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. 25

Defendant's Motion to Exclude Corporate Conduct Expert Opinion

This matter is before the Court on Defendant's Motion to Exclude References to a Public Health Duty of Care, or Other Inapplicable or Non-Legal Standards of Conduct (ECF No. 44, Swartz Docket), Plaintiffs' Memorandum in Opposition (ECF No. 73), and Defendant's Reply (ECF No. 77). For the reasons that follow, the Court **DENIES** Defendant's Motion.

I.

DuPont moves the Court to reconsider its prior decisions related to non-legal duties, stating:

> On February 17, 2016, the Court initially held that it would allow Plaintiffs' corporate conduct experts to refer to a "public health duty of care" in their testimony. DMO 12 at 82–84. On May 26, 2016, however, shortly before the *Freeman* trial, the Court stated that, consistent with its prior rulings "prohibiting the parties from utilizing any terms that have a specialized legal meaning," it would "include[] in this group the word "duty." EMO 6 at 37–38.

(Def's Mot. at 2, ECF No. 44.)

DuPont posits that its Motion "is not just a preservation motion" but instead is based upon the fact that it has chosen not to call the corporate conduct experts that it has previously

utilized and because a new case from this district casts doubt on this Court's prior decisions. *Id.* In its Motion, however, DuPont provides minimal argument with regard to either of these justifications and spends the majority of the brief addressing what this Court has already extensively considered and ruled upon in Evidentiary Motions Order No. ("EMO") 2, EMO 6, Dispositive Motions Order No. ("DMO") 12 (MDL Docket 13-md-2433 at ECF Nos. 4129, 4306, 4551), and numerous *in limine* rulings, which total well over one hundred pages of in-depth analysis of these issues. As this Court recently explained:

> [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, MDL Docket 13-md-2433 at ECF No. 5241.) For these same reasons, the Court will not address DuPont's brief as it relates to the issues it has already had a full and fair opportunity to litigate.

II.

DuPont makes two arguments that were not available to it previously as to why this Court should change its prior decisions on corporate conduct expert opinion: A) Trial Strategy, and B) New Case Law.

A. DuPont's Trial Strategy

DuPont utilized corporate conduct experts in the prior four trials held in this MDL. DuPont now indicates that it has changed its trial strategy with regard to its corporate conduct witnesses. The entirety of DuPont's argument in its Motion on this issue is as follows:

> [T]his case presents a new context where DuPont is no longer offering experts Voltaggio or Snyder, and Bobby Rickard is only being called as a fact witness, not as an expert witness.

(Def's Mot. at 2.) In a footnote in DuPont's Reply Brief it states:

> Plaintiffs also argue that DuPont's expert disclosure for the *Swartz* case, including its notice that it will no longer be offering the testimony of experts Voltaggio and Snyder, and will only be offering the fact witness testimony of Bobby Rickard, "has no bearing on Plaintiffs' expert opinions and testimony." Opp. at 2.
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> However, the Court expressly based its prior admission of MDL plaintiffs' corporate conduct testimony on DuPont's offering what the Court viewed as the same type of expert testimony from Voltaggio, Snyder and Rickard, permitting testimony from these plaintiffs' experts because "[t]he MDL plaintiffs seek to introduce testimony to dispute DuPont's position, which DuPont supports with its own experts' opinions." *See, e.g.*, EMO 6 at 19. Because DuPont will no longer be offering this expert testimony, Plaintiffs have no need to rebut it.

(Def's Reply at 1, n. 1, ECF No. 77.)

DuPont's arguments are not well taken.

First, the Court disagrees that it expressly based its prior admission of Plaintiffs' corporate conduct expert testimony on it being offered as rebuttal to DuPont's experts' opinions. The Court did note that "[f]or context, the Court reviews DuPont's corporate conduct experts' opinions and testimony relevant to the issues currently before the Court." (EMO 6 at 4, MDL Docket 13-md-2433 at ECF No. 4551.) And, the Court also noted that "[t]he MDL Plaintiffs seek to introduce testimony to dispute DuPont's position, which DuPont supports with its own experts' opinions." *Id.* at 19.

DuPont, however, has not changed its position, which Plaintiffs must still dispute in an attempt to prove their case. Instead, DuPont merely changes its strategy of having experts support its position – the position itself is not changed in any way, which is discussed in more detail *infra*. Moreover, the Court has issued decisions consisting of intricate and detailed

analysis of why Plaintiffs' corporate conduct experts' testimony is admissible outside its use as rebuttal. It is therefore appropriate to permit Plaintiffs the ability to "introduce testimony to dispute DuPont's position." *Id.*

DuPont's decision to change its trial strategy is certainly its prerogative. DuPont cannot, however, dictate how Mrs. Swartz presents her case. To prove her claims at trial against DuPont, Mrs. Swartz (and all of the MDL Plaintiffs) must show, *inter alia*, that DuPont owed her a duty of care. *Menifee v. Ohio Welding Prods., Inc.*, 15 Ohio St.3d 75 (1984) (explaining that to establish a claim for negligence under Ohio, a plaintiff must show that (1) the defendant owed her a duty of care; (2) the defendant breached that duty of care; and (3) as a direct and proximate result of the defendant's breach, the plaintiff suffered injury). "[T]he existence of a duty derives from the foreseeability of the injury, which usually depends upon the defendant's knowledge." *Id.* at 77. The "test for foreseeability is whether a reasonably prudent person would have anticipated that an injury was likely to result from the performance or nonperformance of an act." *Id.* Thus, to prove her claim, Mrs. Swartz must show that a reasonably prudent person would have foreseen that injury would likely result from the release of C-8 in the amount and for the duration of time that DuPont released the chemical directly into surface waters and unlined landfills.

