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:

***David Freeman v. E. I. du Pont de Nemours and Company*, Case No. 2:13-CV-1103**

MOTIONS *IN LIMINE* ORDER NO. 10

Evidence Related to Mr. Freeman's Prior Conduct

This matter is before the Court on Plaintiff's Motion *in Limine* No. 18 to Exclude All Evidence Related to Plaintiff's Irrelevant Prior Conduct ("Motion *in Limine* Related to Alcohol, Marijuana, and Tobacco") (ECF No. 4434), and Defendant's Opposition to Plaintiff's Motion *in Limine* Related to Alcohol, Marijuana, and Tobacco (ECF No. 4477). For the reasons that follow, the Court **GRANTS IN PART AND DENIES IN PART** Plaintiff's motion.

I.

Plaintiff David Freeman's case is scheduled for trial on May 31, 2016, and is the second bellwether case to be tried in this multidistrict litigation ("MDL"). Carla Marie Bartlett was the first bellwether plaintiff, and her case was tried in September 2015. It is not disputed that Mr. Freeman is a member of a class ("*Leach* Class") of approximately 3500 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 into surface waters and unlined landfills from DuPont's Washington Works plant. (*Leach* Settlement Agreement ("S.A."); ECF No. 820-8.) C-8 is an organic fluorinated compound that DuPont utilized as a manufacturing aid in the production of Teflon™.

In 2000, Mr. Freeman was diagnosed with testicular cancer, which is a Linked Disease. (http://www.c8sciencepanel.org/study.html) ("[T]he Probable Link reports [are] presented in detail in scientific articles (follow link [on the C-8 Science Panel website to the] Study Publications."). After Mr. Freeman's oncologic surgeon performed a "right radical orchiectomy" ("surgical extraction of his right testis and teratoma"), Mr. Freeman "underwent a ten-year follow-up protocol which involved frequent observation via x-rays, CAT scans, and tumor markers." (Expert Report of Robert Bahnson, M.D., F.A.C.S. at 3, ECF No. 4311-1.)

By agreement of the parties, Mr. Freeman is not required to prove that C-8 is capable of causing his testicular cancer, but he is required to prove that C-8 caused his cancer. (S.A. § 3.3.) To meet his burden, Mr. Freeman has proffered the expert opinion of Robert Bahnson, M.D., F.A.C.S. Dr. Bahnson opined that:

> David Freeman's exposure to C-8 in his drinking water was a substantial contributing factor in bringing about the development of his testicular cancer. Further, his cancer in the right testis now puts him at substantial risk (approximately 15% chance) for developing cancer in the left testis. Additionally, because Mr. Freemam underwent (appropriately so) frequent repeated CT scanning as part of his 10 year observation protocol, his risk for developing other cancers has also increased.

Id. at 7. The Court found Dr. Bahnson's opinion admissible under Federal Rule of Evidence 702 and *Daubert v. Merrell Dow Pharmaceuticals, Incorporated*, 509 U.S. 579 (1993). (Evidentiary Motions Order No. 4, ECF No. 4518.)

DuPont has offered two specific causation experts, one of whom will be called at Mr. Freeman's trial: Tony Luongo, M.D. (Luongo Report, ECF No. 4310-1; Luongo Dep., ECF No. 4308-2), FRCSC, F.A.C.S., and Mark Schoenberg, M.D. (Schoenberg Report, ECF No. 4310-3; Schoenberg Dep., ECF No. 4308-1). The Court excluded as inadmissible under *Daubert* and Rule 702 portions of Dr. Luongo's and Dr. Schoenberg's opinions. Specifically, neither offered reliable affirmative opinions as to the cause of Mr. Freeman's cancer.

In preparation for Mr. Freeman's trial, the parties filed fifty-three motions *in limine*. On May 6, 2016, the Court held oral argument on the motions *in limine*. (Mots. *in Limine* Hearing Tr., ECF No. 4527.) After taking argument on Mr. Freeman's Motion *in Limine* Related to Alcohol, Marijuana, and Tobacco, the Court indicated that it would issue a written decision addressing the motion. *Id.* at 140–46.

II.

