

IRONBOUND HEALTH RIGHTS ADVISORY
COMMISSION, et al.,

SUPREME COURT OF NEW JERSEY
DOCKET NO.

Plaintiffs-Appellants,

vs.

DIAMOND SHAMROCK CHEMICALS
COMPANY, et al.,

(Consolidated)

Defendants-Respondents.

CIVIL ACTION

JOHN BRENNAN, et al.,

Plaintiffs-Appellants,

vs.

DIAMOND SHAMROCK CHEMICALS
COMPANY, et al.,

Defendants-Respondents.

ON APPEAL FROM AN INTERLOCUTORY ORDER
OF THE SUPERIOR COURT OF NEW JERSEY,
APPELLATE DIVISION

Sat Below:

James M. Havey, J.A.D.
William M. D'Annunzio, J.A.D.

BRIEF IN SUPPORT OF PLAINTIFFS-APPELLANTS' MOTION FOR LEAVE TO APPEAL

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TABLE OF CONTENTS

	<u>PAGE</u>
PRELIMINARY STATEMENT.....	1
PROCEDURAL HISTORY.....	6
STATEMENT OF FACTS.....	10
ARGUMENT:	
I. IN LIGHT OF THE SUPREME COURT'S DECISION IN <u>AYERS V. JACKSON TOWNSHIP</u> DECIDING THAT MEDICAL COSTS FOR PRE-SYMP TOM INJURY ARE COMPENSABLE AND THE APPELLATE DIVISION'S REMAND IN THIS CASE STATING THAT THE COURT SHALL DETERMINE DIAMOND SHAMROCK'S OBLIGATION TO FUND MEDICAL EX- AMINATIONS, THE TRIAL COURT ERRED IN REQUIRING PLAINTIFFS TO PERFORM MEDICAL EXAMINATIONS AND SUBMIT REPORTS AND STAYING DISCOVERY AGAINST DEFENDANTS.....	33
A. The cost of medical examinations and surveillance costs are triable issues in this case under <u>Ayers</u> and the Appellate Division's remand.....	33
B. Under the ruling in <u>Ayers</u> , liability for medical examinations and surveillance is to be determined in this action and damages for manifestations of the exposure are to be tried in subsequent actions.....	39
C. The order compelling plaintiffs to perform the medical examinations and the continuing stay on discovery are not just.....	42
CONCLUSION.....	44

TABLE OF AUTHORITIES

	<u>Page</u>
<u>Ayers v. Jackson Township</u> , 106 N.J. 557 (1987) (a copy of the slip opinion begins at page 267 of plaintiffs' appendix)	<u>passim</u>
<u>Evers v. Dollinger</u> , 95 N.J. 399 (1984).....	37
<u>HIRAC v. Diamond Shamrock Chemicals Corporation</u> , 216 N.J. Super. 164 (App. Div. 1987).....	<u>passim</u>
<u>Procanick v. Procanick v. Gillo</u> , 97 N.J. 339 (1984).....	37
<u>Schroeder v. Perkel</u> , 87 N.J. 53 (1981).....	37

Other Authorities

<u>R. 4:10-2</u>	42
<u>R. 4:10-3</u>	42
<u>R. 4:10-4</u>	42
<u>R. 4:17-4(e)</u>	8,9

PRELIMINARY STATEMENT

This appeal concerns the liability for funding medical examinations for more than 100 plaintiffs who have been exposed to dioxin manufactured in Newark by Diamond Shamrock Chemicals Company. Specifically, the Honorable David E. Crabtree, J.T.C., t/a, has ignored the mandate of the Supreme Court in Ayers v. Jackson Township 106 N.J. 557 (1987), and the Appellate Division's remand in this case which directed the trial court to determine whether Diamond Shamrock Chemicals Company is liable for these medical examinations and has ordered plaintiffs to perform and pay for these exams. Judge Crabtree has thus determined through a discovery motion that the plaintiffs must perform and fund the very medical examinations which the Appellate Division ruled are at issue in this case.

Specifically, on May 13, 1987, the Honorable David E. Crabtree, J.T.C., t/a, entered an order as follows:

ORDERED that the Motion of Defendant, Diamond Shamrock Chemicals Company, joined in by (sic) defendant, Roger Brodtkin, and defendant, Aetna Casualty & Surety Company, for an order pursuant to R. 4:17-4(e) be and the same is hereby granted and plaintiffs will cause physical examinations to be performed on each of the living plaintiffs and reports will be furnished to defendants no later than December 15, 1987 or in default thereof, no expert or treating physician whose name or report is not so furnished shall be permitted to testify at trial....

During this period, all oral discovery against defendants is stayed.

This case has already been the subject of one reported Appellate Division decision. IHRAC v. Diamond Shamrock Chemicals Corporation, 216 N.J. Super. 164 (App. Div. 1987), wherein the court determined that it was constitutionally impermissible for a trial court to order the Commissioners of the Department of Health and Environmental Protection to fund medical examinations and medical surveillance activities for these plaintiffs. The cost of exams for the former Diamond Shamrock employees alone was estimated at \$1,500,000. 216 N.J. Super. at 171. Subsequent to the Appellate Division's decision, plaintiffs moved for reconsideration to have the matter remanded to the trial court to determine whether Diamond Shamrock should be liable for the costs of the examinations. By order entered May 11, 1987, plaintiffs' motion was granted:

The matter is remanded to the Chancery Division to determine the obligation of defendant Diamond Shamrock to fund the cost of medical examinations and monitoring.
(Pa-153)

The Honorable David E. Crabtree, J.T.C., t/a, ignored this directive.

In addition to the specific remand in this case, the Supreme Court of New Jersey has recently ruled that defendants in toxic

tort cases are liable for medical monitoring and surveillance costs. See Ayers v. Jackson Township, 106 N.J. 557 (1987). In Ayers, the Supreme Court stated:

[W]e hold that the cost of medical surveillance is a compensable item of damages where the proofs demonstrate through reliable expert testimony predicated upon the significance and extent of exposure to chemicals, the toxicity of the chemicals, 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, that such surveillance to monitor the effect of exposure to toxic chemicals is reasonable and necessary. 106 N.J. at 606.

After the Ayers decision and the Appellate Division's remand in this case, plaintiffs moved for reconsideration before the trial court. By order dated June 23, 1987, the Honorable David E. Crabtree, J.T.C., t/a, denied plaintiffs' motion.

Judge Crabtree's reasoning for denying plaintiffs' motion for reconsideration can only be described as a non-sequitur:

Counsel relies essentially upon the decision of the New Jersey Supreme Court in Ayers, et al. versus Jackson Township, which is an opinion by -- rendered by Justice Stein, and decided on May 7th of this year. The Court finds that case to be distinguishable from the proceeding which is presently before this court on discovery. The distinction can best be characterized as a difference between origins and ends. Here we're dealing with pretrial discovery and the origins of the claims. Ayers dealt with the ends, namely, the submission of proofs in great deal, as indicated by Justice Stein [in the passage from the opinion quoted above],

quoted by counsel in his argument, in which he mentioned on two occasions what the proofs demonstrated. We have not reached the proof stage here. We're still in discovery. That distinction applies with full force to the claims against Dr. Brodtkin, insofar as those claims pertain to the Rule 4:17-4 medical examinations. For those reasons, then, the motion for reconsideration will be denied. (T 6/12/87 p. 62 L. 6-25). [emphasis supplied].

