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: ***Travis and Julie Abbott v. I.E. du Pont De Nemours and Company*****, Case No. 2:17-cv-00998.**

DISCOVERY ORDER NO. 14

Defendant's Motion to Permit Rule 35 Medical Examination

This matter is before the Court on Defendant's Motion to Permit the Rule 35 Medical Examination of Plaintiff Travis Abbott ("Def's Mot. for IME") (ECF No. 37), Plaintiff's Memorandum in Opposition (ECF No. 44), and Defendant's Reply (ECF No. 52). For the reasons that follow, the Court **DENIES** Defendant's Motion.

I.

Plaintiff Travis Abbott brings this "civil action for equitable relief, compensatory and punitive damages, costs incurred and to be incurred by Plaintiffs, and any other damages which the Court or jury may deem appropriate for bodily injury and property damage arising from the intentional, knowing, reckless and negligent acts and omissions of the Defendants in connection with contamination of human drinking water supplies used by Plaintiff Angela Swartz." (Am. Compl. ¶ 1, ECF No. 29.) DuPont does not dispute that for decades it released into the water around its Washington Works plant a synthetic perfluorinated carboxylic acid and fluorosurfactant also known as perfluorooctoanoic acid or ammonium perfluorooctanoate ("C-

8"). Mr. Abbott alleges that the C-8 released from DuPont's Washington Works Plant caused him to develop testicular cancer. Under a contractual agreement between DuPont and a group of individuals who drank water contaminated with C-8, DuPont agreed not to contest whether C-8 is capable of causing Mr. Abbott's cancer (*i.e.*, general causation), and retained the right to contest whether C-8 actually caused his cancer (*i.e.*, specific causation).

Mr. Abbott alleges that the C-8 "[r]eleases have made and/or continue to make Plaintiff and other exposed individuals physically ill and otherwise physically harmed, and/or have caused and continue to cause associated emotional and mental stress, anxiety, and fear of current and future illnesses, including but not limited to, fear of significantly increased risk of cancer and other disease, among Plaintiffs and the other class members." (Am. Compl. ¶ 59, ECF No. 29.) Mr. Abbott brings claims for relief for negligence and malicious/reckless indifference. As damages for his negligence claim, he requests:

> a. Medical and hospital bills treatment of injuries;
> b. Physical injury, both temporary and permanent;
> c. Economic damages;
> d. Severe and significant emotional distress and mental pain and suffering;
> e. Humiliation, embarrassment and fear;
> f. Loss of enjoyment of life;
> g. Annoyance and inconvenience; and
> h. Other damages, which, under the law and circumstances, Plaintiffs are entitled to recover, including attorneys' fees and costs associated with the prosecution of this action.

Id. ¶ 69.

Mr. Abbott's trial will be the sixth held in this MDL, and the second Post-Settlement[1] trial. The plaintiffs in the other five trials made the same claims, based on the same theories of liability, and asked for the *exact same damages* and relief. *See e.g., Angela Swartz and Teddy*

[1] In February 2017, the parties globally settled over 3,500 cases that were then pending in this MDL. Since then, there have been approximately 50 cases filed.

Swartz v. E. I. du Pont de Nemours and Company, Case No. 2:18-cv-00136, ECF No. 15, Am. Compl. ¶ 62; *Freeman v. E.I. du Pont de Nemours and Company*, Case No. Case No. 2:13-cv-1103, ECF No. 40, Am. Compl., ¶ 57; *Vigneron v. E.I. du Pont de Nemours and Company*, Case No. Case No. 2:13-cv-136, ECF No. 73, Am. Compl., ¶ 73; *Moody v. E.I. du Pont de Nemours and Company*, Case No. Case No. 2:15-cv-803, ECF No. 1-1, Compl. ¶ 157.

On May 30, 2019, DuPont filed its Motion for a Rule 35 Medical Examination, requesting the Court to order Mr. Abbott to submit to an independent mental examination. That motion is ripe for review.

II.

