IN THE SUPREME COURT
OF THE STATE OF NEVADA

JACK SADLER and SUSAN SADLER, Appellants, v. PACIFICARE OF NEVADA, INC, a Nevada Corporation, and DOES 1 THROUGH 100, Respondents.	)	Supreme Court Case No.: 62111 District Court Case No.: A566980

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF RESPONDENT'S PETITION FOR EN BANC RECONSIDERATION

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INTEREST OF AMICUS CURIAE

PLF is the oldest and largest public interest law foundation of its kind in America. Founded in 1973, PLF advocates for limited government, private property rights, individual freedom, and free enterprise. PLF has numerous supporters and contributors nationwide, including in the State of Nevada. In furtherance of PLF's mission to defend individual and economic liberties, PLF advocates for limited government and individual liberty. In defense of those values, PLF regularly files amicus briefs stressing the importance of enforcing threshold requirements in tort law; including several relating to medical monitoring. *See Lowe v. Philip Morris USA Inc.*, 183 P.3d 181 (Or. 2008); *Sinclair v. Merck & Co., Inc.*, 948 A.2d 587 (N.J. 2008); *Meyer v. Fluor Corp.*, 220 S.W.3d 712 (Mo. 2007). PLF is well-suited to address the far-reaching implications of the panel's decision in this case from both a legal and a policy perspective. The brief explains that the panel's decision, if left intact, would make Nevada a true outlier jurisdiction, where even those who are not injured can subject defendants to costly and wasteful litigation.

PLF's attorneys are familiar with the legal issues raised by this case and the briefs on file with the Court. PLF believes that its public policy perspective and litigation experience will provide a necessary additional viewpoint on the issues presented in this case.

SUMMARY OF ARGUMENT

None of the plaintiffs in this case have contracted any disease, nor did they allege they came into contact with contaminated blood. *Sadler v. PacifiCare of Nevada, Inc.*, 340 P.3d 1264, 1266 (Nev. 2014). A three-judge panel of this Court all but overruled precedent, *see Badillo v. Am. Brands, Inc.*, 16 P.3d 435 (2001), to say that mere potential contact with a dangerous product or substance allows that plaintiff to state a tort claim. *Sadler*, 340 P.3d at 1267, 1273. Under fundamental principles of tort law, a plaintiff must have suffered an actual injury to state a claim for negligence. A claim for medical monitoring, in the absence of an actual injury, does not satisfy this injury requirement. Instead, the panel decision opens the door to seemingly limitless liability.

There are serious policy concerns with this particular type of claim. Individuals who suffer real physical injury may be uncompensated when "risk of harm" plaintiffs deplete available resources first. Moreover, given the inherent complexities and significant public policy concerns that attend a medical monitoring award in the absence of present physical injury, the legislature rather than the judiciary should determine whether it is in the public interest to recognize such a claim. The legislature has greater institutional capability to weigh social benefits and costs of recognizing such an action.

ARGUMENT

I

NEVADA LAW SHOULD NOT PERMIT A MEDICAL MONITORING CAUSE OF ACTION TO PROCEED WITHOUT MANIFESTATION OF INJURY

Traditionally, tort liability was based on harm to the plaintiff. *See generally* Thomas C. Grey, *Accidental Torts*, 54 Vand. L. Rev. 1225, 1272 (2001) (noting that historically, "the evil against which tort law was directed as the doing of harm, rather than the infringement of rights or the violation of duties."). As tort law expanded from intentional to negligent torts, "'injury' has been synonymous with 'harm' and connotes physical impairment or dysfunction, or mental upset, pain and suffering resulting from such harm." James A. Henderson, Jr. & Aaron D. Twerski, *Asbestos Litigation Gone Mad: Exposure-Based Recovery for Increased Risk, Mental Distress, and Medical Monitoring*, 53 S.C. L. Rev. 815, 842 (2002), citing Restatement (Second) of Torts § 282 (1965) (defining negligence as conduct "which falls below the standard established by law for the protection of others against unreasonable risk of harm"), and Restatement (Second) of Torts § 7(2) (1965) (defining "harm" as "the existence of loss or detriment in fact of any kind to a person.").

Thus, an injury or harm traditionally does not include the fear of harm or potential harm, but only actual, manifested, measurable harm. *See* Matthew D. Hamrick, Comment, *Theories of Injury and Recovery for Post-Exposure,*

Pre-Symptom Plaintiffs: The Supreme Court Takes a Critical Look, 29 Cumb. L. Rev. 461, 463 (1999). The recognition of a claim for medical monitoring in the absence of a present physical injury would precipitate a broad, fundamental change in Nevada tort law.[1]

A claim for medical monitoring, in the absence of any manifested injury whatsoever, represents an unwarranted shift in tort law into a much more expansive doctrine. *See Metro-North Commuter R.R. Co. v. Buckley*, 521 U.S. 424, 436 (1997) (relying on "general policy concerns" as well as statutory interpretation to deny a claim for emotional harm based on the plaintiffs' fears of contracting asbestos-related illness). It is not the novelty of the claim that places it under a cloud of suspicion; after all, tort law certainly does evolve over time; but the sheer breadth of the expansion while simultaneously undercutting one of the principal tenets of tort law that should give this Court pause. *See* Victor E. Schwartz, et al., *Medical Monitoring: The Right Way and the Wrong Way*, 70 Mo. L. Rev. 349, 375 (2005).

