APPENDIX

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 21-3418

IN RE: E.I. DU PONT DE NEMOURS & COMPANY C-8 PERSONAL INJURY LITIGATION

TRAVIS ABBOTT; JULIE ABBOTT,

Plaintiffs-Appellees,

v.

E.I. DU PONT DE NEMOURS & COMPANY,

Defendant-Appellant.

Argued: June 10, 2022
Filed: Dec. 5, 2022

Before: BATCHELDER, STRANCH, and DONALD, Circuit Judges.

OPINION

JANE B. STRANCH, Circuit Judge. In the 1950s, E. I. du Pont de Nemours & Co. (DuPont) began discharging vast quantities of C-8—a "forever" chemical that accumulates in the human body and the environment—into the Ohio River, landfills, and the air surrounding its plant in West Virginia,

contaminating the communities' water sources. By the 1960s, DuPont learned that C-8 is toxic to animals and, by the 1980s, that it is potentially a human carcinogen. Despite these and other warnings, DuPont's discharges increased between 1984 and 2000. By the early 2000s, evidence confirmed that C-8 caused several diseases among the members of the communities drinking the contaminated water, which led to a class action lawsuit against DuPont. The parties undertook negotiations and ultimately entered into a unique settlement agreement in which DuPont promised to carry out treatment of the affected water and to fund a scientific process that would inform the class members and communities about the dangers of and harms from C-8 exposure. In service of that process, the class voted to make receipt of the cash award contingent on a full medical examination to test for and collect data on C-8 exposure. A panel of scientists then conducted an approximately seven-year epidemiological study of the blood samples and medical records of over 69,000 affected community members, during which litigation against DuPont was paused. The parties' agreement limited the legal claims that could be brought against DuPont based on the study's determination of which diseases prevalent in the communities were likely linked to C-8 exposure. The resulting cases were consolidated in a multidistrict litigation (MDL).

After two bellwether trials and a post-bellwether trial reached jury verdicts against DuPont, the parties settled the remaining cases. That did not end all the C-8 litigation, as more class members filed suit when they became sick or discovered the connection between their diseases and C-8, including this case brought by

Travis and Julie Abbott. At the Abbotts' trial, the district court applied collateral estoppel to specific issues that were unanimously resolved in the three prior jury trials, excluded certain evidence from the trial based on the initial settlement agreement, and rejected DuPont's motion for a directed verdict on its statute-of-limitations defense. The jury found for the Abbotts. On appeal, DuPont challenges those three district court decisions. For the reasons that follow, we **AFFIRM** the judgment of the district court in full.

I. BACKGROUND

The Abbotts' case has its roots in the 1950s, when DuPont began using C-8 to manufacture Teflon© products at its Washington Works Plant in Parkersburg, West Virginia. C-8, or perfluorooctanoic acid (PFOA), is a synthetic organic chemical that is soluble in water and persists in both the human body and the environment. DuPont discharged C-8 into the air, the Ohio River, and landfills without limits until the early 2000s, as explained below.

DuPont learned in the 1960s that C-8 was toxic to animals and was reaching groundwater in the communities surrounding its plant. By the late 1980s, DuPont internally considered the chemical a possible human carcinogen and found that it stayed in the human bloodstream for years. Despite warnings from its C-8 supplier on proper disposal and the availability of a substitute, DuPont increased its C-8 discharges between 1984 and 2000. Documents obtained in discovery in a 1998 case against DuPont revealed the contamination and kicked off a wave of further litigation.

