IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

MITCHELL MCCORMICK, *ET AL*.	)	
	)	
PLAINTIFFS,	)	
	)	
v.	)	
	)	Case No. CIV-11-1272-M
HALLIBURTON COMPANY	)	
AND HALLIBURTON ENERGY	)	CLASS ACTION
SERVICES, INC.,	)	
	)	
DEFENDANTS.	)	

DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR JUDGMENT ON THE PLEADINGS AS TO PLAINTIFFS' REQUEST FOR MEDICAL MONITORING RELIEF

Defendants Halliburton Company and Halliburton Energy Services, Inc. ("Halliburton") move the Court, pursuant to Federal Rule of Civil Procedure 12(c), for judgment on the pleadings as to Plaintiffs' Request for Relief for Medical Monitoring. There is no cognizable claim for a medical monitoring remedy under Oklahoma law. This Court should reject any appeal by Plaintiffs to broadly expand existing Oklahoma tort law, especially given (1) the absence of any Oklahoma statutes or state court decisions recognizing or even suggesting the availability of medical monitoring, (2) a federal court opinion from the Northern District of Oklahoma holding that Oklahoma does *not* recognize medical monitoring, and (3) the important public policy considerations that disfavor medical monitoring relief, as reflected by the prevailing trend in other jurisdictions to reject such claims.

I. BACKGROUND

In their First Amended Complaint, Plaintiffs include a "Particularized Request for Relief for Medical Monitoring." First Am. Comp., ¶¶ 80-84. Plaintiffs "seek on behalf of themselves and others similarly situated future appropriate medical screening, the creation of a class-wide medical registry, and medical research and the dissemination of information to health care workers who can best put to use the information in early disease identification, prevention, and treatment from exposures to the hazardous substances released from the Facility, as well as a public oversight body to guide these activities in the public interest." *Id*. ¶ 15. Plaintiffs expressly request this relief "for those who have been or will be exposed to Defendants' hazardous wastes *but who have not yet suffered personal injury from such exposure*." *Id*. ¶ 5 (emphasis added). It is this latter aspect—basing the requested relief on mere alleged chemical exposure rather than on an actual bodily injury—that distinguishes a medical monitoring claim from a traditional claim for future medical expenses for a present injury. Likewise, it is this latter aspect that has caused most courts to reject medical monitoring.[1]

II. LEGAL STANDARD

The Federal Rules of Civil Procedure provide that "[a]fter the pleadings are closed—but early enough not to delay trial—a party may move for judgment on the

[1] Even for presently injured Plaintiffs, there are other aspects of Plaintiffs' medical monitoring claim that run afoul of Oklahoma law. While Oklahoma allows plaintiffs to recover the cost of future medical costs as damages, it does not recognize a claim for a medical monitoring "fund," "creation of a class-wide medical registry," "dissemination of information to health care workers," or creation of "a public oversight body to guide these activities in the public interest." These aspects of Plaintiffs' claim, however, are not addressed by this motion, but rather will be reserved for later resolution.

pleadings." Fed. R. Civ. P. 12(c). When reviewing a motion for judgment on the pleadings under Fed. R. Civ. P. 12(c), a court applies the same standard of review applicable to a motion to dismiss under Rule 12(b)(6). *Nelson v. State Farm Mut. Auto Ins. Co.*, 419 F.3d 1117, 1119 (10th Cir. 2005). A dismissal for failure to state a claim for relief is proper "if, viewing the well-pleaded factual allegations in the complaint as true and in the light most favorable to the non-moving party, the complaint does not contain 'enough facts to state a claim to relief that is plausible on its face.'" *MacArthur v. San Juan Cnty.*, 497 F.3d 1057, 1064 (10th Cir. 2007) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).

"A federal court sitting in diversity must apply the law of the forum state, in this case Oklahoma, and thus must ascertain and apply Oklahoma law with the objective that the result obtained in the federal court should be the result that would be reached in an Oklahoma court." *Wood v. Eli Lilly & Co.*, 38 F.3d 510, 512 (10th Cir. 1994). *See also Hays v. Jackson Nat'l Life Ins. Co.*, 105 F.3d 583, 587 (10th Cir. 1997) ("In reviewing this issue, we must apply Oklahoma law, as announced by that state's highest court.").

