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
JUDGE EDMUND A. SARGUS, JR.

This document relates to:

***Travis and Julie Abbott v. E. I. du Pont de Nemours and Company, et al.*, Case No. 2:17-cv-998**

DISPOSITIVE MOTIONS ORDER NO. 36

Statute of Limitations

This matter is before the Court on Defendant DuPont de Nemours and Company's ("Defendant" or "DuPont") Motion for Summary Judgment Based on the Statute of Limitations (ECF Nos. 49, 50[1]), Plaintiffs' Response in Opposition (ECF No. 81), and Defendant's Reply (ECF No. 86). For the reasons set forth below, the Court **DENIES** Defendant's motion.

I.

A. Travis and Julie Abbott and Mr. Abbott's 1994 Testicular Cancer

Plaintiffs Travis and Julie Abbott live in Pomeroy, Ohio. (*See* First Amend. Compl., ECF No. 29 at ¶ 7.) Mr. Abbott grew up in Pomeroy and lived in homes supplied by the Village of Pomeroy and Tuppers Plains-Chester Water District from 1977 to 1998. (Plaintiff Fact Sheet ("PFS"), ECF No. 49-9 at 3-5.) In 1998, Mr. Abbott moved to Athens, Ohio to attend Ohio University, and returned to live in Pomeroy in 2005. Mr. Abbott taught social studies at Meigs County High School from 2001 to 2015, and became the school's principal in 2016. (*Id.*)

[1] ECF No. 49 is filed under seal and ECF No. 50 is the redacted version filed for public viewing.

Throughout this period, Mr. Abbott lived in Pomeroy (1977-1998, 2000-2001, 2005-2015), Athens (2001-2005), and Marietta, Ohio (2015-2016). Mr. and Mrs. Abbott married in June 2013. (*Id.*)

Mr. Abbott claims that "[i]n connection with its manufacturing operations at the Washington Works Plant, Defendants used hazardous, toxic and/or carcinogenic wastes, substances, pollutants and/or contaminants, including ammonium perfluorooctanoate (a/k/a C-8/FC-143/APFO/ DFS-2/PFOA) (hereinafter "C-8")" and that he was exposed to C-8 contaminated drinking water supplied to his residences, except for the years he was living in Athens, Ohio and one year he lived in Marietta, Ohio. Mr. Abbott also claims he was exposed during the years he attended and taught at Meigs High School. (*See* First Amend. Compl. at ¶¶ 11, 51-53; *see also* PFS.)

Mr. Abbott was first diagnosed with testicular cancer in 1994 when he was 16 years old. (T. Abbott Dep., ECF Nos. 49-10 and 81-1 at 81.) Mr. Abbott underwent an orchiectomy, or removal, of his left testicle on May 2, 1994, and doctors confirmed the testicular mass was malignant. (*Id.* at 85.) Mr. Abbott also underwent a retroperitoneal lymph node dissection ("RPLND") operation several weeks later, but because the cancer had not spread to his lymph nodes, he did not need chemotherapy. (*Id.* at 85-86, 93-95.) Mr. Abbott underwent medical monitoring for any recurrence for ten years until approximately 2004. Since then, however, Mr. Abbott has continued to perform self-examinations on his remaining testicle at least one to two times per month. (*Id.* at 105-06.)

B. The West Virginia Litigation and *Leach* Settlement

On August 31, 2001, a group of individuals ("*Leach* Class") filed a class action against DuPont in West Virginia state court, captioned *Leach v. E. I. du Pont de Nemours & Co.*, No.

01-C-608 (W. Va. Cir. Ct., Wood Cnty.) ("*Leach Case*"). (Dispositive Motions Order No. 10 ("DMO 10"), MDL No. 2433 ECF No. 4215 at 2.) The *Leach* Class asserted claims for personal injuries arising from contamination of drinking water with C-8 near DuPont's Washington Works Plant. (*Id.* (citing *Leach* Am. Class Action Compl., MDL No. 2433 ECF No. 820-5 at ¶¶ 65, 90, 100).)

The *Leach* Case ended in November 2004 when the parties entered into a class-wide settlement ("*Leach* Settlement Agreement"). (MDL No. 2433 ECF No. 820-8.) In the *Leach* Settlement Agreement, the parties fashioned a unique procedure to determine whether the class would be permitted to file actions against DuPont based on any of the human diseases they believed had been caused by their exposure to C-8 discharged from DuPont's Washington Works plant. The procedure required DuPont and the plaintiffs to jointly select three completely independent, mutually-agreeable, appropriately credentialed epidemiologists ("Science Panel") to study human disease among the *Leach* Class.

The Science Panel examined health data and blood samples collected through the C-8 Health Project from approximately 69,000 potential *Leach* Class members. (Evidentiary Motions Order No. 9 ("EMO 9") MDL No. 2433 ECF No. 4777 at 3) In March 2006, Mr. Abbott and his family participated in the C-8 Health Project. Mr. Abbott and his parents testified they participated because of the $400 payment to each participant. (*See* T. Abbott Dep., at 35; R. Abbott Dep., ECF No. 81-2 at 21-22; S. Abbott Dep., ECF No. 81-3 at 36.) Mr. Abbott testified that he recalled that the blood testing was associated with the water districts and he understood he could participate because he had lived in Pomeroy. (*Id.* at 54-55, 58.) Mr. Abbott also testified that he did not understand the Science Panel was set up pursuant to a settlement agreement, and

that he believed he was agreeing to receive $400 from Brookmar in exchange for participating in the study. (*Id.* at 48-49.)

The Survey Introduction stated "[t]he survey is being taken because of a lawsuit against DuPont" and that individuals could be in the project if "the water you drank from your home, work, or school came from one of the six water districts, and that you drank that water for at least one year between 1950 and December 3, 2004." (ECF No. 49-1.) The survey named the six water districts, including Tuppers Plains and the Village of Pomeroy where Mr. Abbott resided. The survey stated that the purpose of the project was the following:

> We want to find out if your health has been affected by the drinking water in your area. The C-8 Health Project asks health questions to people who said they drank water when it had a chemical in it called C-8. The questions are a lot like those you would find on a doctor's office form. They cover many medical problems. *But, none of the medical conditions asked about are known to have a connection with C-8.*

(*Id.*) (emphasis in original). On March 4, 2006, Mr. Abbott completed and signed an Authorization for Release of Protected Health Information, which included the following statement: "Purpose of disclosure: Validate medical history for C8 Health Project and Science: Panel's C8 Study, as described in the Class Action Settlement Agreement. Diagnosis to be validated: Cancer (Testes) 1994." (*Id.*) Mr. Abbott testified "Cancer (Testes) 1994" was written in his handwriting on the release. (T. Abbott Dep. at 45). But Mr. Abbott testified that he does not recall filling out information on this paperwork, or receiving the results of his blood tests. (*Id.* at 38, 59.)