Neither the Federal Rules of Evidence nor the Federal Rules of Civil Procedure explicitly authorize a court to rule on an evidentiary motion *in limine*. The United States Supreme Court has noted, however, that the practice of ruling on such motions "has developed pursuant to the district court's inherent authority to manage the course of trials." *Luce v. United States,* 469 U.S. 38, 41 n.4 (1984). The purpose of a motion *in limine* is to allow a court to rule on issues pertaining to evidence prior to trial to avoid delay and ensure an evenhanded and expedient trial. *See Ind. Ins. Co. v. Gen. Elec. Co.,* 326 F. Supp. 2d 844, 846 (N.D. Ohio 2004) (citing *Jonasson v. Lutheran Child & Family Servs.,* 115 F.3d 436, 440 (7th Cir. 1997)). Notwithstanding this well-meaning purpose, courts are generally reluctant to grant broad exclusions of evidence *in limine*, because "a court is almost always better situated during the actual trial to assess the value

and utility of evidence." *Koch v. Koch Indus., Inc.*, 2 F. Supp. 2d 1385, 1388 (D. Kan. 1998); *accord Sperberg v. Goodyear Tire & Rubber Co.*, 519 F.2d 708, 712 (6th Cir. 1975).

To obtain the exclusion of evidence under such a motion, a party must prove that the evidence is clearly inadmissible on all potential grounds. *See Ind. Ins. Co.*, 326 F. Supp. 2d at 846; *Koch*, 2 F. Supp. 2d at 1388; *cf. Luce*, 469 U.S. at 41, n.4. "Unless evidence meets this high standard, evidentiary rulings should be deferred until trial so that questions of foundation, relevancy and potential prejudice may be resolved in proper context." *Ind. Ins. Co.*, 326 F. Supp. 2d at 846.

The Federal Evidence Rules at issue in Mr. Freeman's Motion *in Limine* Regarding the Emmett Study are 401, 402, 403, and 404(b). Rule 401 defines "relevant evidence" as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Fed. R. Evid. 401. Evidence Rule 402 provides that "[e]vidence which is not relevant is not admissible." Even if evidence is relevant, a court may still exclude the evidence, under Federal Rule of Evidence 403, which provides that, "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Fed. R. Evid. 403. Rule 404 provides, in relevant part, that "[e]vidence of other . . . acts is not admissible to prove the character of a person in order to show action in conformity therewith." Fed. R. Evid. 404(b).

III.

Mr. Freeman attended college nearly 40 years ago. Mr. Freeman testified at deposition that, while at college, he smoked marijuana "probably a period of time there for a year or so that it was, you know, regular weekend activity, that type of thing. Maybe during the week

occasionally. It's kind of a concentrated period, sort of experimented with it." (Freeman Dep. at 258, ECF No. 4312-4.) Mr. Freeman smoked marijuana one time since he left college. *Id.* at 259. Mr. Freeman smoked an occasional cigarette during college as well. *Id.* at 258. Mr. Freeman regularly drank beer in college; since that time he has a glass of wine or an occasional beer between two to four times per week in the evenings. *Id.* at 260–61; (Dep. of Veronica Freeman at 76, ECF No. 4398-1).

Mr. Freeman moves " *in limine*, for an Order excluding all evidence, references, testimony, comment, inference, document, or argument relating to [his] irrelevant prior conduct, specifically, [his] *de minimus* use of marijuana, tobacco, and alcohol." (Pl.'s Mot. *in Limine* Related to Alcohol, Marijuana, and Tobacco at 1.) DuPont responds that Mr. Freeman's "arguments ignore the clear relevance of his exposure to marijuana, tobacco, and alcohol in this case—where he has put his health and exposure history directly at issue and claims that his exposure to C8 as opposed to something else caused his testicular cancer and puts him at risk of future disease." (Def.'s Mem. in Opp. to Pl.'s Mot. *in Limine* Related to Alcohol, Marijuana, and Tobacco.)

A. Rules 401, 402

DuPont asserts that Mr. Freeman's use of marijuana and tobacco is relevant to his claim that DuPont's release of C-8 into the environment specifically caused his testicular cancer and that his use of marijuana, tobacco, and alcohol is relevant "because he has put his past and future health at issue in this case." *Id.* at 4, 6.

1. Specific Causation

DuPont argues that Mr. Freeman's "marijuana use in particular is relevant to his claim that DuPont specifically caused his injury because [DuPont's specific causation expert] Dr.

