UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

IN RE: E. I. DU PONT DE NEMOURS AND COMPANY C-8 PERSONAL INJURY LITIGATION,

Civil Action 2:13-md-2433
CHIEF JUDGE EDMUND A. SARGUS, JR.
Magistrate Judge Elizabeth Preston Deavers

This document relates to:

***David Freeman v. E. I. du Pont de Nemours and Company*, Case No. 2:13-CV-1103**

MOTIONS *IN LIMINE* ORDER NO. 9

Evidence Related to the Emmett Studies

This matter is before the Court on Plaintiff's Motion *in Limine* No. 10 to Exclude All Evidence Relating to Plaintiff's Community Liaison role in the Emmett Studies ("Motion *in Limine* Regarding the Emmett Study") (ECF No. 4426), and Defendant's Memorandum in Opposition to Plaintiff's Motion (ECF No. 4473). For the reasons that follow, the Court **GRANTS IN PART AND DENIES IN PART** Plaintiff's Motion *in Limine* Regarding the Emmett Study in accordance with this Opinion and Order.

I.

Plaintiff David Freeman's case is scheduled for trial on May 31, 2016, and is the second bellwether case to be tried in this multidistrict litigation ("MDL"). Carla Marie Bartlett was the first bellwether plaintiff, and her case was tried in September 2015. It is not disputed that Mr. Freeman is a member of a class ("*Leach* Class") of approximately 3500 individuals who are permitted under a contractual agreement ("*Leach* Settlement Agreement") to file claims against

Defendant E. I. du Pont de Nemours and Company ("DuPont") based on six human diseases ("Linked Diseases") that they believe were caused by their exposure to ammonium perfluorooctanoate ("C-8" or "PFOA") discharged into surface waters and unlined landfills from DuPont's Washington Works plant. (*Leach* Settlement Agreement ("S.A."); ECF No. 820-8.) C-8 is an organic fluorinated compound that DuPont utilized as a manufacturing aid in the production of Teflon™.

In 2000, Mr. Freeman was diagnosed with testicular cancer, which is a Linked Disease. (http://www.c8sciencepanel.org/study.html) ("[T]he Probable Link reports [are] presented in detail in scientific articles (follow link [on the C-8 Science Panel website to the] Study Publications."). After Mr. Freeman's oncologic surgeon performed a "right radical orchiectomy" ("surgical extraction of his right testis and teratoma"), Mr. Freeman "underwent a ten-year follow-up protocol which involved frequent observation via x-rays, CAT scans, and tumor markers." (Expert Report of Robert Bahnson, M.D., F.A.C.S. at 3, ECF No. 4311-1.)

Mr. Freeman filed claims against DuPont for negligence and for punitive damages. To prove his negligence claim, Mr. Freeman must show that (1) DuPont owed him a duty of care; (2) DuPont breached its duty of care to him; and (3) he suffered an injury as a proximate result of DuPont's breach of the duty of care. *Menifee v. Ohio Welding Prods., Inc.*, 15 Ohio St.3d 75 (1984). To prove the existence of a duty, Mr. Freeman must show that a reasonably prudent person would have foreseen that injury was likely to result to someone in Mr. Freeman's position from DuPont's conduct. *Id.* at 77. To prove his punitive damages claim, Mr. Freeman must show by clear and convincing evidence that DuPont acted with a "conscious disregard for the rights and safety of other persons that has a great probability of causing substantial harm." *Preston v. Murty*, 32 Ohio St.3d 334, syllabus (1987).

In its defense, DuPont asserts, *inter alia*, that it owed no duty to Mr. Freeman. DuPont maintains that it "neither knew, nor should have known, that any of the substances to which [the *Leach* Class was] exposed were hazardous or constituted a reasonable or foreseeable risk of physical harm by virtue of the prevailing state of the medical, scientific and/or industrial knowledge available to DuPont at all times relevant to the claims or causes of action asserted by [the *Leach* Class]." (DuPont's First Amended Answer to Freeman Compl. at 4; ECF No. 124-1.)

On May 6, 2016, the Court held oral argument on the parties' fifty-three motions *in limine*. (Mots. *in Limine* Hearing, ECF No. 4527.) After taking argument on Mr. Freeman's Motion *in Limine* Regarding the Emmett Study Motion, the Court indicated that it would issue a written decision addressing the motion.