Judge Crabtree's statement concerning the differences in the procedural postures of the two cases is literally correct; Ayers went to trial and this case has not. The procedural difference between the two cases has, however, no legal significance, as Ayers and the Appellate Division remand in this case state what the applicable rule of law is concerning damages. That rule is that the defendants' responsibility for medical examinations and surveillance costs is a triable issue. The distinction cited by the Honorable David E. Crabtree, J.T.C., t/a, is truly a distinction without a difference.

The Supreme Court stated in Ayers that "It is inequitable for an individual wrongfully exposed to dangerous toxic chemicals...to have to pay his own expenses when medical intervention is clearly reasonable and necessary." 106 N.J. at 604-605. Under the rule of Ayers, as will be shown in the procedural history and the statement of facts, plaintiffs have provided substantially all of the discovery necessary in the areas of toxicology, medicine and engineering to bring this case

to trial. Meanwhile, defendants have not even indentified their experts. (Pa 397-404).

As a result of his flawed analysis, the Honorable David E. Crabtree, J.T.C., t/a, has allowed himself to be sidetracked by an irrelevancy. Plaintiffs cannot be obligated to perform medical exams in this action. The order compelling plaintiffs to perform medical examinations, especially when coupled with the stay on discovery against defendants, can do nothing more than bog the case down and delay its expeditious resolution. Thus, plaintiffs have no choice other than to seek leave to appeal Judge Crabtree's order.

PROCEDURAL HISTORY

Much of the procedural history of this litigation is described in the Appellate Division's prior opinion in this case. I.H.R.A.C. v. Diamond Shamrock Chemicals Co., 216 N.J. Super. 166 1987 (hereinafter IHRAC). The original complaint in this matter was filed on August 1, 1983. IHRAC, supra, 216 N.J. Super. at 169. After what was described by the Appellate Division as "an enormous amount of legal maneuvering," a final judgment in the equitable portion of this case was entered on January 8, 1986. IHRAC, supra, 216 N.J. Super. at 170, 172.

The ruling of the Honorable Reginald Stanton, A.J.S.C. judgment provided:

IT IS HEREBY ORDERED, on this 8 day of January, 1986, that plaintiffs' motion for additional interim relief is denied.

IT IS FURTHER ORDERED that the Commissioner of [the] Department of Health shall implement (with federal technical assistance and financial aid, if available; but without them, if they are not available) the medical testing and monitoring program previously approved by the Court, and the Commissioner of [the] Department of Environmental Protection shall continue to enforce the cleanup of dioxin contamination at and in the environs of 89 Lister Avenue, Newark, New Jersey to the greatest extent feasible within the bounds of known technology....

IT IS FURTHER ORDERED that the matter is hereby transferred to the Law Division, Essex County for all further proceedings on the damage claims herein. 6

IT IS FURTHER ORDERED that the stay on discovery is hereby lifted.*

It is recommended to the Honorable John A. Marzulli, A.J.S.C. that this matter be specially assigned to a single judge for case management. (Pa 145-147).

On January 29, 1986, the Honorable John A. Marzulli, J.S.C., assigned IHRAC, et al. v. Diamond Shamrock Chemicals Co., et al., and the companion Brennan, et al., v. Diamond Shamrock Chemicals Co., et al. to the Honorable David E. Crabtree, J.T.C., t/a.** (Pa-146).

The Commissioners of the Department of Health and Environmental Protection appealed that portion of Judge Stanton's order requiring them to implement the previously approved medical

*Discovery in IHRAC, et al. v. Diamond Shamrock Chemicals Co., et al., was stayed since the onset of the proceedings. Judge Stanton gave his reasoning as follows, "At the outset, I determined (without any serious objection from any of the parties or their attorneys) that top priority had to be given to physical abatement and cleaning of the environment and to helping to get appropriate health programs in place. Financial liability problems were of decidedly secondary importance. I did not want to see the energy and resources of public officials and the parties diverted from the need to solve the existing environmental and health problems. Accordingly, I stayed all proceedings with respect to damage claims, and I prohibited any, discovery on the damage claims. (Pa-141).

**The Brennan complaint was filed in 1985.

plan. On March 3, 1986, Judge Stanton supplemented his prior oral decision with a letter opinion pursuant to R. 2:5-1 (b). (Pa 138-144). All damage claims against the state defendants were dismissed on May 15, 1986. (Pa 149-150).

On March 23, 1987, the Appellate Division reversed Judge Stanton's order compelling the state defendants to perform the medical plan, finding that his order violated constitutional provisions concerning separation of powers. IHRAC, supra, 216 N.J. Super. at 173-177. On April 2, 1987, plaintiffs moved the Appellate Division for reconsideration, seeking a remand to the trial court to determine Diamond Shamrock's liability for funding medical examinations and monitoring. (Pa-153). By order dated May 11, 1987, the Appellate Division granted plaintiffs' motion:

The matter is remanded to the Chancery Division to determine the obligation of defendant Diamond Shamrock to fund the cost of medical examinations and monitoring. (Pa-153).

Thus, as of May 11, 1987, the Appellate Division determined that Diamond Shamrock's liability to fund the cost of medical examinations was an issue in the case.

After the Appellate Division's March 23, 1987 decision but before the Appellate Division's May 11, 1987 order, Diamond Shamrock filed a Motion pursuant to R. 4:17-4(e) to compel plaintiffs to perform medical examinations and provide reports on all living plaintiffs and to stay all further discovery against

defendants. The other defendants subsequently joined in the motion. Plaintiffs cross-moved for case management to set a comprehensive discovery schedule and a trial date. An order was eventually entered on May 13, 1987 granting defendants' motion and denying plaintiff's motion. As to the medical exams, the May 13, 1987 order of the Honorable David E. Crabtree, J.T.C., t/a provided:

Ordered that [defendants' motion for an order pursuant to R. 4:17-4(e) be and the same is hereby granted and plaintiffs will cause physical examinations to be performed on each of the living plaintiffs and reports shall be furnished to defendants no later than December 15, 1987 or, in default thereof, no expert or treating physician whose name or report is not so furnished shall be permitted to testify at trial...

Plaintiffs subsequently moved for reconsideration of this order and vacating of the stay on discovery in light of the Appellate Division's remand and the Supreme Court of New Jersey's May 7, 1987 decision in Ayers v. Jackson Township, 106 N.J. 557 (1987). By order dated June 23, 1987, this motion was denied.

Plaintiffs subsequently sought leave to appeal. Oral argument was had on August 18, 1987 by order dated August 19, 1987, plaintiffs' motion for leave to appeal was denied. This appeal follows.

