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March 8, 2013

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MAR 08 2013

VIA HAND DELIVERY

Daniel E. Shearouse, Clerk of Court
Supreme Court Building
1231 Gervais Street
Columbia, SC 29211

S.C. SUPREME COURT

Re: *Perrin Babb, Debbie Babb, Wayne Elstrom, Sarah Elstrom, Alan Jackson and Kathy Jackson v. Lee County Landfill SC, LLC*
Appellate Case No.: 2012-212741

Dear Mr. Shearouse:

Pursuant to Rule 208(b)(7) of the South Carolina Rules of Appellate Procedure, we are writing to inform the Court of pertinent and significant authority that bears on the above-captioned matter scheduled for oral argument on March 19, 2013. The Maryland Court of Appeals decisions in *Exxon Mobil Corp. v. Albright*, No. 15 Sept. Term 2012, 2013 WL 673738 (Md. Feb. 26, 2013) and *Exxon Mobil Corp. v. Ford*, No. 16 Sept. Term 2012, 2013 WL 673710 (Md. Feb. 26, 2013) are relevant to two of questions certified to the South Carolina Supreme Court by the United States District Court.

More specifically, the above-referenced *Exxon* cases bear on Certified Questions 1 and 3 set forth in the Court's October 17, 2012 Order agreeing to answer the certified questions:

1. Under South Carolina law, when a plaintiff seeks recovery for a temporary trespass or nuisance (asserting claims for annoyance, discomfort, inconvenience, interference with their enjoyment of their property, loss of enjoyment of life, and interference with mental tranquility and abandoning all claims for loss of use, diminution of value, and personal injury), are the damages limited to the lost rental value of the property?
3. Is the maximum amount of compensatory damages a plaintiff can receive in any trespass or nuisance action (temporary or permanent) the full market value of the plaintiffs' property where no claim for restoration or cleanup costs has been alleged?

The defendant Lee County Landfill SC, LLC's analysis of these certified questions appears on pages 12-33 of the defendant's brief.

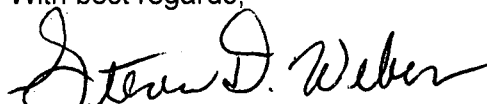
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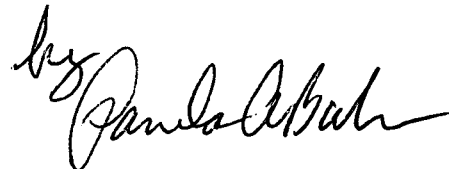
We would appreciate you returning a filed-stamped copy of this letter to my courier.

By copy of this letter with enclosures, I am serving one copy on counsel for the plaintiffs via United States and electronic mail.

Thank you for your time and assistance with this matter.

With best regards,


Steven D. Weber

by 

Enclosures

cc: Bill Hopkins, Esq. (w/encl.)
Gary Poliakoff, Esq. (w/encl.)

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Perrin Babb, Debbie Babb, Wayne Elstrom,)
Sarah Elstrom, Alan Jackson and Kathy)
Jackson,)

Plaintiffs,)

v.)

Lee County Landfill SC, LLC,)

Defendant.)

Appellate Case No.: 2012-212741

CERTIFICATE OF SERVICE

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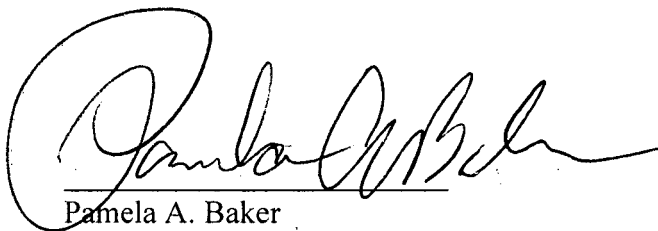
MAR 08 2013

This is to certify that a true and correct copy of the *Supplemental Authority* **S.C. SUPREME COURT** has been
duly served by electronic mail and first class United States mail upon:

Gary W. Poliakoff, Esq.
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Montgomery, AL 36104

This 8th day of March, 2013.


Pamela A. Baker

--- A.3d ----, 2013 WL 673738 (Md.)
 (Cite as: 2013 WL 673738 (Md.))

H

Only the Westlaw citation is currently available.

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 LEASED FOR PUBLICATION IN THE PERMA-
 NENT LAW REPORTS. UNTIL RELEASED, IT IS
 SUBJECT TO REVISION OR WITHDRAWAL.

Court of Appeals of Maryland.
 EXXON MOBIL CORPORATION

v.

Thomas M. ALBRIGHT, et al.

No. 15 Sept. Term 2012.
 Feb. 26, 2013.

Background: Property owners brought action against owner of gas station, seeking damages arising from 26,000-gallon spill of gasoline from underground tank, and alleging numerous claims including negligence, strict liability, trespass, nuisance, and fraud. After a jury trial, the Circuit Court, Baltimore County, entered judgment awarding over \$496 million in compensatory damages and over \$1 billion in punitive damages. Station owner appealed. Before case could be heard by Court of Special Appeals, property owners filed petition for certiorari.

Holdings: The Court of Appeals, Harrell, J., held that: (1) evidence was insufficient to show that property owners had relied, as element of fraud, on station owners' misrepresentations;

(2) property owners were not entitled to emotional distress damages based on fear of contracting cancer;

(3) property owners were not entitled to damages for future costs of medical monitoring;

(4) property owners were not entitled to emotional distress damages related to fear of diminution in real property value;

(5) property owners were not entitled to damages both for diminution in value of real property and for loss of use and enjoyment;

(6) property owners whose wells were not contaminated could not recover damages for diminution in property value; and

(7) expert testimony of real estate appraiser was not supported by sufficiently reliable methodology.

Affirmed in part, reversed in part, and remanded.

West Headnotes

[1] Appeal and Error 30 ↪ 863

30 Appeal and Error

30XVI Review

30XVI(A) Scope, Standards, and Extent, in General

30k862 Extent of Review Dependent on Nature of Decision Appealed from

30k863 k. In General. Most Cited Cases

In reviewing a trial court's denial of a motion for judgment notwithstanding a verdict (JNOV), an appellate court must determine whether there is any evidence adduced, however slight, from which reasonable jurors, applying the appropriate standard of proof, could find in favor of the plaintiff on the claims presented.

[2] Appeal and Error 30 ↪ 934(1)

30 Appeal and Error

30XVI Review

30XVI(G) Presumptions

30k934 Judgment

30k934(1) k. In General. Most Cited Cases

An appellate court reviews a trial court's denial of a motion for judgment notwithstanding the verdict (JNOV) to determine whether it was legally correct, while viewing the evidence and the reasonable inferences to be drawn from it in the light most favorable to the non-moving party.

[3] Appeal and Error 30 ↪ 863

30 Appeal and Error

30XVI Review

30XVI(A) Scope, Standards, and Extent, in General

30k862 Extent of Review Dependent on

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Nature of Decision Appealed from
30k863 k. In General. Most Cited Cases

An appellate court will reverse the denial of a motion for judgment notwithstanding the verdict (JNOV) only if the facts and circumstances permit but a single inference as relates to the appellate issue presented.

[4] Appeal and Error 30 ↪934(1)

30 Appeal and Error
30XVI Review
30XVI(G) Presumptions
30k934 Judgment
30k934(1) k. In General. Most Cited Cases

Appeal and Error 30 ↪1024.4

30 Appeal and Error
30XVI Review
30XVI(I) Questions of Fact, Verdicts, and Findings
30XVI(I)6 Questions of Fact on Motions or Other Interlocutory or Special Proceedings
30k1024.4 k. Proceedings Relating to Judgment. Most Cited Cases

Because fraud must be proven by clear and convincing evidence, reversal of the trial court's denial of the motion for judgment notwithstanding the verdict (JNOV) in an action for fraud is only appropriate when, looking at the evidence in the light most favorable to the non-moving party, the appellate court determines that the non-moving party did not meet the burden of establishing fraud by clear and convincing evidence.

[5] Fraud 184 ↪58(4)

184 Fraud
184II Actions
184II(D) Evidence
184k58 Weight and Sufficiency
184k58(4) k. Reliance on Representations and Inducement to Act. Most Cited Cases

Water Law 405 ↪1126

405 Water Law
405IV Groundwater: Subterranean and Percolating Waters
405k1125 Pollution
405k1126 k. In General. Most Cited Cases

Water Law 405 ↪1147

405 Water Law
405IV Groundwater: Subterranean and Percolating Waters
405k1139 Judicial Intervention, Actions, and Review
405k1147 k. Evidence. Most Cited Cases

Evidence that gas station owner, in obtaining permits for construction and maintenance of underground gasoline tank, made false representations to local and state government officials was insufficient to show that owners of property near the station had personally relied on those representations, as an element of fraud, in action seeking compensatory and punitive damages arising from underground leak of gasoline containing contaminants that were found in property owners' potable wells.

[6] Fraud 184 ↪3

184 Fraud
184I Deception Constituting Fraud, and Liability Therefor
184k2 Elements of Actual Fraud
184k3 k. In General. Most Cited Cases

Fraud 184 ↪58(1)

184 Fraud
184II Actions
184II(D) Evidence
184k58 Weight and Sufficiency
184k58(1) k. In General. Most Cited Cases

To establish fraud, a plaintiff must prove by clear and convincing evidence that (1) the defendant made a false representation to the plaintiff, (2) the falsity of the representation was either known to the defendant or the representation was made with reckless indifference to its truth, (3) the misrepresentation was made for the purpose of defrauding the plaintiff, (4) the

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plaintiff relied on the misrepresentation and had the right to rely on it, and (5) the plaintiff suffered compensable injury as a result of the misrepresentation.

[7] Fraud 184 ↪13(1)

184 Fraud

184I Deception Constituting Fraud, and Liability Therefor

184k8 Fraudulent Representations

184k13 Falsity and Knowledge Thereof

184k13(1) k. Falsity of Representations.

Most Cited Cases

Fraud 184 ↪29

184 Fraud

184I Deception Constituting Fraud, and Liability Therefor

184k29 k. Persons Entitled to Sue. Most Cited

Cases

Ordinarily, a plaintiff seeking recovery for fraud must prove that the defendant made a false representation to the person defrauded.

[8] Fraud 184 ↪21

184 Fraud

184I Deception Constituting Fraud, and Liability Therefor

184k19 Reliance on Representations and Inducement to Act

184k21 k. Persons Who May Rely on Representations. Most Cited Cases

Fraud 184 ↪29

184 Fraud

184I Deception Constituting Fraud, and Liability Therefor

184k29 k. Persons Entitled to Sue. Most Cited

Cases

Maryland law does not permit a third party to recover damages for fraud purely on the basis of a false statement made to a governmental entity.

[9] Fraud 184 ↪20

184 Fraud

184I Deception Constituting Fraud, and Liability Therefor

184k19 Reliance on Representations and Inducement to Act

184k20 k. In General. Most Cited Cases

Fraud 184 ↪25

184 Fraud

184I Deception Constituting Fraud, and Liability Therefor

184k25 k. Injury and Causation. Most Cited Cases

Water Law 405 ↪1126

405 Water Law

405IV Groundwater: Subterranean and Percolating Waters

405k1125 Pollution

405k1126 k. In General. Most Cited Cases

Property owners did not detrimentally rely on allegedly misleading sign posted by gas station owner following leak in underground gasoline tank, and thus owners could not recover for fraud based on posting of sign, in action seeking compensatory and punitive damages arising from underground leak of gasoline containing contaminants that were found in property owners' potable wells; owners' testimony that they had seen sign, stating that fueling facilities were temporarily closed for upgrade, failed to establish that, in reliance on sign, they consumed water from their wells during the five days sign was displayed.

[10] Fraud 184 ↪20

184 Fraud

184I Deception Constituting Fraud, and Liability Therefor

184k19 Reliance on Representations and Inducement to Act

184k20 k. In General. Most Cited Cases

Fraud 184 ↪25

184 Fraud

184I Deception Constituting Fraud, and Liability

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Therefor

184k25 k. Injury and Causation. Most Cited Cases

Water Law 405 ⚡1126

405 Water Law

405IV Groundwater: Subterranean and Percolating Waters

405k1125 Pollution

405k1126 k. In General. Most Cited Cases

Property owners did not detrimentally rely on allegedly false statements by gas station owner following leak in underground gasoline tank, and thus owners could not recover for fraud based on posting of sign, in action seeking compensatory and punitive damages arising from underground leak of gasoline containing contaminants that were found in property owners' potable wells; owners failed to show that they changed their consumption of water from their wells in reliance station owners' statements to state officials concerning the extent and severity of 26,000 gallon leak.

[11] Damages 115 ⚡91.5(1)

115 Damages

115V Exemplary Damages

115k91.5 Grounds for Exemplary Damages

115k91.5(1) k. In General. Most Cited

Cases

Punitive damages may be awarded only if a plaintiff proves malice, ill will, or intent to injure.

[12] New Trial 275 ⚡6

275 New Trial

275I Nature and Scope of Remedy

275k6 k. Discretion of Court. Most Cited

Cases

The decision whether to grant a motion for a new trial is within the sound discretion of the trial court.

[13] Appeal and Error 30 ⚡977(5)

30 Appeal and Error

30XVI Review

30XVI(H) Discretion of Lower Court

30k976 New Trial or Rehearing

30k977 In General

30k977(5) k. Refusal of New Trial.

Most Cited Cases

Appeal and Error 30 ⚡979(5)

30 Appeal and Error

30XVI Review

30XVI(H) Discretion of Lower Court

30k976 New Trial or Rehearing

30k979 For Insufficiency of Evidence

30k979(5) k. Inadequate or Excessive

Damages. Most Cited Cases

Trial court's denial of a motion for a new trial and/or remittitur will be reversed only upon a showing that the trial court abused its discretion in failing to order a new trial.

[14] Damages 115 ⚡57.7

115 Damages

115III Grounds and Subjects of Compensatory Damages

115III(A) Direct or Remote, Contingent, or Prospective Consequences or Losses

115III(A)2 Mental Suffering and Emotional Distress

115k57.7 k. Nature of Conduct in General. Most Cited Cases

Recovery of damages for emotional distress must arise out of tortious conduct.

[15] Damages 115 ⚡57.10

115 Damages

115III Grounds and Subjects of Compensatory Damages

115III(A) Direct or Remote, Contingent, or Prospective Consequences or Losses

115III(A)2 Mental Suffering and Emotional Distress

115k57.8 Nature of Injury or Threat in General

115k57.10 k. Physical Illness, Impact, or Injury; Zone of Danger. Most Cited Cases

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As long as the emotional distress due to tortious conduct is manifested objectively, the emotional distress is deemed genuine and compensable in damages even though the tortious conduct did not cause bodily harm.

[16] Damages 115 ↪ 57.31

115 Damages

115III Grounds and Subjects of Compensatory Damages

115III(A) Direct or Remote, Contingent, or Prospective Consequences or Losses

115III(A)2 Mental Suffering and Emotional Distress

115k57.30 Fear of Developing Disease

115k57.31 k. In General. Most Cited Cases

To recover emotional distress damages for fear of contracting a latent disease because of tortious conduct causing exposure to a toxic substance, a plaintiff must show that: (1) he or she was actually exposed to a toxic substance due to the defendant's tortious conduct; (2) which led him or her to objectively and reasonably fear that he or she would contract a disease; and (3) as a result of the objective and reasonable fear, he or she manifested a physical injury capable of objective determination.

[17] Damages 115 ↪ 57.10

115 Damages

115III Grounds and Subjects of Compensatory Damages

115III(A) Direct or Remote, Contingent, or Prospective Consequences or Losses

115III(A)2 Mental Suffering and Emotional Distress

115k57.8 Nature of Injury or Threat in General

115k57.10 k. Physical Illness, Impact, or Injury; Zone of Danger. Most Cited Cases

A plaintiff may recover damages for emotional distress if a physical injury resulted from the commission of the tort, regardless of impact.

[18] Damages 115 ↪ 57.10

115 Damages

115III Grounds and Subjects of Compensatory Damages

115III(A) Direct or Remote, Contingent, or Prospective Consequences or Losses

115III(A)2 Mental Suffering and Emotional Distress

115k57.8 Nature of Injury or Threat in General

115k57.10 k. Physical Illness, Impact, or Injury; Zone of Danger. Most Cited Cases

A defendant's tortious conduct does not necessarily have to produce a physical impact for a plaintiff to recover emotional distress damages; a plaintiff must prove, however, a clearly apparent and substantial physical injury in one of four ways: (1) an external condition; or (2) symptoms of a resulting pathological; (3) physiological; or (4) mental state.

[19] Damages 115 ↪ 57.10

115 Damages

115III Grounds and Subjects of Compensatory Damages

115III(A) Direct or Remote, Contingent, or Prospective Consequences or Losses

115III(A)2 Mental Suffering and Emotional Distress

115k57.8 Nature of Injury or Threat in General

115k57.10 k. Physical Illness, Impact, or Injury; Zone of Danger. Most Cited Cases

The requirement that, in order to recover emotional distress damages, a plaintiff show objective and demonstrable physical injury achieves a primary purpose of emotional distress damages: to compensate plaintiffs for actual harm, rather than feigned or speculative injury.

[20] Damages 115 ↪ 57.33

115 Damages

115III Grounds and Subjects of Compensatory Damages

115III(A) Direct or Remote, Contingent, or Prospective Consequences or Losses

115III(A)2 Mental Suffering and Emotional

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Distress

115k57.30 Fear of Developing Disease
115k57.33 k. Cancer. Most Cited

Cases

Property owners were not entitled to recover emotional distress damages based on fear of contracting cancer, in tort action against gas station owner arising from underground leak of gasoline containing contaminants methyl tertiary-butyl ether (MTBE) and benzene, absent any showing that property owners had actually been exposed to the contaminants.

[21] Damages 115 ↪ 57.33

115 Damages

115III Grounds and Subjects of Compensatory Damages

115III(A) Direct or Remote, Contingent, or Prospective Consequences or Losses

115III(A)2 Mental Suffering and Emotional Distress

115k57.30 Fear of Developing Disease
115k57.33 k. Cancer. Most Cited

Cases

Property owners were not entitled to recover emotional distress damages based on fear of contracting cancer, in tort action against gas station owner arising from underground leak of gasoline containing contaminants methyl tertiary-butyl ether (MTBE) and benzene, since evidence of property owners' exposure to contaminants was insufficient to show that property owners had an objective, reasonable fear of developing cancer; levels of contaminants detected in property owners' potable wells were below "action levels" for the contaminants set by Environmental Protection Agency (EPA) and Maryland Department of the Environment (MDE).

[22] Damages 115 ↪ 57.32

115 Damages

115III Grounds and Subjects of Compensatory Damages

115III(A) Direct or Remote, Contingent, or Prospective Consequences or Losses

115III(A)2 Mental Suffering and Emotional Distress

115k57.30 Fear of Developing Disease

115k57.32 k. Exposure; Physical Illness, Impact, or Injury. Most Cited Cases

For a fear of developing a latent disease based on exposure to toxins to be objectively reasonable, as required to support an award of emotional damages, the fear must be based on more than mere exposure to a chemical or contaminant of concern; the exposure must be sufficient, based on objective standards, to justify fear of disease.

[23] Damages 115 ↪ 57.33

115 Damages

115III Grounds and Subjects of Compensatory Damages

115III(A) Direct or Remote, Contingent, or Prospective Consequences or Losses

115III(A)2 Mental Suffering and Emotional Distress

115k57.30 Fear of Developing Disease
115k57.33 k. Cancer. Most Cited

Cases

Damages 115 ↪ 192

115 Damages

115IX Evidence

115k183 Weight and Sufficiency

115k192 k. Mental Suffering and Emotional Distress. Most Cited Cases

Property owners were not entitled to recover emotional distress damages based on fear of contracting cancer, in tort action against gas station owner arising from underground leak of gasoline containing contaminants methyl tertiary-butyl ether (MTBE) and benzene, even if levels of contaminants detected in property owners' potable wells were above levels deemed safe by Environmental Protection Agency (EPA) and Maryland Department of the Environment (MDE), absent any expert testimony showing that property owners' alleged physical injuries were related causally to their fear of developing cancer as a result of the leak.

[24] Damages 115 ↪ 208(6)

115 Damages

115X Proceedings for Assessment

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115k208 Questions for Jury
115k208(6) k. Mental Suffering and Emotional Distress. Most Cited Cases

Issue was for jury whether property owner's physical injuries were casually related to her fear of developing cancer as a result of leak in underground storage tank at gas station, as required for property owner to recover emotional distress damages based on fear of developing cancer, in tort action against gas station owner arising from leak of gasoline containing contaminants methyl tertiary-butyl ether (MTBE) and benzene; examining psychiatrist testified that property owner's fear of cancer had caused her to lose her appetite, feel angry and anxious, and develop headaches and digestive problems.

[25] Damages 115 ↪ 43

115 Damages
115III Grounds and Subjects of Compensatory Damages
115III(A) Direct or Remote, Contingent, or Prospective Consequences or Losses
115III(A)1 In General
115k41 Expenses
115k43 k. Medical Treatment and Care of Person Injured. Most Cited Cases

A remedy for medical monitoring costs is a compensable element of damages under traditional tort theories of recovery.

[26] Damages 115 ↪ 191

115 Damages
115IX Evidence
115k183 Weight and Sufficiency
115k191 k. Expenses. Most Cited Cases

Quantifiable, reliable indicia that a defendant's actions have so significantly increased the plaintiff's risk of developing a disease are necessary to recover damages for medical monitoring costs resulting from exposure to toxic substances resulting from a defendant's tortious conduct; the indicia may be proven by a medical expert's testimony, particularized to a plaintiff, and demonstrating a reasonable link to toxic exposure.

[27] Damages 115 ↪ 191

115 Damages
115IX Evidence
115k183 Weight and Sufficiency
115k191 k. Expenses. Most Cited Cases

Requirement, that, in order to recover damages for medical monitoring costs arising from exposure to a toxic substance, a plaintiff must prove by quantifiable reliable indicia that defendant's actions have significantly increased plaintiff's risk of developing a disease, helps to achieve the objective of medical monitoring, that a defendant must compensate a plaintiff for past or present injuries caused by the defendant, and inhibits damages awards for speculative, and thus unreliable, opinions as to a plaintiff's potential risk of developing a future disease.

[28] Damages 115 ↪ 43

115 Damages
115III Grounds and Subjects of Compensatory Damages
115III(A) Direct or Remote, Contingent, or Prospective Consequences or Losses
115III(A)1 In General
115k41 Expenses
115k43 k. Medical Treatment and Care of Person Injured. Most Cited Cases

Maryland recognizes a remedy of recovery of damages for medical monitoring costs resulting from exposure to toxic substances resulting from a defendant's tortious conduct.

[29] Damages 115 ↪ 43

115 Damages
115III Grounds and Subjects of Compensatory Damages
115III(A) Direct or Remote, Contingent, or Prospective Consequences or Losses
115III(A)1 In General
115k41 Expenses
115k43 k. Medical Treatment and Care of Person Injured. Most Cited Cases

To sustain an award for recovery of damages for medical monitoring costs resulting from exposure to

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toxic substances resulting from a defendant's tortious conduct, a plaintiff must show that reasonable medical costs are necessary due to a reasonably certain and significant increased risk of developing a latent disease as a result of exposure to a toxic substance.

[30] Damages 115 ↪43

115 Damages

115III Grounds and Subjects of Compensatory Damages

115III(A) Direct or Remote, Contingent, or Prospective Consequences or Losses

115III(A)1 In General

115k41 Expenses

115k43 k. Medical Treatment and Care of Person Injured. Most Cited Cases

In determining whether to award damages for medical monitoring costs resulting from exposure to toxic substances resulting from a defendant's tortious conduct, a court must consider whether the plaintiff has shown: (1) that the plaintiff was significantly exposed to a proven hazardous substance through the defendant's tortious conduct; (2) that, as a proximate result of significant exposure, the plaintiff suffers a significantly increased risk of contracting a latent disease; (3) that increased risk makes periodic diagnostic medical examinations reasonably necessary; and (4) that monitoring and testing procedures exist which make the early detection and treatment of the disease possible and beneficial.

[31] Damages 115 ↪43

115 Damages

115III Grounds and Subjects of Compensatory Damages

115III(A) Direct or Remote, Contingent, or Prospective Consequences or Losses

115III(A)1 In General

115k41 Expenses

115k43 k. Medical Treatment and Care of Person Injured. Most Cited Cases

Damages 115 ↪191

115 Damages

115IX Evidence

115k183 Weight and Sufficiency

115k191 k. Expenses. Most Cited Cases

Property owners were not entitled to damages for future costs of medical monitoring due to enhanced risk of contracting a latent disease, in action against gas station owner arising from underground spill of gasoline containing contaminants, methyl tertiary-butyl ether (MTBE) and benzene, which had been detected in some property owners' potable wells, since property owners failed to show that they had suffered a significantly increased risk of developing a latent disease; levels of contaminants detected in wells were mostly below safe exposure levels set by Maryland Department of the Environment (MDE), and no expert testimony was presented showing a particularized and significantly increased risk as a result of the leak in relation to the public at large.

[32] Damages 115 ↪57.39

115 Damages

115III Grounds and Subjects of Compensatory Damages

115III(A) Direct or Remote, Contingent, or Prospective Consequences or Losses

115III(A)2 Mental Suffering and Emotional Distress

115k57.36 Injury to Property or Property Rights

115k57.39 k. Other Particular Cases. Most Cited Cases

Property owners were not entitled to recover emotional distress damages related to fear of diminution in real property value, in action against gas station owner arising from underground spill of gasoline containing contaminants detected in property owners' potable wells.

[33] Damages 115 ↪15

115 Damages

115III Grounds and Subjects of Compensatory Damages

115III(A) Direct or Remote, Contingent, or Prospective Consequences or Losses

115III(A)1 In General

115k15 k. Nature and Theory of Compensation. Most Cited Cases

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Property owners were not entitled to recover damages both for diminution in value of real property and for loss of use and enjoyment, in action against gas station owner arising from underground spill of gasoline containing contaminants detected in homeowners' potable wells, since allowing recovery of both types of damages would result in double recovery; claimed loss of use largely arose from property owners' inability to use their well water for customary purposes and the emotional toll and stress attendant to such a disruption, which was not distinguishable from the injury constituting the diminution in value.

[34] Damages 115 ↪ 15

115 Damages

115III Grounds and Subjects of Compensatory Damages

115III(A) Direct or Remote, Contingent, or Prospective Consequences or Losses

115III(A)1 In General

115k15 k. Nature and Theory of Compensation. Most Cited Cases

Compensatory damages should be precisely commensurate with the injury; nothing more, nor less.

[35] Damages 115 ↪ 108

115 Damages

115VI Measure of Damages

115VI(B) Injuries to Property

115k107 Injuries to Real Property

115k108 k. In General. Most Cited

Cases

The general principle upon which compensation for injuries to real property is given is that the plaintiff shall be reimbursed to the extent of his injury.

[36] Damages 115 ↪ 15

115 Damages

115III Grounds and Subjects of Compensatory Damages

115III(A) Direct or Remote, Contingent, or Prospective Consequences or Losses

115III(A)1 In General

115k15 k. Nature and Theory of Compensation. Most Cited Cases

Plaintiffs are entitled to but one compensation, and thus may not recover damages twice for the same injury.

[37] Damages 115 ↪ 110

115 Damages

115VI Measure of Damages

115VI(B) Injuries to Property

115k107 Injuries to Real Property

115k110 k. Permanent and Continuing Injuries. Most Cited Cases

Diminution in value of real property is generally available as the remedy for damages in actions where the injury to real property is permanent in nature.

[38] Damages 115 ↪ 110

115 Damages

115VI Measure of Damages

115VI(B) Injuries to Property

115k107 Injuries to Real Property

115k110 k. Permanent and Continuing Injuries. Most Cited Cases

In addition to damages for permanent diminution in value of real property, an individual whose real property has suffered permanent injury may also recover the loss in the usable value of his property and any consequential damages incurred, provided that neither is encompassed within the diminution in value.

[39] Damages 115 ↪ 110

115 Damages

115VI Measure of Damages

115VI(B) Injuries to Property

115k107 Injuries to Real Property

115k110 k. Permanent and Continuing Injuries. Most Cited Cases

Damages 115 ↪ 111

115 Damages

115VI Measure of Damages

115VI(B) Injuries to Property

115k107 Injuries to Real Property

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115k111 k. Buildings or Other Improvements. Most Cited Cases

Diminution in value damages are appropriate where an injury to real property is considered permanent because such damages presumably compensate the property owner fully for the injury to his or her land and improvements.

[40] Damages 115 **108**

115 Damages

115VI Measure of Damages

115VI(B) Injuries to Property

115k107 Injuries to Real Property

115k108 k. In General. Most Cited Cases

Damages for diminution in value of real property are determined by calculating the difference between the fair market value of the property immediately preceding the harm and the fair market value of the property immediately following the harm.

[41] Damages 115 **15**

115 Damages

115III Grounds and Subjects of Compensatory Damages

115III(A) Direct or Remote, Contingent, or Prospective Consequences or Losses

115III(A)1 In General

115k15 k. Nature and Theory of Compensation. Most Cited Cases

Owners of real property are not necessarily precluded from recovering both permanent diminution in value and loss of use and enjoyment damages, provided that the injuries for which recovery is sought do not overlap, so as to result in duplicative compensation.

[42] Water Law 405 **1126**

405 Water Law

405IV Groundwater: Subterranean and Percolating Waters

405k1125 Pollution

405k1126 k. In General. Most Cited Cases

Property owners whose potable wells were not contaminated as a result of leak in underground gasoline tank could not recover damages in trespass for diminution in value of real property, in action against owner gas station that contained the underground tank; general contamination of an aquifer that may or may not reach a given property at an undetermined point in the future was not sufficient to prove invasion of property.

[43] Trespass 386 **12**

386 Trespass

386I Acts Constituting Trespass and Liability Therefor

386k9 Trespass to Real Property

386k12 k. Entry. Most Cited Cases

An action for trespass may lie when a defendant interferes with a plaintiff's interest in the exclusive possession of the land by entering or causing something to enter the land; thus, recovery for trespass requires that the defendant must have entered or caused something harmful or noxious to enter onto the plaintiff's land.

[44] Water Law 405 **1126**

405 Water Law

405IV Groundwater: Subterranean and Percolating Waters

405k1125 Pollution

405k1126 k. In General. Most Cited Cases

Property owners whose potable wells were not contaminated as a result of leak in underground gasoline tank could not recover damages in nuisance for diminution in value of real property, in action against owner gas station that contained the underground tank, since property owners did not suffer a substantial interference with their use of property by having to use bottled water, reducing the frequency of use of outdoor spaces, or taking shorter showers and baths.

[45] Nuisance 279 **1**

279 Nuisance

279I Private Nuisances

279I(A) Nature of Injury, and Liability Therefor

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 (Cite as: 2013 WL 673738 (Md.))

279k1 k. Nature and Elements of Private Nuisance in General. Most Cited Cases

Private nuisance is a nontrespassory invasion of another's interest in the private use and enjoyment of land.

[46] Nuisance 279 ↪4

279 Nuisance

279I Private Nuisances

279I(A) Nature of Injury, and Liability Therefor

279k4 k. Nature and Extent of Injury or Danger. Most Cited Cases

Not every interference with a plaintiff's use and enjoyment of land will support a cause of action for nuisance; to succeed on a nuisance claim, a plaintiff must establish an unreasonable and substantial interference with his or her use and enjoyment of his or her property, such that the injury is of such a character as to diminish materially the value of the property as a dwelling and seriously interfere with the ordinary comfort and enjoyment of it.

[47] Water Law 405 ↪1128

405 Water Law

405IV Groundwater: Subterranean and Percolating Waters

405k1125 Pollution

405k1128 k. Absolute Liability. Most Cited Cases

Water Law 405 ↪1129

405 Water Law

405IV Groundwater: Subterranean and Percolating Waters

405k1125 Pollution

405k1129 k. Negligence. Most Cited Cases

Property owners whose potable wells were not contaminated as a result of leak in underground gasoline tank could not recover damages in negligence or strict liability for diminution in value of real property, in action against owner gas station that contained the underground tank, absent a showing of more than a possibility of future contamination or mere an-

noyance.

[48] Damages 115 ↪15

115 Damages

115III Grounds and Subjects of Compensatory Damages

115III(A) Direct or Remote, Contingent, or Prospective Consequences or Losses

115III(A)I In General

115k15 k. Nature and Theory of Compensation. Most Cited Cases

Compensatory damages awards attempt to make the plaintiff whole again by monetary compensation.

[49] Damages 115 ↪108

115 Damages

115VI Measure of Damages

115VI(B) Injuries to Property

115k107 Injuries to Real Property

115k108 k. In General. Most Cited Cases

Although determining damages for loss of use and enjoyment of real property must be flexible and based on the factual circumstances of each case, such damages must also be capable generally of reasonable measurement, rather than purely speculative.

[50] Damages 115 ↪108

115 Damages

115VI Measure of Damages

115VI(B) Injuries to Property

115k107 Injuries to Real Property

115k108 k. In General. Most Cited Cases

Although an interest in property may be composed of a bundle of rights and is thus not determinate, plaintiffs may not generally receive damages for loss of use and enjoyment of real property exceeding the pre-injury fair market value of the property.

[51] Damages 115 ↪15

115 Damages

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115III Grounds and Subjects of Compensatory Damages

115III(A) Direct or Remote, Contingent, or Prospective Consequences or Losses

115III(A)1 In General

115k15 k. Nature and Theory of Compensation. Most Cited Cases

Even though compensatory damages are intended to make the plaintiff whole, they are not intended to grant to the plaintiff a windfall as a result of the defendant's tortious conduct; thus, an award for compensatory damages must be anchored to a rational basis on which to ensure that the awards are not merely speculative.

[52] Damages 115 ↪ 138

115 Damages

115VII Amount Awarded

115VII(C) Injuries to Property

115k138 k. Real Property. Most Cited Cases

Evidence 157 ↪ 571(7)

157 Evidence

157XII Opinion Evidence

157XII(F) Effect of Opinion Evidence

157k569 Testimony of Experts

157k571 Nature of Subject

157k571(7) k. Value. Most Cited

Cases

Evidence was sufficient to support \$250,000 award of damages for loss of use and enjoyment of real property, in against gas station owner arising from underground spill of gasoline containing contaminants detected in property owners' potable wells; fair market value of owner's unimpaired property was, as determined by appraisal expert, \$370,000, property owner testified that, because her water made her skin itchy and had an odor that burned her nostrils, she showered at an alternate location, avoided consumption of her well water, and changed her gardening habits, that she could no longer maintain koi fish in her pond, and that her cooking pots and bathtub began to stain.

[53] Damages 115 ↪ 138

115 Damages

115VII Amount Awarded

115VII(C) Injuries to Property

115k138 k. Real Property. Most Cited Cases

Evidence 157 ↪ 571(7)

157 Evidence

157XII Opinion Evidence

157XII(F) Effect of Opinion Evidence

157k569 Testimony of Experts

157k571 Nature of Subject

157k571(7) k. Value. Most Cited

Cases

Evidence was sufficient to support \$700,000 award of damages for loss of use and enjoyment of real property, in against gas station owner arising from underground spill of gasoline containing contaminants detected in property owners' potable wells; appraisal expert testified that unimpaired, pre-leak value of property was \$730,000, and property owners testified that as a result of the gasoline leak, they used bottled water, stopped using their pool, stopped doing yardwork, showered outside for a time, and suffered from noise and odors relating to remediation activities.

[54] Damages 115 ↪ 138

115 Damages

115VII Amount Awarded

115VII(C) Injuries to Property

115k138 k. Real Property. Most Cited Cases

Award to business owner of \$1.6 million for damages for loss of use and enjoyment of real property was impermissibly speculative, in action against gas station owner arising from underground spill of gasoline containing contaminants detected in business owner's potable wells, since there was no showing of the unimpaired, pre-leak market value of owner's business, a nail salon; although owner testified as to loss of business and expense of providing bottled water to customers, no rational basis could be determined for damages award without evidence of pre-leak value of business.

[55] Evidence 157 ↪ 555.6(10)

157 Evidence

157XII Opinion Evidence

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157XII(D) Examination of Experts

157k555 Basis of Opinion

157k555.6 Value

157k555.6(10) k. Comparable Sales or Values. Most Cited Cases

Expert testimony of real estate appraiser regarding diminution of value of real property was not supported by sufficiently reliable methodology, as required to be admissible in property owners' action against gas station owner arising from underground spill of gasoline containing contaminants detected in property owners' potable wells, since appraiser did not rely on comparable sales data without providing a reasonable justification explaining the unsuitability or unreliability of the comparable sales data in the area. Md.Rule 5-702.

[56] Appeal and Error 30 ↪970(2)

30 Appeal and Error

30XVI Review

30XVI(H) Discretion of Lower Court

30k970 Reception of Evidence

30k970(2) k. Rulings on Admissibility of Evidence in General. Most Cited Cases

Evidence 157 ↪546

157 Evidence

157XII Opinion Evidence

157XII(C) Competency of Experts

157k546 k. Determination of Question of Competency. Most Cited Cases

The admissibility of expert testimony is a matter largely within the discretion of the trial court and its action will seldom constitute ground for reversal on appeal unless clearly erroneous.

[57] Damages 115 ↪188(2)

115 Damages

115IX Evidence

115k183 Weight and Sufficiency

115k188 Loss of or Damage to Property

115k188(2) k. Value of Property. Most Cited Cases

Expert testimony is ordinarily required to support

an award of damages for diminution in property value resulting from environmental contamination.

[58] Evidence 157 ↪555.2

157 Evidence

157XII Opinion Evidence

157XII(D) Examination of Experts

157k555 Basis of Opinion

157k555.2 k. Necessity and Sufficiency.

Most Cited Cases

Evidence 157 ↪555.4(2)

157 Evidence

157XII Opinion Evidence

157XII(D) Examination of Experts

157k555 Basis of Opinion

157k555.4 Sources of Data

157k555.4(2) k. Speculation, Guess, or Conjecture. Most Cited Cases

Simply because a witness has been tendered and qualified as an expert in a particular occupation or profession, it does not follow that the expert may render an unbridled opinion which does not otherwise comport with the rule governing admissibility of expert testimony; rather, an expert's opinion must be grounded in sufficient facts, such that it constitutes more than mere speculation or conjecture, and reflect the use of reliable principles and methodology in support of the expert's conclusions. Md.Rule 5-702.

Circuit Court for Baltimore County, Case # 03-C-07-003809.

BELL, C.J., HARRELL, BATTAGLIA, GREENE, BARBERA, McDONALD and ELDRIDGE, JOHN C. (Retired, Specially Assigned), JJ.

HARRELL, J.

*1 On 17 February 2006, Appellant, Exxon Mobil Corporation ("Exxon"), reported a leak of approximately 26,000 gallons of gasoline from the underground tanks at its fueling station located in Jacksonville, Maryland. ^{FNI} The seemingly cursed Jacksonville community, the unfortunate site of multiple gasoline leaks over the years, see, e.g., Exxon Corp. v. Yarema, 69 Md.App. 124, 516 A.2d 990 (1987) (noting that in the early 1980s, three gasoline stations

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located along Jarrettsville Pike in Jacksonville experienced underground gasoline tank leaks), is reliant largely on private wells, rather than municipal supply sources, for its potable water. Thus, following the 2006 release into the underground aquifer serving certain of those wells, 466 residents and business proprietors of Jacksonville (hereinafter referred to collectively as “Appellees”) filed the present suit against Exxon for asserted damages stemming from the contamination of their water supply, other consequential effects, and alleged misrepresentations by Exxon. The result was a jury award of \$496,210,570 in compensatory damages and \$1,045,550,000 in punitive damages for Appellees. Exxon appealed both the compensatory and the punitive damages awards as to all recovering plaintiffs, which were based on claims sounding in fraud, emotional distress for fear of contracting cancer, medical monitoring, emotional distress for fear of loss of property value, diminution in value of real property, and loss of use and enjoyment of real property.

FACTS AND PROCEDURAL HISTORY

Exxon purchased the property located at 14258 Jarrettsville Pike in Phoenix, Maryland, in 1981 for the construction of a new gasoline fueling station (“the Jacksonville Exxon”). Exxon was granted initially a construction permit in 1981. It applied for an extension of the life of the construction permit in 1983. Upon its application for extension, however, the Baltimore County Health Department expressed its formal opposition due to pre-existing contamination of the underground water supply stemming from prior leaks in the surrounding area. As a result, the Baltimore County Office of Permits and Licenses denied Exxon's request.

Exxon appealed the denial to the Baltimore County Board of Appeals. At a 24 August 1983 hearing before the Board, an environmental engineering specialist for Exxon, Frederick M. Anderson, testified regarding, among other things, the ongoing remediation efforts for the three prior spills in the community. During his testimony, Anderson described the containment prevention features of the proposed underground fuel storage system at the new station, stating that Exxon was “planning to really take some extraordinary measures” in constructing the underground storage system. Specifically, he asserted that Exxon planned to construct secondary containment measures at the Jacksonville Exxon station,

including (1) fiberglass tanks and fiberglass lines; (2) sloped concrete troughs under the product lines running from the dispensers back to the tank field; (3) a polymer-coated polyester lining under the entire tank field; and (4) an observation well that would extend nearly to the bottom of the tank field. In response to concerns regarding potential repeated contamination in the wake of the prior gasoline leaks, Anderson opined that the proposed Jacksonville design ensured that the station would not be a source of contamination. He also conceded, however, that “[a]nything is possible.” The Board granted to Exxon the construction permit on 20 October 1983.

*2 During the construction process, Exxon elected to depart from the containment design plans described by Anderson.^{FN2} Rather than installing the tank field liner and single-walled tanks, Exxon installed instead newly-available, double-walled, fiberglass Buffhide tanks, fabric-lined product lines, and a plastic overliner. The Jacksonville Exxon station opened for business on or about 1 November 1984. The station was retrofitted with additional protective features in 1992, made in response to enactment of amendments in 1990 to the federal Clean Air Act.^{FN3} Evidence was submitted at trial suggesting that, during the retrofitting construction, the plastic overliner containment system was destroyed and was not repaired subsequently. Nevertheless, the Jacksonville Exxon station was operated for its owner by Storto Enterprises, Inc. without a harmful incident for over twenty years.^{FN4}

On 13 January 2006, an employee from Crompco Corporation, an Exxon contractor, drilled unknowingly, while performing maintenance on the “super unleaded grade” containment sump, a hole in the underground fiberglass “regular grade” gasoline feed line leading from one of the gasoline storage tanks to the pumps.^{FN5} This hole, approximately 3/16 inch in diameter, was detected duly by an electronic leak detection system,^{FN6} which signaled an alarm inside the station and at the central monitoring service, Gilbarco Veeder-Root,^{FN7} indicating a catastrophic line failure.^{FN8} The leak detection system shut down automatically the regular unleaded gasoline product line. Contractors from Alger Electric, Inc. (“Alger”) were sent to the Jacksonville Exxon station to investigate the cause of the alarm. They concluded (incorrectly) that no actual leak existed. Rather, the technicians concluded that the alarm resulted from a problem with

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a submersible pump motor. After replacing the motor, the Alger technicians recalibrated the leak detection system (incorrectly), such that the alarm system could no longer detect the actual leak when the fuel system was reactivated.

As a result of this confluence of events, the leak continued uninterrupted without activating the alarm system. Andrea Loiero, the station operator, noticed inventory discrepancies following the incident on January 13. Loeiro testified that, although she realized in January that she had an inventory problem, she did not know that the daily inventory variances resulted from a leak. On 16 February 2006, Loeiro reported the discrepancies in her gasoline inventory to Exxon employee Russ Bowen, at which time the fuel system was shut down and the station closed. A sign posted on the property stated, "Please excuse our appearance, we are working to serve you better. Fueling facilities are temporarily closed for upgrade."^{FN9} Following a manual precision line test, which the regular gasoline line failed on February 17, Exxon reported the gasoline release to the Maryland Department of the Environment ("MDE"), informing it of both the leak and the lost product amount. By then, over 26,000 gallons of gasoline were released into the underground environment by the Jacksonville Exxon station.

*3 After notifying the MDE of the leak, Exxon held multiple public meetings in the Jacksonville community to inform residents of the situation, beginning with a previously-scheduled meeting of the Greater Jacksonville Neighborhood Association on February 21. The presentations, conducted by both Exxon and MDE officials, included information regarding the projected migration of the gasoline plume within the underground aquifer. Specifically, Exxon and the MDE predicted that, because of the hydrogeology of the area, the contamination would remain concentrated within a half-mile radius along a line running northeast and southwest from the station, which they termed the "strike line."^{FN10} Baltimore County notified individuals residing or operating businesses within a half-mile radius of the station of the leak. The MDE maintained a website on which it posted information regarding the remediation efforts and all well test results. Some residents outside of the area predicted initially to be contaminated, however, ultimately suffered water contamination.

The MDE is responsible for supervising Exxon's

remediation efforts, pursuant to a Consent Decree entered in September 2008.^{FN11} The MDE will determine when Exxon has completed its remediation obligations under the Consent Decree. During the remediation process, the MDE directed Exxon's investigation of the severity and scope of the leak, as well as in drilling and sampling monitoring and recovery wells. Exxon also submitted weekly site status reports to the MDE. Exxon has installed over 225 monitoring and recovery wells in the Jacksonville area, and, as of the time of trial, spent over \$46 million on remediation.

Additionally, in accordance with the MDE's directives, Exxon provided written updates to residents and government officials regarding the progress of the remediation efforts, including the amount of gasoline recovered. In March and April of 2006, Exxon distributed estimates of how much gasoline had been recovered to Jacksonville residents. After discovering an error in the recovery calculations, Exxon advised residents of the error in April 2006, and submitted corrected estimates to the MDE on 29 June 2006. Exxon and its contractors provided residents with test results from their individual potable wells (where applicable), along with information regarding the drinking water guidelines promulgated by the MDE, and installed POET systems^{FN12} where it and the MDE deemed necessary. Exxon also delivered voluntarily, for a limited period of time, bottled water to those residents whose wells were being ordered tested by the MDE.

Appellees filed suit initially in the Circuit Court for Baltimore County on 5 April 2007^{FN13} against a number of defendants^{FN14} for negligence, strict liability for an abnormally dangerous activity, private nuisance, trespass to land, and fraudulent concealment. Appellees sought compensatory damages for diminution in value and loss of use and enjoyment of real property, emotional distress for fear of loss of property value, medical monitoring, emotional distress for fear of contracting cancer, and punitive damages. Understandably, the case endured a lengthy procedural travail. Appellees filed a total of nine complaints, with the ultimate Eighth Amended Complaint filed on 12 March 2010.^{FN15} Prior to trial, Exxon filed multiple motions for summary judgment,^{FN16} but ultimately, nearly all of Appellees' claims for damages were permitted to be tried.^{FN17}

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*4 At trial, which lasted from 3 January 2011 to 17 June 2011, Appellees maintained that Exxon perpetuated an ongoing fraud designed to deceive both public authorities and members of the community, beginning in 1983 with the construction of the containment system and continuing through the remediation efforts following the discovery of the leak. In support of their allegations, Appellees presented evidence regarding six specific instances of alleged fraud: ^{FN18} (1) Anderson's 1983 testimony before the Board of Appeals (construction fraud); ^{FN19} (2) failure to inform the MDE that the 1992 retrofitting of the station, pursuant to the Clean Air Act, would involve destruction of the overliner (1992 permit fraud); (3) the posting of a misleading sign outside of the Jacksonville Exxon following the discovery of the leak (sign fraud); (4) a 2001 statement by Exxon to the MDE representing that the underground piping at the Jacksonville Exxon was double-walled piping, when actually it was single-walled piping (2001 double-walled piping fraud); ^{FN20} (5) inaccuracies in remediation reports regarding the quantity of leaked product recovered and the alleged flow of the leak (remediation fraud); and (6) deception of the MDE during the remediation process. ^{FN21}

Additionally, Appellees sought emotional distress damages for fear of contracting cancer, as well as relief in the form of medical monitoring costs, stemming from their alleged actual or future exposure to gasoline constituents, particularly benzene, ^{FN22} a known human carcinogen, and methyl tertiary-butyl ether ("MTBE"), ^{FN23} a metabolite of which is formaldehyde. ^{FN24} Although not classified as known human carcinogens, MTBE and formaldehyde are known to have mutagenic properties. ^{FN25} Monitoring performed by Exxon in accordance with the MDE's requirements revealed benzene contamination in only ten wells. ^{FN26} Because few potable wells contained detectable concentrations of benzene, and therefore few Appellees could support their claims for fear of contracting cancer or a need for medical monitoring on the basis of benzene exposure, Appellees' primary contention at trial was that any MTBE contamination detected in any Appellee's well was sufficient to support that Appellee's fear of cancer and medical monitoring claims. Specifically, Appellees contended, through their expert witnesses, that there is "no safe level" of MTBE, and that any exposure to MTBE increases an individual's risk of cancer and is therefore sufficient to support a claim for fear of contracting cancer and medical monitoring. Of Appellees' potable

wells, only eight recorded detections of MTBE above the MDE action level of twenty parts per billion ("ppb") for MTBE in drinking water. ^{FN27}

On Appellees' claims for emotional distress for fear of contracting cancer and medical monitoring, the trial court instructed the jury as follows:

To recover for fear of disease, a Plaintiff need not offer definitive proof of actual exposure to the disease-causing agent where such proof is unavailable; it is sufficient in such a situation if the Plaintiff proves that the Defendant created circumstances making the Plaintiff's exposure a reasonable probability. The evidence is sufficient to establish a reasonable probability if it produces in your minds a belief that an outcome is more likely true than not true.

*5 A Plaintiff's entitlement to damages for fear of disease must be confined to injury suffered during the Plaintiff's legitimate window of mental anxiety. The window of anxiety begins when the Plaintiff first learns of the potential exposure to [sic] disease-causing agent and ends when satisfactory information becomes available that puts to rest the fear of disease.

* * *

Furthermore, a Plaintiff must show that all claimed emotional distresses are objectively ascertainable through evidence of physical manifestations. Physical manifestations of emotional distress may include, but are not limited to, any of the following: Depression, inability to work or perform routine household chores, loss of appetite, insomnia, nightmares, loss of weight, extreme nervousness and irritability.

* * *

The Plaintiffs seek a form of relief called medical monitoring. Medical monitoring is a form of relief that represents the cost of periodic medical tests or examinations, to a reasonable degree of medical certainty, that are necessary to monitor a Plaintiff's health and to facilitate early diagnosis and treatment of a disease caused by exposure to a chemical. To qualify for medical monitoring damages, a Plaintiff must prove by a preponderance of the evidence: Relative to the general population, the Plaintiff has been exposed to MTBE, benzene, toluene, or other

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gasoline constituents; MTBE, benzene, or toluene are disease-causing agents; the exposure was caused by the 2006 Jacksonville Exxon release of gasoline into the environment; the exposure created a significant increase of risk for contracting a serious disease when compared to the general nonexposed population; diagnostic or early detection tests exist for this increased risk of a serious disease and is reasonably beneficial in the treatment of serious disease; this testing would be prescribed by a qualified physician in accordance with contemporary scientific principles and would not be prescribed to the general population absent this exposure.

