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Case Number 393,2022

IN THE SUPREME COURT OF THE STATE OF DELAWARE

CATHERINE BAKER,	)	No. 393, 2022
	)	
Plaintiff-Appellant,	)	Certification of Question of Law
	)	from the United States Court of
v.	)	Appeals for the Third Circuit
	)	Appeal Nos. 21-3360 & 22-1333
CRODA INC., f/k/a Croda, Inc.	)	
	)	**Court below:**
Defendant-Appellee.	)	U.S. District Court, D. Del.
	)	Civil Action No. 1:20-cv-01108-SB

PLAINTIFF-APPELLANT'S REPLY BRIEF

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PRELIMINARY STATEMENT

Defendant-Appellee Croda, Inc. ("Defendant") relies on unfounded assertions, misunderstandings and misapplications of the law, and a complete recharacterization of the injury Plaintiff-Appellant Catherine Baker ("Plaintiff") has asserted to argue that the Court should answer the certified questions before it in the negative. Perhaps recognizing the weakness of its substantive arguments, Defendant then turns to a public policy plea, essentially arguing that if the Court were to allow for recovery where, inter alia, a defendant's negligence has caused an increased risk of disease and resultant need to incur the costs of medical monitoring, victims of a defendant's negligence then actually will be able to recover for those injuries. Such a result, posits Defendant, will be untenable. The law, including in Delaware, has long held that a defendant should be responsible for the foreseeable consequences that stem from its actions and nothing about the injuries Plaintiff has alleged should change that fundamental tenet of the law. Allowing plaintiffs to seek redress for the present harm suffered and caused by defendants in an effort to avoid the worst outcomes that may result from the defendants' conduct is good public policy and established limitations on claims for medical monitoring damages ensure that only those who have truly caused injury will be held responsible for their conduct.

Consistent with established principles of Delaware law as set forth in section 7 of the Restatement (Second) of Torts ("Restatement"), *Brzoska*, *Anderson*,

Mergenthaler, and *Garrison*, Plaintiff has sufficiently alleged a cognizable injury—the invasion of a legally protected interest—because she alleges exposure to Defendant's ethylene oxide while residing near Defendant's Atlas Point facility, an increased risk of disease, and the resulting present medical need for diagnostic testing. Under established principles of Delaware law, Plaintiff does not have to allege a manifestation of disease to establish a cognizable injury. Plaintiff's alleged injuries constitute an invasion of her legally protected interests establishing a present and cognizable injury under Delaware law.

Plaintiff's present injuries caused by Defendant's release of, and her actual past exposure to, toxic ethylene oxide are identifiable, appreciable, and cognizable, and are not speculative or mere fear or apprehension. Ethylene oxide is a carcinogen and powerful mutagen rendering exposure unsafe at any level. Plaintiff was actually exposed to and inhaled this carcinogenic, disease-causing agent as a result of Defendant's negligence, and this actual inhalation caused significant, present harm. Plaintiff and Class members have been injured by the increased risk of developing illness and disease and the resulting medical need to incur the cost of diagnostic testing caused by their exposure to toxic ethylene oxide. Recognizing this harm as cognizable injury is consistent with Delaware law, the Restatement, which Delaware follows, and public policy. The Court should answer the certified questions in the affirmative.

ARGUMENT

I. DEFENDANT IMPROPERLY RECHARACTERIZES PLAINTIFF'S INJURY

In an argument that ignores Delaware law and relies on an improper recharacterization of Plaintiff's alleged injury, Appellee entirely misses the mark. The injury Plaintiff has suffered as the result of Defendant's misfeasance is the increased risk of disease and present need to pay the costs associated with necessary medical monitoring—she does not seek to recover for the fear that she may one day contract one of the diseases that ethylene oxide is scientifically proven to cause.[1] Nor does Plaintiff seek recovery only for an increased risk of disease, Plaintiff also seeks the costs of diagnostic tests that are medically necessary now. As the Pennsylvania Supreme Court explained in *Redland Soccer Club, Inc. v. Department of the Army and Department of Defense of the United States*:

> [M]edical surveillance damages promote early diagnosis and treatment of disease or illness resulting from exposure to toxic substances caused by a tortfeasor's negligence. Allowing recovery for such expenses avoids the potential injustice of forcing an economically disadvantaged person to pay for expensive diagnostic examinations necessitated by another's negligence. Indeed, in many cases a person will not be able to afford such tests, and refusing to allow medical monitoring damages would in effect deny him or her access to potentially life-saving treatment. It also affords toxic-tort victims, for whom other sorts of recovery may prove difficult, immediate compensation for medical monitoring needed as a result of exposure. Additionally, it furthers the deterrent function of the tort system by compelling those who expose others to toxic substances to minimize risks and costs of exposure.