STATEMENT OF FACTS

Diamond Shamrock acquired the 80 Lister Avenue facility in March of 1951 from Kolker Chemical. (Pa-369) Diamond Shamrock operated the site from 1951 to 1969 when it was sold to Chemical and corporation. (Pa-369) Id. The primary products manufactured at the facility were 2,4,5 trichlorophenol (hereinafter 2,4,5 T) and 2,4 dichlorophenol (hereinafter 2,4 D).* The basic manufacturing process was never changed. (Pa-370)

The dioxin which is the concern of this litigation, 2,3,7,8 tetrachlorodibenzo-p-dioxin (hereinafter dioxin or TCDD) is created as part of the 2,4,5 T manufacturing process. (Pa 192, 369, 390) During 1952 to 1968, Diamond Shamrock manufactured approximately 16,000,000 pounds of 2,4,5 T with a dioxin content of from four parts per million to 150 parts per million. (Pa 391, 392)

*Between 1951-1960, Diamond manufactured several other chemicals. Those chemicals were hexachlorobenzene (HCB), dichlorodiphenyl trichloroethane (DDT), p-chlorophenyl-p-chlorobenzene sulfonate (K101), 1,1,1 trichloroacetaldehyde (chloral), benzenesulfonyl chloride (BSC), p-chlorobenzenesulfonyl chloride (BCSC), p-chlorobenzene sulfonamide, 4,4 dichlorodiphenylsulfone (44-DDS), p-acetylamino benzene sulfonyl chloride (PAABSC), p-methoxy benzenesulfonyl chloride (PMBSC). (Pa-312)

Plaintiffs' expert, Dr. Robert Harris, a Ph.D. in biochemistry who has served on the President's Council on Environmental Quality, has performed tests to determine the toxicity of dioxin on laboratory animals and consulted to the Centers for Disease Control's Conference on polyhalogenated aromatic compounds which developed the Centers for Disease Control's risk assessment document on acceptable levels of dioxin in soil has described dioxin as "one of the most toxic man-made chemical[s] so far tested in the laboratory; it causes acute toxic effects, reproductive anomalies, and cancer at extraordinarily low doses." (Pa 190, 191).

Plaintiffs' expert Dr. Joseph Rodricks, a board certified toxicologist, has described dioxin as "one of the most toxic compounds known to man." (Pa 225,236). Dr. Rodricks states that dioxin causes severe skin lesions (chloracne), liver toxicity and alternations in lipid metabolism and immune function. (Pa-237) He also states that dioxin has been shown to cause "malignant tumors in many different organs and tissues" in laboratory animals. (Pa-237) Dr. Rodricks states that dioxin has been shown to "significantly increase the activity of carcinogens (cancer-promotion)." (Pa-237) In addition, dioxin displays "an unusually high degree of reproductive toxicity." (Pa-237) Finally, he states that dioxin attacks the immune system, thereby

enhancing a person's susceptibility to various disease (including infectious disease and cancer). (Pa-238)

Susan M. Daum, M.D., a diplomate of the American Boards of Preventive Medicine (occupational medicine) and Internal Medicine, a fellow of the American College of Chest Physicians and a former director of Mount Sinai Hospital's Occupational Medicine Clinic, also discusses dioxins toxicity. (Pa 200-201). She notes that dioxin causes chloracne, blepharocconjunctivitis, cystitis (hemorrhagic), pleuritis, gastritis and porphyria cutanea tarda. (Pa 202-203) She also notes liver toxicity as being observed in humans and causing deaths in laboratory animals. (Pa-203) She also states that "Persistent immunologic deficiencies have been observed in British workers who were exposed after accident and depression of cellular immunity has been observed in residents of Times Beach, Missouri who were surveyed by the Centers for Disease Control." (Pa-204).

In addition, lymphopenia, leukodema trombocytopenia and anemia have been observed in laboratory animals. Hypercholesteremia and/or hypertriglyceridemia have been observed in exposed human populaces. Vascular disease of the cerebrovascular and cardiovascular system have been observed. Experience has shown elevated lipid levels "years after exposure has ceased." Dr. Daum also notes that disordered carbohydrate metabolism, pancreatic dysfunction and diabetes have been

observed in humans.

Dr. Daum also notes that a range of endocrine and reproductive effects have been noted, "including testicular atrophy or necrosis, inhibition of spermatocyte development, menstrual irregularities, hormonal disturbances, reduced fertility and abortions and stillbirths." Laboratory animals exposed during gestations have shown a variety of fetotoxic effects. Dr. Daum also notes that "teratogenic effects have been observed in all tested species." (Pa 204-205).

Dr. Daum also states that polyneuropathy causing primarily a peripheral sensory loss has been observed. She states, "the neuropathy probably explains the symptoms of muscle and joint pains which have been prominent and disabling symptoms in industrial workers manufacturing 2,4,5-T." (Pa-205). Toxic encephalopathy has been observed and "is blamed for the symptoms of impairment of vision and taste, sleep disturbances, emotional instability, personality change, depression and losses of concentration and memory [in exposed humans]." (Pa-205)

Dr. Daum also states that dioxin has been described "as the most potent carcinogen known to man" because it induces a variety of cancers in laboratory animals at lower doses than any other cancer promotor. In humans, significant increases in histiocytic sarcoma and other soft tissue sarcomas, stomach cancer, lymphomas and lung cancer have been observed in exposed populaces.

Thus, a number of plaintiffs' experts have provided reports on dioxin's toxicity. It is no wonder then that the Appellate Division stated that dioxin is "a substance highly toxic to human being." IHRAC, supra, 216 N.J. Super. at 168.

There is no doubt that Diamond Shamrock knew it had a serious medical problem on its hands as early as 1955.** We can also see that at least as early as 1955, Diamond Shamrock embarked upon a campaign to prevent the affected populace from obtaining adequate medical care. Because of the size of workers' compensation awards being awarded on account of chloracne, Diamond conducted an internal investigation, headquarters personnel thought the New Jersey Commission to be feeble-minded until they saw the horribly disfiguring nature of the injuries first hand. (Pa-395). At one point 85 of 120 exposed workers were being treated for chloracne. (Pa 390, 391).

**Plaintiffs at this point are unable to detail more completely Diamond Shamrock's knowledge of dioxin, its toxicity, and the company's medical and manufacturing response for three reasons. First of all, we have not been allowed to depose anyone. Second, Diamond at the time of the Motion before Judge Crabtree had not turned documents over to plaintiffs which plaintiffs had reviewed and for which plaintiffs had paid. Finally as indicated in Judge Crabtree's May 23, 1987 order, Diamond had to be compelled to turn over plaintiffs' own medical records.

Diamond also noticed the probability of liver deaths as early as 1955. (Pa-396) At that point it was also clear that the company's response to the medical problems in the plant was to conceal the nature of the problem from its workers and to act contrary to the workers' best medical interests. For example, a consultation with a Dr. Marion Sulzberger was suggested. This idea was vetoed because "[Dr.] Sulzberger will feel that ethically he must tell the patient the truth, - that the air contamination in the plant caused his skin trouble and that there is not much help and it will get worse if the harmful exposure continues. Therefore, until and unless, the company is prepared to make some physical changes to the plant, the consultation should be put off." (Pa-395)

The response Diamond ultimately took was to hire independent Doctors Roger Brodtkin and Jacob Blieberg to "treat" their workers. Over the course of many years, Dr. Blieberg and Dr. Brodtkin administered thousands of useless treatments of vitamin B-12 and an anti-infectant; "treatments" which have no basis in scientific literature. (See, e.g., Pa-158)

At least five workers died as a result of their exposure to dioxin. Frank Ostanski was involved in the manufacture of 2,4,5-T. In 1959, as a result of being sprayed with trichlorophenol from a break in the trichlorophenol line, Mr. Ostanski was left with burns and scarring of the face and neck.

(Pa-155).