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[1] For example, the new tort would effectively change on the limitations periods applicable to tort actions. The statute of limitations for actions involving *injury* to a person is two years. Nev. Rev. Stat. Ann. § 11.190 (2013). The panel decision writes the injury requirement out of the statute, rendering the statute inapplicable to non-injury tort actions. This Court has noted that "[i]t is the prerogative of the Legislature, not this court, to change or rewrite a statute." *Holiday Retirement Corp. v. State of Nev. Div. of Indus. Relations*, 274 P.3d 759, 761 (Nev. 2012) (citing *Breen v. Caesars Palace*, 715 P.2d 1070, 1075 (Nev. 1986)).

The panel made this unwarranted shift without considering the adverse effects on the legal and judicial systems. By permitting uninjured plaintiffs to proceed, defendants' resources will be diminished when later, injured plaintiffs file suit. The RAND Institute's study of asbestos litigation (where medical monitoring claims are allowed) revealed, for example, that the number of such uninjured plaintiff claims dwarfed the number of claims made by those who are actually suffering illness. Through the end of 2000, RAND estimated the percentage of unimpaired plaintiffs to be between 66% and 90%, consuming about 65% of the compensation for claims of nonmalignant mesothelioma. *See* Stephen J. Carroll, et al., RAND Inst. for Civil Justice, *Asbestos Litigation Costs and Compensation* (2002) at 20, 65 (reporting studies)[2]; *Anderson v. W.R. Grace & Co.*, 628 F. Supp. 1219, 1232 (D. Mass. 1986) ("'To award damages based on a mere mathematical probability would significantly undercompensate those who actually do develop cancer and would be a windfall to those who do not.'") (citation omitted).

The ease with which an uninjured plaintiff could make a claim was explored in *Metro-North*, 521 U.S. at 442, in which the United States Supreme Court noted that medical monitoring absent actual physical injury could permit literally "tens of millions of individuals" to "justify some form of substance-exposure-related medical

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[2] *Available at* http://www.rand.org/pubs/documented_briefings/DB397/index.html (last visited May 18, 2015).

monitoring." Defendants, in turn, would be exposed to potentially unlimited liability, and a "'flood' of less important cases" would drain the pool of resources available for meritorious claims by plaintiffs with serious, present injury. *Id.* Further, the Court rejected the argument that medical monitoring awards are not costly. *Id.* The Court also feared that allowing medical monitoring claims could create double recoveries because alternative sources of payment, such as health insurance, often are available to those seeking money for medical monitoring. *Id.* at 442-43.

In addition to ensuring compensation of actually-injured plaintiffs, the medical monitoring tort has adverse implications in the context of an employee exposed to a toxic substance at work. If the hospital employees in this case also could assert claims for medical monitoring for fear that they were exposed to contaminated blood, would a court-ordered monitoring program for individuals with no manifested harm be compatible with Nevada's workers' compensation system? The workers' compensation law provides an exclusive remedy for injuries. *See* Nev. Rev. Stat. Ann. § 616A.020 (2011); *Conway v. Circus Circus Casinos, Inc.*, 8 P.3d 837, 839 (Nev. 2000) (employees' exposure to noxious fumes, even if the result of intentional conduct, is subject to the exclusive remedy provisions of the workers' compensation statutes). Thus, where employees are exposed to hazardous substances that may cause harm, but the employees have no manifested injury, their claim—which amounts to an economic injury rather than a physical one—would fall outside the workers'

compensation scheme, a result not likely intended by the Legislature. Moreover, even if the Legislature determined that medical monitoring should be covered, one could argue that an employer that intentionally exposed employees to a dangerous workplace constitutes an intentional tort, an exception to workers' compensation exclusivity. *See Advanced Countertop Design v. Dist. Ct.*, 984 P.2d 756, 758 (Nev. 1999). Such conundrums are best resolved by the Legislature, not the courts. *See Madera v. State Indus. Ins. Sys.*, 956 P.2d 117, 119-20 (Nev. 1998) (the Legislature enacted Nev. Rev. Stat. Ann. § 616D.030 (2014) to overrule *Falline v. GNLV Corp.*, 823 P.2d 888 (Nev. 1991), which recognized tort actions for bad faith and negligence in processing workers' compensation claims).

Allowing the decision of the panel to stand will change the Nevada legal system, and the panel decision fails to account for those changes adequately.