A. The *Leach* Class Action and Settlement

In the early 2000s, individuals who had consumed the contaminated water sued DuPont in West Virginia state court in *Leach v. E. I. du Pont de Nemours & Co.*, No. 01-C-698 (W. Va. Cir. Ct.). They brought numerous claims under West Virginia common law, seeking equitable, injunctive, and declaratory relief, and punitive and compensatory damages for alleged injuries arising from C-8 exposure. In 2002, the West Virginia trial court certified a class of nearly 80,000 individuals "whose drinking water is or has been contaminated with" C-8 attributable to DuPont's C-8 discharges from the Washington Works Plant. (MDL R. 820-8, *Leach* Agreement, PageID 11807)[1] In 2005, the trial court approved the parties' class-wide settlement agreement, called the *Leach* Agreement in the later MDL proceedings. (*See generally id.*)

The *Leach* Agreement fashioned unique measures to be undertaken over time to obtain scientific and medical information in order to address the harms to the affected workers and communities. For example, the parties agreed that DuPont would fund the design, installation, operation, and maintenance of a water treatment project designed to "reduce the levels of C-8 in the affected water supply to the lowest practicable

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[1] The record contains documents filed in Abbott's individual case, 2:17-cv-998 on the district court docket, documents filed on the MDL docket, 2:13-md-2433, as well as documents filed in earlier individual cases against DuPont. Where relevant, our opinion refers to documents filed on Abbott's docket as "R." and documents found on the MDL docket as "MDL R." Where documents from earlier individual cases are relevant, the case name is included before the "R." (*e.g.*, "Bartlett R." for documents from the *Bartlett* docket).

levels as specified by the individual Public Water Districts." (*Id.*, PageID 11821) The *Leach* Plaintiffs were also concerned about how the members of the class were and would be harmed by C-8, so the class voted to make class members' receipt of the cash award reached in the settlement contingent on a full medical examination.[2] The medical data that resulted from those examinations were used in a broad epidemiological study into the effects of C-8 on the community, which DuPont was required to fund. (*See* MDL R. 2416-3, PageID 35731-32; MDL R. 820-8, PageID 11823) The community health study was performed by the Science Panel, three independent epidemiologists jointly selected by DuPont and the Plaintiffs, that carried out research on diseases among the communities exposed to C-8 in the water districts around Washington Works. (MDL R. 820-8, PageID 11823) The *Leach* Agreement also led to medical monitoring of diseases the Science Panel deemed linked to C-8 for class members. (*Id.*, PageID11826-27)

The parties also agreed to a unique procedure that defined the parameters of legal actions the *Leach* Plaintiffs could bring against DuPont based on the results of the epidemiological study. For each disease studied, the Science Panel would ultimately issue

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[2] *See* Nathaniel Rich, *The Lawyer Who Became DuPont's Worst Nightmare*, N.Y. Times (Jan. 6, 2016), https://www.nytimes.com/2016/01/10/magazine/the-lawyer-who-became-duponts-worst-nightmare.html. A *Leach* "Plaintiff" or "class member" is defined as those individuals who had consumed drinking water with 0.05 parts per billion (ppb) or more "C-8 attributable to releases from Washington Works" from at least one of six specific public water districts, private wells in those districts, or otherwise specified private wells. (MDL R. 820-8, PageID 11807)

either a "Probable Link finding" or a "No Probable Link finding." A "Probable Link" means, "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 a particular Human Disease among Class Members." (*Id.*, PageID 11805) Once the Science Panel released its results, the right of individual class members to pursue their personal injury and wrongful death claims against DuPont was limited to diseases with a Probable Link finding. (*Id.*, PageID 11811) In these lawsuits related to linked diseases, DuPont agreed not to contest general causation—"that it is probable that exposure to C-8 is capable of causing a particular Human Disease"—but it retained the right to contest specific causation and assert any other defenses not barred by the *Leach* Agreement. (*Id.*, PageID 11804, 11811) The Agreement defined specific causation to mean "that it is probable that exposure to C-8 caused a particular Human Disease in a specific individual." (*Id.*, PageID 11806) For diseases for which the Science Panel reported a "No Probable Link finding" or found no association with C-8 exposure, class members would be forever barred from bringing claims for injury or death against DuPont for C-8 exposure based on those diseases. (*Id.*, PageID 11810) The *Leach* Plaintiffs also agreed to refrain from seeking immediate relief—through a conditional release of claims and a covenant not to sue DuPont for C-8 exposure—until the Science Panel completed its study. (*See id.*, PageID 11810-11)