Luongo has identified marijuana use as a potential risk factor for testicular cancer, and it is one that was not addressed at all by Mr. Freeman's specific causation expert." *Id.* at 4. DuPont maintains:

> As this Court recognized in Dispositive Motions Order No. 5, "there is no dispute that as part of their cases-in-chief Trial Plaintiffs must prove that C8 specifically caused their Linked Diseases." . . . This Court has further recognized that DuPont need not prove, through expert testimony or otherwise, a *probable alternative explanation* for a plaintiff's Probable Link disease in order to defeat Plaintiff's causation case. Rather, analogizing to a bocce ball game, this Court has made clear that DuPont only needs to "create a triable issue as to whether the plaintiff's case proved causation." *See* Sept. 14, 2015 Trial Tr.

Id. at 5 (internal citations omitted). DuPont continues, asserting:

> DuPont's experts do not need to testify to 'a degree of medical certainty' in order to create a triable issue, and should not be limited in testifying about other potential explanations for Plaintiff's injury, or from criticizing Plaintiff's expert(s) for failing to even take into consideration other potential explanations for Plaintiff's injury—*e.g.*, in this case, Plaintiff's admitted use of marijuana.

Id. DuPont notes that Mr. Freeman's "argument here is just a variation on the same argument that Plaintiff advanced, and lost, in the first bellwether trial in attempting to preclude DuPont from introducing evidence of Mrs. Bartlett's morbid obesity as a risk factor and possible alternative explanation for her kidney cancer." *Id.* n.4.

While DuPont makes several accurate statements, the conclusions it draws from them are mistaken. First, DuPont is correct that because it is Mr. Freeman's burden to prove specific causation, DuPont's expert witnesses do not need to testify to 'a degree of medical certainty' in order to create a triable issue. However, for the expert to be able to "testify[] about other potential explanations for Plaintiff's injury, or from criticizing Plaintiff's expert(s) for failing to even take into consideration other potential explanations for Plaintiff's injury" there must be reliable scientific evidence to support the alternatives. Indeed, this is why DuPont was permitted to offer evidence of obesity in the *Bartlett* trial, and to cross Mrs. Bartlett's specific causation

expert as to obesity. There was no dispute among any of the experts that obesity was an accepted, well known risk factor for kidney cancer supported by reliable scientific evidence.

DuPont offers the following as support for the proposition that marijuana is a known risk factor for testicular cancer:

> DuPont's expert, Dr. Tony Luongo, has opined that risk factors that have been linked to testicular cancer include "maternal lifestyle/exposures, marijuana use, microcalcification, geography, ethnicity, infertility, and AIDS." . . . Among other references, Dr. Luongo cites Stevenson, *et al.*, *Epidemiology and Diagnosis of Testis Cancer*, 42:3 Urological Clinics of North America 269 (2015) ("Stevenson Article"), which states that "[t]he main substances with a potential association with testicular cancer include organochlorines, olychlorinated biphenyls, polyvinyl chlorides, phthalates, marijuana, and tobacco." *Id.* at 271 (emphasis added).

Id. at 3. The Court is unpersuaded.

First, Dr. Luongo does not "opine that marijuana is a risk factor" for testicular cancer, but instead is one that has been *proposed* to be a risk factor:

> Some of the well-established risk factors for testicular cancer include cryptorchidism, family history of testicular cancer, a personal history of testicular cancer, and intratubular germ cell neoplasia (ITGCN) (Stephenson 2015). Other risk factors for testis cancer have been *proposed* including, but not limited to, maternal lifestyle/exposures, marijuana use, microcalcification, geography, ethnicity, infertility, and AIDS (Stevenson et al 2015).

(Luongo Report at 2.) (emphasis added).

Second, the article on which Dr. Luongo relies offers no analysis or scientific data supporting the assertion that marijuana is a risk factor for testicular cancer, offering in total:

> There is a growing body of evidence implicating toxic exposures and an increased risk of testicular cancer. The main substances with a potential association with testicular cancer include organochlorines, polychlorinated biphenyls, polyvinyl chlorides, phthalates, marijuana, and tobacco.

(Stevenson Article at 3.) The article cites to two articles for this proposition: 13. Meeks JJ, Sheinfeld J, Eggener SE, *Environmental toxicology of testicular cancer*, Urol Oncol 2012;30:

212–5 and Lacson JC, Bernstein L, Cortessis VK, *Potential impact of age at first marijuana use on the development of nonseminomatous testicular germ cell tumors*, Cancer 2013;119:1284–5. Neither of these articles, however, offer any support for the proposition that marijuana or tobacco are risk factors for testicular cancer.