In support of their claims for fear of contracting cancer, and over the objection of Exxon's counsel, many Appellees testified regarding their opinions that they, members of their families, or their pets contracted disease as a result of the gasoline leak. At trial, however, no Appellee "assert[ed] a claim for sickness or death of any person or animal." The trial court instructed the jury that no claim could be asserted unless Appellees "offered appropriate expert testimony linking those illnesses or deaths to the level of exposure to gasoline, including any constituent that has caused sickness or death and to any person or animal."

In addition, Appellees sought compensatory damages for diminution in value and past loss of use and enjoyment of real property ^{FN28} as a remedy for their claims of nuisance, trespass, negligence, and strict liability for an abnormally dangerous activity. ^{FN29} Some Appellees sought additional recovery for emotional distress for fear of loss of property value. Appellees testified that they were reluctant to use portions of their properties, needed to purchase bottled drinking water, and were disturbed generally by the lights, noise, and smells produced by remediation activities, which reduced their enjoyment of their properties. Further, in support of their diminution in value allegations, Appellees introduced Dr. John Kilpatrick as an expert witness, who testified that each of the residential Appellees' properties had sustained a sixty percent diminution in value as of the day the leak was discovered. ^{FN30} Exxon countered with its expert witness, Richard Roddewig, who testified that, based on post-leak sales in the Jacksonville community, some properties had not sustained any diminution in value, while others sustained diminution up to 35% of their pre-leak value.

*6 At the close of trial, Judge Dugan granted Exxon's Motion for Judgment on Plaintiffs' Claims for Punitive Damages based on allegations of evil motive, ill will, or intent to injure, determining that Appellees' only viable basis for seeking recovery of punitive damages was fraud. Thus, the case went to the jury on causes of action for negligence, strict liability, trespass, nuisance, and fraud. ^{FN31} The jury returned verdicts for 466 plaintiffs on all causes of action on 28 June 2011, amounting to a total compensatory damages award of \$496,210,570. Following presentation of evidence on the issue of punitive damages, the jury returned an award for punitive damages totaling \$1,045,550,000.

Exxon filed motions for judgment notwithstanding the verdict and for a new trial and/or remittitur, which were denied on 19 July 2011. On 18 August 2011, Exxon noted timely an appeal to the Court of Special Appeals. ^{FN32} Before the intermediate appellate court could decide the appeal, Appellees filed a petition for writ of *certiorari* in this Court on 24 February 2012. Exxon opposed Appellees' petition, arguing that it was better for the case to proceed first through the Court of Special Appeals. We granted Appellees' petition for *certiorari* on 9 May 2012, 426 Md. 427, 44 A.3d 421 (2012), to consider the following issues, ^{FN33} rephrased and consolidated for brevity: ^{FN34}

- (1) Does Maryland recognize third party reliance in a fraud action?
- (2) Was there sufficient evidence to support the jury's fraud awards?
- (3) Where a Plaintiff alleges multiple instances of fraud, must the jury verdict sheet allocate compensatory damages among the various instances of fraud?
- (4) Was the punitive damages award excessive?
- (5) Was there sufficient evidence to support the jury's award of emotional distress damages for fear of cancer?
- (6) Does Maryland recognize a claim for medical monitoring?

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(7) Were the jury's property damages duplicative, excessive, and speculative?

(8) Is the release of a contaminant into an aquifer sufficient to establish trespass to land regardless of the level of detected contamination in an individual Plaintiff's well?

ANALYSIS

I. Sufficiency of Evidence for Fraud Verdict and Punitive Damages

Exxon challenges on multiple grounds the jury's fraud verdicts and resultant punitive damages awards. First, Exxon seeks to undermine the legal sufficiency of the jury's finding of fraud, contending that Appellees did not prove detrimental reliance as to any of the six alleged categories of alleged fraudulent conduct. Second, Exxon argues that the jury verdict sheets were faulty in that they failed to allocate compensatory and punitive damages among the separate categories of alleged fraud, such that an assumed finding of insufficiency by this Court on some, but not all, of the fraud claims mandates nonetheless a new trial. Third, Exxon contends that by failing to require Appellees to define what they meant by "remediation fraud" prior to the commencement of trial, the trial court permitted Appellees to shift their theory of liability during trial in violation of Exxon's due process rights. Lastly, Exxon asseverates that the punitive damages awards are constitutionally excessive. Because we conclude that Appellees' evidence in support of their fraud claims was legally insufficient, we need not decide Exxon's other contentions.

*7 [1][2][3][4] In reviewing a trial court's denial of a motion for judgment notwithstanding a verdict for fraud, we must determine whether "there is any evidence adduced, however slight ... from which reasonable jurors, applying the appropriate standard of proof, could find in favor of the plaintiff on the claims presented." Hoffman v. Stamper, 385 Md. 1, 16, 867 A.2d 276, 285 (2005); see also Darcars v. Borzym, 379 Md. 249, 270, 841 A.2d 828, 840 (2004) (noting that a court "must account for and consider the appropriate burden of persuasion in deciding whether to allow the jury to decide an issue"). We review the trial court's decision to "determine whether it was legally correct, while viewing the evidence and the reasonable inferences to be drawn from it in the light most favorable to the non-moving party." Scapa Dryer Fabrics, Inc. v. Saville, 418 Md. 496, 503, 17 A.3d 159,

163 (2011) (internal citations omitted). We will reverse the denial of a motion for judgment notwithstanding the verdict "only if the facts and circumstances permit but a single inference as relates to the appellate issue presented." Jones v. State, 425 Md. 1, 31, 38 A.3d 333, 350 (2012) (citing Scapa, 418 Md. at 503, 16 A.3d at 163). Thus, because fraud must be proven by clear and convincing evidence, Hoffman, 385 Md. at 16, 867 A.2d at 285 (citing VF Corp. v. Wrexham Aviation, 350 Md. 693, 704, 715 A.2d 188, 193 (1998)), reversal of the trial court's denial of the motion for judgment notwithstanding the verdict is only appropriate when, looking at the evidence in the light most favorable to Appellees, we determine that Appellees did not meet their burden of establishing fraud by clear and convincing evidence.

A. Third Party Reliance

[5] At trial, Appellees alleged on Exxon's part a continuous course of fraudulent conduct continuing over approximately thirty years, based on six specific instances. Exxon challenges the legal sufficiency of the jury's verdict as to three of those instances—the 1983 construction fraud, 1992 permit fraud, and 2001 double-walled piping fraud—on the grounds that the jury relied improperly on a theory of third party reliance, which Exxon contends is not recognized under Maryland law. We determine that Appellees' theory of third party reliance fails to satisfy the requirement that Appellees demonstrate personal reliance, and thus, because they presented no competent evidence on this missing element, their proof is legally insufficient. Therefore, we reverse the judgment as to fraud.

[6] To establish fraud, a plaintiff must prove by clear and convincing evidence that "(1) the defendant made a false representation to the plaintiff, (2) the falsity of the representation was either known to the defendant or the representation was made with reckless indifference to its truth, (3) the misrepresentation was made for the purpose of defrauding the plaintiff, (4) the plaintiff relied on the misrepresentation and had the right to rely on it, and (5) the plaintiff suffered compensable injury as a result of the misrepresentation." Hoffman, 385 Md. at 28, 867 A.2d at 292. Exxon takes issue with the trial court's jury instructions on reliance, which read, in relevant part, that, in order to recover damages for fraud, Plaintiffs need only prove that Exxon "intended the Plaintiffs or Baltimore County or the State of Maryland would act in reliance on [its false] statements" and that "the Plaintiff or

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Baltimore County or the State of Maryland did justifiably rely on the representations of the Defendant.” (Emphasis added).

*8 [7] Ordinarily, a plaintiff seeking recovery for fraud must prove that “the defendant ... made a false representation to the person defrauded.” *Gourdine v. Crews*, 405 Md. 722, 759, 955 A.2d 769, 791 (2011) (citations omitted) (emphasis in original). Here, there is no dispute that (1) Exxon did not direct any of these three allegedly fraudulent representations to any of the Appellees; and (2) none of the Appellees relied personally on the three allegedly fraudulent misrepresentations. None of the Appellees contend that they were present at the 1983 meeting of the Baltimore County Board of Appeals at which Anderson testified, knew about the 1992 permit application, or saw, prior to the leak, the 2001 MDE document representing that the Exxon station employed double-walled piping. In the absence of personal reliance, however, Appellees assert an attenuated third-party reliance theory under which they claim that they need not show any evidence of actual, personal reliance in order to establish fraud. Rather, they claim, a cause of action for fraud may be successful under a theory of third-party reliance by demonstrating that Exxon made intentionally or recklessly a false statement to public officials (Baltimore County or the State of Maryland), which the public officials then relied on to the ultimate detriment of the Appellees—rather like fraud on the people’s government constitutes fraud on the people. Exxon, by contrast, contends that Maryland law requires that “a plaintiff prove he had knowledge of, and relied upon, a misrepresentation” on a direct and personal basis.

In some circumstances, an individual may recover for fraud even when the allegedly fraudulent statement at issue was not made to him or her directly. *See, e.g., Diamond Point Plaza Ltd. P’ship v. Wells Fargo Bank, N.A.*, 400 Md. 718, 741–42, 929 A.2d 932, 946 (2007) (“Liability [for fraud] is not defeated by the fact that Diamond Point’s representations [in a commercial document] were not made directly to Wells Fargo.”); *Rhee v. Highland Development Corp.*, 182 Md.App. 516, 539–40, 958 A.2d 385, 389–90 (2008) (permitting a subsequent purchaser of real estate to proceed against the original seller for his or her alleged fraudulent concealment, even though the misrepresentation was not made directly to the subsequent purchaser); Restatement (Second) of Torts § 531 (“One

who makes a fraudulent misrepresentation is subject to liability to the persons or class of persons whom he intends or has reason to expect to act or to refrain from action in reliance upon the misrepresentation ...”). *But see Gourdine*, 405 Md. at 759–60, 955 A.2d at 791–92 (declining to sustain a cause of action for fraud to a third party in part because the third party was not a party to the alleged misrepresentation).

Despite the instances where recovery for fraud has been sanctioned where the allegedly fraudulent statement was not made directly to the plaintiff, we have not permitted recovery without a demonstration that the plaintiff relied, either directly or indirectly, on the relevant misrepresentation. For example, in *Diamond Point Plaza*, the defendant, Diamond Point, made a fraudulent misrepresentation to two lenders, Pinnacle and PaineWebber, “for the purpose of inducing Pinnacle and PaineWebber to extend a loan, aware that PaineWebber likely would sell the loan in the secondary market.” 400 Md. at 741, 929 A.2d at 946. Wells Fargo bought the loan in the secondary market. Thus, we reasoned that Diamond Point had “reason to expect that the loan documents, including [the fraudulent misrepresentation], would be presented to, would be considered by, and would influence the decision of prospective buyers in the secondary market.” *Id.* at 741–42, 929 A.2d at 946. Therefore, not only did Pinnacle and PaineWebber, the parties to whom the actual misrepresentation was made, rely, but so too did Wells Fargo, the third party buyer in the secondary market. *Id.* Although Diamond Point’s representations were not made directly to Wells Fargo, Wells Fargo, as the third party, established reliance and resultant harm.

*9 [8] Appellees contend that, because we have permitted previously recovery where the allegedly fraudulent statement was not made directly to the plaintiff, recovery by Appellees for the statements made to Baltimore County and the MDE is justified in the present case. Reliance by Baltimore County or the State of Maryland is simply not enough, however.^{FN35} Appellees, like Wells Fargo in *Diamond Point*, must also have relied personally, either directly or indirectly, on the allegedly false representations. Here, however, Appellees do not provide any evidence that they relied personally on Exxon’s allegedly fraudulent statements,^{FN36} nor do they provide any persuasive legal authority sufficient to support their contention that proof of reliance is excused. *Cf. Philip Morris*,

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Inc. v. Angeletti, 358 Md. 689, 752 n. 29, 752 A.2d 200, 234 n. 29 (2000) (denying class certification for a claim of fraud in part because reliance on a misrepresentation by a plaintiff, on an individual basis, is essential to a civil claim of fraud). Maryland law does not permit a third party to recover damages for fraud purely on the basis of a false statement made to a governmental entity.

Appellees argue that such an interpretation, in effect, immunizes corporate deceit to governmental officials. We disagree. Government is capable and empowered generally to take action in such instances to protect its interests and those of the public. Other parties meeting the elements of fraud may proceed properly on such an action if they so choose. Appellees, however, purely by virtue of being residents in the area, without more, cannot maintain an action for fraud based on false statements for which they have admitted no direct, indirect, or personal reliance. Thus, to the extent the jury verdict was dependent on the 1983 construction fraud, the 1992 permit fraud, and the 2001 double-walled piping fraud claims, it is unsupported.

B. Sign Fraud and Remediation Fraud

Exxon argues that Appellees failed to prove by clear and convincing evidence the remaining three instances of alleged fraud: (1) sign fraud; (2) remediation fraud; and (3) remediation fraud in allegedly misleading affirmatively the MDE. Specifically, Exxon contends that, of the approximately 125 Appellees who testified that they saw the misleading sign, most did not provide any testimony lending itself to establishment of any detrimental reliance or change in their water consumption habits. Additionally, although 459 Appellees received awards for remediation fraud either personally or on the basis of the MDE's reliance, Exxon argues that at least 300 of these Appellees did not offer any testimony mentioning the alleged remediation fraud in the first instance, no Appellee proved detrimental reliance, and Appellees provided insufficient evidence to demonstrate that the MDE relied on any false statements.

1. Sign Fraud

[9] Exxon contends that the sign fraud verdicts should be reversed. One-hundred, eighty-six Appellees recovered damages for sign fraud, stemming from the placement of the "misleading" sign outside of the Jacksonville Exxon station from 17 February until 21

February 2006. Exxon claims that of the 186 recovering Appellees, most either provided no testimony regarding seeing the sign in the first instance or "offered no evidence of detrimental reliance or continued using their well water even after they discovered the sign was inaccurate." Moreover, Exxon argues, those demonstrating reliance did not offer any evidence of resulting injury or damage.

*10 As noted above, a false statement by a defendant does not alone provide a sufficient basis to support a cause of action for fraud. Rather, the plaintiff must prove by clear and convincing evidence that he or she relied on the allegedly fraudulent statement to his or her detriment. See *Hoffman*, 385 Md. at 28, 867 A.2d at 292. Here, Appellees' failure to demonstrate detrimental reliance is fatal to their claims. As Exxon notes, very few Appellees testified that they continued to use their well water after seeing the sign because they presumed the sign was correct, that they altered their water consumption following the discovery that the sign was misleading, or that they would have altered immediately their water consumption had the content of the sign been accurate at its installation. For example, many Appellees who asserted that they saw the sign did not begin using bottled water or install POET systems until well after the leak was publicized and the sign removed, therefore negating any claim that their continued consumption of potentially contaminated water resulted from the sign's inaccuracy. Thus, even though 186 Appellees saw the sign, very few demonstrated reliance.^{FN37}

Of those Appellees that claimed to have relied on the misleading sign, none established that he or she suffered injury or damages as a result of his or her reliance. Appellees testifying as to reliance either did not have demonstrable contamination of their wells stemming from the Jacksonville Exxon leak until months after Appellees learned about the leak, or never had a positive well test for contamination. Thus, no Appellee proved by clear and convincing evidence any resulting injury from consuming contaminated water during the five-day period during which the sign was displayed. As a result, Appellees failed to establish a cause of action for fraud based on the posting of the "misleading" sign. The sign fraud verdicts as to all Appellees are therefore reversed.

2. Remediation Fraud

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[10] Exxon urges this Court to reverse the fraud verdicts for the 459 Appellees who recovered for remediation fraud, claiming that they failed to prove fraud by clear and convincing evidence. Exxon challenges additionally the remediation fraud verdicts based on the reliance by the MDE on Exxon's remediation expertise. Lastly, Exxon complains that even the concept of remediation fraud is a violation of Exxon's due process rights, claiming that Appellees' theory of remediation fraud remained undefined and ever-shifting throughout the course of the trial.

The concept of remediation fraud appears to encompass various subtheories premised mainly on actions taken by Exxon during the remediation process. Appellees point to a number of Exxon's representations, including recovery estimates of gasoline proclaimed by Exxon, which later proved to be incorrect and were amended by a subsequent recovery estimate; statements made by Exxon officials predicting that the contamination would migrate, and thus be contained generally, to a "strike line" within a half-mile radius of the station, which was proved incorrect later; representations concerning the safety of the state action level for MTBE contamination; Exxon's decision to deliver or discontinue the delivery of bottled water; and, the decision of where to drill monitoring wells and sample for contamination.

*11 We need not consider whether the amorphous concept of remediation fraud violated Exxon's due process rights. Upon our review of Appellees' testimony,^{FN38} we conclude that the Appellees' claims for remediation fraud suffer from various deficiencies of proof. Specifically, some Appellees never established that the source of their impressions related to the remediation efforts was a representation made by Exxon Mobil,^{FN39} nor that any statement allegedly relied upon was false,^{FN40} let alone intentionally so. Others relied on opinions or predictions regarding where the contamination would flow in the aquifer to form the basis for their fraud claims,^{FN41} which is an insufficient basis for fraud. *See, e.g., Babb v. Bolyard*, 194 Md. 603, 609, 72 A.2d 13, 16 (1950) (noting that, to form the basis for fraud, the statement "must be a statement of an alleged existing fact or facts, and not merely of some future or contingent event, or an expression of opinion as to the subject of the statement" (quoting *Boulden v. Stilwell*, 100 Md. 543, 551, 60 A. 609, 610 (1905))). Most claims, however, suffered in particular from an insufficient showing of detrimental

reliance.

A mere false statement is insufficient to establish fraud. Even for those Appellees who could demonstrate the falsity of a statement, no Appellee proved by clear and convincing evidence detrimental reliance. Most Appellees did not demonstrate any change in behavior resulting from any of the allegedly false statements^{FN42}—for example, few changed (or did not change, as applicable) their water consumption habits in response to the assumedly false statements or in response to their discovery of the assumed falsity of the gasoline recovery estimates. Moreover, many Appellees disclaimed expressly reliance on Exxon's statements, testifying that they knew immediately of the gasoline release or thought Exxon was understating the severity of the leak.^{FN43} Additionally, many of the Appellees who recovered for remediation fraud never experienced a positive well test for contamination, thereby undercutting conclusively any contention that false representations regarding recovery estimates, predicted migration of contaminants, necessity for bottled water, safety of MTBE, and locations of monitoring wells caused any harm.^{FN44} Further, most Appellees offered no evidence that their period of alleged reliance on Exxon's representations caused any damage,^{FN45} and some did not switch to bottled water after discovering contamination in their water supply.^{FN46} Bare contamination of a well or brief consumption of water containing contaminants at or below the MDE and EPA action levels is not, without more, sufficient to support detrimental reliance.

Additionally, Appellees attempt to anchor a claim for remediation fraud based on Exxon's alleged deception of the MDE. Even assuming such a claim by Appellees is permissible under Maryland law, no representative of the MDE testified that Exxon misled intentionally the MDE, or that the MDE relied on Exxon's assertions. Any claim that Appellees relied on Exxon's representations to the MDE fails necessarily for the same reasons that Appellees' personal remediation fraud claims fail on this record. Appellees failed to prove any intentionally misleading statement, by clear and convincing evidence, that resulted in detrimental reliance.

*12 Appellees' proof, rather than proving fraud, demonstrates a general dissatisfaction with Exxon's remediation efforts. The shortcomings in Exxon's remediation efforts (and reporting) simply do not rise

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to the level of fraud, however. Not only was the decision of where and when to test or install monitoring wells directed by the MDE, but many of the allegedly fraudulent statements made by Exxon were statements of opinion and prediction reflecting the available knowledge at the time. Appellees attempt to paint Exxon as attempting intentionally to deceive Jacksonville residents at every turn with a callous disregard for their health and safety, yet provide little but speculation as to Exxon's actual knowledge during the remediation process. Certainly, Exxon could have done a better job communicating with residents of the Jacksonville area, reduced errors, and described more clearly the investigatory process. That Exxon's efforts were imperfect, however, does not rise to fraud. Appellees did not prove by clear and convincing evidence that they relied justifiably, and to their detriment, on statements made with the intention to mislead by Exxon. In the absence of such proof, we reverse the jury's verdict for all Appellees as to the two asserted types of remediation fraud.

[11] Because we reverse the verdicts as to each of the alleged instances of fraud submitted to the jury, the award to Appellees of punitive damages must be reversed as well. Punitive damages may be awarded only if a plaintiff proves at trial malice, ill will, or intent to injure. *See, e.g., Ellerin v. Fairfax Savings, F.S.B.*, 337 Md. 216, 228–29, 652 A.2d 1117, 1122–23 (1995) (noting that Maryland law restricts recovery of punitive damages to situations where the defendant acted wrongfully intentionally); *Owens-Illinois Inc. v. Zenobia*, 325 Md. 420, 460, 601 A.2d 633, 652 (1992) (noting that punitive damages may be awarded only where “the plaintiff has established that the defendant's conduct was characterized by evil motive, intent to injure, ill will, or fraud, *i.e.*, ‘actual malice’”). At the close of trial, Judge Dugan granted Exxon's Motion for Judgment on Plaintiffs' Claims for Punitive Damages based on Allegations of Evil Motive, Ill Will, or Intent to Injure. Appellees did not appeal that aspect of the court's decision. Because no basis for recovering punitive damages remains, we reverse the jury's award of punitive damages.

II. Emotional Distress Damages for Fear of Contracting Cancer

Exxon argues primarily that, because Appellees established neither the existence of present disease nor that they were more likely than not to contract cancer as a result of the 2006 Jacksonville Exxon leak, it was

entitled to judgment as a matter of law on Appellees' emotional distress claims premised on fear of contracting cancer. In the alternative, Exxon contends that, because recovery for fear of cancer requires a showing of past or present exposure and objective, reasonable fear, the instructions submitted to the jury were erroneous, entitling it to a new trial. Lastly, Exxon argues that the trial court committed reversible error by permitting Appellees to testify regarding their opinions that they, members of their families, or their pets contracted various disorders as a result of the gasoline leak, in the absence of expert testimony sufficient to demonstrate causation. Thus, there are three central issues for our consideration: (1) whether Maryland permits recovery for emotional distress due to fear of contracting cancer; (2) if such recovery is permitted, what are the elements required to be established to permit recovery; and (3) whether the evidence in this record, viewed in a light most favorable to Appellees, is legally sufficient to justify recovery of emotional distress damages due to fear of contracting cancer.

*13 We review the trial court's grant or denial of a motion for judgment notwithstanding the verdict to determine whether it was legally correct. *Scapa Dryer Fabrics, Inc. v. Saville*, 418 Md. 496, 503, 16 A.3d 159, 163 (2011) (quoting *Scapa Dryer Fabrics, Inc. v. Saville*, 190 Md.App. 331, 343, 988 A.2d 1059, 1065 (2010)). In so doing, we must “resolve all conflicts in the evidence in favor of the plaintiff and must assume the truth of all evidence and inferences as may naturally and legitimately be deduced therefrom which tend to support the plaintiff's right to recover.” *Smith v. Bernfeld*, 226 Md. 400, 406, 174 A.2d 53, 55 (1961). If there is any competent evidence, “however slight, from which a rational mind could infer a fact in issue,” then denial of a motion for judgment notwithstanding the verdict is appropriate. *Impala Platinum v. Impala Sales*, 283 Md. 296, 328, 389 A.2d 887, 905–06 (1978). Thus, if there is any evidence legally sufficient to generate a jury question, we must affirm the denial of a motion for judgment notwithstanding the verdict. *Jones v. State*, 425 Md. 1, 30–31, 38 A.3d 333, 350 (2012).

[12][13] The decision whether to grant a motion for a new trial is “within the sound discretion of the trial court.” *Buck v. Cam's Broadloom Rugs, Inc.*, 328 Md. 51, 56, 612 A.2d 1294, 1296 (1992) (quoting *Brinard v. Denzik*, 226 Md. 287, 292, 173 A.2d 203,

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206 (1961)). Thus, the trial court's denial of a motion for a new trial and/or remittitur will be reversed only upon a showing that the trial court abused its discretion in failing to order a new trial. *Merritt v. State*, 367 Md. 17, 28, 785 A.2d 756, 763 (2001).

A. The Law Relating to Emotional Distress Damages for Fear of a Latent Disease

[14][15] In Maryland, recovery of damages for emotional distress must arise out of tortious conduct. *Hamilton v. Ford Motor Credit Co.*, 66 Md.App. 46, 63, 502 A.2d 1057, 1066 (1986) (“Recovery may be had in a tort action for emotional distress arising out of negligent conduct. In such case, the emotional distress is an element of damage, not an independent tort.”). The seminal case is *Green v. T.A. Shoemaker & Co.*,^{FN47} where we adopted a rule allowing recovery for mental distress if physical injury resulted from the commission of a tort, regardless of impact. 111 Md. 69, 77–78, 73 A. 688, 691 (1909). After noting that mental distress alone cannot be an independent cause of action and that recovery cannot be obtained for mental distress without “physical impact,” we expressed concern that emotional distress may be feigned easily. *Id.* at 77–79, 73 A. at 691–92. Although no fool-proof method to measure such suffering was imagined, we held that demonstrable emotional distress due to a physical impact would provide a “sufficient guarantee of genuineness that would otherwise be absent in a claim for mental distress alone.” *Vance v. Vance*, 286 Md. 490, 498, 408 A.2d 728, 732 (1979) (discussing *Green*). Thus, as long as the emotional distress due to the tortious conduct is manifested objectively, the emotional distress is deemed genuine and compensable even though the tortious conduct did not cause bodily harm. *Beynon v. Montgomery Cablevision Ltd. P'ship*, 351 Md. 460, 506–07, 718 A.2d 1161, 1184–85 (1998).^{FN48} A physical injury may operate, however, “as the yardstick by which a tort victim's emotional harm may be measured,” and serves as an “objective determination [that] provides reasonable assurance that the claim is not spurious.” *Id.* at 507, 718 A.2d at 1184 (quoting *Belcher v. T. Rowe Price Found.*, 329 Md. 709, 735, 621 A.2d 872, 885 (1993)); see also *Belcher*, 329 Md. at 735, 745–46, 621 A.2d at 885, 890 (holding that a plaintiff may recover under the Worker's Compensation Act for Post Traumatic Stress Disorder sustained after a three-ton beam crashed through her office and landed several feet from her work desk, even in the absence of physical injury, as her mental distress was manifested through ample

objective evidence).

*14 With these concerns and principles in mind, the central issues to address in the present case are, first, whether recovery for emotional distress based on fear of contracting cancer that arose from a defendant's tortious act is permissible in Maryland;^{FN49} and, if so, under what circumstances may a plaintiff recover for fear of cancer.

[16] We hold that, to recover emotional distress damages for fear of contracting a latent disease, a plaintiff must show that (1) he or she was exposed actually to a toxic substance due to the defendant's tortious conduct; (2) which led him or her to fear objectively and reasonably that he or she would contract a disease; and (3) as a result of the objective and reasonable fear, he or she manifested a physical injury capable of objective determination.

1. A Reasonable and Objective Fear of Disease

Faya v. Almaraz, 329 Md. 435, 620 A.2d 327 (1993),^{FN50} a case involving a claim for emotional distress damages based on a fear of contracting the human immunodeficiency virus (HIV), determines the appropriate standard in this case. To constitute a “reasonable” fear, we held that the defendant's conduct must create circumstances that would cause a reasonable person to fear contracting HIV. *Id.* at 447–48, 620 A.2d at 333. Requiring the plaintiffs to prove actual transmission of the virus, we concluded, “would unfairly punish them for lacking the requisite information” to prove transmission at the time of their discovery, which produced their fears. *Id.* at 455, 620 A.2d at 336–37. The plaintiffs' actual *exposure* to the risk of contracting the virus (as the disease vector was understood at that time), however, was undisputed. *Id.* at 439–41, 620 A.2d at 329.

Because the *Faya* plaintiffs tested negative for HIV over one year after their surgeries, we held that their continued fear of contracting the virus after the negative test was unreasonable as a matter of law. *Id.* at 455–56 & n. 9, 620 A.2d at 337 & n. 9. The plaintiffs therefore recovered for their mental distress only within a reasonable window of time: the time period between learning of the surgeon's HIV-positive status and their subsequent negative blood test. *Id.* at 459, 620 A.2d at 337. In triangulating this window of time, we concluded that the time period for which the plaintiffs could recover was approximately six months

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because evidence at the time showed that there was a 95% certainty that an individual will test positive for HIV, if at all, within six months after exposure. *Id.* The plaintiffs' fear within that particular time period, based on actual exposure to the virus by means of their surgeon's HIV-positive status, created an objectively reasonable fear of contracting HIV. *Id.* *Faya* thus demonstrates that there may be a reasonable "window," or measure, of time for which to recover for fear of future disease. Beyond that window of time, the likelihood of contracting future disease becomes so remote that the fear of future disease becomes objectively unreasonable.

*15 Exxon contends that the more stringent "reasonably certain" or "reasonably probable" standards to recover damages for fear of contracting future disease are applicable. See *Pierce v. Johns-Manville Sales Corp.*, 296 Md. 656, 666–67, 464 A.2d 1020, 1026–27 (1983) (in a case decided before *Faya*, the Court adopted a reasonably certain ("greater than 50% chance") standard in holding that the plaintiff's cause of action for developing lung cancer as a result of asbestosis accrued when the presence of cancer was reasonably discovered in the cancer diagnosis, and not when he was diagnosed with asbestosis). See also *Lohrmann v. Pittsburgh Corning Corp.*, 782 F.2d 1156, 1160 (4th Cir.1986) (interpreting Maryland law prior to *Faya* and holding that "recovery of damages based on future consequences of an injury" requires a reasonably probable standard, where the plaintiffs sought recovery for sustaining risks to cancer after being exposed to asbestos, and the district court excluded cancer testimony on the issue of damages). *Lohrmann* and *Pierce*, however, dealt with recovery of damages based on future consequences of an injury, namely, recovery for disease that may (or may not) develop in the future. By contrast, damages for fear of cancer are limited to recovery for present, particularized emotional distress based on an objective, reasonable fear as a matter of law. See *Wetherill v. Univ. of Chicago*, 565 F.Supp. 1553, 1559 (N.D.Ill.1983) (where a federal district court rejected the "reasonably certain" standard for recovery of feared disease because "such a stringent requirement would distort traditional notions of proximate cause. That concept's touchstone—reasonable foreseeability of the claimed injury [emotional distress]—merely demands a reasonable fear, not a high degree of likelihood, that the feared contingency be likely to occur.").

While cancer caused by chemical carcinogens and the transmission of HIV are clearly distinct vectors of different diseases, a fear of contracting any disease has several common principles as a matter of law. *Faya* provides a template for analogous cases involving fear of future disease: namely, that recovering emotional distress damages for fear of future disease requires a rational basis, based on objective circumstances, that the disease may occur because of actual exposure caused by a defendant's tortious conduct. These principles are supported by our precedent. See *Smith v. Borello*, 370 Md. 227, 247–48, 804 A.2d 1151, 1163 (2002) (a pregnant woman who suffers personal injury and the loss of the fetus due to a defendant's tortious conduct may recover for any demonstrable psychic injury, rather than sorrow, that arose as a result of losing the fetus, including depression, anguish, and distress); *Beynon*, 351 Md. at 507–08, 718 A.2d at 1184–85 (where an automobile crash caused the decedent plaintiff's fatal injuries, "[d]amages for 'pre-impact fright' are recoverable when the decedent experiences it during the 'legitimate window of mental anxiety,' " which was the time period between the decedent's realization that he was in "imminent" danger and his subsequent death (quoting *Faya*, 329 Md. at 459, 620 A.2d at 338–39)). See *Buck v. Brady*, 110 Md. 568, 572–73, 73 A. 277, 279 (1909) (a plaintiff was permitted properly to testify about her continuing fear of developing rabies after having been bitten by a rabid dog, even though she did not have the disease currently and had received immediate preventive treatment for the disease).

*16 Our sister jurisdictions that permit recovery for fear of contracting cancer developed an array of guidance by which a plaintiff may recover damages for fear of contracting cancer; however, most jurisdictions require a form of objectively reasonable fear. See, e.g., *Atkins v. Ferro Corp.*, 534 F.Supp.2d 662, 667 (M.D.La.2008) (where plaintiffs presented no evidence that they were exposed actually to harmful levels of hydrochloric acid, their fear was not sufficiently reasonable as a matter of law); *In re Methyl Tertiary Butyl Ether Prods. Liab. Litig.*, No. 1:00–1898, 2008 U.S. Dist. LEXIS 50255, at *20 (S.D.N.Y. July 1, 2008) (expert could not testify reliably that plaintiffs had reasonable fear of cancer because he did not analyze levels of plaintiffs' exposure to MTBE); *Salazar v. American Sterilizer Co.*, 5 P.3d 357, 369 (Colo.App.2000) (expert medical testimony that plaintiff's fear of cancer was reasonable because of the length of her exposure and because

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ethylene oxide is a known carcinogen provided a reasonable basis for admitting evidence regarding plaintiff's fear of cancer); Devlin v. Johns-Manville Corp., 202 N.J.Super. 556, 495 A.2d 495 (N.J.Super.Ct.Law.Div.1985).^{FN51}

These jurisdictions differ, however, on how a plaintiff must prove his or her objectively reasonable fear. While expressing concerns similar to those we voiced in *Vance* and *Green* regarding the difficulty of proving genuine fear and consequent mental anguish, see *supra*, most jurisdictions require actual exposure. See, e.g., *Meyer v. Lockformer Co.*, No. 02-C-2672, 2005 U.S. Dist. LEXIS 15844, at *12 (N.D.Ill. Aug. 2, 2005) (no facts supported plaintiff's allegation of actual exposure to industrial solvent trichloroethylene (TCE)); Reynolds v. Highland Manor, Inc., 24 Kan.App.2d 859, 954 P.2d 11 (Kan.Ct.App.1998) (examining several states' different requirements for exposure in fear of HIV claims and noting that Kansas requires actual exposure). Many jurisdictions also require that the fear be genuine and a foreseeable result of the defendant's tortious conduct. See Bennett v. Mallinckrodt, Inc., 698 S.W.2d 854, 867 (Mo.Ct.App.1985) (in a case involving a denial of recovery for "cancerphobia," the court emphasized that such fear must have been foreseeable reasonably by the defendant); Ferrara v. Galluchio, 5 N.Y.2d 16, 176 N.Y.S.2d 996, 152 N.E.2d 249, 252 (N.Y.1958) (explaining that, for recovery for fear of cancer, "[i]t is entirely possible to allow recovery only upon satisfactory evidence ..., or to look for some guarantee of genuineness in the circumstances of the case").

Our assessment of these cases leads us to conclude that a plaintiff must have a rational basis to recover for fear of cancer. Therefore, recovery for fear of disease is allowed if the plaintiff proves he or she was exposed actually to a toxic substance, which created an objective, reasonable fear that the plaintiff will contract an identified disease. Mere exposure to a toxic substance is insufficient; rather, the circumstances of actual exposure to a toxic substance must lead a reasonable person in the plaintiff's position to believe that contracting a disease is a real consequence of the defendant's tortious conduct.

2. Demonstrable Physical Injury is Required

*17 [17][18] Jurisdictions considering the question are divided on whether a plaintiff must sustain additionally a physical injury to recover for fear of

cancer. In Maryland, however, a plaintiff may recover damages for emotional distress "if a physical injury resulted from the commission of the tort, regardless of impact." Hoffman, 385 Md. at 34, 867 A.2d at 295 (emphasis in original). See Green, 111 Md. at 77, 73 A. at 691 (determining that recovery for mental distress damages should be permitted "when it is shown that a material physical injury has resulted from fright caused by a wrongful act, and especially, as in this case, from a constant repetition of wrongful acts, in their nature calculated to cause constant alarm and terror" (emphasis in original)). For example, in *Green*, we approved the admission of evidence showing the plaintiff's nervous condition, even though there was no physical impact with or corporal injury to her person. *Id.* A defendant's tortious conduct does not have to produce necessarily a physical impact for a plaintiff to recover emotional distress damages. A plaintiff must prove, however, a "clearly apparent and substantial physical injury" in one of four ways: (1) an external condition; or (2) symptoms of a resulting pathological; (3) physiological; or (4) mental state. Bowman v. Williams, 164 Md. 397, 404, 165 A. 182, 184 (1933) (emphasis added).^{FN52} See also H & R Block, Inc. v. Testerman, 275 Md. 36, 48, 338 A.2d 48, 55 (1975), abrogated on other grounds by Owens-Illinois, Inc. v. Zenobia, 325 Md. 420, 601 A.2d 633 (1992) ("The cases have adhered to the *Bowman* rule ... in requiring that there be clearly apparent and substantial physical injury, to guard against the possibility of feigned claims." (citations omitted)); Mahnke v. Moore, 197 Md. 61, 69, 77 A.2d 923, 927 (1951) (affirming *Bowman*).

In Vance v. Vance,^{FN53} 286 Md. 490, 408 A.2d 728 (1979), we addressed specifically the methods by which the traditional "physical injury" element may be proved. The first three methods echo the standards we expressed in *Bowman*, because they include evidence of an external condition that manifests physical injury or "symptoms of a pathological or physiological state." *Id.* at 500, 408 A.2d 728, 408 A.2d at 733. The fourth way to prove a physical injury that demonstrates emotional distress is by "evidence indicative of a 'mental state.'" *Id.* These four methods must each be "capable of objective determination" so as to "guard against feigned claims." *Id.* at 500, 408 A.2d at 733-34.

Three key principles are thus relevant to determine whether a physical injury is capable of objective

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determination:

First, ... the evidence must contain *more than mere conclusory statements*, such as “He was afraid,”.... The evidence must be *detailed enough to give the jury a basis upon which to quantify the injury*. Second, a claim of emotional injury is less likely to succeed if the victim is the sole source of all evidence of emotional injury ... There is no reason why the victim's own testimony may not be sufficient, as long as it otherwise *provides the jury with enough information to render his or her injuries capable of objective determination*. Third, although minor emotional injuries may be less likely to produce the kind of evidence that renders an injury capable of objective determination, that does not mean that an emotional injury must reach a certain threshold level of severity before it becomes compensable. There is no severity prong of the Vance test. Our focus thus is properly on the evidence of mental anguish produced....

*18 Hunt v. Mercy Med. Ctr., 121 Md.App. 516, 531, 710 A.2d 362, 369–70 (1998) (emphasis added).

[19] The evidence in *Vance* of Muriel Vance's mental distress is a particularly effective example of an objective and demonstrable physical injury, as a matter of law:

The disclosure that her twenty-year marriage was void was shown to have had a devastating effect on Muriel. She went into a state of shock, engaged in spontaneous crying and for a period seemed detached and unaware of her own presence. She was unable to function normally, unable to sleep and too embarrassed to socialize. In addition to experiencing symptoms of an ulcer, Muriel suffered an emotional collapse and depression which manifested itself in her external condition, i.e., her significantly deteriorated physical appearance—unkempt hair, sunken cheeks and dark eyes.

286 Md. at 501, 408 A.2d at 734. We concluded that this evidence demonstrated an objectively demonstrable physical injury caused proximately by the defendant's negligence. *Id.* The requirement of an objective and demonstrable physical injury stands unchanged for claims of recovery for emotional distress. Compare New Summit Assocs. Ltd. P'ship v. Nistle, 73 Md.App. 351, 362–63, 533 A.2d 1350, 1355

(1987) (where the court found compensable emotional distress based on objective evidence of insomnia, diarrhea, and nausea, as a result of the tortious conduct), with Roebuck v. Steuart, 76 Md.App. 298, 315, 544 A.2d 808, 816 (1988) (where the court held there was no compensable emotional distress where the plaintiff's sole evidence of physical injury rested on testimony that she went to see a psychiatrist six times, but did not testify as to her own symptoms). See Belcher, Dobbins v. Washington Suburban Sanitary Comm'n, 338 Md. 341, 342–43, 658 A.2d 675, 675–76 (1995) (where, on two separate occasions, a water pipe of the defendant's broke and damaged the plaintiff's property, which plaintiff claimed caused her severe and permanent bodily injury and severe and “protracted shock” to her nervous system and mental anguish, this Court held that the plaintiff's alleged injuries were not caused proximately by the defendant's negligence); 329 Md. at 745–46, 621 A.2d at 890 (where the plaintiff provided ample and objective evidence that, as a result of defendant's tortious conduct, she suffered from nightmares, heart palpitations, headaches, and other mental anguish, and was diagnosed with Post Traumatic Stress Disorder, we held that she proved an objective and demonstrable physical injury); ^{FN54} Beynon, 351 Md. at 505, 718 A.2d at 1183 (noting that “the compensability of ‘pre-impact fright’ [i n survival actions] is permissible [for the decedent's estate] when it is the proximate result of a wrongful act and it produces a physical injury or is manifested in some objective form”); Fava, 329 Md. at 456, 620 A.2d at 337 (noting that “nervous disturbances may constitute suffering of the body or of the mind”). An objective and demonstrable physical injury requirement achieves a primary purpose of emotional distress damages: to compensate plaintiffs for actual harm, rather than feigned or speculative injury. Green, 111 Md. at 81, 73 A. at 692 (“[A] nervous injury arising from actual physical impact is as likely to be imagined as one resulting from fright without physical impact, and that the former is as capable of simulation as the latter.”).

*19 In the context of physical injuries sustained as a result of exposure to toxic substances, subcellular change produced by exposure to toxic chemicals—without manifested symptoms of a disease or actual impairment—is not a compensable “injury” under Maryland law. See Hollingsworth & Vose Co. v. Connor, 136 Md.App. 91, 128, 764 A.2d 318, 338 (2000) (pleural plaques or thickening of blood or vessel walls caused by asbestos exposure is not a

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compensable injury). Likewise, most states decline to recognize subcellular or subclinical^{FN55} injuries as an element of recovery of damages for fear of disease. *Rainer v. Union Carbide Corp.*, 402 F.3d 608, 620–22 (6th Cir.2005) (noting that Kentucky courts would be adverse to allowing a claim based upon subcellular damage); *Burns v. Jaquays Mining Corp.*, 156 Ariz. 375, 752 P.2d 28, 31 (Ariz.Ct.App.1987) (rejecting subcellular injury as a basis for emotional distress damages); *Schweitzer v. Consolidated Rail Corp.*, 758 F.2d 936, 942 (3d Cir.1985) (subclinical injury resulting from exposure to asbestos is insufficient to constitute actual loss or damage).

With these standards in mind as to how a plaintiff must prove physical injury to recover damages for emotional distress in Maryland, we must determine how such standards apply to recovery of emotional distress damages for fear of contracting cancer. The majority of states allowing recovery for fear of cancer require that a plaintiff sustain a manifested and physical injury to prove an objective and reasonable fear of disease. See, e.g., *Capital Holding Corp. v. Bailey*, 873 S.W.2d 187, 195 (Ky.1994);^{FN56} *Cleary v. Wallace Oil Co.*, 55 A.D.3d 773, 865 N.Y.S.2d 663, 665–66 (N.Y.App.Div.2008) (rejecting plaintiffs' fear of disease claim because there was insufficient evidence of exposure and no evidence of physical manifestation of contamination); *Wolff v. A-One Oil, Inc.*, 216 A.D.2d 291, 627 N.Y.S.2d 788, 789–90 (N.Y.App.Div.1995) (plaintiff must establish a “rational basis” for his fear of developing disease, which “has been construed to mean the clinically demonstrable presence” of the feared disease, specifically, a “physical manifestation” of an asbestos-induced disease);^{FN57} *Capital Holding Corp. v. Bailey*, 873 S.W.2d 187, 195 (Ky.1995).^{FN58}

For these reasons, we hold that to recover emotional distress damages for fear of contracting a disease, a plaintiff must show that (1) he or she was exposed actually to a toxic substance due to the defendant's tortious conduct; (2) which led him or her to fear objectively and reasonably that he or she would contract a disease; and (3) as a result of the objective and reasonable fear, he or she manifested a physical injury capable of objective determination.

B. Appellees Cannot Recover Emotional Distress Damages for Fear of Contracting Cancer

1. No Evidence of Actual Exposure Giving Rise to

Objective Reasonable Fear

[20] As explained above, recovery of emotional distress damages for fear of contracting cancer requires that a plaintiff demonstrate that he or she has been exposed actually to a toxic chemical as a result of the defendant's tortious conduct. Thus, Appellees who did not demonstrate actual exposure to benzene or MTBE stemming from the Jacksonville Exxon leak cannot recover damages for fear of cancer. Here, eighty-eight Appellees recovered damages for emotional distress for fear of contracting cancer, yet did not provide evidence of any detectable contamination in their potable wells, air, or water vapors.^{FN59} In the absence of demonstrable contamination, these Appellees have provided no evidence of actual exposure to toxic chemicals stemming from Exxon's conduct.^{FN60} As a result, these Appellees cannot recover damages for fear of cancer.

2. Insufficient Evidence of Actual Exposure Giving Rise to an Objectively Reasonable Fear

*20 [21] In addition to actual exposure, Appellees must demonstrate an objective, reasonable fear of developing cancer in order to recover emotional distress damages for fear of cancer. A plaintiff may demonstrate an objective reasonable fear by showing that he or she has a rational basis to believe reasonably that cancer is likely to develop as a result of exposure to toxic substances stemming from the defendant's tortious conduct. Here, Appellees contend that proof that the aquifer is contaminated with MTBE and benzene is sufficient to support a claim for emotional distress for fear of cancer, regardless of any actual, demonstrable exposure on an Appellee-specific basis. We determine that Appellees who were exposed actually to MTBE as a result of the Jacksonville Exxon leak (as determined by tests of their potable wells), but at levels below the relevant EPA and MDE action levels, cannot demonstrate an objective, reasonable fear of developing cancer.^{FN61}

[22] For a fear to be objectively reasonable, it must be based on more than mere exposure to a chemical or contaminant of concern. The exposure must be sufficient, based on objective standards, to justify fear of disease. In *Faya*, for example, we noted that there was “current credible evidence of a 95% certainty that one will test positive for the AIDS virus, if at all, within six months after exposure to it.” 329 Md. at 455, 620 A.2d at 337. Thus, we determined that it was only reasonable for the plaintiffs to fear con-

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tracting HIV or AIDS within a limited period of time—specifically, the period of time between discovery of the surgeon's illness, which was over a year after their last contact with him, and when they received a negative HIV test. *Id.* at 455–56, 620 A.2d at 337.

Although individuals are exposed routinely and unfortunately in everyday life to MTBE and other carcinogenic toxins, low levels of exposure, absent a rational basis to support a fear of developing cancer, are not sufficient generally to justify an objectively reasonable fear. Here, similar to the circumstances in *Faya*, there is credible scientific evidence to suggest levels of exposure to benzene and MTBE at which a fear of developing cancer becomes objectively reasonable. The EPA and MDE establish routinely action levels, above which exposure to contaminants is deemed generally to be unsafe for human health. As admitted at trial, the relevant drinking water standards are 5 parts per billion for benzene, and 20 parts per billion ^{FN62} for MTBE. ^{FN63} We therefore determine that in order to have an objectively reasonable fear of developing cancer as a result of water contamination, measurable contamination must meet or exceed the relevant environmental action levels, if applicable, for the allegedly carcinogenic or mutagenic contaminant. As a result, Appellees residing at or occupying properties whose evidence shows test results detecting contamination below five parts per billion of benzene and twenty parts per billion of MTBE offered insufficient evidence to establish an objectively reasonable fear supporting recovery of emotional distress damages for fear of contracting cancer. ^{FN64} We therefore reverse the awards for these Appellees.

3. Legally Insufficient Evidence of Physical Injury Resulting from the Jacksonville Exxon Leak

*21 [23] Only eight Appellees recovering emotional distress damages for fear of cancer offered well test results detecting contamination sufficient to create an objectively reasonable fear of developing cancer. ^{FN65} These Appellees still must prove, however, a physical injury resulting from their objectively reasonable fear. The physical injury requirement contemplates not necessarily a “physical” injury as used in its ordinary sense, but rather “that the injury for which recovery is sought is capable of objective determination.” *Vance*, 286 Md. at 500, 408 A.2d at 733–34. Because the physical injury requirement is intended to guard against feigned claims, *id.* at 500,

408 A.2d at 733, an injury that is capable of objective determination must be supported by sufficient evidence tending to prove both the genuineness of the claims and a causal relationship to the alleged tortious conduct. *Id.* at 502, 408 A.2d at 734.

As we noted in *Vance*, claims for emotional distress need not be supported necessarily by expert medical testimony to establish injury and causation where “the causal connection is clearly apparent from the illness itself and the circumstances surrounding it, or where the cause of the injury relates to matters of common experience, knowledge, or observation of laymen.” *Id.* at 502–03, 408 A.2d at 734–35 (quoting *Wilhelm v. State Traffic Safety Comm'n*, 230 Md. 91, 99, 185 A.2d 715, 719 (1962)); see also *Hunt*, 121 Md.App. at 531, 710 A.2d at 369 (“[A] claim for emotional injury is less likely to succeed if the victim is the sole source of all evidence of emotional injury.”). In *Vance*, for example, we determined that expert testimony was not necessary because the plaintiff's discovery of the true status of her “marriage” and its attendant emotional toll is a matter within the common understanding of a layperson. 286 Md. at 503–04, 408 A.2d at 735. See also Md. R. 5–702 (“Expert testimony may be admitted ... if the court determines that the testimony will assist the trier of fact to understand the evidence or to determine a fact in issue.”). Here, however, the causal connection between the physical injuries alleged and fear resulting from exposure to carcinogenic or mutagenic contaminants is neither clearly apparent, nor within the “common experience, knowledge, or observation of laymen.” See *Vance*, 286 Md. at 502–03, 408 A.2d at 734–35. Thus, in order for Appellees to demonstrate that their alleged physical injury is related causally to their fear of developing cancer as a result of the Exxon leak, expert testimony is necessary.

[24] None of the remaining Appellees, with the exception of Gloria Quinan, presented expert testimony attributing their alleged physical injury to the Jacksonville Exxon leak. Therefore, we reverse the jury awards for emotional distress for fear of contracting cancer to Amy Gumina, Van Ho, Barbara Larrabee, Jon Larrabee, Edward Odend'hal, Nanette Odend'hal, and Anna Walega. ^{FN66}

*22 Only one Appellee demonstrating an objectively reasonable fear of developing cancer, Gloria Quinan, presented expert testimony linking her

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claimed physical injury to the Jacksonville Exxon release. In reviewing Quinan's claims for emotional distress for fear of cancer to determine if there was sufficient evidence to support her claim as a matter of law, we must resolve all conflicts in the evidence in her favor. See Houston v. Safeway Stores, Inc., 346 Md. 503, 521, 697 A.2d 851, 859 (1997) ("Only where reasonable minds cannot differ in the conclusions to be drawn from the evidence, after it has been viewed in the light most favorable to the plaintiff, does the issue in question become one of law for the court and not of fact for the jury." (quoting Pickett v. Haislip, 73 Md.App. 89, 98, 533 A.2d 287, 291 (1987))).

As noted previously, the Court of Special Appeals in Hunt provided guidance for determining whether an injury is capable of objective determination. The evidence offered in support of physical injury "must contain more than mere conclusory statements," and be sufficiently detailed "to give the jury a basis upon which to quantify the injury." Hunt, 121 Md.App. at 531, 710 A.2d at 369. Moreover, because the requirement for physical injury must be viewed objectively, and is designed to protect against feigned claims, a claim for emotional distress damages is more likely to succeed "if the victim is [not] the sole source of all evidence of emotional injury." Id. Lastly, although more severe injuries may be more likely "capable of objective determination," there is no threshold severity requirement for establishing compensable physical injury. Id. at 531, 710 A.2d at 369–70.