For seven years, the Science Panel engaged in the specified epidemiological study. In one of the largest domestic epidemiological studies ever, over 69,000 class members provided blood samples and medical

records. (MDL R. 4306, Disp. Mot. Order No. 12 Denying JMOL on *Bartlett* Claims, PageID 89502) In 2012, using this data and its own established protocols, the Science Panel reported Probable Link findings as defined in the *Leach* Agreement for six diseases: kidney cancer, testicular cancer, thyroid disease, ulcerative colitis, diagnosed high cholesterol, and pregnancy-induced hypertension and preeclampsia. (MDL R. 5285, Disp. Mot. Order on Issue Preclusion, PageID 128535) The Science Panel reached a No Probable Link Finding for approximately 50 diseases; class members with those diseases were forever barred from bringing claims against DuPont based on those diseases, even if later discovered facts and science revealed a link to C-8. (*Id.*; MDL R. 820-8, PageID 11810)

B. The MDL and Prior Appeal

After the Science Panel's Probable Link findings, the members of the *Leach* class with linked diseases brought approximately 3,500 cases against DuPont pursuant to the *Leach* Agreement. At DuPont's request, the federal courts consolidated those cases in an MDL in the Southern District of Ohio. The district court overseeing the MDL engaged in a months-long process with the parties to identify 20 cases for discovery, then to narrow that list further for bellwether trials. In guiding the parties' selections, both "[t]he parties and the Court intend[ed]" that the bellwether plaintiffs selected for initial discovery and ultimately trial "reflect a representative sampling of cases which [would] provide meaningful information

for the broader population of cases."[3] Toward this end, the parties limited their initial plaintiff designations according to specified parameters, and the court established a detailed procedure for selection of the initial bellwether trials. The parties were ordered to exchange lists of four proposed plaintiffs, then each side was permitted to strike one of the other side's selections. Ultimately, the parties proposed and the court accepted six cases—three selected by the Plaintiffs' Steering Committee, three by DuPont—for bellwether trials. The district court overseeing the MDL also oversaw the cases as they went to trial or settled.

In the first bellwether trial—a case selected by DuPont—the jury awarded Carla Bartlett $1.6 million in compensatory damages against DuPont for her state law tort claims related to kidney cancer. *See Bartlett v. DuPont*, No. 13-cv-170. Five bellwether cases remained. The next trial, *Freeman v. Dupont*, No. 13-cv-1103, a case selected by Plaintiffs, included a negligence claim arising from Freeman's testicular cancer and resulted in a jury verdict for Freeman. DuPont settled the remaining bellwether cases with the Plaintiffs. The Plaintiffs' Steering Committee then selected the first of the non-bellwether cases to go to trial in 2016. *Vigneron v. DuPont*, No. 13-cv-136. That case brought negligence claims, used the jury instructions on negligence given at the *Bartlett* and

[3] The court's and parties' intentions were aligned with the broader purpose of bellwether trials, which serve the "twin goals" of being "informative indicators of future trends and catalysts for an ultimate resolution." Eldon E. Fallon et al., *Bellwether Trials in Multidistrict Litigation*, 82 Tul. L. Rev. 2323, 2343 (2008).

Freeman trials, and resulted in a jury verdict awarding $2 million in compensatory damages to the plaintiff.

While DuPont continued litigation in the district court, it appealed the *Bartlett* case. In that appeal, DuPont argued that the district court had interpreted the *Leach* Agreement in a way that made the *Bartlett* trial and all other MDL cases fundamentally unfair. The district court had determined that the bargain struck by the parties as set out in the language and defined terms in the *Leach* Agreement barred any challenges to general causation. DuPont claimed that decision was "[a] threshold contract interpretation error [that] eliminated the heart of a critical defense for DuPont in each of the 3,500 cases" in the MDL and resulted in incorrect evidentiary rulings. (MDL R. 5285, PageID 128547 (quoting *Bartlett v. DuPont*, No. 16-3310 (6th Cir.), DuPont Appellant Br. at 1, 18))

In February 2017, after oral argument but before we issued a decision in *Bartlett*, DuPont announced a settlement with the remaining MDL cases, including *Bartlett*, and withdrew that appeal. Although it halted further proceedings in *Bartlett*, the global settlement did not entirely end the litigation. As the vast majority of the MDL cases wound down, some additional Plaintiffs covered by the *Leach* Agreement, including Travis and Julie Abbott, filed cases.