In 2012, the Science Panel delivered Probable Link Findings for six human diseases ("Linked Diseases"): kidney cancer, testicular cancer, thyroid disease, ulcerative colitis, diagnosed high cholesterol (hypercholesterolemia), and pregnancy-induced hypertension and preeclampsia. The Probable Link Finding means that for the *Leach* Class members it is more

likely than not that there is a link between their exposure to C-8 (*i.e.*, drinking water containing at least .05 ppb of C-8 for at least one year) and their Linked Disease.

The settlement received media attention, including in the local newspaper the Pomeroy Daily Sentinel and other newspapers. (*See*, e.g., ECF No. 50-6; ECF No. 50-7.) DuPont contends that notice was mailed to potential class members. The local communities also had some meetings about the settlement, including at the high school where Mr. Abbott worked. Individuals who alleged they suffered from the Probable Link diseases began to file suit in Ohio and West Virginia. The cases were consolidated into a multidistrict litigation ("MDL") in this Court in 2013. Three cases were tried to verdicts in favor of the plaintiffs and reported in the media.

Mr. Abbott testified that he does not recall seeing any of the newspaper articles regarding the *Leach* Case or the MDL trials and that he has never subscribed to any of his local newspapers. (T. Abbott Dep. at 191-92, 194, 199, 202-03, 216.) Mr. Abbott also testified that he did not know of or receive the class notice and that he was not aware of any meeting regarding these publications or notices. (T. Abbott Depo. at 210-11.)

It is not disputed that Mr. Abbott is a member of the *Leach* class "by virtue of his documented exposure history." (ECF No. 81 at PAGEID#2344; *see also* PFS, ECF No. 49-9 at 1, 5.) Specifically, Mr. Abbott consumed drinking water containing C-8 attributable to the Washington Works Plant at a concentration greater than .05 ppb supplied by the Village of Pomeroy Water District from 1997 to 1992 and from the Tuppers Plains-Chester Water District from 1992 to 1998, 2000 to 2015, and 2016 to present. (*Id.*)

C. Mr. Abbott's Second Testicular Cancer and Lawsuit

In October 2015, Mr. Abbott began experiencing discomfort and pain in his remaining testicle (T. Abbott Dep. at 131-134.) After a few days, on October 26, 20105, he drove himself to the emergency room because, given his medical history, he was concerned it was cancer. (*Id.*) An ultrasound revealed a mass on the outer surface of his testicle, and the emergency room physician referred Mr. Abbott to a urologist. (*Id.* at 137.) Mr. Abbott testified that the emergency room physician discussed the possibilities of what the mass could be, including that it could be a benign mass or potentially a form of cancer. (*Id.* at 140-142.)

Mr. Abbott was referred to urologist Dr. Kenneth Weisman, and at Dr. Weisman's direction, Mr. Abbott underwent a CT scan on October 30, 2015. (ECF No. 49-4.) The CT showed the presence of a mass, and the report prepared after the CT scan stated: "CLINICAL INDICATION: Right testicular cancer." (*Id.*) Dr. Weisman reviewed the results of the CT scan with Mr. Abbott. (K. Weisman Dep., ECF Nos. 49-14 and 81-7 at 29-30.) Dr. Weisman provided the following assessment: "1. Seminoma of right testis – C62.91. Right scrotal mass. For referral to Indiana. Films reviewed with patient. Questions about fertility. Questions about in vitro." (ECF No. 49-5; *see also* Weisman Dep. at 29-30, 35.) Dr. Weisman testified that he told Mr. Abbott he probably had testicular cancer and would likely have to have his remaining testicle removed based on his "working diagnosis" of testicular cancer. (Weisman Dep. at 21, 63, 83, 85). Dr. Weisman referred Mr. Abbott to Indiana University. (*Id.* at 20-21, 83.) Dr. Weisman testified that at the time Mr. Abbott left his appointment, Dr. Weisman did not have a definite diagnosis of cancer for Mr. Abbott nor did he tell Mr. Abbott that he definitely had testicular cancer. (*Id.* at 63, 84.) Dr. Weisman testified that an orchiectomy would be scheduled before knowing whether or not a patient actually had cancer, and that the scheduling of an orchiectomy

is not itself a cancer diagnosis. (*Id.* at 65.) Mr. Abbott also testified that from previous experience, the pathology report would be needed to show whether his mass was cancer. (T. Abbott Dep. at 156.)

On November 5, 2015, Mr. Abbott met with Dr. Constantine Albany at Indiana University Health University Hospital. (ECF No. 49-7.) The records developed by the hospital for that visit indicate the following: "REASON FOR VISIT: Testicular Cancer." (*Id.*) The "Assessment and Plan" section of the records state Dr. Albany and Mr. Abbott had a long discussion about the treatment options for stage I testicular cancer, that an inguinal radical orchiectomy was recommended, and that extensive time was spent discussing fertility preservation. (*Id.*) Dr. Albany recommended Mr. Abbott see Dr. Timothy Masterson, an Indiana University urologic surgeon. (*Id.*) Dr. Albany testified that Mr. Abbott's history of testicular cancer increased his risk of having testicular cancer in the remaining testicle, and that after reviewing Mr. Abbott's ultrasound and CT scan and seeing the hypoechoic mass, the "clinical suspicion" was that Mr. Abbott had stage I testicular cancer. (*See* C. Albany Dep., ECF Nos. 49-15 and 81-8 at 15, 18-19, 21-22.) Dr. Albany also testified that although he was suspicious Mr. Abbott had testicular cancer again, that could not be confirmed until he underwent the orchiectomy. (*Id.* at 21-22, 104.) Specifically, Dr. Albany testified:

> Q . . . . And the diagnosis at the time of when he walked out of your office on November 5th, 2015, was that he has a testicular mass and it's unknown whether or not it's actually cancer?
>
> A. It's highly suspicious. Because of that hypoechoic mass on the ultrasound, it's highly suspicious, but I cannot confirm that it is testicular cancer until the pathology tells me so.
>
> . . .
>
> Q . . . . So on the – prior to the orchiectomy on November 16th, 2015, and really the pathology after that, but at no point before November 16th, 2015 had any physician that you're aware of at IU affirmatively diagnosed that Travis

Abbott had testicular cancer?

A. Right. It's incorrect to make the diagnosis before you have the diagnosis. I mean, the pathology is how you make the diagnosis, and that's why the surgery.

Q. So there is a difference between an actual diagnosis and a clinical suspicion?

A. Correct.

(*Id.* at 67-68.) Dr. Albany also explained that the standard of care requires an orchiectomy, not just a biopsy, to diagnose testicular cancer, and that it would be against the standard of care to say a patient has testicular cancer until the pathology confirms the cancer:

Q. So in the standard of care in your field, that you can't even put them in a tumor registry until you actually – until after you actually have the pathology?