In Hunt, the decedent plaintiff,^{FN67} Charles Dell'uomo, offered testimony from three sources in support of his claim for emotional distress damages: his doctor, himself, and the personal representative of his estate. The doctor testified, in essence, that Mr. Dell'uomo was "emotionally upset and ... very skeptical," which the court characterized as "simple, unadorned statements that Mr. Dell'uomo was upset," and thus insufficient to establish an injury capable of objective determination. Id. at 532, 710 A.2d at 370. In reviewing Mr. Dell'uomo's testimony, the court determined that statements like, "I thought I was going to die," and "[my physical problems consisted of] the stress and the aggravation and the worrying about it," were insufficient to render his injury capable of objective determination, id. at 533–34, 710 A.2d at 371, whereas detailed statements regarding "the duration of [his] constipation, the types of activities with which

[his] fatigue interfered, and the incessant nature of [his] sleeplessness would give a jury at least some of the information necessary for quantifying a level of damages attributable to his mental injury." Id. at 535, 710 A.2d at 371. Because the personal representative of Mr. Dell'uomo's estate testified that Mr. Dell'uomo became "extremely tired," "more irritable," stopped walking and accepting invitations to social events, lost his appetite, and became "extremely quiet," the Court of Special Appeals determined that there was sufficient evidence to show a "reasonable basis for [Mr. Dell'uomo's] anxiety and ... render [his] emotional injury capable of objective determination." Id. at 536–37, 710 A.2d at 372.

*23 Here, in support of her claim for emotional distress for fear of contracting cancer, Quinan testified on her own behalf and presented the testimony of Dr. Abdul Malik, a psychiatrist, who examined Quinan.^{FN68} Quinan testified as to the following:

Q: Has the gasoline release affected your emotional state?

A. Yes.

Q: Can you please explain?

A: Well, you know, you get depressed. Anxiety. Headaches. You feel nauseous. Lose your appetite. Don't feel like doing anything. You lose your enthusiasm.

Q: Do you have any concerns for your health and your husband's health?

A: Yes, I do. I'm concerned about cancer or any other things that might develop because not knowing how long—I mean, we were drinking it for all that time and didn't even know it....

* * *

Q: You mentioned a couple of things, but do you know whether or not the fears and concerns that you have have physically manifested themselves in you in any way?

A. Yes....

Q: You talked about depression?

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A. Yes.

Q: Okay. And you talked about lethargy?

A. Yeah. It depends. You start thinking about all of this, and it just gets you so down and then you just lose all your enthusiasm. You don't feel like doing anything.... So, you know, it just gets you down, and it just comes out in all different ways. You lose your appetite. It depends how much you think about it and when you think about it. If you think about it at night, then you don't sleep.

Q. I understand. When did you first begin to feel depressed about the effects of the gasoline release on your family and your home?

A. Well, you know, in the very beginning the concerns made us, you know, gave us, you know, an uneasy feeling and everything, but, when it finally kicked in the fact that we had the contamination, it really did and then I had a rash that wouldn't go away.^{FN69}

Q. When did that start? When did the rash start?

A. It started before May of 2008. I don't know how far before that, but I know May of 2008 I had it.

Q. So after the release?

A. Pardon?

Q. After the gasoline release?

A. After the gasoline release.

Q. How long did you suffer with the rash?

A. Over a year.

Q. Did you try to treat it?

A. Yes. I used all types of prescription topical ointments and creams. I was given a lot. A very potent one by the dermatologist. It did nothing. Nothing took it away until we went on vacation for two weeks, went away and not bathing in the water.

When I came back, it was gone.

Q. And during that approximate year that you were suffering from a rash, did you ever receive any communication from Exxon giving you any information about any potential association between exposure to MTBE and the water and rashes?

A. No.

Q. You mentioned sleeplessness?

A. Yes.

Q. When did you start beginning to have issues with sleeplessness as it relates to your fears and concerns about the gasoline release?

*24 A. We had in the beginning of 2006 and afterwards and they continued but not regularly. I mean, it was a concern and it would bother me, and some nights I couldn't sleep, but after we found out about the contamination, it was going on and on because everything would go through your head. You know, how long have you been drinking it? You know, what is it going to do to us? How is it going to impact our lives?

Q. So over this five year period from 2006 to the present, how often would you say you would have issues of sleeplessness?

A. Sometimes, several nights a week. Sometimes, maybe several times a month.

Q. And you also mentioned headaches?

A. Yes. Same thing.

Q. Same kind—

A. It just depends on how much you let yourself get, I guess, worked up over the whole thing. You know, you try to settle down and then it just gets you again.

Q. ... [O]ver this five year period are you able to tell us would you find yourselves [sic] worked up to the point that would you experience headaches as a result of your fears and concerns relating to the

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gasoline release?

A. Several times a week. Sometimes, it would be a week or so and then you have them again, but would be, you know, several times a week. Several times a month.

Q. You also mentioned a loss of appetite?

A. Yes.

A. Can you talk a little bit about what you mean by that?

A. Well, you just don't feel like eating. You're kind of feeling nauseous. You get upset and then you just don't feel like eating.

Q. Do you feel that way when you're thinking about the gasoline release?

A. Definitely.

Q. How often would you find yourself feeling nauseous and not willing to eat as it relates to your fears and concerns with the gasoline release?

A. Maybe, you know, weekly or a few times a month. I guess several times. I mean, like, a couple days a week or several times a month, you know. Whatever. Like, you might have a few days or a week in between and then it hits you again.

Dr. Malik testified that Quinan was “angry and frustrated and concerned” that she had been drinking and bathing in her well water from 2006 until the first positive detection of contamination of her well in April of 2009.^{FN70} He testified that Quinan “had a rash which started before May of 2008 which [she] never had before ... [which] continued ... until June of 2009 when she went to Florida for one week and South Carolina for one week, so in those two weeks, it—the rash all disappeared after being away from [the] water and has not come back.” Additionally, he testified that Quinan was concerned about her future health:

Q: ... Did you notice anything about her anxiety elements?

A. Yes. She had been drinking and bathing in the contaminated water for several months to years before it was detected in April of 2009, and she had all kinds of problems which disappeared after she was on vacation for two weeks; and her husband also had all kinds of health problems related to [his] stomach, and nothing definitive was diagnosed. And it all disappeared after he started drinking bottled water within two weeks. She was anxious about developing cancer....

*25 Q: Doctor, were you able to reach a diagnosis to a reasonable degree of psychiatric certainty?

A. Yes. She was suffering with anxiety disorder not otherwise specified.

Q: Were you able to determine the cause of her mental disease to a reasonable degree?

A. Yes. It was directly caused by the Exxon spillage.

Q: This did not affect her normal functioning, I take it?

A: No. She has been able to function in her usual ways.

Q: Has it impacted her quality of life and relationships?

A: Yes. She had been drinking bottled water as soon as she learned about the contamination of the water, and she had suffered through a skin condition []; and her husband had suffered through gastrointestinal conditions. Both of them are feeling much better away from the water.

Although the testimony proffered by Quinan and Dr. Malik does not rise to the level of detail observed in *Hunt*, we conclude that the evidence presented was sufficient to create a jury question as to whether Quinan suffered an injury capable of objective determination. Quinan provided testimony regarding the duration and extent of her physical symptoms. Moreover, although much of Dr. Malik's testimony contained conclusory statements which otherwise might be insufficient to establish physical injury, he testified regarding his examination and diagnosis of

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anxiety disorder. Although we recognize that anxiety disorder not impacting normal functioning is less severe than the physical injuries asserted in *Vance*, as the Court of Special Appeals noted in *Hunt*, “[t]here is no severity prong of the *Vance* test.” 121 Md.App. at 531, 710 A.2d at 370. Thus, “although minor emotional injuries may be less likely to produce the kind of evidence that renders an injury capable of objective determination, that does not mean that an emotional injury must reach a certain threshold level of severity before it becomes compensable.” Id. at 531, 710 A.2d at 369–70. Therefore, even though Dr. Malik testified that Quinan remained able to function normally in spite of her diagnosed anxiety disorder, we conclude there is sufficient evidence, considered in the light most favorable to Quinan, to submit her claim to the jury. Therefore, we shall direct remand for Quinan’s claim for emotional distress damages for fear of contracting cancer to the trial court for a new trial.

C. Compensatory Damages for Medical Monitoring 1. Does Maryland Recognize a Right to Recovery for Damages for Medical Monitoring?

Although the trial court permitted nearly every Appellee’s claim for damages for medical monitoring to go to the jury, this Court has not recognized yet a cause of action for the recovery of medical monitoring damages ^{FN71} in Maryland. Exxon contends that the trial court erred in denying its motion for judgment notwithstanding the verdict regarding Appellees’ medical monitoring awards. In considering Exxon’s assertions, we must decide first whether to recognize a right in Maryland to recover damages for medical monitoring. Secondly, we must determine, if we recognize such a claim *vel non*, whether, considering the evidence in this record “taken in the light most favorable to the nonmoving party,” the trial court was legally correct in denying Exxon’s motion for judgment notwithstanding the verdict. Gallagher, 182 Md.App. at 101, 957 A.2d at 632.

*26 The possibility of recovery of damages for medical monitoring in Maryland was raised, but not decided by this Court, in Philip Morris, Inc. v. Angeletti, 358 Md. 689, 779–80, 752 A.2d 200, 250 (2000).^{FN72} In *Angeletti*, we recognized that many courts permit a cause of action for medical monitoring or allow compensation for such as damages in tort actions, and discussed briefly the purpose of recovering damages for medical monitoring and policy concerns associated with this form of recovery. *Id.*

Under such a claim, a plaintiff may recover only the quantifiable costs of “periodic medical examinations necessary to monitor plaintiffs’ health and to facilitate early diagnosis and treatment of disease(s) caused by exposure to chemicals....” Id. at 781, 752 A.2d at 250 (citing Ayers v. Jackson, 106 N.J. 557, 525 A.2d 287, 308 (N.J.1987); In re Paoli R. Yard PCB Litigation (Paoli I), 916 F.2d 829, 849–50 (3d Cir.1990)). These standards for recovering for medical monitoring costs help enforce the common law principle that a defendant must compensate a plaintiff fully for past or present injuries caused by the defendant’s tortious conduct. *See, e.g., Ayers, 525 A.2d at 311–12* (“Compensation for reasonable and necessary medical expenses is consistent with well-accepted legal principles.... 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.”).

We agree now with other jurisdictions that recognize that “exposure itself and the concomitant need for medical testing” is the compensable injury for which recovery of damages for medical monitoring is permitted, Hansen v. Mountain Fuel Supply Co., 858 P.2d 970, 977 (Utah 1993), because such exposure constitutes an “invasion of [a] legally protected interest.” Bower v. Westinghouse Electric Corp., 206 W.Va. 133, 522 S.E.2d 424, 430 (W.Va.1999) (quoting Restatement (Second) of Torts § 7(1) (1964)). Invasion of a specific legally-protected interest in a claim for compensable medical monitoring consists of “a significantly increased risk of contracting a particular disease relative to what would be the case in the absence of exposure.” Id. at 433.

While problems may arise in limiting the potentially expansive class of plaintiffs in medical surveillance awards, *see Metro-North Commuter R.R. Co. v. Buckley, 521 U.S. 424, 442–43, 117 S.Ct. 2113, 2122–23, 138 L.Ed.2d 560, 576 (1997)*, permitting only proven necessary medical costs helps prevent the danger of awarding medical monitoring for speculative injuries, a risk inherent in the area of other common law torts, such as emotional distress.^{FN73} *Id.*

Although in *Angeletti* we considered the possibility that a plaintiff may recover for damages for medical monitoring either as an independent cause of action or as an element of damages, we noted that a “medical monitoring claim may perhaps more accu-

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rately be deemed a remedy rather than a distinct cause of action.” 358 Md. at 786, 752 A.2d at 253. See also Potter v. Firestone Tire & Rubber Co., 6 Cal.4th 965, 25 Cal.Rptr.2d 550, 863 P.2d 795, 823 (Cal.1993) (holding that a defendant's conduct creating the need for future medical monitoring “does not create a new tort. It is simply a compensable item of damage when liability is established under traditional tort theories of recovery.”); James A. Henderson & Aaron D. Twerski, Asbestos Litigation Gone Mad: Exposure-Based Recovery for Increased Risk, Mental Distress, and Medical Monitoring, 53 S.C. L.Rev. 815, 840 (2002) (academic commentators concluded that those states that allow recovery for medical monitoring did not create new causes of action, but rather recognized a new form of tort remedy).

*27 [25] Likewise, our sister jurisdictions that allow recovery for medical monitoring, more often than not, allow such recovery as a remedy, rather than as an independent cause of action. See Xavier v. Philip Morris USA Inc., No. C 10–02067, 2010 U.S. Dist. LEXIS 107959, at *8–*9 (N.D.Cal. Oct. 8, 2010) (dismissing stand-alone medical monitoring claim, but recognizing that California allows a medical monitoring claim as a remedy); Mann v. CSX Transp., Inc., No. 1:07–CV–3512, 2009 U.S. Dist. LEXIS 106433, at *7 (N.D. Ohio Nov. 10, 2009) (medical monitoring recognized as a form of tort damages in Ohio); Duncan v. Northwest Airlines, Inc., No. C98–130Z, 2001 U.S. Dist. LEXIS 18276 (W.D. Wash. Nov. 5, 2001) (declining to create new and independent tort for medical monitoring because flight attendants exposed to second-hand smoke, with present injury, could seek medical monitoring as remedy to a negligence cause of action); Meyer v. Fluor Corp., 220 S.W.3d 712 (Mo.2007) (medical monitoring is a compensable element of damage if liability is demonstrated under traditional tort theories of recovery); Badillo v. American Brands, Inc., 117 Nev. 34, 16 P.3d 435, 440 (Nev.2001) (concluding that remedy of medical monitoring, but not a stand-alone claim, may be available under common law). For these reasons, we hold that a remedy for medical monitoring costs is a compensable element of damage under traditional tort theories of recovery.

2. Burden of Proof for Recovery of Damages for Medical Monitoring

The United States Supreme Court noted that “an exposed plaintiff can recover related reasonable

medical monitoring costs [as an element of damages] if and when he develops symptoms.” Buckley, 521 U.S. at 438, 117 S.Ct. at 2121, 138 L.Ed.2d at 573. By contrast, there is a divided array of states that allow medical monitoring based on different threshold standards. Compare Remson v. Verizon Commc'ns, Inc., No. CV 07–5296, 2009 U.S. Dist. LEXIS 20310 (E.D.N.Y. Mar. 13, 2009) (finding that, in New York, recovery for medical monitoring is allowed as long as the plaintiff alleges exposure to an allegedly toxic chemical and a rational basis for belief of contracting a disease), with Parker v. Brush Wellman, Inc., 377 F.Supp.2d 1290, 1296, 1302 (N.D.Ga.2005) (where plaintiffs claimed a “subclinical” condition due to toxic exposure, but lacked any contemporaneous physiological manifestations, the court concluded that Georgia does not recognize a medical monitoring action without a showing of physical injury). When those costs are deemed “reasonable,” and irrespective of whether actual physical “symptoms” of the toxic substance-induced disease are required to recover such costs, is what we must determine in the present case.

a. “Reasonable and Necessary” Medical Costs

The weight of authority across the country recognizes that recovery for costs of medical monitoring is limited to costs that are necessary and reasonable. The seminal case recognizing compensable damages for medical monitoring seems to be Ayers v. Jackson, 106 N.J. 557, 525 A.2d 287 (N.J.1987). The New Jersey Supreme Court held that a group of plaintiffs could recover medical surveillance costs for toxic exposure after their Township contaminated the town aquifer and consequently their well water, even though no plaintiff had developed symptoms of exposure-related disease that were “quantified” by the evidence, if such monitoring were found to be reasonably necessary. Id. at 312–14. The court articulated certain factors to consider in defining the meaning of “reasonably necessary.”^{FN74} Id. at 312 (noting that the evidence must prove that medical surveillance of the “effect of exposure to toxic chemicals is reasonable and necessary”). Necessity for medical monitoring, however, must be reasonably certain, rather than merely possible. Potter, 25 Cal.Rptr.2d 550, 863 P.2d at 824 (“[T]he cost of medical monitoring is a compensable item of damages where the proofs demonstrate, through reliable medical expert testimony, that the need for future monitoring is a reasonably certain consequence of a plaintiff's toxic exposure and that the recommended monitoring is rea-

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sonable.”). The prime inquiry into the necessity and reasonableness of a plaintiff’s claimed monitoring costs is whether “medical monitoring is, to a *reasonable degree of medical certainty*, necessary in order to diagnose properly the warning signs of disease.” Paoli I, 916 F.2d at 851 (emphasis added). This standard requires, necessarily, medical testimony by a plaintiff’s expert(s).

*28 To determine whether monitoring is reasonably necessary, several courts have established specific multi-factor tests, such as that adopted by the Supreme Court of California:

In determining the reasonableness and necessity of monitoring ... the following factors are relevant: (1) the significance and extent of the plaintiff’s exposure to chemicals; (2) the toxicity of the chemicals; (3) the relative increase in the chance of onset of disease in the exposed plaintiff as a result of the exposure, when compared to (a) the plaintiff’s chances of developing the disease had he or she not been exposed, and (b) the chances of the members of the public at large of developing the disease; (4) the seriousness of the disease for which the plaintiff is at risk; and (5) the clinical value of early detection and diagnosis.

Potter, 863 P.3d at 824–25; see also Paoli I, 916 F.2d at 852 (identifying analogous factors to consider in awarding compensable damages for medical surveillance); ^{FN75} Donovan v. Philip Morris USA, Inc., 455 Mass. 215, 914 N.E.2d 891, 901 (Mass.2009) (“When competent medical testimony establishes that medical monitoring is necessary to detect the potential onset of a serious illness or disease due to physiological changes indicating a substantial increase in risk of harm from exposure to a known hazardous substance, the element of injury and damage will have been satisfied and the cost of that monitoring is recoverable in tort.”).

b. Proving Causation and a “Significantly Increased Risk” are Key to Recovery

Keys to a plaintiff’s recovery are evidence of causation (from the defendant’s tortious conduct) and a *significantly* increased risk of contracting a latent disease. For example, in Theer v. Philip Carey Co., 133 N.J. 610, 628 A.2d 724 (N.J.1993), the New Jersey Supreme Court held that recovery for medical monitoring may be obtained only by plaintiffs who

have “experienced *direct and hence discrete exposure* to a toxic substance and who have [] *suffered an injury or condition resulting from that exposure* and whose risk of cancer [can] be limited and *related specifically and tangibly* to that exposure.” Id. at 733 (emphasis added). Hence, a plaintiff who was exposed to asbestos by laundering her husband’s clothes had no medical monitoring claim because evidence linking any potential risk of cancer to the defendant’s tortious conduct was tenuous; also, the plaintiff was a smoker. Id. Courts have concluded, moreover, that an increased or different monitoring of a latent disease, even due to a preexisting condition caused by a plaintiff’s voluntary conduct, may create entitlement to recover damages, as long as there is reliable evidence that the increased risk is a *direct* and *proximate* result of the exposure to defendant’s tortious conduct. Potter, 25 Cal.Rptr.2d 550, 863 P.2d at 825 n. 27.

Although we recognize that the injury giving rise to an alleged need for medical monitoring costs is the exposure to toxic substances, and that this exposure is an invasion of a legally-protected interest, see Hansen, 858 P.2d at 977, we are wary of damages for speculative claims resting on tenuous proof of risk of disease *attributable* to the type of exposure. In evaluating at “what stage in the evolution of a toxic injury should tort law intercede by requiring the responsible party to pay damages[,]” Ayers, 525 A.2d at 298, we believe that, by its nature, recovery for a *latent* disease due to toxic exposure involves necessarily somewhat nebulous forecasts of a potential risk to develop a disease in the future. We recognize that, because of the “latent nature of most diseases resulting from exposure to toxic substances, ... most toxic-tort plaintiffs cannot establish an immediate physical injury of the type contemplated in traditional tort actions ... [because] the physical injury ... manifests itself years after exposure.” Hansen, 858 P.2d at 977. Requiring quantifiable and reliable proof, however, will assist courts in determining whether causation and significant risk are present in a plaintiff’s prima facie case.

*29 For a fact finder to “ascertain the probability” that the remedy of medical monitoring is appropriate, Paoli I, 916 F.2d at 852, proof of a “*significantly increased risk*” of developing a future disease, based on reliable expert testimony quantifying the risk, is necessary. See id. at 851 (requiring medical expert testimony to demonstrate a plaintiff’s need for reasonable and necessary medical costs); Donovan, 914

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N.E.2d at 901 (“When competent medical testimony establishes that medical monitoring is necessary to detect the potential onset of a serious illness or disease due to physiological changes indicating a substantial increase in risk of harm from exposure to a known hazardous substance, the element of injury and damage will have been satisfied and the cost of that monitoring is recoverable in tort.”). Otherwise, it is difficult for a reasonable fact finder to measure “the relative increase in the chance of onset of disease in the exposed plaintiff as a result of the exposure, when compared to (a) the plaintiff’s chances of developing the disease had he or she not been exposed, and (b) the chances of the members of the public at large of developing the disease.” Potter, 25 Cal.Rptr.2d 550, 863 P.2d at 824–25.

Quantifiable and reliable indicators of risk in developing disease are also helpful to determine a “significant” increase in risk of disease, thus ensuring that the nature and extent of medical monitoring is actually greater than that which should be undertaken by the general population, a key purpose in awarding appropriate medical monitoring damages. Id. at 825 (noting that “there can be no recovery for preventative medical care and checkups to which members of the public at large should prudently submit”).

[26][27] Hence, we conclude that quantifiable, reliable indicia that a defendant’s actions have so increased significantly the plaintiff’s risk of developing a disease are necessary to recover damages for medical monitoring costs. The indicia may be proven by a medical expert’s testimony, particularized to a plaintiff, and demonstrating a reasonable link to toxic exposure. This requirement helps to achieve the objective of medical monitoring—that a defendant must compensate a plaintiff for past or present injuries caused by the defendant—and inhibits damages awards for speculative, and thus unreliable, opinions as to a plaintiff’s potential risk of developing a future disease.

c. A Showing of “Physical Injury” is Not Required

We conclude, as have the majority of our sister jurisdictions, that evidence of physical injury is not required to support costs for medical surveillance. A compelling illustration of why proof of physical injury is not needed for this form of relief is Friends for All Children, Inc. v. Lockheed Aircraft Corp., 746 F.2d 816, 818–19 (D.C.Cir.1984), where recovery for

medical monitoring was permitted, without proof of physical injury, where the defendant caused proximately a present physical manifestation of the plaintiff children who developed brain dysfunctions. The plaintiff organization, on behalf of 149 Vietnamese orphans who survived a plane crash during the evacuation of Vietnam in 1975, sued Lockheed, alleging that because of decompression, as well as the crash, the children suffered from a neurological disorder that was classified generically as Minimal Brain Dysfunction. Id. Initial medical diagnosis trials were conducted for selected children to provide necessary information about probable litigation results. Id. at 820–22. Lockheed did not deny liability for compensatory damages, but disputed that the crash was a cause of the need for medical diagnostic tests. Id.

*30 The federal court rejected the argument that the need for diagnostic examination was not a compensable injury, and affirmed the imposition on Lockheed of liability for diagnostic examination expenses because the need for such examinations was the proximate result of the crash. Id. at 825–26. Even without further proof of injury, the court held, a reasonable need for medical examinations was compensable. Id. at 826. The court held further that a reasonable need for medical examinations was itself compensable, without proof of other injury: “[i]t is difficult to dispute that an individual has an interest in avoiding expensive diagnostic examinations just as he or she has an interest in avoiding physical injury. When a defendant negligently invades this interest, *the injury to which is neither speculative nor resistant to proof*, it is elementary that the defendant should make the plaintiff whole by paying for the examinations.” Id. (emphasis added).

As we discussed earlier, the physical injury a plaintiff suffers in a claim for recovery for medical surveillance costs is the invasion of a legally-protected interest. See Hansen, 858 P.2d at 977. Hence, we believe that, as long as the plaintiff presents proof that the significantly increased risk of contracting a latent disease is not “speculative,” Friends, 746 F.2d at 826, but is instead reasonably certain based on reliable evidence, there is no need that such plaintiff sustain an actual physical harm to recover damages.

d. Administration of Medical Monitoring Award Through an Equitable Fund

We note with approval the recent tendency of

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many courts that award medical monitoring costs to do so by establishing equitably a court-supervised fund, administered by a trustee, at the expense of the defendant. See Exxon Mobil Corp. v. Ford, 204 Md.App. 1, 144, 40 A.3d 514, 598 (2012) (J. Eyler, J., concurring and dissenting in part), *aff'd in part and rev'd in part*, — Md. —, — A.3d — (2013) (“In our view, the alternative that best achieves the goal of medical monitoring is that a court, in the exercise of its equitable powers, can establish a fund, when justified by the evidence, to be administered by a trustee, at the expense of the defendant.”). See also Buckley, 521 U.S. at 441, 117 S.Ct. at 2122, 138 L.Ed.2d at 574. This approach helps ensure that the medical surveillance funds will be used for their intended purpose, while still achieving the objectives of the medical monitoring remedy, for “given the difficulty in precisely estimating the cost of relief to the plaintiffs, any money damages award would run the risk of over-compensating the plaintiffs, and the surest way for the Court to avoid any such inefficiency is to fashion relief through an injunction rather than a money damages award.” Donovan v. Philip Morris USA, Inc., No. 06–12234, 2012 U.S. Dist. LEXIS 37974, at *55 (D.Mass. Mar. 21, 2012). The U.S. Supreme Court assessed the ample support among courts across the country to order an equitable fund to disburse appropriate medical monitoring costs:

*31 [T]he cases authorizing recovery for medical monitoring in the absence of physical injury do not endorse a full-blown, traditional tort law cause of action for lump-sum damages—of the sort that the Court of Appeals seems to have endorsed here. Rather, those courts, while recognizing that medical monitoring costs can amount to a harm that justifies a tort remedy, have suggested, or imposed, special limitations on that remedy. Compare Ayers, [] 525 A.2d at 314 (recommending in future cases creation of “a court-supervised fund to administer medical-surveillance payments”); Hansen, [858 P.2d] at 982 (suggesting insurance mechanism or court-supervised fund as proper remedy); Potter, [] 25 Cal.Rptr.2d 550, 863 P.2d at 825, n. 28 (suggesting that a lump-sum damages award would be inappropriate); Burns, [] 752 P.2d at 34 (holding that lump-sum damages are not appropriate) with, e.g., Honeycutt v. Walden, 294 Ark. 440, 743 S.W.2d 809 (1988) (damages award for future medical expenses made necessary by physical injury are awarded as lump-sum payment) ...

Buckley, 521 U.S. at 440–41, 117 S.Ct. at 2122, 138 L.Ed.2d at 574.

The District Court of Appeals of Florida, holding that future medical monitoring costs are compensable in Florida, determined that a Florida trial court could use its equitable powers to create a fund for medical monitoring recovery, if the plaintiff established a *prima facie* case for recovery. Petito v. A.H. Robbins Co., 750 So.2d 103, 106 (Fla. Dist. Ct. App. 1999). The court outlined specific guidelines for a trial court to follow if it decided that a fund was appropriate, such as: (1) appoint a plan administrator; (2) with the administrator's advice, approve an advisory panel of persons qualified and knowledgeable in the relevant medical field or fields to supervise, among other things, the persons who consume or undergo medication and treatment, and select a list of skilled and neutral examining physicians to perform the medical tests; (3) establish a time frame for those eligible to obtain the monitoring; and, (4) authorize the plan administrator to pay the reasonable amounts of claims based on submitted reports and findings by the monitoring physicians. *Id.* at 107. For these procedures to operate effectively, they “must be tailored to fit the facts in a given case.” Ford, 204 Md.App. at 146, 40 A.3d at 599 (J. Eyler, J., concurring and dissenting in part).

[28][29][30] In sum, we hold that Maryland recognizes a remedy of recovery for medical monitoring costs resulting from exposure to toxic substances resulting from a defendant's tortious conduct. To sustain an award for recovery for medical costs, a plaintiff must show that reasonable medical costs are necessary due to a reasonably certain and significant increased risk of developing a latent disease as a result of exposure to a toxic substance. In awarding relief, a court must consider whether the plaintiff has shown: (1) that the plaintiff was significantly exposed to a proven hazardous substance through the defendant's tortious conduct; (2) that, as a proximate result of significant exposure, the plaintiff suffers a significantly increased risk of contracting a latent disease; (3) that increased risk makes periodic diagnostic medical examinations reasonably necessary; and (4) that monitoring and testing procedures exist which make the early detection and treatment of the disease possible and beneficial.

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*32 To determine what is a “significantly increased risk of contracting a latent disease” for a particular plaintiff, the court may consider quantifiable and reliable medical expert testimony that indicates the plaintiff’s chances of developing the disease had he or she not been exposed, compared to the chances of the members of the public at large of developing the disease. We hold further that, where a plaintiff sustains his or her burden of proof in recovering this form of relief, the court should award medical monitoring costs ordinarily by establishing equitably a fund, administered by a trustee, at the expense of the defendant.

3. Recovery of Medical Monitoring Damages by Appellees in the Present Case

[31] Appellees’ claims for medical monitoring damages suffer from various deficiencies of proof under the tests set out above. Specifically, because Appellees with no detected contamination have not demonstrated sufficiently that they were exposed significantly to a proven hazardous substance, they may not recover damages for medical monitoring.^{FN76} Moreover, as noted above in our discussion of emotional distress damages for fear of contracting cancer, individuals are exposed routinely in everyday life activities to MTBE and its metabolite of concern, formaldehyde. Thus, those Appellees with no demonstrated exposure exceeding the MDE action levels for MTBE and/or benzene are no more at risk of developing a latent disease from these contaminants than the average person—much less suffer a significantly increased risk of developing disease. As a result, Appellees with no demonstrated contamination exceeding the governmental action levels of five and twenty parts per billion for benzene and MTBE, respectively, did not prove as a matter of law that they suffer a significantly increased risk of developing a latent disease justifying an award of damages for medical monitoring. We therefore reverse these judgments.^{FN77}

The remaining Appellees’ potable wells tested at or above the relevant state action levels for benzene and/or MTBE.^{FN78} As we noted above, however, in order for any Appellee to recover damages for medical monitoring, he or she must present expert testimony quantifying his or her risk of developing a latent disease. Specifically, the expert must indicate a particularized, significantly-increased risk of developing a disease in comparison to the general public. Here, in

support of their medical monitoring claims, Appellees presented testimony by medical experts Dr. Kathleen Burns and Dr. Nachman Bratbaur. Dr. Burns testified, in effect, that if an individual is exposed to MTBE or benzene in any dosage or amount, he or she incurs an additional risk of developing cancer.^{FN79} Similarly, Dr. Brautbar opined that plaintiffs exposed to MTBE or benzene contamination in groundwater at greater levels than that to which they would otherwise be exposed through everyday activities possessed a significantly increased risk of developing cancer.^{FN80}

*33 Such testimony is insufficient to establish that Appellees had a significantly increased risk of developing cancer as a result of their alleged exposure to MTBE and benzene. Neither Dr. Brautbar nor Dr. Burns attempted to quantify any individual Appellee’s increased risk of developing cancer. Rather, because Dr. Brautbar and Dr. Burns testified under the assumption that any exposure to MTBE or benzene is unacceptable from a public health standpoint and increases the risk of developing cancer, they offered no Appellee-specific testimony. The level of generalization in this regard presented at trial is insufficient to establish that the remaining Appellees suffered a significantly increased risk of developing cancer as a result of their exposure to MTBE and/or benzene as a consequence of the Exxon leak. Accordingly, we reverse.^{FN81}

III. Compensatory Damages for Injury to Real Property

A. The Proper Measure of Compensatory Damages for Injury to Real Property

As noted earlier, we review the trial court’s denial of Exxon’s motion for judgment notwithstanding the verdict to determine whether it was legally correct. *Scapa Dryer Fabrics*, 418 Md. at 503, 16 A.3d at 163. At the conclusion of the trial, the jury awarded Appellees damages for injury to real property of three principal types: (1) emotional distress for fear of property value loss and fear of loss of use and enjoyment; (2) diminution in value, measured by the difference in value between the day immediately preceding the announcement of the leak and the day immediately subsequent to the announcement of the leak; and (3) loss of use and enjoyment for the period spanning from the day immediately subsequent to the discovery of the leak until the commencement of trial. Exxon challenges these awards as contrary to Maryland law, duplicative, speculative, and grossly exces-

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sive. Specifically, Exxon contends that emotional distress damages for fear of injury to property is not compensable, that Appellees' recovery of damages for both diminution in value and past loss of use and enjoyment constitutes impermissible double compensation, that awards to Appellees not experiencing well contamination were improper and speculative, and that the jury awards were excessive and based on inadmissible expert testimony.

1. Appellees May Not Recover Emotional Distress Damages For Injury to Real Property

[32] The jury awarded approximately one hundred and ninety-five Appellees emotional distress damages for fear of loss of property value and fear of loss of use and enjoyment. Exxon contends that these awards were impermissible. Exxon advances principally three alternative arguments in support of its contention. First, Exxon argues that, in the absence of actionable fraud, Appellees cannot recover for emotional distress as a result of property damage. In the alternative, Exxon maintains that, even if Appellees proved actionable fraud, the emotional distress awards should be reversed as duplicative of the loss of use and enjoyment awards. Lastly, Exxon argues that, of those Appellees recovering damages for emotional distress for fear of loss of property value, approximately one hundred and eighteen did not provide testimony at trial supporting their emotional distress claims.

*34 We need not reach the latter contentions. Ordinarily, as Judge James Eyler of the Court of Special Appeals noted in *Ford*, in the absence of fraud, malice, or like motives, "emotional distress attendant to property damage is not compensable." *Ford*, 204 Md.App. at 101, 40 A.3d at 573 (J. Eyler, J., concurring and dissenting in part). See also *H & R Block, Inc. v. Testerman*, 275 Md. 36, 48-49, 338 A.2d 48, 55 (1975) (stating that "Maryland decisions have generally denied compensation for mental anguish resulting from damage to property"); *Zeigler v. F. Street Corp.*, 248 Md. 223, 226, 236 A.2d 703, 705 (1967) (noting that emotional distress damages attendant to injury to property may be recovered only where there is fraud or malice). Because, as we explained *supra*, we reverse the fraud award in this case,^{FN82} the emotional distress damages related to fear of loss of property value alleged by Appellees are not compensable as a matter of law, and the awards are therefore reversed.^{FN83}

2. Appellees May Recover Damages for Diminution in Value Only

[33] The jury awarded to Appellees, in many instances, damages for both diminution in property value and past loss of use and enjoyment of real property, over Exxon's objection. Prior to trial, Judge Dugan required Appellees to elect between pursuit of damages for diminution in value and prospective loss of use and enjoyment, noting that the forms of relief are duplicative. Appellees elected to pursue damages for diminution in value of real property, rather than prospective loss of use and enjoyment. In addition, however, Judge Dugan permitted Appellees to seek damages for past loss of use and enjoyment,^{FN84} measured as damages for loss of use and enjoyment incurred between the date of the discovery of the leak and the commencement of trial.

Exxon contends that the awards for past loss of use and enjoyment are duplicative of (and subsumed by) the awards for diminution in value, and therefore the trial court erred in permitting recovery of both. Because diminution in value of real property, measured on the date the leak was discovered, encompasses necessarily the lost use and enjoyment of that real property suffered by the property owner from that date forward, Exxon contends that there remains no period of time for which Appellees are eligible for lost use and enjoyment damages. Moreover, Exxon avers that, even if Appellees were entitled to receive both types of damages, the awards for loss of use and enjoyment are excessive because they, in conjunction with the diminution in value damages, exceeded frequently the unimpaired value of the real property. In retort, Appellees contend that their recovery of damages for diminution in value, in addition to past loss of use and enjoyment for the period between the announcement of the leak and the commencement of trial, is consistent with Maryland law. Such an award is neither duplicative nor excessive, as Appellees see it, because the right to use and enjoy one's property exists as a compensable element, independent of the monetary value of real property.

*35 [34][35][36] Assuming that the trial court required properly Appellees to elect between pursuing either diminution in value or prospective loss of use and enjoyment damages, and Appellees were in fact entitled to receive damages for diminution in value,^{FN85} the trial court erred in later permitting Appellees to recover damages for both diminution in value

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and past loss of use and enjoyment. Compensatory damages should be “precisely commensurate with the injury; nothing more, nor less.” Baltimore Belt R.R. Co. v. Sattler, 102 Md. 595, 601, 62 A. 1125, 1127 (1906). Thus, “the general principle upon which compensation for injuries to real property is given is that the plaintiff shall be reimbursed to the extent of his injury.” *Id.* (quoting Redemptorists v. Wenig, 79 Md. 348, 355, 29 A. 667, 668 (1894)). Plaintiffs are entitled to “but one compensation,” and thus may not recover twice for the same injury. Mayor & City Council of Havre de Grace v. Maxa, 177 Md. 168, 182, 9 A.2d 235, 242 (1939).

[37][38] Compensation for injury to real property is dependent generally upon the character of the harm. See, e.g., Hall v. Lovell Regency Homes Ltd. P'ship, 121 Md.App. 1, 23–24, 708 A.2d 344, 355 (1998) (noting that permanent harm to property is measured properly by the permanent diminution in the property's value, while temporary harm may be measured by the decrease in the value of the property's use and enjoyment or by the cost of restoring the property to its unimpaired state). Diminution in value of real property is available generally as the remedy for damages in actions where the injury to real property is permanent in nature. Goldstein v. Potomac Elec. Power Co., 285 Md. 673, 682, 404 A.2d 1064, 1068 (1979). In addition to damages for permanent diminution in value of real property, an individual whose real property has suffered permanent injury may also recover the loss in the “usable value” of his property and any consequential damages incurred, provided that neither is encompassed within the diminution in value. See Maxa, 177 Md. at 182–83, 9 A.2d at 242 (permitting a property owner to collect damages for diminution in value as a result of his property's loss of water access, in addition to the consequential damages incurred by plaintiff for having to store his boat in an alternate location); Restatement (Second) of Torts § 929 Cmt. d (noting that a plaintiff may recover loss of use and enjoyment damages, in addition to diminution in value, provided that the loss of use and enjoyment award is not encompassed within the diminution in value of the real property).

[39][40] Diminution in value damages are appropriate where the injury is considered permanent because such damages compensate presumably the property owner fully for the injury to his or her land and improvements. Damages for diminution in value

are determined by calculating the difference between the fair market value of the property immediately preceding the harm and the fair market value of the property immediately following the harm. The fair market value of property in Maryland is generally the “price as of the valuation date for the highest and best use of the property which a [seller], willing but not obligated to sell, would accept for the property, and which a purchaser, willing but not obligated to buy, would pay....” Md.Code Ann. (1974, 2010 Repl.Vol.) § 12–105(b) of the Real Property Article; see also Pumphrey v. State Roads Comm'n, 175 Md. 498, 506, 2 A.2d 668, 671 (1938) (“Market value is defined as the price which an owner willing but not obliged to sell would accept for the property and which a buyer willing but not obliged to buy would pay therefor.”).

*36 The definition of fair market value suggests that an agreement as to price between the prospective buyer and prospective seller necessarily takes into account any known defects or deleterious conditions in the property.^{FN86} Here, for example, fair market value as determined immediately after public announcement of the gasoline leak would rely necessarily on the highest and best price that a willing purchaser would pay—and thus, would consider presumably not only the features of the individual property, but also, among other things, the existence of a nearby underground gasoline leak, the reliance of the property on well water, the likelihood of ongoing and future remediation activities and potential resulting disturbances, and the possibility that the tap water may be inappropriate or undesirable for consumption or other normal household or business use.^{FN87} Because fair market value as determined immediately following the announcement of the gasoline leak would take presumably these factors into account prospectively, these inconveniences constitute, for Appellees, part of the permanent diminution in value of their properties.^{FN88}

[41] Owners of real property, however, are not precluded necessarily from recovering both permanent diminution in value and loss of use and enjoyment damages, see Maxa, 177 Md. at 182–83, 9 A.2d at 242, provided that the injuries for which recovery is sought do not overlap, so as to result in duplicative compensation. See *id.*; Restatement (Second) of Torts § 929 Cmt. d. Appellees claim that, in addition to diminution in value, they are entitled to recoup damages for injury to property as past loss of use and

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enjoyment for the period spanning from the date of the injury through the commencement of the trial. To permit Appellees to recover for these injuries, as a measure of the loss in monetary value of their home, as well as in past loss of use and enjoyment is, however, to permit recovery twice for the same injury on the record of this case.

In *Mayor & City Council of Havre de Grace v. Maxa*, we considered whether an individual suffering permanent injury to property by virtue of a town dredging improperly fill material and depositing it onto his property (cutting off his water frontage and access) could recover damages for loss of “usable value” in addition to diminution in market value. 177 Md. at 182–83, 9 A.2d at 242. Noting that an individual may not recover twice for the same injury, but that an individual is entitled to “complete” compensation, we permitted recovery of damages for loss in market value as well as loss in “usable value.” *Id.* We defined “usable value” as “the personal enjoyment and use by the plaintiffs as occupiers of the premises, independently of the difference in market value.” *Id.* at 182, 9 A.2d at 242. In *Maxa*, the plaintiff was permitted to recover, as loss in “usable value,” boat storage and wharfage fees, which constituted an additional expense that the plaintiff was forced to bear in order to obtain the same benefit from his property from what he was deprived of by the defendant's conduct. Thus, the plaintiff recovered damages for diminution in value, as well as loss of use and enjoyment in the form of consequential damages—as an additional expense incurred by the plaintiff as a direct result of the defendant's tortious conduct.

*37 In *Hall v. Lovell Regency Homes*, the Court of Special Appeals determined that the plaintiffs could not recover both diminution in value and loss of use and enjoyment damages, based on breach of contract, caused by drainage problems left behind by their builder's construction of the subdivision and their homes. 121 Md.App. at 25, 708 A.2d at 356. The plaintiff homeowners in *Hall* sought damages for diminution in value as a result of damage done essentially to their basements, as well as loss of use and enjoyment based on the following:

The type of loss that they can't use their basements. Its [sic] the type of loss that they have a lot of tension between the spouse and the husband. They don't enjoy their home when they walk in there and

think about what the fungus might be in the basement or think about in a few months when the winter comes the water table is coming up again, that they don't enjoy being there.

Id. Because the alleged loss of use and enjoyment was, in effect, the same as the condition that diminished the market value of their properties, the court determined that “[t]he damages the homeowners were seeking for the loss of use of their basements (and their yards) were subsumed in and were not distinguishable from the damages that they were seeking for loss in fair market value of their properties.” *Id.*

Although Appellees' claims differ qualitatively from those in *Hall*, in that Appellees suffered injury as a result of Exxon's tortious, rather than contractual, wrongdoing, the principle set forth in both *Hall* and *Maxa* applies to the present case. Appellees may not recover twice for the same injury. Testimony by Appellees reveals that their claims for loss of use and enjoyment revolve largely around their inability to use their well water for customary purposes and the emotional toll and stress attendant to such a disruption.^{FN89} Specifically, Appellees noted that they reduced their outdoor activities, including gardening and swimming, reduced the frequency and length of showers and baths, entertained less or worried about potential contamination impacting visitors, drank bottled water, and endured noise and other disturbance emanating from the remediation activities. We fail to see, however, how the injury alleged is distinguishable from the injury constituting the diminution in value.

Unlike the plaintiff in *Maxa*, who recovered consequential damages for loss of use and enjoyment resulting from his payment for alternative boat storage charges—a defined expense caused directly by the defendant and not encompassed necessarily within the value and expected use of the home itself—the contentions here are, like in *Hall*, largely subsumed within the claim for diminution in market value.^{FN90} Appellees allege loss of use and enjoyment due to their inability to use their water, but their homes are diminished in value precisely because their water is contaminated, where evidence supports that conclusion, and the property's use is therefore circumscribed. Appellees argue that noise from remediation activities disturbed their use and enjoyment, but such activities, too, diminished the market value of their property. Thus, their alleged loss of use and enjoyment damages

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are “not distinguishable from” and “subsumed in” their claim for diminution in value, and presumably, the impaired market values of their respective homes reflects the injury. Thus, to the extent that Appellees pleaded and proved at trial an incidental cost that they were forced to bear to obtain or regain a benefit provided previously to them by their property, akin to the boat storage and wharfage charges incurred by the plaintiff in *Maxa*, such damages would be recoverable.^{FN91} In the absence of such proof, however, Appellees are not entitled to any damages for loss of use and enjoyment. Allowing Appellees to recover both, then, constitutes an impermissible double recovery. Because Appellees elected at trial to pursue damages for diminution in value, we therefore reverse the trial court's award of damages for loss of use and enjoyment of real property to all Appellees who pursued damages for both diminution in value and loss of use and enjoyment. Thus, we need not consider whether the damages awarded by the jury for past loss of use and enjoyment are excessive.

3. Plaintiffs With No Detected Contamination May Not Recover Property Damages

*38 The potable wells on the properties of approximately sixty-five Appellees or Appellee families did not test positive for either benzene or MTBE contamination as of the time of trial.^{FN92} Nonetheless, these Appellees recovered property damages stemming from the leak, predicated on expert testimony produced at trial predicting probable or possible contamination appearing during the next thirty years based on the prevailing hydrogeology of the region. Exxon argues primarily that the expert testimony predicting the flow of contamination over the next thirty years was speculative, and thus should not have been admitted. Alternatively, Exxon argues that, despite this expert testimony, in the absence of present proof of contamination, these Appellees may not recover property damages because they cannot satisfy the elements necessary to maintain a cause of action in negligence, nuisance, trespass, or strict liability and prove legal injury. By contrast, Appellees contend that the trial court properly awarded damages to the “non-detect” Appellees because the general contamination of the aquifer from which Appellees draw their water constitutes a substantial interference with a property interest. We consider each of the four theories asserted by Appellees for recovery for damage to property—trespass, nuisance, strict liability for abnormally dangerous activities, and negligence—to determine whether the non-detect Appellees may

recover damages for injury to real property.^{FN93}

a. Trespass

[42][43] Appellees contend that the mere existence of any contamination in the aquifer from which the non-detect Appellees draw their water permits the non-detect Appellees to recover damages for injury to property on a theory of trespass, by virtue of the potential for future detected contamination. Appellees are mistaken. An action for trespass may lie “[w]hen a defendant interferes with a plaintiff's interest in the exclusive possession of the land by entering or causing something to enter the land.” *Rosenblatt v. Exxon Co., U.S.A.*, 335 Md. 58, 78, 642 A.2d 180, 189 (1994). Thus, recovery for trespass requires that the defendant must have entered or caused something harmful or noxious to enter onto the plaintiff's land. *See, e.g., Toy v. Atlantic Gulf & Pacific Co.*, 176 Md. 197, 205–06, 4 A.2d 757, 761–62 (1939) (noting that because the premises of the plaintiffs was not physically invaded, an action in trespass cannot lie). Here, the non-detect Appellees failed to demonstrate any physical intrusion of their land. General contamination of an aquifer that may or may not reach a given Appellee's property at an undetermined point in the future is not sufficient to prove invasion of property. Thus, the non-detect Appellees could not recover, at the time of trial, damages for diminution in value of property based on a theory of trespass.

b. Nuisance

[44][45][46] Exxon contends that the non-detect Appellees may not recover damages for diminution in value under a theory of nuisance because the interference with their properties is not substantial. A cause of action for nuisance does not require present proof of contamination. *See Yarema*, 69 Md.App. at 147–49, 515 A.2d at 1003–04. Private nuisance is “a nontrespassory invasion of another's interest in the private use and enjoyment of land.” *Wietzke v. Chesapeake Conf. Ass'n*, 421 Md. 355, 374, 26 A.3d 931, 943 (2011) (quoting *Rosenblatt*, 335 Md. at 80, 642 A.2d at 190 (quoting *Restatement (Second) of Torts* § 821D)). Not every interference with a plaintiff's use and enjoyment of land, however, will support a cause of action for nuisance. *WSSC*, 330 Md. at 143, 662 A.2d at 749 (citing *Adams v. Michael*, 38 Md. 123, 126 (1873)). *See Wietzke*, 421 Md. at 382–83, 26 A.3d at 948 (noting that a finding of nuisance involves “a balance of the competing property interests at stake”). To succeed on a nuisance claim, a plaintiff must es-

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establish an unreasonable and substantial interference with his or her use and enjoyment of his or her property, such that the injury is “of such a character as to diminish materially the value of the property as a dwelling ... and seriously interfere with the ordinary comfort and enjoyment of it.” *WSSC*, 330 Md. at 143–44, 662 A.2d at 759 (quoting *Slaird v. Klewers*, 260 Md. 2, 9, 271 A.2d 345, 348 (1970)).

*39 In *Exxon Corp. v. Yarema*, the Court of Special Appeals considered whether property owners, who had not demonstrated any physical injury to property from contamination resulting from a gasoline leak, could recover in nuisance despite the absence of tangible or physical harm. 69 Md.App. 124, 515 A.2d 990. Noting that Maryland courts permitted recovery for nuisance resulting from the intangible emanation of sound, see, e.g., *Gorman v. Sabo*, 210 Md. 155, 122 A.2d 475 (1956); *Meadowbrook Swimming Club, Inc. v. Albert*, 173 Md. 641, 197 A. 146 (1938), and the threat of future harm related to nearby storage of explosives, see *Hendrickson v. Standard Oil Co.*, 126 Md. 577, 95 A. 153 (1915), the court determined that the gravamen of a nuisance claim rests not on a tangible invasion of property, but rather on the disturbance and interference in use and enjoyment of property resulting from a defendant's actions. *Yarema*, 69 Md.App. at 147–49, 516 A.2d at 1003–04. In so holding, the *Yarema* court emphasized that, despite there being no requirement to demonstrate physical injury, a plaintiff must show nonetheless that the defendant's interference with the plaintiff's property rights, tangible or intangible, is substantial in order to recover for nuisance. *Id.* at 151–52, 516 A.2d at 1004. Thus, mere diminution of property value, in the absence of a demonstrable tortious injury, is not sufficient to support a cause of action for nuisance. *Id.* at 151, 516 A.2d at 1004.

In order to get to the jury on their claimed cause of action in nuisance, therefore, Appellees without demonstrable contamination were obliged to establish that Exxon's tortious actions unreasonably and substantially interfered with their use and enjoyment of their properties. In *Yarema*, the court determined that the property owners demonstrated a substantial interference due to the “crippling restrictions” imposed on the property owners by Baltimore County government officials. 69 Md.App. at 153, 516 A.2d at 1005. Specifically, owners of contaminated and surrounding non-contaminated properties were forbidden from

using their water, constructing homes, or selling their land. *Id.* Thus, the *Yarema* court distinguished the plaintiffs' injury from cases in which only the reputation of the plaintiffs' land was harmed as a result of the defendant's actions, see, e.g., *McGaw v. Harrison*, 259 S.W.2d 457, 458 (Ky.1953) (a cemetery did not constitute a nuisance “merely because it is a constant reminder of death and has a depressing influence on the minds of persons who observe it, or because it tends to depreciate the value of property in the neighborhood, or is offensive to the aesthetic sense of the adjoining proprietor”); *Gray v. Southern Facilities, Inc.*, 256 S.C. 558, 183 S.E.2d 438, 445 (S.C.1971) (no recovery for nuisance when the “claim for damages is predicated upon an asserted diminution in market value resulting, not from any physical injury, but from a psychological factor, in that prospective buyers allegedly would be reluctant to purchase the property due to the fear of a similar occurrence in the future”). *Yarema*, 69 Md.App. at 152–53, 516 A.2d at 1004–05.

