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 P. Deavers

This document relates to:

***Bartlett v. E. I. du Pont de Nemours and Company*, Case No. 2:13-CV-0170**

MOTION IN LIMINE ORDER NO. 5

Defendant's *Motion in Limine* No. 20, to Exclude Deposition Testimony and Exhibits

This matter is before the Court on Defendant's *Motion in Limine* No. 20, to Exclude Documents Referenced or Testimony Elicited Through Improper Questioning of Witnesses with No Personal Knowledge ("Motion *in Limine* Regarding Lack of Personal Knowledge Testimony") (ECF No. 4102) as that motion was narrowed at the August 24, 2015 Motions *in Limine* Hearing and the September 11, 2015, Final Pretrial Conference; Plaintiff's Memorandum in Opposition (ECF No. 4163); and Defendant'S Trial Brief to Exclude Documents Referenced or Testimony Elicited Through Improper Questioning of Witnesses with No Personal Knowledge ("Trial Brief") (ECF No. 4222); Deposition Testimony of John H. Little (ECF No. 4034-7) and Kathleen Forte (ECF No. 4034-3); and the parties' line-by-line objections to the deposition testimony.

I.

The litigation between the parties in this multidistrict litigation ("MDL") began in 2001 in a class action in West Virginia state court captioned *Leach v. E. I. du Pont de Nemours & Co.*, No. 01-C-698 (Wood County W. Va. Cir. Ct.) ("*Leach* Case"). The *Leach* Case was concluded in 2005 when the parties finalized a class-wide settlement. (*Leach* Settlement Agreement; ECF No. 820-8.) The plaintiffs in this MDL all bring, *inter alia*, personal injury claims against Defendant E.I. du Pont de Nemours and Company ("DuPont") for injuries they believe were caused by their exposure to ammonium perfluorooctanoate ("C-8" or "PFOA") discharged from DuPont's Washington Works plant. Plaintiff Carla Marie Bartlett suffered from kidney cancer that she believes was caused by her ingestion of C-8 in her drinking water.

DuPont's position is that it "never had any knowledge or expectation . . . that there was *any* likelihood of *any* harm to community members at the relatively low PFOA levels found outside the plant." (DuPont's Mem. in Opp. to Pls.' Third Mot. for Summ. J. at 14); (*see also* DuPont's Answer to Bartlett Compl. ¶ 232; ECF No. 35). DuPont maintains that the evidence shows that it "exhibited a proactive concern for safety in its use of PFOA at its Washington Works plant, consistently going beyond the regulatory requirements and the typical conduct of most chemical companies." (DuPont's Mot. for Summ. J. on Punitive Damages at 1–2; ECF No. 2825.)

On August 24 and 25, 2015, the Court heard oral argument on the parties' forty (40) motions *in limine*. The Court addressed DuPont's Motion *in Limine* Regarding Lack of Personal Knowledge Testimony at that hearing.

On September 3, 2015, the parties submitted their proposed final pretrial order to the Court. In that proposed order, the parties informed the Court that there were over 11,000

exhibits that were objected to on either side. On September 4, 2015, the Court issued Pretrial Order No. 38, in which it stated that it was impractical, if not impossible, to resolve all of the exhibit objections in the nine days remaining before trial. The Court indicated that it would try the case the old-fashioned way and rule on the exhibits at the end of trial. The parties instead chose to pare down their objections to several hundred exhibits that the Court could realistically resolve at the final pretrial conference.

On September 10, 2015, the Court held the final pretrial conference. The conference lasted well into the evening, and the Court resolved the parties' objections to the exhibits. The Court continued the final pretrial conference on Friday, September 12, 2015.

At the continued final pretrial conference, the Court took argument on DuPont's objections to the deposition testimony that the parties planned to utilize in opening statements and/or the first few days of trial. The objections spanned thousands of pages of testimony. The parties offered the deposition testimony of Bernard Reilly, a senior DuPont environmental attorney, Washington Works Plant Manager John H. Little, and DuPont's Vice President of Public Affairs Kathleen Forte. The Court, again working into the evening, was able to consider only about one-third of the objections.

The following day, Saturday September 12, 2012, the Court held a telephone conference with the parties to make its ruling on the nearly 600 pages of remaining objections to the deposition testimony of Mr. Little and Ms. Forte. The Court, while indicating on the record that it did not intend to chastise counsel, articulated the impracticality of the situation in which it found itself. The trial was scheduled to begin in two days and Mrs. Bartlett had no ruling on the admissibility of evidence she would like to utilize early in the trial. Therefore, in *lieu* of going line-by-line as it had done the previous day at the final pretrial conference, the Court made

certain general rulings, memorialized below, and indicated that it would accept argument during trial as needed. Thus, the Court granted in part and denied in part DuPont's Motion *in Limine* Regarding Lack of Personal Knowledge Testimony.

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 in advance of trial in order to avoid delay and ensure an evenhanded and expeditious 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)).