III. ARGUMENT

A. Oklahoma Has Never Recognized a Medical Monitoring Remedy.

Plaintiffs' request for medical monitoring relief is not—and should not be—recognized under Oklahoma law. Neither the Oklahoma state legislature nor the Oklahoma state courts have ever recognized medical monitoring, either as a cause of action or as a claim for relief. Indeed, the U.S. District Court for the Northern District of Oklahoma recently affirmed this statement of law in *Cole v. ASARCO Inc.*, 256 F.R.D.

690 (N.D. Okla. 2009). There, the court observed that "[t]he parties cite, and the court finds, no state law addressing the propriety of a medical monitoring remedy." *Id*. at 695. Consequently, the court expressly held that "Oklahoma law does not support creation of a medical monitoring class." *Id*. Nothing has changed since *ASARCO*.

Importantly, the Plaintiffs here do not seek future medical expenses for existing diseases or physical injuries. Instead, they seek a relief that is wholly novel under Oklahoma law: medical monitoring for individuals who allege no bodily injuries. *See* First Am. Comp., ¶ 5 (requesting "a future medical monitoring fund . . . for those who have been or will be exposed to Defendants' hazardous wastes *but who have not yet suffered personal injury from such exposure*") (emphasis added). As the court recognized in *ASARCO*, "Oklahoma law requires plaintiffs to demonstrate an existing disease or physical injury before they can recover the costs of future medical treatment that is deemed medically necessary." 256 F.R.D. at 695 (citing *Vaught v. Holland*, 554 P.2d 1174, 1178 (Okla. 1976)). *See also Reed v. Scott*, 820 P.2d 445, 449-50 (Okla. 1991) (requiring an expert to determine whether "*injuries* will result, with a reasonable certainty, in future pain and suffering, permanent injury, and future medical expenses") (emphasis added). Unless and until Plaintiffs develop a disease or physical injury, they cannot, under Oklahoma law, recover the costs of future medical treatment, let alone the broad forms of relief requested in the First Amended Complaint.

B. This Court Should Reject Plaintiffs' Invitation To Create New Oklahoma Tort Remedies.

In characterizing a federal court's proper role when sitting in diversity, this Court has instructed that "'we are generally reticent to expand state law without clear guidance from its highest court.'" *Schrock v. Wyeth, Inc.*, 601 F. Supp. 2d 1262, 1266 (W.D. Okla. 2009) (quoting *Taylor v. Phelan*, 9 F.3d 882, 887 (10th Cir. 1993)). When applying state substantive law under *Erie*,[2] the Tenth Circuit routinely rebuffs attempts by litigants to fashion new causes of actions or remedies in the absence of clear signals from a state legislature or judiciary. *See, e.g., Vice v. Conoco, Inc.*, 150 F.3d 1286, 1291 (10th Cir. 1998) ("The courts of Oklahoma, however, have never recognized the tort of negligent investigation. We therefore decline to accept the appellant's invitation to create a new tort under Oklahoma law.") (internal citations omitted).

Federal courts within the Tenth Circuit have warned that such judicial innovations are not only inconsistent with *Erie*, but threaten the interests of comity and federalism as well. *Fed. Ins. Co. v. Southwestern Wire Cloth, Inc.*, No. 95-C-689-K, 1999 U.S. Dist. LEXIS 4273, at *20 (N.D. Okla. Feb. 5, 1999) ("[T]his Court is mindful of federalism concerns which suggest that state courts should be allowed to decide whether and to what

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[2] *See Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938) (holding that federal district courts in diversity cases must apply the substantive law of the states in which they sit). Courts in this Circuit have recognized that "[o]ne of the key purposes of the *Erie* doctrine is to ensure that 'the outcome of the litigation in federal court should be substantially the same, so far as legal rules determine the outcome of a litigation, as it would be if tried in a State court.'" *Scottsdale Ins. Co. v. Tolliver*, 262 F.R.D. 606, 609 (N.D. Okla. 2009) (quoting *Guaranty Trust Co. of New York v. York*, 326 U.S. 99, 109 (1945)).