*40 Here, however, although there is no dispute that any interference with Appellees' properties by Exxon was unreasonable, there is little to suggest that Appellees with non-detect results experienced a substantial interference. Unlike the plaintiffs in *Yarema*, the gravamen of Appellees' complaints consist largely of relatively minor disturbances and stigma impacts that are not comparable to the severe restrictions placed on the *Yarema* plaintiffs. Although interference with the use and enjoyment of property, in the absence of physical impact, need not rise necessarily to the level of the restrictions in *Yarema* to constitute a nuisance, the disturbances reported in this case fall well on the opposite end of the continuum and are insufficient to maintain a nuisance action. For example, most non-detect Appellees complain primarily of using bottled water or Brita filters, entertaining in and about their homes less than expected, reducing the frequency of use of outdoor spaces, and taking shorter showers and baths. Such Appellees were not deprived, however, of the use of significant portions of their property, nor was the availability of their properties for their customary uses impaired substantially.

Moreover, Appellees' adjustments in the use of their properties appear to derive not from Exxon's actual interference with their property, but rather from their fear of contamination and its possible impacts. In order to recover for nuisance, however, a plaintiff

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must establish that any adjustments he, she or it makes in the use of his, her, or its property as a result of the defendant's tortious conduct are objectively reasonable. *See, e.g., Gorman*, 210 Md. at 159, 122 A.2d at 477 (noting that, to recover for nuisance, the disturbance alleged must be “offensive or inconvenient to the normal person”). As noted above in our discussion of fear of contracting cancer, however, these Appellees' fear of future contamination and resultant effects thus far is not objectively reasonable. They have no detected contamination, nor been advised that their water is unsafe for use. Unlike the plaintiffs in *Yarema*, Appellees have not received communication from governmental entities that would lead them to believe reasonably that alteration of water use is necessary to protect their health. Thus, in the absence of physical injury to real property resulting from Exxon's actions, Appellees must demonstrate more than modest adjustments in their use of their real property resulting from the leak in order to establish nuisance. Because this category of Appellees have not demonstrated that Exxon's interference with the use and enjoyment of their land was substantial, they may not recover damages for diminution in value of real property on the grounds that Exxon's actions constituted a nuisance.

c. Negligence and Strict Liability

[47] The *Yarema* court concluded also that no proof of physical harm to property is required to recover under a negligence or strict liability theory.^{FN94} 69 Md.App. at 153–55, 516 A.2d at 1005–06. In reaching this conclusion, the Court of Special Appeals relied principally on *Toy v. Atlantic Gulf & Pacific Company*, 176 Md. 197, 4 A.2d 757 (1939), where this Court considered whether a defendant could be held liable for negligence despite the absence of physical invasion of property. *Yarema*, 69 Md.App. at 155, 516 A.2d at 1006. In *Toy*, the plaintiffs sought recovery for the loss of water access and use of a carp pond on their property resulting from obstruction of a navigable creek following dredging operations performed by the defendant. We noted that, because the destruction of the creek “greatly diminished in value the property of the Plaintiffs, ... [it] was the cause of a particular and special injury for which an action will lie,” despite the lack of physical invasion of property owned by the plaintiffs. *Toy*, 176 Md. at 207, 4 A.2d at 763. Because plaintiffs had suffered damages as a result of the obstruction of the navigable creek—specifically, they could no longer access their property via boat, nor control the level of water necessary to sustain the carp

in their pond—we determined that plaintiffs alleged a sufficient injury to land in order to recover, provided that they could establish a wrongful act on the part of the defendant.^{FN95} *Id.* at 207–08, 4 A.2d at 762–63.

*41 The alleged injury to the non-detect Appellees' properties here, however, is different in kind than that suffered by the plaintiffs in *Toy*. In *Toy*, the defendant's actions deprived the plaintiffs of substantial benefits of their property—specifically, their right of access by water and the use and enjoyment of the carp pond on their property. *Id.* at 207, 4 A.2d at 762–63. The non-detect Appellees here, however, have proven no analogous injury. In the absence of direct evidence of physical injury, Appellees must show more than a possibility of future contamination or mere annoyance in order to recover. Although we do not determine expressly that it need rise to the level of the interference in *Yarema* or *Toy*, there is insufficient evidence on which to base recovery for the non-detect Appellees on the record of this case. The diminution in real property value suffered by these Appellees is, without more, *damnum absque injuria*—a loss without legal injury.

4. Remaining Loss of Use and Enjoyment Awards

It appears to us that only four Appellees may maintain a claim for loss of use and enjoyment of real property: Amy Gumina, Van Ho, and Leslie and Timothy Tripp. Exxon conceded that it was liable to Ms. Ho and to the Tripp family for compensatory damages, but did not specify which type of damages.^{FN96} Ms. Ho leased her property from a landlord, who was not a named plaintiff in either this case or *Ford*. Ms. Gumina and the Tripps, who have each sold their properties subsequent to the announcement of the leak, were owners of real property at the time of the leak and that tested positive for contamination during their period of occupancy in their properties. None of these four named Appellees claimed damages for diminution in value.

Exxon asserts that the loss of use and enjoyment awards are excessive and that the trial court should have granted its motion for a new trial and/or remittitur. We review the trial court's denial of a motion for a new trial and/or remittitur under an abuse of discretion standard. *Merritt*, 367 Md. at 28, 785 A.2d at 763. As we noted, we will reverse a trial court's denial of a motion for remittitur only where the verdict is “‘grossly excessive’ or ‘shocks the conscience of the

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court.’ “ *Banegura v. Taylor*, 312 Md. 609, 624, 541 A.2d 969, 976 (1988) (citations omitted).

[48][49] Compensatory damages awards “attempt to make the plaintiff whole again by monetary compensation.” *Yarema*, 69 Md.App. at 137, 516 A.2d at 997. Although, as the Court of Special Appeals noted in *Yaffe v. Scarlett Place Residential Condo., Inc.*, determining damages for loss of use and enjoyment “must be flexible and based on the factual circumstances of each case,” 205 Md.App. 429, 450, 45 A.3d 844, 856 (2012), such damages must also be capable generally of reasonable measurement, rather than purely speculative. See *McAlister v. Carl*, 233 Md. 446, 455, 197 A.2d 140, 145 (1963).

[50][51] Although we recognize that an interest in property may be composed of a “bundle of rights” and is thus not determinate, see *Weems v. County Comm’rs*, 397 Md. 606, 618–24, 919 A.2d 77, 85–88 (2007) (discussing an individual’s right to compensation “for the taking of ... [a] ‘stick’ from [his or her] bundle of rights”), plaintiffs may not receive generally damages for loss of use and enjoyment of real property exceeding the pre-injury fair market value of the property. See generally *Regal Constr. Co. v. West Lanham Hills Citizen’s Assoc.*, 256 Md. 302, 305, 260 A.2d 82, 84 (1970) (noting that restoration damages exceeding the pre-impairment value of the home are not permitted generally, but may be recovered only where the owner establishes a “reason personal for restoring the original condition”). Even though compensatory damages are intended to make the plaintiff whole, see *Sattler*, 102 Md. at 601, 62 A. at 1127; *Yarema*, 69 Md.App. at 137, 516 A.2d at 997, they are not intended to grant to the plaintiff a windfall as a result of the defendant’s tortious conduct. Thus, an award for compensatory damages must be anchored to a rational basis on which to ensure that the awards are not merely speculative. See *McAlister*, 233 Md. at 455, 197 A.2d at 145 (noting, while considering a claim for loss of enjoyment of life, the difficulty in laying down a “hard and fast rule and to draw a clear and sharp line of demarcation between damages which are purely speculative and damages which are capable of some reasonable measurement”). In the context of damages for loss of use and enjoyment of real property, we determine that loss of use and enjoyment of real property cannot exceed the fair market, unimpaired value of the property at issue.

*42 [52] We affirm the awards for loss of use and enjoyment as to Ms. Gumina and Leslie and Timothy Tripp. The fair market value of Ms. Gumina’s unimpaired property was, as determined by Appellees’ expert, \$370,000. Ms. Gumina testified that, because her water made her skin itchy and had an odor that burned her nostrils, she showered at an alternate location, avoided consumption of her well water, and changed her gardening habits. Additionally, she testified that she could no longer maintain koi fish in her pond, and that her cooking pots and bathtub began to stain. Ms. Gumina received, for her approximately fourteen months’ residency, \$250,000 in compensatory damages for loss of use and enjoyment.

[53] Similarly, Appellees’ expert determined that the unimpaired value of the Tripps’ property was \$730,000. Mr. and Mrs. Tripp testified that, as a result of the gasoline leak, they used bottled water, stopped using their Jacuzzi and pool, stopped doing yardwork, showered outside for a time, and suffered from noise and odors relating to remediation activities. Mr. and Mrs. Tripp each recovered \$350,000 in damages for loss of use and enjoyment, thus totaling \$700,000—\$30,000 less than the unimpaired value of their home. Although Ms. Gumina and the Tripps’ compensatory damage awards approach very nearly the unimpaired market value of their respective properties, they do not violate the standards discussed above. Thus, while acknowledging that Ms. Gumina and the Tripps resided in the contaminated properties for only limited amounts of time, we do not think the awards are unsupported by the evidence, nor do they shock this Court’s conscience. Thus, we decline to substitute our judgment for that of the jury.

[54] As to Ms. Ho, Exxon challenges the facial excessiveness of the award for loss of use and enjoyment, although it admitted liability. Ms. Ho operates a nail and hair salon in a property located directly adjacent to the Jacksonville Exxon station. Ms. Ho provided no evidence regarding the unimpaired market value of her salon as an ongoing business,^{FN97} and thus we do not have a rational basis, on appeal, upon which to determine whether her award was excessive. Moreover, Ms. Ho testified that the remediation efforts and related noise impacted negatively her business, and that the use of bottled water to provide service to her customers was extremely difficult in practice. Although difficult, she stated that it was necessary because some customers told her that they would

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no longer patronize her salon if she discontinued the use of bottled water. She testified that, following the announcement of the leak, her business has dropped off by an average of \$3,000 to \$4,000 per year, lost twenty to thirty percent of its customers, and required the addition of hair services and related investments (such as the purchase of appropriate chairs) to remain in business. Ms. Ho testified that she shortened her operating hours during the evening as a result of her fears of the men performing remediation activities nearby. Additionally, Ms. Ho testified that the testing of the POET system in her building was inconvenient, the nearby monitoring well was noisy, and that the area outside surrounding the Exxon station (and her adjacent business) was chaotic.

*43 We determine that, in light of the evidence provided at trial, the \$1.6 million loss of use and enjoyment award to Ms. Ho was too speculative and thus, denial of the request for a new trial as to Ms. Ho's claim was an abuse of discretion. As noted above, awards for loss of use and enjoyment may not exceed the unimpaired market value of the property at issue. Without evidence of the pre-leak, unimpaired market value of the ongoing business of the salon operated by Ms. Ho, we cannot determine appropriately whether the jury's award was premised on a rational basis. Although we are sympathetic to the inconveniences suffered by Ms. Ho, an award of \$1.6 million was not justified properly, based on the evidence of a discomfort, annoyance, and a \$3,000–\$4,000 per year loss in business. We therefore reverse her verdict and direct remand of her claim for a new trial.

B. Admissibility of Testimony of Dr. Kilpatrick to Establish Diminution in Value of Real Property

[55][56] Exxon contends that the trial court admitted impermissibly the testimony of Dr. John Kilpatrick, Appellees' real property valuation expert witness. “[T]he admissibility of expert testimony is a matter largely within the discretion of the trial court and its action will seldom constitute ground for reversal.” *Radman v. Harold*, 279 Md. 167, 173, 367 A.2d 472, 476 (1977). Thus, the admissibility of expert opinion “is within the sound discretion of the trial judge and will not be disturbed on appeal unless clearly erroneous.” *Blackwell v. Wyeth*, 408 Md. 575, 618, 971 A.2d 235, 261 (2009) (quoting *Wilson v. State*, 370 Md. 191, 200, 803 A.2d 1034, 1039 (2002)); see also *Radman*, 269 Md. at 173, 367 A.2d at 476 (“[I]t is well settled ... that the trial court's de-

termination [regarding expert qualification] ... may be reversed if it is founded on an error of law or some serious mistake, or if the trial court clearly abused its discretion.”). Therefore, we must determine whether the trial court abused its discretion in admitting the expert testimony of Dr. Kilpatrick.^{FN98}

[57] Expert testimony is required ordinarily to establish diminution in property value resulting from environmental contamination. See *Ford*, 204 Md.App. at 151, 241–42, 40 A.3d at 602, 654 (J. Eyster, J., concurring and dissenting in part, and Graeff, J., concurring); *Hous. Auth. of City of New Brunswick v. Suydam Investors, LLC*, 355 N.J.Super. 530, 810 A.2d 1137, 1150 (N.J.Super.Ct.App.Div.2002) (“[T]he effect of environmental contamination upon a property's value must be determined on the basis of expert appraisal evidence.”), *aff'd in part and rev'd in part on other grounds*, 177 N.J. 2, 826 A.2d 673 (N.J.2003). The admissibility of expert testimony is examined generally under Maryland Rule 5–702, which requires the court to make three determinations regarding an expert's opinion. Specifically, the court must determine that (1) the witness is qualified as an expert by knowledge, skill, experience, training, or education; (2) the subject matter is appropriate for expert testimony; and (3) a sufficient factual basis exists to support the expert's opinion. Md. R. 5–702.

*44 [58] As the Court of Special Appeals noted in *Giant Food, Inc. v. Booker*, “simply because a witness has been tendered and qualified as an expert in a particular occupation or profession, it does not follow that the expert may render an unbridled opinion, which does not otherwise comport with Md. Rule 5–702.” 152 Md.App. 166, 182–83, 831 A.2d 481, 490 (2003). Rather, an expert's opinion must be grounded in sufficient facts, such that it constitutes more than mere speculation or conjecture, and reflect the use of “reliable principles and methodology in support of the expert's conclusions.” *Id.*; see also *CSX Transp., Inc.*, 159 Md.App. at 189, 858 A.2d at 1063 (noting that the third factor of Maryland Rule 5–702 encompasses the two sub-issues of sufficient factual basis and reliable methodology). Here, Exxon challenges the trial court's admission of Dr. Kilpatrick's expert testimony under only the third requirement, contending that (1) the methodology underlying his estimates as to diminution in value is unreliable (as reflected in Exxon's *Frye-Reed* challenge); and (2) the testimony lacked a sufficient factual basis because Dr. Kilpatrick failed to

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take into account actual comparable real estate sales in the area following the leak.^{FN99}

In developing his “impaired” valuation of Appellees’ residential properties, Dr. Kilpatrick used three primary methods: (1) meta-analysis derived from an article published by Dr. Robert Simons; (2) case studies, including jury verdicts and settlements from around the country (including *Ford*);^{FN100} and (3) a contingent valuation telephone survey designed by Dr. Simons, in which respondents were asked what they would be willing to pay for a hypothetical house with MTBE well water contamination. Dr. Kilpatrick did not rely on comparable sales data, despite numerous sales of residential properties in the relevant Jacksonville area following the announcement of the leak, opining that the market was unreliable and the buyers uninformed perhaps. Thus, Dr. Kilpatrick concluded, as a blanket proposition, that each of the Appellees’ properties suffered a 60% permanent diminution in value as of 16 February 2006—regardless of the distance of the property from the emanating gasoline station^{FN101} and whether, and in what amount, the wells on the properties tested positive for MTBE or benzene contamination. Exxon contends that Dr. Kilpatrick’s methodology was faulty, and claims that he should have considered the comparable sales data of the nearly 180 real estate sales that occurred in Jacksonville between the leak and 2008.^{FN102} We agree with Exxon’s points. Because we determine that Dr. Kilpatrick’s methodology was faulty, for failing to consider comparable sales data, we do not consider here the validity of the use of the three alternative methods utilized in his report.

Appraisals of fair market value are the most common method of establishing the value of real property. Comparable sales are often utilized in determining fair market value, and “ha[ve] long been accepted in Maryland.” *Bern-Shaw Ltd. P’ship v. Mayor & City Council of Balt.*, 377 Md. 277, 289, 833 A.2d 502, 509 (2003) (citing *Brinsfield v. Mayor & City Council of Balt.*, 236 Md. 66, 202 A.2d 335 (1964)). While Maryland law does not compel the use of comparable sales data, to the exclusion of all other methodologies, a real estate appraisal expert must proffer a reasonable justification for ignoring market data where it is available. Here, there was ample actual market data from which a valuation opinion (baseline or otherwise) could have been made, had Dr. Kilpatrick chosen to use it. Any adjustments could have

been explained and justified. Thus, to discard market data, Dr. Kilpatrick had to provide a reasonable justification explaining the unsuitability or unreliability of the comparable sales data in the Jacksonville area.

*45 Dr. Kilpatrick did not discard the use of comparable sales data generally. In fact, he measured the value of plaintiffs’ properties prior to the leak using actual transactional data. He opined, however, that the post-leak value of the properties at issue could not be calculated principally using comparable sales data because of the inherent unreliability of the comparable sales data in the post-leak Jacksonville community. In trying to establish this unreliability, Dr. Kilpatrick’s report advanced a nuanced distinction between “market value” and “market price.” Specifically, Dr. Kilpatrick stated that market value represents the true value of the property where the buyer and seller possess perfect and utterly complete information. Market price, by contrast, does not necessarily reflect perfect information. Because of the possibility that the buyer may be uninformed, Dr. Kilpatrick asserts that the market price of real estate reflects an artificial inflation over the market value. Here, Dr. Kilpatrick determined that the transactional data could not be relied upon because the sales in Jacksonville represented the market price, rather than the market value, stating that “disclosure of the ExxonMobil spill, and the risks of latent defects stemming from that spill, is not occurring in a reasonable fashion. The lack of information to buyers is creating market inefficiencies and thus sales transactions that do not represent market value.”

Dr. Kilpatrick based his assessment of unreliability on informal interviews and surveys of real estate agents. These interviews, however, belie Dr. Kilpatrick’s assertions. The surveyed real estate agents noted the difficulties in closing sales in the Jacksonville real estate market subsequent to announcement of the leak. Specifically, these agents noted that some buyers stayed away from the area surrounding the spill, with buyers refusing to “even look at the house because of the spill,” or “look and then decide it’s just too much to deal with.” Other agents noted that prices were reduced dramatically in order to complete a sale; that disclosure forms were given to prospective purchasers; and in most cases, water tests were performed prior to the sale of residential properties in the Jacksonville area. Additionally, surveys of real estate mortgage lenders suggested that some financial institutions would not even agree to finance the purchase

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of a property with actual groundwater contamination.^{EN103} Taken together, these interviews and surveys suggest, contrary to Dr. Kilpatrick's assertions, that individuals in the Jacksonville real estate market were, in fact, informed regarding the leak, and that such information made it significantly more difficult to complete a sale; yet, there were nearly 180 sales after the leak was made public.

The statements of the real estate agents are relevant to the amount of diminution in value of properties in the Jacksonville area, but do not provide an acceptable or sufficient factual basis for Dr. Kilpatrick's conclusion that the sales that occurred were unreliable. An expert's opinion "is of no greater probative value than the soundness of his reasons given therefor will warrant." *Surkovich v. Doub*, 258 Md. 263, 272, 265 A.2d 447, 451 (1970). Not only do the interviews and surveys of real estate agents and the testimony of the homeowners contradict Dr. Kilpatrick's proffered justifications for ignoring comparable sales data, but the level of speculation attendant to that conclusion is, as the United States District Court for the Northern District of California noted in reviewing Dr. Kilpatrick's proposed testimony in another case, "serious[ly] concern[ing]." *Palmisano v. Olin Corp.*, No. C-03-01607 RMW, 2005 U.S. Dist. LEXIS 48005, at *16 n. 5 (N.D.Cal. July 5, 2005). Dr. Kilpatrick testified that he does not know when, if ever, the "market price" will reflect the sixty percent diminution in "market value" that he concludes the properties suffered. As we have noted, however, fair market value is the highest and best price at which a prospective buyer and a prospective seller will agree for the sale of a given property. See Md.Code (1974, 2010 Repl.Vol.), Real Property Article § 12-105(b). Thus, even if we accepted, for the sake of argument, Dr. Kilpatrick's theory that prospective purchasers are ill-informed regarding the Jacksonville Exxon leak, the market prices represented by actual sales in the community still represent the highest and best price for the property—even if the buyers are paying, as Dr. Kilpatrick asserts, too much. Allowing the plaintiffs to recover damages for a hypothetical and speculative diminution in market value that may never materialize is to permit them a potential double recovery—"[i]f plaintiffs could recover for a decline in value that had not yet been reflected in prices, they could sell their homes immediately and receive a windfall: damages for as-yet unrealized diminution in value plus the full market price." *Palmisano*, 2005 U.S. Dist. LEXIS 48005, at *16 n. 5. Dr. Kilpatrick's disregard of the

existence of an actual, functioning market—no matter how skewed—was clear error. Because the trial court's admission of Dr. Kilpatrick's testimony was clear error, we reverse the jury awards for diminution in value as to all Appellees and direct remand for a new trial.

***46 JUDGMENTS OF THE CIRCUIT COURT FOR BALTIMORE COUNTY FOR FRAUD IN FAVOR OF ALL APPELLEES REVERSED; JUDGMENTS FOR PUNITIVE DAMAGES IN FAVOR OF ALL APPELLEES REVERSED; JUDGMENTS FOR EMOTIONAL DISTRESS FOR FEAR OF CONTRACTING CANCER IN FAVOR OF ALL APPELLEES REVERSED, EXCEPT THAT THE CLAIM OF APPELLEE GLORIA QUINAN IS VACATED AND REMANDED TO THE CIRCUIT COURT FOR A NEW TRIAL NOT INCONSISTENT WITH THIS OPINION; JUDGMENTS FOR MEDICAL MONITORING IN FAVOR OF ALL APPELLEES REVERSED; JUDGMENTS FOR EMOTIONAL DISTRESS FOR FEAR OF LOSS OF PROPERTY VALUE IN FAVOR OF ALL APPELLEES REVERSED; JUDGMENTS FOR LOSS OF USE AND ENJOYMENT IN FAVOR OF APPELLEES AMY GUMINA, LESLIE TRIPP, AND TIMOTHY TRIPP AFFIRMED; JUDGMENT FOR LOSS OF USE AND ENJOYMENT IN FAVOR OF APPELLEE VAN HO REVERSED AND REMANDED TO THE CIRCUIT COURT FOR A NEW TRIAL NOT INCONSISTENT WITH THIS OPINION; JUDGMENTS FOR LOSS OF USE AND ENJOYMENT IN FAVOR OF ALL OTHER APPELLEES REVERSED; JUDGMENTS FOR DIMINUTION IN VALUE OF REAL PROPERTY IN FAVOR OF APPELLEES DAVID AUSTIN, EMILY AUSTIN, PATRICIA BATEMAN, JON BLUM, TRACY BLUM, MARGARET BROWN, LOUISE BULL, ADRIANE BURKE, LLOYD BURKE, BARI JO BURNETT, CARLO CAPIZZI, FRANCA CAPIZZI, PHILIP CAPRON, SUSAN CAPRON, LLOYD CLARK, JOAN CLARK, SHARON DORSCH, WILLIAM DORSCH; DARYL DUTROW, JENNIFER DUTROW, CHRISTOPHER EASTON, MONIQUE EASTON, BRUCE ELLIOTT, CHRIS FEDERICO, TRACY FEDERICO, CLEVER FONSECA, DENISE FONSECA, MARIANNE FRATTAROLA LIVING TRUST, ANN FULLER, STANLEY FULLER, MARY PAT GOODHUES, HEATHER HUEY, MI-**

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CHAE L HUEY, DOROTHY HYMAN, RICHARD HYMAN, KENNETH KELLY, STEPHANIE KELLY, LEONARD KENNEDY, MARGARET KENNEDY, PAUL KING AS PERSONAL REPRESENTATIVE FOR KATHERINE KING, MARK KIRKWOOD, NANCY PUGLIESE, ELLEN KOERNER, HENRY KOERNER, DONNA LAWRENCE, ROBERT LAZZARO, NIKOLAOS MAKRIS, VALERIE MAKRIS, JOHN MATRA, MARY MATRA, KIRK MCCLEARY, MARY MCCLEARY, PAMELA MORGAN, RONALD MORGAN, DENISE MOSS, GREGORY MOSS, KATHLEEN NAUGHTON, TIM NAUGHTON, GREGORY NAYLOR, SUSAN NAYLOR, DONALD NEMER, KELLI NEMER, JOANNE O'CONNELL, ANITA PODLES, THOMAS PODLES, CYNTHIA POPOMARONIS, WILLIAM POPOMARONIS, MARY KATHRYN PROEFROCK, SCOTT PROEFROCK, EDNA RUDELL, PAUL RUDELL, RICHARD RUDELL, ALAN SAEVA, ELLAINE SAEVA, JOSEPH SCHMITZ, SUSAN SCHMITZ, ERNEST SESSA, PAULA SESSA, NATALIE SHIELDS, BRUCE STUMPP, NORMA STUMPP, CHESTER TOKARSKI, MARYLYN TOKARSKI, CHRISTY WHALEY, NEIL WHALEY, HANS WILHEMSEN (AWARDS FOR PROPERTIES LOCATED AT 13707, 13729, AND 13821 JARRETTSVILLE PIKE), JEAN WIMMER, PAUL WIMMER, CHRISTOPHER GARLISS/HIGHPOINT HOMEBUILDERS, INC., KLEIN'S OF JACKSONVILLE, AND 14342 JARRETTSVILLE PIKE, LLC REVERSED; JUDGMENTS FOR DIMINUTION IN VALUE OF REAL PROPERTY IN FAVOR OF DOGWOOD MANAGEMENT, LLC, KLEIN FAMILY DEVELOPMENT CORP., 3313 PAPER MILL ROAD, LLC, JARRETTSVILLE RETAIL, LLC, 14231 JARRETTSVILLE PIKE, LLC, 14237 JARRETTSVILLE PIKE, LLC, 3422 SWEET AIR ROAD, LLC, LENORE ZACCARI/LENORE E. ZACCARI RESIDUAL TRUST AFFIRMED; JUDGMENTS FOR DIMINUTION IN VALUE OF REAL PROPERTY IN FAVOR OF ALL OTHER APPELLEES REVERSED AND REMANDED TO THE CIRCUIT COURT FOR A NEW TRIAL NOT INCONSISTENT WITH THIS OPINION. COSTS IN THIS COURT TO BE DIVIDED PRO RATA BY APPELLEES.

FN1. The 2006 gasoline leak is also the genesis of *Exxon Mobil Corp. v. Ford*, —

Md.—, — A.3d — (2013), the opinion in which is filed immediately after the opinion in the present case.

FN2. Exxon did not provide any direct evidence at trial that amended construction plans were submitted to Baltimore County, but maintained rather that it was its ordinary practice to update permit applications when altering design plans in the field.

FN3. Regulations passed by the Environmental Protection Agency in 1988 established underground storage tank standards, which required station owners and operators to retrofit their stations to comply with the new regulations within a ten-year period. The 1990 amendments to the Clean Air Act required stations located in certain metropolitan areas, including Baltimore, to install Stage II vapor recovery systems.

FN4. In 1987, the Jacksonville Exxon experienced a leak, which was contained successfully by the secondary containment system as constructed.

FN5. Appellees attribute this human error to a flaw in Exxon's station design following the retrofitting construction in 1992. Specifically, they contend that, because Exxon sought to disturb the original design of the station as minimally as possible in completing the retrofit, the "regular grade" gasoline line was too close to the containment sump for the "super unleaded grade" gasoline line. Thus, when the Crompco contractor performed maintenance on the "super unleaded grade" containment sump, he was enabled to drill accidentally into the "regular grade" product line—an error that would not have occurred if the product line was located properly. Exxon admits that the "regular grade" gasoline line was located improperly too closely to the containment sump.

FN6. The Station employed primarily two leak detection systems, in compliance with Maryland regulations. The first was a daily inventory control system, required by COMAR 26.10.04.01E-G, which consisted

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of daily measurements of product levels in the tanks and comparison with inventory revealed by the station operator's delivery records, and was capable of detecting leaks both in piping and in the tanks. At the Jacksonville Exxon, this was performed by station operator Andrea Loeiro of Storto Enterprises. The second was an electronic leak detection system, EECO 3000, manufactured by Emco Wheaton, which monitored leak detectors designed to identify leaks in the underground storage tank systems and generate alarms in the event of a positive detection. The automatic line leak detector feature measured pressure levels in the piping system, and could indicate leaks through two types of tests: (1) a precision test designed to detect leaks as small as one-tenth of a gallon per hour, pursuant to COMAR 26.10.05.02D(2)(b); and (2) an "hourly test," run after each dispensing cycle after the pump motor was turned off, designed to detect leaks as small as three gallons per hour, pursuant to COMAR 26.10.05.02D(2)(a).

FN7. Exxon contracted with Gilbarco Veeder-Root ("Gilbarco"), a remote monitoring service located in North Carolina. In the event of a failed test by the EECO system, Gilbarco received notice of the alarm and, if the alarm could not be cleared remotely, would notify Exxon's designated Managed Maintenance Service Manager, Integrated Process Technologies ("IPT"), of the alarm. IPT would then dispatch contractors to visit the station and determine the cause of the alarm.

FN8. An alarm indicated a catastrophic line failure when the EECO 3000's hourly test detected a leak measuring five gallons or more per hour.

FN9. The sign was removed, due to its inaccuracy, following a meeting on 21 February 2006 between Exxon representatives, government officials, and residents of the Jacksonville community.

FN10. Appellees contended at trial that Ex-

xon and the MDE adopted an oversimplified explanation of the hydrogeology of Jacksonville in order to justify the "strike line" theory, and that Exxon avoided investigating the vertical migration of the contamination.

FN11. Under the Consent Decree, Exxon agreed to pay a \$4 million civil penalty to the MDE, comply fully with the Interim Remedial Measures Plan approved by the MDE, develop and follow a Corrective Action Plan subject to the MDE's approval, and submit quarterly progress reports to the MDE including sampling data and volume of treated groundwater, among other things.

FN12. POET systems, or point of entry treatment systems, remove gasoline contamination from potable wells before the water is used by the occupants of the dwelling or users of a business.

FN13. The action was filed initially with 119 plaintiffs and styled as *Allison v. Exxon Mobil Corp.*, Case No. 03-C-07-003809. Five additional actions, also filed on 5 April 2007, were consolidated under the *Allison* caption by order dated 12 May 2008.

FN14. Appellees named initially, in addition to Exxon, the following defendants: Storto Enterprises; the Veeder Root Company; Gilbarco Veeder-Root; Crompco, LLC; Crompco Corporation; Alger Electric, Inc.; BP America, Inc.; BP Products North America Inc.; Phoenix BP; and The Carroll Independent Fuel Company. Claims against all other defendants were dismissed, however, and Exxon remained the sole defendant at trial.

FN15. Appellees' Fifth and Sixth Amended Complaints, as well as their Motion for Leave of Court to Amend to Add Plaintiffs to the Proposed Seventh Amended Complaint, were stricken by the first judge assigned specially to try the case, Judge Susan Souder, on 9 June 2009 as a violation of the Scheduling Order. An Eighth Amended Complaint was struck by Judge Souder on 23 August 2010. Although Judge Souder struck

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Appellees' Motion for Leave of Court to Amend to Add Plaintiffs to the Proposed Seventh Amended Complaint, nothing in the record indicates that she struck the Seventh Amended Complaint.

FN16. Exxon filed multiple motions for partial summary judgment on 18 June 2010. Judge Souder granted Exxon's motion for partial summary judgment on plaintiffs' claims for emotional distress as to certain plaintiffs, but denied it as to others. She also granted Exxon's motion for partial summary judgment as to claims for fear of contracting cancer.

Judge Souder denied Exxon's motions for partial summary judgment as to the following claims: medical monitoring, prospective loss of use and enjoyment, fraud, and liability for punitive damages based on allegations of evil motive, ill will, or intent to injure. Judge Souder required Appellees to elect between pursuit of damages for diminution in value of real property and prospective loss of use and enjoyment of their properties in an order dated 23 August 2010, and also ordered that Exxon's use of MTBE ("methyl tertiary-butyl ether," a chemical additive to vehicular motor fuel) in gasoline and its remediation efforts could not provide a basis for the fraud claims.

FN17. Following his assignment to try the case, Judge Robert N. Dugan, on 14 October 2010, reversed Judge Souder's Order granting partial summary judgment as to fear of cancer. On 19 October, Judge Dugan reversed Judge Souder's order stating that Exxon's use of MTBE in gasoline and its remediation efforts could not provide a basis for fraud.

FN18. Exxon contends that, of the instances submitted to the jury on the special verdict sheets, two should not have been submitted to the jury because they were not pleaded in any operative complaint. Specifically, an allegation of a 1992 permit fraud was pleaded only in Appellees' Eighth Amended Com-

plaint, which was stricken by Judge Souder on 23 August 2010 (a ruling not reversed by Judge Dugan), and a claim regarding double-walled piping was never pleaded, and raised for the first time only at trial.

Further, Exxon argues, it was unclear throughout trial what were the specific bases and arguments in support of Appellees' fraud claims. For example, although Appellees characterized at times their fraud claims as a single overarching fraudulent scheme, and thus only one count of fraud, the special verdict sheets submitted to the jury appeared to contain reference to six separate incidents of fraud, but did not require the jury to allocate any compensatory or punitive awards among the various frauds (or other torts) alleged. Moreover, in closing arguments on 13 June 2011, counsel for Appellees stated that they had "established in this case six fraud claims by clear and convincing evidence."

FN19. Appellees argue that the secondary containment system, as installed, was less comprehensive than that proposed by Anderson in 1983, and part of a concerted corporate plot to deceive state and local authorities and cut regulatory corners. By contrast, Exxon contends that the containment system as installed was not only superior, more costly, and incorporated newer technology than that proposed by Anderson in 1983, but also that its features as installed were well-known to the County.

FN20. The double-walled piping allegations are based on a "Notification for Underground Storage Tanks" form filed with the MDE in April 2001 by Exxon, which stated incorrectly that the Jacksonville Exxon station utilized double-walled piping. According to Exxon, by 2004, the MDE's files reflected correctly that the Jacksonville Exxon station utilized single-walled piping only.

FN21. Appellees' claim appears to include not only the alleged manipulation of the MDE by Exxon regarding locations of monitoring wells, amount of gasoline recovered,

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and migration of contamination, but also an alleged awareness by Exxon of the leak prior to notifying the MDE. This allegation appears to be precipitated by a 14 February 2006 visit to the Jacksonville Exxon by employee Brian Shedd of Kleinfelder, Inc., (a company which later played an active role in remediation efforts). It is undisputed that Shedd visited the Jacksonville Exxon on that date to determine whether a soil vapor extraction system was appropriate for that site. Appellees contended that, because soil vapor extraction technology is used to assist in cleaning up gasoline leaks, Shedd's visit constituted evidence of Exxon's knowledge at that time. By contrast, Exxon posited that Shedd's visit was merely part of an ongoing company policy to examine each Maryland Exxon site to determine suitability for soil vapor extraction technologies. Counsel for Exxon indicated in a post-trial motions hearing on 11 October 2011 that Shedd visited three Exxon stations in Maryland, including the Jacksonville Exxon, for this purpose on 14 February 2006. Shedd did not testify at trial.

FN22. Benzene is a constituent of gasoline and a known human carcinogen. Both the EPA and the MDE have promulgated drinking water standards indicating that benzene contamination in drinking water may not exceed five parts per billion. *See* 40 C.F.R. § 141.61; COMAR 26.04.01.07(D).

FN23. Although MTBE was first used in 1979, it was added to some gasoline in higher concentrations following the 1990 amendments to the Clean Air Act to fulfill oxygenate requirements, help gasoline burn more cleanly, and reduce tailpipe emissions.

FN24. The EPA classifies formaldehyde as a "probable human carcinogen." United States Environmental Protection Agency, Integrated Risk Information System: Formaldehyde, *available at* www.epa.gov/iris/subst.0419.htm (last visited 5 February 2013). At trial, Exxon's expert, Dr. James Swenberg, testified that because formaldehyde is present in every cell

of the human body, is exhaled in each human breath, and is essential to life and growth, there is a safe level of exposure of formaldehyde, despite its classification as a probable human carcinogen. By contrast, Appellees' expert witnesses—Dr. Nachman Brautbar and Dr. Kathleen Burns—opined that there is "no safe level" of human exposure to formaldehyde, nor, therefore, to MTBE. There is no relevant EPA or MDE action level for formaldehyde in drinking water.

FN25. A mutagen is "an agent (as mustard gas or various radiations) that tends to increase the frequency or extent of mutation." Merriam-Webster's Collegiate Dictionary 768 (10th ed.1993). In the present case, it refers to a chemical agent that operates at an intra-cellular level.

FN26. Benzene was detected at the following Appellees' properties: Ensor family; James and Mary Kelly family; Over family; Rusinko family; Yen family; Dogwood Management, LLC; Klein Family Development Corp.; Klein's of Jacksonville; 3313 Paper Mill Road, LLC; Jarrettsville Retail, LLC; and, Van Ho (Elegant Hair & Nails). Five of these properties were located within the strike line zone (northeast and southwest of the station). The remainder were located outside of the strike line zone, but within an approximately half-mile radius of the Jacksonville Exxon station.

FN27. MTBE is not regulated presently by the Environmental Protection Agency ("EPA") under the federal Safe Drinking Water Act. Both the MDE and the EPA have promulgated guidelines, however, recommending control levels for communities that experience MTBE drinking water contamination. The MDE notes that contamination of MTBE in drinking water at or above levels of twenty parts per billion constitutes a "level of concern," *see* COMAR 26.10.02.03(B)(3)(e), while the EPA issued an advisory recommending limiting acceptable levels of contamination between twenty and forty parts per billion. The EPA noted,

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however, that its respective action level is not based on concerns for human health, but rather is classified appropriately as an “aesthetic” standard, above which MTBE can be detected by an unpleasant odor or taste. The EPA noted that a range of 20–40 parts per billion provides “a large margin of exposure (safety) from toxic effects.” United States Environmental Protection Agency, Drinking Water Advisory: Consumer Acceptability Advice and Health Effects Analysis on Methyl Tertiary-Butyl Ether (MtBE) 2 (1997).

FN28. Appellees initially pursued damages for both diminution in value and prospective loss of use and enjoyment, but were required to elect between the two theories of recovery prior to trial. Appellees elected to pursue damages for permanent diminution in value measured as of the day the leak was discovered, as well as damages for past loss of use and enjoyment, measured between the date the leak was discovered and the date trial began.

FN29. Many Appellees' properties had not received positive detection well tests at the time of trial. Rather, their claims relied on expert testimony provided by Dr. Caroline Loop and Dr. Richard Spruill, who opined that it was “possible” or “probable” that Appellees' properties would experience contamination at some point during the next thirty years.

FN30. The jury adopted ultimately the view of Dr. Kilpatrick, awarding compensatory damages to each property owner amounting to sixty percent of the pre-leak value of his, her, or its property.

FN31. For some Appellees, Exxon admitted causation and liability for some compensatory damages, while preserving its arguments as to the type and amount of damages that may be awarded. Specifically, Exxon admitted that it caused the following Appellees to suffer compensatory damages of some type as a result of the Jacksonville Exxon gasoline leak: Allison family; Craig family; DiPino family; Ensor family; Hairston fam-

ily; Van Ho; James and Mary Kelly family; Larrabee family; Lindenmeyer family; Munson family; Odend'hal family; Puller family; Rebold family; Riegger family; Rusinko family; Sheeler family; Stehman family; Sullivan family; Trader family; Tripp family; Vuong family; Welms family; Yen family; Lenore Zaccari; 14237 Jarrettsville Pike, LLC; 14231 Jarrettsville Pike, LLC; 3313 Paper Mill Road, LLC; 3422 Sweet Air Road, LLC; and Dogwood Management, LLC.

FN32. Following Exxon's notice of appeal, proceedings continued in the trial court. On 17 November 2011, Judge Dugan issued an opinion explaining his reasons for denying generally Exxon's request to set aside or reduce the punitive damages award. Judge Dugan reduced the punitive damages awards for five plaintiffs, as set forth in an order dated 16 May 2012. The trial court proceeded to resolve various ambiguities and errors with regard to specific plaintiffs and the verdict sheets, with the final judgment entered on 14 June 2012.

FN33. Because the case is before this Court on bypass of the Court of Special Appeals by virtue of our granting Appellees' petition for *certiorari* pursuant to Maryland Rule 8–302(a), we stand in the shoes of the Court of Special Appeals. *See* Md. R. 8–131(b)(2). Thus, although the scope of our review with regard to the issues raised by Appellees is limited, as in a cross-appeal, to those contained in their petition for *certiorari*, any and all issues raised by Exxon in its brief, if preserved in the trial court, are within the purview of this Court on review. *See Wildwood Med. Ctr., LLC v. Montgomery Cnty.*, 405 Md. 489, 496, 954 A.2d 457, 461 (2008).

FN34. In its brief, Exxon posited the following questions:

- (1) May verdicts for fraud be upheld (a) when based on claims not found in the operative complaint or defined for the jury; and (b) absent clear and convincing evidence that Defendant made a knowingly

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false representation to the Plaintiff, intending to deceive the Plaintiff, and resulting in reliance by and damage to the Plaintiff?

(2) May punitive damage verdicts be upheld when it is impossible to determine what, if any, compensatory damages were awarded for fraud, or what punitive damages were awarded on any of the six frauds, and where the punitive damage instructions did not advise the jury of all of the relevant factors it should consider?

(3) Did the trial court commit reversible error in admitting highly prejudicial, emotional lay opinion regarding cancer and other illnesses that was not supported by expert testimony and contradicted by the admissions of Plaintiffs' counsel?

(4) Did the trial court commit reversible error in allowing recovery for emotional distress damages for fear of contracting cancer recoverable in the absence of proof of exposure or proof that future disease is more likely than not to occur, and by failing to instruct the jury that such proof was required?

(5) Does Maryland law permit recovery of medical monitoring damages and, if so, should recovery be permitted where (a) no Plaintiff claimed to have any current disease caused by MTBE; (b) no Plaintiff has a significantly increased risk of disease; and (c) many Plaintiffs were not exposed to MTBE?

(6) Were the property damage awards speculative, duplicative, grossly excessive and contrary to Maryland law?

(7) If punitive damages were permitted, were the punitive damage awards impermissibly excessive?

In their petition for *certiorari*, Appellees framed the following questions for review:

(1) Whether, in an action for fraud, evidence of the Defendant's deceitful representations to the government, made with the intent of influencing government action, and relied upon by it to the Plaintiffs' detriment, satisfies the requirement that Plaintiffs prove reliance?

(2) Whether, in an action involving the release of 26,000 gallons of gasoline into the aquifer which is the Plaintiffs' sole source of potable water, where expert testimony has established the Plaintiffs' resulting exposure to a genotoxic substance for which there is no safe level, Plaintiffs are entitled to recover damages for fear of cancer and medical monitoring?

(3) Whether, in an action for property damage, evidence that the Defendant released 26,000 gallons of gasoline into the aquifer that serves as the Plaintiffs' sole source of potable water is sufficient to establish the Defendant's liability for an invasion of the Plaintiffs' land?

FN35. Moreover, even assuming that reliance by Baltimore County or the MDE alone was sufficient to support Appellees' cause of action for fraud, we are not convinced that Appellees proved by clear and convincing evidence reliance by the governmental entities. Rather, Appellees' claims appear to be based on mere conjecture, and the absence of any testimony by anyone at either the MDE or the Baltimore County Board of Appeals demonstrates Appellees' failure to meet their burden of proof.

FN36. Appellees also rely on *State v. Fox*, 79 Md. 514, 29 A. 601 (1894), and *State v. Katcef*, 159 Md. 271, 150 A. 801 (1930), which each noted that the seller of a horse, represented falsely to be healthy or safe, could be held liable to third parties sickened or injured by the horse. These cases, however, are inapposite, as they imposed liability for the sale of an inherently dangerous instrumentality that was "placed in such position that injury might be inflicted, and that without notice or warning to the vendee in

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respect to the dangerous qualities or afflictions.” Rounds v. Phillips, 166 Md. 151, 162–63, 170 A. 532, 536 (1934) (discussing *Fox* and *Katcef*). Moreover, in *Fox*, we emphasized that liability to a third party could only exist where the third party was “in some way connected with the purchaser,” noting that under the facts of that case, the third party was acting under the direction of the purchaser. 79 Md. at 529, 29 A. at 604. Specifically, we stated, “we do not mean to decide that any third party [injured by the horse] ... could sue.” *Id.*

FN37. Upon our review of Appellees' testimony, it appears that only the following Appellees demonstrated arguably reliance on the sign: Susan Allison; Margaret Brown; John Wright; Clever Fonseca; Denise Fonseca; James Kelly; Mary Kelly; Stephanie Kelly; Jennifer Riegger; Julia Riegger; KatieRose Riegger; Meghen Riegger; Anna Walega; and, Nancy Williams.

FN38. Many Appellees who received verdicts for remediation fraud did not offer any testimony in support of their assertions, including most of the minor and adult children occupants of residences. Because fraud requires proof of reliance on an individual basis, the trial court should not have permitted the claim for remediation fraud for these Appellees to go to the jury, absent the presentation of testimony regarding their fraud claims offered by them or on their behalf. *See, e.g.*, Agnieszka Hudzik (Allison); Eric Allison; Kristen Allison; Caitlin Andrews; Daniel Andrews; Jeanne Andrews; Ian Austin; Reid Austin; Emily Backus; Alex Blum; Madelyn Blum; Lloyd Burke, Jr.; Lloyd Burke; Riley Burke; Ashley Brookhart; Sean Brookhart; Victoria Brookhart; Tara Brown; Terry Bueche; Louise Bull; Amanda Buscemi; Cari Cheelsman (Buscemi); Charles Cheelsman (Buscemi); Mary Buscemi; Rachel Buscemi; Adriana Capizzi; Francesca Capizzi; Julia Capizzi; Maria Cole–Navarro; Phillip Diedeman, Jr.; Dominique DiPino; Francesca DiPino; Joseph DiPino; Paul DiPino III; Sarah Dyer; Brian Easton; David Easton; Michael Easton; James Turfler (Eis-

gruber); Janice Elliott; Christopher Federico; Emily Federico; Grace Federico; Kevin Federico; Sarah Fletcher; Zachary Fletcher; Bruna Fonseca; Maira Fonseca; Tiago Fonseca; Gia Fontanazza; Debra Gillespie; Kevin Gillespie; Tara Gillespie; Thomas Gillespie III; Marjorie Gribble; Gavin Grogan; Linda Hairston–Taulton; Theodore Hannibal; Connor Hartman; Gavin Hartman; Allison Higgins; Patrick Higgins; Richard Higgins; Kenneth Kelly; Lauren Dance (Kelly); Michele Tehan (Kelly); Kathleen Kennedy; Calvin Kirkwood; Chase Kirkwood; Jeremy Kirkwood; Tyler Kirkwood; Kristen Lawrence; Jennifer Lazzaro; Kaitlyn Lindenmeyer; Megan Lindenmeyer; Corey Makow; Allie Mangione; Taylor Mangione; Ryan McCleary; Leigh Morgan Sharp (Morgan); R. Wade Morgan; Catherine Murphy (Moss); Gregory Moss; Natalie Murphy; Payton Murphy; Rosemary Murphy; Gregory Naylor, Jr.; Kenneth Naylor; Tracy Naylor; Bessie Over; Andrew Palmer; Geoffrey Palmer; Andrew Parker; James Parker; Bradley Peters; John Peters; Jena Pietropaoli; Joseph Pietropaoli, Jr.; Paulette Pietropaoli; Jennifer Riegger; KatieRose Riegger; Meghen Riegger; Mary Judith Rudell; Janice Scarff; Allison Shields; Erin Shields; John Shields, Jr.; Kevin Shields; Marah Schmitz; Susan Schmitz; Adam Seery; Meghan Seery; Chelsea Simanski; Alexander Trader; Matthew Trader; Brian Tripp; Steven Tripp; Elliot Gloger (Vaughan); Kieran Vaughan; Chase Vosvick; Tanner Vosvick; Jack Wachter; Kimberly Wachter; Ryan Wachter; Megan Welms; Cole Wilhelmsen; Hans Wilhelmsen III; and, Jennifer Winfield.

In addition to these Appellees, the following Appellees did not present any testimony supporting remediation fraud by any owner or occupier of the relevant premises, but recovered verdicts and punitive damages for fraud nonetheless: Edgar Argo, through personal representative Marlene Argo (did not seek recovery for fraud); Dana Rhyne Dieter; Patricia Dieter; Alissa Dutrow; Daryl Dutrow; Emily Dutrow; Jennifer Dutrow; Anthony Frattarola; Marianne Frattarola; Victoria Frattarola;

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la; Eugene Freeman; Pearlie Freeman; Katherine King, through personal representative Paul King; Kathleen Oursler; Rodger Oursler; Bessie Over, through personal representative Nancy Lee Over Webster; Christy Shaw; Thomas Shaw; Amy Vuong; Krystal Vuong; Man A. Vuong; Shuzhen Wu (Vuong); Sinh Vuong; Stacy Vuong; Chen-Yu Yen (regarding remediation fraud due to false statements made by MDE); Ray-Whey Yen (regarding remediation fraud due to false statements made by MDE); Christopher Zaccari; Patricia Zaccari; Lenore Zaccari; Dogwood Management, LLC; Klein Family Development Corp.; Klein's of Jacksonville, Inc.; 14342 Jarrettsville Pike, LLC; 3313 Paper Mill Road, LLC; Jarrettsville Retail, LLC; 14231 Jarrettsville Pike, LLC; 14237 Jarrettsville Pike, LLC; and, 3422 Sweet Air Road, LLC.

We therefore reverse the verdicts for remediation fraud for these Appellees.

FN39. See, e.g., Phillip Diedeman; Susan Diedeman; Laura Hartman; Michael Hartman; Cheryl Howells; Almarie Ianuly; Paul Ianuly; Charles Parker; Kimberly Parker; Joseph Pietropaoli; Anna Popomaronis; Cynthia Popomaronis; Eleni Popomaronis; Peter Vailas (Popomaronis); Thomas Popomaronis; William Popomaronis; Joseph Schmitz; David Vaughan; Terri Vaughan; David Vosvick; Deedra Vosvick; Anna Walega; and, John Walega.