A. Correct.

Q. And so it would be against the standard of care to say this – to any person actually has a testicular cancer until the pathology is confirmed?

A. Correct. And that's not unique to testicular cancer. When you have a lung mass, you call it a lung mass until you stick a needle and do biopsy to tell you this is lung cancer.

So that's really, you know, in general, cancer, you know, you're suspecting this is lung cancer – and I'm just making an example here – until you take a sample and make a diagnosis. And the unique here about testicular cancer, why we did not do a biopsy, it is not the standard of care to do a biopsy. You have to remove the testicle. Because the biopsy can actually increase the risk of, if this was cancer, to spread the cancer in this particular situation.

Q. So that's a good point, and it's been told to me before on this, that when you have a mass like this in the testis that the standard of care is you need to go to surgery and do the orchiectomy anyway, even if it ends up not being cancer.

A. Correct.

Q. And so there are instances where you have an orchiectomy, you schedule it because there's a mass, you pull it out, and then after the pathology comes back, it's determined it is non-cancerous?

A. Yeah…

. . .

Q. Okay. So, thank you, Doctor. So the determination to make – to schedule the orchiectomy after the November 5th surgery [sic][2], wasn't because there was a confirmation that he definitely had cancer; it was because that's the medical standard of care to do the procedure to find out if he even has cancer?

A. Correct.

(*Id.* at 69-71.) Dr. Albany also testified that because Mr. Abbott's "tumor markers" from his blood work were normal, there was at least one indication during that visit that Mr. Abbott's testicular mass may not be cancerous. (*Id.* at 65-67.)

Also on November 5, 2015, Mr. Abbott met with the urologic surgeon referred by Dr. Masterson. (T. Masterson Dep., ECF Nos. 49-16 and 81-9 at 19.) Dr. Masterson noted Mr. Abbott's "history of testicular cancer" and "a new testicular mass." (*Id.*) Dr. Masterson testified that his initial diagnosis was of a testicular mass, and that he discussed with Mr. Abbott the high likelihood that the mass was a germ cell tumor. (*Id.* at 25-26; *see also* ECF No. 49-8.) Dr. Masterson further testified that Mr. Abbott had a "pre-operative diagnosis" of a testicular mass, and that "the pathology confirmed the histology of that mass being a malignancy." (Masterson Dep. at 92.) He stated:

> So you always have a pre-operative diagnosis. Pathology renders the underlying etiology of that enlarged lymph node or that testicular mass. So you do have a pre-operative diagnosis.
>
> It does not necessarily always have to be a cancer, per se, in this situation. So you do the procedure based upon what is indicated.

[2] Mr. Abbott's radical right orchiectomy took place on November 16, 2015, not November 5, 2015.

(*Id.* at 93.) Dr. Masterson testified that the pre-operative diagnosis of a testicular mass was based on the large mass he saw in Mr. Abbott's right testicle, and that it was because of the mass that he conducted the orchiectomy. (*Id.*) Dr. Masterson testified that when Mr. Abbott left the November 5, 2015 appointment, Dr. Masterson had not told Mr. Abbott he definitively had cancer. (*Id.* at 90.) He stated that prior to November 16, 2015, there had been no confirmatory diagnosis of testicular cancer for Mr. Abbott in that testicle. (*Id.* at 91) According to Mr. Abbott, Dr. Masterson told him it would be irresponsible to say he had cancer until the pathology report came back after the orchiectomy. (*Id.* at 153-54.)

On November 16, 2015, Dr. Masterson performed the radical right orchiectomy. (*Id.* at 30.) He testified:

Q And after the orchiectomy and the pathology came back, there was the confirmation that this mass was cancer?

A Correct.

(*Id.* at 93.) The pathology showed the mass was a stage 1 germ cell tumor—specifically, a seminoma. (*Id.* at 32-33.) Dr. Masterson testified that Mr. Abbott was told he had cancer after the orchiectomy. (*Id.* at 91.) Mr. Abbott likewise testified that the first time he was aware that he had cancer in his right testicle was after the November 16, 2015 orchiectomy when the pathology results came back. (T. Abbott Depo. at 230.) He further testified that Dr. Masterson called after the second orchiectomy to tell him "the test results were, in fact, positive and at that time confirmed that the mass we had found was cancer[.]" (*Id.* at 227.) None of Mr. Abbott's treating physicians linked Mr. Abbott's testicular cancer with C-8. (Weisman Dep. at 43; Albany Dep. at 59, 60, 64; Masterson Dep. at 59, 91-92; T. Abbott Dep. at 227.)

Mr. Abbott testified that he did not learn of any potential link between either of his testicular cancers and C-8 until the fall of 2017. Mr. Abbott became the Principal of Meigs High

School in the fall of 2016. (PFS at 4.) One of his secretaries was Leila Haggy. (*See* L. Haggy Dep., ECF Nos. 49-13 and 81-6.) Ms. Haggy was aware of the link between C-8 and certain cancers, as she and her husband had filed suit against DuPont in 2014 arising from his kidney cancer, which was later transferred to this Court in this MDL. (*See Haggy v E.I. du Pont de Nemours & Co.*, Case No. 2:15-cv-02538.)

Shortly before Mr. Abbott became Principal, Ms. Haggy learned from someone else that Mr. Abbott previously had cancer and surgery in the fall of 2015. (*Id.* at 32.) Mr. Abbott then personally informed her he had cancer just before his RPLND surgery in November 2016, related to the orchiectomy, because he was going to take an extended leave. (*Id.* at 35-37.) Ms. Haggy testified that she told Mr. Abbott about C-8 and gave him attorney Kathy Brown's contact information on either October 31, 2017 or November 1, 2017 because she and her husband had just found out about their final settlement, and she felt like he should know about the settlement as well. (*Id.* at 55-56.) Ms. Haggy testified that she did not previously tell Mr. Abbott about Kathy Brown because Mr. Abbott "is a very private person" and she "really hesitated about telling him." (*Id.* at 57.) Ms. Haggy testified that Mr. Abbott approved her request for time off to be deposed in her case against DuPont, but that she did not tell him the reason or about the deposition. (*Id.* at 23, 27-28.) Ms. Haggy explained why she eventually told Mr. Abbott about the lawsuit:

> Q. So what changed that allowed you to come over that – overcome that hesitation?
>
> A. Well, I had worked with him just a little longer, and I just decided that I was just going to tell him because he needed to know. And I said – I literally walked in the office and I said, "I hope I don't upset you over this because I know you're a very private person," and I told him, I said, "Now I've told you. What you do with it is up to you. I'm not going to mention it to you again."

