**STATE OF MICHIGAN**
**IN THE COURT OF APPEALS**

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| GARY & KATHY HENRY, et al.<br>Plaintiffs-Appellees,<br>vs.<br>THE DOW CHEMICAL COMPANY,<br>a Delaware corporation,<br>Defendant-Appellant. | Court of Appeals No. _____<br><br>Saginaw County Circuit Court,<br>Case No. 03-47775- NZ<br>Hon. Leopold P. Borrello |


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# PLAINTIFFS' ANSWER TO DEFEDANT-APPELLANTE THE DOW CHEMICAL COMPANY'S EMERGENCY APPLICATION FOR LEAVE TO APPEAL AND BRIEF IN OPPOSITION TO MOTION FOR PEREMPTORY REVERSAL

**The Order appealed has and will not result in the significant consequences alleged by Dow. The discovery Dow seeks is unnecessary to the hearing on December 18, 2003; Dow has provided no legal or evidentiary support that this discovery is needed prior to the hearing.**

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## RESPONSE TO STATEMENT OF JURISIDCTION

Plaintiffs do not dispute Dow's Statement of Jurisidiction.

## COUNTER-STATEMENT OF QUESTION INVOLVED

Did the trial court err in denying Defendant's motion for partial summary disposition as to Plaintiffs' claims for medical monitoring through an equitably administered medical monitoring trust fund and program?

The Saginaw County Circuit Court answered "no."

Plaintiffs answer "no."

Dow answers "yes."

## I. INTRODUCTION

This case presents important public policy issues that should be resolved upon a complete record. The trial court did not err in so finding. On the contrary, the trial court made the only decision available under the current state of Michigan law.

## II. COUNTER-STATEMENT OF FACTS

Dow's Statement of Facts softens the circumstances faced by the current and former residents of the Tittabawassee River. Indeed, the introduction to the Second Amended Complaint speaks for itself best:

> 1. The Tittabawassee River was once a desirable place to live in Saginaw County. Both modest and expensive homes line its banks, all set in a beautiful and wooded landscape. Residents live here to enjoy the recreation and leisure activities unique to the area. Imagine children playing in the mud; swimming in the river; fishing on its banks. Families garden together; tend to their yards; mow their grass; all in a wooded, riverside park-like setting.
>
> 2. In early 2002, those families learned shocking news from the Michigan Department of Environmental Quality. They learned for the first time that all of these activities are dangerous, especially to their children. They learned that their homes and yards are polluted with Dioxin, the same toxin that has caused entire towns to disappear; a substance that has been described as "one of the deadliest toxins known to man." They learned that they are at risk to suffer from many deadly and life altering diseases: cancer, immune deficiencies, and birth defects, to name but a few. Worst of all, they learned that their children suffer the greatest risk.
>
> 3. Life for the residents along the Tittabawassee has changed forever. They now know that as much as 7,300 parts per trillion of Dioxin has been detected in and near their backyards, an amount that exceeds the residential clean up standard of 90 parts per trillion 81 times over. Like Love Canal and Times Beach, the Tittabawassee neighborhood will be gone one day. But for now, the residents remain trapped in homes made worthless by the Dioxin there. Dioxin that the Dow Chemical Company put there. While Dow lobbies the government so that Dow may do little or nothing; while the government contemplates, considers and studies Dow's requests, nothing is done. But as each day passes, the people along the Tittabawassee are exposed to more Dioxin.
>
> 4. The time has come to free these residents from the poisonous traps that were once their homes. The time has come to provide the medical monitoring necessary to determine whether the residents have been afflicted by Dioxin's diseases, and if so, to

> treat those conditions. The time has come to hold Dow responsible for what it has done to the residents of the Tittabawassee.

Second Amended Complaint, ¶¶ 1-4.

Dow goes on to state: "Not one plaintiff claims to have expended even a dollar for health monitoring, and not one claims to have suffered a physical injury," citing Plaintiff's Brief in Opposition to Dow's Motion for Summary Disposition. First, there is no basis in the record for Dow to make either claim. To the contrary, each dollar spent by any plaintiff for health care and medical diagnosis is quite possibly a dollar spent because of their exposure to dioxin. And many physical injuries suffered by plaintiffs may well be the result of their exposure to Dow's dioxin pollution. *However*, because many of these ailments and diseases have other causes, plaintiffs here do not make claims for recovery of their personal injuries, nor for their prior medical expenses.