FN40. See, e.g., Annette Armstrong; John Armstrong; Ryan Backus; Shelly Backus; Patricia Bateman; Jon Blum; Tracey Blum; Florence Brock; Keith Brock; Ellen Brookhart; Margaret Brown; Adriane Burke; Karen Buscemi; Frederick Craig; Rosina Craig; Bruce Elliott; Ellison Ensor; Sarah Ensor; Gina DiPino; Paul DiPino, Jr.; Tracy Federico; Edward Fletcher; Regina Fletcher; Thomas Gillespie, Jr.; Curtis Glatfelter; Alicia Grogan; David Grogan; Mary Pat Goodhues; Jeanette Hairston; Walter Hairston; Virginia Hannibal; Rebecca Heyman-Magaziner; John Higgins; Mary Hig-

gins; Dorothy Hyman; Richard Hyman; Kenneth Kelly; Stephanie Kelly; Kimberly Kobus; Thomas Kobus; Ellen Koerner (through Gloria Quinan); Henry Koerner (through Gloria Quinan); Barbara Larrabee; John Larrabee; Mitchell Larrabee; William Larrabee; Donna Lawrence; Lelah Mahoney; Patrick Mahoney; Christopher Makowy; Heather Meldron (Makowy); Kim Makowy; Rebecca Meldron (Makowy); William Makowy; Alexander Makris; Eleni Makris; Nikolaos Makris; Valerie Makris; Brian Mangione; Justine Mangione; John Matra; Mary Matra; Eric Munson; Georgia Munson; Jeffrey Munson; Leslie Munson; John Murphy; Christian O'Brien; Christopher O'Brien; Shelby O'Brien; Edward Odend'hal; Nanette Odend'hal; Betty Over; Sylvester Over; Emily Pagani; Nicholas Pagani; Rebecca Pagani; Steven Pagani; Charles Parker; Kimberly Parker; Joseph Pietropaoli; Anna Popomaronis; Cynthia Popomaronis; Eleni Popomaronis; Peter Vailas (Popomaronis); Thomas Popomaronis; William Popomaronis; Mary Prime; William Prime; Casey Proefrock; Kate Proefrock; John Proefrock; Mary Kathryn Proefrock; Megan Proefrock; Scott Proefrock; Gloria Quinan; Granville Quinan; Jerome Rebold; Rochelle Roth; Steven Roth; Alan Saeva; Ellaine Saeva; Alexander Scheetz; Arden Scheetz; Michele Scheetz; Ricky Scheetz; Charlotte Slaughter; Diann Kohute (Slaughter); Emily Slaughter; Kaitlyn Jones (Slaughter); Nancy Slaughter; William Slaughter, Jr.; William Slaughter; Bruce Stumpp; Norma Stumpp; David Vaughan; Terri Vaughan; Anna Walega; John Walega; Nancy Welms; Christy Whaley; Neil Whaley; Dolores Whitehurst; Gertrude McNicholas (Whitehurst); and, Van Ho, Elegant Nails & Hair.

FN41. See, e.g., Susan Allison; David Austin; Emily Austin; Tracey Blum; Margaret Brown; Adriane Burke; Ronald Bueche; Carlo Capizzi; Franca Capizzi; Philip Capron; Susan Capron; Philip Carbone; Joan Clark; Lloyd Clark; Michael Cole; Frederick Craig; Rosina Craig; Phillip Diedeman; Susan Diedeman; Gina DiPino; Paul DiPino, Jr.; Sharon Dorsch; William Dorsch; Robert Dyer; Teresa Dyer; Christopher Easton;

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Monique Easton; Edward Fletcher; Regina Fletcher; Franklin Fontanazza; Gina Fontanazza; Alexandra Freas; James Freas; Kathleen Freas; Paul Freas; Thomas Gillespie, Jr.; Charlene Glatfelter; George Gribble; Alicia Grogan; David Grogan; Walter Hairston; Joan Hanst; John Hanst; Laura Hartman; Michael Hartman; Brendan Huey; Heather Huey; Michael Huey; Shannon Huey; James Kelly; Mary Kelly; Mark Kirkwood; Nancy Pugliese Kirkwood; Dale Knapp; James Knapp; Kimberly Kobus; Thomas Kobus; Barbara Larrabee; John Larrabee; Mitchell Larrabee; William Larrabee; Robert Lazzaro; Susan Lazzaro; Karen Lindenmeyer; Mark Lindenmeyer; Lelah Mahoney; Patrick Mahoney; Christopher Makowy; Heather Meldron (Makowy); Kim Makowy; Rebecca Meldron (Makowy); William Makowy; Eric Munson; Georgia Munson; Jeffrey Munson; Leslie Munson; John Murphy; Gregory Naylor; Susan Naylor; Kathleen Naughton; Tim Naughton; Alexandra Nemer; Emanuel Nemer; Donald Nemer; Kelli Nemer; Edward Odend'hal; Nanette Odend'hal; Emily Pagani; Nicholas Pagani; Rebecca Pagani; Steven Pagani; David Palmer; Kimberly Palmer; Cathy Gay-Peters; Marcus Peters; Andrew Podles; Anita Podles; Claire Podles; John Podles; Thomas Podles; Thomas Podles, Jr.; Amy Gumina (Prime-Gumina); Brynn Puller; John Puller; Patricia Puller; Richard Puller; Gloria Quinan; Granville Quinan; Charles Riegger; Julia Riegger; Rochelle Roth; Steven Roth; Paul Rudell; Barbara Rusinko; John Rusinko; Alexander Scheetz; Arden Scheetz; Michele Scheetz; Ricky Scheetz; Joseph Schmitz; Susan Seery; Thomas Seery; Ernest Sessa; Paula Sessa; Barbara Sheeler; Donald Sheeler; Natalie Shields; Alyssa Stehman; John Stehman; Jonathan Stehman; Marina Stehman; Sierra Stehman; Theresa Stehman; Bruce Stumpp; Norma Stumpp; Alicia Sullivan; Brendan Sullivan, Jr.; Brendan Sullivan; Emily Sullivan; Leslie Tripp; Timothy Tripp; Martin Wachter; Christy Whaley; Neil Whaley; Hans Wilhelmsen; Kristen Wilhelmsen; Jean Wimmer; Paul Wimmer; Janet Winfield; Timothy Winfield; Andrea Zachary; and, Mary Lefell (Zachary).

FN42. See, e.g., Richard Andrews; Margaret Brown; Bari Jo Burnett; John Wright

(Bull/Wright); Ellen Brookhart; Ronald Brookhart; Carlo Capizzi; Franca Capizzi; Robert Dyer; Teresa Dyer; Carl Eisgruber; Lynn Eisgruber; Clever Fonseca; Denise Fonseca; Alexandra Freas; James Freas; Kathleen Freas; Paul Freas; Ann Fuller; Stanley Fuller; Thomas Gillespie, Jr.; George Gribble; Virginia Hannibal; Jeffrey Hummel; Dorothy Hyman; Richard Hyman; James Kelly; Mary Kelly; Kenneth Kelly; Stephanie Kelly; Leonard Kennedy; Margaret Kennedy; Mark Kirkwood; Nancy Pugliese Kirkwood; Robert Lazzaro; Susan Lazzaro; Karen Lindenmeyer; Mark Lindenmeyer; Lelah Mahoney; Patrick Mahoney; Christopher Makowy; Heather Meldron (Makowy); Kim Makowy; Rebecca Meldron (Makowy); William Makowy; Eric Munson; Georgia Munson; Jeffrey Munson; Leslie Munson; John Murphy; Gregory Naylor; Susan Naylor; Kathleen Naughton; Tim Naughton; Alexandra Nemer; Emanuel Nemer; Donald Nemer; Kelli Nemer; Betty Over; Sylvester Over; Anna Popomaronis; Cynthia Popomaronis; Eleni Popomaronis; Peter Vailas (Popomaronis); Thomas Popomaronis; William Popomaronis; Amy Gumina (Prime-Gumina); Casey Proefrock; Kate Proefrock; John Proefrock; Mary Kathryn Proefrock; Megan Proefrock; Scott Proefrock; Jerome Rebold; Barbara Rusinko; John Rusinko; Alan Saeva; Ellaine Saeva; Alexander Scheetz; Arden Scheetz; Michele Scheetz; Ricky Scheetz; Joseph Schmitz; Natalie Shields; Amanda Sutor; Austin Sutor; David Sutor; Lynn Sutor; Mary Trader; Patrick Rudolph (Trader); Christopher Tsakalos; Nicholas Tsakalos; Triantafilia Tsakalos; Ernest Viscuso; Francesca Viscuso; Gabrielle Viscuso; Lisa Viscuso; Nicole Viscuso; Martin Wachter; Lindsey Williams; Nancy Williams; Owen Williams; Thomas Williams; Janet Winfield; Timothy Winfield; Andrea Zachary; Mary Lefell (Zachary); Dogwood Management, LLC; and, Van Ho, Elegant Nails & Hair.

FN43. See, e.g., Richard Andrews; Ryan Backus; Shelly Backus; Christopher Easton; Clever Fonseca; Denise Fonseca; Alicia Grogan; David Grogan; Edward Odend'hal; Nanette Odend'hal; Joseph Schmitz; Char-

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lotte Slaughter; Diann Kohute (Slaughter); Emily Slaughter; Nancy Slaughter; William Slaughter, Jr.; William Slaughter; Martin Wachter; and, Van Ho, Elegant Nails & Hair.

FN44. See, e.g., Susan Allison; David Austin; Emily Austin; Patricia Bateman; Jon Blum; Tracey Blum; Margaret Brown; John Wright (Bull/Wright); Adriane Burke; Bari Jo Burnett; Carlo Capizzi; Franca Capizzi; Philip Capron; Susan Capron; Joan Clark; Lloyd Clark; Sharon Dorsch; William Dorsch; Christopher Easton; Monique Easton; Bruce Elliott; Tracy Federico; Clever Fonseca; Denise Fonseca; Ann Fuller; Stanley Fuller; Mary Pat Goodhues; Connor Hartman; Gavin Hartman; Laura Hartman; Michael Hartman; Cheryl Howells; Brendan Huey; Heather Huey; Michael Huey; Shannon Huey; Dorothy Hyman; Richard Hyman; Kenneth Kelly; Stephanie Kelly; Leonard Kennedy; Margaret Kennedy; Mark Kirkwood; Nancy Pugliese Kirkwood; Ellen Koerner (through Gloria Quinan); Henry Koerner (through Gloria Quinan); Donna Lawrence; Jennifer Lazzaro; Robert Lazzaro; Susan Lazzaro; Alexander Makris; Eleni Makris; Nikolaos Makris; Valerie Makris; John Matra; Mary Matra; Kelly McCleary; Kirk McCleary; Mary McCleary; Pamela Morgan; Ronald Morgan; Denise Moss; Kathleen Naughton; Tim Naughton; Gregory Naylor; Susan Naylor; Alexandra Nemer; Emanuel Nemer; Donald Nemer; Kelli Nemer; Joanne O'Connell; Andrew Podles; Anita Podles; Claire Podles; John Podles; Thomas Podles; Thomas Podles, Jr.; Anna Popomaronis; Cynthia Popomaronis; Eleni Popomaronis; Peter Vailas (Popomaronis); Thomas Popomaronis; William Popomaronis; Casey Proefrock; Kate Proefrock; John Proefrock; Mary Kathryn Proefrock; Megan Proefrock; Scott Proefrock; Jeff Reckseit; Edna Rudell; Paul Rudell; Richard Rudell (no potable water on property); Alan Saeva; Ellaine Saeva; Joseph Schmitz; Ernest Sessa; Paula Sessa; Natalie Shields; Alyssa Stehman; John Stehman; Jonathan Stehman; Marina Stehman; Sierra Stehman; Theresa Stehman; Bruce Stumpp; Norma Stumpp; Chester Tokarski; Marilyn Tokarski; Ernest Viscuso; Francesca Viscuso; Gabrielle Vis-

cuso; Lisa Viscuso; Nicole Viscuso; David Vosvick; Deedra Vosvick; Nancy Welms; Christy Whaley; Neil Whaley; Jean Wimmer; Paul Wimmer; Christopher Garliss/Highpoint Homebuilders, Inc.; 14342 Jarrettsville Pike, LLC; and, 3422 Sweet Air Road, LLC.

FN45. See, e.g., Richard Andrews; Annette Armstrong; John Armstrong; Ryan Backus; Shelly Backus; Ellen Brookhart; Ronald Brookhart; Ronald Bueche; Florence Brock; Keith Brock; Karen Buscemi; Philip Carbone; Michael Cole; Frederick Craig; Rosina Craig; Phillip Diedeman; Susan Diedeman; Gina DiPino; Paul DiPino, Jr.; Robert Dyer; Teresa Dyer; Carl Eisgruber; Lynn Eisgruber; Ellison Ensor; Sarah Ensor; Edward Fletcher; Regina Fletcher; Franklin Fontanazza; Gina Fontanazza; Alexandra Freas; James Freas; Kathleen Freas; Paul Freas; Thomas Gillespie, Jr.; Charlene Glatfelter; Curtis Glatfelter; George Gribble; Alicia Grogan; David Grogan; Virginia Hannibal; Joan Hanst; John Hanst; Rebecca Heyman-Magaziner; John Higgins; Mary Higgins; Jeffrey Hummel; Almarie Ianuly; Paul Ianuly; James Kelly; Mary Kelly; Dale Knapp; James Knapp; Kimberly Kobus; Thomas Kobus; Ellen Koerner; Henry Koerner; Robert Lazzaro; Susan Lazzaro; Karen Lindenmeyer; Mark Lindenmeyer; Lelah Mahoney; Patrick Mahoney; Christopher Makowy; Heather Meldron (Makowy); Kim Makowy; Rebecca Meldron (Makowy); William Makowy; Makris family; Carol Malstrom; William Malstrom; Brian Mangione; Justine Mangione; Ian Marsico; Jodi Marsico; Kaitlin Marsico; Michael Marsico; Eric Munson; Georgia Munson; Jeffrey Munson; Leslie Munson; John Murphy; Christian O'Brien; Christopher O'Brien; Shelby O'Brien; Betty Over; Sylvester Over; Emily Pagani; Nicholas Pagani; Rebecca Pagani; Steven Pagani; David Palmer; Kimberly Palmer; Charles Parker; Kimberly Parker; Cathy Gay-Peters; Marcus Peters; Joseph Pietropaoli; Andrew Podles; Anita Podles; Claire Podles; John Podles; Thomas Podles; Thomas Podles, Jr.; Anna Popomaronis; Cynthia Popomaronis; Eleni Popomaronis; Peter Vailas (Popomaronis); Tho-

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mas Popomaronis; William Popomaronis; Mary Prime; William Prime; Brynn Puller; John Puller; Patricia Puller; Richard Puller; Jerome Rebold; Charles Riegger; Julia Riegger; Rochelle Roth; Steven Roth; Richard Rudell; Barbara Rusinko; John Rusinko; Alexander Scheetz; Arden Scheetz; Michele Scheetz; Ricky Scheetz; Joseph Schmitz; Alfred Schober; Susan Seery; Thomas Seery; Barbara Sheeler; Donald Sheeler; Simanski family; Charlotte Slaughter; Diann Kohute (Slaughter); Emily Slaughter; Kaitlyn Jones (Slaughter); Nancy Slaughter; William Slaughter, Jr.; William Slaughter; Alicia Sullivan; Brendan Sullivan, Jr.; Brendan Sullivan; Emily Sullivan; Amanda Sutor; Austin Sutor; David Sutor; Lynn Sutor; Mary Trader; Patrick Rudolph (Trader); Leslie Tripp; Timothy Tripp; Christopher Tsakalos; Nicholas Tsakalos; Triantafilia Tsakalos; David Vaughan; Terri Vaughan; David Vosvick; Deedra Vosvick; Martin Wachter; Dolores Whitehurst; Gertrude McNicholas (Whitehurst); Lindsey Williams; Nancy Williams; Owen Williams; Thomas Williams; Hans Wilhelmsen; Kristen Wilhelmsen; Janet Winfield; Timothy Winfield; Andrea Zachary; Mary Lefell (Zachary); and, Dogwood Management, LLC.

FN46. See, e.g., Michael Marsico and Jerome Rebold.

FN47. In *Green*, over a period of nearly eight months, the defendants conducted blasting operations in the vicinity of the plaintiff's home, hurling large stones on the plaintiff's property that broke the roof, windows, other glass, and doors of the house. The plaintiff sought damages for mental distress caused by the defendants' negligent operations. The evidence showed that the defendants' negligent conduct caused the plaintiff to fear for her life, drove her frequently to take refuge in the cellar, and to suffer frequent and violent vibrations. This Court held that the evidence was legally sufficient to demonstrate that the plaintiff suffered a physical injury as a proximate result of the fright she suffered because of the defendants' negligence, even

though the plaintiff was not struck by the hurled stones. 111 Md. 69, 71–83, 73 A. 688, 689–93 (1909).

FN48. In *Beynon*, the survivors of the decedent's estate filed actions against a cable company, as well as others, for wrongful death and survivorship, claiming that defendants were negligent and were liable jointly and severally for the car accident that killed the decedent. We held that a decedent's estate may recover for emotional distress and mental anguish where a decedent experiences undoubtedly "great fear and apprehension of imminent death before the fatal physical impact," as long as the distress is capable of objective determination. Id. at 464, 718 A.2d 1161, 621 A.2d at 1163. Based on evidence showing that the decedent's vehicle left 71 1/2 feet of skid marks before the collision (indicating that the decedent applied his brakes), we determined that the decedent's anticipation of an imminent collision and great fear was capable of objective determination, and reversed the judgment denying the plaintiffs damages for pre-impact emotional distress suffered by the decedent. Id. at 507–09, 621 A.2d at 1184–85. Several other wrongful death cases have affirmed this form of recovery for pre-impact emotional distress that was manifested objectively. See, e.g., *Smallwood v. Bradford*, 352 Md. 8, 15, 720 A.2d 586, 589 (1998); *Freed v. D.R.D. Pool Serv.*, 186 Md.App. 477, 488, 974 A.2d 978, 985 (2009), *aff'd*, 416 Md. 46, 5 A.3d 45 (2010).

FN49. Recovery for damages for fear of cancer differs from the cause of action of a claim for enhanced or increased risk of disease. Fear of cancer is contemporaneous, but the risk of developing future disease necessitates speculation. See *Day v. NLO*, 851 F.Supp. 869, 879 (S.D. Ohio 1994) (determining that to allow recovery for increased risk of cancer would be to permit speculation).

FN50. In *Faya*, an oncological surgeon performed operations on two patients knowing that he had the human immunodeficiency

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virus (HIV), but did not inform his patients of his condition. 329 Md. at 450, 620 A.2d at 330. After discovering one year later that the surgeon had died from acquired immune deficiency syndrome (AIDS), the patients sued the surgeon's estate, the surgeon's Maryland professional association business entity, and the hospital for failing negligently to inform them that he was HIV-positive prior to their operations. *Id.* Several weeks after the discovery, the patients tested HIV-negative. In their suit, the patients claimed that the surgeon's negligence placed them in fear of contracting HIV, causing severe emotional distress, including headaches and sleeplessness. *Id.* The trial court dismissed the plaintiffs' complaints for failure to state a claim for a legally compensable injury. *Id.* at 442-43, 620 A.2d at 330-31.

FN51. In *Devlin*, an asbestos-related case, the court held that recovery for reasonable and reliable fear of cancer was permitted if (1) the plaintiff suffers currently from "serious fear or emotional distress or a clinically diagnosed phobia of cancer;" (2) the "fear was proximately caused by exposure to asbestos;" (3) the plaintiff's "fear of getting cancer due to their exposure to asbestos is reasonable;" and (4) the defendants "are legally responsible for plaintiff's exposure to asbestos." *Id.* at 499. If plaintiffs meet this burden of proof, the court concluded such plaintiffs' reasonable "fear of cancer will not lead to recovery for speculative claims." *Id.*

FN52. In *Bowman*, the defendant operated negligently a truck and crashed into the plaintiff's house. Prior to the crash, the plaintiff saw the truck coming toward his house and feared that his son, who was in the basement, was in danger. As a result, the plaintiff experienced a nervous shock when the defendant crashed into the foundation of his house, and he fell to the floor. For several weeks thereafter the plaintiff was bed-ridden and was unable to work for six months. The plaintiff experienced no physical injury or impact from the truck. *Id.* at 398-99, 165 A. 182, 164 A. at 182.

FN53. The plaintiff in *Vance*, Muriel Vance, obtained damages for emotional distress arising from negligent misrepresentations made by Dr. Vance, the person whom she believed for 18 years was her husband, but had never divorced his first wife before marrying Muriel. 286 Md. 490, 492-93, 408 A.2d 728, 729 (1979).

FN54. Specifically, the evidence of the objectively demonstrable physical injury in *Belcher* showed that, after a three-ton beam (under the control of the defendant) crashed into the plaintiff's office and landed near the plaintiff's work desk, the plaintiff's employer sought trauma counseling for the plaintiff as a result of the plaintiff's fright and nervous condition subsequent to the crash. *Id.* at 713, 621 A.2d at 874. After processing her worker's compensation claim, the plaintiff received psychiatric counseling for evaluation and treatment twenty-two times. *Id.* The psychiatrist's reports were introduced into evidence at the administrating hearing, and included the following history of the accident after the beam fell:

[The plaintiff] was frozen in fear, did not know what had happened and wondered if it had been a bomb. She was quite shaken. She seemed to have had some amnesia for the next several hours but was told that she was shaking, chain smoking and holding onto the walls. She was, at that point, quite cold and may have been in shock. Concrete pieces were all over her bodice. There are still some nuggets present on her desk.... Headaches occur and she often has dry mouth. She is fearful of a heart attack. She feels like she may explode. She has panic attacks at work and sometimes has to leave the area.... She has had ongoing nightmares, waking up screaming several times and, in each nightmare, she herself has been killed.... She has had some weight gain, a loss of senses and, at times feels "as if she is dead".

Id. at 713-14, 621 A.2d at 874.

FN55. A "subclinical" condition is one that is

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“not detectable or producing effects that are not detectable by the usual clinical tests,” such as cancer. Merriam–Webster Dictionary 1173 (9th ed.1989).

FN56. The *Bailey* court required a physical injury for recovery for feared disease because “mere ingestion of a toxic substance does not constitute sufficient physical harm upon which to base a claim for damages.” A plaintiff has the burden to prove some harmful result attributable to the exposure, though he or she need not prove that he or she suffers from cancer. *Id.*

FN57. The court in *Wolff* required proof of asbestos-induced disease or presence of asbestos fibers in the plaintiff’s body.

FN58. The court required a physical injury for recovery for feared disease because “mere ingestion of a toxic substance does not constitute sufficient physical harm upon which to base a claim for damages.” Thus, a plaintiff has the burden to prove some harmful result attributable to the exposure, though he or she need not prove that he or she suffers from cancer. *Id.*

FN59. The following Appellees recovered damages for emotional distress for fear of cancer, but did not provide evidence of actual exposure: Agnieszka Hudzik (Allison); Eric Allison; Susan Allison; David Austin; Emily Austin; Jon Blum; Tracy Blum; Margaret Brown; John Wright (Bull/Wright property); Adriane Burke; Lloyd Burke; Bari Jo Burnett; Philip Capron; Susan Capron; Joan Clark; Lloyd Clark; Sharon Dorsch; William Dorsch; Monique Easton; Bruce Elliott; Clever Fonseca; Denise Fonseca; Ann Fuller; Mary Pat Goodhues; Laura Hartman; Michael Hartman; Cheryl Howells; Heather Huey; Michael Huey; Richard Hyman; Kenneth Kelly; Stephanie Kelly; Margaret Kennedy; Calvin Kirkwood; Chase Kirkwood; Jeremy Kirkwood; Mark Kirkwood; Nancy Pugliese Kirkwood; Tyler Kirkwood; Donna Lawrence; Kristen Lawrence; Robert Lazzaro; Susan Lazzaro; Alexander Makris; John Matra; Mary Matra; Kelly McCleary;

Kirk McCleary; Mary McCleary; Denise Moss; Gregory Naylor; Susan Naylor; Donald Nemer; Kelli Nemer; Joanne O’Connell; Anita Podles; Thomas Podles; Anna Popomaronis; Cynthia Popomaronis; Eleni Bowden (Popomaronis); Thomas Popomaronis; William Popomaronis; Mary Kathryn Proefrock; Scott Proefrock; Jeff Reckseit (Wilhelmsen property); Edna Rudell; Paul Rudell; Ellaine Saeva; Joseph Schmitz; Susan Schmitz; Ernest Sessa; John Stehman; Theresa Stehman; Bruce Stumpp; Norma Stumpp; Chester Tokarski; Marilyn Tokarski; Ernest Viscuso; Lisa Viscuso; David Vosvick II; Deedra Vosvick; Man A. Vuong; Stacy Vuong; Nancy Welms; Christy Whaley; Neil Whaley; Jean Wimmer; and, Paul Wimmer.

FN60. As to many of the Appellees, Exxon challenges whether the contaminants found in their potable wells was attributed properly to the Jacksonville Exxon leak. The jury was presented with conflicting evidence regarding the underground flow of the gasoline. Because we must view all inferences in the evidence in the light most favorable to Appellees, we presume that Appellees who demonstrated contamination in their potable wells attributed the contamination correctly to the Jacksonville Exxon leak.

FN61. At trial, Appellees’ experts testified that there is “no safe level” of MTBE, and thus any exposure to MTBE, however slight, is sufficient to justify an award of damages for fear of cancer. Without delving into the reliability of such a theory (which was not raised by Exxon on appeal), we do not believe that such testimony is sufficient to support the causation requirement set forth today. To satisfy their burden of proof, Appellees must show that any actual exposure, as well as any objective and reasonable fear they have of developing cancer, is attributable to the Exxon leak. Individuals are exposed routinely to MTBE and its metabolite of concern, formaldehyde, in everyday life. Thus, Appellees would need to show that any objectively reasonable fear, and any actual exposure, was due not to the MTBE and

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formaldehyde that they have been exposed to routinely, but specifically to that released by Exxon. If Appellees' experts are correct that there is no safe level of exposure to MTBE, then a claim that Appellees' fear of developing cancer as a result of the Exxon spill specifically would necessarily be unreasonable; due to the background levels of MTBE that individuals (and Appellees) are exposed to on a regular basis.

FN62. The EPA recommends against exposure in drinking water to MTBE at levels above 20–40 parts per billion. Because the MDE's standard is stricter than the recommended level promulgated by the EPA, we look to the MDE's action level for purposes of our analysis.

FN63. The MTBE action level is described generally as an aesthetic standard, meaning a level at which contamination is detectable by unpleasant taste and smell, rather than necessarily a human safety level. The MDE has not developed a standard at which MTBE is deemed to be hazardous to human health, although testimony presented at trial suggests that this level may be many times higher—perhaps 20,000 to 100,000 times higher—than the aesthetic standard. Absent specific standards from the MDE regarding the level at which MTBE exposure becomes hazardous to human health, however, we decline to speculate that the action level promulgated by the MDE is insufficiently protective of human health. Thus, for purposes of this case, we shall treat any measurable contamination of MTBE exceeding the MDE action level of 20 parts per billion as sufficient to support an objective, reasonable fear of developing cancer.

FN64. These Appellees are: Jeanne Andrews; Richard Andrews; Annette Armstrong; John Armstrong; Ryan Backus; Shelly Backus; Florence Brock; Ellen Brookhart; Ronald Brookhart; Sean Brookhart; Ronald Bueche; Terry Bueche; Amanda Buscemi; Charles C. Buscemi; Karen Buscemi; Mary Buscemi; Rachel Buscemi; Philip Carbone; Maria Navarro Cole; Michael

Cole; Frederick Craig; Rosina Craig; Phillip Diedeman; Susan Diedeman; Dana Rhyne Dieter; Patricia Dieter; Gina DiPino; Paul DiPino, Jr.; Robert Dyer; Teresa Dyer; Carl Eisgruber; Lynn Eisgruber; Ellison Ensor; Edward Fletcher; Regina Fletcher; Franklin Fontanazza; Gia Fontanazza; Gina Fontanazza; Paul Freas; Eugene Freeman; Pearl Freeman; Debra Gillespie; Kevin Gillespie; Tara Gillespie; Thomas Gillespie, Jr.; Charlene Glatfelter; Curtis Glatfelter; George Gribble; Marjorie Gribble; Alicia Grogan; David Grogan; Jeanette Hairston; Linda Hairston–Taulton; Walter Hairston; Virginia Hannibal; John Higgins; Patrick Higgins; Richard Higgins; Jeffrey Hummel; Almarie Ianuly; Paul Ianuly; James Kelly; Dale Knapp; James Knapp; Kimberly Kobus; Thomas Kobus; Kaitlyn Lindenmeyer; Karen Lindenmeyer; Mark Lindenmeyer; Megan Lindenmeyer; Kim Makowy; William Makowy; Carol Malstrom; William Malstrom; Brian Mangione; Justine Mangione; Jodi Marsico; Michael Marsico; Jeffrey Munson; Leslie Munson; John Murphy; Rosemary Murphy; Christian O'Brien; Christopher O'Brien; Kathleen Oursler; Roger Oursler; Betty Over; Sylvester Over; Rebecca Pagani; Steven Pagani; David Palmer; Kimberly Palmer; Charles Parker; Kimberly Parker; Cathy Peters; Marcus Peters; Mary Prime; William Prime; Brynn Puller; John Puller; Patricia Puller; Richard Puller; Charles Riegger; Jennifer Lookingbill (Riegger); Julia Riegger; KatieRose Dobrzykowski (Riegger); Meghen Riegger; Rochelle Roth; Steven Roth; John Rusinko; Michele Scheetz; Ricky Scheetz; Susan Seery; Thomas Seery; Barbara Sheeler; Donald Sheeler; Anna Marie Simanski; Kaitlyn Jones (Slaughter); Diann Kohute (Slaughter); William Slaughter; Brendan Sullivan; Emily Sullivan; David Sutor; Lynn Sutor; Alexander Trader; Mary Trader; Patrick Rudolph (Trader); Leslie Tripp; Timothy Tripp; Christopher Tsakalos; Triantafilia Tsakalos; David Vaughan; Terri Vaughan; Kimberly A. Wachter; Martin R. Wachter; Delores Whitehurst; Gertrude Whitehurst; Hans Wilhelmsen; Kristen Wilhelmsen; Lindsey Williams; Nancy Williams; Owen Williams; Thomas Williams; Chen–Yu Yen;

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Ray–Whey Yen; Andrea Zachary; and, Mary Leffell (Zachary).

FN65. These Appellees are: Barbara Larrabee; Jon Larrabee; Edward Odend'hal; Nannette Odend'hal; Amy Gumina; Gloria Quinan; Anna Walega; and, Van Ho (Elegant Nails & Hair).

Exxon contends, and presented evidence at trial supporting its assertion, that the contamination on the property owned by Anna and John Walega is not attributable to the Jacksonville Exxon leak, but rather to an improperly abandoned underground storage tank found nearby. The jury, however, determined otherwise. Because we view the evidence in the light most favorable to these Appellees, we will not disturb the jury's conclusion that the evidence was sufficient to determine that the contamination detected on the Walega property was attributable to the Jacksonville Exxon spill.

Similarly, the property leased by Van Ho (Elegant Nails & Hair) was contaminated already at the time of the Jacksonville Exxon leak due to a prior gasoline leak in 2004 at the Four Corners Amoco/BP station, and was already equipped with a carbon filtration system. The jury, however, determined apparently that the contamination detected in March of 2006 (after the POET system malfunctioned) was attributable to the Exxon leak.

FN66. Because we determine that Appellees have not demonstrated sufficiently on this record a causal connection between their alleged physical injuries and the Jacksonville Exxon leak, we make no determination regarding the sufficiency of Appellees' testimony to establish physical injury.

FN67. Mr. Dell'uomo filed a medical malpractice suit with the Medical Health Claims Arbitration Office after being misdiagnosed with prostate cancer and receiving several radiation treatments. *Id.* at 520, 627 N.Y.S.2d 788, 710 A.2d at 364. Prior to the arbitration

hearing, Mr. Dell'uomo passed away, and the personal representative of his estate, Carol Sue Hunt (the appellant), was substituted for Mr. Dell'uomo. *Id.* at 520–21, 710 A.2d at 364. Mr. Dell'uomo sat for a deposition prior to his death, the transcript of which was introduced at the arbitration hearing. *Id.* at 533, 710 A.2d at 370.

FN68. Quinan's husband, Granville Quinan, also testified. He did not, however, offer any testimony regarding his wife's emotional distress.

In its brief, Exxon criticizes the testimony of Dr. Malik, noting that of the ninety-six plaintiffs for whom he performed a psychiatric evaluation, every plaintiff but one received a psychiatric diagnosis, despite Dr. Malik's conclusion that all of the plaintiffs seen were functioning normally. Additionally, Exxon claims that Dr. Malik erred in conducting clinical examinations, rather than forensic examinations, which take into account broader sources of information (rather than relying solely on the patient). Despite these criticisms, Exxon did not raise the admission of Dr. Malik's expert testimony as an issue on appeal on grounds of reliability or methodology. We therefore presume that Dr. Malik's testimony was admitted properly.

FN69. Testimony regarding the rash suffered presumptively by Quinan was admitted by the trial court solely for the purpose of establishing Quinan's state of mind. The rash may not support an award for emotional distress damages for fear of cancer on the grounds that it constitutes a physical injury resulting from the Exxon leak. Because we determine that expert medical testimony is required to establish that physical injury is related causally to fear of developing disease as a result of exposure to toxic substances, and Quinan did not present expert medical testimony supporting a claim that the rash resulted from her fear of developing cancer, Quinan's rash may not support an award for emotional distress damages for fear of cancer on these grounds.

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Exxon argues that this type of testimony, admitted as probative of the state of mind of an Appellee, should have been excluded by the trial court because the prejudicial impact of the testimony far outweighs its probative value. *See* Md. R. 5-403. Alternatively, Exxon contends that the trial court should have given an immediate limiting instruction to the jury, rather than waiting until the end of the trial. Because we review the trial judge's decision to admit such evidence under an abuse of discretion standard, reversal is appropriate only "where no reasonable person would share the view taken by the trial judge." *Consol. Waste Indus., Inc. v. Std. Equip. Co.*, 421 Md. 210, 219, 26 A.3d 352, 357 (2011). Because we do not believe that "no reasonable person" would admit the testimony regarding Quinan's rash, we decline to disturb Judge Dugan's evidentiary ruling in the limited circumstances presented by the testimony relating to Quinan.

FN70. The Quinan well first tested positive for MTBE contamination below the MDE action level on 16 April 2009. On 9 July 2009, a well test revealed MTBE contamination at 22 ppb, exceeding the MDE action level. The MDE installed a POET system at the Quinan property on 3 August 2009.

FN71. Recovery of damages for medical monitoring, also known as medical surveillance, where allowed, is distinct from a cause of action for an enhanced or increased risk of disease. In theory, a plaintiff may receive damages for medical monitoring only for "quantifiable costs of periodic examinations necessary to detect the onset of physical harm, whereas an enhanced risk claim seeks compensation for the anticipated harm itself, proportionately reduced to reflect the chance that it will not occur." *Angeletti*, 358 Md. 689, 781 n. 40, 752 A.2d 200, 251 n. 40 (2000) (quoting *Recovery for Damages for Expense of Medical Monitoring to Detect or Prevent Future Disease or Condition*, 17 A.L.R.5th 327, § 3).

FN72. In *Angeletti*, the plaintiffs, as class representatives, sought damages and injunctive relief against tobacco manufacturers and related entities for cancer and pulmonary disorders from smoking cigarettes, claiming violations of the Maryland Consumer Protection Act, Md.Code Ann. Com. § 13-101 *et seq.*, and damages for medical monitoring, among other claims. *Angeletti*, 358 Md. at 699-704, 752 A.2d at 205-08. The case reached this Court on a petition for writ of mandamus or prohibition by the tobacco manufacturers based on issues of class certification. *Id.* We granted the relief of mandamus and ordered the trial court to decertify two classes. Specifically, and most relevant to this case, we held that, even if medical monitoring constituted a valid cause of action or form of relief in Maryland, a class action seeking equitable relief should not have been certified under Maryland Rule 2-231(b)(2) on the basis of a claim for medical monitoring, under the circumstances of that case. *Id.* at 782, 752 A.2d at 251.

FN73. Moreover, "if a reasonable physician would not prescribe [medical monitoring] for a particular plaintiff because the benefits of the monitoring would be outweighed by the costs, which may include, among other things, the burdensome frequency of the monitoring procedure, its excessive price, or its risk of harm to the patient, then recovery would not be allowed." *Hansen*, 858 P.2d at 980.

FN74. To recover for medical monitoring, the court held, the plaintiff must prove "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." *Id.* at 312.

FN75. The Third Circuit outlined specific elements that a plaintiff must prove to recover damages for medical monitoring: a plaintiff must show (1) that he or she "was

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significantly exposed to a proven hazardous substance through the negligent actions of the defendant;" (2) that, "[a]s a proximate result of exposure, *plaintiff suffers a significantly increased risk of contracting a serious latent disease;*" (3) that "increased risk makes periodic diagnostic medical examinations reasonably necessary;" and (4) that "monitoring and testing procedures exist which make the early detection and treatment of the disease possible and beneficial." *Paoli I*, 916 F.2d at 852 (emphasis added).

FN76. These appellees are: Agnieszka Hudzik (Allison); Eric Allison; Kristen Allison; Susan Allison; David Austin; Emily Austin; Ian Austin; Reid Austin; Patricia Bateman; Alex Blum; Jon Blum; Madelyn Blum; Tracy Blum; Margaret Brown; Tara Brown; John Wright (Bull/Wright property); Adriane Burke; Lloyd Burke; Lloyd Burke, Jr.; Riley Burke; Bari Jo Burnett; Adriana Capizzi; Carlo Capizzi; Franca Capizzi; Francesca Capizzi; Julia Capizzi; Philip Capron; Susan Capron; Joan Clark; Lloyd Clark; Sharon Dorsch; William Dorsch; Alissa Dutrow; Daryl Dutrow; Emily Dutrow; Jennifer Dutrow; Brian Easton; David Easton; Michael Easton; Monique Easton; Bruce Elliott; Janice Elliott; Chris Federico; Emily Federico; Grace Federico; Kevin Federico; Tracy Federico; Bruna Fonseca; Clever Fonseca; Denise Fonseca; Maira Fonseca; Tiago Fonseca; Anthony Frattarola; Marianne Frattarola; Victoria Frattarola; Ann Fuller; Stanley Fuller; Mary Pat Goodhues; Connor Hartman; Gavin Hartman; Laura Hartman; Michael Hartman; Cheryl Howells; Brendan Huey; Heather Huey; Michael Huey; Shannon Huey; Dorothy Hyman; Richard Hyman; Kenneth Kelly; Lauryn Kelly; Michele Kelly; Stephanie Kelly; Kathleen Kennedy; Leonard Kennedy; Margaret Kennedy; Calvin Kirkwood; Chase Kirkwood; Jeremy Kirkwood; Mark Kirkwood; Nancy Pugliese Kirkwood; Tyler Kirkwood; Ellen Koerner; Henry Koerner; Donna Lawrence; Kristen Lawrence; Jennifer Lazzaro; Robert Lazzaro; Susan Lazzaro; Alexander Makris; Eleni Makris; Nikolaos Makris; Valerie Makris; John Matra; Mary Matra; Kelly McCleary; Kirk McCleary; Mary McCleary; Ryan

McCleary; Leigh Morgan; Pamela Morgan; R. Wade Morgan; Ronald Morgan; Denise Moss; Gregory Naylor; Gregory Naylor, Jr.; Kenneth Naylor; Susan Naylor; Tracy Naylor; Alexandra Nemer; Donald Nemer; Emmanuel Nemer; Kelli Nemer; Joanne O'Connell; Andrew Podles; Anita Podles; Claire Podles; John Podles; Thomas Podles; Thomas Podles, Jr.; Anna Popomaronis; Cynthia Popomaronis; Eleni Bowden (Popomaronis); Peter Vailas (Popomaronis); Thomas Popomaronis; William Popomaronis; Casey Proefrock; John Proefrock; Kate Proefrock; Mary Kathryn Proefrock; Megan Proefrock; Scott Proefrock; Jeff Reckseit (Wilhelmsen property); Edna Rudell; Paul Rudell; Alan Saeva; Ellaine Saeva; Joseph Schmitz; Marah Schmitz; Susan Schmitz; Ernest Sessa; Paula Sessa; Allison Shields; Erin Shields; John Shields, Jr.; Kevin Shields; Natalie Shields; Alyssa Stehman; John Stehman; Jonathan Stehman; Marina Stehman; Sierra Stehman; Theresa Stehman; Bruce Stumpp; Norma Stumpp; Chester Tokarski; Marilyn Tokarski; Ernest Viscuso; Francesca Viscuso; Gabrielle Viscuso; Lisa Viscuso; Nicole Viscuso; Chase Vosvick; David Vosvick II; Deedra Vosvick; Tanner Vosvick; Amy Vuong; Krystal Vuong; Man A. Vuong; Shuzhen Vuong; Sinh Vuong; Stacy Vuong; Megan Welms; Nancy Welms; Christy Whaley; Neil Whaley; Jean Wimmer; and, Paul Wimmer.

FN77. These appellees are: Thomas Albright; Paula Albright; Caitlin Andrews; Daniel Andrews; Jeanne Andrews; Richard Andrews; Annette Armstrong; John Armstrong; Emily Backus; Ryan Backus; Shelly Backus; Keith Brock; Ashley Brookhart; Ellen Brookhart; Ronald Brookhart; Sean Brookhart; Victoria Brookhart; Ronald Bueche; Terry Bueche; Amanda Buscemi; Cari C. Buscemi; Charles C. Buscemi; Karen Buscemi; Mary Buscemi; Rachel Buscemi; Philip Carbone; Maria Navarro Cole; Michael Cole; Frederick Craig; Rosina Craig; Phillip Diedeman; Phillip Diedeman, Jr.; Susan Diedeman; Dana Rhyne Dieter; Patricia Dieter; Dominique DiPino; Francesca DiPino; Gina DiPino; Joseph DiPino; Paul DiPino, Jr.; Paul DiPino, III; Robert Dyer;

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Sarah Dyer; Teresa Dyer; Carl Eisgruber; James Turfler (Eisgruber); Lynn Eisgruber; Ellison Ensor; Sarah Ensor; Edward Fletcher; Regina Fletcher; Sarah Fletcher; Zachary Fletcher; Franklin Fontanazza; Gia Fontanazza; Gina Fontanazza; Alexandra Freas; James Freas; Kathleen Freas; Paul Freas; Eugene Freeman; Pearlle Freeman; Debra Gillespie; Kevin Gillespie; Tara Gillespie; Thomas Gillespie, Jr.; Thomas Gillespie, III; Charlene Glatfelter; Curtis Glatfelter; George Gribble; Marjorie Gribble; Alicia Grogan; David Grogan; Gavin Grogan; Jeanette Hairston; Linda Hairston-Taulton; Walter Hairston; Theodore Hannibal; Virginia Hannibal; Joan Hanst; John Hanst; Rebecca Heyman-Magaziner; Allison Higgins; John Higgins; Mary Higgins; Patrick Higgins; Richard Higgins; Almarie Ianuly; Paul Ianuly; James Kelly; Mary Kelly; Dale Knapp; James Knapp; Kimberly Kobus; Thomas Kobus; Kaitlyn Lindenmeyer; Karen Lindenmeyer; Mark Lindenmeyer; Megan Lindenmeyer; Christopher Makowy; Corey Makowy; Heather Makowy; Kim Makowy; Rebecca Makowy; William Makowy; Carol Malstrom; William Malstrom; Allie Mangione; Brian Mangione; Justine Mangione; Taylor Mangione; Ian Marsico; Jodi Marsico; Kaitlin Marsico; Michael Marsico; Eric Munson; Georgia Munson; Jeffrey Munson; Leslie Munson; John Murphy; Natalie Murphy; Payton Murphy; Rosemary Murphy; Christian O'Brien; Christopher O'Brien; Shelby O'Brien; Kathleen Oursler; Roger Oursler; Betty Over; Sylvester Over; Emily Pagani; Nicholas Pagani; Rebecca Pagani; Steven Pagani; Andrew Palmer; David Palmer; Geoffrey Palmer; Kimberly Palmer; Andrew Parker; Charles Parker; James Parker; Kimberly Parker; Bradley Peters; Cathy Peters; John Peters; Marcus Peters; Jena Pietropaoli; Joseph Pietropaoli; Joseph Pietropaoli, Jr.; Paulette Pietropaoli; Sheila Pinsch; Mary Prime; William Prime; Brynn Puller; John Puller; Patricia Puller; Richard Puller; Jerome Rebold; Charles Riegger; Jennifer Lookingbill (Riegger); Julia Riegger; KatieRose Dobrzykowski (Riegger); Meghan Riegger; Rochelle Roth; Steven Roth; Barbara Rusinko; John Rusinko; Alexander Scheetz; Arden Scheetz; Michele

Scheetz; Ricky Scheetz; Alfred Schober; Adam Seery; Meghan Seery; Susan Seery; Thomas Seery; Barbara Sheeler; Donald Sheeler; Anna Marie Simanski; Chelsea Simanski; Garrett Simanski; James Simanski; Julia Simanski; Charlotte Slaughter; Emily Slaughter; Kaitlyn Jones (Slaughter); Diann Kohute (Slaughter); Nancy Slaughter; William Slaughter; William Slaughter, Jr.; Alicia Sullivan; Brendan Sullivan; Brendan Sullivan, Jr.; Emily Sullivan; Amanda Sutor; Austin Sutor; David Sutor; Lynn Sutor; Alexander Trader; Mary Trader; Matthew Trader; Patrick Rudolph (Trader); Brian Tripp; Leslie Tripp; Steven Tripp; Timothy Tripp; Christopher Tsakalos; Nicholas Tsakalos; Triantafilia Tsakalos; David Vaughan; Elliott Gloger (Vaughan); Kieran Vaughan; Terri Vaughan; Kimberly A. Wachter; James Wachter; Martin R. Wachter; Ryan Wachter; Delores Whitehurst; Gertrude Whitehurst; Cole Wilhelmsen; Hans Wilhelmsen; Hans Wilhelmsen, III; Kristen Wilhelmsen; Lindsey Williams; Nancy Williams; Owen Williams; Thomas Williams; Janet Winfield; Jennifer Winfield; Timothy Winfield; Chen-Yu Yen; Ray-Whey Yen; Christopher Zaccari; Patricia Zaccari; Andrea Zachary; and, Mary Leffell (Zachary).

FN78. These Appellees are: Amy Gumina; Van Ho; Barbara Larrabee; John Larrabee; Mitchell Larrabee; William Larrabee; Edward Odend'hal; Nanette Odend'hal; Gloria Quinan; Granville Quinan; Anna Walega; and, John Walega.

FN79. Specifically, Dr. Burns testified to the following:

Q. Did you qualitatively assess the risk faced by individuals in the Jacksonville area who were exposed or being exposed to MTBE in terms of whether or not they are at increased risk of cancer?

A. Yes. "Qualitative" means I didn't assign numbers to people, but I did look at where there's going to be increased cancer risk. If somebody is exposed to MTBE or benzene, they are incurring additional risk.

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* * *

Q. At what level of exposure in your professional opinion should individuals be afforded medical monitoring who have been exposed to MTBE?

A. ... You know, any level of exposure, whether it's by dermal exposure in a shower, inhalation [sic] or ingestion imposes some risk so any level of exposure of people really requires that they be [] offered medical monitoring."

* * *

Q. Do you have an opinion to a reasonable degree of scientific certainty as to what level of exposure to benzene puts someone at risk of developing leukemia before the nonexposed person?

A. Any level of exposure to benzene imposes some cancer risk.

FN80. In particular, Dr. Brautbar stated:

Q. Doctor, I want you to assume that there was a 26,000 gallon gasoline release at the Jacksonville Exxon from January 13th to February 13th, 2006. I want you to further assume that it is more likely than not that all of the Plaintiffs in this case have been or will be exposed to gasoline constituents, including MTBE, in the 30 years following the release. Finally, I want you to assume that the exposure as a result of that release to these individuals and Plaintiffs will be greater than that to which they would otherwise be exposed. Assuming all of those to be true, do you have an opinion based on a reasonable degree of medical certainty whether those Plaintiffs would have a significantly increased risk greater than the normal risk all of us encounter in our everyday lives?

* * *

Q. Do you have an opinion, Doctor?

A. Yes, I do.

Q. And what is that opinion?

A. The opinion is that they will have an increased risk of cancer.

Q. And how would you characterize the risk, significant?

A. Significantly increased risk of cancer.

Q. What do you mean by significantly increased risk of?

A. Meaning that it is not a theoretical or rhetorical factor. It is an actual factor.

FN81. Although this Court has not recognized previously the availability of damages for medical monitoring, we determine that, because the jury instructions given by Judge Dugan hew closely to the standards we adopt today, Judge Dugan's exposition of law relating to medical monitoring was consistent with this opinion. Our opinion does not alter the legal standard as instructed by Judge Dugan, but merely elaborates on the sufficiency of the evidence needed to create a jury question. Thus, because the evidence provided by Appellees at trial was insufficient, considering the legally correct standard enunciated by Judge Dugan, to create a jury question, reversal (without remand) is appropriate.

FN82. As noted earlier, Judge Dugan granted Exxon's Motion for Judgment Motion for Judgment on Plaintiffs' Claims for Punitive Damages based on Allegations of Evil Motive, Ill Will, or Intent to Injure. Thus, because Judge Dugan determined as a matter of law that Appellees could not establish malice or evil intent sufficient to support a finding of punitive damages, Appellees similarly may not recover emotional distress damages related to injury to real property on the basis of evil motive, ill will, or intent to injure.