[1] *Contra* Appellee's [Corrected] Answering Brief ("Answering Brief") at 12.

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

696 A.2d 137, 145 (Pa. 1997) (internal citations and quotation marks omitted) (quoting *Hansen v. Mountain Fuel Supply Co.*, 858 P.2d 970 (Utah 1993) (citing *Ayers v. Township of Jackson*, 525 A.2d 287, 311 (N.J. 1987))).

While this exact situation has yet to be evaluated by Delaware courts,[2] principles of established Delaware law, the Restatement, and public policy all support the conclusion that Delaware recognizes a cognizable injury as occurred in the circumstances presented here—where actual exposure to a toxic substance causes an increased risk of latent disease that presently requires medical monitoring. Plaintiff's Compliant alleges that she was exposed to ethylene oxide that was negligently, if not knowingly and recklessly, emitted by Defendant into the

[2] Perplexingly, Defendant also faults Plaintiff because she "cites no Delaware case ever accepting a claim based on increased risk of future harm without a physical injury." Answering Brief at 2. Not only does this mischaracterize the alleged injury—which is both the increased risk of disease and the present need to pay the costs associated with necessary medical monitoring following Plaintiff's actual exposure to ethylene oxide caused by defendant's misfeasance, but also, as this Court recognized in accepting the certified questions, there is no case law directly on point as to Plaintiff's actual alleged injury. Whether the increased risk of harm, as a result of actual exposure to a toxic substance, and ***present*** (***not future***) need to pay the costs associated with necessary medical monitoring caused by a defendant's misfeasance is thus far an unsettled area of the law in Delaware. *See, e.g.*, Appellant's [Corrected] Opening Brief ("Opening Brief"), Exhibit D ¶ 4 (noting "there are important and urgent reasons for an immediate determination of the questions certified").

community surrounding its Atlas Point facility; and that, as a result, she now has an increased risk of developing diseases caused by that exposure and a current need to incur the costs associated with a medical monitoring program to identify diseases caused by ethylene oxide exposure. Allowing those harmed by the negligent conduct of a defendant to require that defendant to shoulder the financial burden of the harm it caused is a proper result.

II. ESTABLISHED PRINCIPLES OF DELAWARE LAW FIND COGNIZABLE INJURY IN THE CIRCUMSTANCES PRESENTED

As explained in Plaintiff's Opening Brief, well-established principles of Delaware law should guide the Court to the conclusion that where a plaintiff has suffered an increased risk of disease and resultant need to undergo the expense of medical monitoring to detect that disease, she has suffered a cognizable injury. It is well established that one whose legally protected interests have been endangered by the tortious conduct of another is entitled to recover for expenditures reasonably made, or harm suffered, in a reasonable effort to avert the harm threatened. Restatement § 919(1); *see also Tenneco Auto., Inc. v. El Paso Corp.*, 2007 WL 92621, at *4 (Del. Ch. Jan. 8, 2007) (quoting and citing Restatement § 919(1)).

The Court has evaluated situations that share similar, though not identical, facts with those presented here and to date has provided several guideposts directing victims of a tortfeasor's negligence as to under what conditions liability may be found under Delaware law. In *Mergenthaler v. Asbestos Corp. of America*, the plaintiff-wives alleged mental anguish and a fear of contracting cancer because of their contact with asbestos fibers from their husbands' clothing. 480 A.2d 647, 649, 651 (Del. 1984). They sought to recover for the cost of medical surveillance and mental anguish. *Id.* The Supreme Court upheld dismissal of those claims, because the plaintiff-wives failed to allege direct and actual exposure. *Id.* at 651.