extent they will expand state common law."). Accordingly, "[f]ederal courts must take great caution when blazing new state-law trails." *Id*. (declining to "create" state law). Numerous other courts have echoed these prudent concerns. *See, e.g.*, *Insolia v. Philip Morris Inc.*, 216 F.3d 596, 607 (7th Cir. 2000) ("Federal courts are loathe to fiddle around with state law. Though district courts may try to determine how the state courts would rule on an unclear area of state law, district courts are encouraged to dismiss actions based on novel state law claims."); *Dayton v. Peck, Stow & Wilcox Co. (Pexto)*, 739 F.2d 690, 694 (1st Cir. 1984) ("[W]e are in a particularly poor position, sitting as a federal court in a diversity case, to endorse the fundamental policy innovation implicit in the [plaintiff's tort] theory. Absent some authoritative signal from the legislature or the courts [of the state], we see no basis for even considering the pros and cons of innovative theories of [tort] liability.").

The *Erie* doctrine counsels judicial restraint even in close cases, where – unlike this one – intermediate state courts have provided conflicting signals. *See Birchler v. Gehl Co.*, 88 F.3d 518, 521 (7th Cir. 1996) ("When we are faced with opposing plausible interpretations of state law, we generally choose the narrower interpretation which restricts liability, rather than the more expansive interpretation which creates substantially more liability."); *Rhynes v. Branick Mfg. Corp.*, 629 F.2d 409, 410 (5th Cir. 1980) ("Even in the rare case where a course of [state court] decisions permits us to extrapolate or predict with assurance where that law would be had it been declared, we should perhaps . . . be more chary of doing so than should an inferior state tribunal."). The need to avoid an expansion of state tort law is all the more compelling here, where

Oklahoma's courts and legislature have provided *no basis* for believing that medical monitoring is an available remedy under Oklahoma tort law and where a sister Oklahoma federal district court has already rejected this claim.

Accordingly, this Court should not allow Plaintiffs' request to craft remedies hitherto unavailable under Oklahoma state law.

C. Public Policy Interests and the Weight of Authority in Other Jurisdictions Caution Against Recognizing Medical Monitoring Claims and Remedies.

Additionally, important public policy considerations militate against this Court endorsing the non-traditional tort remedy of medical monitoring. Although a handful of other states have allowed recovery for medical monitoring, the U.S. Supreme Court disapproved of exposure-related medical monitoring for uninjured plaintiffs in a claim brought under the Federal Employers' Liability Act. *See Metro-North Commuter R.R. Co. v. Buckley*, 521 U.S. 424 (1997). A clear preponderance of states that have considered the issue post-*Buckley* have similarly rejected medical monitoring claims or remedies in the absence of a present and manifest physical injury. *See Rhodes v. E.I. duPont de Nemours & Co.*, 657 F. Supp. 2d 751, 774 (S.D. W. Va. 2009) (noting post-*Buckley* trend); *Norwood v. Raytheon Co.*, 414 F. Supp. 2d 659, 667 (W.D. Tex. 2006) (discussing "the recent trend of rejecting medical monitoring as a cause of action" in light of *Buckley*); *see also* Zarov et al., *A Medical Monitoring Claim for Asymptomatic Plaintiffs: Should Illinois Take the Plunge?*, 12 DEPAUL J. HEALTH CARE L. 1, 2 (2009).

In *Buckley*, the Supreme Court highlighted many of the problems that inevitably pervade medical monitoring claims in the absence of physical injury. The plaintiff in

Buckley had sought to recover the costs of medical check-ups he expected to incur as a result of his exposure to asbestos-containing insulation dust. *Buckley*, 521 U.S. at 438. The plaintiff requested this relief despite the fact he had not yet manifested symptoms of any disease. *Id*. at 427. While acknowledging the lower court's concerns which led it to adopt the medical monitoring remedy, the Supreme Court reasoned that it was "more troubled . . . by the potential systemic effects of creating a new, full-blown, tort cause of action." *Id*. at 443. Accordingly, the Court held that a non-injured plaintiff is not legally entitled to recover medical monitoring costs. *Id*. at 427.