FN83. The awards being reversed are as to the following Appellees: Susan Allison;

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Jeanne Andrews; Richard Andrews; Annette Armstrong; John Armstrong; David Austin; Emily Austin; Ryan Backus; Shelly Backus; Tracy Blum; Florence Brock; Ellen Brookhart; Ronald Brookhart; Margaret Brown; Ronald Bueche; Terry Bueche; Louise Bull; Adriane Burke; Lloyd Burke; Bari Jo Burnett; Philip Capron; Susan Capron; Philip Carbone; Joan Clark; Lloyd Clark; Michael Cole; Frederick Craig; Rosina Craig; Phillip Diedeman; Susan Diedeman; Dana Rhyne Dieter; Patricia Dieter; Paul DiPino, Jr.; Sharon Dorsch; William Dorsch; Robert Dyer; Teresa Dyer; Christopher Easton; Monique Easton; Carl Eisgruber; Lynn Eisgruber; Bruce Elliott; Ellison Ensor; Edward Fletcher; Regina Fletcher; Clever Fonseca; Denise Fonseca; Franklin Fontanazza; Gina Fontanazza; Paul Freas; Eugene Freeman; Pearlie Freeman; Ann Fuller; Debra Gillespie; Thomas Gillespie, Jr.; Charlene Glatfelter; Curtis Glatfelter; Mary Pat Goodhues; George Gribble; Marjorie Gribble; Alicia Grogan; David Grogan; Jeanette Hairston; Walter Hairston; Virginia Hannibal; Richard Higgins; Heather Huey; Michael Huey; Jeffrey Hummel; Richard Hyman; Almarie Ianuly; Paul Ianuly; James Kelly; Kenneth Kelly; Stephanie Kelly; Margaret Kennedy; Mark Kirkwood; Nancy Pugliese (Kirkwood); Dale Knapp; James Knapp; Kimberly Kobus; Thomas Kobus; Barbara Larrabee; John Larrabee; Donna Lawrence; Robert Lazzaro; Karen Lindenmeyer; Mark Lindenmeyer; Kim Makowy; William Makowy; Carol Malstrom; William Malstrom; Brian Mangione; Justine Mangione; Jodi Marsico; Michael Marsico; John Matra; Mary Matra; Kirk McCleary; Mary McCleary; Denise Moss; Jeffrey Munson; Leslie Munson; John Murphy; Rosemary Murphy; Gregory Naylor; Susan Naylor; Donald Nemer; Kelli Nemer; Christian O'Brien; Christopher O'Brien; Joanne O'Connell; Edward Odend'hal; Nanette Odend'hal; Kathleen Oursler; Roger Oursler; Betty Over; Sylvester Over; Rebecca Pagani; Steven Pagani; David Palmer; Kimberly Palmer; Charles Parker; Kimberly Parker; Cathy Gay-Peters; Marcus Peters; Joseph Pinsch; Anita Podles; Thomas Podles; Cynthia Popomaronis; William Popomaronis; Mary Prime; William

Prime; Mary Kathryn Proefrock; Scott Proefrock; Patricia Puller; Richard Puller; Gloria Quinan; Jeff Reckseit (awarded to landlord Hans Wilhelmsen); Charles Riegger; Julia Riegger; Rochelle Roth; Steven Roth; Edna Rudell; Paul Rudell; Richard Rudell; John Rusinko; Ellaine Saeva; Michele Scheetz; Ricky Scheetz; Joseph Schmitz; Susan Schmitz; Susan Seery; Thomas Seery; Ernest Sessa; Barbara Sheeler; Donald Sheeler; Anna Marie Simanski; William Slaughter; John Stehman; Theresa Stehman; Bruce Stumpp; Norma Stumpp; Brendan Sullivan; Emily Sullivan; David Sutor; Lynn Sutor; Chester Tokarski; Marilyn Tokarski; Mary Trader; Christopher Tsakalos; Triantafilia Tsakalos; David Vaughan; Terri Vaughan; Ernest Viscuso; Lisa Viscuso; Man A. Vuong; Stacy Vuong; Kimberly A. Wachter; Martin R. Wachter; Anna Walega; Nancy Welms; Christy Whaley; Neil Whaley; Hans Wilhelmsen; Kristen Wilhelmsen; Nancy Williams; Thomas Williams; Jean Wimmer; Paul Wimmer; Chen-Yu Yen; Ray-Whey Yen; Andrea Zachary; Mary Leffell (Zachary); and, Christopher Garliss.

FN84. The parties characterize differently the loss of use and enjoyment damages awarded by the jury. Exxon-refers in its brief to these awards as damages for prospective loss of enjoyment, presumably because its primary contention is that these damages were incurred prospectively from the date of valuation of property and thus are subsumed in its market value. By contrast, Appellees refer to these damages as past loss of use and enjoyment, presumably because the trial court determined that damages for prospective loss of use and enjoyment and diminution in value are duplicative. For purposes of simplicity and consistency with the trial court's characterization of these damages, we will refer to the loss of use and enjoyment damages awarded by the jury for the period between when the harm first occurred and the commencement of trial as damages for "past loss of use and enjoyment."

FN85. Generally, diminution in value damages are available only where the injury to

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real property is permanent. *Goldstein v. Potomac Elec. Power Co.*, 285 Md. 673, 682, 404 A.2d 1064, 1068 (1979). Here, the trial court did not determine expressly that the injury to Appellees' property was permanent in nature, although Appellees' expert, Dr. John Kilpatrick, based his valuation opinion upon the assumption that the well water contamination was permanent. Because Appellees elected to proceed to trial claiming damages for diminution in value, rather than prospective loss of use and enjoyment, and no party has raised on appeal the issue of the propriety of awarding damages for diminution in value, we assume, without deciding, that the injury to land here is permanent.

Because damages for permanent injury to real property are generally available only to the owners of real property, see *Peters v. Contigroup*, 292 S.W.3d 380, 389 (Mo.Ct.App.2009) (noting that, because "damages for a permanent nuisance involve the diminution in value of the property [,] ... one seeking damages for a permanent nuisance must have a property interest"); *In re the Premcor Refining Grp., Inc.*, 233 S.W.3d 904, 908-09 (Tex.App.2007) (dismissing the claims of minor plaintiffs, adult next friends, and adult plaintiffs who were not "record owners of the real property at the time the initial injury [constituting a permanent nuisance] to the real property occurred"), awards for loss of use and enjoyment to children and non-owner occupiers of the land therefore are reversed.

Thus, the loss of use and enjoyment awards are reversed as to the following Appellees: Agnieszka Hudzik (Allison); Eric Allison; Kristen Allison; Caitlin Andrews; Daniel Andrews; Ian Austin; Reid Austin; Emily Backus; Alex Blum; Madelyn Blum; Ashley Brookhart; Sean Brookhart; Victoria Brookhart; Tara Brown; John Wright (Bull/Wright); Amanda Buscemi; Cari Cheelsman (Buscemi); Charles Cheelsman (Buscemi); Karen Buscemi; Mary Buscemi; Rachel Buscemi; Adriana Capizzi; Francesca Capizzi; Julia Capizzi; Maria

Navarro-Cole; Dominique DiPino; Francesca DiPino; Gina DiPino; Joseph DiPino; Paul DiPino, III; Alissa Dutrow; Emily Dutrow; Sarah Dyer; Brian Easton; David Easton; Michael Easton; James Turfler (Eisgruber); Emily Federico; Grace Federico; Kevin Federico; Sarah Fletcher; Zachary Fletcher; Bruna Fonseca; Maira Fonseca; Tiago Fonseca; Gia Fontanazza; Anthony Frattarola; Marianne Frattarola; Victoria Frattarola; Alexandra Freas; James Freas; Eugene Freeman (individually); Pearlle Freeman (individually); Kevin Gillespie; Tara Gillespie; Thomas Gillespie, III; Gavin Grogan; Linda Hairston-Taulton; Allison Higgins; John Higgins; Patrick Higgins; Brendan Huey; Shannon Huey; Lauryn Kelly; Michele Kelly; Kathleen Kennedy; Calvin Kirkwood; Chase Kirkwood; Jeremy Kirkwood; Tyler Kirkwood; Mitchell Larrabee; William Larrabee; Kristen Lawrence; Jennifer Lazzaro; Susan Lazzaro; Kaitlyn Lindenmeyer; Megan Lindenmeyer; Christopher Makowy; Corey Makowy; Heather Makowy; Rebecca Makowy; Alexander Makris; Eleni Makris; Allie Mangione; Taylor Mangione; Ian Marsico; Kaitlin Marsico; Kelly McCleary; Leigh Morgan; R. Wade Morgan; Catherine Moss; Natalie Murphy; Payton Murphy; Gregory Naylor, Jr.; Kenneth Naylor; Tracy Naylor; Alexandra Nemer; Emmanuel Nemer; Shelby O'Brien; Emily Pagani; Nicholas Pagani; Andrew Palmer; Geoffrey Palmer; Andrew Parker; James Parker; Bradley Peters; John Peters; Andrew Podles; Claire Podles; John Podles; Thomas Podles, Jr.; Anna Popomaronis; Eleni Popomaronis; Peter Vailas (Popomaronis); Thomas Popomaronis; Casey Proefrock; John Proefrock; Kate Proefrock; Megan Proefrock; Brynn Puller; John Puller; Jennifer Riegger; KatieRose Riegger; Meghan Riegger; Mary Judith Rudell; Alexander Scheetz; Arden Scheetz; Marah Schmitz; Adam Seery; Meghan Seery; Allison Shields; Erin Shields; Kevin Shields; Chelsea Simanski; Garrett Simanski; Julia Simanski; Charlotte Slaughter; Diann Kohute (Slaughter); Emily Slaughter; Kaitlyn Jones (Slaugh-

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ter); Nancy Slaughter; William Slaughter, Jr.; Alyssa Stehman; Jonathon Stehman; Marina Stehman; Sierra Stehman; Alicia Sullivan; Brendan Sullivan, Jr.; Amanda Sutor; Austin Sutor; Alexander Trader; Matthew Trader; Patrick Trader; Brian Tripp; Steven Tripp; Nicholas Tsakalos; Elliott Gloger (Vaughan); Kieran Vaughan; Francesca Viscuso; Gabrielle Viscuso; Nicole Viscuso; Chase Vosvick; Tanner Visvoci; Amy Vuong; Krystal Vuong; Shuzhen Vuong; Sinh Vuong; Jack Wachter; Ryan Wachter; Megan Welms; Delores Whitehurst; Gertrude McNicholas (Whitehurst); Cole Wilhelmsen; Hans Wilhelmsen III; Lindsey Williams; Owen Williams; and, Jennifer Winfield.

As explained below, Exxon admitted liability for some compensatory damages to Appellee Van Ho. Because Ms. Ho is a lessee, she did not claim, and is not entitled to recover, damages for diminution in value of the real property she leased. Because Exxon admitted liability to Ms. Ho, however, she may recover damages for loss of use and enjoyment as a lessee, and not an owner, of the real property at issue in this case. As explained below, we will reverse and direct remand for a new trial as to the loss of use and enjoyment award to Ms. Ho.

FN86. Maryland law requires sellers of real property to disclose any latent defects of which he or she has actual knowledge. See Md.Code (1974, 2010 Repl.Vol.), Real Property Article § 10-702. As the trial court instructed the jury, “[u]nder Maryland law, a seller of real property has a duty to disclose any latent defects of which he or she has actual knowledge that a purchaser would not reasonably be expected to ascertain by a careful visual inspection and that would pose a direct threat to the health or safety of the purchaser or an occupant. The seller must disclose, among other things, any latent defects in the ‘source of household water’ and any issues related to ‘hazardous materials.’”

FN87. Indeed, Appellees who purchased

their properties in the vicinity of the strike line radius subsequent to 16 February 2006, acknowledged that they knew about the leak prior to closing, yet opted to complete the sale, in some instances even signing a written statement acknowledging their knowledge of the leak.

FN88. Thus, Appellees who purchased their homes or business properties following the announcement of the leak presumably did so at a depreciated value, and are therefore ineligible to receive damages for either diminution in value or loss of use and enjoyment. These Appellees include the Hartmans (Laura and Michael), Cheryl Howells, and the Vosvicks (Chase, David II, Deedra, and Tanner). Exxon contends that the verdicts for the Hueys, Nemers, and Proefrocks should be reversed also on these grounds. These Appellees entered into contracts to buy homes in the Jacksonville community prior to announcement of the leak, but did not go to settlement until after the discovery of the leak. We do not believe that these Appellees' awards for injury to property should be reversed simply because they did not proceed to closing until after the leak was discovered. Rather, because they entered into contracts for sale prior to discovery of the leak, they paid presumably the pre-leak, unimpaired values for their homes, and thus, barring any other grounds for reversal, would be eligible for damages for diminution in value of real property only (as explained herein).

FN89. We assume, without deciding, that the testimony offered in support of Appellees' claims for loss of use and enjoyment was appropriate to that purpose. As Judge James Eyler recognized in *Ford*, however, a plaintiff may not circumvent the prohibition against the recovery of emotional distress awards relating to property damage by cloaking his or her emotional distress claim as a claim for loss of use and enjoyment of property. 204 Md.App. at 103, 40 A.3d at 574 (J. Eyler, J., concurring and dissenting in part) (citing *Hall v. Lovell Regency Homes*, 121 Md.App. 1, 26, 708 A.2d 344, 356 (1998)).

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FN90. Exxon cites *Washington Suburban Sanitary Comm'n v. CAE-Link Corp.*, 330 Md. 115, 622 A.2d 745 (1993) (“*WSSC*”), for the proposition that loss of use and enjoyment and diminution in value damages are necessarily duplicative remedies. Exxon’s reliance on *WSSC* is mistaken, however. In *WSSC*, we considered whether damages for inverse condemnation, calculated under both the common law and the statutory method, could be recovered for the same injury. *Id.* at 149–52, 622 A.2d at 762–63. We determined that, because both measures of damages sought to achieve the same goal, they were necessarily duplicative and thus could not both be recovered. *Id.* at 151–52, 622 A.2d at 763 (citing *Brannon v. State Roads Comm’n*, 305 Md. 793, 799, 506 A.2d 634, 637–38 (1986)). Here, however, Appellees did not assert both a common law and a statutory remedy, but rather two, permissible, common law methods of calculating damages. Thus, any analogy sought to be drawn between *WSSC* and the present case fails.

FN91. Some Appellees with businesses were allocated damages for out-of-pocket expenses by the jury. It does not appear, however, that the residential Appellees claimed recovery of costs for the installation and maintenance of POET systems or the purchase of bottled water, which, provided that causation was proved sufficiently, may have been recoverable under *Maxa*. Although the proposed versions of the verdict sheets offered by Appellees’ counsel appear to indicate the possibility that some Appellees could recover out of pocket expenses if alleged, and some Appellees testified regarding the costs of such out-of-pocket expenditures, the Appellee-specific verdict sheets sent to the jury did not provide an option for the jury to allocate damages for out-of-pocket expenses. As a result, damages were therefore not allocated thusly and it appears that no residential Appellee sought out-of-pocket expenses for POET systems and bottled water.

FN92. These Appellee-owned properties in-

clude the following Appellee families or businesses: Allison; Austin; Bateman; Blum; Brown; Bull/Wright; Burke; Burnett; Capizzi; Capron; Clark; Dorsch; Dutrow; Easton; Elliott; Federico; Fonseca; Frattarola; Fuller; Goodhues; Hartman; Howells; Huey; Hyman; Kenneth & Stephanie Kelly; Kennedy; King; Kirkwood/Pugliese; Koerner; Lawrence; Lazzaro; Makris; Matra; McCleary; Morgan; Moss; Naughton; Naylor; Nemer; Joanne O’Connell; Podles; Popomaronis; Proefrock; Jeff Reckseit (Wilhelmsen property); Edna Rudell; Paul Rudell; Richard Rudell; Saeva; Schmitz; Sessa; Shields; Stehman; Stumpp; Tokarski; Viscuso; Vosvick; Vuong; Welms; Whaley; Wilhelmsen (properties located at 13707, 13729, and 13821 Jarrettsville Pike); Wimmer; Christopher Garliss/Highpoint Homebuilders, Inc.; 14342 Jarrettsville Pike, LLC; and, 3422 Sweet Air Road, LLC.

Of these Appellees, Exxon admitted liability for negligence, trespass, nuisance, and strict liability to the following: Allison, Stehman, Vuong, Welms, and 3422 Sweet Air Road, LLC. Because Exxon admitted liability to these Appellees, they are excluded from this discussion and may recover damages for diminution in value to real property, even though their properties never tested positive for contamination.

FN93. All of the Appellees listed at *supra* n. 92 claimed damages for diminution in value, with the exception of the Viscuso family, who claimed damages for loss of use and enjoyment only.

FN94. The *Yarema* court noted that leaking underground storage tanks could support causes of action for negligence and strict liability because a leak “constitute[s] a breach of [Exxon’s] duty to its neighboring landowners not to impair their ownership rights through water contamination,” and “the placement of large underground gasoline tanks in close proximity to private residences and drinking wells constitutes an abnormally dangerous activity from which strict liability may flow.” *Id.* at 153–54, 516

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A.2d at 1005 (citing *Yommer v. McKenzie*, 255 Md. 220, 257 A.2d 138 (1969)).

FN95. The plaintiffs in *Toy* were denied recovery ultimately, however, because plaintiffs could not demonstrate that defendant failed to take reasonable care in performing the dredging operations, nor did the facts support a cause of action for strict liability. *Id.* at 211, 214, 4 A.2d at 764–65.

FN96. Because Exxon conceded liability to Ms. Ho and the Tripp family (while disputing expressly any fraud, fear of cancer, or medical monitoring claims), they may recover damages for loss of use and enjoyment, their sole remaining category of damages.

FN97. Evidence produced at trial suggested that Ms. Ho paid approximately \$590 per month in rent and associated costs for her salon space.

FN98. Exxon contends that Dr. Kilpatrick's testimony should have been disqualified under *Frye-Reed*, and that we should therefore apply a *de novo* standard of review. See *Wilson*, 370 Md. at 201 n. 5, 803 A.2d at 1040 n. 5 (“Appellate review of a trial court's decision regarding admissibility under *Frye-Reed* is *de novo*”). *Frye-Reed* is the Maryland test for determining the admissibility of expert scientific testimony. See *Frye v. United States*, 293 F. 1013 (D.C.Cir.1923) (articulating standard of “general acceptance in the relevant scientific community”); *Reed v. State*, 283 Md. 374, 391 A.2d 364 (1978) (adopting the *Frye* standard in Maryland). *Frye-Reed* applies only to expert opinion based on new and novel scientific techniques. *Montgomery Mut. Ins. Co. v. Chesson*, 399 Md. 314, 328, 923 A.2d 939, 946 (2007); *Clemons v. State*, 392 Md. 339, 364, 896 A.2d 1059, 1073 (2006); *Reed*, 283 Md. at 381, 391 A.2d at 368. As the Court of Special Appeals noted in *CSX Transportation, Inc. v. Miller*, *Frye-Reed* contemplates “new, and arguably questionable, techniques such as lie detector tests, breathalyzer tests, paraffin tests, DNA identification, voiceprint identification, as in the *Reed* case itself, and

the use of polarized light microscopy to identify asbestos.” 159 Md.App. 123, 187, 858 A.2d 1025, 1062 (2004).

Here, Exxon attempts to impose the strictures of *Frye-Reed* on the expert testimony of a real estate appraiser. Valuation of real property, however, is not the type of scientific expert opinion contemplated by the *Frye-Reed* test. See *id.* Thus, even though the trial court conducted a *Frye-Reed* hearing prior to accepting Dr. Kilpatrick as an expert witness, we determine that *Frye-Reed* does not apply here.

FN99. Exxon did not object at trial to Dr. Kilpatrick's valuation methods as it relates to the following Appellee commercial properties: Dogwood Management, LLC; Klein Family Development Corp.; 14342 Jarrettsville Pike, LLC; 3313 Paper Mill Road, LLC; Jarrettsville Retail, LLC; 14231 Jarrettsville Pike, LLC; 14237 Jarrettsville Pike, LLC; 3422 Sweet Air Road, LLC; and, Lenore Zaccari/Lenore Zaccari Residual Trust (property at 3411 Sweet Air Road). Exxon does not challenge specifically on appeal the diminution in value awards to these Appellees, and thus, with the exception of 14342 Jarrettsville Pike, LLC (reversed on other grounds as explained *supra*), those judgments are affirmed.

Exxon challenges on appeal, however, Dr. Kilpatrick's valuation of Appellee Klein's of Jacksonville (“Klein's”), which operated a grocery store on property owned by Appellee Klein Family Development Corp. at 14330 Jarrettsville Pike, and recovered damages for injury to its business based on a “forced liquidation theory.” Exxon did not object to the admission of Dr. Kilpatrick's testimony before the trial court, but argued at trial that Dr. Kilpatrick's testimony as to Klein's was speculative, not supported by a factual basis, and should not be permitted to go to the jury.

Klein's opened for business in the years immediately preceding the subject gasoline leak, and remained unprofitable at the

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time of the leak (as was expected by Klein's, according to Dr. Kilpatrick's testimony). Dr. Kilpatrick testified that the proper valuation of Klein's was its liquidation value, or what the store would be worth to a prospective purchaser. Dr. Kilpatrick's "impaired" valuation was based on what he termed a "disorderly liquidation," in which there is no prospective purchaser due to the undesirability of locating in the Jacksonville area. Under Dr. Kilpatrick's theory, therefore, Klein's would be forced to sell off its fixtures and furniture in piecemeal form to prospective purchasers from outside the Jacksonville area, thus incurring additional costs.

Exxon argues that this methodology was based on the unfounded assumption that Klein's of Jacksonville would go out of business regardless of the existence of the leak, an assumption not supported by testimony from any Klein's representative or other evidence produced at trial. To the contrary, Dr. Kilpatrick acknowledged that unprofitability in the store's first few years of operation was anticipated by Klein's, and that, following the leak, revenues had increased approximately fifty percent. Because Dr. Kilpatrick's fundamental assumption—that Klein's would be forced to liquidate due to negative impacts resulting from the spill—as unsupported by any evidence offered at trial, we conclude that his opinion lacked a sufficient factual basis. Thus, because Dr. Kilpatrick's testimony had no probative force as to the valuation of the business, and Klein's offered no additional evidence in support of its claim for damages, the trial judge erred in submitting the claim to the jury. See Giant Food, 152 Md.App. at 182, 831 A.2d at 490 ("No matter how highly qualified the expert may be in his field, his opinion has no probative force unless a sufficient factual basis to support a rational conclusion is shown." (quoting State Dep't of Health v. Walker, 238 Md. 512, 520, 209 A.2d 555, 559 (1965))). Therefore, we reverse the judgment for "loss of liquidation value" as to Klein's of Jacksonville.

FN100. Dr. Kilpatrick's case study methodology considered summaries of settlements or jury verdicts in seven trials that involved claimed property damage due to groundwater contamination. One of these seven trials was Exxon Mobil Corp. v. Ford, in which the jury was permitted to find that some of the plaintiffs' homes were valueless. Although we recognize, assuming that the case study methodology is an appropriate valuation technique, that the data generated in Ford is likely most relevant as it concerns the same community, we do not think it appropriate to base valuation conclusions on jury awards that are not yet final because of a contemporaneously pending appeal.

FN101. Dr. Kilpatrick testified that proximity was, in essence, the same for each and every plaintiff in this case, and thus an irrelevant factor, because every Appellees' property sits atop the same aquifer that experienced MTBE contamination.

FN102. Dr. Kilpatrick acknowledged the existence of the sales in his testimony, and even noted that he deemed 100 of these sales to be relevant to valuing the contaminated properties. He did not consider them, however, in calculating his impaired values. These sales reflected, as a general proposition, an approximately seven percent diminution in value.

FN103. One lender stated that many banks "stay away from lending on property near gas stations" as a general proposition.

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Court of Appeals of Maryland.
 EXXON MOBIL CORPORATION

v.
 Paul D. FORD, et al.

No. 16, Sept. Term 2012.
 Feb. 26, 2013.

Background: Homeowners and other residents brought claims against owner of gas station, alleging groundwater contamination from 26,000-gallon underground gasoline leak, and asserting claims for strict liability, private nuisance, trespass, negligence, and fraudulent concealment. Station owner accepted liability for all claims except fraudulent concealment, and disputed only causation and damages. The Circuit Court, Baltimore County, Maurice W. Baldwin, J., entered judgment on jury verdict awarding compensatory damages totaling over \$147 million but rejecting fraudulent concealment claim. Station owner appealed. The Court of Special Appeals, 204 Md.App. 1, 40 A.3d 514, affirmed in part, reversed in part, and remanded. Parties petitioned and cross-petitioned for certiorari.

Holdings: The Court of Appeals, Harrell, J., held that:
 (1) homeowners were not entitled to recover emotional distress damages based on fear of contracting cancer;
 (2) homeowners were not entitled to recover compensatory damages for future costs of medical monitoring;
 (3) testimony of homeowners' expert was admissible on issue of diminution of property value; and
 (4) evidence was insufficient to show that homeowners' properties had zero value.

Affirmed in part, reversed in part, and remanded with directions.

West Headnotes

[1] Certiorari 73 ↪ 64(2)73 Certiorari

73II Proceedings and Determination

73k63 Review

73k64 Scope and Extent in General

73k64(2) k. Jurisdictional Questions.

Most Cited Cases**Courts 106 ↪ 102(1)**106 Courts

106II Establishment, Organization, and Procedure

106II(J) Concurrence in Adjudication

106k102 In General

106k102(1) k. In General. Most Cited

Cases

Even if in banc panel Court of Special Appeals had not decided some issues by requisite majority, Court of Appeals, having granted both parties' petitions for writs of certiorari, could consider and decide "all the issues that would have been cognizable by the intermediate appellate court." West's Ann.Md.Code, Court and Judicial Proceedings, § 1-403(c); Md.Rule 8-131(b)(2).

[2] Appeal and Error 30 ↪ 154(1)30 Appeal and Error

30IV Right of Review

30IV(B) Estoppel, Waiver, or Agreements Affecting Right

30k154 Recognition of or Acquiescence in Decision

30k154(1) k. What Constitutes Recognition or Acquiescence in General. Most Cited Cases

Appeal and Error 30 ↪ 88330 Appeal and Error

30XVI Review

30XVI(C) Parties Entitled to Allege Error

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30k881 Estoppel to Allege Error
30k883 k. Assent to Proceeding. Most

Cited Cases

Gas station owner did not waive its right to appeal compensatory damages awards in homeowners' tort action arising from underground gasoline spill, where, at trial, station owner's counsel stated during opening statement and closing argument, that station owner was taking responsibility for compensating homeowners who had been harmed by the spill, would accept responsibility to pay for whatever damages jury awarded, and primarily disputed punitive damages; statements merely urged the jury to award an appropriate compensatory award based on the properly admitted evidence at trial and proper jury instruction, and statements could not have acquiesced in judgment since they were made prior to rendition of judgment.

[3] Estoppel 156 ↪ 52.10(2)

156 Estoppel
156III Equitable Estoppel
156III(A) Nature and Essentials in General
156k52.10 Waiver Distinguished
156k52.10(2) k. Nature and Elements of Waiver. Most Cited Cases

Estoppel 156 ↪ 52.10(3)

156 Estoppel
156III Equitable Estoppel
156III(A) Nature and Essentials in General
156k52.10 Waiver Distinguished
156k52.10(3) k. Implied Waiver and Conduct Constituting Waiver. Most Cited Cases

Waiver is conduct from which it may be inferred reasonably an express or implied intentional relinquishment of a known right.

[4] Appeal and Error 30 ↪ 154(5)

30 Appeal and Error
30IV Right of Review
30IV(B) Estoppel, Waiver, or Agreements Affecting Right
30k154 Recognition of or Acquiescence in Decision
30k154(5) k. In General. Most Cited

Cases

The doctrine of acquiescence, or waiver, is that a voluntary act of a party which is inconsistent with the assignment of errors on appeal normally precludes that party from obtaining appellate review.

[5] Appeal and Error 30 ↪ 154(1)

30 Appeal and Error
30IV Right of Review
30IV(B) Estoppel, Waiver, or Agreements Affecting Right
30k154 Recognition of or Acquiescence in Decision
30k154(1) k. What Constitutes Recognition or Acquiescence in General. Most Cited Cases

Appeal and Error 30 ↪ 161

30 Appeal and Error
30IV Right of Review
30IV(B) Estoppel, Waiver, or Agreements Affecting Right
30k160 Acceptance of Benefits
30k161 k. In General. Most Cited Cases

Appeal and Error 30 ↪ 883

30 Appeal and Error
30XVI Review
30XVI(C) Parties Entitled to Allege Error
30k881 Estoppel to Allege Error
30k883 k. Assent to Proceeding. Most Cited Cases

The doctrine of waiver, under which a party's voluntary act inconsistent with assignment of errors on appeal precludes it from obtaining appellate review, is also known as estoppel, acceptance of benefits creating mootness, and acquiescence in judgment.

[6] Appeal and Error 30 ↪ 153

30 Appeal and Error
30IV Right of Review
30IV(B) Estoppel, Waiver, or Agreements Affecting Right
30k153 k. Inconsistent Position or Action in General. Most Cited Cases

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Appeal and Error 30 154(.5)

30 Appeal and Error

30IV Right of Review

30IV(B) Estoppel, Waiver, or Agreements Affecting Right

30k154 Recognition of or Acquiescence in Decision

30k154(.5) k. In General. Most Cited Cases

A party's right to appeal may be waived only where there is acquiescence in the decision from which the appeal is taken or by otherwise taking a position inconsistent with the right to appeal.

17] Appeal and Error 30 153

30 Appeal and Error

30IV Right of Review

30IV(B) Estoppel, Waiver, or Agreements Affecting Right

30k153 k. Inconsistent Position or Action in General. Most Cited Cases

The waiver doctrine applies only to conduct that is necessarily inconsistent with the right to appeal.

18] Appeal and Error 30 153

30 Appeal and Error

30IV Right of Review

30IV(B) Estoppel, Waiver, or Agreements Affecting Right

30k153 k. Inconsistent Position or Action in General. Most Cited Cases

To take actions that are necessarily inconsistent with challenging a judgment, so as to waive appellate review of the judgment, a party must have knowledge of the nature and effect of the judgment.

19] Appeal and Error 30 154(1)

30 Appeal and Error

30IV Right of Review

30IV(B) Estoppel, Waiver, or Agreements Affecting Right

30k154 Recognition of or Acquiescence in Decision

30k154(1) k. What Constitutes Recognition or Acquiescence in General. Most Cited Cases

Waiver by acquiescence of appellate review of a judgment is limited to a party's post-judgment conduct.

110] Damages 115 57.33

115 Damages

115III Grounds and Subjects of Compensatory Damages

115III(A) Direct or Remote, Contingent, or Prospective Consequences or Losses

115III(A)2 Mental Suffering and Emotional Distress

115k57.30 Fear of Developing Disease

115k57.33 k. Cancer. Most Cited

Cases

Evidence 157 571(7)

157 Evidence

157XII Opinion Evidence

157XII(F) Effect of Opinion Evidence

157k569 Testimony of Experts

157k571 Nature of Subject

157k571(7) k. Value. Most Cited

Cases

Homeowners were not entitled to recover emotional distress damages based on homeowners' fear of contracting cancer, in action against gas station owner arising from underground spill of gasoline containing the contaminants methyl tertiary-butyl ether (MTBE) and benzene, since homeowners lacked an objectively reasonable fear based on exposure and failed to show sufficient manifestation of physical injury; although the contaminants were detected in homeowners' potable wells, and homeowners' expert testified that there was "no safe level" of exposure to MTBE, an administrator for Maryland Department of the Environment (MDE) oil control program testified that state had set exposure levels above those found in homeowners' wells, and none of the homeowners claimed any sickness or symptoms of disease attributable to exposure to contaminants.

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[11] Appeal and Error 30 ⚡863

30 Appeal and Error

30XVI Review

30XVI(A) Scope, Standards, and Extent, in General

30k862 Extent of Review Dependent on Nature of Decision Appealed from

30k863 k. In General. Most Cited Cases

An appellate court reviews a trial court's decision to allow or deny judgment or judgment notwithstanding the verdict (JNOV) to determine whether it was correct legally.

[12] Judgment 228 ⚡199(3.5)

228 Judgment

228VI On Trial of Issues

228VI(A) Rendition, Form, and Requisites in General

228k199 Notwithstanding Verdict

228k199(3.5) k. Propriety of Judgment in General. Most Cited Cases

A party is entitled to judgment notwithstanding the verdict (JNOV) when the evidence at the close of the case, taken in the light most favorable to the nonmoving party, does not legally support the nonmoving party's claim or defense.

[13] Judgment 228 ⚡199(3.5)

228 Judgment

228VI On Trial of Issues

228VI(A) Rendition, Form, and Requisites in General

228k199 Notwithstanding Verdict

228k199(3.5) k. Propriety of Judgment in General. Most Cited Cases

Error in a denial of judgment notwithstanding the verdict (JNOV) is found if the evidence does not rise above speculation, hypothesis, and conjecture, and does not lead to the jury's conclusion with reasonable certainty.

[14] Appeal and Error 30 ⚡840(4)

30 Appeal and Error

30XVI Review

30XVI(A) Scope, Standards, and Extent, in General

30k838 Questions Considered

30k840 Review of Specific Questions and Particular Decisions

30k840(4) k. Review of Questions of Pleading and Practice. Most Cited Cases

The standard of appellate review for jury instructions is that, so long as the law is fairly covered by the jury instructions, reviewing courts should not disturb them.

[15] Appeal and Error 30 ⚡1032(3)

30 Appeal and Error

30XVI Review

30XVI(J) Harmless Error

30XVI(J)1 In General

30k1032 Burden to Show Prejudice from Error

30k1032(3) k. Instructions. Most Cited Cases

The standard for reversible error, on appeal of a trial court's jury instructions, places the burden on the complaining party to show both prejudice and error.

[16] Damages 115 ⚡43

115 Damages

115III Grounds and Subjects of Compensatory Damages

115III(A) Direct or Remote, Contingent, or Prospective Consequences or Losses

115III(A)1 In General

115k41 Expenses

115k43 k. Medical Treatment and Care of Person Injured. Most Cited Cases

Homeowners were not entitled to recover compensatory damages for future costs of medical monitoring due to enhanced risk of contracting a latent disease, in action against gas station owner arising from underground spill of gasoline containing contaminants, methyl tertiary-butyl ether (MTBE) and benzene, which had been detected in some homeowners' potable wells; levels of contaminants detected in wells were mostly below safe exposure levels set by

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Maryland Department of the Environment (MDE), and no evidence was presented showing that homeowners faced a particularized and significantly increased risk as a result of the leak in relation to the public at large.

[17] Damages 115 ↪43

115 Damages

115III Grounds and Subjects of Compensatory Damages

115III(A) Direct or Remote, Contingent, or Prospective Consequences or Losses

115III(A)1 In General

115k41 Expenses

115k43 k. Medical Treatment and Care of Person Injured. Most Cited Cases

Maryland recognizes a remedy of recovery of compensatory damages for future medical monitoring costs due to enhanced risk of contracting a latent disease from sufficient exposure to toxic substances resulting from defendant's tortious conduct.

[18] Damages 115 ↪43

115 Damages

115III Grounds and Subjects of Compensatory Damages

115III(A) Direct or Remote, Contingent, or Prospective Consequences or Losses

115III(A)1 In General

115k41 Expenses

115k43 k. Medical Treatment and Care of Person Injured. Most Cited Cases

To sustain an award for recovery of compensatory damages for future medical monitoring costs due to enhanced risk of contracting a latent disease from exposure to toxic substances resulting from tortious conduct, a plaintiff must show that such costs are necessary due to a reasonably certain and significantly increased risk of developing a latent disease as a result of exposure to a toxic chemical.

[19] Damages 115 ↪43

115 Damages

115III Grounds and Subjects of Compensatory Damages

115III(A) Direct or Remote, Contingent, or Prospective Consequences or Losses

115III(A)1 In General

115k41 Expenses

115k43 k. Medical Treatment and Care of Person Injured. Most Cited Cases

In determining whether to award compensatory damages for future medical monitoring costs due to enhanced risk of contracting a latent disease from exposure to toxic substances resulting from tortious conduct, a court must consider whether the plaintiff has shown: (1) that the plaintiff was exposed significantly to a proven hazardous substance through the defendant's tortious conduct; (2) that, as a proximate result of significant exposure, the plaintiff suffers a significantly increased risk of contracting a latent disease; (3) that increased risk makes periodic diagnostic medical examinations reasonably necessary; and (4) that monitoring and testing procedures exist which make the early detection and treatment of the disease possible and beneficial.

[20] Damages 115 ↪191

115 Damages

115IX Evidence

115k183 Weight and Sufficiency

115k191 k. Expenses. Most Cited Cases

To determine what is a significantly increased risk of contracting a latent disease for a particular plaintiff, as required to entitle plaintiff to recover compensatory damages for future medical monitoring costs due to enhanced risk of contracting a latent disease from exposure to toxic substances resulting from tortious conduct, the plaintiff must present quantifiable and reliable medical expert testimony that indicates the individual plaintiff's particularized chances of developing the disease had he or she not been exposed, compared to the chances of the members of the public at large of developing the disease.

[21] Appeal and Error 30 ↪970(2)

30 Appeal and Error

30XVI Review

30XVI(H) Discretion of Lower Court

30k970 Reception of Evidence

30k970(2) k. Rulings on Admissibility

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of Evidence in General. Most Cited Cases

Appeal and Error 30 ⚡979(5)

30 Appeal and Error

30XVI Review

30XVI(H) Discretion of Lower Court

30k976 New Trial or Rehearing

30k979 For Insufficiency of Evidence

30k979(5) k. Inadequate or Excessive

Damages. Most Cited Cases

Ordinarily, an abuse of discretion standard governs appellate scrutiny of the admissibility of expert testimony and the denials of motions for a new trial or remittitur.

[22] Appeal and Error 30 ⚡970(2)

30 Appeal and Error

30XVI Review

30XVI(H) Discretion of Lower Court

30k970 Reception of Evidence

30k970(2) k. Rulings on Admissibility

of Evidence in General. Most Cited Cases

An appellate court will find an abuse of discretion, warranting reversal of a trial court's admission of expert testimony, when the court's ruling is clearly against the logic and effect of facts and inferences before the court, when the decision is clearly untenable, unfairly depriving a litigant of a substantial right and denying a just result, when the ruling is violative of fact and logic, or when it constitutes an untenable judicial act that defies reason and works an injustice.

[23] Appeal and Error 30 ⚡970(2)

30 Appeal and Error

30XVI Review

30XVI(H) Discretion of Lower Court

30k970 Reception of Evidence

30k970(2) k. Rulings on Admissibility

of Evidence in General. Most Cited Cases

Evidence 157 ⚡546

157 Evidence

157XII Opinion Evidence

157XII(C) Competency of Experts

157k546 k. Determination of Question of Competency. Most Cited Cases

Admissibility of expert opinion is within the sound discretion of the trial judge and will not be disturbed on appeal unless clearly erroneous.

[24] Appeal and Error 30 ⚡979(5)

30 Appeal and Error

30XVI Review

30XVI(H) Discretion of Lower Court

30k976 New Trial or Rehearing

30k979 For Insufficiency of Evidence

30k979(5) k. Inadequate or Excessive

Damages. Most Cited Cases

When a trial judge denies a motion for a new trial and/or remittitur based on the excessiveness of compensatory damages, an appellate court considers his or her exercise of discretion based on whether the verdict is grossly excessive, or shocks the conscience of the court, or is inordinate or outrageously excessive, or even simply excessive.

[25] New Trial 275 ⚡6

275 New Trial

275I Nature and Scope of Remedy

275k6 k. Discretion of Court. Most Cited

Cases

The grant or denial of a motion for a new trial is within the sound discretion of the trial court.

[26] Appeal and Error 30 ⚡977(5)

30 Appeal and Error

30XVI Review

30XVI(H) Discretion of Lower Court

30k976 New Trial or Rehearing

30k977 In General

30k977(5) k. Refusal of New Trial.

Most Cited Cases

Appeal and Error 30 ⚡979(5)

30 Appeal and Error

30XVI Review

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30XVI(H) Discretion of Lower Court
30k976 New Trial or Rehearing
30k979 For Insufficiency of Evidence
30k979(5) k. Inadequate or Excessive
Damages. Most Cited Cases

An appellate court will reverse the trial court's denial of a motion for a new trial and/or remittitur only upon a showing that the trial court abused its discretion.

[27] Evidence 157 ↪ 571(7)

157 Evidence
157XII Opinion Evidence
157XII(F) Effect of Opinion Evidence
157k569 Testimony of Experts
157k571 Nature of Subject
157k571(7) k. Value. Most Cited
Cases

Testimony of expert in real estate appraisal and environmental economics, regarding diminution of value of homeowners' properties as a result of underground spill of gasoline at gas station, had a sufficient factual basis, as required for testimony to be admissible in homeowners' action against gas station owner, even though expert did not use actual comparable sales of real property within proximity of properties affected by the leak; expert recognized existence of comparable sales data and explained his reasons for rejecting or minimizing the utility of that information in his appraisal calculations. Md.Rule 5-702.

[28] Evidence 157 ↪ 555.2

157 Evidence
157XII Opinion Evidence
157XII(D) Examination of Experts
157k555 Basis of Opinion
157k555.2 k. Necessity and Sufficiency.
Most Cited Cases

Evidence 157 ↪ 555.4(2)

157 Evidence
157XII Opinion Evidence
157XII(D) Examination of Experts
157k555 Basis of Opinion
157k555.4 Sources of Data

157k555.4(2) k. Speculation, Guess, or Conjecture. Most Cited Cases

Simply because a witness has been tendered and qualified as an expert in a particular occupation or profession, it does not follow that the expert may render an unbridled opinion which does not otherwise comport with the rule governing admissibility of expert testimony; instead, sufficient facts must underlie the expert's opinions that indicate the use of reliable principles and methodology in support of the expert's conclusions so that the opinion constitutes more than mere speculation or conjecture. Md.Rule 5-702.

[29] Damages 115 ↪ 188(2)

115 Damages
115IX Evidence
115k183 Weight and Sufficiency
115k188 Loss of or Damage to Property
115k188(2) k. Value of Property. Most
Cited Cases

Expert testimony is ordinarily required to establish damages for diminution in property value resulting from environmental contamination.

[30] Evidence 157 ↪ 555.6(2)

157 Evidence
157XII Opinion Evidence
157XII(D) Examination of Experts
157k555 Basis of Opinion
157k555.6 Value
157k555.6(2) k. Real Property in
General. Most Cited Cases

Testimony of expert in real estate appraisal and environmental economics, regarding diminution of value of homeowners' properties as a result of underground spill of gasoline at gas station, was supported by sufficiently reliable methodology, as required for testimony to be admissible in homeowners' action against gas station owner; expert employed a combination of methods because, in his experience, the leak presented an unusual situation requiring several methods to obtain the most accurate appraisal of the leak-impacted properties, and expert cited a peer-reviewed publication that recommended the use of several techniques of valuation in instances of toxic

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substance contamination of groundwater. Md.Rule 5-702.

[31] Evidence 157 ↪ 555.2

157 Evidence

157XII Opinion Evidence

157XII(D) Examination of Experts

157k555 Basis of Opinion

157k555.2 k. Necessity and Sufficiency.

Most Cited Cases

To be supported by reliable methodology, an expert opinion must provide a sound reasoning process for inducing its conclusion from the factual data and must have an adequate theory or rational explanation of how the factual data led to the expert's conclusion. Md.Rule 5-702.

[32] Damages 115 ↪ 57.39

115 Damages

115III Grounds and Subjects of Compensatory Damages

115III(A) Direct or Remote, Contingent, or Prospective Consequences or Losses

115III(A)2 Mental Suffering and Emotional Distress

115k57.36 Injury to Property or Property Rights

115k57.39 k. Other Particular Cases.

Most Cited Cases

Homeowners were not entitled to recover emotional distress damages related to fear of diminution in property value, in action against gas station owner arising from underground spill of gasoline containing contaminants detected in homeowners' potable wells.

[33] Damages 115 ↪ 57.37

115 Damages

115III Grounds and Subjects of Compensatory Damages

115III(A) Direct or Remote, Contingent, or Prospective Consequences or Losses

115III(A)2 Mental Suffering and Emotional Distress

115k57.36 Injury to Property or Property Rights

115k57.37 k. In General. Most Cited

Cases

Maryland law does not ordinarily recognize recovery of damages for emotional distress resulting from injury to real property.

[34] Damages 115 ↪ 188(2)

115 Damages

115IX Evidence

115k183 Weight and Sufficiency

115k188 Loss of or Damage to Property

115k188(2) k. Value of Property. Most

Cited Cases

Evidence 157 ↪ 571(7)

157 Evidence

157XII Opinion Evidence

157XII(F) Effect of Opinion Evidence

157k569 Testimony of Experts

157k571 Nature of Subject

157k571(7) k. Value. Most Cited

Cases

Evidence of diminution of property value was insufficient to show that homeowners' properties had zero value, as required to support damages award of 100% of pre-leak market value, in action against gas station owner arising from underground spill of gasoline containing contaminants that were detected in homeowners' potable wells; homeowners' lay testimony indicated that they believed their properties had decreased in value, due to inconvenience of remediation efforts and perceived stigma, did not establish any substantive valuation, and homeowners' expert testified that their properties retained between 50% and 65% of their pre-leak value.

[35] Evidence 157 ↪ 584(1)

157 Evidence

157XIV Weight and Sufficiency

157k584 Weight and Conclusiveness in General

157k584(1) k. In General. Most Cited Cases

Expert testimony is not required on matters of which jurors would be aware by virtue of common

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knowledge. Md. Rule 5-702.

Circuit Court for Baltimore County, Case #
 03-C-06-010932.

BELL, C.J., HARRELL, BATTAGLIA, GREENE, BARBERA, McDONALD and JOHN C. ELDRIDGE, (Retired, Specially Assigned), JJ.

HARRELL, J.

FACTUAL BACKGROUND

*1 This is a companion case ^{FN1} brought by residents of Jacksonville, Maryland, ^{FN2} against Exxon Mobil Corporation (Petitioner) ^{FN3} for an underground gasoline leak from an Exxon Mobil-owned gasoline service station, located at the corner of Jarrettsville Pike and Paper Mill Road in the Jacksonville area of Baltimore County, that began on 13 January 2006. ^{FN4} The leak detection system at the station failed to detect a punctured underground line leak, which caused a gasoline leak of approximately 26,000 gallons into the underground aquifer and resulted in the contamination of wells supplying water to a number of households over a period of more than thirty days.

On the record of this case, there is a dispute as to when the residents of the impacted Jacksonville neighborhood learned of the leak. While Exxon contends that it notified Herbert Meade, administrator for the oil control program in the Maryland Department of the Environment (MDE), of the spill on February 17, and that Meade contacted immediately the president of the local community association, Respondents maintain that they learned of the leak only after local media reported the story four days later.

Following notification of the leak, the MDE, pursuant to its statutory authority, ordered Exxon to submit an Interim Remedial Measure Plan. See Md. Code (1982, 2007), Environment Art., §§ 4-401-4-419. As part of its immediate remediation efforts, Exxon drilled wells for monitoring and recovery surrounding the proximate vicinity of the Exxon station. The monitoring wells were dug at various depths in order to conduct water samples indicating the presence and extent of the contamination, also known as the “strike line.” The purpose of the recovery wells was to treat groundwater to prevent further expansion of the strike line. There were 227 monitoring wells installed by October 2007, and the MDE ordered an additional thirty wells in order to conduct

long-term monitoring. Since February 2006, water samples have been taken from the monitoring wells and residential potable wells.

Respondents filed suit in the Circuit Court for Baltimore County against Exxon. Their claims alleged that their properties had decreased in value, and that their health was threatened as a result of exposure to toxic chemicals—specifically, methyl tertiary-butyl ether (“MTBE”), a possible carcinogen, and benzene, a known carcinogen ^{FN5}—in the gasoline leak. The Respondents' alleged exposure arose from their use of water from the potable wells on their properties. The properties owned by Respondents were located at varying distances from the source of the leak. The overview of Respondents' claims and summary of the evidence at trial are discussed below.

PROCEDURAL BACKGROUND

I. Respondents' Claims

A single complaint was filed on 17 October 2006. Respondents, composed of eighty-four households, ^{FN6} sought compensatory and punitive damages based on allegations of fraudulent concealment, ^{FN7} intentional infliction of emotional distress, strict liability, trespass, private nuisance, and negligence. ^{FN8} They sought punitive damages and three types of compensatory damages: (1) monetary damages for diminution in the fair market value of their real property; (2) non-economic damages for emotional distress, including fear of contracting cancer; and (3) damages for the costs of future medical monitoring.

*2 The claims of intentional infliction of emotional distress were dismissed subsequently by all Respondents, but the trespass counts were dismissed by only some Respondents. Petitioner admitted liability for trespass, private nuisance, negligence, and strict liability, but denied liability for fraud and punitive damages. Petitioner further maintained that certain of the compensatory damages claimed—non-economic emotional distress damages arising from injury to property and fear of cancer, and damages for medical monitoring costs—were not compensable under Maryland law.

The cases were consolidated by the Circuit Court for trial. On 14 October 2008, a jury trial began, presided over by the Honorable Maurice W. Baldwin, Jr., and lasted until 12 March 2009. Liability was not contested by Exxon, so the trial focused on whether

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any Respondents suffered compensable injuries as a proximate result of the leak and, if so, what compensatory damages should be awarded. The jury was asked also whether Exxon was liable for fraud warranting the award of punitive damages.^{FN9}

II. Contamination of Wells on Respondents' Properties

Of the eighty-four properties implicated in this case, water testing of the residential potable wells in 2006 indicated MTBE concentrations above the MDE action level of 20 ppb in only two.^{FN10} Exxon paid for the installation of point of entry treatment ("POET") systems to filter well water entering those homes. Measurable amounts of MTBE below 20 ppb were found in samples from potable wells on sixty-three of the plaintiffs' properties in 2006. By the time of trial, however, the most recent samples revealed no potable wells with MTBE concentrations exceeding 20 ppb.^{FN11} Although five potable wells tested for detectable amounts of benzene,^{FN12} none of the potable well samples tested for benzene at an amount exceeding the MDE's 5 ppb action level.

Monitoring wells installed on all properties were used also to measure the extent of MTBE and benzene contamination. Monitoring wells were dug on at least thirteen of Respondents' properties, ranging from one to a maximum of nineteen monitoring wells on each property. The samples from the monitoring wells showed MTBE concentrations exceeding the action level on five properties.^{FN13} Benzene levels exceeding the 5 ppb action level were found in samples from monitoring wells on four properties.^{FN14}

III. Lay Testimony

Respondents' testimony involved: the nature, extent, and impact of remediation activities on a particular property; the extent to which residents' outdoors and/or indoors activities were limited by the effects of the leak; the nature and extent of MTBE and/or benzene contamination on a property, as reflected by well test readings; whether harmful chemicals not attributable to gasoline were found in wells; the location of each property in relation to the strike line; the nature and extent of use of well water; the impact of the leak's consequences on the value of each property;^{FN15} employment and other financial concerns of Respondents; matters related to emotional distress; and Respondents' perceived need for future medical monitoring.

IV. Expert Testimony

*3 Much of the expert testimony at trial turned on whether a property had been contaminated by MTBE or benzene as a result of the leak, based on a property's location in relation to the strike line and the extent of contamination, if any.

A. For Respondents

Respondents' attorney arranged for any Respondent, who wished to, to see Abdul Malik, M.D., a psychiatrist. Eighty-seven individual plaintiffs accepted the offer. Thirteen sought follow-up treatment in Dr. Malik's office. Dr. Malik, and his colleagues, interviewed these Respondents individually for about forty-five minutes to an hour each. The parties stipulated at the beginning of trial that if a witness from Dr. Malik's organization, Psych Associates of Maryland, were called to testify, the witness would testify that each of these Respondents was diagnosed with a disorder that was caused by, or exacerbated by, the leak. The stipulation included a recitation that Petitioner disagreed with the proffered testimony and asserted that none of the Respondents suffered permanent psychological injuries or longterm emotional distress.

Eight of the Respondents covered by the stipulation had pre-existing psychological conditions that, at some point, required psychotherapy, counseling, or medication. Of those other Respondents covered by the stipulation, Dr. Malik did not recommend therapy or counseling for thirty-six of them, recommended treatment for twenty-one Respondents with no prior history of treatment for emotional distress, and advised four Respondents with preexisting conditions to continue therapy.

A second stipulation was entered by the parties as to the testimony of Nachman Brautbar, M.D., where they agreed that, if Dr. Brautbar were called to testify, he would state that all Respondents required medical monitoring.^{FN16} Dr. Brautbar recommended annual tests for testicular cancer, kidney cancer, liver cancer, and hematolymphatic cancers, with estimated total costs per Respondent of \$2,000 per year.

Another expert for Respondents was Harvey Cohen, a geologist with a specialty in hydrogeology, who testified about the movement of ground water generally, the function of potable wells, his mapping of the well test results, and his opinion about future contamination of the aquifer. His opinion was that,

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from the time of commencement of the leak through April 2007, sixty-six properties had detectable levels of MTBE, and five had a detectable amount of benzene. He also described the levels of contaminants found in monitoring wells over the same time period. His testimony was based on exhibits displaying the maximum concentrations, without indicating the point in time at which those levels were recorded. He further opined that the area of contamination would be ever-changing because of the movement of ground water.