C. The Abbott Case

Travis Abbott has lived and worked in and around Pomeroy, Ohio, since childhood. Consequently, for 20 years—beginning at only 6 years old—Abbott was exposed to C-8 contaminated water at home and in his community. At age 16, Abbott found a mass in his left

testicle, and, after surgically removing his testicle, doctors diagnosed him with testicular cancer. He did not experience a relapse until 10 years later when he was beginning to plan a family with his wife, Julie, while still living in the Pomeroy region. In October 2015, Abbott sought medical help for pain in his remaining testicle. A definitive diagnosis of testicular cancer came only after doctors removed his testicle to conduct a pathology analysis. The spread of the cancer to his lymph nodes required further surgery, and Abbott must take testosterone injections due to his loss of both testicles.

Travis and Julie Abbott sued DuPont in November 2017. The district court scheduled the Abbotts' case for a joint trial with that of another couple, the Swartzes, in early 2020. After rejecting DuPont's renewed challenges to the district court's MDL rulings on the meaning of the *Leach* Agreement, the district court granted partial summary judgment to the Abbotts on the duty, breach, and foreseeability elements of Travis Abbott's negligence claims based on collateral estoppel. The court further held that collateral estoppel precluded DuPont from relitigating (1) the interpretation of the *Leach* Agreement and its application to evidentiary issues and (2) the inapplicability of the Ohio Tort Reform Act (OTRA) to Travis Abbott's claims.

The month-long jury trial for the Abbott and Swartz cases began in January 2020. In evidentiary rulings, the district court prohibited DuPont from offering evidence and testimony that the court concluded would violate the *Leach* Agreement, including testimony asserting that Travis Abbott's

level of C-8 exposure was insufficient to cause his cancers. The court instructed jurors that 0.05 ppb was a threshold level for general causation, but that specific causation was still at issue in the case. DuPont then presented testimony about the concentration of C-8 in Abbott's bloodstream and C-8's half-life in the human body, along with expert opinions on potential alternative causes of his cancers. The jury found for both Travis and Julie Abbott, awarding them $40 million and $10 million in damages, respectively. The district court later applied the Ohio Tort Reform Act to Julie Abbott's award, reducing it to $250,000. Because the jury did not agree on the Swartzes' claims related to Mrs. Swartz's kidney cancer, that case concluded in a mistrial.

This appeal in the Abbotts' case followed.

II. ANALYSIS

DuPont raises several challenges to the district court's decisions on appeal. First, it challenges the order granting the MDL Plaintiffs' motion for application of nonmutual offensive collateral estoppel to duty, breach, general causation, and the inapplicability of the OTRA. Based on that order, those issues were not submitted to the jury for its deliberations in the Abbotts' case. Next, DuPont argues that several of the district court's evidentiary rulings related to specific causation were erroneous. And finally, DuPont asserts that the district court abused its discretion by entering a directed verdict denying DuPont's statute of limitation defense. We address each challenge in turn.

A. Nonmutual Offensive Collateral Estoppel

A district court has "broad discretion to determine" whether to apply collateral estoppel. *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 331 (1979). We review de novo whether the district court's decision to do so was error. *Abbott v. Michigan*, 474 F.3d 324, 331 (6th Cir. 2007).

In successive federal diversity actions, we apply state law to determine whether a prior decision has preclusive effect, so long as the state rule is not "incompatible with federal interests." *Prod. Sols. Int'l, Inc. v. Aldez Containers, LLC*, 46 F.4th 454, 457-58 (6th Cir. 2022) (quoting *Semtek Int'l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 508-09 (2001)).