II.

Neither the Federal Rules of Evidence nor the Federal Rules of Civil Procedure explicitly authorize a court to rule on an evidentiary motion *in limine*. The United States Supreme Court has noted, however, that the practice of ruling on such motions "has developed pursuant to the district court's inherent authority to manage the course of trials." *Luce v. United States,* 469 U.S. 38, 41 n.4 (1984). The purpose of a motion *in limine* is to allow a court to rule on issues pertaining to evidence prior to trial to avoid delay and ensure an evenhanded and expedient trial. *See Ind. Ins. Co. v. Gen. Elec. Co.,* 326 F. Supp. 2d 844, 846 (N.D. Ohio 2004) (citing *Jonasson v. Lutheran Child & Family Servs.,* 115 F.3d 436, 440 (7th Cir. 1997)). Notwithstanding this well-meaning purpose, courts are generally reluctant to grant broad exclusions of evidence *in limine*, because "a court is almost always better situated during the actual trial to assess the value

and utility of evidence." *Koch v. Koch Indus., Inc.*, 2 F. Supp. 2d 1385, 1388 (D. Kan. 1998); *accord Sperberg v. Goodyear Tire & Rubber Co.*, 519 F.2d 708, 712 (6th Cir. 1975).

To obtain the exclusion of evidence under such a motion, a party must prove that the evidence is clearly inadmissible on all potential grounds. *See Ind. Ins. Co.*, 326 F. Supp. 2d at 846; *Koch*, 2 F. Supp. 2d at 1388; *cf. Luce*, 469 U.S. at 41, n.4. "Unless evidence meets this high standard, evidentiary rulings should be deferred until trial so that questions of foundation, relevancy and potential prejudice may be resolved in proper context." *Ind. Ins. Co.*, 326 F. Supp. 2d at 846. Whether to exclude evidence under Rule 403 is a matter within the trial court's discretion. *Paschal v. Flagstar Bank,* 295 F.3d 565, 576 (6th Cir. 2002) ("In reviewing the trial court's decision for an abuse of discretion, the appellate court must view the evidence in the light most favorable to its proponent, giving the evidence its maximum reasonable probative force and its minimum reasonable prejudicial value.").

The Federal Evidence Rules at issue in Mr. Freeman's Motion *in Limine* Regarding the Emmett Study are 401, 402, and 403. Rule 401 defines "relevant evidence" as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Fed. R. Evid. 401. Evidence Rule 402 provides that "[e]vidence which is not relevant is not admissible." Even if evidence is relevant, a court may still exclude the evidence, under Federal Rule of Evidence 403, which provides that, "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Fed. R. Evid. 403.

III.

Mr. Freeman's Motion *in Limine* Regarding the Emmett Study Motion is directed at studies conducted by Professor Edward Emmett of the University of Pennsylvania relating to C-8 exposure in Little Hocking, Ohio, that have been released in peer-reviewed publications ("Emmett Study"). *See* Emmett, E.A., *et al.*, "Community Exposure to Perfluorooctanoate: Relationships Between Serum Concentrations and Exposure Sources," 48(8) *J. Occup. Environ. Med.* 759-70 (Aug. 2006), ECF No. 4426-5; Emmett, E.A., *et al.*, "Community Exposure to Perfluorooctanoate: Relationship Between Serum Levels and Certain Health Parameters," 48(8) *J. Occup. Environ. Med.* 771-79 (Aug. 2006), ECF No. 4426-6. The Emmett Study was supported by the Environmental Justice Program and a grant from the National Institute of Environmental Health. The Emmett Study, which analyzed individuals throughout the community with a median of 354 parts per billion of C-8 in their blood, found that there was "no toxicity from [C-8]" at these levels. (Def.'s Mem. in Opp. at 4) (citing ECF No. 4426-6 at 1).

Mr. Freeman's connection to the Emmett Study was based on his affiliation with the Decatur Community Association. Mr. Freeman served as a community liaison for the Study, providing community subjects to Dr. Emmett's group and serving as an intermediary who advised community members about the progress of the Emmett Study. (Mot. *in Limine* Hearing Tr. at 113–22.) In August 2005, Dr. Emmett made a presentation to the community regarding the study results. At that meeting, Mr. Freeman made brief introductory remarks and passed the microphone among audience members who had questions about the study; Dr. Emmett handled all the questions about the results of the study. Mr. Freeman and his family were selected as participants in the Emmett Study. Mr. Freeman is named on the publications as a co-author.