Edward Sullivan, a geologist with a specialty in hydrogeology, employed by the Whitman Companies, also testified as an expert for Respondents. He described underground fractures, aquifers, and the movement of ground water generally. Sullivan opined that the detected levels of contamination were caused probably by the gasoline leak, that the Baigs' potable well likely would be contaminated in the future, and that the gasoline forced down in the deeper bedrock would likely not be recovered by remediation, and that it would be difficult to determine its movement.

*4 Dr. Kenneth Rudo, a toxicologist employed by the State of North Carolina, also testified as an expert witness for Respondents. He stated that there is a relatively sparse body of knowledge relating to MTBE because it has been used in gasoline for only about twenty to thirty years. He opined that MTBE is a probable human carcinogen and a probable human mutagen, and that MTBE exposure can occur through ingestion, bathing or other skin contact, or breathing vapor containing MTBE. He stated that exposure produces an increased risk of cancer. Dr. Rudo testified that he could not state that any of the Respondents would, more likely than not, contract cancer as a result of the leak, but that there is "no safe level" of exposure to MTBE.^{FN17}

Kenneth Acks testified as an expert in real estate appraisal and "environmental economics." Relying on a stipulation by the parties as to the pre-leak value of each property and on information provided by the other experts, Acks' testimony discussed the diminished value of each property. We discuss Acks' testimony in greater detail in Section V.A. of this opinion.

Dr. Ira Whitman, Ph.D, a civil engineer, and Dr. Jerold Jaynes, Ph.D, an economist, were the last two

experts who testified for Respondents. Dr. Whitman testified as an expert in environmental engineering and worked with the geologists, Cohen and Sullivan, to explain that thirty-eight or thirty-nine potable wells were likely contaminated between 13 January 2006 and 17 February 2006. He noted that, as of the date of his 2006 report, fifty homes showed some contamination at some point in time, and that number later rose to sixty-six homes.^{FN18} Dr. Jaynes testified about the present value of the cost of future medical monitoring for Respondents.^{FN19}

B. For Petitioner

Petitioner's expert, Dr. Gary Krieger, M.D., testified that all people in this country are exposed to carcinogens and mutagens, including MTBE and benzene, every day, including in food and water that is consumed. He emphasized that the dose is the real issue—essentially, that mere exposure does not cause cancer. He further stated that the risk of disease Respondents faced was no different than the risk of disease for the general population.

Ronald Lipman, a real estate appraiser, testified that, in 2007 and 2008, there was a general downturn in the real estate market nationally, and that the effect of the gasoline leak on property values in Jacksonville ranged from 0% to 15 %, depending on the property.

Another expert for Petitioner was Gregory Martin, who described the remediation efforts conducted pursuant to a consent order entered into between the MDE and Petitioner. In compliance with the order, Petitioner filed a corrective action plan and intends to continue efforts until the remediation goals are met.

Herbert Meade, administrator for the oil control program in the MDE, testified regarding the Maryland action level for MTBE. He asserted that the MDE action level is protective of human health. Significantly, he noted that MTBE is the most frequently found ground water contaminant in Maryland. With respect to the properties in this case, he stated that some needed filter systems and others should have them as a precautionary matter, but that the potable well water is safe to drink. Meade also acknowledged that, because of the lack of human studies, he did not know the long term effects of exposure to MTBE.

*5 Thomas Maguire, another expert testifying for Petitioner, discussed the nature of an underground fuel

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leak and how gasoline and its contaminants are dispersed, removed, or attenuated naturally. He opined that the underground plume for this leak had stabilized, meaning the residual contaminants were trapped and immobile.^{FN20} He acknowledged there likely was still some residual contamination which, in the future, would be removed as part of the remediation efforts, or would be attenuated naturally.

V. The Jury's Verdicts

Before the trial court gave the jury instructions on causation and damages, the court advised the jury that the instructions applied to each plaintiff, unless otherwise indicated.^{FN21} The instructions were all phrased in terms of what each plaintiff had to prove to be entitled to recover. In particular, the jury instruction as to recovery for emotional distress damages based on fear of contracting cancer was as follows:

A Plaintiff may also recover non-economic damages for fear of contracting a particular disease such as cancer. To recover for such fear, however, the Plaintiff must demonstrate that the fear genuinely exists and that his or her fear of contracting the disease in question is objectively reasonable. There can be no compensation for fear and anxiety that is objectively unreasonable. To be objectively reasonable, it is not enough that a ... Plaintiff's fear be genuine and sincere. There must be reliable medical or scientific evidence that it is more likely than not that the substance can cause cancer.

The same format for the jury's awards appeared in the verdict sheets for each plaintiff: each asked essentially "(A) do you find ... fraud by concealment? (B) do you find that [Petitioner's admitted liability for negligence, strict liability, nuisance, and trespass] caused [the plaintiffs] any injuries and damages? and (C) if the answer to (A) or (B) is yes, how much [compensatory] damages do you award?" The last question was followed by individual categories of damages to be filled-in if the jury responded "yes":

Economic Damages

Damages to Property Owner [name of property owner]

Diminution in Property Value \$

Medical Monitoring

[names of plaintiffs] \$

Non-Economic Loss (Emotional Distress)

[names of plaintiffs] \$

Punitive Damages

If you answered "yes" to [question (A)], should the Plaintiffs be awarded punitive damages? [names of plaintiffs] YES NO

On 12 March 2009, the jury returned its verdicts. The jury returned a verdict in favor of Exxon with respect to the fraudulent concealment and punitive damage claims, but found in favor of all remaining plaintiffs^{FN22} as to all other claims for compensatory damages. The jury found that each of the plaintiffs' properties was worthless, and awarded monetary damages for diminution of real property value in an amount equal to the full value of the properties before the leak. The jury also awarded to all plaintiffs non-economic damages for emotional distress, including fear of contracting cancer and damages for the cost of future medical monitoring. Generally, in households with children, the awards for the adults were reduced by the amount of the awards for the minors. The total amount of damages awarded to Respondents was approximately \$147 million.

*6 Petitioner filed six post-judgment motions^{FN23} for judgment notwithstanding the verdict, for a new trial, or for remittitur, challenging the property damage awards, the emotional distress awards, and the damages for medical monitoring, based on various grounds. Although Judge Baldwin denied each motion,^{FN24} he reduced the awards for non-economic damages for four plaintiffs because of the applicable statutory cap of \$665,000, pursuant to § 11-108 of the Maryland Code (1973; 2006 Repl. Vol.), Court and Judicial Proceedings Article. Respondents filed a motion arguing that Petitioner should be estopped from challenging the jury verdicts because of seemingly concessionary statements made by its counsel during opening and closing arguments; however, the Circuit Court denied the motion.

VI. Proceedings in the Court of Special Appeals

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On 9 September 2009, Exxon noted an appeal to the Court of Special Appeals. It challenged the sufficiency of the evidence supporting the jury's awards for complete diminution of property value, damages for emotional distress, and damages for future medical monitoring costs. It also challenged the jury instructions regarding the legal standards to be applied by the jury in deciding the claims for damages based on fear of developing cancer and future medical monitoring costs. Respondents contended, in turn, that Exxon's attorney at trial waived Exxon's right to challenge the compensatory damage awards by certain things he said in opening statement and closing argument.

On 6 January 2010, the Court of Special Appeals consolidated the eighty-eight appeals. In January 2011, a three-judge panel of that court (consisting of Judges Meredith, Zarnoch, and retired Judge Thieme, the latter specially assigned) heard argument. The panel did not issue a decision. Thus the court ordered rehearing in banc on 9 June 2011.^{FN25}

On 9 February 2012, the in banc panel, consisting of nine incumbent members of the court, issued a per curiam opinion and a number of attributed opinions on various questions presented by the appeal. Exxon Mobil Corp. v. Ford, 204 Md.App. 1, 40 A.3d 514 (2012). The Court of Special Appeals affirmed in part and reversed in part the judgment of the Circuit Court for Baltimore County, having the effect of reducing the \$147 million in damages awarded to the Respondents by more than half.

The intermediate appellate court rejected un-animously the Respondents' contention that Petitioner was estopped from challenging the compensatory damages awards, and concluded unanimously that the Circuit Court had not abused its discretion in admitting Respondents' expert testimony in support of their claims of diminution in property values. See id. at 10–11, 40 A.3d at 519 (per curiam).^{FN26}

Different majorities of the sitting court explained, in various written opinions, their support for the remaining portions of the judgment announced by the per curiam opinion. Regarding the claims for diminution in property value, six of the nine judges affirmed the portion of the judgments that awarded damages to each Respondent (whose judgments had not been remitted by the Circuit Court or the Court of Special Appeals based on the post-leak sale of the property for

value) in an amount equal to the value of their property prior to the leak. See id. at 11, 40 A.3d at 519. The reasoning for this result, however, differed in several respects between the judges' opinions. See id. at 34–50, 40 A.3d 534–43 (Zarnoch, J., joined by Meredith, Woodward, and Wright, JJ.), id. at 148–68, 204 Md.App. 1, 40 A.3d at 600–12; (J. Eyler, J., joined by Watts, J.); id. at 241–44, 40 A.3d at 655 (Graeff, J.), id. at 247–52, 204 Md.App. 1, 40 A.3d at 658–60 (Watts, J.); id. at 269–74, 204 Md.App. 274, 40 A.3d at 671–74 (D.Eyler, J).

*7 The court's decision as to the non-economic damages awards also resulted from different views. Most of the court concluded that a plaintiff may recover damages for emotional distress based on fear of contracting cancer in certain circumstances, and that an error in the jury instructions related to this issue required reversal of all of the judgments for non-economic damages. The judges disagreed, however, about whether the circumstances that would permit recovery had been established and about the legal standard that should apply to such claims. See id. at 52–53, 40 A.3d 541–42 (Zarnoch, J.).^{FN27} Nevertheless, a majority voted to reverse judgment awarding damages for emotional distress for fifty-three plaintiffs based on insufficient evidence, and reversed and remanded the remaining claims for a new trial due to a faulty jury instruction. See id. at 11, 204 Md.App. 1, 40 A.3d at 519 (per curiam); 204 Md.App. 1, 40 A.3d at 600–12 (J. Eyler, J., joined by Hotten, J.)^{FN28}, id. at 245, 40 A.3d at 655–56 (Graeff, J.),^{FN29} id. at 254, 204 Md.App. 274, 40 A.3d at 671–78 (Watts, J.);^{FN30} id. at 259–69, 204 Md.App. 1, 40 A.3d at 665–71 (D.Eyler, J.).^{FN31} As a result, the court reversed all emotional distress judgments and ordered a new trial for all but fifty-three of the plaintiffs on those claims, to be conducted consistent with the views of the majority/plurality opinion. Id. at 11–12, 40 A.3d at 520 (per curiam).

Respondents' awards for damages for future medical monitoring costs also produced split majorities of the in banc panel. Although a majority would recognize a claim for monetary damages for medical monitoring, see id. at 63–70, 40 A.3d at 550–55 (Zarnoch, J. joined by Meredith, Woodward, and Wright, JJ.), id. at 247, 40 A.3d at 658 (Graeff, J.), a differently aligned majority decided that the evidence did not warrant any plaintiff's entitlement to this form of damages. See id. at 11 (per curiam); id. at 132–47,

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40 A.3d at 591–600 (J. Eyer, J.), *id.* at 247, 204 Md.App. 1, 40 A.3d at 658 (Graeff, J.), *id.* at 255–57, 40 A.3d at 663–64 (Watts, J.).^{FN32} Hence, the court reversed the portions of the judgments that awarded damages for medical monitoring.

On 27 February 2012, Respondents filed a motion under Maryland Rule 8–605 requesting that the Court of Special Appeals reconsider its February 9 in banc decision because the portions of that decision that were supported by fewer than seven judges “violate the clear mandate” of Section 1–403(c) of Court and Judicial Proceedings Article (“CJP”) authorizing the court to decide an appeal through the in banc mechanism.^{FN33}

On 6 March 2012, the Court of Special Appeals denied, in a per curiam opinion, the plaintiffs' motion for reconsideration, concluding that the plaintiffs' reading of § 1–403(c) was “overly technical,” “inconsistent with sound rules of statutory construction,” and “contrary to well-reasoned authorities.” *Ford*, 204 Md.App. 274, 277, 40 A.3d 674, 675 (2012). The court held that “disqualification is tantamount to a vacancy for the limited purpose of determining voting requirements[.]” *id.* at 279 n. 5, 40 A.3d at 677 n. 5, that a 7–2 majority was not required to support the court's ruling in this case, and that each part of the court's per curiam ruling was supported by a majority of the nine judges “qualified to act in this case.” *Id.* at 281, 40 A.3d at 678.^{FN34}

IV. Questions Presented and Parties' Present Appellate Contentions^{FN35}

*8 On 26 March 2012, Exxon filed a Petition for Writ for Certiorari.^{FN36} Respondents^{FN37} filed a cross-petition on 27 March 2012.^{FN38} A conditional cross-petition by Exxon to Respondents' cross-petition questions was filed next.^{FN39} This Court granted all of the petitions for certiorari (by whatever title) on 9 May 2012, *Exxon Mobil Corp. v. Ford*, 426 Md. 427, 44 A.3d 421 (2012). The consolidated questions presented by the petitions are as follows, rephrased for purposes of brevity:

(1) Did the Court of Special Appeals violate Md.Code (1973, 2006 Repl.Vol.), Court and Judicial Proceedings Article (CJP), § 1–403(c), by issuing its in banc decision without a “concurrence of a majority of the incumbent judges of the entire Court[.]” for each non-unanimous judgment, such

that this Court otherwise has no authority to review the merits of the current appeal?^{FN40}

(2) Did the Court of Special Appeals err in holding that counsel for Petitioner did not waive his client's right to challenge the compensatory damage awards?

(4) Does Maryland permit awards for emotional distress due to fear of developing cancer? If so, what is the appropriate standard?

(5) Should the emotional distress verdicts be overturned where the uniform awards ignored the substantial differences among Plaintiffs, evidence satisfying the standards of *Vance v. Vance*, 286 Md. 490, 408 A.2d 728 (1979), for recovery of such damages was not presented, and the jury instruction permitted recovery for fear of cancer without any evidence of exposure to the alleged carcinogen or that the exposure made it “reasonably probable” that a Plaintiff would contract cancer?

(6) Did the Court of Special Appeals err in holding that the “fear of cancer” jury instruction given at trial was erroneous and prejudicial?

(7) Does Maryland permit damages for medical monitoring and, if so, may such damages be awarded where a) no Plaintiff claimed to have any current disease caused by exposure to contaminant, b) there was no proof that any Plaintiff had a significantly increased risk of developing any disease, and c) as to many Plaintiffs, there was no proof of exposure?

(8) Should Respondents' property damage expert's opinions have been admitted where he did not use any generally accepted method of valuation and he did not use actual sales or valuations in his assessment of the diminution in value of Respondents' properties?

(9) May a jury's verdict that all of Plaintiffs' properties were worthless be upheld where (a) the properties were all still habitable and many had no contamination; (b) all experts testified that the properties retained substantial value; and (c) those properties which were sold all obtained a substantial price?

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(10) Is a new damages only trial required when a jury's award of compensatory damages is not based on the Plaintiff's alleged injuries?

DISCUSSION

I. The Court of Special Appeals's In Banc Decision

[1] We address first a threshold procedural issue raised by Respondents in their cross-petition: whether the Court of Special Appeals violated CJP § 1-403(c)^{FN41} in its in banc procedure here.^{FN42} Respondents and Petitioner agree that we have the authority to resolve all issues in this case; however, Respondents contend that this Court has also the authority not to decide the issues presented to the Court of Special Appeals and, instead, resolve only this procedural issue, dismiss the Writ of Certiorari as to the others, and vacate the judgment of the Court of Special Appeals. We decline Respondents' invitation.

*9 We begin our analysis with a brief summary of the in banc proceedings in the intermediate appellate court. As the court noted in its 6 March 2012 denial of the Respondents' second Motion for Reconsideration, the appeal before the in banc panel was argued before nine incumbent qualified judges of the Court of Special Appeals, a majority of which participated in deciding each of the issues on appeal. *Exxon Mobil Corp. v. Ford*, 204 Md.App. 274, 281, 40 A.3d 674, 678 (2012). The intermediate appellate court's March 6 ruling stated that three members of the court elected to disqualify themselves under Rule 2.11 of the Maryland Code of Judicial Conduct,^{FN43} while another seat on the court was vacant when the case was argued.^{FN44} *Id.* at 276 n. 1, 40 A.3d at 675 n. 1.

Respondents contend that the in banc decisions that were not decided by a proper majority of the Court of Special Appeals—requiring, in their view, a seven-member majority—violate CJP § 1-403(c). As a result of this violation, Respondents assert, this Court should withdraw or decline certiorari on all other issues not decided by a sevenmember majority of the in banc panel, and reinstate the jury's verdict. We hold, however, that the questions presented in the petitions that we granted bypassed the intermediate appellate court and are properly before this Court for review, assuming, for the sake of argument, that the arguments regarding CJP § 1-403(c) and the in banc decision have merit.

Even if we were to agree with Respondents' argument that the in banc panel did not decide certain issues by the requisite majority (which we do not so decide), our precedent allows us to treat the present appeal as if a writ or writs of certiorari had been granted on bypass “prior to entry of a proper judgment by the Court of Special Appeals.” *Wildwood Med. Ctr., LLC v. Montgomery Cnty.*, 405 Md. 489, 496, 954 A.2d 457, 461 (2008).^{FN45} In *Wildwood*, a member (Judge Theodore G. Bloom) of a three-judge panel of the Court of Special Appeals, in a case decided purportedly by a 2–1 vote, died before the opinion (which facially reflected him as the author of the majority opinion) was filed, leaving the remaining panel judges divided evenly as to the proper disposition of the appeal. *Id.* at 493–94, 954 A.2d at 460. Similar to the instant case, a threshold jurisdictional issue seemingly impeding our review of the merits in *Wildwood* was whether a decision arising from an improperly-constituted panel's facial opinion, which lacked a concurrence in the majority, under Section 1-403(b) of the Courts and Judicial Proceedings Article (“CJP”) of the Maryland Code (1973, 2006 Repl.Vol.), prevents this Court from reviewing an appeal of that decision.^{FN46} *Id.* at 494–96, 954 A.2d at 460–61. We determined that the consequence of Judge Bloom's death was to dissolve the “concurrence of a majority of the panel” that is “necessary for the decision of a case.” *Id.* (quoting Md.Code (1973, 2006 Repl.Vol.), CJP § 1-403(b)). We held ultimately that the panel's decision and its posthumously-issued opinion and mandate were unauthorized because the judges had failed to achieve a concurrence of a panel majority. *Id.* at 495, 954 A.2d at 461. Although we concluded that the lack of majority nullified the intermediate three-member panel's decision and mandate, we held that this Court obtained jurisdiction to decide the merits by virtue of its authority to bypass the intermediate appellate court and consider appeals not yet decided by that court. *Id.*

*10 Here, we granted both parties' petitions for Writs of Certiorari, which, as in *Wildwood*, enables us to consider and decide “all the issues that would have been cognizable by the intermediate appellate court.” *Id.* (citing Md. R. 8-131(b)(2)).^{FN47, FN48} Even if, as the Respondents argue here, the in banc decision attributed majority status erroneously to 6–3 and 5–4 rulings, thereby lacking a concurrence of a majority of the entire court under a possible reading of CJP § 1-403(c), then, under *Wildwood*, this Court nonetheless has the authority to review the issues of this ap-

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peal. Whether a majority of an in banc panel issued the underlying decision is of no moment to whether we have authority to decide the instant appeal.^{FN49} For these reasons, we hold that, regardless of whether the in banc panel had a concurrence of a majority under CJP § 1-403(c), our precedent allows us to consider (and we shall) the merits of the appeals before us.^{FN50} Before moving to the next question, we reiterate that we do not decide whether our intermediate appellate court brethren failed to comply with CJP § 1-403(c). We observe, however, that they gave thorough and comprehensive consideration of all issues in a complex and difficult case.

II. Petitioner Did Not Waive its Right to Appeal Compensatory Damages Awards

[2] Respondents contend that Petitioner's counsel waived Petitioner's right to appeal the compensatory damages awards when he made certain statements during opening and closing arguments. According to Respondents, Petitioner's waiver arose when Petitioner sought a "quid pro quo" arrangement with the jury, promising the jury that Exxon would pay any compensatory damages awarded in exchange for the jury's decision not to award punitive damages. We see it differently and agree with the unanimous in banc panel of the Court of Special Appeals.

Respondents contend that, in Exxon's opening statement, Exxon's counsel "made it abundantly clear that the trial was not about compensatory damages but was about punitive damages[,]," quoting the following excerpt:

Well, it occurs to me at this point that you're probably wondering, if Exxon takes responsibility and accepts liability to pay compensatory damages for that harm, then why are we here? ... So, [Respondents' counsel] says we're trying to blame 'em. This, of course, is not true. Blame 'em for the—for the compensatory liability? No. I told you. We're paying that. Whatever you decide is right about that, we're paying that.

Respondents' claim relies also on the following excerpts of Petitioner's closing argument to the jury:

[W]e accept responsibility to pay for whatever damages you find occurred here, that's not blaming somebody else. That's saying it's us. We've taken responsibility. We pay. You find that people were

hurt here, you charge us. We pay. Now, (are we blaming people for punitive damages. Of course, not. We spent a lot of time proving to you they couldn't be guilty of punitive conduct because they didn't know.

*11 [Respondents' attorney] argues to you that your verdict should send a message ... But his message can't be sent because he did not prove to you what he said he was going to prove to you about fraud. I want you to send a message that when a company makes a mistake and then does what it ought to do, which is take responsibility, apologize and try to make it right, that if a company stands up and does what it is supposed to do to make things right, that it will not be punished if all there is an accident. So it is not a reward, it is a withholding of punishment in order to send the message we want you to behave like ExxonMobil behaved in this case.

(Emphasis added).

Regarding the compensatory damages for diminution in property value, Petitioner's attorney told the jury, also in his closing argument:

I'm not going to put up a chart where I tried to tell you what are the suggested numbers for each household. My reasoning is this: I do not want you to award even a dollar less than the amount you think it takes to make it right for each plaintiff household that you determine is actually harmed.

That's your call. I want you to make that decision. Not [Respondents' attorney]. Not somebody[']s expert. I want you to make that call.

Now, obviously, some homes are not impacted and some are, and you know the difference. Those with nondetects, those that are now nondetect, there's no impact. Those that have detections ... then it's a question of how much.

These statements, Respondents contend, amounted to Petitioner forfeiting its right to appeal by its counsel's anticipatory acquiescence to the jury's verdict. We hold that these statements did not indicate that Petitioner's counsel acquiesced to the jury's judgment or waived Petitioner's right to appeal the subsequent judgments.

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[3][4][5] Waiver is conduct from which it may be inferred reasonably an express or implied “intentional relinquishment” of a known right. Gould v. Trans-american Assocs., 224 Md. 285, 294, 167 A.2d 905, 909 (1961). “The doctrine of acquiescence—or waiver—is that ‘a *voluntary* act of a party which is inconsistent with the assignment of errors on appeal normally precludes that party from obtaining appellate review.’ “ Bd. of Physician Quality Assurance v. Levitsky, 353 Md. 188, 200, 725 A.2d 1027, 1032 (1999) (quoting Franzen v. Dubinok, 290 Md. 65, 69, 427 A.2d 1002, 1004 (1981)) (emphasis in original). The doctrine of waiver is also known as “estoppel, acceptance of benefits creating mootness, and acquiescence in judgment.” Downtown Brewing Co. v. Mayor & City Council of Ocean City, 370 Md. 145, 149, 803 A.2d 545, 547 (2002).

[6][7][8] A party's right to appeal may be waived only “where there is acquiescence in the decision from which the appeal is taken or by otherwise taking a position inconsistent with the right to appeal.” Gran-dison v. State, 305 Md. 685, 765, 506 A.2d 580, 620 (1986). The waiver doctrine applies only to conduct that is necessarily “inconsistent” with the right to appeal. Downtown Brewing, 370 Md. at 149, 803 A.2d at 547; see Turner v. Turner, 47 Md.App. 350, 381, 809 A.2d 18, 35–36 (2002). “To take actions that are necessarily inconsistent with challenging a judgment, a party *must have knowledge of the nature and effect of the judgment.*” Boyd v. Bowen, 145 Md.App. 635, 666, 806 A.2d 314, 331 (2002) (emphasis added).

*12 We concluded that a waiver of a right to appeal was warranted where a party accepted a condemnation award in the underlying proceeding, but later sought to appeal that same judgment. See Downtown Brewing, 370 Md. at 151, 803 A.2d at 548. We recognized that “the right to appeal may be lost by acquiescence in, or in recognition of, the validity of the decision below from which an appeal is taken.” “Id. at 149, 803 A.2d at 547 (quoting Rocks v. Brosius, 241 Md. 612, 630, 217 A.2d 531 (1966)).

[9] Moreover, waiver by acquiescence is limited to a party's *post*-judgment conduct. Except for consent to a judgment, we have not applied waiver by acquiescence to conduct before entry of judgment, namely because a party cannot relinquish knowingly a right to appeal the nature and effect of a judgment

before that judgment is known and entered. Boyd, 145 Md.App. at 666, 806 A.2d at 331.

In the present case, Respondents maintain that, before the return of the jury's verdicts and the entry of judgment, the Petitioner's counsel's statements to the jury in argument constituted acquiescence in what became the jury's verdict and a waiver of Petitioner's right to appeal the resultant entry of final judgment. The Circuit Court and the Court of Special Appeals rejected Respondents' waiver argument. We agree with their reasoning. A reasonable view of the closing argument of Petitioner's counsel is that, by counsel saying “we pay,” Petitioner's counsel asserted only his client's intention to take responsibility for its actionable and proven conduct affecting adversely Respondents. Counsel's other statements, taken within their context, urged the jury to award an appropriate compensatory award based on the properly admitted evidence at trial and proper jury instruction. Counsel's arguments illustrate strategic advocacy, rather than a blatant offer of a quid pro quo arrangement with the jury to avoid a punitive damage award.

In any event, the conduct of Petitioner's counsel occurred before the rendition of the jury's verdict and entry of judgment, and thus it is unreasonable for Respondents to argue that Petitioner could relinquish knowingly the right to challenge the jury's decision. As there was no implicit or express consent to the jury's actual judgment, we hold that the conduct of Petitioner's counsel was not inconsistent with the Petitioner's right to appeal the final judgment, and therefore did not amount to Petitioner's waiver of the right to appeal.

IV. Emotional Distress Damages for Fear of Cancer
 [10][11][12][13] In Exxon Mobil Corp. v. Albright, we addressed directly whether a plaintiff may recover emotional distress damages based on a fear of contracting a latent disease after tortious exposure to a toxic substance. — Md. at —, — A.3d at — (slip op. at 39–56). Exxon seeks here also reversal of the trial judge's denial of its motion for judgment notwithstanding the verdict (“JNOV”) regarding damages for fear of contracting cancer as well as medical monitoring. We review a trial court's decision to allow or deny judgment or JNOV to determine whether it was correct legally. Jones v. State, 425 Md. 1, 8, 38 A.3d 333, 337 (2012); Scapa Dryer Fabrics, Inc. v. Saville, 418 Md. 496, 503, 16 A.3d 159, 163 (2011). A

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party is entitled to JNOV “when the evidence at the close of the case, taken in the light most favorable to the nonmoving party, does not legally support the nonmoving party's claim or defense.” Gallagher v. H.V. Pier Homes, 182 Md.App. 94, 101, 957 A.2d 628, 632 (2008). Error in a denial of JNOV is found if the evidence “does not rise above speculation, hypothesis, and conjecture, and does not lead to the jury's conclusion with reasonable certainty.” Bartholomee v. Casey, 103 Md.App. 34, 51, 651 A.2d 908, 916 (1994).

*13 [14][15] Respondents argue that the Court of Special Appeals erred when it concluded that the jury instruction on fear of cancer was erroneous and prejudicial. “The standard of review for jury instructions is that so long as the law is fairly covered by the jury instructions, reviewing courts should not disturb them.” Univ. of Md. Med. Sys. Corp. v. Malory, 143 Md.App. 327, 337, 795 A.2d 107, 113 (2001) (quoting Farley v. Allstate Ins. Co., 355 Md. 34, 46, 733 A.2d 1014 (1999)). “This standard for reversible error places the burden on the complaining party to show both prejudice and error.” Farley, 355 Md. at 46, 733 A.2d at 1020.

In Albright, we held that, to recover emotional distress damages for fear of contracting a latent disease, a plaintiff must show that (1) he or she was exposed actually to a toxic substance due to the defendant's tortious conduct; (2) which led him or her to fear objectively and reasonably that he or she would contract a latent disease; and, (3) as a result of the objective and reasonable fear, he or she manifested a physical injury capable of objective determination. — Md. at —, — A.3d at — (slip op. at 56). Hence, we hold that, viewed in the light most favorable to the Respondents, the evidence in this record is insufficient as a matter of law to support Respondents' claims for emotional distress damages based on a fear of contracting cancer. We hold further that, as the trial court's jury instructions did not cover fairly the standard for recovery that we have adopted, the jury instructions were erroneous.

The test results, at the maximum detection levels, for the potable wells on the Respondents' properties showed that the potable wells of seventeen ^{FN51} of the eighty-four properties did not have any measurable MTBE contamination—labeled as “non-detects”—as a result of the leak. Results from the monitoring wells

indicate that five of the properties contained contamination above the MTBE action level of 20ppb. Benzene above the 5ppb action level was not found in any of the Respondents' potable wells, although results of the monitoring wells indicate that four had benzene contamination above the action level.

Dr. Rudo, the toxicologist who testified as an expert witness on Respondents' behalf, testified that MTBE is a mutagen that causes changes in DNA, and, therefore, there is “no safe level” of exposure to MTBE. In contrast, the MDE (consistent with the EPA standard) has set an action level for MTBE at 20 ppb. Herbert Meade from the MDE testified that aesthetic standards, such as the MTBE 20–40 ppb standard, which is consistent with the EPA standard, do not evince any evidence of a risk to human health and are meant only to ensure acceptable odor and taste.

It is significant that none of the Respondents claimed sickness or symptoms of a disease attributable to the leak, despite their claims that they had a fear of contracting a latent disease. None of the Respondents claimed a physical injury, apart from emotional distress caused allegedly by the leak.^{FN52} Some Respondents testified that they experienced emotional or psychological difficulties prior to the leak and some of them had sought treatment for their problems. Some Respondents stated that they had experienced stress unrelated to the leak, such as problems in their marriage or other relationships, or concerns about their health or health of family members. Lastly, we note that for those Respondents who elected to consult Dr. Malik regarding their emotional distress evaluations, each evaluator relied in his or her later opinion on self-reported information from Respondents. The evaluators did not have medical records regarding those Respondents prior to February 2006, and did not speak to any of the Respondents' personal physicians.

1. No Evidence of Actual Exposure That Would Give Rise to Objective Reasonable Fear

*14 As there are no air samples or vapor studies in evidence to demonstrate that breathing vapors may have caused exposure to MTBE or benzene, the only evidence relevant to assessing actual contamination and consequent exposure is that collected from the Respondents' potable wells and the monitoring wells. No other evidence was presented to show that exposure could occur absent contamination in a potable well.

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The evidence reflects that there are seventeen properties for which there was no past or current evidence that the potable wells were contaminated by the leak, or that would become contaminated in the future. Respondents' experts testified that the chance of future contamination of the wells for these properties was "low," which they meant as unlikely to occur. Further, Respondents owning these particular properties did not adduce any evidence that contamination was present in the ambient air or water vapor in any of their houses (including those using well water for bathing). Thus, without proof of contamination in the potable wells on these 17 properties, there can be no ingestion or skin contact with contaminated water. As there is no indicia that these Respondents were in contact with any form of contamination as a consequence of the leak, the likelihood of potential future exposure is insufficient as a matter of law.

Despite the absence of proof of contamination, the Respondents who own these seventeen properties received awards for emotional distress damages based on fear of contracting cancer. In the absence of any exposure, there can be no objective reasonable fear of cancer. The trial court erred in not granting Petitioner's motion for JNOV with respect to these Respondents' emotional distress claims.^{FN53} We reverse the judgments and shall remand to the Court of Special Appeals with directions to remand to the Circuit Court and direct the entry of judgment in favor of Petitioner.

b. Insufficient Evidence of Actual Exposure That Would Give Rise to an Objectively Reasonable Fear

For the remaining Respondents' fears to be objectively reasonable, they must have a rational basis to apprehend reasonably that they would develop cancer as a result of exposure to the toxic substances of the leak. The evidence presented at trial indicated that all Marylanders are exposed to toxic substances (some carcinogens, some mutagens) in our daily lives.^{FN54} As Judge James Eyler summarized aptly in his concurring and dissenting opinion in this case in the intermediate appellate court:

People who pump their own gasoline are exposed to MTBE and benzene, by contact with or by breathing vapors. People who drive many miles and fill their tanks often are more exposed than those who drive less. People who keep gasoline in their homes for use in generators, lawn mowers, or other engines,

have greater exposure than those who do not. *In order to have a valid tort claim, a claimant must be different from the general population.*

*15 204 Md.App. 1, 128–29, 40 A.3d 514, 590 (2012) (J. Eyler, dissenting and concurring) (emphasis added). Claiming mere exposure to MTBE as a result of the leak is insufficient under the standard we adopted in *Albright*. Based on the evidence presented, mere exposure to MTBE would not lead a reasonable person in the Respondents' position to believe that they will develop cancer.

Respondents' claims arise from the same factual background as in *Albright*. In *Albright*, we determined that the rational basis for an objective and reasonable fear arising from the leak's toxic exposure was at the point a reasonable person under these circumstances would believe that a toxic chemical was actually present in their potable water.^{FN55} — Md. at —, — A.3d at — (slip op. at 57–58). There is ample evidence and testimony that the exposure to MTBE above the MDE's action level of 20 ppb is still considered safe; however, the MDE chose the 20 ppb standard to measure the point at which an individual's level of tolerance to odor and taste is triggered. As we concluded in *Albright*, assuming that an objective reasonable fear of developing cancer may arise when an individual is exposed to a level of MTBE significantly beyond that which is deemed aesthetically tolerable, based on the MDE's 20 ppb level, we conclude that those individuals exposed to MTBE at levels below the 20 ppb do not have a rational basis to fear they will develop cancer. — Md. at —, — A.3d at — (slip op. at 59–60). Moreover, Meade, on behalf of the MDE, stated at trial that the water was safe to use, and that he communicated this information to several Respondents.

Hence, those Respondents belonging to the sixty-three households whose properties' potable wells were tested with results below the MDE 20 ppb action level do not have an objective reasonable fear, as a matter of law, that they may develop cancer as a result of exposure to the leak.^{FN56} We reverse those judgments entered in favor of these Respondents and remand to the Court of Special Appeals with directions to remand to the Circuit Court and direct the entry of judgment in favor of Petitioner.

c. Legally Insufficient Evidence of Demonstrable

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Physical Injury as a Result of Exposure

None of the Respondents' evidence or testimony provided sufficient manifestation of physical injury as a matter of law. As we discussed in *Albright*, to sustain an award for emotional distress for fear of cancer, a plaintiff must prove that as a result of actual exposure and his or her objective reasonable fear, he or she sustained an objectively demonstrable physical injury manifesting emotional distress, which may include a mental state, physiological or psychological symptoms, or an actual physical harm. — Md. at —, — A.3d at — (slip op. at 49–56). Pursuant to *Vance v. Vance*, 286 Md. 490, 500–01, 408 A.2d 728, 733–34 (1979), and *Hunt v. Mercy Med. Ctr.*, 121 Md.App. 516, 524–25, 710 A.2d 362, 366 (1998), a physical injury is manifested and objective if the evidence is not conclusory or speculative, and provides some quantifiable basis for the jury to determine the appropriate award.

*16 The trial court erred in denying Petitioner's motion for JNOV with respect to the emotional distress awards entered in favor of Respondents who did not testify, and therefore presented no evidence to show that they experienced any emotional distress.^{FN57} We reverse those judgments and remand to the Court of Special Appeals with direction that it remand to the Circuit Court and direct the entry of judgment in favor of Petitioner.

The trial court erred in denying Petitioner's motion for JNOV regarding the awards for emotional distress entered in favor of Respondents who briefly and intermittently mentioned in testimony and provided minimal-to-no evidence of emotional distress.^{FN58} These Respondents' evidence of physical injury, if any, did not demonstrate physical injuries of an objective and quantifiable nature. The evidence they did present did not indicate any objective and demonstrable injury arising from exposure to the leak because it included only the following: (1) proof that any emotional stress resulted from a concern about property damages only, such as the loss of use and enjoyment, rather than human health or safety; (2) proof that any emotional stress was due to preexisting mental or emotional conditions or was attributed to the maintenance of the litigation; and, (3) lack of sufficient physical manifestation.

Most of these Respondents did not provide any supporting medical testimony as to their emotional

distress. Further, these Respondents, based on the opinion of their expert, Dr. Rudo, asserted that their physical injuries included subcellular changes as a result of exposure to MTBE's likelihood of causing cell mutation and increasing the risk of cancer. As discussed in *Albright*, however, such injuries are not compensable in Maryland without symptoms of disease or actual impairment. — Md. at —, — A.3d at — (slip op. at 54). There is no such evidence or testimony in this record. We reverse those judgments and remand to the Court of Special Appeals with directions to order remand to the Circuit Court for the entry of judgment in favor of Petitioner.

Our holdings by no means exclude the filing of future actions by those Respondents who may develop, unfortunately, a future latent disease as a result of exposure to the 2006 leak. Such claims would not be barred by res judicata or the statute of limitations: the tolling period for causes of action for latent disease would begin to run only when a plaintiff knew or should have discovered reasonably the nature and cause of the disease. See *Hecht v. Resolution Trust Corp.*, 333 Md. 324, 334, 635 A.2d 394, 399 (1994); *Pierce v. Johns-Manville Sales Corp.*, 296 Md. 656, 663, 464 A.2d 1020, 1025 (1983).

V. Compensatory Damages for Future Costs of Medical Monitoring

[16][17] Maryland recognizes now a remedy of recovery for medical monitoring costs due to enhanced risk from sufficient exposure to toxic substances resulting from defendant's tortious conduct. *Albright*, — Md. at —, — A.3d at — (slip op. at 77). Petitioner argues that the trial court erred in denying its motion for JNOV regarding damages for medical monitoring. Respondents urge us to affirm the jury's awards for medical monitoring costs to all of the Respondents. Our consideration of these contentions requires us to view the evidence in the record “taken in the light most favorable to the nonmoving party.” *Gallagher*, 182 Md.App. at 101, 957 A.2d at 632. Viewing the evidence in that light, we conclude that it was insufficient to sustain the jury's awards for medical monitoring and thus hold that the trial court was legally incorrect in denying Petitioner's motion for JNOV.

*17 [18][19][20] To sustain an award for recovery of medical monitoring costs, a plaintiff must show that such costs are necessary due to a reasonably cer-

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tain and significantly increased risk of developing a latent disease as a result of exposure to a toxic chemical. *Albright*, — Md. at —, — A.3d at — (slip op. at 86–87). In determining whether to award relief, a court must consider whether the plaintiff has shown: (1) that the plaintiff was exposed significantly to a proven hazardous substance through the defendant's tortious conduct; (2) that, as a proximate result of significant exposure, the plaintiff suffers a significantly increased risk of contracting a latent disease; (3) that increased risk makes periodic diagnostic medical examinations reasonably necessary; and (4) that monitoring and testing procedures exist which make the early detection and treatment of the disease possible and beneficial. *Id.* (slip op. at 86–87). To determine what is a “significantly increased risk of contracting a latent disease” for a particular plaintiff, the plaintiff must present quantifiable and reliable medical expert testimony that indicates the individual plaintiff's particularized chances of developing the disease had he or she not been exposed, compared to the chances of the members of the public at large of developing the disease. *Id.* (slip op. at 83–84).

Here, the jury awards indicated that if, at any point in time, a household's potable well had a MTBE reading above 0.5 ppb, the members of that household received 100% of his or her claimed costs for future medical monitoring; if the MTBE reading was less than 0.5 ppb, that individual received 50% of his or her claimed costs for future medical monitoring; and, lastly, if a household's potable well never tested positively for MTBE, each member of that household nonetheless received 25% of his or her claimed future medical monitoring costs. As discussed in our summary of the contamination results in Section II of the procedural history of this case, tests of the potable wells on the all properties showed that seventeen properties did not suffer any contamination as a result of the leak. Monitoring well results show that benzene levels above the action level were found only in five of the Respondents' potable wells, while six of the properties contained contamination above the MTBE action level.

Those Respondents who owned and/or resided on properties where the potable well lacked any contamination failed to show exposure to a toxic substance, which is a threshold requirement to recover for medical monitoring.^{FN59} Although Cohen, one of Respondents' hydrogeologist experts, testified that the

potential for future contamination of these non-detect properties was possible, he could not predict which well or wells might become contaminated in the future or when. The possibility of future contamination for these non-detect properties is therefore too speculative. With respect to these claims, the trial court erred in denying Petitioner's motion for JNOV. We reverse those judgments and remand to the Court of Special Appeals with directions to remand to the Circuit Court for entry of judgment in favor of Petitioner.

*18 As discussed in our analysis related to emotional distress damages for fear of contracting cancer, the evidence demonstrates that most Marylanders are exposed to MTBE every day. Evidence at trial demonstrated that exposure to MTBE above the 20 ppb action level is still considered safe, and that the selected 20 ppb standard measures merely the point at which an individual's level of tolerance to the odor and taste of MTBE in water becomes an impediment to its consumption. Those who are exposed to MTBE at well-recognized safety levels are no more at risk of developing a latent disease than the rest of the population—much less face a *significantly* increased risk in relation to other Marylanders' exposure to MTBE. Hence, those Respondents whose properties tested below 20 ppb are not suffering, as a matter of law, a significantly increased risk of developing a latent disease for which medical monitoring costs are necessary.^{FN60} We hold that the trial court erred in denying the Petitioner's motion for JNOV regarding these Respondents' judgments, and thus reverse those judgments, and remand to the Court of Special Appeals with directions to remand to the Circuit Court for entry of judgment in favor of Petitioner.

Lastly, Respondents from the remaining five households^{FN61} also have not demonstrated a significant risk of developing a disease in the future because the expert testimony did not indicate that any individual faced a particularized and significantly increased risk as a result of the leak in relation to the public at large. We concluded in *Albright* that particularized evidence is necessary to prove a “significantly” increased risk of developing a future disease, such as medical testimony specifically noting a plaintiff's individually increased risk to develop cancer. — Md. at —, — A.3d at — (slip opinion at 77–84).

No such evidence was presented in this case.

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Although some Respondents consulted with Dr. Malik and were evaluated for their described symptoms, neither Dr. Malik nor Dr. Brautbar indicated any particularized evidence that an individual Respondent faced an increased risk of developing a future disease that was significantly higher than similar risks posed to the general population. Rather, Respondents' expert testimony generalized that all Respondents faced a significantly increased risk of developing a future disease, without providing individual assessments of any Respondent. Accordingly, the trial court erred in denying the Petitioner's motion for JNOV with regard to these Respondents. We reverse those judgments and remand to the Court of Special Appeals with directions to direct entry of judgment in favor of Petitioner.

VI. Property Damages

Respondents sought damages for diminution in their property values as a result of the leak. The jury found that all of their properties had become worthless, and awarded the owners of each home 100% of the pre-leak market value based on (1) the difference in market value prior to and subsequent to when notice of the leak became public; and, (2) loss of use and enjoyment for the time between the date of the leak to the commencement of trial. Judge Baldwin granted Petitioner's blanket post-trial motion challenging the award, but as to only three Respondents' households who had sold their homes following the leak, ^{ENG2} reducing the award to the difference between the full pre-leak value and the actual sales price. The court denied Petitioner's motion for a new trial or remittitur for the judgments awarded to the remaining households whose properties had not been sold after the leak.

*19 Petitioner appeals Judge Baldwin's denial of its motion for a new trial or, in the alternative, a remittitur (on the basis of excessive compensatory damages) because (1) the testimony of Respondents' real estate appraisal expert, Kenneth Acks, was inadmissible; (2) Respondents produced insufficient evidence to warrant a jury verdict finding that their properties were worthless; and (3) the evidence shows that those Respondents' properties retained substantial post-leak value.

We hold that the trial court was correct in admitting Acks' expert testimony. Nevertheless, we hold also that, because no competent evidence in this record indicated that Respondents' properties had

“zero value,” the trial court's denial of Petitioner's motion for JNOV or a new trial was erroneous. Thus, Respondents shall receive a new trial for their claims of property damage based on diminution in value, in light of our decision in *Albright*, — Md. at —, — A.3d at — (slip op. at 93–129).

A. Standards of Review

[21][22][23] Ordinarily, an abuse of discretion standard governs appellate scrutiny of the admissibility of expert testimony and the denials of motions for a new trial or remittitur. We will find an abuse of discretion when the court's ruling is “clearly against the logic and effect of facts and inferences before the court[,]” when the decision is “clearly untenable, unfairly depriving a litigant of a substantial right and denying a just result [,]” when the ruling is “violative of fact and logic[,]” or when it constitutes an “untenable judicial act that defies reason and works an injustice.” *Powell v. Breslin*, — Md. —, — A.3d —, — (2013) (No. —, September Term, 2013) (opinion filed 18 January 2013) (slip. op. at 12–13) (citing *North v. North*, 102 Md.App. 1, 13–14, 648 A.2d 1025, 1031 (1994) (internal quotation marks omitted)). Thus, the admissibility of expert opinion “is within the sound discretion of the trial judge and will not be disturbed on appeal unless clearly erroneous.” *Blackwell v. Wyeth*, 408 Md. 575, 618, 971 A.2d 235, 261 (2009) (quoting *Wilson v. State*, 370 Md. 191, 200, 803 A.2d 1034, 1039 (2002)); see *Radman v. Harold*, 279 Md. 167, 173, 367 A.2d 472, 476 (1977) (“[T]he trial court's determination [regarding expert qualification] ... may be reversed if it is founded on an error of law or some serious mistake, or if the trial court clearly abused its discretion.”).

[24][25][26] When a trial judge denies a motion for a new trial and/or remittitur based on the excessiveness of compensatory damages, we consider his or her exercise of discretion based on “whether the verdict is ‘grossly excessive,’ or ‘shocks the conscience of the court,’ or is ‘inordinate’ or ‘outrageously excessive,’ or even simply ‘excessive.’” *Banegura v. Taylor*, 312 Md. 609, 624, 541 A.2d 969, 976 (1988). The grant or denial of a motion for a new trial is “within the sound discretion of the trial court.” *Buck v. Cam's Broadloom Rugs, Inc.*, 328 Md. 51, 56, 612 A.2d 1294, 1296 (1992) (quoting *Brinand v. Denzik*, 226 Md. 287, 292, 173 A.2d 203, 206 (1961)). We reverse the trial court's denial of a motion for a new trial and/or remittitur only upon a showing that the

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trial court abused its discretion. See *Merritt v. State*, 367 Md. 17, 28, 785 A.2d 756, 763 (2001).

B. Admissibility of Kenneth Acks' Testimony ^{FN63}

*20 [27][28] The admissibility of expert testimony generally is subject to evaluation according to three requirements: (1) the witness qualifies as an expert on the topic about which he or she intends to testify; (2) the subject is appropriate for expert testimony; and (3) there is an adequate factual basis supporting the testimony. Md. R. 5-702. The last factor includes two sub-issues: factual basis and methodology. *CSX Transp. Inc.*, 159 Md.App. at 189, 858 A.2d at 1063. “[S]imply because a witness has been tendered and qualified as an expert in a particular occupation or profession, it does not follow that the expert may render an unbridled opinion which does not otherwise comport with Maryland Rule 5-702.” *Giant Food, Inc. v. Booker*, 152 Md.App. 166, 182-83, 182, 831 A.2d 481, 490 (2003). Instead, sufficient facts must underlie the expert's opinions that indicate the use of “reliable principles and methodology in support of the expert's conclusions” so that the opinion constitutes more than mere speculation or conjecture. *Id.*

[29] “Expert testimony is required ordinarily to establish diminution in property value resulting from environmental contamination.” *Albright*, —Md. at —, — A.3d at — (slip op. at 121-22); *Hous. Auth. of City of New Brunswick v. Suydam Investors, LLC*, 355 N.J.Super. 530, 810 A.2d 1137, 1150 (N.J.Super.Ct.App.Div.2002) (“[T]he effect of environmental contamination upon a property's value must be determined on the basis of expert appraisal evidence.”), *aff'd in part and rev'd in part on other grounds*, 177 N.J. 2, 826 A.2d 673 (N.J.2003).

In evaluating the factual basis of an expert's testimony, “[t]he facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing.” Md. R. 5-703(a). If those facts or data are “of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.” *Id.*

Acks' estimation of property values in the instant case was buttressed by the following facts and data: (1) the stipulated pre-leak appraised values of the Respondents' homes; (2) the presence of actual pota-

ble well contamination; (3) another expert's determinations of the risk of future contamination; ^{FN64} (4) whether people have been able to sell homes within a one mile radius of the Exxon station; and (5) peer-reviewed articles discussing diminution in property value in other contamination events. Based on this collection of facts and data, Acks concluded that properties with evidence of contamination had decreased in value by 60%; properties with a high probability of future contamination had decreased in value by 50%; properties with a medium probability of future contamination had decreased in value by 45%; and properties with a low probability of future contamination had decreased in value by 30%.

*21 Petitioner challenges the admission of Acks' testimony under the third requirement of *Maryland Rule 5-702*, asserting that (1) the methodology underlying his diminution in value estimates was unreliable; and (2) those estimates lacked a sufficient factual basis because he ignored actual comparable sales of real property within proximity of those properties affected by the leak. We disagree.

Petitioner first asserts that Acks' conclusions “ignored” the comparable sales of forty-nine properties, five of which belonged to plaintiffs, located near or within a half-mile radius of the strike line. Comparable sales are often utilized in determining fair market value of single-family residential properties, and “ha[ve] long been accepted in Maryland.” *Albright*, —Md. at —, — A.3d at — (slip op. at 125); *Bern-Shaw Ltd. P'ship v. Mayor & City Council of Balt.*, 377 Md. 277, 289, 833 A.2d 502, 509 (2003) (citing *Brinsfield v. Mayor & City Council of Balt.*, 236 Md. 66, 202 A.2d 335 (1964)) (discussing use of comparable sales in condemnation cases). The use of comparable sales data, however, is not the only methodology accepted to appraise the fair market value of a residential property. See *Albright*, —Md. at —, — A.3d at — (slip op. at 125-26). The record indicates that, rather than ignoring the data of comparable sales in the strike line area, Acks thought the comparable sales were of minimal use to his assessment of the value of Respondents' properties, either because (1) the four properties sold by plaintiffs since the leak were “low-hanging fruit,” ^{FN65} and thus not indicative necessarily of the overall diminution in value of the other properties, or (2) the lack of pre-leak appraisals for the other approximately forty-five properties ^{FN66} sold by non-parties between the date of

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the leak and the date of trial was not available, and he believed it was impossible to conduct an accurate appraisal based only on sales price.^{FN67}

Acks recognized thus the existence of the comparable sales data and explained his reasons for rejecting or minimizing the utility of that information in his appraisal calculations, rather than completely rejecting the use of such data, as alleged by Petitioner.^{FN68} We agree with the view of Judge Zarnoch of the Court of Special Appeals in the present case, that “there is no support in Maryland case law for the proposition that a *reasoned decision* not to incorporate such data, *due to the particular circumstances of the case*, mandates the exclusion of the expert’s testimony.” *Ford*, 204 Md. at 29–30, 40 A.3d at 531 (Zarnoch, J.) (emphasis added).