In so holding, the Court identified various far-reaching consequences that the requested medical monitoring relief might portend, particularly "the effects upon interests of other potential plaintiffs who are not before the court and who depend on a tort system that can distinguish reliable and serious claims on the one hand, and unreliable and relatively trivial claims on the other." *Id*. at 443-44. In this regard, the Court commented that mass exposures,

> along with uncertainty as to the amount of liability, could threaten both a "flood" of less important cases (potentially absorbing resources better left available to those more seriously harmed . . .) and the systemic harms that can accompany "unlimited and unpredictable liability" (say, for example, vast testing liability adversely affecting the allocation of scarce medical resources).

Id. at 442. The Court further observed that medical monitoring is a costly remedy, and that identifying which monitoring costs are necessary often poses "special difficulties for judges and juries." *Id*. at 441-42 (quotation marks omitted).

In the wake of *Buckley*, numerous state supreme courts adopted the reasoning of the Supreme Court and rejected medical monitoring claims and remedies under state law. *See, e.g.*, *Hinton v. Monsanto Co.*, 813 So. 2d 827, 830 (Ala. 2001) ("To recognize medical monitoring as a distinct cause of action . . . would require this Court to completely rewrite Alabama's tort-law system, a task akin to traveling in uncharted waters, without the benefit of a seasoned guide. We are unprepared to embark upon such a voyage."); *Badillo v. Am. Brands, Inc.*, 16 P.3d 435, 441 (Nev. 2001) (en banc) ("[W]e hold that Nevada common law does not recognize a cause of action for medical monitoring"); *Wood v. Wyeth-Ayerst Labs., Div. of Am. Home Prods.*, 82 S.W.3d 849, 857 (Ky. 2002) ("We are supported in rejecting prospective medical monitoring claims (in the absence of present injury) by both the United States Supreme Court and a persuasive cadre of authors from academia. These authorities explain that, while well-intentioned, courts allowing recovery for increased risk and medical screening may be creating significant public policy problems."); *Henry v. Dow Chem. Co.*, 701 N.W.2d 684, 703 (Mich. 2005) ("To recognize a medical monitoring cause of action would essentially be to accord carte blanche to any moderately creative lawyer to identify an emission from any business enterprise anywhere, speculate about the adverse health consequences of such an emission, and thereby seek to impose on such business the obligation to pay the medical costs of a segment of the population that has suffered no actual medical harm."); *Paz v. Brush Engineered Materials, Inc.*, 949 So. 2d 1, 5-6 (Miss. 2007) (refusing to recognize a claim for medical monitoring allowing a plaintiff to recover medical monitoring costs for mere exposure to a harmful substance without proof

of a current actual bodily injury); *Lowe v. Philip Morris USA, Inc.*, 183 P.3d 181, 187 (Or. 2008) ("[W]e hold that negligent conduct that results only in a significantly increased risk of future injury that requires medical monitoring does not give rise to a claim for negligence.").[3] The lion's share of federal and state courts making *Erie* guesses have followed *Buckley*'s example as well.[4] On occasion, state legislatures have also intervened to overrule courts that have improvidently recognized medical monitoring in the absence of injury.[5]

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[3] A minority of state supreme courts that have analyzed the issue post-*Buckley* have departed from this jurisdictional trend. *See Bower v. Westinghouse Elec. Corp.*, 522 S.E.2d 424, 431 (W. Va. 1999); *Meyer v. Fluor Corp.*, 220 S.W.3d 712, 717-18 (Mo. 2007); *Donovan v. Philip Morris USA, Inc.*, 914 N.E.2d 891, 901 (Mass. 2009).