DuPont moves under Rules 401, 402, 403, and 602. Under Rule 602 of the Federal Rules of Evidence, "[a] witness may testify to a matter only if evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter." Fed. R. Evid. 602. Further, "irrelevant evidence is not admissible." Fed. R. Evid. 402. To be relevant, evidence must make a fact of consequence in determining the action more or less probable. Fed. R. Evid. 401. Under Rule 403, even relevant evidence may be excluded if "its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence." Fed. R. Evid. 403.

III.

DuPont contends that counsel for Mrs. Bartlett inappropriately read into the deposition record excerpts from documents that were unknown to deponents Mr. Little and Ms. Forte, and then asked these witnesses to confirm they were was read accurately or to provide interpretations or reactions to the excerpt. DuPont posits that Mrs. Bartlett's counsel used these "improper questioning tactics" in an effort to "introduce documents or portions of documents" about which Mr. Little and Ms. Forte had no personal knowledge. (Def.'s Mot. *in Limine* Regarding Lack of Pers. Knowledge Testimony at 1) (relying on Fed. R. Evid. 602). DuPont continues, asserting that "Plaintiff should not be given license to distract the jury or waste precious judicial resources by engaging in this 'time-consuming pursuit' of questioning about documents that Plaintiff acknowledges DuPont employees have not seen," which would "only serve to confuse the issues, mislead the jury, and waste time." (DuPont's Trial Brief at 6.)

Mrs. Bartlett responds that "[d]uring the depositions of these witnesses who held or still hold these high-level management, supervisory, or executive positions in the company, the witnesses were asked about documents and data reflecting both DuPont's and the public's knowledge of the dangers of C-8 throughout various points in time." (Pl.'s Mem. In Opp. at 3.) Mrs. Bartlett continues:

> [T]he challenged testimony goes to the heart of one of DuPont's central defenses in this case—that it did not know and should not have known about the dangers of C-8. The documents at issue in DuPont's Motion all relate to the extent to which numerous individuals—both inside and outside of DuPont—were aware of the dangers of C-8 during the very timeframe in which DuPont claims it had no knowledge of these dangers and that no "reasonable" person would allegedly have perceived any such danger at any time. These documents were used to elicit relevant testimony on the topic of DuPont's knowledge and notice of C-8 health effects and related dangers during each of the depositions at issue.

Id. at 4. Mrs. Bartlett's argument is well taken.

Initially, the Court notes that the exhibits it reviewed about which Mr. Little and Ms. Forte were questioned, are all exhibits that will be admitted into evidence through other witnesses or by admissions. Therefore, the fact that these documents will come into evidence somewhat alleviates DuPont's concern that Mrs. Bartlett is utilizing the questioning of these deponents to improperly describe or offer such documents. Under Evidence Rule 403, the risk of unfair prejudice from use of these documents is minimal.

Next, as set out *supra*, the general rule is that a witness cannot be questioned about a document on which she has no personal knowledge. However, there are exceptions. Here, Mr. Little and Ms. Forte were high-level DuPont employees who were both involved with C-8 and not simply strangers to the issues referenced in the documents. Mr. Little was the Washington Works Plant Manager during the time Mrs. Bartlett was diagnosed with kidney cancer through 2000, when he had "[d]irect and lead over 2,000 people at the largest site in DuPont, making polymers and resins for ten global supply chains responsible for over $2 billion of annual revenue.'" (Dep. Tr. of John Little at 25–27; ECF No. 4034-7.) Mr. Little expressly testified that he relied upon the experts at DuPont to give him accurate information for disclosure to the public and that as Plant Manager, he was the "face of DuPont in the community." *Id.* at 67, 72–74. Ms. Forte was in charge of public relations at DuPont's corporate headquarters, was a vice president of DuPont, and was responsible for speaking about the issue of C-8. (*See generally* Dep. Tr. of Kathleen Forte; ECF No. 4034-3.)

Because Mr. Little and Ms. Forte were charged with conveying DuPont's position on C-8 to DuPont employees and the public, the extent to which they were not made aware of information within DuPont's possession and/or information in the public domain regarding the alleged dangers of C-8 is relevant to Mrs. Bartlett's claim that DuPont attempted to suppress the

information or prevent it from reaching individuals within the company who would be asked to make key decisions on C-8. Thus, Mrs. Bartlett's line of questioning is appropriate in this situation because these witnesses' lack of knowledge is relevant and probative of key issues in this case. *See, e.g.*, *In re A.H. Robbins Co., Inc.*, 575 F. Supp. 718, 726 (D. Kan. 1983) ("the mere fact of their ignorance on a particular topic is often relevant and material in unraveling the corporate decisionmaking process"). The Court also finds that presentation of this relevant and probative evidence is not a waste of time or judicial resources.

IV.

Based on the foregoing, the Court, in accordance with this Opinion and Order, **GRANTS IN PART AND DENIES IN PART** DuPont's Motion *in Limine* Regarding Lack of Personal Knowledge Testimony. (ECF No. 4102.)

IT IS SO ORDERED.

10-1-2015
DATE

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