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,

Case No. 2:13-md-2433
CHIEF JUDGE EDMUND A. SARGUS, JR.
Magistrate Judge Elizabeth Preston Deavers

This document relates to: ALL CASES.

DISPOSITIVE MOTIONS ORDER NO. 17

Defendant's Motion for Reconsideration of Court's Decision on Bifurcation

This matter is before the Court on Defendant's Motion for Reconsideration of the Court's Decision on Bifurcation (ECF No. 4400), Plaintiff's Memorandum in Opposition to Defendant's Motion (ECF No. 4525), and Defendant's Reply in Support of its Motion (ECF No. 4536). For the reasons that follow, the Court **GRANTS IN PART AND DENIES IN PART** Defendant's Motion in accordance with this Opinion and Order.

I.

Mr. Freeman's case is scheduled for trial on May 31, 2016, and is the second bellwether trial in this multidistrict litigation ("MDL"). It is not disputed that Mr. Freeman is a member of a class ("*Leach* Class") of approximately 3,500 individuals who are permitted under a contractual agreement ("*Leach* Settlement Agreement") to file claims against Defendant E. I. du Pont de Nemours and Company ("DuPont") based on six human diseases ("Linked Diseases") that they believe were caused by their exposure to ammonium perfluorooctanoate ("C-8" or "PFOA")

discharged from DuPont's Washington Works plant. (*Leach* Settlement Agreement ("S.A."); ECF No. 820-8.) Mr. Freeman suffered from testicular cancer, which is a Linked Disease. In the *Leach* Settlement Agreement, DuPont agreed not to contest that "it is probable that exposure to C-8 is capable of causing a" Linked Disease in the defined group of individuals that constitute the *Leach* Class. (S.A. § 1.25.) It is Mr. Freeman's burden to show that C-8 specifically caused his testicular cancer.

As did Carla Marie Bartlett, the first bellwether plaintiff, Mr. Freeman filed claims against DuPont for negligence and for punitive damages. To prove his negligence claim, Mr. Freeman must show that (1) DuPont owed him a duty of care; (2) DuPont breached its duty of care to him; and (3) that he suffered an injury as a proximate result of DuPont's breach of the duty of care. *Menifee v. Ohio Welding Prods., Inc.*, 15 Ohio St.3d 75 (Ohio 1984). To prove the existence of a duty, Mr. Freeman must show that a reasonably prudent person would have foreseen that injury was likely to result to someone in Mr. Freeman's position from DuPont's conduct. *Id.* at 77.

In Mrs. Bartlett's trial, the Court bifurcated the punitive damages stage of the trial, explaining at the Motions *in Limine* Hearing:

> This is the traditional way I would do it, and everyone else in this building would do it, and that is as far as matters of conduct, original liability on the claims, damages on the claims, and conduct that might give rise to a preliminary finding that would lead us to a punitive damages analysis would all be in the first phase.
>
> And to make a long story short, we have all the regular jury instructions. The jurors would get a definition of key words that go with punitives, damages, malice, all the different words that would follow. And then they will be given a simple interrogatory: Do you find the plaintiff has or has not met the standard? Yes or no.
>
> If the answer is no, the case is over. If the answer is yes, then we would go to phase two. And the only additional evidence would be matters relating to finances basically, ability to pay and non-ability to pay. Now I know the

> defendants have suggested another way. But it seems to me we have a lot of the same witnesses who would be there on the primary claims and on the issues that might give rise to punitive damages or might not. And if it did, I would call it a trifurcation, rather than a bifurcation. We would be bringing back a lot of the same witnesses to augment their testimony. It would seem to me that would be very unwieldy and expensive.

(ECF No. 4209 at 228.)