[4] *See, e.g.*, *Parker v. Brush Wellman, Inc.*, 230 F. App'x 878, 883 (11th Cir. 2007) (applying Georgia law); *Cole v. ASARCO, Inc.*, 256 F.R.D. 690 (N.D. Okla. 2009) (applying Oklahoma law); *Avila v. CNH Am. LLC*, No. 4:04CV3384, 2007 U.S. Dist. LEXIS 66898, at *11-12 (D. Neb. Sept. 10, 2007) (applying Nebraska law); *Norwood v. Raytheon Co*., 414 F. Supp. 2d 659, 665 (W.D. Tex. 2006) (applying Texas law); *Mehl v. Canadian Pac. Ry. Ltd.*, 227 F.R.D. 505, 518 (D.N.D. 2005) (applying North Dakota law); *In re Prempro Prods. Liab. Litig.*, 230 F.R.D. 555, 569 (E.D. Ark. 2005) (applying Arkansas law); *In re St. Jude Med., Inc.*, MDL No. 01-1396**,** 2004 U.S. Dist. LEXIS 149, at *26 (D. Minn. 2004) (applying Minnesota law); *Bostick v. St. Jude Med., Inc.*, No. 03-2636 BV, 2004 U.S. Dist. LEXIS 29997, at *44-45 (W.D. Tenn. Aug. 17, 2004) (applying Tennessee law); *Rosmer v. Pfizer, Inc.*, No. 9:99-2280-18RB, 2001 U.S. Dist. LEXIS 6678, at *15 (D.S.C. Mar. 30, 2001) (applying South Carolina law); *Duncan v. Northwest Airlines, Inc.*, 203 F.R.D. 601, 608-09 (W.D. Wash. 2001) (applying Washington law); *Alsteen v. Wauleco, Inc.*, 802 N.W.2d 212, 223 (Wis. Ct. App. 2011); *Miranda v. Dacruz*, No. PC 04-2210, 2009 R.I. Super. LEXIS 129, at *30-31 (R.I. Super. Ct. 2009); *Curl v. Am. Multimedia, Inc.*, 654 S.E.2d 76, 81 (N.C. Ct. App. 2007) (applying North Carolina law). *But see, e.g.*, *Exxon Mobil Corp. v. Ford*, 40 A.3d 514, 552 (Md. Ct. Spec. App. 2012); *Petito v. A.H. Robins Co*., 750 So. 2d 103, 106 (Fla. Dist. Ct. App. 1999).

[5] *See Bourgeois v. A.P. Green Indus. Inc.*, 716 So. 2d 355 (La. 1998), *superseded by statute*, LA. CIV. CODE ANN. art. 2315(B) (1999), *as recognized in Bourgeois v. A.P. Green Indus., Inc*., 783 So. 2d 1251, 1255 (La. 2001).

As these authorities demonstrate, medical monitoring for uninjured plaintiffs (1) encourages highly speculative claims and equally conjectural awards; (2) diverts scarce medical resources away from truly injured individuals who need them most; (3) subjects defendants to open-ended liability; and (4) places significant strain on a judicial system that is generally ill-equipped to formulate and then supervise complex medical monitoring regimes. In light of these public policy considerations, it is plain to see why medical monitoring is an increasingly disfavored remedy. Neither the courts nor the legislature of Oklahoma have provided any reason to deviate from that trend.

D. *Ponca Tribe* Does Not Support Plaintiffs' Medical Monitoring Contention.

Despite the complete absence of antecedent Oklahoma authority recognizing medical monitoring, Plaintiffs allege that "Oklahoma law clearly supports Plaintiffs' quest for future medical expenses arising from exposure to Defendant's release of pollutants." First Am. Comp., ¶ 81. In support of their contention, Plaintiffs provide a curious—and bare—citation to *Ponca Tribe of Indians of Okla. v. Cont'l Carbon Co.*, No. Civ-05-445-C (W.D. Okla., Oct. 18, 2005) [Dkt. 61]. However, that unpublished order actually *undercuts* Plaintiffs' position on medical monitoring.

The court in *Ponca Tribe* emphasized that "each of the individuals identified in [the complaint] as 'medical monitoring Plaintiffs' are alleged in [the complaint] *to have suffered injury* from Defendants' alleged pollution." *Id*. at 3 (emphasis added). In this respect, the court clarified that "Plaintiffs' Complaint clearly contemplates 'medical monitoring' as a *remedy for injury*, not as a basis for legal liability." *Id*. (emphasis

added). In other words, the court merely recognized the uncontroversial point that those who *have sustained injury* may be entitled to future medical expenses. *Accord Buckley*, 521 U.S. at 438 (holding that only a plaintiff who has actually developed symptoms – *i.e.*, is injured or ill – can recover medical expenses, including "related reasonable medical monitoring costs"). Indeed, the court in *Ponca Tribe* commented that the plaintiffs "perhaps inartfully" pleaded "medical monitoring" as the remedy sought.[6] *Ponca Tribe*, No. Civ-05-445-C, slip op. at 3.

