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:

***Kenneth Vigneron, Sr. v. E. I. du Pont de Nemours and Company*, Case No. 2:13-CV-136**

DISPOSITIVE MOTIONS ORDER NO. 21

Defendant's Motion for Summary Judgment Related to Specific Causation

This matter is before the Court on Defendant's Motion for Summary Judgment Based on Specific Causation (ECF No. 4653), Plaintiff's Memorandum in Opposition (ECF No. 4686), and Defendant's Reply in Support of its Motion (ECF No. 4699). For the reasons that follow, the Court **DENIES** Defendant's Motion.

I.

Plaintiff Kenneth Vigneron, Sr. alleges that he is a member of the class ("*Leach* Class") of 3500-plus individuals who are permitted under a contractual agreement ("*Leach* Settlement Agreement") to file personal injury or wrongful death claims against Defendant E. I. du Pont de Nemours and Company ("DuPont") that they believe were caused by their exposure to ammonium perfluorooctanoate ("C-8") discharged from DuPont's Washington Works plant. (*Leach* Settlement Agreement ("S.A."); ECF No. 820-8.) In 2005, the *Leach* Settlement

Agreement established a panel of epidemiologists ("Science Panel") to study human disease among the *Leach* Class. *Id.* §§ 12.2.1, 12.2.2. In 2011 and 2012, the Science Panel issued the conclusions to their study in Probable Link Findings for six human diseases ("Linked Diseases"): kidney cancer, testicular cancer, thyroid disease, ulcerative colitis, diagnosed high cholesterol (hypercholesterolemia), and pregnancy-induced hypertension and preeclampsia.

The *Leach* Settlement Agreement requires application of the Probable Link Findings to the individual plaintiffs in this MDL who prove that they are members of the *Leach* Class and that they suffer or suffered from a Linked Disease. Application of the Probable Link Finding establishes that, "based upon the weight of the available scientific evidence, it is more likely than not that there is a link between exposure to C-8 and [the Linked Disease] among Class Members," and DuPont is prohibited from challenging whether "it is probable that exposure to C-8 is capable of causing" that Linked Disease. (S.A. at §§ 1.49, 3.3, 12.2.1, 12.2.2.) DuPont retained the right to contest whether "it is probable that exposure to C-8 caused" the Linked Disease, and to assert any other defenses not barred by the *Leach* Settlement Agreement. (S.A. §§ 1.60, 3.3.)

The Court has tried two bellwether cases in this MDL. The first, chosen by DuPont, was a kidney cancer case brought by Carla Marie Bartlett (Case No. 2:13-cv-170), and the plaintiffs picked a testicular cancer case filed by David Freeman (Case No. 2:13-1103), which was tried second. In both of those cases the jury found that DuPont was negligent in releasing the C-8 from its Washington Works plant, and that DuPont's acts or failures to act were a substantial factor in bringing about the plaintiffs' injuries and without which the injuries would not have occurred. (Bartlett Jury Instructions and Verdict, Bartlett ECF Nos. 139, 142; Freeman Jury

Instructions and Verdict, Freeman ECF Nos. 97, 102). In *Freeman*, the jury also found the Mr. Freeman proved by clear and convincing evidence that DuPont acted with couscous disregard for the rights and safety of other persons that had a great probability of causing substantial harm.

Mr. Vigneron's case is the first non-bellwether case selected for trial, which is scheduled for November 14, 2016. As did Mrs. Bartlett and Mr. Freeman, Mr. Vigneron brings claims for negligence and punitive damages. DuPont moves for judgment as a matter of law on Mr. Vigneron's negligence claim. That motion is ripe for review.

II.

Summary judgment is appropriate "if the movant shows that there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The Court may therefore grant a motion for summary judgment if the nonmoving party who has the burden of proof at trial fails to make a showing sufficient to establish the existence of an element that is essential to that party's case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

The "party seeking summary judgment always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions" of the record which demonstrate "the absence of a genuine issue of material fact." *Id.* at 323. The burden then shifts to the nonmoving party who "must set forth specific facts showing that there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986) (quoting Fed. R. Civ. P. 56(e)). "The evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor." *Id.* at 255 (citing *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 158-59 (1970)). A genuine issue of material fact exists "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson*, 477 U.S. at 248. *See*

also Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986) (the requirement that a dispute be "genuine" means that there must be more than "some metaphysical doubt as to the material facts"). Consequently, the central issue is "'whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.'" *Hamad v. Woodcrest Condo. Ass'n*, 328 F.3d 224, 234-35 (6th Cir. 2003) (quoting *Anderson*, 477 U.S. at 251-52).