In the *Bartlett* trial, the Court instructed the jury as follows:

> **Instruction No. 33**
>
> **INTERROGATORY TO BE GIVEN**
>
> You will be presented with an interrogatory that will ask you whether you found in favor of Mrs. Bartlett on either of her claims. If you find for Mrs. Bartlett, you will be asked whether Mrs. Bartlett proved by clear and convincing evidence whether DuPont acted with actual malice and whether Mrs. Bartlett has presented proof of actual damages that resulted from those acts or failures to act of DuPont.
>
> **Instruction No. 34**
>
> **CLEAR AND CONVINCING EVIDENCE**
>
> "Clear and convincing" means that the evidence must produce in your minds a firm belief or conviction about the facts to be proved. It must be more than evidence that simply outweighs or overbalances the evidence opposed to it.
>
> **Instruction No. 35**
>
> **MALICE**
>
> "Malice" means a conscious disregard for the rights and safety of other persons that has a great probability of causing substantial harm. Malice may be inferred from conduct and surrounding circumstances.

(Final Jury Instructions at 35–36; Bartlett ECF No. 139.)

The *Bartlett* jury returned the interrogatory with its verdict, indicating that Mrs. Bartlett did not prove by clear and convincing evidence that DuPont acted with actual malice. The trial, therefore, did not go into the second phase on punitive damages.

DuPont moved for a new trial based upon, *inter alia*, the Court's decision to bifurcate the trial in the manner described above. (DuPont's Post Trial Mot., Bartlett ECF No. 151.) The Court denied DuPont's request (Dispositive Mot. Order No. 12, ECF No. 4306.) DuPont appealed that decision, which is currently pending before the United States Court of Appeals for the Sixth Circuit.

DuPont has now moved the Court for reconsideration of its bifurcation decision. (ECF No. 4400.) That motion is ripe for review. (ECF Nos. 4525, 4536.)

II.

A. Standard

Generally, reconsideration is available only in limited circumstances involving: (1) a clear error of law; (2) newly-discovered evidence; (3) intervening changes in controlling law; and (4) manifest injustice. *GenCorp., Inc., v. Am. Int'l./ Underwriters*, 178 F.3d 804, 834 (6th Cir. 1999). Motions for reconsideration are "not an opportunity to re-argue a case." *Sault Ste. Marie Tribe of Chippewa Indians v. Engler*, 146 F.3d 367, 374 (6th Cir. 1998).

B. Analysis

Mr. Freeman contends that DuPont is not entitled to reconsideration of this Court's bifurcation decision because it "has failed to present any valid, *much less compelling*, reason as to why this Court should reverse it prior rulings on these issues." (Pl.'s Mem. in Opp. at 3.) DuPont replies that, "there is no question that this Court has the inherent authority to reconsider its prior rulings, and may modify, vacate, or set aside such rulings when 'it is consonant with justice to do so.'" (Def.'s Reply at 1) (quoting *Stark v. Gov't Accounting Solutions, Inc.*, No. 2:07-cv-755, 2009 U.S. Dist. LEXIS 114902, at *3 (S.D. Ohio Dec. 9, 2009)).

The Court is inclined to review its decision. The first bellwether trial held in this MDL was a learning experience for all involved. Because this is the second bellwether trial, the Court has indicated to the parties that requests for reconsideration in this second case are not discouraged. The Court, however, is sensitive to the fact that much of the benefit of centralization of cases in an MDL is lost if the parties are permitted to ask for reconsideration of every decision with which they are dissatisfied. It is also this Court's desire, and indeed duty, to provide the parties – here over 3,500 of them – a timely resolution to their disputes.

III.

A. Standard

"Federal Rule of Civil Procedure 42(b) allows a district court to 'separate trial of any claim . . . or of any separate issue' to promote convenience and economy or to avoid prejudice." *Am. Trim, L.L.C. v. Oracle Corp.*, 383 F.3d 462, 474 (6th Cir. 2004). "A district court's decision to do so is within its sound discretion and 'will be affirmed unless the potential for prejudice to the parties is such as to clearly demonstrate an abuse of discretion.'" *Id.* (quoting *In re Bendectin Litig.*, 857 F.2d 290, 308 (6th Cir. 1988)).