Nevertheless, the Court seemed to suggest that allegations of direct and actual exposure exposure plus a need for medical surveillance would have constituted an actionable tort—the plaintiffs simply failed to allege it. *See id.*

In *Brzoska v. Olson*, this Court indicated that even mere apprehension of contracting a disease may be recoverable under Delaware law where a plaintiff had *actual exposure* to a disease. 668 A.2d 1355, 1357 (Del. 1995) (holding a plaintiff could not recover for fear of contracting a disease "absent a showing of a resultant physical injury ***or*** exposure to the disease." (emphasis added)). The Court thereby indicated that recovery was available under tort theories of liability even with no physical injury. *Id.* at 1364. To the extent that Defendant otherwise argues *Brzoska* stands for the proposition that there is no recovery in tort absent present physical injury, it is simply incorrect. The issue before the Court in *Brzoska* was whether "fear of contracting a disease" was a cognizable injury without present physical harm. *Id.* Plaintiff does not allege she was injured because she fears contracting a disease in the future, she alleges a present injury in the form of a *present* increased risk of disease and the *present* need to incur the costs to undergo necessary diagnostic testing as a result of actual, direct exposure.

Two months after *Brzoska*, this Court heard certified questions in *United States v. Anderson*, 669 A.2d 73 (Del. 1995), which asked, inter alia,

> I. Recovery for Increased Risk of Harm Viewed as a Present Change in Position

> a. May a plaintiff who successfully asserts a claim pursuant to 18 Del. C. § 6853 recover, as an element of damages, for increased risk of harm stemming from the fact that defendant's failure to diagnose, which constitutes a deviation from the standard of care, caused, to a reasonable medical probability, plaintiff to become more likely to suffer a recurrence of cancer?
>
> * * *
>
> II. Recovery for Increased Risk of Harm Viewed as a Probability of Future Injury
>
> a. ***May a plaintiff*** who successfully asserts a claim pursuant to 18 Del. C. § 6853 ***recover, as an element of damages, for increased risk of future cancer*** where the evidence shows that the plaintiff probably will not suffer the future cancer?

United States v. Anderson, 669 A.2d 73, 74 (Del. 1995) (emphases added). The Court answered both questions in the affirmative. *Id.* at 79. While *Anderson* was a medical negligence case, the *Anderson* Court's examination of what constitutes an "injury" is instructive.

Despite these ultimate holdings, Defendant relies on dicta discussing Connecticut law in *Anderson* to argue that Delaware law would not recognize the increased risk of disease and present need to incur the costs of medical monitoring as cognizable injury.[3] Appellee misconstrues that dicta.

In *Anderson*, this Court held that it was permissible under Delaware law to allow a plaintiff to recover for an increased risk of recurrence of testicular cancer as

[3] Answering Brief at 12–14.

a result of his doctors' failure to diagnose. In conducting its analysis, the Court observed that the approach then taken by the Connecticut Supreme Court required a medical malpractice plaintiff to establish a present physical injury to recover for speculative, future harm. *Anderson*, 669 A.2d at 77. This dicta was merely an observation about Connecticut law, which ultimately this Court did not adopt. *Id.* at 77–78. Indeed, this Court recognized, "one additional element of his damages is the increased risk of a recurrence. In view of the risk of recurrence, he certainly has ***suffered an injury*** which is significantly greater than that which he would have suffered in the absence of negligence." *Id.* at 78 (emphasis added). That is, while the *Anderson* plaintiff had not suffered a recurrence, the Court held that that risk that he would in the future was a cognizable injury that entitled him to recover damages. As in *Anderson*, in view of their increased risk of developing cancer due to their exposure to ethylene oxide, Plaintiff and those in her community have "suffered an injury which is significantly greater than that which [they] would have suffered in the absence of negligence." *Id.* Accordingly, Plaintiff should be permitted under Delaware law to recover for her injury.

Examination of Delaware law with regard to tort "injury" without present physical harm in other contexts is also instructive. Delaware allows recovery for the intentional infliction of severe emotional distress "even in the absence of accompanying bodily harm." *Cummings v. Pinder*, 574 A.2d 843, 845 (Del. 1990).