The Lacson, Bernstein, Cortessis note is not a journal article, but rather a "correspondence" that directs its attention to the age of the first use of marijuana, suggesting that "subjects who started using marijuana at age 18 years or younger" may have a higher risk of developing a certain type of testicular cancer. However, the authors indicated that the impact of first marijuana use "data were too sparse to support meaningful analyses" so the results "were not presented in our recently published study."

The Meeks article is reported in a scholarly journal, and indicates that "[c]hronic smoking of marijuana and its active chemical 9-tetrahydrocannabinol (THC) has consistently been shown to increase the risk of developing testicular cancer." And with regard to tobacco, the article states that "the relationship between cigarette smoking and [testicular cancer] remains less clear." The author then compares two studies, one that "did not find a significantly increased risk with cigarette smoking (OR 1.18, 95% CI 0.95–1.46)" and the other that found "an increased risk of [testicular cancer] in men with a greater than 12 pack-year history (OR 1.96, 95% CI: 1.12– 4.77) and for those smoking for more than 21 years (OR 3.18, 95% CI 1.32–7.64)."

These articles are not helpful to DuPont's position. First, while DuPont is not required in this context to offer expert testimony to a reasonable degree of medical certainty, the evidence still must survive Rule 702/*Daubert* scrutiny. (Mots. *in Limine* Hearing Tr. at 145) ("THE COURT: But this is pure *Daubert.* I mean there has to be a scientific foundation. Th[ere] has to be reliability. There has to be something that goes with this besides a flat statement."). These

articles do not support the position that any use of tobacco and marijuana (or alcohol) are risk factors for Mr. Freeman's testicular cancer.

Second, even if admissible, the evidence presented does not provide any support for the proposition that Mr. Freeman's limited use of marijuana and tobacco nearly 40 years ago is a risk factor for his testicular cancer. Mr. Freeman did not first smoke marijuana when he was under 18, was not a chronic marijuana smoker, and did not have a greater than 12-pack-year history or smoke for more than 21 years.

For these same reasons, it is not appropriate for DuPont, as it requests, to "be able to cross-examine Plaintiff's causation expert regarding his failure to consider whether Plaintiff's use of tobacco and marijuana could have played a part in his testicular cancer.[1]" (Def.'s Mem. in Opp. at 5–6.)

2. Past and Future Health

DuPont next contends:

> Mr. Freeman's "use of marijuana, tobacco, and alcohol are also relevant because he has put his past and future health at issue in this case. . . . The state of his past and future health is and will be impacted by the substances he has and currently does put into his body. This is especially true where, as here, Plaintiff claims that he remains at an increased risk for cancer as a result of DuPont's alleged conduct."

Id. at 6–7. DuPont then concludes:

> Because Plaintiff has directly put at issue his future health and his relative cancer risk, evidence of his past use of marijuana, tobacco, and alcohol are relevant. *See United States v. Bender*, 622 Fed. App'x. 520, 524-525 (6th Cir. 2015) (affirming district court's admission of past drug use—over a Rule 403 objection—where the district court found that "[the defendant] had put his concerns about his health at issue."); *Ballard v. Union Carbide Corp.*, 2012 U.S. Dist. LEXIS 79853, at *10-14 (S.D. W. Va. June 8, 2012) (permitting discovery on plaintiffs' history of, *inter alia*, drug, tobacco, and alcohol use where plaintiffs sought medical monitoring

[1] The Court notes that DuPont's own specific causation expert, Mark Schoenberg, M.D., does not list marijuana or tobacco use a risk factor for testicular cancer.

> related to emissions at metals plant, specifically asserting increased risk of, *inter alia*, cancer, and defendants argued that plaintiffs had put their health at issue and "that they must be able to conduct discovery into any factors that could have caused the plaintiffs' risk of disease independent of the plaintiffs' alleged exposure to substances emitted").

Id. at 7. DuPont's arguments are not well taken.

The cases upon which DuPont relies offer no support. In *Bender* a criminal defendant who, while on bail "failed to appear in court as ordered and was charged with violating 18 U.S.C. § 3146(a)(1), which prohibits knowingly failing to appear." *Bender*, 622 Fed. Appx. at 525. The defendant "asserted an affirmative defense that uncontrollable circumstances prevented him from appearing, 18 U.S.C. § 3146(c), namely his concerns about his health." *Id.* The court admitted "evidence that [the defendant] Bender had tested positive for marijuana and cocaine use while on bail to show that Bender was not truly concerned about his health." *Id.* And, *Ballard* is likewise no help. *Ballard* addresses discovery, not admissibility of evidence. Like the defendant in *Ballard*, DuPont was permitted to conduct discovery into any factors that it believed could have caused Mr. Freeman's cancer. That is a separate and distinct inquiry from admissibility considerations.

