

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: *Angela Swartz and Teddy Swartz v. E. I. du Pont de Nemours and Company*, Case No. 2:18-cv-00136.

EVIDENTIARY MOTIONS ORDER NO. 26

Defendant's Motion to Exclude or Limit Dr. Barry S. Levy's Trial Testimony

This matter is before the Court on Defendant's Motion to Exclude or Limit Dr. Barry S. Levy's Trial Testimony (ECF No. 45, *Swartz* Docket<sup>1</sup>), Plaintiffs' Memorandum in Opposition (ECF No. 65), and Defendant's Reply (ECF No. 74). For the reasons that follow, the Court **DENIES** Defendant's Motion.

I.

DuPont moves the Court to reconsider its prior decisions related to Plaintiffs' expert Barry S. Levy, M.D., M.P.H. DuPont acknowledges that "this Court has made prior rulings regarding Dr. Levy, *see* EMOs [Evidentiary Motions Order Nos.] 2 and 7, DuPont makes new and additional arguments here, based on changed circumstances and the different context of the current trial cases." (Def's Mot. at 1, ECF No. 45.) DuPont makes no explanation as to why it believes that the circumstances have changed and the current trial cases are in a different context. Instead, DuPont makes its "new and additional arguments" as to why Dr. Levy's opinions should

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<sup>1</sup> Unless otherwise noted the ECF references are to the docket in *Swartz*, 2:15-cv-136.

be excluded such as in its prior decisions this Court “primarily considered Dr. Levy’s qualifications, and did not focus on the substance of the testimony he seeks to offer,” the Court failed to focus on Dr. Levy’s flawed methodology, which “is not reliable within the meaning of Fed. R. Civ. P. 702, and “DuPont also presents a new argument that Dr. Levy’s methodology is not reliable.” *Id.* at 1–2.

Plaintiffs respond that “*Dr. Levy did not amend ANY of his prior expert opinions*” and in its twenty-page motion DuPont merely “reargues issues already ruled on by this Court.” (Pls’ Mem. in Opp. at 1, ECF No. 65.) Plaintiffs maintain that “these ‘new’ arguments made by DuPont do not encompass any change in the law or new evidence that was not available to [DuPont] in the prior briefings to exclude Plaintiffs’ Experts, and [its] continued insistence on rehashing old arguments is a waste of this Court’s time and resources and should warrant the award of fees and costs related to the substantial time which Plaintiffs’ are forced to spend reviewing, analyzing, and responding to the same.” *Id.* at 1–2.

In its Reply Brief, DuPont does not dispute that it could have made its new and different arguments in its prior briefings, but rather points out that Plaintiffs failed to respond to DuPont’s arguments and “instead [rely] on the Court’s rulings with respect to different arguments made in previous motions.” (Reply at 1, ECF No. 74.) DuPont maintains that the Court should grant its Motion because it “now presents new arguments in favor of excluding Dr. Levy’s testimony.” *Id.* This Court, however, disagrees.

Initially, the Court notes that it is not surprising that DuPont does not explain how the “circumstances” have “changed” such that the current trial cases are in a “different context” as they relate to this expert testimony, because no circumstances have changed nor are the current

trial cases somehow in a different context. As to the arguments DuPont does make, there is no dispute that these arguments could have been made previously.

Further, DuPont is simply wrong that the Court “primarily considered Dr. Levy’s qualifications, and did not focus on the substance of the testimony he seeks to offer,” or focus on its contention that Dr. Levy utilized unreliable methodology. (Def’s Mot. at 1–2.) In EMO 2, the Court offered extensive analysis with regard to the substance of Dr. Levy’s testimony, even titling a subsection of its decision “Reliability” and starting and ending that section with:

In its Motion, DuPont posits that the testimony and reports of Drs. Levy ad Siegel and Mssrs. Petty and Amter should be excluded because they are unreliable.

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The Court concludes that the Trial Plaintiffs have met their burden of showing that their expert witnesses utilized a reliable methodology.

(EMO 2 at 13, 15, ECF No. 4129.)

Moreover, even if the Court did focus its prior opinion in a way in which DuPont is dissatisfied, it is still not an appropriate reason for reconsideration. As this Court has stated in two very recent decisions:

[R]econsideration of a previous order is an extraordinary remedy, to be used sparingly in the interests of finality and conservation of judicial resources.” 12 James Wm. Moore et al., Moore’s Federal Practice ¶ 59.30[4] (3d ed.). A Court does a grave injustice to the judicial system if it continues to utilize scarce judicial resources to address issues that the parties have had a full and fair opportunity to litigate. The Court’s declination to address these issues again not only protects judicial resources but also protects the parties from the expense and vexation attendant to multiple, repetitive briefing of the same issue and fosters reliance on judicial action.

(DMO 32 at 3, ECF No. 5241; EMO 25 at 2, ECF No. 5254.)

Finally, the Court currently declines to award Plaintiffs the fees and costs incurred in responding to DuPont’s inappropriate request for reconsideration. The Court cautions DuPont

that it will consider granting Plaintiffs' request for fees and costs if DuPont continues to file motions based on nothing more than the desire to make arguments it had the full and fair opportunity to make previously. At this point, the Court has provided ample notice to the parties that motions to reconsider at this stage in this MDL (which started six years ago, and has 100s of issued decisions, 4 trials, 1 appeal, and settlement of over 3,500 cases for \$670 million), must be based on more than the desire to make "different arguments" that were previously available, but either strategically or negligently unused.

**III.**

Based on the foregoing, the Court **DENIES** Defendant's Motion to Exclude or Limit Dr. Barry S. Levy's Trial Testimony. (ECF No. 45.)

**IT IS SO ORDERED.**

8-6-2019  
DATE

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