Mr. Ostanski was treated by Dr. Blieberg and Dr. Brodkin as early as 1959. (Pa-155). Betram Carnow, M.D., a Professor of Medicine at the University of Illinois, and a specialist in occupational and environmental medicine described Mr. Ostanski's condition as follows:

On June 13, 1963, he was seen because of complaints and findings of multiple large cysts and comedones which involved his ears, the neck behind the ears, the face, and other portions of the neck. He was stated to have had the chloracne "for some years". Five large cysts were removed from his ears and the right anterior part of his neck. [emphasis in original] He was treated with (SPL) staph vaccine used on many others with chloracne with the same complete lack of results. He continued to develop large cysts which were removed but at no point during this time was any mention made about removal from exposure. During this examination on June 13, 1963, in addition to the severe chloracne which consisted of multiple large cysts in ears and earlobes, behind the ears, on the front and back of the neck, on the shoulders and the chest, there were increased areas of pigmentation exposed to light and increase of hair growth above the outer third of the eyebrows. It was noted by Dr. Bleiberg that he had had the chloracne for a number of years but had not come in for treatment. Cysts continued to develop and over the next period of years, this man, as others, was given in excess of 100 injections of staphylococcus vaccine and what appears to be kermycin which apparently did nothing to reduce the frequency or the recurrence or size of the cysts, and they continued to be removed from the neck and back and the back of the neck. Nowhere in any of these notes was there any suggestion that this man be

removed from exposure. In January of 1966, Brodkin's records note that for the past 1 1/2 years the man had complained of numerous aches and pains and he looked ill. Examination on that date, the 27th of January in 1966, found large, matted, hard nodes over the right upper neck. He felt that they appeared to be malignant, particularly since there were many nodes felt in the axilla. The case was referred to Drs. Goldman and Shapiro who found multiple axillary and lingual nodes, weakness, and weight loss and recommended that a biopsy be done. Biopsy was performed and a reticulum cell sarcoma was found. The patient was given chemotherapy and he returned to work. Following treatment for the sarcoma, he continued to produce cysts, comedones and infected areas and continued his almost weekly treatments of SPL and antibiotics. He last saw Brodkin for his injection on March 7, 1968. By March 11, 1968, he was very ill and was hospitalized because of weakness, anemia and a rapid weight loss. He also had developed a mass over his ribs. A repeat biopsy again showed reticulum cell sarcoma. He was released and died at home on June 2, 1968.

Frank Ostanski, who had daily extensive exposure to dioxin contaminated 2,4,5-T and other chemicals developed during the course of his work at Diamond Shamrock, severe systemic chemical poisoning from dioxin and other chemicals in the workplace. In 1959, he was sprayed with trichlorophenol, undoubtedly containing dioxin, and received a severe burn including a thermal and alkali burn... The fact that Mr. Ostanski was suffering from chronic systemic chemical poison from dioxin is unquestioned. While the first overt manifestation appeared to be the chloracne which appeared some time in the late 1950's or early 1960's, the disease process began long before and the chloracne represents a far advanced manifestation and expression of the disease. In addition, he

was found to have abnormally increased pigmentation of the areas exposed to light (reported in Bleiberg's letter of June 17, 1963). There also was a beginning increase of hair growth above the outer third of the eyebrows, a condition which may be found in the far advanced end stage porphyria (Pazderova 1981, Bleiberg 1964). This increase in hair growth plus increased pigmentation of light exposed areas represents porphyria cutanea tarda, the most severe stage of porphyria. He had 2 manifestations of severe dioxin poisoning.

* * * *

In summary, the finding of severe chloracne and porphyria cutanea tarda indicate without question that Mr. Ostanski is suffering from chronic systemic poison from dioxin. The occurrence of reticulum cell sarcoma a rare tumor in an individual so affected clearly indicates that the sarcoma was caused by the dioxin poisoning. In addition, malignancies often develop to a greater extent in areas where there is scar tissue, and the finding of the reticulum cell cancer first on the right side of the neck in the area of the scar where he was sprayed with dioxin is further evidence that this tumor was caused by his exposure. (Pa 155-158).

Dr. Carnow then concludes:

The Drs. Brodtkin and Bleiberg and Diamond Shamrock knew certainly that by the time that his chloracne had developed the only treatment for this man was removal from exposure. Although, removal from exposure would not have stopped the progression of his disease it might have slowed it down. Removal might have resulted in his not developing this malignancy. Continued and repeated exposure clearly aggravated his existing illness. The treatments rendered to Mr. Ostanski were useless and have no basis

in medical practice. They not only did not help this man, and subjected him to what appears to be hundreds of injections, but also gave him a false sense of security in that he almost felt that he was being protected or being appropriately treated. His physician and his employer did not at any point try and remove him from work. Even after he was found to have metastatic reticulum cell sarcoma he returned to work and remained there until he died. (Pa 158) [emphasis supplied].

Thus, the actions of Diamond Shamrock, Dr. Blieberg and Dr. Brodtkin killed Frank Ostanski.

Joseph Ostanski was another Diamond Shamrock worker. Mr. Ostanski was given numerous useless injections for many years by Dr. Brodtkin. Dr. Carnow describes the cause of Mr. Ostanski's death as follows:

He re-entered the hospital in May, 1965 with weakness, weight loss, chest pain and shortness of breath and was discharged, date unknown, only to be readmitted to the Veterans hospital on May 25, 1965, where he remained until his death on June 21, 1965.

An autopsy was carried out at the veterans hospital and revealed the cause of death to be due to a very large, flocculated, active, chronic empyema of the right pleural cavity. A culture of the empyema produced multiple organisms including a pneumococcus, and Aerobacter aerogenes and an a-faecalis. Examination of the organs at autopsy revealed severe clarification, sclerosis and marked narrowing of the vessels of the coronary arteries. The aorta also showed severe calcification and sclerosis. On microscopic examination, the lymph nodes showed chronic hyperplasia, which is an overgrowth of tissue, with increased follicular pattern and

moderate degree of interstitial fibrosis. This was felt to represent a chronic inflammation of the lymph nodes. The lungs on microscopic examination revealed the abscess (empyema), scarring, and, in addition, moderately severe hardening of the pulmonary arteries. The heart revealed chronic inflammatory changes which was felt to represent a pericarditis. The liver showed fibrosis and lymphatic infiltration. In summary, he was felt to have had polyserositis, cause unknown, bilateral pleural effusion with empyema, chronic pericarditis, cirrhosis of the liver and severe atherosclerosis, and arteriosclerosis with narrowing and hardening of arteries of multiple organs.

Mr. Ostanski, in my opinion, developed chronic systemic chemical poisoning from exposure to dioxin (2,3,7,8-TCDD), a contaminant of 2,4,5-T and other chemicals to which he was exposed over the years from 1950 until his death in 1965. While many organs are affected, often before the skin, the earliest obvious manifestation of his chronic poisoning was chloracne, a condition which medical science has known to be caused by exposure to chlorinated compounds since 1900 (Herxhelmer 1899) and, more specifically, related to 2,4,5-T production since 1949 (Ashe and Suskind 1949, 1950). This is not a separate skin disease but a skin manifestation of systemic metabolic poisoning caused by TCDD. TCDD, the most toxic of all man-made chemicals (Sharma, 1979), causes a remarkable, prolonged and pervasive disruption of normal body function by affecting the rate of production of a group of enzymes called the p-450 enzymes (Poland, 1979, Poland, 1973). TCDD turns this system on, particularly in the liver, which results in a wide range of serious effects including hyperplasia of the cells and ducts in the skin, with blocking of these ducts and the formation of blackheads, cysts, and abscesses. This was what happened in Mr.