III.

It is not disputed that Mr. Vigneron is a member of the *Leach* Class and that he suffered from testicular cancer, which is a Linked Disease. Thus, Mr. Vigneron is entitled to the application of the Probable Link Finding, which scientifically proves that it is more likely than not that there is a link between his exposure to C-8 and his testicular cancer. Based on this scientific evidence, DuPont agreed not to challenge whether it is probable that exposure to C-8 is capable of causing Mr. Vigneron's testicular cancer. DuPont's challenge lies in Mr. Vigneron's ability to show that C-8 actually caused his testicular cancer. As to that inquiry, DuPont argues:

> Trial Plaintiff Kenneth Vigneron, Sr. cannot meet his burden to prove that exposure to drinking water containing C-8 from DuPont's Washington Works facility specifically caused his testicular cancer for several independent reasons. *First*, Plaintiff has insufficient evidence to establish specific causation under Ohio law because the proffered expert opinions of his sole specific causation expert, Dr. Robert Bahnson, are unreliable, irrelevant, and inadmissible in their entirety. *Second*, even if Dr. Bahnson's opinions were admissible, which they are not, Plaintiff still cannot prove that his testicular cancer "more likely than not" resulted from exposure to C-8.

(Def.'s Mot. at 1.)

A. Specific Causation Expert Opinion

DuPont argues that it is entitled to summary judgment on Mr. Vigneron's negligence claim because the proffered expert opinion of his sole specific causation expert, Robert Bahnson

M.D., F.A.C.S., is inadmissible in its entirety. This Court, however, has considered and rejected this argument in its Evidentiary Motions Order No. 9.[1] ("EMO 9.") In EMO 9, the Court concluded that Dr. Bahnson's specific causation report and testimony constitute relevant, reliable, and admissible evidence.

B. Burden of Proof

With regard to DuPont's second argument, it contends that, "[e]ven if the Court permits Plaintiff to introduce Dr. Bahnson's unreliable differential etiology opinion, Plaintiff still cannot meet his burden of proving specific causation under Ohio law," which requires a plaintiff to "prove that it is 'more likely than not' that he would not have developed testicular cancer but for his exposure to C-8." (Def.'s Mot. at 4) (citing, *inter alia*, Ohio Jury Instruction § 405.01) Specifically, DuPont contends that (1) Mr. Vigneron "cannot make this showing if his testicular cancer is as reasonably attributable to a cause (whether known or unknown) for which DuPont is not liable," (2) Dr. Bahnson's "differential etiology alone is insufficient to prove specific causation unless 'all' other potential causes of the disease can be eliminated," and (3) Mr. Vigneron focuses on the wrong standard for causation, leaving DuPont's dispositive motion unrebutted. (Def.'s Mot. at 4–5); (Def.'s Reply at 2–5).

1. Multiple Possibilities Cases

DuPont maintains that Mr. Vigneron cannot meet his burden to "prove that it is 'more likely than not' that he would not have developed testicular cancer but for his exposure to C-8," stating:

> Plaintiff cannot make this showing if his testicular cancer is as reasonably attributable to a cause (whether known or unknown) for which DuPont is not liable. *See, e.g., Herman v. Cattron, Inc.*, 227 F. Supp. 2d 774, 778-780 (N.D.

[1] DuPont did not have the benefit of this Court's decision in EMO 9 because it was issued after DuPont had filed its motion related to specific causation.

> Ohio 2002) (granting motion for summary judgment on causation because the "evidence is such that the cause may be as reasonably attributed to non-liability [as] liability"); *Frauenthal v. Burke*, 1991 Ohio App. LEXIS 1223, at *5-6 (Mar. 21, 1991) ("If the cause of [injury] may be as reasonably attributed to things for which [defendant] is not responsible as to things for which he is responsible, [plaintiff] has not sustained his burden of proving that his alleged damages are a proximate result of the [defendant's] negligence . . . .").

(Def.'s Mot. at 4–5) (omissions and substitutions DuPont's argument is not well taken.