Rule 35 of the Federal Rules of Civil Procedure provides that a court "may order a party whose mental or physical condition . . . is in controversy to submit to a physical or mental examination by a suitably licensed or certified examiner." Fed. R. Civ. P. 35(a)(1). Such an order "may be made only on motion for good cause and on notice to all parties and the person to be examined." Fed. R. Civ. P. 35(a)(2)(A).

The United States Supreme Court explained that, unlike the rules pertaining to the permissible scope of other forms of discovery such as interrogatories and production of documents—which require only that the information sought be "relevant to the subject matter involved in the pending action," and that discovery devices not be used in bad faith so as to cause undue "annoyance, embarrassment, or oppression,"—Rule 35 contains a "restriction" that the matter be "in controversy," and also requires that the movant affirmatively demonstrate "good cause." *Schlagenhauf v. Holder*, 379 U.S. 104, 117 (1964) (citing Fed. R. Civ. P. 26(b) and 30(b)). The *Schlagenhauf* Court went on to state that the requirements of Rule 35 are "not a mere formality," and "are not met by mere conclusory allegations of the pleadings -- nor by mere

relevance to the case," but rather "require an affirmative showing by the movant that each condition as to which the examination is sought is really and genuinely in controversy and that good cause exists for ordering each particular examination." *Id.* at 118. The Court directed that Rule 35 "requires discriminating application by the trial judge, who must decide . . . whether the party requesting a mental or physical examination or examinations has adequately demonstrated the existence of the Rule's requirements of 'in controversy' and 'good cause,' which requirements . . . are necessarily related." *Id.* at 118–19.

The "good cause" and "in controversy" requirements of Rule 35 make it clear that "sweeping examinations of a party who has not affirmatively put into issue his own mental or physical condition are not to be automatically ordered merely because the person has been involved in an accident -- or, as in [*Schlagenhauf*], two accidents -- and a general charge of negligence is lodged." *Id.* at 121. "To hold otherwise would mean that such examinations could be ordered routinely in automobile accident cases." *Id.*, 379 U.S. at 121–22.

III.

DuPont moves this Court to order Mr. Abbott to submit to a mental examination by "a clinical psychologist and associate professor in the Department of Medicine and Department of Psychiatry at Washington University School of Medicine" so that she can "evaluate the scope and cause of the mental and emotional distress claimed by Mr. Abbott, his current condition and future prognosis, and treatment options that may be available to alleviate any current, ongoing, or recurring mental distress that he may be experiencing related to his cancer and infertility." (Def's Mot. for IME at 5, ECF No. 37.) DuPont contends that it has affirmatively shown that it is entitled to the IME because Mr. Abbott has placed his mental condition "in controversy," and that DuPont has offered "good cause" for the IME.

A. In Controversy

While the Sixth Circuit has not spoken on this exact issue, several sister district courts have, with one recently explaining that "'[t]he majority of courts have held that plaintiffs do not place their mental condition in controversy merely by claiming damages for mental anguish or 'garden variety' emotional distress.'" *T.C. ex rel. S.C. v. Metro. Gov't of Nashville & Davidson Cty.*, 2018 U.S. Dist. LEXIS 113517, *33–34, 106 Fed. R. Evid. Serv. (Callaghan) 1060, 2018 WL 3348728 (M.D. Tenn. July 9, 2018) (citing *Santifer v. Inergy Auto. Sys.*, LLC, No. 5:15-CV-11486, 2016 U.S. Dist. LEXIS 45493, 2016 WL 1305221, at *2 (E.D. Mich. Apr. 4, 2016); *Gaines-Hanna v. Farmington Pub. Sch.*, No. 04-CV-74910-DT, 2006 U.S. Dist. LEXIS 21506, 2006 WL 932074, at *8 (E.D. Mich. Apr. 7, 2006)) (additional citations omitted). The majority of courts, including numerous district courts in the Sixth Circuit, determine whether the claimed emotional distress is "garden variety" by evaluating whether any of the following factors exist in the case:

> (1) a tort claim is asserted for intentional infliction or negligent infliction of emotional distress; (2) an allegation of a specific mental or psychiatric injury or disorder is made; (3) a claim of unusually severe emotional distress is made; (4) plaintiff intends to offer expert testimony in support of a claim for emotional distress damages; and/or (5) plaintiff concedes that her mental health condition is in controversy within the meaning of Rule 35.