Ostanski's case. He should have been immediately removed from exposure by Dr. Brodtkin or his employer as soon as he broke out, since it had been known for many years, at least since 1951 (Ashe and Suskind 1949), when reports were published by them of similar findings among Monsanto workers at the Nitro, West Virginia Plant. Another large group of workers in Germany were similarly affected in 1953 and showed evidence of damage to multiple organ systems including the skin, central nervous system, peripheral nervous system, liver and other organs. A study of the health effects of TCP (and dioxin) was published by Baader and Bauer in 1951, Kimmig and Schulz in 1957, by Bleiberg et al, in 1964, Dugois in 1957, and others. There is no definitive treatment for this disease and the only possible way of helping those affected is to remove them from exposure in the hope that the process will be slowed. It is well-known that even such removal does not prevent progression of this disease over years. Dr. Brodtkin's treatment with a staphylococcus vaccine and the excision of comedones represents no useful treatment at all. It gave this man the false hope that he was being treated for his disease under the care of a physician. Unquestionably, the failure of Dr. Brodtkin to recommend removal and the failure of the company to remove Mr. Ostanski from the workplace intensified the problem and accelerated the disease process which led to Mr. Ostanski's death. [emphasis supplied].

Dioxin is known to affect virtually all of the major organ systems. His death was reported to be due to empyema, a severe infection with accumulation of pus in the lungs. This was unquestionably due to lowered resistance to disease a result of liver disease and of damage, we now know, to his immune system (Thigpen, 1975, Luster, 1979)...

It is my opinion, that Mr. Ostanski's

exposure to dioxin in his work place over a period of years led to the development of a systemic chemical poisoning which led to his death. (Pa 163-166)

James Tanzola worked at Diamond Shamrock and was also "treated" by Dr. Blieberg and Dr. Brodtkin for many years. After detailing Mr. Tanazola's medical history, Dr. Carnow states:

Mr. Tanzola who worked at Diamond Shamrock for a period of almost twenty years revealed on numerous examinations findings representing far advanced chronic systemic chemical poisoning from dioxin.

The clinical picture presented by this man over the years is in every respect similar to that found in other workers exposed to dioxin and other chemicals in the workplace (Bauer 1961, Pazderova 1981, Kimmig 1957, Goldmann 1972, Poland 1971). Dioxin is a systemic chemical poison which acts to destroy metabolic regulation of the body and, thus, the function of all major organ systems are affected (Poland 1974, Poland 1973). Mr. Tanzola exhibits many of the stigmata of this disease and the manifestations of the disease in multiple organ systems. The chloracne which he had and which was not a primary skin condition but a manifestation of systemic metabolic poison....

The derangement of liver function also has been shown to occur in all species tested including humans exposed to dioxin (Pazderova 1981, Bauer 1961, Fara 1982). There was evidence of liver disease including enlargement of the liver and abnormalities of liver function (Kimmig 1957, Schwetz 1973, McConnell 1978, Jones 1975). In addition, he developed abnormal lipid metabolism with abnormally increased cholesterol which played an important role in the development of atherosclerosis with hardening of the arteries, subsequent myocardial infarctions

and death (Zinkl 1973, Pazderova 1981, Allen 1978, Zack 1983, Bombick 1984, Walker 1979, Goldmann 1972, Oliver 1975). He showed further evidence of abnormal liver metabolism and function in that he developed evidence of porphyria. This included abnormal pigmentation of the skin, abnormal blistering of the skin in summer and increased hair formation on the face (McConnell 1978, stehl 1977, Bleiberg 1964, Centen 1979). All of these represent deranged liver metabolism. The resulting abnormal enzyme production then leads to abnormal regulation of functions in many other parts of the body.

He also showed evidence of central and peripheral nervous system damage including severe eighth nerve deafness and findings on examination in July of 1970 of evidence of extensive damage to the brain. While this was diagnosed as "traumatic anxiety neurosis", he complained of headaches, dizziness, nervousness, slipiness, and depression, all symptoms of toxic poisoning found and reported in many cases of dioxin poisoning. He had numbness of the fingers which represented peripheral neuropathy and complained of easy fatigue which also is central in origin. Abnormal reflexes were found which represented organic damage to brain and other nerve tissue including depression of the corneal and pharyngeal reflexes, and hyperactive reflexes of the extremities. He also was found to have tremors of the tongue, eyelids and fingers and a positive romberg all of which represent brain damage. Similar findings were present in other individuals poisoned by dioxin (Pazderova 1981, Goldmann 1972, Bauer 1961). The central nervous system is also a major target organ. The damage to the lungs found in 1971 represents a combination dioxin exposure and exposure to other fumes and dust including one acute episode where he inhaled very caustic fumes and had difficulty in breathing. The damage to the eyes which was found results from the same abnormal

metabolic process as has been shown with chloracne, namely, an overgrowth of cells lining ductal tissue with formation of keratitis and obstruction (Bauer 1961, Kimmig 1957, Poland 1971, Fara 1932).

In every regards as noted above Mr. Tanzola shows evidence of far advanced dioxin chemical toxicity. The progression of illness is a result of that intoxication and his death from repeated heart attacks is the effect of the result of the pathophysiologic process which adversely affects liquid metabolism, vascular integrity and function. The damage to and dysfunction of many other organs also contributed to additional physiologic stress and his downhill course and death.

The treatments rendered to Mr. Tanzola by Doctors Brodtkin and Bleiberg were useless and of no help to this patient whatsoever. There is no basis in the medical literature or in therapeutics for giving the types of medication and injections that were received by Mr. Tanzola. The only possible treatment for this man would have been the immediate removal from exposure at the time that he developed the chloracne if not before. While this would not have stopped the disease, it might have slowed the progression and the rapid downhill course which led to great suffering and ultimately death. The treatment in fact was damaging to the man because it may have encouraged him to keep working since he was receiving "treatment" which he was told would help him. It was known in at least 1937 (Butler 1937) and before, that chloracne was a systemic disease which could be caused by chlorinated phenols. Certainly the reports of the examination of groups of workers from the Monsanto Plant in Nitro, West Virginia (Ashe & Suskind 1950), the BASF plant in Germany (Baader 1951), from Phillips Duphar (Dalderup 1974), Coalite (Walker 1972), Spolana (Jirasek 1973) and others should have familiarized them with the

symptoms and finding resulting from systemic poisoning by trichlorophenols contaminated with dioxin. Drs. Bleiberg and Brodkin wrote an article pointing out the systemic nature of the disease. Diamond Shamrock too should have known, and, in my opinion, did know about the effects of dioxin related chemicals on the health of humans. [emphasis supplied].

It is my opinion that the exposure of this man, the failure to remove him from exposure, the false security given to him through the use of worthless injections and his continued exposure all resulted in damage to multiple organ systems with progressive deterioration of health, impairment of cardiac function, damage to the vascular system and death, from systemic poisoning by dioxin. [Pa 169-172]

James Tanzola, too, was killed by Diamond Shamrock, Dr. Blieberg and Dr. Brodkin.

Robert Maksimow also died from working at Diamond Shamrock. He, too, had chloracne. (Pa-176).