The Court disagrees with DuPont's contention that Ohio law prevents Mr. Vigneron from meeting his causation burden of proof because his testicular cancer "is as reasonably attributable to a cause (whether known or unknown) for which DuPont is not liable." The two cases upon which DuPont relies are not pertinent to the instant analysis because they deal with what the *Herman* court called "multiple possibilities" cases, where the *cause of the injury* is known but the *origination of the cause* has multiple possibilities. The *Herman* court explains:

> The leading case on the issue of proximate cause and multiple possibilities is *Gedra v. Dallmer Co.*, 153 Ohio St. 258 (1950). In that case plaintiff sought damages for a rat bite incurred when she was a patron in the defendant's theater. The record showed that there were nearby restaurants and grills which served food and were breeding places for rats. The theater owner, the court pointed out, had no control over those premises. Thus, it was
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> > equally certain that the rat could have originated from premises over which defendant had no control and that it got into defendant's theater without any negligence on the part of defendant. In such a situation the law is that there can be no guessing by either court or jury. There must be some evidence, direct or inferential, that the agency which produces an injury is the result of the negligence of a defendant before he can be held liable therefor, and *if the cause of an injury to a plaintiff may be as reasonably attributed to an act for which the defendant is not liable as to one for which he is liable*, the plaintiff has not sustained the burden of proving that his injury is the direct result of the defendant's negligence. . . .
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> 153 Ohio St. 258 (citation omitted).

Herman, 227 F. Supp. 2d at 777–78 (emphasis added; parallel citation omitted).

In the instant action, there are not multiple possibilities as to the origination of the C-8 that Mr. Vigneron drank in his water. It is not disputed that DuPont's release of the C-8 from its Washington Works plant contaminated Little Hocking Water Association (LHWA") and that LHWA supplied Mr. Vigneron's home with water. There is no allegation that some other company also released C-8 that contaminated the water supply distributed by LHWA.

2. Dr. Bahnson's Specific Causation Opinion

DuPont again addresses Dr. Bahnson's specific causation opinion, stating that "[e]ven if the Court determined that Dr. Bahnson's 'differential etiology' opinion was admissible under the Federal Rules of Evidence, it is still insufficient to meet the 'more likely than not' causation standard required by Ohio law. (Def.'s Mot. at 5) (citing *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 596 (1993) and *Conde v. Vesicol,* 24 F.3d 809, 813 (6th Cir. 1994) for the proposition "that a court should grant summary judgment where marginal causation evidence is admissible, but not sufficient, to meet the plaintiff's burden")). DuPont continues:

> Under Ohio law, a differential etiology alone is insufficient to prove specific causation unless "all" other potential causes of the disease can be eliminated. *See Finley v. First Realty Prop. Mgmt.*, 924 N.E.2d 378, 386 (Ohio Ct. App. 9th Dist. 2009) (affirming grant of summary judgment where the defendant's expert failed to rule out "*all* potential causes" in his differential etiology (emphasis added)). For example, in *Kerns v. Hobart Bros. Co.*, 2008 Ohio App. LEXIS 1928, at *15-22 (May 9, 2008) the court affirmed summary judgment for the defendant after finding that the plaintiff's specific causation expert failed to account for the fact that between "65 to 75 percent" of cases of the disease at issue "have a cause that is currently unknown." The *Kerns* court held that a differential etiology can only establish specific causation under Ohio law after the "systematic elimination of *all* potential causes." *Id.* at *16 (emphasis added). In line with this principle, the Ohio Supreme Court in *Valentine v. PPG Indus.*, 821 N.E.2d at 599, 640 (Ohio 2006) affirmed summary judgment in favor of the defendant, holding that plaintiff cannot simply rest on a differential etiology where the cause of a "condition is unknown in the majority of cases," as "there is nothing to eliminate."
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> Here, because Dr. Bahnson did not reliably exclude "all" other potential causes of Plaintiff's testicular cancer, summary judgment should be granted to

> DuPont under Ohio law. As explained more fully in DuPont's Bahnson Motion, Dr. Bahnson did not properly exclude a number of risk factors for testicular cancer, including, but not limited to, cryptorchidism; intratubulular germ cell neoplasia, and Plaintiff's occupational history. Further, Dr. Bahnson failed to properly exclude the likelihood that something unknown could have caused Plaintiff's testicular cancer, meaning that *the fact remains that it is much "more likely than not" that something unknown caused Plaintiff's testicular cancer (as in the majority of cases) rather than his C-8 exposure*. *See* Bahnson Motion at 8-12, which DuPont incorporates by reference here.

Id. at 5–6. DuPont's arguments are not well taken.