Id. (quoting *Stevenson v. Stanley Bostitch*, Inc., 201 F.R.D. 551, 554 (N.D. Ga. 2001)) (additional citations omitted).

DuPont recently moved for and was denied permission to conduct a Rule 35 mental examination of a plaintiff in *Angela Swartz and Teddy Swartz v. E. I. du Pont de Nemours and Company*, Case No. 2:18-cv-00136, which will be tried immediately before Mr. Abbott's case. DuPont states that "this Court held that, from the face of the Complaint, Mrs. Swartz's emotional distress damages were a 'garden variety' and failed

to meet any of the five 'in controversy' factors." (Def.'s Mot. for IME at 1) (citing to Discovery Order No. 13, ECF No. 5238). Mrs. Swartz and Mr. Abbott have alleged the same emotional distress damages; therefore, DuPont indicates that its current motion "focuses on factor 4," because, unlike Mrs. Swartz, Mr. Abbott intends to offer expert testimony in support of a claim for emotional distress damages. *Id.*

As this Court indicated in Discovery Order No. 13, "[c]ourts find it more likely that emotional distress claims are not garden variety when the plaintiff offers expert testimony to support her claim for emotional distress damages." (ECF No. 5238 at 12) (citing *Womack v. Stevens Transport*, 205 F.R.D. 445, 447 (E.D. Pa. 2001) ("A[n] . . . IME would be relevant in this case because without it, the Defendant's defense would be limited to the mere cross-examining of evaluations offered by Plaintiff's experts."); *Gaines-Hanna v. Farmington Pub. Schs*, 2006 U.S. Dist. LEXIS 21506 *35, 69 Fed. R. Evid. Serv. (Callaghan) 1025 (E.D. Mich. 2006) ("plaintiff will be offering medical expert testimony in support of her case").

DuPont seeks a mental examination of Mr. Abbott and the ability to offer expert testimony from a clinical psychologist/professor because, in DuPont's view, "Mr. Abbott undeniably put his mental condition 'in controversy' when, on May 21, 2019, he identified an expert to testify about his emotional distress damages at trial." *Id.* at 1–2. Mr. Abbott responds that he "has disclosed no such expert." (Pl's Mem. in Opp. at 1.) This Court agrees.

The expert to whom DuPont refers is Kamal Pohar, M.D., F.R.C.S.C., a board-certified urologist at The Ohio State University, who is Mr. Abbott's causation expert. (Pohar Rep. at 2, ECF No. 33-1.) Dr. Pohar was asked to opine as to whether C8 "was a

substantial contributing factor in causing Mr. Abbott to develop testicular cancer" and "the course of Mr. Abbott's treatment and the physical and emotional damages he experienced *directly related to his underlying cancer diagnosis and treatment*." *Id.* (emphasis added). Dr. Pohar did not conduct any psychiatric or psychological exam or evaluation, and indeed could not have done so since he himself denies expertise in that area and discusses the emotional distress in the context of his patient's cancer diagnosis and treatment, as is shown in his deposition:

> Defense counsel: And we've established that you're not an expert in terms of psychiatric or psychological care.
>
> Dr. Pohar: It's my responsibility as a cancer physician to be aware of the emotional and psychologic context of anybody afflicted by cancer. I'm not an expert; but at the same time I'm not unaware, and I don't think I'm a poor practitioner. And so the fact that he has -- what he told me about how he's feeling, that's not a surprise to me. He's one of hundreds and hundreds of other cancer patients that I've treated. I mean, they all feel the same way. Their families feel the same way, for the most part. He -- you know, his emotions and his current state of feelings are not unusual.