Q. You mentioned you decided to tell him. Specifically what did you tell him?

A. That he might ought to look into the C8 for compensation.

(*Id* at 57-58.) According to Ms. Haggy, the conversation was brief, and Mr. Abbott seemed like he did not know what she was talking about. (*Id.*) Around the same time, Mr. Abbott's parents saw an attorney advertisement on television that mentioned C-8 and testicular cancer, and they mentioned it to Mr. Abbott. (R. Abbott Dep. at 25-26; T. Abbott Dep. at 72.) Mr. Abbott then contacted Kathy Brown, who referred him his current counsel. (*Id.* at 70.) Mr. and Ms. Abbott then filed this action against DuPont on November 14, 2017. (*See* Compl., ECF No. 1.)

II.

Pursuant to Federal Rule of Civil Procedure 56(a), summary judgment is appropriate when "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." The Court may therefore grant summary judgment if the nonmoving party who has the burden of proof at trial fails to make a showing sufficient to establish the existence of an element that is essential to that party's case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). The moving party "always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions" of the record which demonstrate "the absence of a genuine issue of material fact." *Id.* at 323.

The burden shifts to the nonmoving party who "'must set forth specific facts showing that there is a genuine issue for trial.'" *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986) (quoting Fed.R.Civ.P. 56(e)). "The evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor." *Id.* at 255 (citing *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 158-59 (1970)). A genuine issue of material fact exists "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson*, 477 U.S.

at 248. *See also Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986) (the requirement that a dispute be "genuine" means that there must be more than "some metaphysical doubt as to the material facts"). Consequently, the central issue is "'whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.'" *Hamad v. Woodcrest Condo. Ass'n,* 328 F.3d 224, 234-35 (6th Cir. 2003) (quoting *Anderson,* 477 U.S. at 251-52).

III.

DuPont has moved for summary judgment on all of Plaintiffs' claims, arguing Mr. Abbott's claims are time-barred by Ohio's two-year statute of limitations, and that Mrs. Abbott's derivative loss of consortium claim must be dismissed as well. Ohio Revised Code § 2305.10(A) provides that "an action for bodily injury . . . shall be brought within two years after the cause of action accrues." This statute for bodily injury claims based on toxic chemical exposure states:

> [A] cause of action for bodily injury . . . that is caused by exposure to hazardous or toxic chemicals, ethical drugs, or ethical medical devices accrues upon the date on which the plaintiff is informed by competent medical authority that the plaintiff has an injury that is related to the exposure, or upon the date on which by the exercise of reasonable diligence the plaintiff should have known that the plaintiff has an injury that is related to the exposure, whichever date occurs first.

Ohio Rev. Code § 2305.10(B)(1). Thus, the two-year statute of limitations is triggered on the earliest of either: 1) the date the plaintiff was informed by competent medical authority that he has an injury that is related to the exposure, or 2) the date on which by the exercise of reasonable diligence he should have known that he has an injury that is related to the exposure. This inquiry incorporates the discovery rule.

This discovery rule "entails a two-pronged test—i.e., discovery not just that one has been injured but also that the injury was 'caused by the conduct of the defendant'—and that a statute of limitations does not begin to run until both prongs have been satisfied." *Norgard v. Brush*

Wellman, Inc., 95 Ohio St.3d 165, 167 (Ohio 2002) (quoting *O'Stricker v. Jim Walter Corp.*, 4 Ohio St.3d 84, 86 (Ohio 1983), paragraph two of the syllabus)). "Discovery of physical injury alone is insufficient to start the statute of limitations running if at that time there is no indication of tortious conduct giving rise to a legal claim." *Schmitz v. Nat'l Collegiate Athletic Ass'n*, 155 Ohio St. 3d 389, 395 (Ohio 2018) (citing *Norgard*, 95 Ohio St.3d at 167). The Ohio Supreme Court "has been careful to note that the discovery rule must be specially tailored to the particular context to which it is to be applied." *Norgard*, 95 Ohio St.3d at 167 (citing *Browning v. Burt*, 66 Ohio St.3d 544, 559 (Ohio 1993)).

DuPont argues the Plaintiffs' claims are time-barred under Ohio Revised Code § 2305.10 because more than two years before they filed this lawsuit: 1) Mr. Abbott knew of his first cancer and was, at a minimum, on "inquiry notice" of cancer in his remaining testicle that triggered a "duty to investigate" and 2) he was on constructive notice that C-8 had been widely and publicly "linked" to testicular cancer. The Court addresses each argument in turn.

A. When Mr. Abbott knew, or should have known, of his cancers

First, DuPont argues that Mr. Abbott knew or was, at a minimum, on "inquiry notice" of his testicular cancers more than two years before he filed this lawsuit on November 14, 2017. Plaintiffs agree that Mr. Abbott knew of his first cancer in 1994, and as discussed more fully below, when the statute of limitations began to run for that cancer will depend on when Mr. Abbott knew or should have known his cancer was related to his exposure to C-8.

The Court instantly addresses when Mr. Abbott knew, or with the exercise of reasonable diligence should have known of his *second testicular cancer*. DuPont argues that "Mr. Abbott unquestionably knew before November 14, 2015 that it was likely he had another testicular

cancer" and that "[t]his knowledge created a duty to investigate and triggered the running of the statute of limitations." (ECF No. 50, PAGEID#1201.) DuPont cites to *Yacezko v. Roy*, No. 20091, 2001 WL 22307 (Ohio Ct. App. Jan. 10, 2001), and other cases for the proposition that the occurrence of a "cognizable event imposes upon the plaintiff the duty to investigate, and triggers the running of the statute of limitations." (*Id.* at PAGEID#1199.) DuPont contends that there were "multiple events more than two years prior to the filing of the complaint that were sufficient to trigger Mr. Abbott's duty to investigate any potential claim he might have related to his testicular cancers." (*Id.*) DuPont's arguments are not well-taken.

The test recognizing the occurrence of a "cognizable event" as triggering the statute of limitations was established for medical malpractice claims governed by Ohio Revised Code § 2305.11, not negligence claims under Ohio Revised Code § 2305.10. The Ohio Supreme Court has held that its "decisions concerning the accrual of causes of action for medical malpractice are not applicable to determine the accrual date of claims not related to the medical malpractice of a physician." *Browning*, 66 Ohio St.3d at 559.

Just recently, in *Mason v. CVS Health*, 384 F.Supp.3d 882 (S.D. Ohio 2019), this Court rejected the argument that a "cognizable event is 'the occurrence of facts and circumstances which lead, or should lead, the patient to investigate the existence of a claim'" as one party contended in a negligence action subject to Ohio Revised Code § 2305.10. *Id.* at 890. This Court explained that Ohio case law for medical malpractice claims state that "a 'cognizable event' is the occurrence of facts and circumstances which lead, or should lead, *the patient to believe that the physical condition or injury of which she complains is related to a medical diagnosis or injury of which she complains* is related to a medical diagnosis, treatment, or procedure that the patient previously received." *Id.* (quoting *Flowers v. Walker*, 63 Ohio St. 3d 546, 549 (Ohio

1992)) (emphasis original).

