IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 09-4548

JONATHAN HIRSCH, JEANNE MYERS,
Individually and on behalf of all others similarly situated,

and

CHRISTOPHER MANN,
Individually and on behalf of all others similarly situated,

Plaintiffs-Appellants

v.

CSX TRANSPORTATION, INC.,

Defendant-Appellee.

On Appeal from an Order of the United States District Court for the Northern District of Ohio, No. 1:07-cv-3512 (Hon. Dan Aaron Polster)

AMICI CURIAE BRIEF OF COALITION FOR LITIGATION JUSTICE, INC., CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, NATIONAL ASSOCIATION OF MANUFACTURERS, AMERICAN TORT REFORM ASSOCIATION, PROPERTY CASUALTY INSURERS ASSOCIATION OF AMERICA, AMERICAN INSURANCE ASSOCIATION, AMERICAN PETROLEUM INSTITUTE, AMERICAN COATINGS ASSOCIATION, AND AMERICAN CHEMISTRY COUNCIL IN SUPPORT OF DEFENDANT-APPELLEE

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DISCLOSURE STATEMENT PURSUANT TO RULE 26.1 OF THE FEDERAL RULES OF APPELLATE PROCEDURE

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, counsel for *amici curiae* hereby states that the associations represented on this brief have no parent corporations and have issued no stock.

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QUESTION PRESENTED

Whether seven individual plaintiffs, who claim that exposure to a chemical at levels their own experts admit will result in less than one theoretical cancer per one million people, are entitled to decades of medical monitoring in the absence of: (1) independently analyzing the scientific literature on causation; (2) establishing exposure of the seven individuals to the chemical in question; or (3) linking any actual exposure to a significantly increased risk of developing any of the diseases plaintiffs propose to monitor. *See* Brief of Appellee CSX Transp., Inc. (CSXT).[1]

IDENTITY AND INTEREST OF *AMICI CURIAE* AND SOURCE OF AUTHORITY TO FILE

Amici are organizations that represent companies doing business in Ohio and their insurers. Consequently, *amici* have a substantial interest in the manner in which federal courts resolve cases affecting Ohio businesses and their insurers.

Here, the District Court correctly concluded that "Plaintiffs cannot get past the summary judgment stage because their experts rely on carcinogen classifications as their only evidence that dioxins [the chemical at issue] cause the endpoint diseases for which they seek medical monitoring," *Mann v. CSX Transp., Inc.*, No. 1:07-CV-3512, 2009 WL 3766056, at *3 (N.D. Ohio Nov. 10, 2009), and

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[1] No party or any counsel for a party in this appeal authored the proposed brief in whole or in part or made a monetary contribution intended to fund the preparation or submission of the brief. No person or entity other than the *amici curiae* made a monetary contribution intended to fund the preparation or submission of the brief.

because "Plaintiffs have failed to establish that they were exposed to dioxins in an amount warranting a reasonable physician to order medical monitoring." *Id*. at *4.

Reversal would set an unsound precedent adversely affecting *amici*'s members. Like the District Court, *amici* believe that a one-in-a-million risk is too speculative to justify imposing on CSXT (or any defendant) a costly medical monitoring requirement (here, costing hundreds of millions of dollars). Such remote hypothetical risks are also insufficient to justify imposing on the court system the need to fashion and administer medical monitoring programs that could last several decades (here, twenty to forty years).

Amici submit this brief with an accompanying Motion for Leave to File.

STATEMENT OF THE CASE

Amici adopt Defendant-Appellee's Statement of the Case.

INTRODUCTION

Plaintiffs seek the establishment of a court-administered medical monitoring program that could cost nearly a half-billion dollars and span up to forty years for a one-in-a-million increased hypothetical risk of cancer stemming from a 2007 freight train derailment and fire in Painesville, Ohio.[2]

[2] "As a frame of reference, the risk of being struck by lightning is 0.002 percent; the risk of dying from a bicycle accident is 0.019 percent; fire 0.084 percent; drowning 0.11 percent; food poisoning 0.12 percent; homicide 0.45 percent; car accident 1 percent; alcohol 1.1 percent; stroke 14 percent; heart disease 18 percent." *In re W.R. Grace & Co*., 355 B.R. 462, 492 (Bankr. D. Del. 2006) (citation omitted).