Toward the end of his employment at Diamond Shamrock his family has related, he began to develop personality changes and he became "very nervous". He said that he could not "cope with people" and became withdrawn. He also began to have episodes where he would become very violent. The family stated that when he started at the job, he was very active in sports, never smoked or drank and never had any violent tendencies. But, in the late 1950's and the early 1970's, he began to drink beer all the time, and then began to obtain medications from the physicians, particularly Valium.

* * * *

In 1971, examination revealed abnormal liver enzymes and proteins. 1972, he

developed a central nervous system neuropathy, specifically a trigeminal neuritis, and, in 1973, developed multiple abnormalities including enlarged liver and infections of the gums, lymph glands and sinuses. He also developed severe headaches in that year. His liver enzymes and serum proteins continued to be abnormal with a depressed globulin and an abnormally elevated albumin-globulin ratio, as well as abnormal SGOT. When this test was repeated a month later, it continued to show these abnormalities and, in addition, showed an abnormal elevation of SGPT, another liver enzyme. He began, in 1977, to show abnormal lipid elevations including triglyceride at 259 and then a 354, markedly elevated. Liver enzymes continued to be abnormal and he was found to have a hyperprebetalipoproteinemia, phenotype 4. At about this time, age 38, his blood pressure suddenly rose and was found to be 160/120. Repeated tests continued to show abnormalities of lipid metabolism, and then of abnormal kidney function with an elevated creatinine. His drinking and consumption of Valium apparently became worse and he had multiple hospitalizations for this. In 1985, Mr. Maksimow apparently left the hospital where he was being treated for the alcoholism and excessive use of Valium, and, a few weeks later on February 12, 1985, he died. The immediate cause of death was an overdose of both alcohol and Valium.

* * * *

He became progressively worse and began to exhibit manifestations of central nervous system damage which has been described in others exposed to dioxin (Bauer 1961, Kimmig 1957, Goldman 1972, Pazderova 1981, Goldman 1973, Allen 1957). These individuals not only become depressed but also irritable and, because of the disfigurement and pain of the chloracne, frequently remove themselves from social activity. It is not uncommon in these circumstances for them to resort to alcohol

or medications as support. Other manifestations of central nervous system damage that he exhibited included nervousness, headaches, and inflammation of a cranial nerve, trigeminal neuritis.

* * * *

When this man developed chloracne, he should have immediately been removed from any further exposure. This is the only treatment, and while the disease continues to be active, the pace of the disease may slow. There is evidence in the medical literature, particularly in animal studies, of marked acceleration of and the aggravation disease with repeated small doses. Mr. Maksimow was not removed from work activity and even more, was erroneously led to believe that the treatments which he received on at least a hundred occasions would protect and help him. The treatments, in fact, were useless and there is absolutely no basis anywhere in the medical literature of therapeutic pharmacopia, which suggests that either the B-12 or any of the other medications he received was of any value in combating this disease. By giving him this false sense of security, it, in fact, aggravated his condition and led to damage to multiple organ systems which then resulted in his abuse of alcohol and medication to make himself comfortable. His death in 1935 was an immediate result of excessive consumption of alcohol and Valium. This lethal consumption was caused by chronic systemic poisoning from dioxin. Drs. Brodtkin and Bleiberg and Diamond Shamrock knew that this man, along with the others so affected, were suffering from severe chronic systemic poison as a result of exposure to dioxin and other chlorinated compounds. Reports in the literature, at least since 1936 and certainly of examinations of workers in the Monsanto Plant in Nitro, West Virginia (Ashe 1950) and those from the BASF Plant in Germany (Baader 1951) revealed that, in addition to chloracne

there were extensive systemic abnormalities found. Many reports then entered the literature of similar findings in animals and humans including a report in the literature by Dr. Bleiberg himself. [emphasis supplied].

Thus, Robert Maksimow died from working at Diamond Shamrock.

Finally, Griffin Baisley died from working at Diamond Shamrock. After noting the hundreds of useless injections given to Mr. Baisley and reviewing his medical history, Dr. Carnow states:

Mr. Baisley was without question suffering from severe and far advanced chronic systemic poisoning from dioxin and other chemicals in his workplace. He showed extensive damage to multiple organ systems known to be so damaged by dioxin. These include:

1. Severe far advanced chloracne which is not primarily a skin disease, but rather a skin manifestation of systemic poisoning. The pustules, cysts, and abscesses of chloracne are caused by severe metabolic derangement secondary to dioxin with an overgrowth (hypertrophy and hyperplasia) of cells lining the skin ducts so that the ducts become occluded and form keratin, a type of chloracne. This was reported and known since 1900 to occur with chlorinated compounds and with the chlorinated phenols since Butler's description in 1937 (Butler, 1937). Following an explosion at the Nitro, West Virginia plant of Monsanto in 1949 (Ashe and Suskind 1950) and the BASF in Germany, 1953, (Baader, 1951) reports of examinations of workers revealed this and many of the other findings noted in this man. The reports, incidents and effects of dioxin exposure were known to Diamond Shamrock and Dr. Jacob Bleiberg and Dr. Roger Brodtkin (Bleiberg, 1964).

2. Porphyria cutanea tarda. This is the most advanced form of porphyria, a disorder of porphyrin metabolism, and carries with it a very serious prognosis. Disturbances of porphyrin metabolism were found in 1949 at the Nitro, West Virginia, Monsanto plant and were reported by others in both animal and human studies (McConnell, 1978, Stehl, 1977, Bleiberg, and Brodtkin, 1964, Centen 1979). Drs. Bleiberg and Brodtkin published an article on the incidents of the disease in this plant. This, too, was a result of dioxins causing metabolic dysfunction, too, was a result of dioxins causing metabolic dysfunction, particularly in liver with a turning on of an enzyme system, the p-450 enzymes, which regulate many functions in the body (Poland, 1974, Poland, 1979, Poland, 1973). This abnormal activity of enzyme systems results in derangement of porphyrin metabolism. Cases of porphyrin abnormalities and porphyria have been found in workers and others exposed, and the finding of porphyria cutanea tarda represented a massive exposure to Mr. Baisley.

3. Extensive atherosclerotic and cardiovascular abnormalities. The derangement of metabolism includes as one of the most prominent features, abnormal body handling of lipids (Pazderova, 1981, Oliver, 1975, Walker, 1979, Zinkl, 1973). Individuals exposed to dioxin may then go on to develop severe changes in the vascular system, particularly the arteries going to the heart. Mr. Baisley had far advanced sclerosis in the blood vessels of most of his organs, not only the larger vessels, but smaller arteries and arterioles as well. There are many reports in the literature of animals and humans exhibiting this derangement of lipid metabolism with vascular pathology. This is a common cause of death in workers exposed to dioxin.

The treatment rendered by Drs. Brodtkin and Bleiberg is not supported by anything in the medical literature, was useless in the case of Mr. Baisley, and was not acceptable medical practice. The useless treatment given to Mr. Baisley could only have lulled him into a false sense of security that his medical condition was being properly treated.

There is no evidence from anything in the medical literature suggesting that SPL or Vitamin B-12 are useful in the treatment of any of the effects of dioxin exposure. The only treatment for this man should have been immediate removal from the harmful exposure. While his disease had already been far advanced in 1953, the continued exposure for a number of years after unquestionably accelerated and aggravated his disease and caused his death. [emphasis supplied].