In a similar vein, DuPont argues Mr. Abbott was on "inquiry notice" of his second cancer before November 14, 2015 and that had he sought independent expert advice at the time, he should have been able to determine whether to file a claim. (ECF No. 50 at PAGEID#1199.) But, DuPont relies upon cases arising under the Federal Tort Claims Act ("FTCA") that apply an inquiry notice standard and do not incorporate a discovery rule, making them unhelpful to the instant analysis. *See Peterson v. United* States, No. 17-6361, 2018 WL 6039242 (6th Cir. Oct. 16, 2018); *Hertz v. United States*, 560 F.3d 616 (6th Cir. 2009) (explaining the leading precedent concerning accrual claims for the FTCA "applied not a discovery rule (in the sense of discovering the existence of a claim) with respect to the accrual of claims under the FTCA, but an inquiry-notice rule.")

As to the applicable test, the Court focuses its analysis on when Mr. Abbott knew, or with the exercise of reasonable diligence should have known that he had been injured—that is, he had testicular cancer in his remaining testicle in 2015. *See* Ohio Rev. Code § 2305.10(B)(1); *see also Petit v. SmithKline Beecham Corp.*, No. 2:09-cv-00602, 2010 WL 1463479 at *2. DuPont contends that Mr. Abbott knew it was likely he had cancer before the November 16, 2015 orchiectomy and pathology report, missing the statute of limitations by, at most, a few weeks. DuPont claims that a "conclusive diagnosis after final pathology" is not required to trigger the statute of limitations, and that "diagnostic tools such as the ultrasound and CT scan that Mr. Abbott underwent in October 2015 trigger the running of a statute of limitations." (ECF No. 50 at PAGEID#1201; ECF No. 86 at PAGEID#2708.) According to Dupont, Mr. Abbott should have known he had his second cancer before the November 16, 2015 orchiectomy and pathology report based on his testicular pain, emergency room visit, and ultrasound on October 26, 2015,

his CT scan on October 30, 2015, mentions of testicular cancer in his medical records and conversations with his doctors on November 3, 2015 and November 5, 2015, diagnosis of a testicular mass and suspicions of cancer, and scheduling of his orchiectomy.

Plaintiffs disagree, arguing that "the statute of limitations for any claim concerning Travis's second cancer could not accrue until he knew or should have known that he actually had cancer. As both Travis and his doctors testified, this simply was not possible until the doctors had sufficient information to make the diagnosis and informed Travis." (ECF No. 81, PAGEID#2358.) The doctors had this sufficient information following the November 16, 2015 orchiectomy and subsequent pathology that provided a definitive diagnosis of testicular cancer. Plaintiffs contend that each of the events on which DuPont relies as triggering the statute of limitations preceded Mr. Abbott's and his physicians' knowledge that he had a second cancer. According to Plaintiffs, Mr. Abbott's and his physicians' suspicions of cancer were insufficient to trigger the statute of limitations, and the scheduling of his orchiectomy was not a cancer diagnosis. Moreover, Plaintiffs argue that the *Leach* Settlement Agreement requires an actual diagnosis before Mr. Abbott was permitted to file a case against DuPont. (*See* ECF No. 81.)

Plaintiffs' arguments are well-taken. Mr. Abbott and his physicians testified that he was not diagnosed with his second testicular cancer until after the November 16, 2015 orchiectomy and pathology. While the physicians testified, and the medical records show, that they suspected Mr. Abbott had a second cancer in the weeks preceding his orchiectomy and pathology report based on the presence of the testicular mass, Ohio courts have held that "alerting a person's suspicions of the need to investigate does not rise to the same level as receiving definite information by competent medical authority" and that "suspicion is not sufficient to trigger the discovery rule." *Colby v. Terminix Int'l Co., L.P.*, No. 96-CA-0241, 1997 WL 117218, at *1-2

(Ohio Ct. App. Feb. 10, 1997); *see also Telakowicz v. John Bunn Co.*, No. CA-1024, 1993 WL 289898, at *4 (Ohio Ct. App. July 23, 1993) (holding statute of limitations began to run when the plaintiff had "suspicions" of the cause of his plaintiff's respiratory failure confirmed in writing by doctor, despite earlier hospitalizations and statements by doctors that malfunctioning device could have caused his illness).

Moreover, Mr. Abbott's physicians testified that it would have been "incorrect" and "against the standard of care" to diagnose him with cancer until the pathology confirmed the cancer following the orchiectomy. (*See* Albany Dep. at 67-71.) Before the pathology confirmed the cancer, Mr. Abbott had only been diagnosed with a testicular mass. As the Ohio Supreme Court has recognized, had a plaintiff brought a claim based only the testicular mass alone, or on his suspicions that the mass was cancerous, he would have certainly faced strong opposition from a defendant. In *Liddell v. SCA Serv. of Ohio, Inc.*, 70 Ohio St.3d 6 (Ohio 1994), the Ohio Supreme Court found that the statute of limitations began to run when a biopsy revealed a cancerous growth in the plaintiff's nasal cavity and his physician advised him there might be a relationship between the cancer and exposure to toxic fumes, even though the plaintiff had been exposed to those chemicals seven years prior (in 1981) and had experienced frequent sinus infections and previously underwent surgery to the other nasal cavity. The court noted:

> [H]d Liddell attempted to bring a cause of action for negligence in 1981, any specification of damages for cancer certainly would have been strongly opposed by SCA on the grounds that they were too speculative. Hence, under SCA's theory Liddell would be confronted with a dilemma. He could either meet the statute of limitations and file a claim for compensation more than four years before he discovered the disease, or, as he did here, file a claim at the time of discovery, which occurred more than four years after the statute of limitations had expired."

Id. at 10-11. The court held the case did not "represent the circumstance of a plaintiff sitting on his rights" and that the plaintiff "could not, and did not discover his injury, the cancer, before the

two-year statute of limitations governing bodily injuries had expired." *Id.* at 13.