Instead, plaintiffs seek the establishment of an equitably administered medical monitoring trust fund for the maintenance of a medical monitoring program as set forth on paragraph 217 and subparagraph (b) of the prayer for relief of the Second Amended Complaint. Plaintiffs' *have not* requested an award of medical monitoring damages.

## III. COUNTER-STATEMENT OF NECESSITY FOR INTERLOCUTORY REVIEW

Dow has not shown that it will suffer "substantive harm" by allowing the judicial process to proceed in normal course. MCR 7.205(B)(1). Dow makes much of its need to conduct discovery of the medical histories and medical circumstances of the entire 179 Plaintiffs. Dow claims this need exists "because the court must be informed of what issues will be considered in any class wide trial, and discovery related to class issues will both relate to and go beyond that required in the absence of a class." Dow's Brief at 7. This simply makes no sense. The number of plaintiffs here is surely representative of the larger class of current and former residents.

Insofar as Plaintiffs do not seek recovery for prior medical monitoring expenses and, instead, collectively seek a medical monitoring trust fund and program, there is absolutely no need to depose or conduct other discovery related to the medical conditions of these Plaintiffs for class certification purposes. This is particularly true where, as here, most of the medical maladies they face are latent and will not be known for years to come.

Moreover, the trial court overruled Dow's motion for summary disposition on this claim in order to allow a record to be developed for later consideration. No such record exists now, and Dow seeks to terminate its creation. That record will establish, among other things, that the public funds for health monitoring and study of this problem are minimal. State and local community health agencies are planning to test 25 residents to determine dioxin exposure levels, while admitting that the planned testing is statistically insignificant. They say they simply do not have the funding. All the while, Dow is attempting to fashion self-serving studies of its own.

Much of the medical monitoring claim surrounds whether Dow, government, or private individuals should bear the burden of ascertaining and monitoring the health consequences associated with Dow's pollution. Unless this Court permits a record to be developed, the Court of Appeals and the Supreme Court will simply have insufficient information before them to evaluate the public policy issues in this or any subsequent appeal.

## IV. ARGUMENT

### A. BY PROCLAMATION OF THE MICHIGAN SUPREME COURT, A FULLY DEVELOPED FACTUAL RECORD IS A NECESSARY PREREQUISITE TO APPELLATE REVIEW IN THIS CASE.

Dow filed a Motion for Partial Summary Disposition under MCR 2.116 (c)(8) regarding Plaintiffs' claim for medical monitoring, which is Count VI of the Second Amended Complaint. Generally, a motion for failure to state a claim upon which relief can be granted is based upon the pleadings only. The motion can only be granted if no factual development could possibly

justify recovery. *Beaudrie v. Henderson*, 465 Mich. 124, 129, 130; 631 N.W. 2d 308 (2001). All factual allegations in support of the claim, as well as any reasonable inferences or conclusions from the facts, must be accepted as true. *Diehl v. Danuloff*, 242 Mich. App. 120, 123; 618 N.W. 2d 83 (2000).

This case, however, involves a claim for medical monitoring upon which there is no clear legal precedent. That summary disposition is appropriate when the law on an issue is well defined and the facts are not in dispute (or in this case, taken as true) is axiomatic. *Hoffman v. JDM Associates*, 213 Mich. App. 466, 540 N.W. 2d 689 (1995). But when the law is not well defined and the Courts are answering questions of first impression a *de novo* review is both inappropriate and premature.

Indeed, the Supreme Court essentially said just that when it first reviewed medical monitoring as a claim under Michigan law in *Meyerhoff v. Turner Construction Co.,* 456 Mich. 933, 575 N.W.2d 550 (1998)(the history of which will be discussed extensively *infra.*) Therefore, given the prior proclamation of the Michigan Supreme Court, the standard of review here should not be *de novo* based upon the pleadings, but upon a fully developed record in the trial court.

**B.** THE TRIAL COURT DID NOT ERR IN DENYING DOW'S MOTION FOR SUMMARY DISPOSITION AS TO PLAINTIFFS' MEDICAL MONITORING CLAIMS IN COUNT VI OF THE SECOND AMENDED COMPLAINT.

While it is true that the Michigan Supreme Court has never itself reached the issue of whether Michigan law recognizes medical monitoring as a cause of action, the Supreme Court has not said otherwise. Had the Supreme Court wished to proclaim a medical monitoring cause of action non-existent under Michigan law, it could have done so. It did not. Because prior rulings of the Michigan Court of Appeals and public policy support the existence of a medical monitoring cause of action in Michigan, this Court should deny Defendant-Appellant The Dow

Chemical Company's Emergency Application for Leave to Appeal, as well as its motion for peremptory reversal.