The District Court below recognized the flimsy nature of the Plaintiffs' evidence and concluded that "Plaintiffs have failed to establish that they were exposed to dioxins in an amount warranting a reasonable physician to order medical monitoring." *Mann*, 2009 WL 3766056, at *4. The District Court also acknowledged that "Plaintiffs proposed program would likely be extremely expensive and inconvenience thousands of people for many years in the future." *Id*. at *6.

The District Court's holding was correct. Indeed, other courts have found highly remote risks to be insufficient to justify court-supervised medical monitoring. Even risks greater than in the instant matter have been found insufficient. In other contexts, courts also have found such decisions to be properly decided on summary judgment.

The District Court's decision also represents sound public policy. Allowing medical monitoring claims based on remote hypothetical risks would invite frivolous or speculative litigation, subject defendants to enormous costs with little or no corresponding public benefit, threaten payment to sick claimants now and in the future, and impose a huge administrative burden on the courts as a result of having to fashion and supervise medical monitoring programs for years on end.

Finally, it is important to note that in this particular case Plaintiffs seek only equitable relief, adding to the need for prudence to be applied. A court's equitable

powers must be exercised delicately, because the court's discretion is considerable. Here, the District Court was right to conclude that "Plaintiffs have not presented enough evidence for a reasonable jury to conclude that such a burdensome program is warranted." *Id.*

For these reasons, the decision below should be affirmed.

ARGUMENT

I. THE DISTRICT COURT PROPERLY APPLIED THE LAW

Here, the District Court properly found that Plaintiffs failed to establish that their alleged one-in-a-million risk of cancer from any dioxin exposure would warrant a reasonable physician ordering medical monitoring.[3]

Other courts have found highly remote risks to be insufficient to justify court-supervised medical monitoring, *see Pohl v. NGK Metals Corp.*, No. 0733, 2006 Phila. Ct. Com. Pl. LEXIS 472, at *45-49 (Pa. Ct. Cm. Pl. Nov. 29, 2006); *In re Meridia Prods. Liab. Litig.*, 328 F. Supp. 2d 791, 826 (N.D. Ohio 2004), *aff'd sub nom. Meridia Prods. Liab. Litig. v. Abbott Labs.*, 447 F.3d 861 (6th Cir. 2006); *Sheridan v. NGK Metals Corp.*, 614 F. Supp. 2d 536 (E.D. Pa. 2008), or to support class certification, *see Rowe v. E.I. DuPont de Nemours & Co.*, Civil Nos. 06-1810 (RMB), 06-3080, 2008 WL 5412912, at *12 (D.N.J. Dec. 23, 2008). Even risks

[3] *See Day v. NLO*, 851 F. Supp. 869, 881 (S.D. Ohio 1994) (predicting Ohio would permit medical monitoring if liability is established under a traditional tort theory of recovery, such as negligence, and plaintiffs "show by expert medical testimony that they have increased risk of disease which would warrant a reasonable physician to order monitoring.").

greater than in the instant matter have been found insufficient. *See O'Neal v. Dept. of the Army*, 852 F. Supp. 327, 336 (M.D. Pa. 1994).

In other contexts, courts also have found such decisions to be properly decided on summary judgment. *See Barrett v. Whirlpool Corp*., No. 3:08-0958, 2010 WL 1408724 (M.D. Tenn. Mar. 31, 2010); *see also Abuan v. General Elec. Co.*, 3 F.3d 329, 334-35 (9th Cir. 1993) (summary judgment was proper where plaintiffs' experts did not attempt to state how "significant" or relative the increased risk was for any individual, either in the abstract or as compared to other members of the class), *cert. denied*, 510 U.S. 1116 (1994).

It is important for courts to decide such matters on summary judgment to avoid needlessly protracted and costly litigation, and the possibility that defendants may be forced into what Judge Posner on the Seventh Circuit has called "blackmail settlements." *In re Rhone-Poulenc Rorer, Inc*., 51 F.3d 1293, 1298 (7th Cir.), *cert. denied*, 516 U.S. 867 (1995).