Undoubtedly the same is true here. That is, "had [Mr. Abbott] attempted to bring a cause of action for negligence [before November 16, 2015], any specification of damages for cancer certainly would have been strongly opposed by [DuPont] on the grounds that they were too speculative. Hence, under [DuPont]'s theory [Mr. Abbott] would be confronted with a dilemma. He could either meet the statute of limitations and file a claim for compensation . . . before he discovered the disease, or, as he did here, file a claim at the time of discovery, which occurred in DuPont's view after the statute of limitations had expired." *See id.*

The Ohio Supreme Court has also rejected the idea that the statute of limitations begins to run when a plaintiff learns they have an injury that "may be related" to toxic exposure. In *Burgess v. Eli Lilly & Co.*, 66 Ohio St.3d 59 (Ohio 1993), the court struck down as violative of the Right-to-Remedy Clause of the Ohio Constitution, Section 16, Article I, a previous version of Ohio Revised Code § 2305.10 that started the statute of limitations for DES exposure claims once a plaintiff learned his or her injury "may be related" to the DES exposure. The court held that under that language, the statute of limitations commenced when a plaintiff learned he or she "possibly" had a DES-related injury, and that "[t]here is more than a semantic difference between knowing that one has a DES-caused injury and knowing that one may have such an injury. A degree of certainty is missing." *Id.* at 61 ("Knowledge of the possibility that an injury may be related to a specific cause simply does not reach the constitutionally mandated threshold granting every person a remedy in due course of law for an injury done.").

Likewise, there is a difference between knowing that one has cancer, and knowing that one *may* have cancer. Although a plaintiff "need not be able to prove [his] claim to a degree of metaphysical certitude," the statute of limitations should not begin to run "before a plaintiff even

knew of [his] injury and its cause." *Burgess*, 66 Ohio St.3d at 63. Moreover, a cause of action alleging a plaintiff "may" or "possibly" have cancer would likely not survive Rule 12(b)(6) or summary judgment scrutiny. *Burgess*, 66 Ohio St.3d at 62 ("If a plaintiff were to file a complaint stating that she suffered a bodily injury which might be related to DES, the complaint would be dismissed for failure to state a claim. The statute sets a limitations period for an inconceivable cause of action.").

Filing a claim before a class member was diagnosed with a Probable Link Disease would also be barred by the terms of the *Leach* Settlement Agreement. The *Leach* Settlement Agreement prohibits any *Leach* Class member, such as Mr. Abbott, from filing a case against DuPont unless he or she suffers from one of the six Probable Link Diseases, such as testicular cancer. Dr. Masterson testified that the initial diagnosis on November 5, 2015 was a "testicular mass," (Masterson Dep. at 25-26), which is not a disease for which there was a Probable Link Finding. Had Mr. Abbott filed suit against DuPont before receiving his diagnosis—say, on November 5, 2015 after leaving Dr. Masterson's office—DuPont could have argued his claims were barred by the *Leach* Settlement Agreement. Even though Dr. Masterson's "clinical suspicion" was that Mr. Abbott's mass was cancerous, no doctor had diagnosed him with cancer. (*See* Masterson Dep. at 91-93.) Because Mr. Abbott's doctors were not willing to say he had cancer at this point, "'it would be illogical to hold [Mr. Abbott] to a higher degree of knowledge than [his] . . . physician.'" *Cacciacarne v. G.D. Searle & Co.*, 908 F.2d 95, 97-98 (6th Cir. 1990) (holding personal injury cause of action did not accrue until physician informed the plaintiff she would not be able to conceive because "[p]rior to that time, there was no certainty about plaintiff's condition, or the cause of her condition. The nature of her problem was unclear.")

Based on the above analysis, DuPont is not entitled to a judgment as a matter of law.

Plaintiffs did not move for summary judgment on this issue, requiring the matter to be presented to the jury. If the evidence before the jury is the same that has been presented to this Court, however, Plaintiffs may likely be entitled to judgment as a matter of law on this issue.

B. When Mr. Abbott knew, or should have known, of the link between C-8 and his cancers

Plaintiffs argue the statute of limitations for Mr. Abbott's second testicular cancer did not begin to run until after the November 16, 2015 orchiectomy and pathology report. Because Plaintiffs filed this action less than two years later, on November 14, 2017, they argue, Mr. Abbott's claims based on his second testicular cancer are timely (with two days to spare).

Even if Mr. Abbott knew or should have known of his second testicular cancer before the orchiectomy, his claims could still be timely because "[d]iscovery of physical injury is insufficient to start the statute of limitations running if at that time there is no indication of tortious conduct giving rise to a legal claim." *Schmitz*, 155 Ohio St.3d at 395. That is, Mr. Abbott must have also known, or with reasonable diligence should have known that his cancer was related to his C-8 exposure in order for the statute of limitations to begin to run.

The parties agree that Mr. Abbott knew of his first testicular cancer in 1994. The Court must therefore consider, for both cancers, whether Mr. Abbott knew, or with the exercise of reasonable diligence should have known both cancers were related to his C-8 exposure more than two years before he filed this lawsuit on November 14, 2017.

DuPont claims that Mr. Abbott had "constructive notice" of the link between C-8 and his testicular cancer more than two years before he filed this suit on November 16, 2017 because of the "extensive" public record and widespread publicity surrounding the *Leach* Settlement, Science Panel, and litigation in this MDL. (*See* ECF No. 50 at PAGEID#1202-06.) DuPont posits:

> Plaintiffs profess ignorance, repeatedly claiming that Mr. Abbott did not have actual knowledge of a link between C-8 and his testicular cancer because he purportedly did not see, hear, or read any of the relevant notices, articles, publications, advertisements, media, presentations, reports, or paperwork. But Plaintiffs miss the point.
>
> Under Ohio law, a plaintiff is charged with *constructive* notice of events that receive widespread publicity, triggering the running of the limitations period.

(ECF No. 86 at PAGEID#2712.)

For this proposition, DuPont cites, *inter alia*, *State ex rel. Cnty. of Cuyahoga v. Jones Lang Lasalle Great Lakes Co.*, 2017-Ohio- 7727, at ¶¶ 94-116 (Ohio Ct. App., 8th Dist. Sept. 21, 2017), which "affirm[ed the] trial court ruling that cause of action accrued on July 29, 2008, the date of publication of local newspaper article, where article was sufficient to alert reasonable person of wrongdoing." (ECF No. 86 at PAGEID#2712.) This case is simply not supportive of DuPont's position.

Whether an employer county knew that one of its highest-level office holders—the county commissioner—was involved in "salacious allegations of public corruption" reported in the region's leading newspaper has little significance to the facts before this Court. Indeed, this Court has to seriously question DuPont's use of this case as supportive of its position. In the cited case, one of the three county commissioners had his public office searched by numerous FBI Agents in full view of the public and within a county office building. The Ohio Court of Appeals found such open, obvious and notorious conduct as actual notice to the county itself. DuPont does not explain any similarly to the case at bar. The Court admonishes DuPont to pay closer attention to the applicability of the law and not to rely on cases that do not stand for the propositions for which it relies.