Ohio courts generally apply issue preclusion when that issue "was actually and directly litigated in the prior action" and "a court of competent jurisdiction" decided the issue, and "the party against whom collateral estoppel is asserted was a party in privity with a party to the prior action." *State ex rel. Jefferson v. Russo*, 150 N.E.3d 873, 875 (Ohio 2020) (quoting *Thompson v. Wing*, 637 N.E.2d 917, 923 (Ohio 1994)). The "fact or . . . point" in question must have been "actually and necessarily litigated and determined" as part of a final judgment. *Fort Frye Tchrs. Ass'n, OEA/NEA v. State Emp. Rels. Bd.*, 692 N.E.2d 140, 144 (Ohio 1998); *see State v. Williams*, 667 N.E.2d 932, 935 (Ohio 1996). And the party against whom estoppel is sought must have had a "full and fair opportunity" to litigate the issue in the previous action. *Walden v. State*, 547 N.E.2d 962, 966 (Ohio 1989) (quoting *Hicks v. De La Cruz*, 369 N.E.2d 776, 778 (Ohio 1977)). In

sum, Ohio's standard is very similar to the federal one. *See Smith v. S.E.C.*, 129 F.3d 356, 362 (6th Cir. 1997) (en banc).

DuPont initially claimed that Ohio law forbids the use of non-mutual offensive collateral estoppel altogether. While the "principle of mutuality" is generally a "prerequisite to the application of collateral estoppel," the Ohio Supreme Court has explicitly "recogniz[ed] the need in certain instances for the flexibility and exceptions to such rule." *Goodson v. McDonough Power Equip., Inc.*, 443 N.E.2d 978, 987 (Ohio 1983). Where a "party defendant clearly had his day in court on the specific issue brought into litigation within the later proceeding, the non-party plaintiff [can] rely upon the doctrine of collateral estoppel to preclude the relitigation of that specific issue." *Id.* at 985. Ohio is "willing to relax the [mutuality] rule where justice would reasonably require it."[4] *Id.* at 984.

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[4] Even if mutuality were required, it is a "somewhat amorphous" concept under Ohio law. *Brown v. Dayton*, 730 N.E.2d 958, 962 (Ohio 2000). A contractual relationship is not required; a "mutuality of interest, including an identity of desired result," may be sufficient. *Id.* "As a general matter, privity 'is merely a word used to say that the relationship between the one who is a party on the record and another is close enough to include that other within the res judicata.'" *Id.* (quoting *Thompson v. Wing*, 637 N.E.2d 917, 923 (Ohio 1994)). Not only do Plaintiffs share a contractual relationship with DuPont—the *Leach* Agreement—but they also share a mutuality of interest and identity of desired result with all other plaintiffs in this MDL, who, like Abbott, are *Leach* class members, allege injury due to drinking water contaminated with C-8, and seek the same result.

If Ohio's requirements are met, the Supreme Court has offered four additional considerations that may suggest caution in determining whether to apply offensive nonmutual collateral estoppel against a party. *Parklane Hosiery Co.*, 439 U.S. at 329-31; *see Goodson*, 443 N.E.2d at 983 & n.12 (discussing *Parklane Hosiery* factors); *O'Nesti v. DeBartolo Realty Corp.*, 862 N.E.2d 803, 809 (Ohio 2007) (same). First, courts should avoid applying nonmutual offensive collateral estoppel where it would encourage "a 'wait and see' attitude" among potential plaintiffs hoping "that the first action by another plaintiff will result in a favorable judgment." *Parklane Hosiery Co.*, 439 U.S. at 330. Second, courts should not use the doctrine if the defendant did not have a reason "to defend vigorously, particularly if future suits [were] not foreseeable." *Id.* Third, the doctrine should not apply "if the judgment relied upon as a basis for the estoppel is itself inconsistent with one or more previous judgments in favor of the defendant." *Id.* Fourth and finally, courts should avoid the use of nonmutual offensive collateral estoppel if the later action would give "the defendant procedural opportunities unavailable in the first action that could readily cause a different result." *Id.* at 331.