As this Court has stated, "[b]ifurcation is the exception to the general rule that disputes should be resolved in a single proceeding and should be ordered only in exceptional cases." *Woods v. State Farm Fire & Cas. Co.*, No. 2:09-cv-482, 2010 U.S. Dist. LEXIS 35230, at *2 (S.D. Ohio 2010) (citation omitted). "Because the piecemeal trial of separate issues in a single lawsuit or the repetitive trial of the same issue in severed claims is not to be the usual course, the party seeking bifurcation has the burden of showing that concerns such as judicial economy and prejudice weigh in favor of granting the motion." *Id.* at *3 (citation and internal quotations omitted).

B. Analysis

As this Court recognized in *Woods*, *supra*, many other courts have also found that in cases such as this one, "the normal procedure is to try compensatory and punitive damage claims together with appropriate instructions to make clear to the jury the difference in the clear and convincing evidence required for the award of punitive damages." *Hangarter v. Provident Life & Acc. Ins. Co.*, 373 F.3d 998, 1021 (9th Cir. 2004) (citing *McLaughlin v. State Farm Mut. Auto Ins. Co.*, 30 F.3d 861, 871 (7th Cir. 1994)). In consideration of the prejudice that DuPont may suffer as a result of bringing information related to its ability to pay a damages award into the liability and compensatory damages stage of this case, the Court bifurcated that portion of this case in the *Bartlett* trial.

DuPont "asks the Court to reconsider and revise the procedure followed during the *Bartlett* trial. . . . [to] bifurcate Trial Plaintiff David Freeman's claims for punitive liability and damages (if the Court allows trial on punitive damages to proceed at all) from the compensatory liability damages phase of trial in this case." (Def.'s Mem. in Support of its Mot. for Reconsideration at 1.) DuPont contends that "[t]he admission of evidence related to punitive liability and damages during the compensatory liability damages phase" is (1) irrelevant, will unduly prejudice DuPont, confuse the jurors, waste time and cause unnecessary expense, and (2) DuPont has a substantive right to bifurcation under Ohio law.

1. Evidence

DuPont argues that "the majority of the evidence related to punitive liability or damages is not relevant to Mr. Freeman's compensatory damages claims." (Def.'s Mem. in Support of its Mot. for Reconsideration at 2.) Specifically, DuPont states:

> For example, and without limitation, this evidence relates to: (i) events that occurred after Mr. Freeman's April 2000 diagnosis and successful treatment, (ii)

> communications to which he was not a party, (iii) statements from DuPont that he did not hear or see or rely upon, (iv) prior litigation that has nothing to do with his alleged exposure to C8, and (v) alleged violations of TSCA and RCRA that are irrelevant to his claimed injuries.

Id. at 7. DuPont, however, does not expand on any of these arguments except those related to the first point, and indeed recognizes in footnotes that the other arguments are the subjects of motions *in limine*. On May 6, 2016, the Court held an all-day hearing on those motions *in limine*, and therefore, will not address them in this decision. (Mot. *in Limine* Transcript, ECF No. 4527.)

As to DuPont's first point, it contends:

> Because **Mr. Freeman's testicular cancer was diagnosed and successfully removed in April 2000, with no recurrence, DuPont's conduct and any knowledge it gained with respect to C-8 after April 2000 did not and could not have contributed or prevented Mr. Freeman's testicular cancer**, and is therefore not relevant to Mr. Freeman's compensatory liability and damages claims. At most, such evidence would only be relevant to the jury's consideration of the amount of punitive damages as part of the reprehensibility analysis, and should be confined to the second phase in any event . . . .

(Def.'s Mot. for Reconsideration at 2.) This Court disagrees.