In any event, constructive notice is not the applicable test. The remainder of the cases to which DuPont cites for the proposition that Mr. Abbott had "constructive notice" of the link did

not arise under Ohio Revised Code § 2305.10 or Ohio law. *See, e.g., United States v. Kubrick,* 444 U.S. 111 (1979) (analyzing statute of limitations for medical malpractice claim under FTCA); *Ball v. Union Carbide*, 385 F.3d 713 (6th Cir. 2004) (applying federal law to determine triggering event for Tennessee's one-year statute of limitations); *Hughes v. Vanderbilt University*, 215 F.3d 543 (6th Cir. 2000) (analyzing federal law to determine when a civil rights action under 42 U.S.C. § 1983 action accrues); *Hicks v. Hines, Inc.*, 826 F.2d 1543 (6th Cir. 1987) (analyzing statute of limitations under federal law for Federal Employers' Liability Act claim).

The applicable test under Ohio Revised Code § 2305.10(B)(1) for the accrual of toxic exposure claims is "the date on which by the exercise of reasonable diligence the plaintiff should have known that the plaintiff has an injury that is related to the exposure[.]" *Id.* Ohio cases require that the statute of limitations in Ohio Revised Code § 2305.10 began to run when Mr. Abbott actually encountered some information that should have alerted him of the potential link between C-8 and his testicular cancer.

The Ohio Supreme Court has explained that Ohio's discovery rule cases "all stand for the proposition that the statute of limitations begins to run once the plaintiff acquires additional information of the defendant's wrongful conduct." *See Norgard*, 95 Ohio St.3d at 169 (Ohio 2002) (finding statute of limitations began to run when the plaintiff, who had previously been diagnosed for a serious lung disease related to toxic exposure at his workplace, read an article and spoke to an attorney and learned the facts about his employer's wrongful conduct to prove his employer intentional-tort claim); *Browning*, 66 Ohio St.3d at 560-61 (finding statute of limitations for the plaintiff's negligent credentialing claim against the defendant hospital began to run when the plaintiff viewed a television program and became aware that many of their

doctor's ex-patients suffered similar abnormalities as a result of the doctor's practices at the hospital); *see also Yacub v. Sandoz Pharmaceuticals Corp.*, 101 F.Supp.2d 852, 866 (S.D. Ohio 1998) (denying defendant's motion for summary judgment because the statute of limitations in Ohio Revised Code § 2305.10 began to run when the plaintiff reviewed a newspaper article stating the defendant drug manufacturer was discontinuing its use of a drug the plaintiff's deceased wife took and reporting a pending lawsuit accusing the U.S. Food and Drug Administration of ignoring injuries suffered by women taking that drug); *Vaccariello v. Smith & Nephew Richards, Inc.*, No. 76594, 2000 WL 1060649, at *5 (Ohio Ct. App. Aug. 3, 2000) (finding statute of limitations for the plaintiff's claims began running when she actually viewed an evening news program in which she learned a device implanted in her back could be the source of her injury).

"[S]uspicion is not enough to trigger the statute of limitations. . . .The standard is knowledge, not suspicion." *Grimme v. Twin Valley Community Local School Dist. Bd.*, 173 Ohio App. 3d 460, 466 (Ohio Ct. App. Oct. 15, 2007) (holding teacher's suspicions that an odd odor was causing her injuries and that it may have come from the ventilation system in her classroom "did not rise to the level of knowledge sufficient to trigger the running of the statute of limitations" and finding the statute of limitations did not begin to run until school board meeting when a test revealed the presence of a Freon leak); *Burgess*, 66 Ohio St.3d at 61 ("There is more than a semantic difference between knowing that one has a DES-caused injury and knowing that one may have such an injury. A degree of certainty is missing. Knowledge of the possibility that an injury may be related to a specific cause simply does not reach the constitutionally mandated threshold granting every person a remedy in due course of law for an injury done.").

DuPont contends that, even if Mr. Abbott had to actually encounter some information that

should have alerted him of the potential link between C-8 and his testicular cancers, he did encounter such information. (*See* ECF No. 50 at PAGEID#1203; ECF No. 86 at PAGEID#2714.) Specifically, DuPont argues that Mr. Abbott was a member of the *Leach* Class, and written notice was sent to potential class members explaining the settlement. Furthermore, Mr. Abbott participated in the C-8 Health Project in 2006 by giving a blood sample and authorizing the release of his medical records relating to his 1994 testicular cancer.

Plaintiffs, however, argue:

- There is no evidence that Travis or his family ever actually received any *Leach* class notice, or any communication, following the resolution in 2004, ten years after his first cancer. (*See* T. Abbott Depo., at 191:5-16, 192:2-23, 194:13-25, 199:12-23, 202:10-203:24; S. Abbott Depo., at 50:16-51:15, 52:23-55:11; R. Abbott Depo., at 19:2-5, 21:14-19);

- To the extent Travis received a *Leach* class notice a decade after his first cancer, which he does not recall and for which there is no evidence in the record, it stated no link between C8 and Travis's testicular cancer. (*See* MSJ, at 8);

(ECF No. 81 at PAGEID#2365.) And, as to the C-8 Health Project, Mr. Abbott testified that while he generally understood that the C-8 Health Project was related to the water districts and it was studying blood samples and medical records, he did not understand it was set up pursuant to the *Leach* Settlement Agreement, and that he only participated in order to receive the $400 incentive payment—a week's pay to him at the time. And while Mr. Abbott confirmed his signature on the survey paperwork that stated the purpose of the study was to find out if the participant's "health has been affected by the drinking water" in his area and that the project "asks health questions to people who said they drank water when it had a chemical in it called C-8," the survey then said *"[b]ut, none of the medical conditions asked about are known to have a*

connection with C-8." (ECF No. 49-1 (emphasis original)).[3]

Ohio courts have rejected similar consent forms as insufficient to trigger the running of the statute of limitations. For example, in *Browning*, the Ohio Supreme Court found that a special consent form signed by the plaintiff and made a part of their medical records, warning of the non-scientifically researched nature of the experimental medical procedures she was undergoing, would not have alerted the plaintiffs that their doctors had committed numerous improper procedures that would call the defendant hospital's credentialing practices into question. 66 Ohio St.3d. at 547.

The Ohio Supreme Court explained that the only evidence of "any perspicuous event" that should have alerted the plaintiffs to pursue their negligent credentialing claim against the defendant hospital occurred when they viewed a television program and became aware that many of their doctor's ex-patients suffered similar abnormalities as a result of the doctor's practices at the hospital. *Id.* at 560. Even though the plaintiffs signed consents about the experimental nature of their surgeries, the court held that there was no evidence in the record that the plaintiffs knew or should have known that the hospital had done anything wrong in continuing to grant privileges to the doctors until they saw the news program.