First, in Evidentiary Motions Order No. ("EMO") 4, this Court addressed at length DuPont's argument that a plaintiff cannot rely only on a differential diagnosis when a condition is unknown in the majority of cases. (EMO 4 at 10–20, ECF No. 4518.) The Court concluded that in the circumstances presented in this MDL, *i.e*., a causation analysis created and circumscribed by the parties' contractual agreement, a properly conducted differential diagnosis addressing testicular cancer was sufficient to support a finding of specific causation. That is, a properly conducted differential diagnosis is sufficient to support the expert's opinion that exposure to C-8 in the *Leach* Class member's drinking water was a substantial contributing factor in bringing about the development of his testicular cancer. From that evidence, a reasonable jury could find that the plaintiff met his burden of showing proximate causation, *i.e*., showing that DuPont's act or failure to act was a substantial factor in bringing about an injury and without which the injury would not have occurred.

Second, as indicated in Section III.A. of this decision, the Court has found that Dr. Bahnson's expert opinion is relevant, reliable, and admissible. (EMO 9.) In DuPont's request to exclude Dr. Bahnson's opinion, it makes the same arguments regarding exclusion of all relevant risk factors and possibility of unknown causes it now reiterates in its current motion. *Compare* (Def.'s Mot. at 6) (Dr. Bahnson "did not properly exclude a number of risk factors for testicular

cancer, including, but not limited to, cryptorchidism; intratubulular germ cell neoplasia, and Plaintiff's occupational history.") *with* (Def.'s Mot. to Exclude Bahnson at 13, ECF No. 4657) (Dr. Bahnson "failed to rule in or reliably exclude several other relevant risk factors [(*i.e.*, cryptorchidism; intratubulular germ cell neoplasia, family and occupational history)] for testicular cancer in Plaintiff's case without any scientifically valid, reasonable explanation."); *Compare* (Def.'s Mot. at 6) ("Dr. Bahnson failed to properly exclude the likelihood that something unknown could have caused Plaintiff's testicular cancer"*) with* (Def.'s Mot. to Exclude Bahnson at 13) (Dr. Bahnson "failed to even mention the possibility of unknown causation in his expert report, much less explain how he reliably ruled unknown causation out of his differential etiology"). This Court explained at length in EMO 9 why DuPont's assessment of Dr. Bahnson's expert report and deposition testimony is incorrect, and will not repeat that explanation here.

The Court notes, however, that the cases upon which DuPont currently relies do not convince the Court that it made its prior decision in error. Specifically, the Court disagrees with DuPont that in *Valentine v. PPG Industries* the Ohio Supreme Court "held" that a "plaintiff cannot simply rest on a differential etiology where the cause of a 'condition is unknown in the majority of cases,' as 'there is nothing to eliminate.'" (Def.'s Mot. at 5–6.) The appellate court in *Valentine v. PPG Industries, Inc.*, 158 Ohio App. 3d 615, 821 N.E. 580 (Ohio 2006) ("*Valentine I*"), which is quoted by DuPont, focused not on whether the cause of the majority of cases was known or unknown, but instead was focused on whether there were known causes that were scientifically found to be capable of causing the disease at issue.

By way of explanation, the *Valentine I* court indicated that "differential diagnosis alone

does not always establish proximate cause, particularly when general causation evidence is lacking." *Valentine I*, 158 Ohio App. 3d 615, ¶ 53 (Ohio App. 4th Dist. 2004), *aff'd sub nom. Valentine v. Conrad*, 110 Ohio St. 3d 42 (2006) ("*Valentine II*"). The *Valentine I* court continued, stating that "'[t]he process of differential diagnosis is undoubtedly important to the question of 'specific causation.' . . . But a valid differential diagnosis presupposes that general causation has been established, *i.e.*, that agent X is capable of causing [the medical condition at issue] in humans generally." *Id.* at (citing *Cavallo v. Star Enter.*, 892 F. Supp. 756, 771 (E.D. Va. 1995), aff'd in relevant part, rev'd in irrelevant part, 100 F.3d 1150 (4th Cir. 1996) ("a fundamental assumption underlying [differential diagnosis] is that the final, suspected 'cause' remaining . . . must actually be capable of causing the injury")). To clarify further, the *Valentine I* court gave an example:

> For example, in *Cavallo,* the plaintiff's expert used differential diagnosis to opine that the plaintiff's exposure to jet fuel caused her respiratory problems. However, the plaintiff presented no reliable evidence that jet fuel fumes could, in fact, cause such respiratory problems. *See, also*, *Raynor v. Merrell Pharmaceuticals, Inc.* (C.A.D.C.1997), 104 F.3d 1371 (rejecting differential diagnosis when general causation had not been established).
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> Compare *Cavallo* with *Westberry,* where the court found the expert's differential diagnosis reliable to prove causation when general causation already had been established. The court noted that "it was undisputed that inhalation of high levels of talc irritates mucous membranes." *Westberry,* 178 F.3d [257,] 264 [(4th Cir. 1999)]; *see, also*, *Mattis v. Carlon Elec. Products* (C.A.8, 2002), 295 F.3d 856 (accepting differential diagnosis for causation when evidence also existed regarding general causation).