The current turbulence in Michigan law on this question arises from the Michigan Supreme Court's handling of this Court's ruling in *Meyerhoff v. Turner Const. Co.*, 202 Mich. App. 499, 509 N.W.2d 847 (1993). In *Meyerhoff*, this Court held that "medical monitoring expenses are a compensable item of damages where the proofs demonstrate that such surveillance to monitor the effect of exposure to toxic substances, such as asbestos, is reasonable and necessary." 202 Mich. App. at 505.

> In determining whether such medical monitoring damages are reasonable and necessary, the following factors must be considered: 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 chance of onset of disease in those exposed; and the value of early diagnosis.

*Id.* (citing *Ayers v. Jackson Twp.*, 106 N.J. 557, 606, 525 A.2d 287 (1987); *Mauro v. Raymark Industries, Inc.*, 116 N.J. 126, 136-137, 561 A.2d 257 (1989)).

The rationale of the *Meyerhoff* court was clear and compelling—companies like Dow, who are responsible for polluting communities with deadly and dangerously toxic substances, should be responsible for paying the associated costs for medical monitoring of those exposed to that pollution. Indeed, the *Meyerhoff* court said:

> There exists a number of policy reasons for recognizing a claim for medical monitoring damages. "Medical monitoring claims acknowledge that, in a toxic age, significant harm can be done to an individual by a tortfeasor, notwithstanding latent manifestation of that harm." *Id*. at 852. Recognizing this tort does not require courts to speculate about the probability of future injury; rather, it merely requires courts to ascertain the probability that the less-costly remedy of medical supervision is appropriate. *Id.* Allowing plaintiffs to recover medical monitoring expenses deters the irresponsible discharge of toxic substances by defendants and encourages plaintiffs to detect and treat their injuries as soon as possible. *Id.* See also *Ayers, supra,* 106 N.J. p. 603, 525 A.2d 287 (compensation for reasonable and necessary medical expenses is consistent with the important public health interest in fostering access to medical testing for individuals whose exposure to toxic substances creates an enhanced risk of disease); *Askey v. Occidental*

> *Chemical Corp.,* 102 A.D.2d 130, 137, 477 N.Y.S.2d 242 (1984) (such a remedy would permit the early detection and treatment of maladies and, as a matter of public policy, the tortfeasor should bear the cost). Permitting recovery for reasonable presymptom medical monitoring expenses subjects defendants to significant liability when proof of the causal connection between the tortuous conduct and plaintiffs' exposure is likely to be most readily available. *Ayers, supra,* 106 N.J. p. 604, 525 A.2d 287. Another consideration compelling recognition of a presymptom medical monitoring claim is that it is inequitable for an individual, wrongfully exposed to dangerous toxic substances but unable to prove that disease is likely, to have to pay the expense of medical intervention that is clearly reasonable and necessary. *Id.,* pp. 604-605, 525 A.2d 287.

*Id.* at 504-505. The rationale and public policy behind *Meyerhoff* remains valid and undisturbed by the Michigan Supreme Court.

The first time *Meyerhoff* came before the Michigan Supreme Court on appeal, the Court refused to hear it. *Meyerhoff v. Turner Const. Co.*, 451 Mich. 922, 550 N.W.2d 535 (1996). On reconsideration, the Supreme Court vacated its prior decision to refuse to hear the appeal and said: "Leave to appeal is GRANTED, limited to the issue whether the Court of Appeals erred in recognizing a cause of action resulting in damages for medical monitoring where plaintiff has not yet suffered physical illness or physical injury." *Meyerhoff v. Turner Const. Co.*, 454 Mich. 873, 562 N.W.2d 781 (1997).

But then the Supreme Court changed its mind again. *Meyerhoff* v. *Turner Const. Co.*, 456 Mich. 933, 575 N.W.2d 550 (Feb. 1998). This time, after briefing and argument, the Court vacated its order that granted leave to appeal. *Id.* The Supreme Court also said:

> The factual record is not sufficiently developed to allow a [sic] medical monitoring damages. Accordingly, we VACATE that portion of the Court of Appeals decision which holds that medical monitoring expenses are a compensable item of damages. The circuit court's decision to grant the motion for summary disposition was based, in part, on its having taken judicial notice of certain facts. The Court of Appeals correctly held that the Court should not have taken judicial notice, making the grant of summary disposition improper. Thus, the case is remanded to the circuit court for further proceedings. In all other respects, leave to appeal is DENIED.