Similarly, in *Yacub*, this Court held that the statute of limitations did not begin to run until an event that provided some actual knowledge to the plaintiff. In that case, the plaintiff husband read an article stating the defendant drug manufacturer was discontinuing its use of the

[3] As Plaintiffs correctly posit, there were no Probable Linking Findings at this point in time, and in fact, DuPont continued to disclaim any connection between any medical conditions and C-8. (*See* Survey, ECF No. 49-1 ("none of the medical conditions asked about are known to have a connection with C-8.")) It is illogical to find that Mr. Abbott should have known about the link between C-8 and his testicular cancer based on his participation in the study when there had been no Probable Link Finding—and there would still be no link for another six years—and when DuPont was publicly claiming no link existed. *See Grimme*, 173 Ohio App. 3d at 466 ("It is nonsensical to attribute to [the plaintiff] a certain knowledge of an injury-causing condition when the school still maintains that no such condition exists or existed.").

drug taken by his deceased wife and that there were numerous reports of injuries suffered by women taking the same drug, even though he had previously met with attorneys about filing suit after his wife died and received information from a medical review report indicating his wife's use of the drug was a risk factor and possible cause of her death. 101 F.Supp.2d at 866. This Court found that while the plaintiff knew of his wife's injury and was generally suspicious about the cause of her death when he met with attorneys later in 1991, this "generalized suspicion that some type of wrongdoing might have occurred, without knowledge of the cause of his wife's injury, is insufficient to trigger the statute of limitations." *Id.* at 861.

While "'metaphysical certitude' is not required," this Court held the medical review report "did not inform the Plaintiff, with any degree of certainty, what had caused [his wife]'s injury." *Id.* at 864. This Court explained that "[u]nlike the report, the news article specifically apprised the Plaintiff that Parlodel's manufacturer was discontinuing the drug's use as a lactation suppressor in the wake of increased injuries reported by postpartum women" and that:

> Once the plaintiff determined the cause of his wife's injury with relative certainty, however, the statute of limitations began running, even though he did not know whether the Parlodel was defective, who manufactured the drug, or the legal significance of the facts (i.e., that he possessed a possible product liability claim). At that point, just like a plaintiff who knows a blown tire caused his traffic accident, the Plaintiff had an obligation to investigate the facts and pursue his potential remedies.

Id. at 865-66. And in *Cacciacarne*, the Sixth Circuit held that the statute of limitations on the plaintiff's products liability claim against the manufacturer of her intrauterine device ("IUD") did not begin until the plaintiff learned she would not be able to conceive a child, even though she had previously been told the IUD could have been the cause of her inability to conceive. The court held:

> [P]laintiff's cause of action did not accrue until Dr. Schmidt informed her she would not be able to conceive. Prior to that time there was no certainty about plaintiff's

> condition, or the cause of her condition. The nature of the problem was unclear. The precise question is whether Dr. Seiler's statement to the plaintiff that the IUD might be the cause of her tubal blockage was enough to put her 'on notice of the need to pursue [her] possible remedies.' *Allenius*, 538 N.E.2d at 96....It is undisputed that plaintiff thought the IUD might possibly have caused her problem. But her doctor did not know the cause. He did not rule out endometriosis or other possible causes. Because plaintiff's doctor did not know the cause, 'it would be illogical to hold [her] to a higher degree of knowledge than [her] ...physician[ ]....This case was not far enough along the scale of clarity and certainty of condition and cause to trigger the running of the statute until April[,] 1986."

908 F.2d at 97-98.

Notably, the cases just reviewed involved plaintiffs who knowingly underwent medical procedures, had medical devices put into their bodies, or took medication and later experienced injuries allegedly caused from that medication, the medical device, or the medical procedures. In contrast, here, Mr. Abbott did not knowingly undergo a procedure, have a medical device put into his body, or take a medication that caused his injury. He simply drank his water. If Ohio courts decline to start the statute of limitations in cases like *Browning*, *Yacub,* and *Cacciacarne*, Mr. Abbott cannot be held to a higher standard.[4]

Mr. Abbott testified that he did not learn of the potential link between his testicular cancers and C-8 exposure until the fall of 2017. Mr. Abbott avers that he does not recall seeing any of the newspaper articles discussing the *Leach* case and publishing settlement notices. Mr. Abbott also testified that he did not see any news media coverage or published notice of the Probable Link Findings in 2012. And, he declares that no person ever told or recommended to him that he should investigate C-8, file a lawsuit or take any action against DuPont, or that there had been lawsuits and settlements until his secretary, Ms. Leila Haggy, informed Mr. Abbott that

[4] *See also Petit*, 2010 WL 1463479 at *2 (denying motion for judgment on the pleadings on statute of limitations because defendant company began to warn physicians of a drug's risks for pregnant women, holding "Plaintiffs should not be required to have researched the medical literature for drugs prescribed to them eight years earlier.").

"he might ought to look into the C8 for compensation." (L. Haggy Dep. at 57-58.) Ms. Haggy testified that either on October 31, 2017 or November 1, 2017, she approached Mr. Abbott and told him to look into whether his cancer could have been caused by C-8. Around the same time, Mr. Abbott's parents saw an unrelated attorney advertisement on television that mentioned C-8 and testicular cancer, and they mentioned it to Mr. Abbott. Mr. Abbott then contacted an attorney, Kathy Brown, who referred him to Plaintiffs' counsel. Mr. Abbott filed this action on November 14, 2017.

DuPont has offered no evidence to contradict Mr. Abbott's testimony that he did not know of the potential link between his testicular cancers and his C-8 exposure before the fall of 2017. Thus, DuPont is not entitled to judgment as a matter of law. The evidence will be presented to the jury under the law outlined in this opinion.

IV.

The Court holds DuPont is not entitled to summary judgment in its favor on Mr. Abbott's claims for either of his cancers. If the facts presented in support or opposition to DuPont's motion for summary judgment are presumed to be the entirety of the facts, Plaintiffs would be entitled to judgment as a matter of law. Plaintiffs, however, did not move for summary judgment, and consequently the Court cannot presume that all facts are before it. In short, the Court cannot grant summary judgment to a party who did not move for it. This matter will be submitted to the jury, unless either side prevails under Rule 50 of the Federal Rules of Civil Procedure. In fact, the evidence establishes Mr. Abbott's claims for both testicular cancers were timely filed, and judgment as a matter of law could have been granted for Plaintiffs had they so moved. But because the only motion for summary judgment before the Court is DuPont's, the evidence will be presented to the jury for determination of whether Mr. Abbott's claims were timely filed. The

Court **DENIES** DuPont's Motion for Summary Judgment.

IT IS SO ORDERED.

1-17-2020
DATE

EDMUND A. SARGUS, JR.
UNITED STATES DISTRICT JUDGE