This history of treatment, goes far beyond poor medical care and judgment. It is my opinion that there was a deliberate attempt to harm this worker and conceal his true medical condition which ultimately caused his death. [emphasis supplied]

Thus, at least five people died because of Diamond's acts and the gross malpractice of Dr. Brodtkin and Dr. Blieberg.

Thus, Diamond Shamrock and Dr. Brodtkin were confronted with an extremely serious medical situation at the Newark Plant. Diamond's response was to engage in an active campaign to prevent the workers from obtaining competent medical help. Dr. Brodtkin while watching his patients become ill and die, administered useless treatment and did not give his patients the most meaningful advice, which would have been to stop their exposure.

The story of Diamond Shamrock and its dioxin does not

stop inside the walls of the old plant. In June of 1983, dioxin was discovered on the old plant site and in the surrounding neighborhood. The levels on the plant site ranged from 60 to 51,000 parts per billion and in many cases over 1 part per billion in soil samples in the adjacent residential neighborhood.

On the basis of these discoveries, Governor Kean declared a public health emergency. The centers for disease control has also determined that levels in soil in excess of 1 part billion in soil in residential areas presents an unacceptable risk to public health.

As Dr. Harris stated, "[T]he concentrations of [dioxin] in soil discovered by the USEPA/NJDEP monitoring program at the Diamond Alkali site and on surrounding private property indicates that a significant health risk is posed by [dioxin]." As the Appellate Division noted, this testing showed that "levels of dioxin [on the 80 Lister Avenue Site] were as high as 51,000 parts per billion (ppb) and that levels of dioxin were greater than 1,000 ppb throughout the adjoining residential and business area. According to the Federal Centers for Disease Control, Dioxin concentrations in the soil of one ppb constitute (sic) an 'unacceptable risk to human health.'" IHRAC, supra, 216 N.J. Super. at 169.

Based upon all of this data, Dr. Daum recommended an initial medical program to evaluate health impacts. This protocol

includes testing for dysfunction in skin, mucous membrane, immune, endocrine, neurologic, reproductive, and liver systems. It also recommends lipid analysis, testing for porphyria and carbohydrate metabolism abnormalities. In addition, Dr. Daum has suggested a cancer surveillance program. Plaintiffs commend the court to this program which is at pages 208 to 216 of the appendix.

Thus, plaintiffs have provided an analysis of the toxicology of dioxin, its application to the plaintiffs and recommended an initial medical surveillance program. Thus, under Axers v. Jackson Township, 106 N.J. (1987), plaintiffs have provided essentially all of the expert discovery which it is necessary for us to provide. Defendants have not even identified experts. Plaintiffs, therefore, respectfully request this court to vacate the order requiring plaintiffs to conduct medical examinations by December 15, 1987 and to vacate the discovery stay.

ARGUMENT

I. IN LIGHT OF THE SUPREME COURT'S DECISION IN AYERS V. JACKSON TOWNSHIP DECIDING THAT MEDICAL COSTS FOR PRE-SYMPTOM INJURY ARE COMPENSABLE AND THE APPELLATE DIVISION'S REMAND IN THIS CASE STATING THAT THE COURT SHALL DETERMINE DIAMOND SHAMROCK'S OBLIGATION TO FUND MEDICAL EXAMINATIONS, THE TRIAL COURT ERRED IN REQUIRING PLAINTIFFS TO PERFORM MEDICAL EXAMINATIONS AND SUBMIT REPORTS AND STAYING DISCOVERY AGAINST DEFENDANTS.

A. The cost of medical examinations and surveillance costs are triable issues in this case under Ayers and the Appellate Division's remand.

As has been amply demonstrated, plaintiffs through Dr. Daum, Dr. Carnow, Dr. Rodricks and Dr. Harris have provided an analysis of dioxin's toxicity, death reports indicating Dr. Brodtkin's malpractice and Diamond Shamrock's complicity, and have submitted a medical examination and surveillance protocol. Defendants have not even identified experts. An analysis of Ayers v. Jackson Township and the Appellate Division's remand will show that plaintiffs have provided essentially all expert discovery necessary.

Ayers v. Jackson Township concerned pollution of private wells by a municipally owned and operated landfill. One of these issues was whether the defendants should be required to pay for

the costs of plaintiffs post-exposure by pre-symptom medical diagnostic and surveillance exams. The court held:

Accordingly, we hold that the cost of medical surveillance is a compensable item of damages where the proofs demonstrate, through reliable expert testimony predicated upon the significance and extent of the chemicals, the seriousness of the diseases for which individuals are at risk, the relative increase of the chance of onset of disease in those exposed, and the value of early diagnosis, that such surveillance to monitor the effect of exposure to toxic chemicals is reasonable and necessary. 106 N.J. at 606.

Thus, it is beyond dispute that in a properly presented and proven case the costs of the very examinations which have been imposed upon plaintiffs by Judge Crabtree are properly borne by the defendants themselves. In fact, the court specifically stated that imposing the costs on plaintiffs is inequitable.:

Other considerations compel recognition of a pre-symptom medical surveillance claim. It is inequitable for an individual, wrongfully exposed to dangerous toxic chemicals but unable to prove that the disease is likely, to have to pay his own expenses when medical intervention is clearly reasonable and necessary. 106 N.J. at 604-605.

Thus, it is clear that the liability for the costs of these exams is an issue that must be adjudicated. The court identified three

interests in allowing such claims. First, the court stated:

Although some individuals exposed to hazardous chemicals may seek regular medical surveillance whether or not the cost is reimbursed, the lack of reimbursement will undoubtedly deter others from doing so. An application of tort law that allows post-injury pre-symptom recovery in toxic tort litigation for reasonable medical surveillance costs is manifestly consistent with the public interest in early detection and treatment of disease. 106 N.J. at 604

In addition to early detection and treatment of disease, the court identified deterrence of pollution as a societal interest, "[P]ermitting recovery for reasonable pre-symptom, medical surveillance expenses subjects polluters to significant liability when proof of the causal connection between the tortious conduct and the plaintiffs' exposure to chemicals is likely to be most readily available." Id. Finally, the court stated that it was "inequitable" for wrongfully exposed individuals to have to bear the costs of the medical surveillance. Id.

As the court is aware, Judge Stanton ordered the State of New Jersey to perform medical examinations on certain of the plaintiffs and other exposed individuals as a result of the public health emergency created by the discovery of dioxin in Newark. This decision was ultimately reversed by the Appellate Division on constitutional grounds, but on May 11, 1937, the

Appellate Division remanded the matter to the Chancery Division to determine Diamond Shamrock's liability to fund medical examinations for the plaintiffs. (Pa158)

Judge Crabtree's distinguishing of Ayers, that is, Ayers deals with proofs at trial and this case is now in discovery, is incoherent, incomprehensible and illogical. He also made a passing reference to Dr. Brodtkin's status. It is clear under New Jersey Law that increased medical expenses are compensable in malpractice actions. As the Supreme Court stated in Ayers:

Compensation for reasonable and necessary medical expenses is consistent with well-accepted legal principles. See C. McCormick, Handbook on the Law of Damages, Sec. 90 at 323-27 (1935). It is also consistent 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. The value of early diagnosis and treatment for cancer patients is well-documented. See Evers v. Dollinger, supra, 95 N.J. at 424 (Handler, J., concurring):

Harm in the form of increased risk of future cancer attributable to delay in diagnosis and treatment has become so widely accepted by the medical community that the existence of such harm could be reasonable inferred from this professional common knowledge. A survey of the medical literature indicates that it is universally agreed within the medical community that

delay in cancer diagnosis and treatment usually increases the risk of metastasis.