*Id.* Once again reconsideration was sought and denied. *Meyerhoff v. Turner Const. Co.*, 456 Mich. 933, 577 N.W.2d 690 (Apr. 1998).

Dow mischaracterizes the state of Michigan law when it contends that "[i]f this court allows plaintiffs' medical monitoring claim … to go forward, despite the fact that plaintiffs are uninjured, it will be charting Michigan law on a new course." Dow's Brief in Support of its Motion for Summary Disposition (Exhibit A) at 10. In light of *Meyerhoff, supra,* Dow's contention does not follow. Michigan law has already proceeded down this course. The Court of Appeals recognized medical monitoring as a claim. The Supreme Court seemed poised to consider whether such a claim was valid under Michigan law but for reasons unknown chose not to address the issue. Yes, the Supreme Court vacated that part of the *Meyerhoff* decision relating to medical monitoring, but it did so because the "factual record" was "not sufficiently developed." 456 Mich. 933. The issue of whether medical monitoring damages were recoverable absent allegations of manifested injury had already been briefed and argued. The Supreme Court, had it wanted to, most certainly could have held that Michigan law would not recognize a claim for medical monitoring; it did not.

The Michigan Court of Appeals, however, remains the only barometer of Michigan law on this point, regardless of the order vacating the *Meyerhoff* opinion. The Supreme Court did not say the Court of Appeals was wrong to follow New Jersey and the District of Columbia in validating the medical monitoring claim, although it could have. The Supreme Court simply chose not to address the question. Simply put, the policy and legal rationale given by the Court of Appeals in *Meyerhoff* remains unchallenged analytically or intellectually. This Court should follow the rationale of *Meyerhoff* at this stage of these proceedings. Plaintiffs will make the

necessary factual record as this case proceeds to trial. The extent to which that record is sufficient is a question for another day.

**DOW'S RELIANCE ON OTHER STATES IS MISPLACED**

To the extent this Court chooses to look to other jurisdictions, many jurisdictions have held that medical monitoring is compensable absent manifested physical injury. The first major case to do so was *Askey v. Occidental Chemical Corp.*, 102 A.D.2d 130, 477 N.Y.S.2d 242, 247 (1984), in which the New York Supreme Court, Appellate Division, acknowledged medical monitoring could be a recoverable damage. Since then, at least ten other appellate courts have recognized medical monitoring as a claim or remedy. *See, e.g., Petito v. A.H. Robins Co.,* 750 So.2d 103 (Fla.Dist.Ct.App.1999), *review denied,* 780 So.2d 912 (Fla. 2001); *Bower v. Westinghouse Elec. Corp.*, 206 W.Va. 133, 522 S.E.2d 424 (W.Va.1999); *Bourgeois v. A.P. Green Indus., Inc.,* 716 So.2d 355 (La.1998)(later abrogated by statute); *Redland Soccer Club, Inc. v. Dep't of the Army,* 548 Pa. 178, 696 A.2d 137 (1997); *Potter v. Firestone Tire & Rubber Co.,* 6 Cal.4th 965, 25 Cal.Rptr.2d 550, 863 P.2d 795 (1993); *Hansen v. Mountain Fuel Supply Co.,* 858 P.2d 970 (Utah 1993); *Meyerhoff v. Turner Constr. Co.,* 210 Mich.App. 491, 534 N.W.2d 204 (1995); *Burns v. Jaquays Mining Corp.,* 156 Ariz. 375, 752 P.2d 28 (Ct.App.1987); *Ayers v. Township of Jackson,* 106 N.J. 557, 525 A.2d 287 (1987); *see also Elam v. Alcolac, Inc.,* 765 S.W.2d 42 (Mo.Ct.App.1988), *cert. denied,* 493 U.S. 817, 110 S.Ct. 69, 107 L.Ed.2d 36 (1989). Interpreting the law of seven states and the District of Columbia, federal courts have permitted claims for medical monitoring. *See, e.g., Carey v. Kerr-McGee Chem. Corp.,* 999 F.Supp. 1109 (N.D.Ill.1998) (applying Illinois law, and in later opinion certifying the medical monitoring claim for an interlocutory appeal, stated that "although most courts from other states that have decided this issue have recognized at least some type of medical monitoring claims there are reasoned opinions holding to the contrary." *Carey v. Kerr-McGee Chemical LLC,* 1999