II. THE DISTRICT COURT'S DECISION REPRESENTS SOUND PUBLIC POLICY

A. Fairness to Defendants

On a daily basis, almost everyone comes into contact with a potentially limitless number of substances that arguably pose risk levels as low as that from this fire but would then require medical monitoring under the regime Plaintiffs suggest here. *See* Arvin Maskin et al., *Medical Monitoring: A Viable Remedy for*

Deserving Plaintiffs or Tort Law's Most Expensive Consolation Prize?, 27 Wm. Mitchell L. Rev. 521 (2000). Many events or products could give rise to medical monitoring claims if courts begin to go down the road of monitoring for risks that are one-in-a-million. For example, fires that result in the release of dioxins happen all the time in every city, including Painesville. *See, e.g., Painesville Township: Damages Estimated in the Millions After Industrial Fire,* Sept. 30, 2008, *available at http://www.wkyc.com/news/local/story.aspx?storyid=97588&provider=top.*

Allowing medical monitoring claims based on remote risks would invite frivolous or speculative litigation, because "we may all have reasonable grounds to allege that some negligent business exposed us to hazardous substances." Susan L. Martin & Jonathan D. Martin, *Tort Actions for Medical Monitoring: Warranted or Wasteful?*, 20 Colum. J. Envtl. L. 121, 130 (1995). As the United States Supreme Court has recognized, "tens of millions of individuals may have suffered exposure to substances that might justify some form of substance-exposure related monitoring." *Metro-North Commuter R.R. Co. v. Buckley*, 521 U.S. 424, 440 (1997).[4] In *Metro-North*, the Court ruled 7-2 against allowing a medical monitoring claim brought under the Federal Employers' Liability Act. The Court rejected the argument that medical monitoring awards are not costly and feared

[4] *See also* Paul J. Komyatte, *Medical Monitoring Damages: An Evolution of Environmental Tort Law*, 23 Colo. Law. 1533, 1533 (1994) ("Some 40 million persons—nearly 20 percent of the U.S. population—live within four miles of a hazardous waste site on the EPA's National Priority List, and eight out of ten Americans live near some type of hazardous waste site.").

that allowing such claims could create double recoveries because alternative sources of monitoring are often available, such as through employer-provided health insurance plans. *See id.* at 443-44.[5]

Thus, it is critical for courts to exercise prudence when awarding such relief. As this Court has said in another context, "mere conjecture or even possibility does not justify the court awarding damages for a future disability which may never materialize." *Sterling v. Velsicol Chem. Corp.*, 855 F.2d 1188, 1204 (6th Cir. 1988). Otherwise, defendants would be subjected to enormous costs with little or no corresponding public benefit. *See Hinton v. Monsanto Co.*, 813 So. 2d 827, 830 (Ala. 2001) (stating that "a 'cost-benefit' analysis counsels against recognizing a cause of action for medical monitoring.").

B. Advancing Public Health

Medical monitoring awards also involve a human toll. Individuals who are presently sick or may become sick in the future could be adversely affected as a result of needed resources being diverted to persons who are not sick and are very unlikely to ever develop a disease as a result of their alleged exposure. *See Wood v. Wyeth-Ayerst Laboratories*, 82 S.W.3d 849, 857 (Ky. 2002) ("[D]efendants do not have an endless supply of financial resources. Spending large amounts of

[5] Medical monitoring "may be an extremely redundant remedy for those who already have health insurance." Maskin et al., 27 Wm. Mitchell L. Rev. at 528. Approximately 80 percent of standard medical testing is paid for by third party insurance. *See* American Law Institute, 2 *Enterprise Responsibility for Personal Injury – Reporters' Study* 379 (1991).

money to satisfy medical monitoring judgments will impair their ability to fully compensate victims who emerge years later with actual injuries that require immediate attention."); *Henry v. Dow Chem. Co*., 701 N.W.2d 684, 694 (Mich. 2005) ("Litigation of these preinjury claims could drain resources needed to compensate those with manifest physical injuries and a more immediate need for medical care.").[6]