In *Garrison v. Med. Ctr. of Delaware Inc.*, this Court noted that the injury to parents with regard to a claim for negligence in delayed reporting of the results of a chromosomal study was not a claim arising from physical harm. 581 A.2d 288, 290 (Del. 1989). This injury required and would require them to incur extraordinary expenses in the care and education of their child afflicted with a genetic abnormality over the child's lifetime, which the Court held was recoverable in tort, and present physical injury was not a predicate to the parents' recovery. *Id.* at 290–93.

Defendant attempts to distinguish this case by arguing the child, who had not asserted any claims at issue in the appeal, had a "physical injury," but in doing so, misconstrues the facts of the case. The child suffered from genetic disorders that themselves were in no way tied to the alleged negligence—they were not caused by the negligence, and they did not result from any action or inaction taken by the alleged tortfeasor. *Id.* at 289–90. This Court defined the injury not in the context of the child's genetic disorders, but instead in "being deprived of the opportunity to make an informed decision to terminate the pregnancy." *Id.* at 290. The Court held that the parents could see to recover the economic costs that stemmed from that negligence in the form of the costs of caring for, maintaining, and educating their child to the extent those costs exceed the usual costs of raising an unimpaired child. *Id.* at 288, 292–93. This approach is entirely consistent with a recognition of medical monitoring damages—it allowed recovery without a present physical injury. *See*

Friends for All Children, Inc. v. Lockheed Aircraft Corp., 746 F.2d 816, 825 (D.C. Cir. 1984) (requiring proof of ongoing medical monitoring beyond "the wear and tear of daily life" to detect latent diseases).[4]

Accordingly, established principles of Delaware law support the conclusion that Delaware law recognizes as cognizable injury an increased risk of disease accompanied by the need to incur the costs to undergo a medical monitoring schedule.

[4] Defendant also attempts to distinguish *McCracken*, but that argument is also of no consequence, as there, the Court held that the costs of future medical treatment to avoid future injury was nonetheless compensable. *McCracken v. Wilson Beverage*, 1992 WL 301985 (Del. Super. Ct. Oct. 15, 1992). Here, there is a present need to undergo diagnostic testing and medical monitoring.

III. THE RESTATEMENT DOES NOT REQUIRE PHYSICAL INJURY TO ESTABLISH AN INJURY

As set forth in Plaintiff's Opening Brief, Delaware follows the Restatement Section 7, and it recognizes the injury Plaintiff alleges as redressable harm. Appellee flatly states "Plaintiff does not identify any Restatement provision suggesting that increased risk suffices for an injury," once again failing to address Plaintiff's allegations with regard to her present need for medical monitoring, but also this argument again misses the point. As Defendant subsequently acknowledges, Restatement Section 7, which Delaware follows, defines injury to include "the invasion of ***any legally protected interest of another***."[5] Defendant also acknowledges that "there may be an injury although no harm is done."[6] Here, harm was done and injury occurred. The Restatement explicitly draws a distinction between "harm" and "physical harm" separately defining the terms and, therefore, acknowledging that either "harm" ***or*** "physical harm" could constitute a cognizable injury. *See* Restatement § 7 cmts. (b), (e). Consistent with the Restatement Section 7, Plaintiff has alleged harm and thus, a cognizable injury—the invasion of her legally protected interest in being free from increased risk of disease and the need to

[5] Answering Brief at 18–19 (emphasis added)).

[6] *Id.*

incur the costs associated with medical monitoring caused by tortious toxic exposure.

Multiple state high courts in the states that follow the Restatement with regard to injury have evaluated whether increased risk of disease and resultant need for medical monitoring in the toxic tort context establishes cognizable injury—i.e. the invasion of a legally protected interest—under the Restatement Section 7, including in California, Maryland, Nevada, New Jersey, Utah, and West Virginia. Each has held that a plaintiff could recover for medical monitoring without a present physical injury. *Potter v. Firestone Tire & Rubber Co.*, 863 P.2d 795, 822–24 (Cal. 1993); *Exxon Mobil Corp. v. Albright*, 71 A.3d 30, 75–76, 80, *on reconsideration in part*, 71 A.3d 150 (Md. 2013); *Sadler v. PacificCare of Nev.*, 340 P.3d 1264, 1270–71 (Nev. 2014); *Ayers*, 525 A.2d at 304–05, 311–13; *Hansen*, 858 P.2d at 976–77; *Bower v. Westinghouse Electric Corp.*, 522 S.E.2d 424, 430 (W. Va. 1999).[7] Defendant cites to no cases where the law of that state follows and courts have evaluated the Restatement Section 7, but recovery was disallowed in the circumstances presented here. As Delaware follows the Restatement Section 7, it