There is no dispute that the Emmett Study is relevant to whether DuPont owed and/or breached a duty of care to Mr. Freeman. That is, whether DuPont knew, or should have known, that its release of C-8 into the surface waters and unlined landfills around its Washington Works plant constituted a reasonable or foreseeable risk of physical harm to members of that community. Further, DuPont's knowledge of the Emmett Study is also relevant to whether DuPont exhibited a conscious disregard for the rights and safety of other persons that had a great probability of causing substantial harm. Indeed, DuPont used the Emmett Study just for these purposes in the *Bartlett* trial. In DuPont's opening statement in the *Bartlett* trial, counsel highlighted the fact that the Emmett Study was done independently from DuPont, yet found no toxicity from C-8 exposure:

> So, we're going to talk about 2006. Remember, the conduct she is challenging is back in this time frame (indicating [toward demonstrative exhibit]). We're going to talk about 2006 for a minute.
> . . . .
>
> You see this article, the peer-reviewed literature, exposure to this chemical, C-8, or perfluorooctanoate. Professor Emmett.
> . . . .
>
> University of Pennsylvania, Dr. Emmett and other doctors there and some others helping them out. The study was supported by whom? By DuPont. By 3M? No. The Environmental Justice Program and a grant from the National Institute of Environmental Health.
>
> DuPont had nothing to do with this. 3M had nothing to do with this.
>
> What were their conclusions in 2006? And they're looking at people with 354 median - - 354 parts per billion in their blood, 354.
>
> Conclusions, 2006: No toxicity from PFOA was demonstrated, 2006. . . .

(Bartlett Trial Tr. at 140–41, Bartlett ECF No. 154.)

Mr. Freeman asks the Court to preclude DuPont "from introducing any evidence, testimony, or argument of counsel that Plaintiff David Freeman was a co-author or contributor

to" the Emmett Study or that he participated in it in any way. (Pl.'s Mot. at 1.) DuPont responds that the motion "should be denied because this evidence has a direct nexus to Mr. Freeman's claims, and is highly probative of DuPont's defenses in this case." (Def.'s Mem. in Opp. at 1.)

A. Federal Evidence Rule 401, 402

DuPont contends:

> *First*, Mr. Freeman's work and participation in the Emmett Study is highly probative of DuPont's liability defense in this case. It is directly probative of the independent nature of the study and the state of scientific knowledge at the time it was published **in 2006**, prior to the Science Panel's finding in 2012. Further, it shows that, after substantial investigation and research (with involvement by community members and no involvement by any industry representatives), including research conducted directly on Mr. Freeman and his entire family, Mr. Freeman signed off on and approved a publication that concluded there was "no toxicity" from C8 at the levels seen among members of his community. This is highly probative and relevant to the state of the science as it developed, the timing of when it developed, issues of duty and breach, and whether DuPont is liable to Mr. Freeman.
>
> Among other things, it is highly and critically relevant to DuPont's primary liability defense that it had no legal duty to Mr. Freeman because, prior to 2012 when the Science Panel released its Probable Link report, there was no evidence establishing that C8 was likely to cause testicular cancer or any other human disease at the relatively low exposure levels in the community. Mr. Freeman's direct participation in the Study, and his review and agreement to be listed as an author of the papers that bear his name, are also probative of the weight that the jury should give this evidence.
>
> *Second*, Mr. Freeman's work on the Emmett Study is relevant to the jury's determination of liability for and amount of punitive damages, should the jury reach that stage. Indeed, an Ohio plaintiff like Mr. Freeman must show . . . that DuPont acted with a "conscious disregard for the rights and safety of other persons that has a great probability of causing substantial harm." . . . In addition, even if DuPont is found liable for punitive damages, due process would require that, in assessing the reprehensibility of DuPont's actions and calculating the amount of punitive damages, the jury base any award on conduct that is "specific to" Mr. Freeman. . . . For these reasons, in determining liability for and the amount of punitive damages, the jury is entitled to hear evidence that, as of 2006, both DuPont and Mr. Freeman had access to the exact same scientific information showing that, after an extensive study, there was no indication that C8 was likely to cause any harm to anyone in the community based on the state of the knowledge at the time.