At the Motions *in Limine* Hearing, DuPont offered an additional reason that it believed Mr. Freeman's alcohol use was relevant:

> MS. NIEHAUS: Well, there is an additional point of relevancy I think beyond just the specific causation of testicular cancer, in fact the circle we've been talking about with giving the complete picture of the plaintiff and his health to the jury. . . . Well, I think the plaintiffs are going to try to paint Mr. Freeman as a model of clean living. He works out. He eats well. The fact is that he lives like a normal person, and they shouldn't be permitted to preclude that type of evidence, to put all his -- his entire lifestyle –
>
> . . . .
>
> THE COURT: I would be more inclined if we're getting this, you know, you are Mr. Perfect. If we're getting normal, I don't think the alcohol is going to have anything to do with it. It could be there for rebuttal. We will see how this goes.

(Mot. *in Limine* Hearing Tr. at 140–41.) Thus, at this point, the alcohol use is excluded. The Court will "see how the direct examination goes, and [may] consider it [then]." *Id.* at 142

B. Rule 403

Mr. Freeman argues that, even if the evidence regarding alcohol, tobacco, and marijuana were somehow relevant, it is, *inter alia*, unfairly prejudicial. (Pl.'s Mot. at 5) (citing *Cook v. Hoppin*, 783 F.2d 684, 689 (7th Cir. 1986) (for the proposition that evidence is unfairly prejudicial where it "will induce the jury to decide the case on an improper basis, commonly an emotional one, rather than on the evidence presented."). This Court agrees.

Any mention of the use of marijuana or tobacco use in the distant past would be unfairly prejudicial. As the Court explained at the Motions *in Limine* Hearing:

> But I also want to go back to the basic 403 analysis. When we are talking about particularly marijuana, because we're talking about a crime in Ohio, there is a lot of prejudicial effect of this. So there has to be some additional showing of probative value, some scientific validity, before I would consider this because it was something that I would assume there would be a great chance of the jurors looking at this for the wrong reason. And also alcohol use to a point. I think that's a little bit less prejudicial. But I want some scientific showing before that can be used. But I will give you a chance to supplement it.

(Mot. *in Limine* Hearing Tr. at 145–46) (DuPont has chosen to forego offering any additional support).

Because the Court has left open the possibility of permitting Mr. Freeman's alcohol use to come in for rebuttal, it will make its 403 determination if that situation presents itself at trial.

C. Rule 404(b)

Rule 404 provides, in relevant part, that "[e]vidence of a crime, wrong, or other act is not not admissible to prove the character of a person in order to show action in conformity therewith." Fed. R. Evid. 404(b). Mr. Freeman argues that, "[p]ursuant to Federal Rule of Evidence 404(b), DuPont should be precluded from arguing, inferring, commenting on, or

offering the evidence at issue, as such evidence would be an improper use of character evidence." (Pl.'s Mot. at 8.) Mr. Freeman contends that "any type of evidence and argument about Mr. Freeman's use of marijuana or tobacco nearly 40 years ago, or his occasional enjoyment of wine or beer is the quintessential improper use of character evidence." (Pl.'s Mot. at 9.) DuPont responds that "Rule 404(b) explicitly recognizes, evidence of other acts 'may be admissible for another purpose[.]'" (Def.'s Mem. in Opp. at 10.) DuPont maintains that in this case, it does not intend to use the evidence to suggest an improper inference of Mr. Freeman's character, but instead "for the purpose of defending against Plaintiff's claim of specific causation and his claimed past and future injuries." *Id.*

The Court, however, found that Mr. Freeman's use of marijuana and tobacco are not relevant to DuPont's defenses. As for Mr. Freeman's use of alcohol, it too does not appear to be relevant to any DuPont defense and will be limited to possible rebuttal testimony as explained above. Thus, any use of this irrelevant evidence would not be probative of a material issue other than character.

IV.

In accordance with this Opinion and Order, the Court **GRANTS IN PART AND DENIES IN PART** Mr. Freeman's Motion *in Limine* Related to His Prior Conduct. (ECF No. 4434.) As with all *in limine* decisions, this ruling is subject to modification should the facts or circumstances at trial differ from those which have been presented in the pre-trial motions and memoranda.

IT IS SO ORDERED.

5-27-2016
DATE

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