[7] As discussed in Plaintiff's Opening Brief, in addition to these six states that recognize medical monitoring without present physical injury as a standalone claim or a cognizable injury and measurable damages per the Restatement Section 7, courts evaluating the law in 14 other states have allowed recovery in such circumstances. Opening Brief at 27–30.

should recognize the increased risk of disease caused by actual, direct exposure to a toxic substance and the corresponding medical need to incur costs for medical monitoring as cognizable injury.

IV. WELL-ESTABLISHED BURDENS OF PROOF LIMIT RECOVERY FOR MEDICAL MONITORING TO INSTANCES WHERE A PLAINTIFF HAS SUFFERED ACTUAL HARM

Defendant baselessly predicts that if the Court were to allow plaintiffs to recover for their tortious emission of toxic ethylene oxide into the community surrounding its facility and the resultant increased risk of disease and present need to incur the costs of medical monitoring, the proverbial floodgates would swing open wide. It posits, "*any* exposure to a carcinogen producing *any* increased risk would suffice."[8] Not so. Not only will Plaintiff and others like her still have to establish all other elements of the claims asserted necessary to establish liability, they will also have to establish the need for an appropriate medical monitoring program that will allow for early detection of disease. Tellingly, while Defendant argues "a flood of limitless litigation" will follow should the Court recognize Plaintiff's injury, it fails to back that up with any actual legal or empirical support.[9] Recovery for the injury Plaintiff here alleges has been available in many states for decades, yet the thousands of lawsuits Defendant argues will ensue here have yet to emerge in any of the states recognizing such injuries.

This Court need not impose a manifestation of physical harm requirement to limit recovery for the costs of medical monitoring made necessary by Defendant's

[8] Answering Brief at 29.

[9] Answering Brief at 26.

tortious conduct. The elements of proof with regard to proof of damages in the form of medical monitoring are well established. For example the test adopted by the West Virginia Supreme Court in *Bower*, which established the rights of West Virginians to recover as damages the costs of medical monitoring, requires a plaintiff to prove that (1) he or she has, relative to the general population, been significantly exposed; (2) to a proven hazardous substance; (3) through the tortious conduct of the defendant; (4) as a proximate result of the exposure, plaintiff has suffered an increased risk of contracting a serious latent disease; (5) the increased risk of disease makes it reasonably necessary for the plaintiff to undergo periodic diagnostic medical examinations different from what would be prescribed in the absence of the exposure; and (6) monitoring procedures exist that make the early detection of a disease possible. 522 S.E.2d at 432–33.

The Pennsylvania Supreme Court in *Redland* adopted similar requirements, as did the New Jersey Superior Court in *Ayers*. *Redland*, 696 A.2d at 145–46; *Ayers v. Jackson Township*, 461 A.2d 184, 190 (N.J. Super. Ct. 1983); *Ayers*, 525 A.2d at 312. More recently, the Maryland Court of Appeals in *Exxon Mobil Corp.*, also held that a plaintiff could recover for medical monitoring damages with a showing:

> (1) that the plaintiff was significantly exposed to a proven hazardous substance through the defendant's tortious conduct; (2) that, as a proximate result of significant exposure, the plaintiff suffers a significantly increased risk of contracting a latent disease; (3) that increased risk makes periodic diagnostic medical examinations reasonably necessary; and (4) that monitoring and testing procedures

> exist which make the early detection and treatment of the disease possible and beneficial.