(Def.'s Mem. in Opp. at 5) (citations omitted). DuPont's arguments are not well taken.

The Court finds no logical connection between Mr. Freeman's participation in the Emmett Study and "the state of the science as it developed, the timing of when it developed, issues of duty and breach, and whether DuPont is liable to Mr. Freeman." The Court does not disagree that the Emmett Study is "relevant to DuPont's primary liability defense that it had no legal duty to Mr. Freeman because, prior to 2012 when the Science Panel released its Probable Link report, [because DuPont contends] there was no evidence establishing that C-8 was likely to cause testicular cancer or any other human disease at the relatively low exposure levels in the community." But, the Court simply cannot see how Mr. Freeman's participation in or name on the Study is "probative of the weight that the jury should give the evidence."

Similarly, Mr. Freeman's participation in or name on the Emmett Study does not offer any probative evidence of whether DuPont acted with "conscious disregard for the rights and safety of other persons that has a great probability of causing substantial harm." The Court struggled with this lack of connection at the Motions *in Limine* Hearing:

> THE COURT: -- What I see it as relevant from your end is this is a study that has nothing to do with DuPont. And it reaches conclusions that you will argue show DuPont's good faith belief and so on. I mean I get it. That's all in play for that purpose.
> . . . .
>
> [Mr. Freeman] is not a scientist. . . . But he is in no way someone with expertise in this area. You will all agree on that. . . . His view and his opinion of this is -- It isn't really – It doesn't go to any triable issue, does it? . . . What issue does that go to that's triable in this case?
>
> MR. MACE (for DuPont): The credible nature of this study and that it was reasonable for DuPont to rely on the results of that study when it was evaluating things –
>
> THE COURT: That part I'm with you on this. . . . I mean in terms of an article that's conducted by a neutral that DuPont was aware of, that had a completely

> opposite conclusion, I'm with you on that. These are scientists, peer reviewed. It's published. This is all in play. It's his name on it, that's the part that just seems to me to be more coincidental than anything else.

(Mot. *in Limine* Hearing Tr. at 117–19.)

The fact that Mr. Freeman participated in or was named as a co-author does not lend credibility to a scientific article published in a peer-reviewed scholarly journal. Indeed, Mr. Freeman is correct that DuPont's failure to mention him as a co-author on any documents generated in connection with the Emmett Study in the *Bartlett* trial betrays its current position that his name somehow lends credibility to the Study.

Moreover, there is no evidence to support DuPont's characterization of Mr. Freeman's name on and participation in the Emmett Study as "sign[ing] off on and approv[ing] the publication that concluded there was 'no toxicity' from C8 at the levels seen among members of his community." The evidence all reflects the opposite. As DuPont's counsel conceded several times at oral argument, Mr. Freeman did not, indeed was not qualified to, opine on the substance of the study.

Finally, DuPont's final argument misses its mark. That is, DuPont contends that, "in determining liability for and the amount of punitive damages, the jury is entitled to hear evidence that, as of 2006, *both DuPont and Mr. Freeman had access to the exact same scientific information* showing that, after an extensive study, there was no indication that C8 was likely to cause any harm to anyone in the community based on the state of the knowledge at the time." The jury, however, is not tasked with determining whether Mr. Freeman was negligent or reckless. Instead, the jury must only determine liability with regard to DuPont, *i.e.*, what DuPont knew or should have known and whether DuPont's conduct, in light of this knowledge, was

negligent or exhibited conscious disregard for the rights of other persons that had a great probability of causing substantial harm.

All of that being said, the Court does find probative value to the fact that Mr. Freeman and his family participated in and that he knew of the results of the Emmett Study. These facts go to his claim for emotional distress damages. As this Court explained in Dispositive Motions Order No. 17:

> DuPont's post-injury conduct is relevant to Mr. Freeman's compensatory damages claims. That is, Mr. Freeman alleges that he suffers from cancerphobia, which is "a claimed present injury consisting of mental anxiety and distress over contracting cancer in the future, as opposed to risk of cancer, which is a potential physical predisposition of developing cancer in the future." *Cantrell v. GAF Corp.*, 999 F.2d 1007, 1012 (6th Cir. Ohio 1993) (quoting *Lavelle v. Owens–Corning Fiberglas Corp.*, 30 Ohio Misc. 2d 14 (1987)). "Therefore, if Mr. Freeman proves that DuPont is negligent, he may not only recover damages, which may include emotional distress and pain and suffering that resulted from the diagnosis of cancer and the operation removing his cancerous testicle, but he may also recover damages for his mental anxiety and distress over contracting cancer in the future." (Dispositive Mot. Order No. 14, Def.'s Mots. For Summ. J. on Freeman's Fraud and Emot. Distress Claims at 8, ECF No. 4458.) "To recover for the alleged cancerphobia, Mr. Freeman must show that he is aware that he in fact possesses an increased statistical likelihood of developing cancer, and that from this knowledge springs a reasonable apprehension which manifests itself as emotional distress." *Id.*
>
> Consequently, DuPont's post-2000 conduct of continuing to release C-8 into Mr. Freeman's drinking water is evidence that Mr. Freeman may use to support his claim that he had a statistical likelihood of developing cancer of which he was aware and that caused him emotional distress. It is also relevant to a determination of whether his apprehension was reasonable. For example, knowing of town meetings related to C-8, bottled water programs, studies, or complaints of violations of environmental law could support Mr. Freeman's burden of showing that his emotional distress was reasonable.

(DMO No. 17, Defendant's Motion for Reconsideration of Court's Decision on Bifurcation, ECF No. 4549.) Thus, the facts that Mr. Freeman knew of the results of the Emmett Study and that he and his family were tested are relevant to whether Mr. Freeman is entitled to emotional distress damages, and if so, how much he is entitled to. How Mr. Freeman's knowledge of the results of the Emmett Study affected his awareness of any potential increased likelihood of developing cancer in

the future, and how that knowledge reflects the reasonableness of his fear is relevant to Mr. Freeman's claimed emotional damages.

B. Federal Evidence Rule 403

Mr. Freeman maintains that permitting DuPont to refer to or introduce "evidence that Mr. Freeman was a party to the Emmett Study or a co-author of any of the Emmett Study publications, including the powerpoint presented by Dr. Emmett at the August 2005 community meeting . . . will do nothing more than prejudice Plaintiff, confuse the jury, waste the Court's time, and result in undue delay." (Pl.'s Mot. *in Limine* Regarding the Emmett Study at 7) (citing Fed. R. Evid. 403).

Mr. Freeman continues, arguing:

> In light of the uncontested testimony of Mr. Freeman's non-scientific role in the Emmett Study, and in light of the fact that Mr. Freeman lacks the expertise to testify as to General and/or Specific Causation with respect to his C-8 exposure causing his testicular cancer, introduction of evidence of Mr. Freeman's role in the Emmett Study will only confuse the jury into thinking that Mr. Freeman is somehow bound by Dr. Emmett's research or by whatever Dr. Emmett may have thought about the scientific literature or data at the time and would fuel an entirely inappropriate argument by DuPont that somehow Mr. Freeman is being hypocritical for bringing a personal injury claim against DuPont that DuPont misleadingly argues is contradicted in part by the Emmett research.

Id. at 8, 9. Mr. Freeman is partially correct.

Even if the evidence of Mr. Freeman's role as liaison or "co-author" was somehow relevant, the Court would exclude it as being confusing and unfairly prejudicial. Discussing Mr. Freeman's role as liaison or as a "co-author" has the real potential to improperly lead the jury to view Dr. Emmett's conclusion or findings as those of Mr. Freeman. The same, however, cannot be said of the fact that Mr. Freeman and his family were participants, which as the Court explained *supra* is relevant to Mr. Freeman's emotional distress damages. The value of that evidence is not substantially outweighed by the danger of unfair prejudice. Therefore, DuPont may question Mr. Freeman as to his family's participation as subjects in the Study, his knowledge of the results of the study, and how that that knowledge affected his fear of contracting cancer in the future.

IV.

In accordance with this Opinion and Order, the Court **GRANTS IN PART AND DENIES IN PART** Mr. Freeman's Motion *in Limine* Regarding the Emmett Study. (ECF No. 4426.) As with all *in limine* decisions, this ruling is subject to modification should the facts or circumstances at trial differ from those which have been presented in the pre-trial motions and memoranda.

IT IS SO ORDERED.

5-26-2016
DATE

EDMUND A. SARGUS, JR.
CHIEF UNITED STATES DISTRICT JUDGE