1. Application of Collateral Estoppel to the Negligence Claims

As an initial matter, we address DuPont's claim that our court has placed additional constraints on the use of nonmutual offensive collateral estoppel in mass tort cases. DuPont points to a footnote in *In re Bendectin Products Liability Litigation*, 749 F.2d 300 (6th Cir. 1984), in which we noted that the Supreme

Court's decision in *Parklane Hosiery* "explicitly stated that offensive collateral estoppel could not be used in mass tort litigation." *Id.* at 305 n.11. DuPont's interpretation of *Bendectin*, however, is inconsistent with the Supreme Court's clear pronouncement in *Parklane Hosiery* that "the preferable approach for dealing with" the fairness concerns regarding offensive collateral estoppel "is not to preclude the use of offensive estoppel" but instead to provide "broad discretion" to trial courts determining when it applies. *Parklane Hosiery Co.*, 439 U.S. at 331; *see also City of Cleveland v. Cleveland Elec. Illuminating Co.*, 734 F.2d 1157, 1165 (6th Cir. 1984). *Bendectin*, an appeal of a district court's class-certification decision, focused on the requirements of Rule 23, and our opinion mentioned but did not hinge on whether district courts could ever apply nonmutual offensive collateral estoppel in mass tort cases. *Bendectin*, 749 F.2d at 304-05. No court has followed the *Bendectin* footnote beyond agreeing that courts should not use offensive collateral estoppel in mass tort cases in ways inconsistent with the *Parklane Hosiery* factors. *See, e.g.*, *In re Air Crash at Detroit Metro. Airport, Detroit, Mich. on Aug. 16, 1987*, 776 F. Supp. 316, 324-25 (E.D. Mich. 1991) (explaining that nonmutual offensive collateral estoppel could be used in mass tort cases if consistent with the instruction in *Parklane Hosiery* and "should be developed on a case-by-case basis"). Ohio has similarly instructed that offensive collateral estoppel is permissible in the mass tort context where

the *Parklane Hosiery* standards are applied.[5] *See Goodson*, 443 N.E.2d at 987.

Ohio's collateral estoppel factors and the additional considerations delineated in *Parklane Hosiery* provide the framework for the district court's exercise of its broad discretion. We will not place DuPont's requested additional constraints on that discretion given the Supreme Court's clear instruction.

In applying offensive collateral estoppel, the district court concluded that the three prior jury trials—*Bartlett*, *Freeman*, and *Vigneron*—raised and litigated to a final conclusion the same questions of duty, breach, and foreseeability raised in Travis Abbott's negligence claims. DuPont asserts that this use of nonmutual offensive collateral estoppel violated its due process rights because duty, breach, and foreseeability in the three prior trials were factually distinct. The Abbotts dispute that factual argument and counter that the use of collateral estoppel here "serve[d] the core principles of judicial integrity and economy," and the doctrine "was made for a case like this one." We apply Ohio law and *Parklane Hosiery*'s considerations in turn.

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[5] DuPont frames *Goodson* as demonstrating the Ohio Supreme Court's disapproval of mass-tort collateral estoppel. But the language DuPont quotes from *Goodson* that expresses caution about applying "a decision made by one jury in the context of one set of facts" to "all subsequent cases involving separate underlying factual circumstances" is specific to product liability litigation; it is not about mass-tort litigation generally. 443 N.E.2d at 987.

a. Ohio Law

We begin by determining whether the "identical issue was actually decided in the former case." *Goodson*, 443 N.E.2d at 987. Factual differences do exist among the different cases, but the question is whether any of those factual differences are legally significant—*i.e.*, were crucial to resolving the issues in the compared cases. *See Smith v. Sushka*, 117 F.3d 965, 969-70 (6th Cir. 1997) (quoting *Monahan v. Eagle Picher Indus., Inc.*, 486 N.E.2d 1165, 1168 (Ohio 1984)); *see also United States v. Stauffer Chem. Co.*, 464 U.S. 165, 172 (1984). DuPont claims that duty, breach, and foreseeability were unique to each plaintiff given that each plaintiff was differently situated. For example, it asserts, the *Freeman* and *Vigneron* Plaintiffs argued that DuPont should have foreseen their injuries because the C-8 concentration in their water districts' drinking water exceeded DuPont's voluntary exposure guidelines. Travis Abbott's water was below these guidelines at relevant times. DuPont also contends that Abbott conceded that DuPont was unaware of C-8 in his water supply before 2001, unlike the Plaintiffs in *Freeman* and *Vigneron* who asserted that DuPont knew about, but did not warn them of, the C-8 in their drinking water for over a decade. DuPont argues that these questions of duty, breach, and foreseeability were so closely tied to the individual plaintiffs that preclusive effect is impossible.