DuPont's post-injury conduct is relevant to Mr. Freeman's compensatory damages claims. That is, Mr. Freeman alleges that he suffers from cancerphobia, which is "a claimed present injury consisting of mental anxiety and distress over contracting cancer in the future, as opposed to risk of cancer, which is a potential physical predisposition of developing cancer in the future." *Cantrell v. GAF Corp.*, 999 F.2d 1007, 1012 (6th Cir. Ohio 1993) (quoting *Lavelle v. Owens–Corning Fiberglas Corp.*, 30 Ohio Misc. 2d 14 (1987)). "Therefore, if Mr. Freeman proves that DuPont is negligent, he may not only recover damages, which may include emotional distress and pain and suffering that resulted from the diagnosis of cancer and the operation removing his cancerous testicle, but he may also recover damages for his mental anxiety and

distress over contracting cancer in the future." (Dispositive Mot. Order No. 14, Def.'s Mots. For Summ. J. on Freeman's Fraud and Emot. Distress Claims at 8, ECF No. 4458.) "To recover for the alleged cancerphobia, Mr. Freeman must show that he is aware that he in fact possesses an increased statistical likelihood of developing cancer, and that from this knowledge springs a reasonable apprehension which manifests itself as emotional distress." *Id.* Consequently, DuPont's post-2000 conduct of continuing to release C-8 into Mr. Freeman's drinking water is evidence that Mr. Freeman may use to support his claim that he had a statistical likelihood of developing cancer of which he was aware and that caused him emotional distress. It is also relevant to a determination of whether his apprehension was reasonable. For example, knowing of town meetings related to C-8, bottled water programs, studies, or complaints of violations of environmental law could support Mr. Freeman's burden of showing that his emotional distress was reasonable.

DuPont additionally argues that the post-2000 evidence should be excluded under Rule 42(b) "to eliminate the significant risk of unfair prejudice to DuPont *and* confusion of the issues while the jury considers liability for, and any amount of, compensatory damages." (Def.'s Mem. in Support of its Mot. for Reconsideration at 5.) However, as the Court just noted, the evidence is as relevant to determining the amount, if any, of compensatory damages as it is to punitive damages. Thus, the Court sees no prejudice to DuPont, nor confusion of the issues. The only alternative is an unwieldy and expensive trial requiring the parties to proffer evidence twice, which promotes the opposite of convenience and economy. This is particularly so in this case.

In its defense DuPont asserts that it "neither knew, nor should have known, that any of the substances to which [Mr. Freeman was] allegedly exposed were hazardous or constituted a reasonable or foreseeable risk of physical harm by virtue of the prevailing state of the medical,

scientific and/or industrial knowledge available to DuPont at all times relevant to the claims or causes of action asserted by [Mr. Freeman]." (DuPont's Answer to Bartlett Compl. ¶ 232; ECF No. 35.) Consequently, the parties both offer numerous expert witnesses to assist the jury in understanding the "prevailing state of the medical, scientific and/or industrial knowledge available to DuPont." Requiring these expert witnesses to testify at two separate proceedings – one for liability and one for punitive damages is not only expensive, but inconvenient, as well as a drain on judicial resources. Further, the evidence in support of one proceeding is very likely in support of the other.

Finally, and most tellingly with regard to the lack of prejudice to DuPont, the jury did *not* award punitive damages in the *Bartlett* trial where the same exact bifurcation procedure was utilized.

All that being said, the Court finds that because the evidence at issue is relevant to the compensatory damages portion of Mr. Freeman's negligence claim and not the liability portion, DuPont is entitled to a limiting instruction. The Court will provide to the jury an instruction that it is to consider DuPont's pre-injury conduct in its determination of whether a reasonably prudent corporation would have foreseen that injury was likely to result to someone in Mr. Freeman's position, and DuPont's post-injury conduct is to be considered when determining (a) whether Mr. Freeman is entitled to emotional damages, and (b) the amount if any to which he is entitled, for his claimed cancerphobia. This is premised upon Mr. Freeman being generally aware of DuPont's conduct after his testicular cancer was diagnosed and abated.

2. Ohio Law

DuPont argues that "a complete bifurcation of all punitive issues is **mandatory** under Ohio law in any tort action on request of one of the parties." (Def.'s Mem. in Support of its Mot.

for Reconsideration at 10.) DuPont relies upon Ohio Revised Code § 2315.21(B)(1)(a), which provides:

> The initial stage of the trial shall relate only to the presentation of evidence, and a determination by the jury, with respect to whether the plaintiff is entitled to recover compensatory damages for the injury or loss to person or property from the defendant. During this stage, no party is to present evidence that relates solely to the issue of whether the plaintiff is entitled to recover punitive or exemplary damages . . . .