Some plaintiffs would likely suffer extreme anxiety as a result of "[f]alse positives [that] can devastate patients and their families." Victor E. Schwartz et al., *Medical Monitoring: The Right Way and the Wrong Way*, 70 Mo. L. Rev. 349, 356-57 (2005); ABC News, *More Cancer Tests Mean More False-Positive Results*, May 11, 2010, *available at* http://abcnews.go.com/Health/Healthday/story?id=7562464&page=1. One study found that "the probability of overdiagnosis is remarkably high" in screening and early detection programs (*i.e.*, "some of the cases diagnosed by an early detection program would have never developed the disease"). Ori Davidov & Marvin Zelen, *Overdiagnosis in Early Detection Programs*, 5 Biostatistics 603, 603 (2004).

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[6] *See also Ball v. Joy Mfg. Co.*, 755 F. Supp. 1344, 1372 (S.D. W. Va. 1990) ("There must be a realization that such defendants' pockets or bank accounts do not contain infinite resources. Allowing today's generation of exposed but uninjured plaintiffs to recover may lead to tomorrow's generation of exposed and injured plaintiff's [sic] being remediless."), *aff'd sub. nom. Ball v. Joy Tech., Inc.*, 958 F.2d 36 (4th Cir. 1991), *cert. denied*, 502 U.S. 1033 (1992); James A. Henderson, Jr. & Aaron D. Twerski, *Asbestos Litigation Gone Mad: Exposure-Based Recovery for Increased Risk, Mental Distress, and Medical Monitoring*, 53 S.C. L. Rev. 815 (2002).

Furthermore, medical screening itself may pose health risks, *see, e.g.*, Shirley S. Wang, *CT Scans Linked to Cancer*, Wall St. J., Dec. 15, 2009, *available at* http://online.wsj.com/article/SB126082398582691047.html, which may be greater than the risks for which monitoring is sought. "[E]xcept for a few types of cancer, routine screening has not been proven to reduce the death toll from cancer for people without specific symptoms or risk factors—like a breast lump or a family history of cancer—and could even lead to harm, many experts on health say." Natasha Singer, *In Push for Cancer Screening, Limited Benefits*, N.Y. Times, July 17, 2009, *available at* http://www.nytimes.com/2009/07/17/health/17screening.html. Already scarce medical resources could be stretched even further.

C. Avoiding Judicial Morass

Awarding relief in the circumstances presented here would impose a huge administrative burden on the courts. *See Henry*, 701 N.W.2d at 689-99 ("the day to day operation of a medical monitoring program would necessarily impose huge clerical burdens on a court system lacking the resources to effectively administer such a regime."). "[T]he economic, manpower, and time costs for such programs are usually substantial." Martin & Martin, *supra*, at 143.

Courts must make scientific and medical decisions about which treatment is proper for specific plaintiffs. In some cases, plaintiffs' lawyers deluge the court with a battery of diagnostic tests they would like to see the court allow for their

clients.[7] Critics have suggested that "[t]he all-too-transparent method behind this madness is to inflate as much as possible the cost of yearly monitoring per plaintiff so as to maximize plaintiffs' damage award and their attorneys' contingent fees." Thomas M. Goutman, *Medical Monitoring: How Bad Science Makes Bad Law* 15 (2001). Courts must then decipher which of these suggested tests to channel the plaintiff toward by "[s]crutiniz[ing] the clinical efficacy of the [suggested diagnostic tests], and in some cases, even the treatments planned to follow identification of disease." David M. Studdert et al., *Medical Monitoring for Pharmaceutical Injuries: Tort Law for the Public's Health?*, JAMA, Feb. 19, 2003, at 890.[8] Adding complexity, this determination may change over time with

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[7] For example, the plaintiffs in *In re Paoli R.R. Yard PCB Litig.*, 113 F.3d 444 (3d Cir. 1997), requested the following tests for feared PCB exposure: amniocentesis, developmental and achievement testing, electrocardiography, pulmonary function tests, mammography, sigmoidoscopy, urine cytology, sputum cytology, basic immunotoxicology panel, chromosomal analysis, complete optomologic evaluation, complete cardiovascular evaluation, complete neurological evaluation, complete gastrointestinal evaluation, PCV detoxification, urinalysis, PSA, CBC, urine porphyrin, and male fertility evaluation. *See* Schwartz et al., 70 Mo. L. Rev. at 377 n.171.