This inescapable reading of *Ponca Tribe* is further confirmed by the authority cited by that court to buttress its conclusion that future medical expenses are recoverable for *personal injuries*. First, the *Ponca Tribe* court stated that the plaintiffs' requested remedy was supported by *M. K. & O. Airline Transit Co. v. Deckard*, 397 P.2d 888 (Okla. 1964)—a case decided two decades before *any* jurisdiction in the United States recognized medical monitoring as a cause of action or remedy.[7] *See Ponca Tribe*, No. Civ-05-445-C, slip op. at 3. Moreover, there is no question that the plaintiff in *Deckard* suffered a physical injury in a car accident -- in fact, a companion case reveals that the plaintiff "sustained extensive lacerations of scalp, forehead and chin, a compound

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[6] *Cf. Ponca Tribe of Indians of Okla. v. Cont'l Carbon Co.*, No. CIV-05-445-C, 2009 U.S. Dist. LEXIS 8577, at *5 (W.D. Okla. Feb. 5, 2009) (noting that "Plaintiffs have withdrawn their claims for . . . medical monitoring").

[7] Medical monitoring was not recognized by any jurisdiction until the mid-1980s, with the D.C. Circuit's opinion in *Friends for All Children, Inc. v. Lockheed Aircraft Corp.*, 746 F.2d 816 (D.C. Cir. 1984). *See* Zarov et al., *A Medical Monitoring Claim for Asymptomatic Plaintiffs: Should Illinois Take the Plunge?*, 12 DEPAUL J. HEALTH CARE L. 1, 3 (2009).

fracture of the skull, and shock due to loss of blood." *See M. K. & O. Airline Transit Co. v. Deckard*, 397 P.2d 883, 885 (Okla. 1964). Lastly, the *Ponca Tribe* court stated that the plaintiffs' requested remedy was permitted by Oklahoma's civil jury instructions. *See Ponca Tribe*, No. Civ-05-445-C, slip op. at 3 (citing Instruction Nos. 4.1 & 4.2, OIJI-CIV(2d)). Notably, those jury instructions are entitled "PERSONAL INJURIES - ADULTS" and "PERSONAL INJURIES - MINOR CHILD," respectively. *See* OUJI-CI §§ 4.1 & 4.2.

Halliburton has located no authority suggesting that *Ponca Tribe* somehow recognized medical monitoring in the absence of physical injury under Oklahoma law. As discussed above, the Northern District of Oklahoma expressly reiterated—in a case decided *after Ponca Tribe*—that "Oklahoma law does not support creation of a medical monitoring class." *ASARCO*, 256 F.R.D. at 695; *see also id.* at 695-96 (finding "no state law addressing the propriety of a medical monitoring remedy" and stating that "Tenth Circuit law also casts doubt on the permissibility [of] the medical monitoring remedy sought in this case").

In short, Oklahoma has never recognized medical monitoring as a form of relief (or as a cause of action) for individuals who have suffered no bodily injury. This Court should not be the first to create such a remedy.

IV. CONCLUSION

For the foregoing reasons, medical monitoring is not an available remedy under Oklahoma law. Therefore, Halliburton is entitled to judgment on the pleadings as to Plaintiffs' request for medical monitoring relief.

Respectfully Submitted,

/s/ *J. Kevin Buster*

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CERTIFICATE OF SERVICE

I hereby certify that on July 9, 2012, I caused the foregoing document to be electronically filed using the electronic case filing system of the Court. The electronic case filing system sent a "Notice of Electronic Filing" to the attorneys of record who have consented in writing to accept this Notice as service of this document by electronic means. All other counsel of record will be served by mail.

/s/ *J. Kevin Buster*