Id.

Initially, the Court notes that this statute is not applicable because the evidence at issue does not "relate[] solely to the issue of" punitive damages. Instead, as the Court explained *supra*, the evidence relates to Mr. Freeman's compensatory damages claim as well. Therefore, the procedure adopted in this case fully comports with the state law.

Even if the statute did apply, it is displaced by Federal Rule of Civil Procedure 42(b), which provides for bifurcation at the Court's discretion. In *Patel Family Trust v. AMCO Ins. Co.*, No. 2:11-cv-1003, 2012 U.S. Dist. LEXIS 97412 (S.D. Ohio July 13, 2012), this Court addressed the issue stating that "Ohio law does not . . . govern the question of whether bifurcation of proceedings is proper in a given case." *Id.* at *2. The Court noted that "[b]ifurcation is a procedural matter addressed by Fed. R. Civ. P. 42(b) and, thus, Rule 42(b) is the controlling authority for assessing whether a federal court will grant a motion to bifurcate." *Id.* at *3 (citations omitted).

Furthermore, Rule 42(b) controls, despite the Ohio Supreme Court's decision in *Havel v. Villa St. Joseph*, 963 N.E.2d 1270 (Ohio 2012), holding that Section 2315.21(B) of the Ohio Revised Code created a substantive right. *Id.* "A state's characterization of its own rule as 'substantive' instead of 'procedural' must yield to the strong presumptive validity of the properly promulgated federal procedural rule, which will be upheld as controlling the procedure in the

federal court." *Id.* at *4 (citations and internal quotations omitted); *see also Piskura v. Taser Int'l, Inc.*, No. 1:10-CV-248, 2013 U.S. Dist. LEXIS 89682, at *5-6 (S.D. Ohio June 26, 2013) (rejecting argument that Ohio Supreme Court's characterization of § 2315.21(B) as substantive controlled federal court's analysis); *C.B. Fleet Co., Inc. v. Colony Specialty Ins. Co.*, No. 1:11-CV-0375, 2013 U.S. Dist. LEXIS 64961, at *19 n.10 (N.D. Ohio May 7, 2013) ("The *Patel* court also noted that, while Ohio tort reform statute O.R.C. § 2315.21(B)(1) requires bifurcation of the presentation of evidence of compensatory damages and punitive damages in Ohio state court, numerous cases have held § 2315.21(B) is 'entirely irrelevant to the issue of bifurcation [in federal court] because bifurcation is a procedural matter governed by federal law.'"); *Valley Ford Truck, Inc. v. Phoenix Ins. Co.*, No. 1:10-CV-02170, 2011 U.S. Dist. LEXIS 29210, at *2–3 (N.D. Ohio Mar. 7, 2011) (rejecting the defendant's argument that Ohio Rev. Code § 2315.21(B) applied because "[i]n determining whether to bifurcate a suit and order separate trials, state law is not controlling, even in diversity suits, because Federal Rule of Procedure 42(b) is a valid regulation of procedure."); *Nationwide Mut. Fire Ins. Co. v. Jahic*, 3:11-CV-00155, 2013 U.S. Dist. LEXIS 1798, at *4–5 (W.D. Ky. Jan. 7, 2013) (collecting "overwhelming precedent where federal courts sitting in diversity have applied Federal Rule of Civil Procedure 42(b) rather than state law to decide bifurcation issues"). Thus, Civil Rule 42(b), which leaves bifurcation to the discretion of the district court, governs this issue. *Id.*

IV.

Based on the forgoing, the Court **GRANTS IN PART AND DENIES IN PART**

Defendant's Motion for Reconsideration of the Court's Decision on Bifurcation in accordance with this Opinion and Order. (ECF No. 4400.)

IT IS SO ORDERED.

5-25-2016
DATE

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