WL 966484 (Sep. 30, 1999)); *Witherspoon v. Philip Morris, Inc.,* 964 F.Supp. 455 (D.D.C.1997) (applying District of Columbia law); *Burton v. R.J. Reynolds Tobacco Co.,* 884 F.Supp. 1515 (D.Kan.1995) (applying Kansas law); *Day v. NLO,* 851 F.Supp. 869 (S.D.Ohio 1994) (applying Ohio law); *Bocook v. Ashland Oil, Inc.,* 819 F.Supp. 530 (S.D.W.Va.1993) (applying Kentucky law); *Cook v. Rockwell Int'l Corp.,* 755 F.Supp. 1468 (D.Colo.1991) (applying Colorado law); *Ball v. Joy Technologies, Inc.*, 958 F.2d 36 (4th Cir.1991), *cert. denied* 502 U.S. 1033 (1992) (applying West Virginia and Virginia law); *Stead v. F.E. Myers Co.,* 785 F.Supp. 56 (D.Vt.1990) (applying Vermont law).

A Maryland Circuit Court recently concluded that Maryland law recognizes a claim for medical monitoring, but the Maryland Court of Appeals did not reach the issue because it dismissed the case on other grounds. *See Philip Morris v. Angeletti*, 358 Md. 689, 752 A.2d 200, 249-51 (2000)

Dow relies heavily on a recent Supreme Court decision: *Metro-North Commuter Railroad Co. v. Buckley,* 521 U.S. 424, 117 S.Ct. 2113, 138 L.Ed.2d 560 (1997). That case however, does not stand for all Dow says it does. Indeed, a recent Florida Court of Appeals decision refuses to accept the same argument Dow makes here. *See Petito v. A.H. Robins Company, Inc.*, 750 So.2d 103, 105 (Fla. App. 1999). The Florida Court said:

> Defendants also contend that the United States Supreme Court has recently rejected a claim for medical monitoring. This is not entirely accurate. The Court merely held that medical monitoring was not provided for by the Federal Employers' Liability Act.

The Florida Court went on to approve a medical monitoring trust fund of the type sought here and to provide guidelines for the establishment of such a fund. *Id.* at 105-106.

As these cases illustrate, medical monitoring is a valid cause of action and remedy in numerous states around the nation. While some courts have failed to recognize medical monitoring, many more have done so.

**DOW'S RELIANCE ON OTHER MICHIGAN CASES IS MISPLACED**

Dow erroneously relies on a number of inapposite cases in forming its own view of what the Supreme Court would have said had it chosen to say something substantive in *Meyerhoff*.[1] Dow's efforts to shun its responsibility for exposing Plaintiffs to dioxin perhaps is best illustrated by the point it attempts to make here. The overarching position of Dow is that, unless an injury has been manifested and can be legally proven to be caused by Dow, Dow bears no legal or other responsibility—this notwithstanding the fact that Dow has polluted the backyards, homes and fields of the Tittabawasee flood plain with this dangerous and deadly toxin. As has been pleaded and will be proven at trial, this is exactly the kind of double-speak that Dow has been engaged in for years. They say they are socially responsible on the one hand, and then endeavor with all their might and clout to avoid responsibility on the other.

Courts have seen through this "logic" in other cases. In Michigan, the Court of Appeals did so in *Meyerhoff*. Said the Court of Appeals in that case:

> Medical monitoring is one of a growing number of non-traditional torts that have developed in the common law to compensate plaintiffs who have been exposed to various toxic substances. *In re Paoli Railroad Yard PCB Litigation*, 916 F.2d 829, 849 (3rd Cir. 1990). Often, the diseases or injuries caused by this exposure are latent. *Id*., pp. 849-850. A claim for medical monitoring expenses seeks to

[1] Dow cites first *Daley v. LaCroix*, 384 Mich. 4 (1970) for the proposition that emotional distress is not actionable without physical injury in a case involving an electrical explosion resulting from a automobile hitting a home. That this case is not "on all fours" goes without saying. If anything, this case illustrates the need for the in depth analytical thinking engaged in by the Court of Appeals in Meyerhoff and the many cases cited in that opinion. Dow then cites *Atkins v. Thomas Solvent Co*., 440 Mich. 293 (1992), a case which stands for the proposition that emotional distress in the form of fear of contamination cannot form the basis of a nuisance claim where the property was not in fact contaminated. Here, the state of Michigan has concluded that the entire Tittabawasee flood plain is contaminated with dioxin; that children cannot safely play in their backyards even though they have been doing so for years. Dow's citation to *Atkins* further illustrates Dow's perspective here, but does little to illuminate any applicable or otherwise meaningful legal principals upon which this Court should rely.

