# SUPREME COURT OF LOUISIANA

NO. 97-C-3188

**ROBERT ANDREW BOURGEOIS, ET AL.**

versus

**A.P. GREEN INDUSTRIES, INC., ET AL.**

ON WRIT OF CERTIORARI TO THE COURT OF APPEAL
FIFTH CIRCUIT, PARISH OF JEFFERSON

**CALOGERO, C.J.** concurring.

I agree with the majority opinion insofar as it reverses the court of appeal judgment and concludes that a claim for medical monitoring is a valid cause of action under Louisiana law. I write separately, however, to present my views as to what elements a plaintiff should have to prove in order to recover in a claim for medical monitoring.

The majority opinion sets forth seven elements that a plaintiff must satisfy in order to prevail in a claim for the reasonable costs of medical monitoring. I agree with the majority opinion with regard to the first six stated elements. However, I take issue with the seventh element, which reads: "There is some demonstrated clinical value in the early detection and diagnosis of the disease." Slip op. at p. 11. In my view, if a plaintiff has satisfied the first six stated elements, he is entitled to recover medical monitoring expenses, notwithstanding the fact that the early detection of the disease would not cure or ameliorate the consequences of the illness.

I disagree with the majority's conclusion that "[u]nless such treatment is

available, then there is nothing for plaintiff to gain for a hastened diagnosis . . . ." Slip op. at p. 11. One thing that such a plaintiff might gain is certainty as to his fate, whatever it may be. If a plaintiff has been placed at an increased risk for a latent disease through exposure to a hazardous substance, absent medical monitoring, he must live each day with the uncertainty of whether the disease is present in his body. If, however, he is able to take advantage of medical monitoring and the monitoring detects no evidence of the disease, then, at least for the time being, the plaintiff can receive the comfort of peace of mind. Moreover, even if medical monitoring did detect evidence of an irreversible and untreatable disease, the plaintiff might still achieve some peace of mind through this knowledge by getting his financial affairs in order, making lifestyle changes, and, even perhaps, making peace with estranged loved ones or with his religion. Certainly, these options should be available to the innocent plaintiff who finds himself at an increased risk for a serious latent disease through no fault of his own.

In addition, as the Supreme Court of Pennsylvania recognized in expressly rejecting a similar restriction that a plaintiff prove the existence of a treatment that would make early detection beneficial, such a restriction "would unfairly prevent a plaintiff from taking advantage of advances in medical science." ***Redland Soccer Club, Inc. v. Department of the Army***, 696 A.2d 137, 146 n.8 (Pa. 1997). In my view, if no treatment is available at the time that the plaintiff seeks medical monitoring to discover the existence of the disease in his body, the burden should not be placed on the plaintiff to keep abreast of advances in medical science in order to recover the cost of medical monitoring.

For the reasons given above, I respectfully concur.