Other considerations compel recognition of a pre-symptom medical surveillance claim. It is inequitable for an individual, wrongfully exposed to dangerous toxic chemicals but unable to prove that disease is likely, to have to pay his own expenses when medical intervention is clearly reasonable and necessary. In other contexts, we have intervened to provide compensation for medical expenses even where the underlying disease was not compensable. In Procanik by Procanik v. Cillo, 97 N.J. 339 (1984), an action for "wrongful birth", we allowed compensation for medical expenses but disallowed the claims for pain and suffering and for a diminished childhood attributable to birth defects. In Schroeder v. Perkel, 87 N.J. 53 (1981), we upheld the claim of parents for incremental medical costs associated with raising a child who suffers from cystic fibrosis, without recognizing a "wrongful birth" cause of action based on that condition. 106 N.J. at 603-604.

Indeed, New Jersey Courts have allowed reasonable future medical expenses in a number of situations involving medical malpractice. See, e.g., Procanick by Procanick v. Cillo, 97 N.J. 339, 352 (1984); Schroeder v. Perkel, 87 N.J. 53, 68-69 (1981). Thus, if plaintiffs can demonstrate that Dr. Brodtkin's malpractice is a substantial contributing factor to their need for medical surveillance costs, Dr. Brodtkin is liable for those costs. Cf. Evers v. Dollinger, 95 N.J. 399, 417 (1984).

Thus, the law of this state and the law of this case are

that the costs of medical surveillance are triable issues. Despite these obvious facts, Judge Crabtree ignored the clear mandate of the Appellate Courts. He must be reversed.

B. Under the Ruling in Ayers liability for medical examinations and surveillance is to be determined in this action and damages for manifestations of the exposure are to be tried in subsequent actions.

Even though it is clear that the responsibility for funding medical examinations and medical surveillance costs are triable issues in this case, it is important to emphasize that Ayers states that neither the statute of limitations nor the single controversy doctrine bar future actions. In Ayers, the court first noted New Jersey's discovery rule that "tolls the statute until the victim discovers both the injury and the facts suggesting that a third party may be responsible." (Citations omitted). The court then noted that the single controversy "may bar recovery where, as here, suit is instituted to recover damages to compensate for the immediate consequences of toxic pollution, but the initiation of additional litigation depends upon when, if ever, physical injuries threatened by pollution are manifested. 106 N.J. at 583.

The court made it explicit that neither the statute of limitation nor the single controversy doctrine will bar future actions.

As the Appellate Division implied, 202 N.J. Super. at 125, we need not resolve such issues for the litigants in this case.

Nevertheless, it is appropriate that all of the parties in interest understand that neither the single controversy doctrine nor the statute of limitations, N.J.S.A. 2A:14-2, will preclude a timely-filed cause of action for damages prompted by the future "discovery" of a disease or injury related to the tortious conduct at issue in this litigation. The bar of the statute of limitations is avoided because, under New Jersey's discovery rule, the cause of action does not accrue until the victim is aware of the injury or disease and of the facts indicating that a third party is or may be responsible. Lynch v. Rubacky, supra, 85 N.J. at 70. Moreover, the single controversy rule, intended "to avoid the delays and wasteful expense of the multiplicity of litigation which results from the splitting of a controversy" Id. at 557 (quoting Ajamian v. Schlanger, 14 N.J. 483, cert. denied, 348 U.S. 835, 99 L.Ed. 2d 659 (1971)), cannot sensibly be applied to a toxic-tort claim filed when disease is manifested years after the exposure, merely because the same plaintiff sued previously to recover for property damage or other injuries. In such a case, the rule is literally inapplicable since, as noted, the second cause of action does not accrue until the disease is manifested; hence, it could not have been joined with the earlier claims.

Accordingly, we concur with the principle advanced by the trial court, 139 N.J. Super. at 568, and endorsed by other federal and state courts, see Hagerty v. L & L Marine Servs., Inc., 788 F. 2d 315, 320-21 (5th Cir.), modified on other grounds, 797 F. 2d 257 (5th Cir. 1986); Eagle-Picher Indus. v. Cox, 481 So. 2d 517, 519-21 (Fla. Dist. Ct. App. 1985), that neither the statute of limitations nor the single controversy rule should bar timely causes of action in toxic-tort cases instituted after discovery of a disease or injury related to tortious conduct, although there has been prior

litigation between the parties of different claims based on the same tortious conduct. See Devlin v. Johns-Manville Corp., 202 N.J. Super. 556, 568-70 (Law Div. 1985). 106 N.J. at 583 - 584.

Thus, the proper way to proceed here is, for example, to try the medical examination and surveillance issues, pain and suffering, quality of life, the death cases, business losses, other property related damages and punitive damages. Then, when and if plaintiffs are diagnosed as suffering from diseases relating to their exposures, the disease issues shall be tried in the future. This is the clear mandate of Ayers. Judge Crabtree must be reversed.

C. The Order compelling plaintiffs to perform the medical examinations and the continuing stay on discovery are not just.

Despite the fact that plaintiffs have provided substantial expert discovery and defendants have not even identified their experts, Judge Crabtree ordered plaintiffs to conduct medical examinations and stayed discovery against defendants. This order violates both the letter and spirit of our discovery rules.

One of the primary rules of discovery is R. 4:10-2 which describes the scope of discovery. Fundamentally, discovery may be had on any matter "which is relevant to the subject matter involved in the pending action..." Initially, plaintiffs note that compelling plaintiffs to perform medical examinations is not relevant to any issue of proof in this case. Ayers and the Appellate Division remand means nothing if the very examinations which are at issue in this case must be performed by plaintiffs.

The general rule is that parties may perform discovery in any manner, in any sequence and as often as desired. R. 4:10-1; R. 4:10-4. The only exceptions to this general rule are protective orders under R. 4:10-3 and an order "in the interests of justice", pursuant to R. 4:10-4, directs otherwise for the convenience of the parties and witnesses.

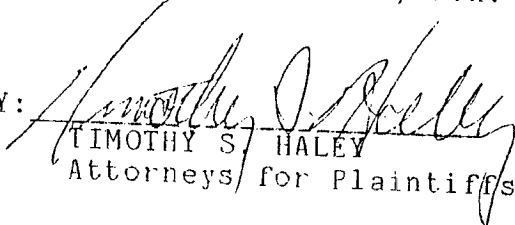
It is absolutely certain that Judge Crabtree's Order is not in the interests of justice. Judge Crabtree has required

plaintiffs to provide irrelevant and extremely extensive discovery, despite the fact that plaintiffs have provided extensive expert discovery, and stayed discovery against defendants, who have not even identified their experts. Judge Crabtree has thus capitulated to the delaying tactics of the defendants, has not moved this case to trial and is, therefore, acting in a totally unjust manner. He must be reversed in the interests of justice.

CONCLUSION

For the reasons stated above, it is respectfully requested that plaintiffs' motion for leave to appeal be granted, that Judge Crabtree's Order requiring plaintiffs to have examinations and reports completed by December 15, 1987 and staying discovery against defendants be reversed, and that the matter be remanded to the trial court for further proceedings consistent with the reversal.

Respectfully submitted,
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