II

THE LEGISLATURE, NOT THIS COURT, SHOULD CHOOSE WHETHER TO ADOPT A MEDICAL MONITORING TORT

Other states have placed responsibility for deciding whether a new medical monitoring tort should exist, particularly absent manifestation of injury, firmly in the state legislature. *See Wood v. Wyeth-Ayerst Labs.*, 82 S.W.3d 849, 859 (Ky. 2002) (refusing medical monitoring claim absent manifestation of injury for plaintiffs who ingested diet drugs because it was "not prepared to step into the legislative role and

mutate otherwise sound legal principles."); *Henry v. The Dow Chemical Co.*, 701 N.W.2d 684, 689 (Mich. 2005) (recognizing that a medical monitoring cause of action was not properly established by the judiciary); *Budding v. SSM Healthcare System*, 19 S.W.3d 678, 682 (Mo. 2000) (Even where "appealing public policy arguments can be made both for and against" imposing a new theory of tort liability, "when the legislature has spoken on the subject, the courts must defer to its determinations of public policy.").

This Court exercised this same caution the last time it visited this issue and when confronted with other opportunities to judicially create new torts. *See Badillo*, 16 P.3d at 440 (rejecting medical monitoring for casino workers exposed to cigarette smoke to diagnose the onset of allegedly related illnesses because "[a]ltering common law rights, creating new causes of action, and providing new remedies for wrongs is generally a legislative, not a judicial function."); *Wyphoski v. Sparks Nugget, Inc.*, 915 P.2d 261, 262 n.2 (Nev. 1996) (declining to recognize a new cause of action for recoupment of improperly awarded payment of benefits "[a]bsent legislative intervention" to balance the interests of claimants and insurers in cases where a doctor tells a workers' compensation claimant that her injury is not work-connected); *Chavez v. Sievers*, 43 P.3d 1022, 1025-26 (Nev. 2002) (where statutes provide remedies for racial discrimination in employment only for employers with 15 or more employees, the court will not expand the common law tortious discharge cause of action to cover

alleged wrongful discharge on account of race, where the employer has fewer than 15 employees).

Federal law further illustrates this circumspection. For example, in the context of toxic tort litigation arising under CERCLA, Congress created the Agency for Toxic Substances and Disease Registry as part of the Superfund Amendments and Reauthorization Act to provide medical care and testing to exposed individuals, including tissue sampling, chromosomal testing, epidemiological studies, or any other assistance appropriate under the circumstances. 42 U.S.C. § 9604(i)(l)(D). The federal government's criteria for establishing medical monitoring programs include:

- Evidence of exposure at a sufficient level of risk is documented.
- A well-defined population is at risk.
- A scientific basis exists for an association between exposure and health effects.
- The health effects are detectable and amenable to prevention/intervention.
- Medical screening requirements should be satisfied.
- Accepted treatment/intervention exists and a referral system is available.
- Logistics must be resolved prior to program implementation.

U.S. Dept. of Health & Human Services, Agency for Toxic Substances and Disease Registry, Summary of ATSDR's Criteria for Medical Monitoring, 60 Fed. Reg. 38,840-44 (July 28, 1995) (emphasis added). All seven criteria—including

manifestation of injury—must be met before a medical monitoring program is recommended. *Id.* *See also* La. Civ. Code art. 2315(B) (2014) ("Damages do not include costs for future medical treatment, services, surveillance, or procedures of any kind unless such treatment, services, surveillance, or procedures are directly related to a manifest physical or mental injury or disease.").

Nevada's legislature has shown itself willing to create new causes of action where it deems it necessary. *See Fernandez v. Kozar*, 814 P.2d 68, 70 (Nev. 1991) (The Legislature created a new cause of action of wrongful death by a decedent's survivors against a "provider of health care."); *Olson v. Richard*, 89 P.3d 31, 33-34 (Nev. 2004) (Legislature amended statute to expand construction defect claims). This Court should not recognize a new, expansive tort cause of action, but should leave that to the Legislature.

CONCLUSION

The full Court should grant review to vacate the panel decision and re-affirm that there is no cause of action for medical monitoring in the State of Nevada.

DATED: May 22, 2015.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF RESPONDENT'S PETITION FOR EN BANC RECONSIDERATION complies with the typeface and type style requirements of NRAP 32(a)(4)-(6), because this brief has been prepared in a proportionally spaced typeface in 14-point Times New Roman type style.

I further certify that this brief complies with the page- or type-volume limitations of NRAP 29(e) because it does not contain more than 2,333 words (half of the number allowed for Respondent's Petition under NRAP 40(d)).

Finally, I hereby certify that I have read this brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

/s/ Travis W. Gerber
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CERTIFICATE OF SERVICE

I, the undersigned, declare under penalty of perjury, that I am over the age of eighteen (18) years, and I am not a party to, nor interested in, this action. On May 22, 2015, I caused to be served a true and correct copy of the foregoing BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF RESPONDENT'S PETITION FOR EN BANC RECONSIDERATION upon the parties listed below by submitting to the above-entitled Court for electronic filing and service upon the Court's Service list for the above-referenced case.

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