a "judicial hellhole." Id., at 20.

Yet, in all of these arguments against the awarding of money damages, one thing becomes crystal clear: Plaintiffs in this case will have no adequate remedy at law. Indeed, if the Court were to adopt the interpretation of Michigan case law proposed by Dow, Plaintiffs would have no legal remedy at all for their medical monitoring needs. (Brief of Defendant-Appellant The Dow Chemical Company, pp. 11-15.)

Relying on tort law principles to address a request for equitable relief, Dow makes the implausible argument that a party must show a "manifest physical injury" before a trial court can grant injunctive relief to prevent that injury from occurring. Id., pp. 16-28. In effect, Dow argues that Michigan courts cannot take injunctive action until it is too late to prevent the undesirable harm from occurring anyway.

Dow's argument in this respect obviously flies in the face of accepted case law governing injunctions, which are intended to preserve the status quo and prevent harm from occurring in the first place. See, e.g., *Gates*, supra. Even in the context of a petition for a *preliminary* injunction, there is no requirement that irreparable harm or injury must have already occurred in order for injunctive relief to be available. *Michigan Coalition of State Employee Unions v. Michigan Civil Service Comm'n*, 465 Mich 212, 228 (2001). To the contrary, it is sufficient to demonstrate that "the applicant will suffer irreparable injury" absent the preliminary injunction. *Id*. Here, Plaintiffs allegations regarding the severe risk of irreparable injury created by the toxicity and prevalence of the dioxin contamination provide a factual foundation for the injunctive relief that Plaintiffs seek. Dow's argument that there must be a showing of "manifest physical injury" to justify injunctive relief is simply incorrect.

Plaintiffs in this case have alleged facts justifying the conclusion that they have no adequate remedy at law and that they will be irreparably harmed in the absence of appropriate equitable relief. Therefore, Dow's appeal should be denied, and Plaintiffs should be permitted the opportunity to present evidence to the trial court warranting the imposition of mandatory injunctive relief in the form of a medical monitoring program.

6. The posture of the case is such that factual development could justify an appropriate remedy.

The trial court in this case took the correct approach in ruling that "Plaintiffs should be given the opportunity to create a record" supporting the medical monitoring relief sought. (Opinion and Order, p.4.) Notably, the trial court did not actually approve a medical monitoring program, but rather refused to rule out such a program as a reasonable remedy in the case.

The trial court took guidance from *Meyerhoff* to the extent that the decision offered five factors for consideration and proof in evaluating a potential program: "the significance and extent of the exposure; the toxicity of the substance; the seriousness of the diseases for which individuals are at risk; the relative increase in the change of onset of disease in those exposed; and the value of early diagnosis." *Id*., quoting *Meyerhoff v. Turner Construction Co*, 202 Mich App 499, 505 (1993). The trial court clearly understood that substantial proof would be required for this type of relief to be granted

The trial court also recognized the types of policy concerns that have been raised by Dow and others regarding monetary damage awards attributed to medical monitoring. Opinion and Order, at 3-4, discussing *Metro-North Commuter Railroad Co v. Michael Buckley*, 521 US 424 (1997). Expressing awareness that "many of the courts authorizing medical monitoring have imposed limitations on the remedy that address these policy concerns," however, the trial court implied a willingness to take responsibility for fashioning a remedy that avoids these problems particularly as they relate to "awards of lump sum damages" for medical monitoring claimants. (Opinion and Order, at 4, quoting *Petito v. A.H. Robins Co, Inc*, 750 So2d 103, 106 (Fla. App. 1999)). The mere fact that an appropriate remedy may be difficult to construct does not mean

that we should refuse to work at it, and the trial court obviously understood this case in this framework.

There is no doubt that policy concerns need to be addressed in designing an appropriate medical monitoring program, but there is equally no doubt that the risk of toxic exposure resulting from excessive dioxin exposure requires us to address those concerns. Given the serious nature of the facts alleged, the equitable form of the remedy requested, and the willingness of the court to work to sort through these complexities, it would make absolute sense to permit Plaintiffs "the opportunity to create a record" in support of an appropriate medical monitoring program. Therefore, it would be appropriate for this Court to affirm the ruling of the trial court in this regard.

7. We should not foreclose Michigan courts from granting this equitable remedy where it is justified.

Amici Curiae support the type of equitable relief sought by Plaintiffs in this case because it is well suited to the factual context at issue and to the equitable jurisprudence of Michigan. In doing so, Plaintiffs have clearly looked to the best analyses offered in other states as well. See, e.g., *Potter v. Firestone Tire & Rubber Co*, 863 P2d 795, 821-25 (Cal. 1993); *Redland Soccer Club v. Department of the Army*, 696 A2d 137, 145-46 (Pa. 1997); *Hansen v. Mountain Fuel Supply Co*, 858 P2d 970, 979-82 (Utah 1993); *Burns v. Jaquays Mining Corp*, 752 P2d 28, 33-34 (Ariz. Ct. App. 1987); *Petito*, supra.

These cases demonstrate a growing trend toward the acceptance of medical monitoring as an equitable remedy subject to the close control of the court. Taking the best features of these cases, Plaintiffs also have placed their request for relief firmly within the historical equitable jurisprudence of Michigan by seeking the type of mandatory injunction long approved by our

courts where the circumstances justify it. *Van Buren Public School Dist*, supra, 61 Mich App at 20-21; *Gates*, supra, 151 Mich at 551-52.

The underlying facts of this case merit our close attention and prudent consideration. The dioxin exposure to which Plaintiffs have been subjected is pervasive and severely threatening. Plaintiffs have no adequate remedy at law, and there is a substantial risk that they will suffer irreparable harm in the absence of an appropriate remedy. The medical monitoring program that Plaintiffs have proposed in the form of injunctive relief may be the best method we have to detect and deter the onset of illness resulting from this excessive dioxin exposure, and this program may provide us with the most cost-effective means of saving lives under these circumstances.

We simply must not foreclose our courts from granting this type of equitable remedy where it is justified. It is certainly appropriate to demand substantial proof to support such injunctive relief, and court control of any medical monitoring program is wise. But we can, and we must, continue to entrust our courts with the prudent exercise of the equitable powers they have held for so long. In this case, there is no reason for us to lack confidence that the trial court can weigh the equities involved and reach the right result.

In summary, we should commend Plaintiffs for proceeding in this direction, working to establish a medical monitoring program that is effective and subject to appropriate court supervision. We should now permit Plaintiffs to begin the process of developing the factual record to support their claims. Therefore, it would be appropriate for the Court to deny Defendant-Appellant's appeal and remand this case to the trial court for further proceedings.

VIII. CONCLUSION AND REQUEST FOR RELIEF

For all of the reasons stated above, Amici Curiae respectfully request this Honorable Court to deny the appeal of Defendant-Appellee and to remand this action to the trial court for further proceedings.

Respectfully submitted,

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Robert B. June (P51149)
Law Offices of Robert June, P.C.
Attorney for Amici Curiae
124 Pearl Street, Suite 201
Ypsilanti, Michigan 48197-5374
(734) 481-1000

Dated: September 1, 2004

Proof of Service

I certify that I served this document on this date by enclosing two copies in sealed envelopes with first class postage prepaid, addressed to all counsel of record, and by depositing them in the United States mail.

I declare that the statements above are true to the best of my information, knowledge, and belief.

Respectfully submitted,

_____
Robert B. June (P51149)

Dated: September 1, 2004