(Pohar. Dep. Tr. at 248–49, ECF No. 44-2.) As Dr. Pohar suggests, very few medical conditions are confined to a single specialty, and practitioners are aware of this. However, discussion of the emotions attendant to a physical illness does not convert a physician's testimony into one of an expert in psychology or psychiatry. Dr. Pohar was questioned extensively about his qualifications and repeatedly agreed with Defendant that he is not an expert in terms of psychiatric or psychological care, for example:

> Defense counsel: You are not an expert with respect to psychiatric or psychological medicine of any kind.
>
> Dr. Pohar: Very true.
>
> Defense counsel: And it is not your practice to diagnose psychological disorders.
>
> Dr. Pohar: Now, I'm not a psychiatrist and it's not -- and I don't diagnose disorders, but I'm a cancer physician.

Id. at 86; *see also id.* at 248–59.

Dr. Pohar comments on Mr. Abbott's emotional injuries in the same context that he comments on the emotional impact of cancer on any his patients. That is, Dr Pohar's report is directed at Mr. Abbott's physical injuries, stating that "Mr. Abbott has experienced severe physical pain and suffering." (Pohar Rep. at 11.) Dr. Pohar categorizes Mr. Abbott's "concerns and worries" that are "related to his cancer diagnoses and treatment" and his continued "fear of cancer recurrence and anxiety over his infertility issues" as "appropriate and normal considering his personal experience of multiple underlying cancer diagnoses and surgeries." (Pohar Rep. at 7–8, 11.) The Court finds that Dr. Pohar's testimony addresses the commonplace emotional distress attendant to a diagnosis of cancer. He does not offer expert opinion on Mr. Abbott's mental condition. Dr. Pohar's report and testimony are of a different quality than that of a psychiatric or psychologic expert. Permitting a Rule 35 exam in this context would *de facto* place any cancer patient's mental state "in controversy" and would mean that such examinations could be ordered routinely in personal injury cases such as the one *sub judice*. That is exactly what the Supreme Court cautioned against in *Schlagenhauf*. 379 U.S. at 121–22 (requiring a discriminating application by the trial judge to prevent automatic or routinely ordered IMEs in an personal injury case).

Consequently, none of the factors courts utilize to determine whether the claimed emotional distress is "garden variety" is present in this case. Further, the Court finds that there are no other facts or circumstances present in this case that would cause this Court to find that Mr. Abbott's emotional distress allegations are anything more than those that any individual diagnosed with cancer would claim. Accordingly, the Court concludes that DuPont has failed to affirmatively show that Mr. Abbott's mental condition "is really and genuinely in controversy," as required by Rule 35. *Schlagenhauf*, 379 U.S. at 118.

condition "is really and genuinely in controversy," as required by Rule 35. *Schlagenhauf*, 379 U.S. at 118.

B. Good Cause

With regard to the movant's burden to show good cause to require a party to submit to a Rule 35 IME, this Court has explained:

> The "good cause" requirement is satisfied, in part, by a showing that the requested information cannot be obtained by other means. [*Schlagenhauf*, 379 U.S. at 118]; *Marroni v. Matey*, 82 F.R.D. 371, 372 (E.D. Pa. 1979). It also appears to require a showing that, in a particular case, there is some reason for the examination other than the fact that a party's mental or physical condition is at issue, such as a reasonably-based belief that the examination will reveal information about that condition which is adverse to conclusions reached by other examining physicians. *See, e.g., Anson v. Fickel*, 110 F.R.D. 184 (N.D. Ind. 1986). Otherwise, the Court would routinely grant a Rule 35 request in any case where a party claimed any physical or psychological injury, a result seemingly inconsistent with *Schlagenhauf's* requirement that the Court make a "discriminating application" of Rule 35.

Young v. City of Cambridge, 2010 U.S. Dist. LEXIS 19918 *3–4, 2010 WL 546361 (S.D. Ohio Feb. 10, 2010).