> recover the cost of periodic medical examinations intended to monitor the plaintiffs' health and facilitate early diagnosis and treatment of diseases caused by the plaintiffs' exposure to toxic substances. *Ayers v. Jackson Twp.*, 106 N.J. 557, 599, 525 A.2d 287 (1987). Therefore, an action for medical monitoring expenses seeks to recover only the quantifiable costs of periodic medical examinations necessary to detect the onset of physical harm. *Paoli*, p. 850; *Mauro v. Raymark Industries, Inc.*, 116 N.J. 126, 136, 561 A.2d 257 (1989).
>
> In *Friends For All Children, Inc. v. Lockheed Aircraft Corp.*, 241 U.S.App.D.C. 83, 93, 746 F.2d 816 (1984), the court, quoting from 1 Restatement Torts, 2d, § 7, p 12 defined injury as " 'the invasion of any legally protected interest of another.'" *See also Ayers*, supra, 106 N.J. p. 601, 525 A.2d 287. The court in *Friends*, 241 U.S.App.D.C. p. 93, 746 F.2d 816, held that a reasonable need for medical examinations is itself compensable without proof of other injury:
>
> > It is difficult to dispute that an individual has an interest in avoiding expensive diagnostic examinations just as he or she has an interest in avoiding physical injury. When a defendant negligently 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.
>
> *See Ayers*, 106 N.J. pp. 601-602, 525 A.2d 287.
>
> Similarly, as the court held in *Paoli, supra,* p. 852, a plaintiff need not exhibit symptoms of a disease, nor is a physical injury required, before a claim for medical monitoring can be maintained.

202 Mich. App. at 502-503.

Indeed, the United States District Court for the District of Columbia in *Friends For All Children, Inc. v. Lockheed Aircraft Corp*., 746 F.2d 816 (D.C. Cir. 1984), a case often cited in *Meyerhoff* and other cases approving medical monitoring claims, said:

> To aid our analysis of whether tort law should encompass a cause of action for diagnostic examinations without proof of actual injury, it is useful to step back from the complex, multi-party setting of the present case and hypothesize a simple, everyday accident involving two individuals, whom we shall identify simply as Smith and Jones: Jones is knocked down by a motorbike which Smith is riding through a red light. Jones lands on his head with some force. Understandably shaken, 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. From our example, it 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.

746 F.2d at 825.

Unlike the Michigan cases cited by Dow, none of which relate to a medical monitoring claim, these cases address the legal principals and public policy behind recognizing claims and damages for medical monitoring in toxic tort cases. Ultimately, the simple question is this—when a chemical company pollutes its downstream residential neighbors with dangerous toxins, who should pay for the additional medical monitoring reasonably necessary because of that exposure? The chemical company or the innocent exposure victims? Justice demands that Dow, the chemical company, be held responsible and be required to pay. The Court in *Meyerhoff* agreed. While the Supreme Court vacated that part of the *Meyerhoff* opinion, the Supreme Court purposely passed on its opportunity to address the issue because of the state of the record in that case.

The simple, fair, logical, and just approach is for this Court to follow the reasoning and legal analysis of *Meyerhoff* and the cases cited by that Court. Any other approach permits Dow to continue to pollute with impunity. Ironically, the approach advocated by Dow creates for them a safe harbor within the law—so long as Dow insures that its pollution is very dangerous toxic waste that causes widespread but latent diseases, Dow will *never* be accountable for its pollution and its associated consequences to human health.

This Court, consistent with the reasoning and analysis of the Michigan Court of Appeals in *Meyerhoff*, should deny Dow's application for leave to appeal and its motion for peremptory reversal.

## V. CONCLUSION

This case presents important public policy questions that should only be answered with a full record. Plaintiffs do not relish, any more than Dow, the possibility of incurring significant resources toward a claim that this Court would dispose of summarily. However, because this case seems to be one of second impression, where the first bore no conclusion because of an inadequate record, prudence dictates the development of a complete record. Only then will the appellate courts of this state have before them a full factual basis for answering the critical question posed here: will the polluter or polluted bear legal responsibility for the expense associated with monitoring the medical risks created by pollution.

Dated: _____

Respectfully submitted,

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