Id. ¶¶ 54, 55.

In affirming *Valentine I*, the Ohio Supreme Court reiterated that while "differential diagnosis is a standard scientific method for determining causation . . . its use is appropriate only when considering potential causes that are scientifically known." *Valentine II*, 110 Ohio St.3d 42, at ¶ 22. The other two cases upon which DuPont relies state the same proposition. *See*

Kerns, Case No. 2007 CA 32, 2008 Ohio App. LEXIS 1928, at *15–22 ("Differential diagnosis describes the process of isolating the cause of a patient's symptoms through the systematic elimination of all potential causes. . . . Although differential diagnosis is a standard scientific method for determining causation, . . . its use is appropriate only when considering potential causes that are scientifically known.); *Finley v. First Realty Prop. Mgt., Ltd.*, 185 Ohio App. 3d at 375 ("While we recognize that Ohio courts have considered the use of a differential diagnosis a reliable manner in which to determine causation, they have not done so in the absence of reliable medical evidence sufficient to attribute specific causation to the target cause (in this case toxic mold) and to the exclusion of all other causes (in this case other environmental or physiological conditions)).

In the case *sub judice*, the parties contractually agreed over a decade ago to a scientific study and application of the findings from that study to the *Leach* Class. Thus, Mr. Vigneron is entitled to the application of the scientific finding (*i.e*, the Probable Link Finding) that it is more likely than not that there is a link between Mr. Vigneron's exposure to C-8 and his testicular cancer. And, because of this scientific finding, DuPont cannot contest that C-8 is capable of causing Mr. Vigneron's testicular cancer. Thus, a differential diagnosis alone is sufficient to determine specific causation in Mr. Vigneron's case. And, a reasonable jury could find that Dr. Bahnson's opinion is sufficient to meet Mr. Vigneron's burden to prove specific causation. *See Conde*, 24 F.3d at 813.

3. Proximate Causation Test and Rebuttal of Summary Judgment Request

DuPont's last argument relates to whether Mr. Vigneron can meet his burden of raising a genuine issue of material fact as to causation. In DuPont's Reply in Support of its Motion,

DuPont contends that it is entitled to summary judgment on specific causation because Mr. Vigneron "**leaves undisputed in his Opposition that he cannot make [the required] showing**" that "it is more likely than not that his testicular cancer 'would not have occurred' but for his exposure to C-8. *Cf. Brown v. VHS of Mich., Inc.*, 545 F. App'x 368, 372 (6th Cir. 2013) ('This Court's jurisprudence on abandonment of claims is clear: a plaintiff is deemed to have abandoned a claim when a plaintiff fails to address it in response to a motion for summary judgment.')" (Def.'s Reply at 4) (emphasis by DuPont). This Court, however, disagrees with DuPont's conclusion.

In his opposition memorandum, Mr. Vigneron explicitly sets out the standard that this Court utilized in the jury instructions in both the *Bartlett* and the *Freeman* trials, which is:

> Proximate cause is an act or failure to act that was a substantial factor in bringing about an injury and without which the injury would not have occurred.

(Pl.'s Mem. in Opp. at 10) (citing to Freeman Trial Tr. 23-241.)

Simply because Mr. Vigneron focuses on the first part of this standard (the conduct must be a substantial factor) does not mean that he leaves *undisputed* the second part (without which the injury would not have occurred). The relevant inquiry is whether Mr. Vigneron raised any genuine issue of material fact as to proximate causation. As this Court has discussed throughout this decision, Mr. Vigneron has offered evidence from which a reasonable jury could find that he met his burden to show by a preponderance of the evidence that DuPont's actions or failures to act were a substantial factor in bringing about Mr. Vigneron's testicular cancer, and without which the injury would not have occurred. Mr. Vigneron, therefore, addresses the proximate causation element of his claim of negligence, and certainly does not abandon the entire claim.

IV.

Based on the foregoing, the Court **DENIES** Defendant's Motion for Summary Judgment Based on Specific Causation. (ECF No. 4653.)

IT IS SO ORDERED.

11-7-2016
DATE

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