DuPont's position is that it owed no duty to Mrs. Swartz. DuPont's Answer filed in the instant trial case offers the same defenses it has throughout this litigation, which include:

> DuPont neither knew, nor should have known, that any of the substances to which Plaintiffs were allegedly exposed were hazardous or constituted a reasonably 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 Plaintiffs.
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> . . . .

> [A]ll conduct and activities of DuPont related to matters alleged in the Complaint conformed to industry standards based upon the state of medical, scientific, and/or industrial knowledge which existed at the time or times that Plaintiffs are alleged to have been exposed.

(Answer at ¶¶ 107, 119, ECF No. 6.)

The parties hotly dispute whether, based upon the state of the medical, scientific, and/or industrial knowledge at the relevant time, C-8 constituted a reasonably foreseeable risk of harm or whether DuPont's conduct conformed to industry standards based upon the state of the health and environmental information that was available to the industry and regulators about C-8. They dispute the relevant and scientific inquiry of what the toxicological and epidemiological studies on C-8 showed. DuPont maintains that it demonstrated sound environmental stewardship practices which conformed to the industry standards with regard to C-8 based on the state of the available information and Plaintiffs contend that DuPont instead purposefully utilized scientific testing methods that would provide inaccurate results so that it could continue using C-8 even though it knew it was harmful.

Mrs. Swartz and the other MDL Plaintiffs have retained experts to opine on whether DuPont knew that the C-8 to which they were exposed was hazardous or constituted a reasonably foreseeable risk of physical harm by virtue of the prevailing state of the medical, scientific and/or industrial knowledge and standards during the relevant time period. Mrs. Swartz and the other MDL Plaintiffs have not only the right to present their case, but they have the *burden* to prove by a preponderance of the evidence that a duty existed (*i.e.*, that a reasonably prudent person would have foreseen that injury was likely to result to someone in Mrs. Swartz's position from DuPont's conduct).

Accordingly, the Court shall not deviate from its prior decisions related to these corporate conduct experts based upon DuPont's change in trial strategy.

B. New Case Law

With regard to the new case upon which DuPont relies, DuPont contends:

> In *Rheinfrank*, this Southern District of Ohio excluded an expert's testimony regarding his opinion that certain companies "owe a duty to avoid harm to the public." *Rheinfrank v. Abbott Labs., Inc.*, 2015 U.S. Dist. LEXIS 191660, [2015 WL 13022172], at *32 (S.D. Ohio Oct. 2, 2015). The court did so, in relevant part, on the basis that "the standards to which [the expert] refers are undefined and appear to be based on nothing more than personal opinion." *Id.* at *33.

(Reply at 4, ECF No. 77.)

Plaintiffs contend that *Rheinfrank* is distinguishable in material ways. This Court agrees.

In *Rheinfrank*, the defendants sought exclusion of Dr. C. Ralph Buncher, a Professor of Biostatistics and Epidemiology at the University of Cincinnati. *Rheinfrank*, 2005 WL 13022172, at *10. Although the court found that Dr. Buncher was qualified to testify to the medical facts and science regarding a pharmaceutical drug and compare that data to the drug's label, he was precluded from offering opinions on industry ethics and manufacturers responsibilities because they "appeared to be nothing more than his personal opinion." *Id.* at 11. Unlike in *Rheinfrank*, Mrs. Swartz's experts' opinions are based on more than personal opinions as explained in detail by this Court in EMO 2, EMO 6, DMO 12, and numerous *in limine* rulings. For example, in EMO 2 the Court explained: "Specifically, the parties' experts opine on DuPont's stewardship of C-8 within the framework of the then-governing industry standards, best practices, and the state and federal regulatory programs; deriving their opinions from their specialized and technical knowledge, which will assist the trier of fact." (EMO 2 at 12, MDL Docket 13-md-2433 at ECF No. 4129.)

Indeed, even DuPont has argued that corporate conduct expert testimony is necessary to help a jury understand DuPont's contention that it not only complied with all prevailing

industrial and scientific standards, but that it was proactive in that regard and demonstrated exemplary conduct related to its use and disposal of C-8. As this Court highlighted in EMO 2:

> DuPont itself has *expressly acknowledged* in the context of prior C-8 drinking water contamination litigation that "[t]here is little doubt that . . . whether DuPont's stewardship of [C-8] was consistent with the industry's best practices, falls outside the 'everyday knowledge and experience of a lay juror" and that expert "testimony on the reasonableness of [DuPont's] conduct may be helpful to a jury in understanding otherwise complex issues." (Plaintiffs' Standard of Care Aff. Ex. L at 13.)
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> (Trial Pls.' Mem. in Opp. at 35.)
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> DuPont further noted:
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> [T]estimony on the reasonableness of a sophisticated manufacturer in its use and stewardship of an unregulated polyfluoromer chemical [C-8] within the framework of existing state and federal regulatory and remediation programs and the then-governing industry standards and best practices" derived from an expert's "specialized and technical knowledge, will assist the trier of fact in determining a highly complex and nuanced aspect of this case, and is the type of opinion testimony contemplated for submission to the jury under Rule 702 and *Daubert*." (*Id.* Ex. L at 14-15 (emphasis added).)
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> *Id.* (emphasis removed).

(EMO 2 at 10, MDL Docket 13-md-2433 at ECF No. 4129.)

Thus, the Court finds *Rheinfrank* inapposite and concludes that it does not impact the Court's prior decisions on the proffered testimony and/or reports of Plaintiffs' corporate conduct experts.

III.

Based on the foregoing, the Court **DENIES** Defendant's Motion to Exclude Corporate Conduct Experts. (ECF No. 44.)

IT IS SO ORDERED.

8-2-2019
DATE

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