[8] The prevailing view in the medical community now favors individualized testing rather than a "one size fits all" approach:

> In the 1970s and 1980s, based on scientific evidence, it was determined that an annual physical examination and standard testing was not clinically valuable for the individual. Therefore, in 1983, the AMA issued another statement withdrawing its support for an across-the-board annual physical examination and standard testing for everyone. *The standard of care now with regard to medical monitoring is to perform periodic physical examinations targeted to specific medical conditions that depend upon an individual's risk factors.*

Hoyte v. Stauffer Chem. Co., No. 98-3024-CI-7, 2002 WL 31892830, at *29 (Fla. Cir. Ct. Pinellas County Nov. 6, 2002) (emphasis added).

emerging cures and treatments for current diseases and with the introduction of new types of diseases.

For instance, devising a sound medical monitoring plan would require, at a minimum, specifying the nature and amount of benefits available, the source of funding and funding allotments, the procedures for determining eligibility for monitoring, the payment mechanism for the provider and the percentage of provider reimbursement, when eligible parties may join the program, the length of time the program should last, the frequency of any periodic monitoring and the circumstances in which the frequency can be changed to allow special monitoring, the content of the monitoring exams, whether the facility testing will be formal or informal, and whether the service provider is to be designated by the court or chosen by the claimant. *See* Jesse R. Lee, *Medical Monitoring Damages: Issues Concerning the Administration of Medical Monitoring Programs*, 20 Am. J.L. & Med. 251, 267-72 (1994). Additionally, as a medical monitoring program matures, its scope and administrative operation will inevitably require adjustments, particularly if the program's designers erroneously estimate funding needs or the number of eligible participants. *See Petito v. A.H. Robins Co.*, 750 So. 2d 103, 107 (Fla. Dist. Ct. App. 1999) ("Doubtless many perplexing questions will arise in the administration of such a program."), *review denied*, 780 So. 2d 912 (Fla. 2001).

Finally, it is important to note that in this particular case Plaintiffs seek only equitable relief, adding to the need for prudence to be applied. A court's equitable powers must be exercised delicately, *see Detroit Newspaper Publishers Ass'n v. Detroit Typographical Union No. 18*, 471 F.2d 872, 876 (6th Cir. 1972), because the court's discretion is considerable. Medical monitoring actions, in particular, may invite "regulation through litigation" because courts are being asked to craft novel remedies that run counter to the traditional tort law rule that a plaintiff must have a present physical injury to obtain a recovery. *See* Victor E. Schwartz et al., *Medical Monitoring – Should Tort Law Say Yes?*, 34 Wake Forest L. Rev. 1057 (1999).

Here, the court-administered medical monitoring program sought by Plaintiffs would cost the Defendant hundreds of millions of dollars, would be complex and difficult to fashion, and would require ongoing judicial supervision for perhaps forty years, yet the public benefit is infinitesimal. The District Court was right to conclude that "Plaintiffs have not presented enough evidence for a reasonable jury to conclude that such a burdensome program is warranted." *Mann*, 2009 WL 3766056, at *6.

CONCLUSION

For these reasons, the District Court's decision should be affirmed.

Respectfully submitted,

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Dated: May 14, 2010

CERTIFICATE OF COMPLIANCE WITH FEDERAL RULE OF APPELLATE PROCEDURE 32(a)

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because the brief has been prepared in a proportionally-spaced typeface using Microsoft Word 2007 in 14-point Times New Roman.

This brief complies with the length requirements of Fed. R. App. P. 29(d) and 32(a)(7)(B) because the brief contains 2,967 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

/s/ Mark A. Behrens
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Dated: May 14, 2010

CERTIFICATE OF SERVICE

I certify that on May 14, 2010, a copy of the foregoing brief was filed with the Court via electronic case filing. I further certify that a copy was served on all parties or their counsel of record through the Court's CM/ECF system if they are registered users or, if they are not, then by placing a true and correct copy in the U.S. mail, postage prepaid to their address of record:

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