71 A.3d at 81–82.

Plaintiffs will have the burden to prove the established elements when seeking recovery of medical monitoring costs, which will limit the recovery for tortiously caused increased risk of disease and reasonably necessary diagnostic testing without imposing a requirement of proof of manifestation of physical harm. Contrary to Defendant's assertions, adoption of these standards with regard to medical monitoring damages would not allow recovery where a plaintiff merely "fears future disease," and it would not lead to limitless lawsuits by people afraid they have been exposed to a dangerous substance. Rather, these standards appropriately balance the proper concerns to ensure that victims of a defendant's misconduct are not forced to shoulder the economic burden of the necessary consequences that result therefrom.

V. PUBLIC POLICY SUPPORTS A RECOGNITION OF COGNIZABLE INJURY

Contrary to Defendant's assertion,[10] it is simply untrue that the law in a majority of states fails to recognize recovery of medical monitoring damages absent manifestation of physical harm. Defendant's Answering Brief attempts to argue that this is not so, but in doing so, mischaracterizes the decisions of a number of courts and cites articles that contradict this assertion.

A. EMOTIONAL DISTRESS CLAIMS

Plaintiff does not assert emotional distress claims. Accordingly, Plaintiff is not asking the Court to change the requirements necessary under Delaware law to assert a claim for emotional distress. Despite this, several of the cases cited by Defendant, that it argues to assert the "majority" of states support its position, relate to emotional distress claims. In *Metro-North*, the United States Supreme Court evaluated whether a plaintiff could recover for an exposure to asbestos under a theory of negligent inflection of emotional distress (claims Plaintiff does not assert) under the Federal Employers' Liability Act ("FELA"). *Metro-North Commuter R. Co. v. Buckley*, 521 U.S. 424 (1997). The issue before the Supreme Court was whether, under FELA, the plaintiff's exposure constituted a threat of immediate risk of physical harm as required under FELA to recover for negligent infliction of

[10] Answering Brief at 19, 24.

emotional distress. *Id.* at 430–31. It concluded that it was well-established that to recover for negligent infliction of emotional distress, it was required that there be either an immediate physical harm or a threat of immediate physical harm. That decision has no bearing on Plaintiff's claims, because Plaintiff does not assert claims for negligent infliction of emotional distress, nor does Plaintiff assert any claims under FELA, and, therefore, the elements of a claim for negligent infliction of emotional distress addressed in *Metro-North* have absolutely no bearing on this case. The Supreme Court then turned to whether the economic cost of extra medical checkups as a result of exposure to asbestos was recoverable as unqualified lump sum damages stemming from an independent cause of action under FELA. *Id.* at 440–41. It found that FELA did not contain a tort liability rule allowing such a cause of action without further qualification and did not express any view "about the extent to which FELA might, or might not, accommodate medical cost recovery rules more finely tailored than the rule we have considered." *Id.* at 444. The Supreme Court did, however, recognize qualifications, and limitations, that other courts had adopted in connection with their recognition of medical monitoring damages absent present physical injury, seemingly indicating that these qualifications may have addressed the Court's concerns. *Id.* at 440–41 (citing *Ayers*, 525 A.2d 287; *Hansen*, 858 P.2d 970; *Potter*, 863 P.2d 795; *Burns v. Jaquays Mining Corp.*, 752 P.2d 28 (Ariz. App. 1987)).

Several other cases cited by Defendant have no application for the same reason or are otherwise distinguishable.[11] Additionally, other than *Metro-North*, which cites the Restatement Section 7 in a dissent by Justice Ginsberg, joined by Justice Breyer, in which she asserted a medical monitoring claim was available under FELA,[12] none of the cases cited by Defendants as rejecting claims for medical