Likewise, the exclusion of market fluctuations in Acks’ appraisals did not render his testimony inadmissible. Acks considered the data of the 2006, 2007, and 2008 Baltimore County housing market provided by the Maryland Association of Realtors, but concluded that, as the market went up in 2006 and 2007, but dropped in 2008, the fluctuations were not helpful in his assessments. Petitioner’s claim that Acks did not reach the same conclusions as its own expert, based on the same data, is a “critique going to the weight, not the admissibility, of Acks’ testimony. [Petitioner] properly addressed it during cross-examination of Acks and its direct examination of its own property value expert.” *Ford*, 204 Md. at 28–29, 40 A.3d at 530. (Zarnoch, J). We therefore conclude that Acks’ testimony was admissible, despite his minimization of market fluctuation data.

*22 [30][31] Lastly, we examine Petitioner’s assertion that Acks’ methodology rendered his testimony inadmissible. Petitioner contends that Acks used “‘combined’ aspects of various methodologies,” instead of a single commonly accepted appraisal method. To constitute reliable methodology, “an expert opinion must provide a sound reasoning process for inducing its conclusion from the factual data” and must have “an adequate theory or rational explanation of how the factual data led to the expert’s conclusion.” *CSX Transp., Inc. v. Miller*, 159 Md.App. at 202–03, 858 A.2d at 1071. The explanation must not be conclusory, or constitute a “because I say so” approach. *Wood v. Toyota Motor Corp.*, 134 Md.App. 512, 525, 760 A.2d 315, 323 (2000) (concluding that the trial

judge had not erred in excluding an expert’s opinion where the expert determined that the cause of the plaintiff’s injuries was the size and location of the vent holes in an air bag in a motor vehicle, but provided no rational explanation why such information had anything to do with the injuries sustained).

Acks stated that he employed a combination of methods because, in his experience, the leak presented an unusual situation requiring several methods to obtain the most accurate appraisal of the leak-impacted properties. Further, he cited a peer-reviewed publication that recommended the use of several “techniques” of valuation in instances of toxic substance contamination of groundwater in rural areas.^{FN69} In contrast to the expert testifying for the respondents in *Albright*, — Md. at —, — A.3d at — (slip op. at 124–29) (where he relied on a nuanced view of “market price” and informal interviews with real estate agents to conduct his estimations), Acks testified that his methodology included the peer-reviewed PCB contamination study and other studies, such as one assessing, by surveying potential buyers, how an underground storage tank leak impacted the value of residential properties.^{FN70} Acks considered also a study that examined the effect of pre-sale environmental disclosure requirements, from which he concluded that “a lot of people use data points to come up with relatively low value diminutions which really aren’t very relevant because [potential buyers] don’t know about the contamination or don’t understand it.”^{FN71}

Respondents’ expert’s testimony indicates that, although he did not identify a peer-reviewed article sanctioning the exact combination of methods he employed, he provided a “sound reasoning process” for how his methodology produced his appraisals of the diminution in value of Respondents’ properties. *See CSX Transp.*, 159 Md.App. at 202, 858 A.2d at 1071. As Judge Zarnoch explained aptly for the unanimous Court of Special Appeals in banc panel, “[r]eal estate appraisal is not an exact science in the same way as automobile engineering or DNA comparison. [Petitioner] raises legitimate concerns about Acks’s methods, but these criticisms go to the weight, not the admissibility, of his testimony.” *Ford*, 204 Md. at 31, 540 A.3d at 532 (citing *Thomassen Lincoln-Mercury, Inc. v. Goldbaum*, 45 Md.App. 297, 305, 413 A.2d 218, 223 (1980) (concluding that “appellant’s complaints about the manner in which [an

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expert witness] derived and stated his opinion as to value go to the weight to be accorded his testimony rather than to its admissibility.”)).

*23 For expert testimony to be admissible, his or her conclusions must be based on a sound reasoning process explaining how the expert arrived at those conclusions. Here, Acks' calculations included consideration of market fluctuations and recognition of comparable sales data, using a combination of reasonably explained methods, but did not reach the same conclusions as Petitioner's experts based on that information. The trial court thus did not abuse its discretion in finding Acks' testimony admissible.

C. Respondents May Not Recover Emotional Distress for Injury to Real Property, But May Recover for Damages for Diminution in Property Value

1. Emotional Distress Damages for Injury to Real Property

[32][33] In addition to recovering for emotional distress damages for fear of cancer, Respondents sought and recovered damages for the diminution in value of their properties; the loss of use and enjoyment of their properties; nuisance due to annoyance, embarrassment, inability to use their yards, noise, dust, and unusual traffic; and, anxiety about the loss in value of their properties. Petitioner challenges these judgments in its conditional cross-petition, arguing that Maryland law denies compensation for emotional distress resulting from damage (or fear of damage) to property. Petitioner therefore asks us to adopt Judge James Eyler's dissenting and concurring opinion in *Ford* reversing the emotional distress awards and allowing only thirty-five of the Respondents to pursue emotional distress claims at a new trial. In light of our decision in *Albright*, — Md. at —, — A.3d at — (slip op. at 93–95), we hold that Maryland law does not recognize ordinarily recovery for emotional distress resulting from injury to real property, and therefore reverse all judgments of such awards to all Respondents.

We recognized in *Albright* that ordinarily, absent evidence of fraud or malice in the underlying tort, emotional distress resulting from property damage (or fear of property damage) is not compensable in Maryland. *Albright*, — Md. at —, — A.3d — at — (slip op. at 94); *Ford*, 204 Md.App. at 101, 40 A.3d at 573 (Eyler, J., concurring and dissenting in part). See also *H & R Block, Inc. v. Testerman*, 275

Md. 36, 48–49, 338 A.2d 48, 55 (1975), *abrogated on other grounds by Owens-Illinois v. Zenobia*, 325 Md. 420, 601 A.2d 633 (1992), (recognizing that “Maryland decisions have generally denied compensation for mental anguish resulting from damage to property”); *Zeigler v. F. Street Corp.*, 248 Md. 223, 226, 236 A.2d 703, 705 (1967) (emotional distress damages attendant to injury to property may be recovered only where there is fraud or malice). As the jury rendered judgment in favor of Petitioner for Respondents' claims of fraud (*see supra* Section V of procedural history), the judgments for emotional distress damages related to fear of lost property value entered for the Respondents were erroneous. Those awards are therefore reversed.

2. Recovery for Diminution in Property Value

*24 [34] When trial began, Petitioners sought damages for diminution in their properties' market values and the loss of use and enjoyment, with each owner claiming damages for the difference between the fair market value of property before disclosure of the leak and its fair market value after disclosure. The evidence at trial focused on the post-leak value because the parties stipulated to the pre-leak value of those properties.

First, we note that Andrea Greco and Veronica Greco withdrew their claims for property damages and resulting diminution in value. Nonetheless, they received property damages equal to the full pre-leak value of their property. Thus, the Circuit Court erred in denying Petitioner's motion for JNOV with respect to the Grecos' claims. We reverse that judgment and remand to the Court of Special Appeals with directions to remand to the Circuit Court for the entry of judgment in favor of Petitioner.

Second, in light of *Albright*, those Respondents here who owned or resided in non-detect properties ^{FN72} failed similarly to show a substantial interference sufficient to sustain actions for nuisance, trespass, negligence, or strict liability. *Albright*, — Md. at —, — A.3d at — (slip op. at 109–16). Apart from complaints of modest disturbances (such as using bottled water, reducing the use of outdoor spaces, or taking shorter baths and showers) and allegations that their properties are tainted by perceived stigma, the evidence indicates that any adjustments Respondents made to the use of their properties was out of fear of possible contamination. As their prop-

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erties lacked any tangible evidence of contamination, such fear is not objectively reasonable for purposes of making a prima facie showing of nuisance. *Id.* at —, — A.3d at — (slip op. at 113–14). There was no evidence that Respondents were deprived of any part of their properties or that Exxon's remediation efforts and the consequences of the leak impaired greatly Respondents use and enjoyment of their properties. Hence, “[i]n the absence of physical injury to property resulting from Exxon's actions, [Respondents] must demonstrate more than modest adjustments in their use of their real property resulting from the leak in order to establish nuisance.” *Albright*, — Md. at —, — A.3d at — (slip op. at 114).

Third, as the remaining Respondents requested damages for diminution in value based on the difference between their properties' pre-leak fair market value and fair post-leak market value (essentially, full compensation for a permanent injury), we presume that Respondents' property damage claims were based on their properties' allegedly permanent diminutions in value. The evidence presented at trial—namely, Acks' expert testimony, the evidence of contamination as to some of Respondents' properties, the evidence and testimony of Petitioner's experts that there was substantial value retained by Respondents' properties—raises a question for the jury as to whether Respondents sustained damages for diminution in value, in light of our holdings in *Albright*. Hence, we hold, on remand, that those Respondents may recover only for damages to their property resulting in diminution of his or her property's market value, in light of our decision in *Albright*, — Md. at — A.3d at — (slip op. at 93–129).

D. Respondents' Lay Testimony Lacked Value Probative of Diminution in Market Value

*25 Petitioner asserts that the jury's finding that each property was “worthless” was contrary to all of the evidence. Petitioner maintains, and we agree, there was evidence showing that: Respondents' properties retained some market value after disclosure of the leak; although two of the eight Respondents who decided to sell their homes post-leak were unsuccessful, ^{FN73} four were successful in selling their properties; ^{FN74} evidence showed that owners of ten properties were able to procure refinancing; and approximately forty-five properties sold by non-parties within the Jacksonville strike line were sold for substantial prices after public disclosure of the leak.

Petitioner argues that the lay witness testimony had no probative value—or if it did, that value was limited to the homes of those owners. ^{FN75} We hold that none of the Respondents' lay testimony had any probative value as to the measure of damages for diminution in property value and, thus, that the lay testimony was insufficient to support the jury's verdict that the Respondents' properties were worthless.

Owners of seventy-three of the eighty-four properties involved presently in this litigation testified as to their own opinion of their properties' post-leak value or as to the marketability of other properties in the neighborhood. ^{FN76} These owners either expressed no opinion on the value of their properties, ^{FN77.FN78} or testified that (1) their property diminished in value by some unspecified percentage; ^{FN79.FN80} (2) they believed that their properties were worthless; ^{FN81.FN82} or (3) that the owners were unwilling to sell for “moral” reasons. ^{FN83} While some Respondents stated that their neighbors could not sell their properties after publicity about the leak, other Respondents testified that they had tried unsuccessfully to sell their homes. Almost all of the Respondents opined that the news coverage of the leak created a “stigma” on their neighborhood, with some Respondents reporting that there was “an absolute stigma about real estate in the area.” ^{FN84}

The reasons provided by the Respondents for the diminution in value of their homes were: (1) the lack of or diminished safety and convenience due to actual contamination of their properties' wells and the potential risk for future contamination; (2) contamination-induced stigma associated with the neighborhood; and, (3) the inconvenient and unsightly remediation efforts. ^{FN85}

Respondents described what they believed were the post-leak value of their properties; however, their testimony was not probative to measure damages for a property's diminution in value. Rather, such damages in a claimed toxic contamination situation must be measured by the *market* value of property—a definite valuation produced by analysis of the property in relation to any impact produced by contamination. *See Albright*, — Md. at —, — A.3d at — (slip op. at 121–22, 125). This valuation may generally be made reliably only by expert testimony. *Id.* at —, — A.3d at — (slip op. at 121–22).

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*26 [35] A landowner who testifies as to the value of his or her property is “not opining as to market value but rather is opining as to the effect of the contamination of the landowner's property.” *Ford*, 204 Md.App. at 151, 40 A.3d at 602 (J., Eyler, J., concurring and dissenting.). It is well established that expert testimony is not required “on matters of which the jurors would be aware by virtue of common knowledge.” *Hartford Accident & Indem. Co. v. Scarlett Harbor Assocs.*, 109 Md.App. 217, 257, 674 A.2d 106, 125–26 (1996) (citing *Babylon v. Scruton*, 215 Md. 299, 307, 138 A.2d 375, 379 (1958)). As we recognized in *Albright*, the effect of contamination on a property's value is ordinarily beyond common knowledge and therefore requires expert testimony. See — Md. at —, — A.3d at — (slip opinion at 121–22); see *Ford*, 204 Md.App. at 151, 40 A.3d at 602 (J., Eyler, J., concurring and dissenting.); *Cunningham v. Masterwear Corp.*, 569 F.3d 673, 676 (7th Cir.2009) (concluding that, even though a property owner knew his property value at certain time periods, he could not offer a responsible opinion about the cause of a change in the value of his property; rather, the landowner needed evidence by a real estate agent or real estate appraiser to establish the contamination effect on his property's value); *Hous. Auth. v. Suydam Investors*, 355 N.J.Super. 530, 810 A.2d 1137, 1149–50 (N.J.Super.Ct.App.Div.2002), *aff'd in part and rev'd in part on other grounds*, 177 N.J. 2, 826 A.2d 673 (N.J.2003) (“[T]he effect of environmental contamination upon a property's value must be determined on the basis of expert appraisal evidence.”)^{FN86}

Respondents' testimony indicated that they believed their properties had decreased in value, but did not offer substantive valuations. Instead, several Respondents asserted in a conclusory fashion that they could not sell their properties in good conscience, and they believed therefore that their properties had zero sale value. While lay testimony may be relevant to any possible loss of use and enjoyment suffered in conjunction with Respondents' property damage claims, it offered no probative value as to the diminution in value claims. None of the Respondents—even those who identified themselves as real estate agents—testified as offered-and-accepted experts, and none testified based on any relevant training or expertise to accredit their lay opinions. While almost all Respondents maintained that a stigma was associated with their properties because of the leak, there was no evidence that there such stigma was permanent, which

would be relevant to their claims of nuisance and the level of substantial interference. See *Albright*, — Md. at —, — A.3d at — (slip op. at 112–13). Even Respondents' expert, as discussed above, testified that the properties retained some value after the leak. See Section V.B of this opinion.

No evidence in this record supports the jury's verdict that Respondents' properties became worthless in terms of market value as a result of the leak; however, there is evidence that the properties suffered diminution in value. The trial court erred, however, in not performing an individualized assessment of each verdict in ruling on the motion for new trial or remittitur. Therefore, we hold that the trial court's denial of Petitioner's motion for a new trial was legally incorrect. We reverse the judgments in favor of Respondents who received awards despite owning or residing on non-detect properties. We reverse the jury's verdicts as to the remaining property diminution damage judgments, and direct remand of those cases for a new trial in light of our opinion here and in *Albright*.

***27 JUDGMENTS OF THE COURT OF SPECIAL APPEALS AFFIRMED IN PART AND REVERSED IN PART; JUDGMENTS FOR DIMINUTION IN PROPERTY VALUE IN FAVOR OF GEORGE BADDERS, MINDY SHOEMAKER, ROBERT DENNEY BARNETT, LOUIS LINDSEY, THOMAS BENNEY, DENNIS BERLIN, LISA BERLIN, ROBERT BUTLER, MARGARET BUTLER, BARLETT COLGAN, PATRICIA COLGAN, CAROL COPELAND, BRIAN CORMIER, KAREN HEALEY, FRANK FULCO, KATHLEEN FULCO, CLAUDE GOLLIHUE, JANET GOLLIHUE, MARTIN GREENBLATT, ELIZABETH ROBERTSON, MILDRED HAHN, JEFFREY JENKINS, NICOLE RIPKEN, ELAINE LINDSAY, WALTER MERSKI, ANTHONY MONTONE, VALERIE MONTONE, LEON NICKEL, JR., TERESA NICKEL, MICHAEL OBERLIN, LINDA OBERLIN, AND JOYCE PERTEE REVERSED; JUDGMENTS FOR DIMINUTION IN PROPERTY VALUE AS TO ALL OTHER RESPONDENTS REVERSED AND REMANDED TO THE COURT OF SPECIAL APPEALS WITH DIRECTIONS TO REVERSE THE JUDGMENTS AND REMAND THE CASE TO THE CIRCUIT COURT FOR BALTIMORE COUNTY FOR FURTHER PROCEEDINGS NOT INCONSIS-**

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TENT WITH THIS OPINION; JUDGMENTS FOR EMOTIONAL DISTRESS REVERSED; JUDGMENTS FOR MEDICAL MONITORING COSTS REVERSED. COSTS TO BE PAID PRO RATA BY RESPONDENTS.

FN1. *Exxon Mobil Corp. v. Albright*, — Md. —, — A.3d — (2013) (No. 15, September 2012) (filed 26 February 2013) is the other case, and arises from the same general factual background as the present case. The opinion in *Albright* was filed immediately prior to this opinion.

FN2. The impacted Jacksonville residents in the present case, as explained further in this opinion, filed here as Respondents, Petitioners, Cross-Respondents, and Cross-Petitioners. For the sake of simplicity, we shall refer to them as Respondents, collectively. The following are the individuals and families (constituting eighty-four households) Exxon named as Respondents in its Petition for Writ of Certiorari, which initiated the case in this Court: Thomas and Christine Acchione; Jeff and Marsha Alban; David and Joyce Albert; Thomas Anderson and Stacey Curtiss; Robert Babcock and family; George Badders and Mindy Shoemaker; Mirza Baig and Amtul Baig and family; Roberty Denney Barnett and Louis Lindsey; Thomas Benney and Louis Lindsey; Joseph and Palma Barone; Joseph and Sharon Bateman; Scott and Andrea Batton; Thomas and Lisa Benney; Dennis and Lisa Berlin; William Bieber; Martin and Joyce Blair; Martin and Cassandra Brady; Robert and Margaret Butler; David and Jennifer Cadigan; Thomas and Karen Carroll; John and Gina Coffay; Bartlett and Patricia Colgan; Carol Copeland; Brian Cormier and Karen Healey; Michael and Susan Cremen and family; John and Martha Csicsek; Michael and Bobbie Davis and family; Thomas and Liza Debolt; Mae DeDeo; Lisa De Koomen; Ricci and Sally Depasquale; Ronald and Joan Diedeman; Dennis and Priscilla Digalbo; Jai Dixon and Janet Elkington; Hilton Ryan and Amy Dobb; Barry and Susan Faber; Thomas and LaGina Facinoli; Gary and Tracey Flora; Paul and Judith Ford;

Matthew Fox; David and Stacy Fritz; Frank and Kathleen Fulco; Claude and Janet Golihue; Allan and Barbara Gottschalck; Andrea Greco and Veronica Greco; Martin Greenblatt and Elizabeth Robertson, David and Lisa Gregory; Mildred Hahn; Herman and Laverne Hannan; Walter and Carolyn Heggie; James and Janet Hourihan; Thomas and Jodi Howe; Jeffrey Jenkins and Nicole Ripken; Bernard and Christine Kropfelder; Glen and Hope Kukucka; Mark and Mary Lamos; John and Yvonne Lanting; Elaine Lindsay; David and Rosemarie Mahoney; Terry and Janice Martin; Edward and Barbara Mclewee; Walter Merski; Anthony and Valerie Montone; Frank Mucha, III and Jennifer Mucha; Leon Nickel, Jr. and Teresa Nickel; Michael and Linda Oberlin; Michael and Gail Osmeier; Joyce Pertee; Robert Peters; C. Boyd and Brenda Pfeiffer; John and Jennifer Quinn; Gary and Kim Rosch; Leslie Rush and Joyce Rush; Michael Schech and family; Christopher Schultz and Margaret McDevitt; Jeffrey and Amy Shimp; John and Patricia Sipes; Mary Thompson; Kenneth Thompson and Maria Chavez; Anthony and Lilian Tirocchi; Steven and Tracey Tizard; Roger Tolle, Jr., and family; Robert and Shawnee Twardzik; Kurt and Cynthia Vavovsky; Michael and Lori Vogler; Christopher Wiedey and Christine Wilkinson; and Franz and Dolores Wittelsberger.

FN3. As explained later, Exxon Mobil (referred to also as Exxon in this opinion) is a Petitioner, Cross-Respondent, and Cross-Petitioner. For purposes of simplicity, we refer to Exxon as Petitioner in this opinion.

FN4. The history of this gasoline leak is explained in detail in *Albright*. — Md. at —, — A.3d at — (slip op. at 1–13). To summarize, a leak from underground service lines at the Exxon Mobil-owned gasoline service station occurred on 13 January 2006. A contractor who responded to an electronic alarm surmised incorrectly that a pump motor triggered the alarm, replaced the pump motor, and caused incidentally the leak detection system to require recalibration. Be-

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cause the system was recalibrated improperly, it failed to detect the continuing leak when placed back in service. On 16 February 2006, the service station operator reported a possible leak based on an inventory discrepancy. The service station was shut down thereafter. On February 17, Exxon confirmed the existence of the leak, which amounted to approximately 26,000 gallons of gasoline, and notified the Maryland Department of the Environment (MDE). In conjunction with and under the supervision of the MDE, Exxon initiated remediation efforts, including constructing monitoring and/or recovery wells used to monitor and recover contaminants. These remediation efforts are described in *Albright*.

FN5. MTBE is a toxic substance found in gasoline. Since 1979, MTBE has been added to gasoline to reduce emissions of air pollutants from exhaust systems. There are no human studies indicating the MTBE is a proven carcinogen. The U.S. Environmental Protection Agency ("EPA") has identified MTBE as a possible carcinogen, in large doses, but not at low exposure levels. Based on the absence of proven scientific studies showing that MTBE is a human carcinogen, the EPA has not set a maximum contaminant level ("MCL"), but instead has established a maximum MTBE level at 20–40 parts per billion ("ppb") based on the substance's unpleasant taste and odor at and beyond that level. The EPA has recognized that a range of 20–40 ppb provides "a large margin of exposure (safety) from toxic effects." United States Environmental Protection Agency, Drinking Water Advisory: Consumer Acceptability Advice and Health Effects Analysis on Methyl Tertiary-Butyl Ether (MTBE) 2 (1997). The MDE has adopted likewise an MCL of 20 ppb for MTBE based on the chemical's unpleasant odor and taste at and beyond that level, but has noted that any contamination above the 20 ppb level is a matter of "concern." See COMAR 26.10.02.03(B)(3)(e). MCL standards for MTBE are different across the states, with some lower and some higher than those adopted by the EPA and MDE.

Benzene is a toxic chemical classified as a carcinogen. It has an MCL of 5 ppb, as established by the EPA. The MDE has promulgated the same standard for benzene. See COMAR 26.04.01.07(D).

FN6. The residents of Jacksonville who were plaintiffs in the underlying case comprised eighty-eight households. The plaintiffs who are Respondents in the present appeal, however, comprise only eighty-four of those households, as some of the original plaintiffs settled or dismissed their claims at various stages of this lengthy litigation.

FN7. The fraud claim was based on allegations that (1) the line leak detection system at the station was antiquated and unreliable, that Petitioner had concerns about the system, and that Petitioner failed to disclose those facts to the Jacksonville residents; and (2) Petitioner failed to notify immediately the residents when the leak was discovered and thereafter failed to keep them informed fully. We will not address further these claims because they are not before us on appeal.

FN8. The Respondents in the present case are those individuals who had emotional distress claims remanded for a new trial, or whose damage claims for the full pre-leak value of their properties were affirmed, by the Court of Special Appeals. Exxon Mobil Corp. v. Ford, 204 Md.App. 1, 11, 40 A.3d 514, 520 (2012). Certain individuals, who were plaintiffs in the underlying case, but not Respondents currently, however, are Cross-Petitioners and Cross-Respondents in the present case. The Libertini family is not before this Court in any capacity because their claims were settled after suit was filed.

FN9. Respondents called several witnesses with regard to the fraud claim, arguing that Petitioner concealed information before and after the leak. We will not further address this evidence, however, because it is not necessary to do so in order to determine the issues raised in the instant appeal.

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FN10. These were wells on the Anderson and Fox properties, which indicated MTBE concentrations of 20.4 ppb and 47.7 ppb, respectively.

FN11. Current (as of the trial) MTBE test results were not available for eleven wells.

FN12. Specifically, these wells were owned by the following households and indicated the following levels of benzene contamination: Dobb (0.42 ppb); Fritz (0.096 ppb); Rush (0.10 ppb); Vacovsky (0.13 ppb); and Wiedey (0.10 ppb).

FN13. These were: the Baig property (317,000 ppb); the Brady property (754 ppb); the Dobb property (60.7 ppb); and the McLewee property (37, 200 ppb).

FN14. These were: the Baig property (18,500 ppb); the Brady property (7.9 ppb); the McLewee property (324 ppb); and the Tizard property (11.8 ppb).

FN15. Respondents' testimony regarding property damage is amplified in Section V of this opinion.

FN16. The stipulation provided that Dr. Brautbar would testify: "[b]ased on the opinions of Kenneth Rudo and my understanding of the nature and extent of Plaintiffs' exposure to MTBE, I believe the following tests for examinations should be performed as part of an annual medical monitoring protocol." The tests are described above.

FN17. On direct examination of Dr. Rudo, the following testimony was adduced regarding thirty-nine plaintiffs who were exposed allegedly to the leak's contamination in their potable wells, prior to being notified of the leak:

RESPONDENTS' COUNSEL:you would agree that the exposures to the various plaintiffs vary from plaintiff to plaintiff?

DR. RUDO: Yes.

COUNSEL. And the amount of contamination in their wells varies not only from plaintiff to plaintiff but from test to test?

DR. RUDO: Yes, sir.

COUNSEL: Now, with that in mind, can you state to a reasonable degree of probability in your field as a toxicologist that each of the plaintiffs that I have just described is in fact at an increased risk for developing these cancers in the future?

DR. RUDO: Yes, they are.

COUNSEL: And what is it about the exposure of any kind? Because they do vary from levels that are below one part per billion to levels that I think the highest level, 47.7 parts per billion, explain to the jury the-how you parse through the levels of exposure, the levels of contamination that they were exposed to and how you were able to conclude that even at these low levels in some of the plaintiffs' wells they were exposed to a level that will likely put them at increased risks for cancers in the future?

DR. RUDO: Well, Number one, they were most certainly exposed. They had the positive [well] tests, you know, had exposure to a chemical that we consider more likely than not to be carcinogenic. Because we also consider it to be more likely than not a mutagenic chemical that can change DNA, that that implies that in essence *there is no safe level; there is no safe level in terms of exposure time and there is no safe level in terms of the amount of chemical that is there. So in essence, the safe level would be considered zero. Anything over and above that would increase the risk.*

(Emphasis added). Apart from this testimony, Dr. Rudo did not testify as to any other Respondent's increased risk to contracting cancer.

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FN18. Dr. Whitman's company performed air sampling in four homes, but did not further pursue air sampling. He did not do a time series mapping of the effect of remediation activities. He acknowledged that gasoline attenuates naturally, but stated that not all of it does. He did not conduct an attenuation study in these cases.

FN19. Dr. Jaynes multiplied the remaining years of life expectancy for each Respondent by \$2,000 per year, and increased the cost per year assuming an inflation rate of 3.74 %. He then reduced the total to present value, assuming an interest rate of 5.2%.

FN20. Maguire based his opinion on the life cycle of a plume, which initially expands and later reaches equilibrium. The latter occurs when the rate at which the contaminants are dissolving equals the rate of attenuation.

FN21. No exceptions were taken to that instruction.

FN22. The Roeterings and Williams families dismissed their claims during trial.

FN23. Petitioner filed, specifically: (1) a motion for judgment notwithstanding the verdict (JNOV) regarding the specific claims of nineteen households; (2) a motion for new trial or remittitur regarding property damage awards for those families whose properties did not have contamination at or above the State MCL for MTBE or benzene; (3) a motion for new trial or remittitur on the claims for property damage; (4) a motion for a new trial based principally on admission of prejudicial evidence, namely Dr. Kenneth Rudo's testimony that he believed MTBE to be a human carcinogen; (5) a motion for JNOV or a new trial on the emotional distress claims; and, lastly, (6) a motion for JNOV on the damages for medical monitoring, arguing that such a claim is not compensable in Maryland.

FN24. In refusing to reverse the property

value diminution awards, Judge Baldwin wrote:

This writer is very tempted to substitute my view of the evidence for that of the jury and grant post trial relief. I will decline that strong temptation by keeping in mind that the jury's view of the admitted evidence should be respected unless the verdict is against the weight of the evidence, shocks the conscience, is grossly excessive, or is excessive. It is not, but is a *millimeter shy* of those standards.

(Emphasis added).

FN25. We address further Respondents' argument that the in banc decision was improper in Section I of this opinion.

FN26. The intermediate appellate court also agreed unanimously that the damage award for one family (the Grecos) should be struck because the family sold their home for a profit and had withdrawn their claim for diminution in value, but was awarded nonetheless \$367,000 in damages. *See id.* at 10, 40 A.3d at 519 (per curiam). Additionally, damages for \$50,000 each to Luke DeKoomen and Seth DeKoomen (who are not Respondents in the present case) were reversed as part of a ruling affecting fifty-one other plaintiffs, on the basis that the awards were not supported by sufficient evidence. *See id.* at 11–12, 40 A.3d at 519–20 (per curiam).

FN27. Judge Zarnoch adopted the standard of a substantial and medically verifiable possibility of contracting a latent disease as the basis to recover emotional distress damages, and would have affirmed the awards under that standard based on the conclusion that the evidence was sufficient and that the jury instructions communicated fairly the correct legal standard. *See id.* at 51–62, 40 A.3d at 544–50. (Zarnoch, J., joined by Meredith, Woodward, and Wright, JJ.)

FN28. Judge James Eyler adopted a standard of whether a plaintiff is “more likely than

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not” susceptible to contracting cancer in order to recover damages based on fear of cancer, and concluded that most of the plaintiffs failed to present sufficient evidence of emotional distress, except for thirty-five plaintiffs, whose claims he would have remanded for a new trial. *See id.* at 105–32, 40 A.3d at 575–91 (J. Eyler, J., joined by Hotten, J.); *see also id.* at 168–241, 40 A.3d at 613–654 (appendix surveying evidence as to each plaintiff) (J. Eyler, J.).

FN29. Judge Graeff agreed with Judge Zarnoch’s fear of cancer standard, but she found the jury instruction did not convey adequately that standard, and she found that the evidence did not warrant the judgments for four categories of plaintiffs identified by Judge Eyler. *See id.* at 244–47, 40 A.3d at 656–57. As to the remaining plaintiffs, Judge Graeff believed there was sufficient evidence to warrant their judgments. *See id.*

FN30. Judge Watts agreed generally with the standard endorsed by Judge James Eyler, but concluded that one of the several plaintiffs identified by him presented sufficient evidence of emotional distress to be granted a new trial. *See id.* at 252–55, 40 A.3d at 660–63.

FN31. Judge Deborah Eyler concluded that none of the plaintiffs could recover damages for fear of cancer because there was no evidence that the plaintiffs sustained a probability of developing cancer and because none proffered evidence of a sufficiently demonstrable physical injury. *Id.* at 259–69, 40 A.3d at 665–71.

FN32. Judge Deborah Eyler did not discuss in her opinion the issue of recovery for future medical monitoring costs.

FN33. In their motion, Respondents asserted that for a decision of a case heard by the court in banc, a concurrence of a majority of the incumbent judges of the entire court is required. Respondents claimed further that the three judges who had been scheduled originally to participate on the in banc panel

(Chief Judge Krauser, and Judges Mattric-ciani and Kehoe), but who disqualified themselves from hearing the appeal, were nevertheless “incumbent judges” who should be counted in determining whether a majority was reached. We address this issue in Section I of the Discussion section of this opinion.

FN34. On 8 March 2012, Respondents filed a second motion under Rule 8–605, seeking reconsideration of both the February 9 and March 6 decisions of the intermediate appellate court. Respondents reasserted their argument made in their first motion for reconsideration, and offered a new issue, based in the March 6 opinion, indicating that “[a]ll incumbent members of the Court joined in the decision to order in banc review, including the 9 judges who eventually heard argument and decided the case.” *Id.* at 279 n. 7, 204 Md.App. 274, 40 A.3d at 677 n. 7. Respondents maintained that participation in this decision by the three judges who later recused themselves “tainted the deliberative process” with the result that the entire in banc procedure violated Rules 1.2 and 2.11 of the Maryland Code of Judicial Conduct in Rule 16–814 and CJP § 1–403(c). The intermediate appellate court denied the motion.

FN35. On 9 May 2012, we issued a Writ of Certiorari in *Exxon Mobil Corp. v. Albright*, 426 Md. 427, 44 A.3d 421 (2012), a pending case in the Court of Special Appeals. The Respondents in the instant case assert that resolution of the issues presented in *Albright* would also resolve the substantive issues in this appeal (in this contention, they are correct), and would allow this Court to “with-draw[] or declin[e] certiorari” on those issues if the Court determines that the Court of Special Appeals’s per curiam opinion was not issued properly.

FN36. In its petition for Writ of Certiorari, Exxon presented two questions:

1. Does Maryland permit award for emotional distress due to fear of contracting cancer, and, if so, must the claimant prove that his or her wrongful exposure to a car-

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cinogen makes it more likely than not that he or she will contract cancer?

2. May a jury's verdict that all of Plaintiffs' properties were worthless be upheld where (a) the properties were all still habitable and many had no contamination; (b) all experts testified that the properties retained substantial value; and (c) those properties which were sold all sold for a substantial price?

FN37. As noted earlier, these Respondents, representing eighty-four households, are not those whose eighty-eight cases were consolidated on appeal and were awarded trial.

FN38. In their cross-petition for Writ of Certiorari, Respondents posed the following questions:

1. Did the Court of Special Appeals violate the clear mandate of Md.Code (1973, 2006 Repl.Vol.), Court and Judicial Proceedings Article (CJP), § 1-403(c), when it issued its in banc decision without a "concurrence of a majority of the incumbent judges of the entire Court?"

2. Did the Court of Special Appeals err in holding that counsel for ExxonMobil did not waive his client's right to challenge the compensatory damage awards, despite implicit acquiescence in the jury's decision?

3. Did the Court of Special Appeals err in holding that the "fear of cancer" jury instruction was erroneous and prejudicial?

4. Did the Court of Special Appeals reach a majority vote of the sitting judges, on the issue of medical monitoring and, if they did, was there error in holding that the evidence was insufficient to support an award for medical monitoring?

FN39. Exxon's conditional cross-petition posed the following questions:

1. Assuming fear of cancer is compensable, did Plaintiffs provide legally sufficient evidence of their emotional distress claims?

2. Does Maryland law permit the recovery of damages for medical monitoring and should it do so where (a) as to many Plaintiffs there was no proof of exposure to MTBE or benzene; (b) no Plaintiff claimed to have any current disease caused by MTBE or benzene; and (c) there was no proof that any Plaintiff has a significantly increased risk of contracting any disease

3. Should Plaintiffs' property damage expert's opinions have been admitted where he failed to use any generally accepted method of valuation and failed to consider actual sales?

4. Did ExxonMobil consent to the [] verdicts?

5. Did the in banc decision of the Court of Special Appeals violate § 1-403(c) of the Courts and Judicial Proceedings Article?

FN40. We concluded that the Court of Special Appeals may have an institutional interest in the resolution of this question, if reached by this Court. Thus, on 26 June 2012, we issued an order inviting the Attorney General of Maryland to submit an *Amicus Curiae* brief to address questions concerning the Court of Special Appeals's in banc procedure in the present case. We specified in the order that the Attorney General's brief "on behalf of the Court of Special Appeals" address only the issues raised by Respondents regarding the procedural posture of the intermediate appellate court's in banc decision, not the substantive merits of the case. The Attorney General filed its *Amicus Curiae* brief on 9 October 2012.

FN41. § 1-403(c) provides, in relevant part:

A hearing or rehearing before the court in banc may be ordered in any case by a

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majority of the incumbent judges of the court. Six judges of the court constitute a quorum of the court in banc. *The concurrence of a majority of the incumbent judges of the entire court is necessary for decision of a case heard or reheard by the court in banc.*

FN42. In its conditional cross-petition, Petitioner urged this Court to grant plenary review of this question.

FN43. Between the time that the three-judge panel heard argument in January 2011 and the in banc hearing in September 2011, the Maryland Judicial Ethics Committee published an opinion in response to requests from three undisclosed appellate judges who questioned whether they should participate in an appeal involving a corporate appellant-litigant in which two of the judges owned stock and in which the third had held recently stock that the judge had since sold. See 16 August 2011 Maryland Judicial Ethics Committee Opinion in Request Nos.2011-19, 2011-20, 2011-21. The ethics opinion disclosed that the appeal in question was from a judgment in “the amount of \$147 million.” The Committee opined that these interests did not amount to express grounds for disqualification, but that the judges may wish to consider whether recusal was appropriate based on a risk of a potential perception of impropriety.

FN44. Judge Ellen M. Hollander, formerly an incumbent judge on the intermediate appellate court, was selected for a federal district court judgeship on the U.S. District Court for the District of Maryland. Her vacancy on the state court was filled by Judge Stuart R. Berger, who was appointed in December 2011. Neither Judge Hollander nor Judge Berger participated in the court's consideration of the appeal in this case.

FN45. The Attorney General explained persuasively in its *Amicus Curiae* brief this particular ground for our review of the present case.

FN46. That statute provides:

Sessions; panels; hearings in banc.

(b) *Panels.*—A case before the Court of Special Appeals shall be heard by a panel of not less than three judges. The concurrence of a majority of a panel is necessary for the decision of a case.

FN47. Maryland Rule 8-131(b)(2) provides the authority for this Court's discretion to bypass the Court of Special Appeals in choosing to hear an appeal not yet decided by the intermediate appellate court:

(2) [e]xcept as otherwise provided in Rule 8-304(c), when the Court of Appeals issues a writ of certiorari to review a case pending in the Court of Special Appeals before a decision has been rendered by that Court, the Court of Appeals will consider those issues that would have been cognizable by the Court of Special Appeals.

FN48. This approach, as explained in its *Amicus Curiae* brief, is one of the Attorney General's suggested resolutions to this procedural issue.

FN49. Respondents argue that *Lee v. State*, 69 Md.App. 302, 305-07, 517 A.2d 774, 775-76 (1986), *aff'd*, 311 Md. 642, 537 A.2d 235 (1987), supports their argument that the trial court's judgment must be affirmed. We disagree, primarily because *Lee* and the present case arise from two distinctly different procedural backgrounds. In *Lee*, the Court of Special Appeals was evenly divided on one issue, and therefore affirmed the trial court's judgment. Here, Respondents maintain that the decision of the intermediate appellate court is rendered null by its lack of majority concurrence of a seven-member majority. *Id.* *Lee* does not support the reasoning of Respondents' argument.

FN50. Respondents contend also that the in banc panel did not constitute a quorum of the eligible voting members. Section 1-403(c) of

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the Courts and Judicial Proceedings Article defines a quorum of an in banc panel as six members. As there were nine members of the intermediate appellate court who heard and decided the instant appeal, we need not address further this issue.

FN51. There were other Respondents whose potable wells were labeled as “non-detects,” but Petitioner appeals the damages awards for emotional distress and medical monitoring costs for only seventeen of the total non-detect properties. The other non-detect properties are discussed in Section VI of this opinion.

FN52. Instead, Respondents testified to one or more (while others did not testify to any) of the following complaints, some related and some unrelated to the leak's impact: anxiety, sleeplessness, anger, worry about health and finances, headaches, anxiousness, stress, frustration, embarrassment, depression, upset stomach, and panic attacks.

FN53. This group of Respondents is comprised of the Badders, Barnett/Lindsey, Benney, Berlin, Butler, Colgan, Copeland, Cormier, Fulco, Gollihue, Greenblatt, Jenkins, Lindsay, Merski, Montone, Nickel, and Oberlin households.

FN54. For example, Respondents' expert, Dr. Rudo, testified that our food—such as mushrooms, coffee, peanut butter, or bread—contain carcinogens, and that certain other foods contain mutagens.

FN55. We do not consider whether Respondents, as a matter of law, could fear reasonably that they were exposed to MTBE and could develop cancer when Exxon's agents/employees distributed water bottles to the Jacksonville residents, or when they discovered the extent of the leak through the media, neighborhood meetings, or by other means. As discussed above, the only form of undisputed evidence relevant to determining an objectively reasonable fear in this case is the evidence of contamination in the properties' potable wells and the results of the

properties' monitoring wells.

FN56. These households are: Acchione, Alban, Albert, Babcock, Barone, Bateman, Batton, Bieber, Blair, Cadigan, Carroll, Coffay, Cremen, Csicesek, Davis, Debolt, Dedeo, De Koomen, Depasquale, Diedeman, DiGalbo, Dixon, Dobb, Faber, Facinoli, Flora, Ford, Fox, Fritz, Gottschalck, Greco, Gregory, Hannan, Heggie, Hourihan, Howe, Kropfelder, Kukucka, Lamos, Lanting, Mahoney, Martin, Mucha, Osmeyer, Peters, Pfeiffer, Quinn, Rosch, Rush, Schech, Schultz, Shimp, Sipes, Thompson, Tirocchi, Tolle, Twardzik, Vacovsky, Vogler, Wiedey, and Wittelsberger.

FN57. These Respondents are: David Fritz, Jr., Brendan Fritz, Aidan Fritz, and Melodie Heggie.

FN58. These Respondents are: Thomas Anderson, Stacey Curtiss, Mirza Baig, Zain Baig, Martin Brady, Cassandra Brady, Edward McLewee, Barbara McLewee, Steven Tizard, and Tracey Tizard.

FN59. These households are: Badders, Barnett/Lindsey, Benney, Berlin, Butler, Colgan, Copeland, Cormier, Fulco, Gollihue, Greenblatt, Jenkins, Lindsay, Merski, Montone, Nickel, and Oberlin. *See supra* note 51.

FN60. This group of Respondents includes the following households: Alban, Albert, Babcock, Barone, Bateman, Batton, Bieber, Blair, Cadigan, Carroll, Coffay, Cremen, Csicsek, Davis, Debolt, DeDeo, De Koomen, DePasquale, Diedeman, Dixon/Elkington, Faber, Facinoli, Flora, Ford, Fox, Fritz, Gottschalck, Gregory, Hannan, Heggie, Hourihan, Howe, Kuckucka, Lamos, Lanting, Martin, Mucha, Osmeyer, Peters, Pfeiffer, Quinn, Rosch, Rush, Schech, Schultz, Shimp, Thompson, Tirocchi, Tizard, Tolle, Twardzik, Vacovsky, Vogler, Wiedey/Wilkinson, Wittelsberger.

FN61. These Respondents are Thomas Anderson, Stacey Curtiss, Mirza Baig, Zain Baig, Martin Brady, Cassandra Brady, Mat-

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thew Fox, Edward McLewee, Barbara McLewee, Steven Tizard, and Tracey Tizard.

FN62. The Brady household sold their home for \$679,500 (a 6.9% decline from its pre-leak value). The Csicsek household sold their home for \$767,000 (a 10.3% decline from its pre-leak value). The Simms household sold their home for \$505,000 (a 16.6% decline from its pre-leak value).

FN63. Petitioner contends that “[u]nder Maryland Rule 5-702 and *Frye-Reed*, Acks' opinion should not have been admitted.” The question of whether Acks' testimony is admissible is governed by Maryland Rule 5-702 rather than the *Frye-Reed* test. The latter is reserved for issues admissibility of expert testimony involving new or novel scientific techniques. *Wilson v. State*, 370 Md. 191, 201 n. 5, 803 A.2d 1034, 1040 n. 5 (2002); see *CSX Transp. Inc. v. Miller*, 159 Md.App. 123, 187-88, 858 A.2d 1025, 1061-62 (2004) (explaining what is encompassed as a “new and novel scientific technique” under the *Frye-Reed* test). Maryland Rule 5-702, on the other hand, applies to the discretionary threshold of admitting generally an expert's testimony. *Id.* As *Frye-Reed* is not applicable to the present situation, we review the admission of Acks' testimony under an abuse of discretion standard pursuant to Maryland Rule 5-702.

FN64. Additionally, Acks relied on test readings of wells on various properties taken after the leak, but before trial, and an exhibit prepared by Sullivan, one of Respondents' hydrogeology experts, reflecting Sullivan's opinion as to whether properties with no contamination had a low, medium, or high chance of becoming contaminated in the future.

FN65. These properties were owned and sold by the Brady, Csicsek, Simms, and Murray households. The trial court granted Exxon's motion for remittitur as to the diminution in value claims of these households, reducing each award to an amount equal to the difference between the pre-leak adjusted value

and the actual sales price.

FN66. Acks testified based on a map presented at trial that reflected forty-nine sales (the most current number at the time of his deposition), but the map was updated for trial to reflect fifty-two sales.

FN67. In Acks' words, “A home could sell for a million dollars, and that might sound like a lot, but if it's really a \$3 million home, then there's a big diminution.”

FN68. Acks' recognition, but exclusion, of the comparable sales data stands in stark contrast to the exclusion of such data by the appraisal expert in *Albright*, who concluded merely that such information was unreliable and the buyers for those properties were uninformed. — Md. at —, — A.3d at — (slip op. at 120-29).

FN69. Robert Simons, *Estimating Proximate Property Damage for PBC Contamination in a Rural Market: A Multiple Techniques Approach*, LXX Appraisal J. 388 (October 2002).

FN70. Robert A. Simons & Kimberly Winson-Geideman, *Determining Market Perception on Contamination of Residential Property Buyers Using Contingent Valuation Surveys*, 27 J. Real Estate Research 193 (2005). The authors of this article, according to Acks, discarded the survey results of potential buyers because of their expressed belief that they would never bid on the property or would bid only one percent of the property value. Acks found the latter basis unrealistic and “very conservative.”

FN71. Robert Berrens et al., *The Effect of Environmental Disclosure Requirements on Willingness to Pay for Residential Properties in Borderlands Community*, 84 Social Sci. Q. 359 (2003).

FN72. The Badders, Barnett/Lindsey, Benney, Berlin, Butler, Colgan, Copeland, Cormier, Fulco, Gollihue, Greenblatt, Hahn,

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Jenkins, Lindsay, Merski, Montone, Nickel, and Oberlin, and Pertee properties' wells never showed any contamination.

FN73. These were the Barone and Gregory families.

FN74. These were the Brady, Csicsek, Simms (not Respondents in the instant case), and Murray (also not Respondents in this case) households.

FN75. Respondents assert repeatedly that Petitioner did not object to the lay testimony, thereby waiving the right to challenge the probative value of the testimony. Whether Petitioner objected to such testimony is irrelevant in determining the probative value of the lay testimony. As Judge Deborah Eyler noted succinctly in her concurring and dissenting opinion in *Ford*:

The absence of an objection is meaningless to the analysis of this issue, ... The central sufficiency question on property damage was whether the evidence was legally sufficient to support a reasonable finding that the homes all were worth nothing. As in any case, evidence to support a finding must be probative of it. *Evidence that otherwise is not probative does not become probative merely because it was not objected to.*

204 Md.App. at 272, 204 Md.App. 1, 40 A.3d at 673 (D.Eyler, J.).

FN76. These Respondents' testimony extended to the marketability of neighbors' homes, others homes close to the strike line, close to a remediation site, or those properties "completely surrounded ... by positive results for gas."

FN77. These Respondents did not express an opinion as to the value of their homes, or made statements relevant to the issue, but not covered by the categories listed *infra*. This group included the following property owners: Acchione, Butler, Csicsek, DiGalbo,

Dixon, Elkington, Greco, Kropfelder, Lindsay, Mahoney, McDevitt, Shimp, Shultz, Sipes, and Wittelsberger.

FN78. For example, one Respondent reported that she feared that she would be unable to sell her property because a neighbor failed to sell his home. Another Respondent testified that she and her family were "stunned" when their house was sold because they had not expected any offers.

FN79. This group of Respondents included the following households: Alban, Albert, Anderson/Curtiss, Bateman, Benney, Berlin, Bieber, Brady, Cadigan, Coffay, Colgan, Copeland, Davis, DePasquale, Dobb, Faber, Fox, Fritz, Gottschalk, Gregory, Hourihan, Howe, Kukucka, Martin, McLewee, Merski, Montone, Mucha, Nickel, Oberlin, Osmeyer, Pfeiffer, Quinn, Rosch, Rush, Tolle, Twardzik, Vacovsky, Vogler, and Wiede/Wilkinson.

FN80. These owners testified that they believed their homes had diminished in value, but did not state by what amount. They did not maintain expressly that their homes had no value. For example, one Respondent testified that the value of his property had "gone down just a huge amount," but not to zero, as "someone would buy my house for \$10." Other Respondents used terms like "greatly diminished" or "severely impacted" to describe their properties' value. Twelve property owners questioned his or her property's value, stating they would not sell or that no sane person would buy, without actually stating that the property was worthless. Their explanations ran a gamut: (1) no sane person would buy the property, (2) the person testifying would not buy it if they did not live there and were looking for a house, and (3) the person testifying would not sell it either because he or she did not want to move or, as a matter of conscience and good morals, would refuse to sell it to anyone.

FN81. Respondents who offered such testimony were the owners of the following properties: Babcock, Baig, Barone, Batton,

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Blair, Carroll, Cremen, DeBolt, DeDeo, De Kooman, Diedeman, Facinoli, Ford, Flora, Hannan, Heggie, Howe, Jenkins, Lanting, Lamos, Peters, Schech, Thompson, Tirocchi, and Tizard.

FN82. Owners of about twenty-five properties testified, either explicitly or implicitly, that their properties were “worthless,” “had no value,” or were “worth “absolutely negative zero.” Many Respondents stated that if given the chance they would not purchase their own homes, and thus could not imagine why anyone else would do so “whatever the amount of money.” Even though one Respondent recognized that some of the leak-impacted properties had sold, he observed “there [are] a limited number of fools out there that will pay money for a property that is completely surrounded by ... positive test results for gas.”

FN83. A significant number of Respondents testified they were unwilling to sell their properties for “moral” or “good conscience” reasons, such as one Respondent who testified that even if he and his wife could sell their home, they did not want “to put this problem, this burden on someone else.” Another Respondent reported that she was “morally uncomfortable” with selling the house to a family with children. Ford, a Respondent who is a real estate agent, testified that he would tell his clients to “walk away” from purchasing a property like his own.

FN84. Another Respondent (not Ford), who was also a real estate agent, opined that there was a stigma associated with the Jacksonville area. Another Respondent asserted that potential buyers would not consider his property even if he decided to sell, while others testified that even though they desired to sell, they felt they could not do so because any sale price would be insufficient to pay their home mortgages. The Baig property had nineteen monitoring wells with remediation equipment pumping twenty-four hours a day. In closing argument, Respondents' counsel stated: “Who would buy this house? It is

worthless....”

FN85. Respondents described the remediation as causing loud and constant noise, bright lights, and the ruin of yards due to digging and heavy machinery.

FN86. See also *Player v. Motiva Enters. LLC*, 240 Fed.Appx. 513, 516–18, 522, 2007 U.S.App. LEXIS 16914 (3d Cir. July 13, 2007) (in a case involving contamination of plaintiff property owners' properties by hazardous substances, the Third Circuit concluded that a plaintiff property owner's testimony—that a potential buyer had reneged on his offer to buy her property after he learned about the contamination—was insufficient proof of a decrease in property value.).

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