DuPont argues:

> Because Mr. Abbott has offered expert testimony to support his claimed severe emotional distress damages that extend beyond "garden variety" emotional distress, Mr. Abbott's mental injuries are "in controversy," and there is good cause to order a Rule 35 examination. "Good cause" is satisfied "when the requested information cannot be obtained by other means" and "there is some reason for the examination other than the fact that a party's mental" condition is at issue.
>
> Defendants have a reasonably-based belief that Dr. Deshields' independent medical examination will reveal information about Mr. Abbott's condition that rebuts Dr. Pohar's opinions. Specifically, Dr. Pohar—a surgeon with no training in psychological assessment—failed to use any screening tools for anxiety, depression, or distress. Dr. Pohar also failed to address an appropriate treatment plan or prognosis, or explain how he can simultaneously opine that Mr. Abbott's emotional distress is "severe" but that Mr. Abbott's emotional reactions are normal.

(Def's Mot. at 4–5.)

DuPont's first argument presupposes that Mr. Abbott has placed his mental condition in controversy, which he has not done.

DuPont's second argument misses the mark. That is, Dr. Pohar did not utilize any tools to support an expert opinion on Mr. Abbott's mental condition because he offers no expert opinion on Mr. Abbott's mental condition. Dr. Pohar merely speaks to the emotional distress Mr. Abbott exhibited in terms of the physician's "thousands of cancer patients that [he has] seen [and] how much emotional stress cancer causes people . . . ." (Pls' Mem. in Opp., Ex. A, Pohar Dep at 86, ECF No. 44-2 at 4.) Dr. Pohar testified:

> Mr. Abbott has experienced severe physical pain and suffering and emotional distress related to his cancer diagnoses and treatment and continues to suffer from fear of cancer recurrence and anxiety over his infertility issues. These are normal responses to Mr. Abbott's testicular carcinomas and metastasis and this is supported by the testimony of each of Mr. Abbott's treating physicians who also opined that his level of emotional responses were appropriate and expected.

(Pohar Report at 11, ECF No. 33-1.)

"'[E]motional distress' is not synonymous with the term 'mental injury' as used by the Supreme Court in *Schlagenhauf v. Holder* for purposes of ordering a mental examination of a party under Rule 35(a)." (Discovery Order No. 13 at 10.) (quoting *Turner v. Imperial Stores*, 161 F.R.D. 89, 94 (S.D. Cal. 1995)). Mr. Abbot does not allege any mental disorder of the type courts require in Rule 35 exams. *See e.g.*, *Hearring v. Sliwowski*, No. 3:10-0746, 2011 WL 3897803 (M.D. Tenn. Sept. 6, 2011) (ordering Rule 35 mental exam where plaintiff alleged "grievous mental suffering, including but not limited to post-traumatic stress disorder"); *Roberson v. Bair*, 242 F.R.D. 130, 137 (D.D.C. 2007) (allowing IME because the plaintiff "unquestionably claims that she is suffering from two identifiable forms of mental illness or disorder and that those conditions were caused by Defendant."). Mr. Abbott has not alleged a specific mental or psychiatric injury, and instead alleges only pain and suffering as a result of his

physical cancer diagnosis, treatment, and monitoring – something with which oncologists are familiar in their treatment of cancer patients. Consequently, even if DuPont had shown that Mr. Abbott placed his mental condition in controversy, it has failed to show good cause for this Court to order an independent medical exam.

Accordingly, DuPont has failed to meet its burden to "affirmatively demonstrate good cause" to be permitted to subject Mr. Abbott to a Rule 35 mental examination. *Schlagenhauf v. Holder*, 379 U.S. at 117.

IV.

Based on the foregoing, the Court **DENIES** Defendant's Motion to Permit the Rule 35 Medical Examination of Plaintiff Angela Swartz. (ECF No. 37.)

IT IS SO ORDERED.

7-8-2019
DATE

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