[11] *See Ball v. Joy Techs., Inc.*, 958 F.2d 36, 39 (4th Cir. 1991) (holding that "the law of West Virginia and Virginia requires physical injury before a plaintiff may recover damages for emotional distress" and disallowing recovery); *Curl v. Am. Multimedia, Inc.*, 654 S.E.2d 76, 81–82 (N.C. Ct. App. 2007) (evaluating claims of negligent and intentional infliction of emotional distress and discussing whether North Carolina would recognize a medical monitoring cause of action and noting that the plaintiffs did not actually assert a claim for medical monitoring or medical monitoring damages in their complaint); *Parker v. Brush Wellman, Inc.*, 377 F. Supp. 2d 1290, 1299–1300, 1302 (N.D. Ga. 2005) *aff'd sub nom. Parker v. Wellman*, 230 F. App'x 878 (11th Cir. 2007)) (discussing whether there can be claims for emotional distress absent physical injury and evaluating whether a "medical monitoring claim" then existed under Georgia law and noting it was "not the function of a federal court to expand state tort doctrine in novel directions."); *Miranda v. Dacruz*, 2009 WL 3515196, *7 (R.I. Super. Oct. 26, 2009) (evaluating Rhode Island's requirement that recovery for "present damages for future apprehended consequences" requires a showing that "such consequences are reasonably certain to ensue[,]" a standard rejected by Delaware in *Anderson*, 669 A.2d at 77–78); *Jones v. Brush Wellman, Inc.*, 2000 WL 33727733, at *8 (N.D. Ohio Sept. 13, 2000) (holding the court would not create a new cause of action under state law); *Rosmer v. Pfizer, Inc.*, 2001 WL 34010613, *5 (D.S.C. Mar. 30, 2001) (simply noting in the context of class certification that South Carolina had not yet recognized a claim for medical monitoring). The remaining cases cited by Defendant failed to address the Restatement Section 7, which Delaware follows and, thus, provides a framework for this Court's analysis.

[12] *Metro-North*, 521 U.S. at 450–51 ("The 'injury' sustained by an asbestos-exposed worker seeking to recover medical monitoring costs is the invasion of that

monitoring discuss the harm/physical harm and injury distinctions in the Restatement Section 7, which Delaware follows, at all.[13]

B. PUBLIC POLICY SUPPORTS RECOGNIZING THAT GIVEN THE FACTS ALLEGED IN THE COMPLAINT, IF PROVEN, AN INJURY HAS OCCURRED

As cited in Plaintiff's Opening Brief, in fact, 20 jurisdictions have recognized claims for medical monitoring absent proof of present physical injury. Of those 20 jurisdictions, three share a border with Delaware—Pennsylvania (which recognizes it as a cause of action) and New Jersey and Maryland (which both allow medical monitoring damages to be recovered).[14]

Delaware public policy supports adoption of medical monitoring claims without a manifested physical injury, as have Delaware's neighboring states.[15] To find otherwise would leave Delaware residents in the preposterous position of having no remedy where they have suffered an increased risk of disease and present

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employee's interest in being free from the economic burden of extraordinary medical surveillance.").

[13] *See generally* Answering Brief n.2.

[14] Opening Brief at 30–34.

[15]Delaware, Pennsylvania, New Jersey, and Maryland have historically looked to each other concerning policy issues. *See William H.Y. v. Myrna L.Y.*, 450 A.2d 406, 409 n.6 (Del. 1982) (noting that a Delaware rule regarding child custody had been adopted by New Jersey, Maryland, and Pennsylvania); *Kent General Hospital, Inc. v. Blue Cross and Blue Shield of Delaware, Inc.*, 442 A.2d 1368, 1372 (Del. 1982) (looking to the policy view expressed in an "excellent" trial opinion by Delaware's "neighboring State of Pennsylvania" and adopting the same policy).

need to incur the costs of medical monitoring for an actual exposure to the same contaminants for which their neighbors are able to recover. The purpose of allowing medical monitoring damages is to ensure that tortfeasors are responsible for harms that they have caused to others. Recognizing such harms, as have all of Delaware's neighboring state, would comport with Delaware public policy.

Appellee's public policy argument against the proposition that Delaware law should recognize a plaintiff could recover for necessary medical monitoring as a result of a defendant's tortious conduct is, at base, just an argument that victims of a defendant's misconduct should be the ones, along with the medical system, the State, and health insurers, among others, to bear the cost of the resulting harm instead of it. This argument should be soundly rejected.

CONCLUSION

For the foregoing reasons, Plaintiff-Appellant respectfully requests that the Court answer the certified questions in the affirmative, and hold that Delaware law recognizes that where there has been exposure to a toxic substance, and as a result, a plaintiff suffers from a present increased risk of disease and the present need to incur the costs associated with medical monitoring, a cognizable injury has occurred, regardless of whether physical illness or disease has yet manifested.

Respectfully submitted,

Dated: February 1, 2023

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