DuPont's argument attempts to ignore the fundamental principle that the pertinent factual issues for the negligence claims in each trial revolved around *DuPont's* conduct and knowledge in relation to

the *Leach* class members. In *Bartlett*, *Freeman*, and *Vigneron*—the cases that served as the basis for collateral estoppel—each jury received identical instructions on duty, breach, and foreseeability. Each jury found that DuPont owed a duty to the class member, breached that duty, and should have foreseen that injury would result from the alleged breach. To illustrate, consider the jury instructions from the *Bartlett* case:

NEGLIGENCE – DUTY

> To prove the existence of a duty, Mrs. Bartlett must show by a preponderance of the evidence that a reasonably prudent person would have foreseen that injury was likely to result to someone in Mrs. Bartlett's position from DuPont's conduct. In deciding whether reasonable prudence was used, you will consider whether DuPont should have foreseen, under the circumstances, that the likely result of an act or failure to act would cause injuries. The test for foreseeability is not whether DuPont should have foreseen the injuries exactly as it happened to Mrs. Bartlett. The test is whether under the circumstances a reasonably prudent corporation would have anticipated that an act or failure to act would likely cause injuries.

NEGLIGENCE – BREACH

> If you find that DuPont owed Mrs. Bartlett a duty, you must next determine whether DuPont breached that duty. A corporation breaches a duty by failing to use ordinary

> care. As I have just instructed, ordinary care is the care that a reasonably careful corporation would use under the same or similar circumstances.
>
> If you decide that DuPont did not use ordinary care, then DuPont breached its duty of care to Mrs. Bartlett. If you decide that DuPont did use ordinary care, then DuPont did not breach its duty of care to Mrs. Bartlett. . . .
>
> **NEGLIGENCE – PROXIMATE CAUSE – FORSEEABLE INJURY**
>
> . . . . For Mrs. Bartlett's injuries to be considered the natural and probable consequence of an act, Mrs. Bartlett must prove that DuPont should have foreseen or reasonably anticipated that injury would result from the alleged negligent act. The test for foreseeability is not whether DuPont should have foreseen the injury exactly as it happened to Mrs. Bartlett. Instead, the test is whether under the circumstances a reasonably careful person would have anticipated that an act or failure to act would likely result in or cause injuries.

(*Bartlett* R. 139, *Bartlett* Final Jury Instructions, PageID 6205-08)

The instructions must and do reference each specific plaintiff, but their focus, and the focus of the jury's inquiry in each of the cases, was on DuPont's conduct. The instructions state that a duty exists when "a reasonably prudent person would have foreseen that injury was likely to result to *someone in*

Mrs. Bartlett's position from DuPont's conduct," explaining that "[t]he test for foreseeability is not whether DuPont should have foreseen the injuries exactly as it happened to Mrs. Bartlett." The instructions—and the law more generally—peg the duty to whether "a reasonably prudent corporation would have anticipated" that its actions or inactions would cause injury. Foreseeability in the context of the proximate cause jury instructions similarly looks to DuPont's actions. Put simply, these instructions turn on *DuPont's* conduct, not the particulars of Bartlett's individual circumstances. To say otherwise and adopt DuPont's argument would make it virtually impossible to ever find preclusive effect in negligence claims. The key concept applicable here is that DuPont's conduct impacted the Plaintiffs in virtually identical ways—contamination of their water supplies with a carcinogen. The district court was correct to conclude that the "facts relating to DuPont's negligence were virtually identical" across the four trials.

In sum, we are not persuaded by DuPont's contention that near factual identity on the Plaintiffs' water district, location, exposure, timing, and toxicity is necessary and controlling—instead of evidence of DuPont's conduct. But even if that were the standard, we are not convinced that the Plaintiffs here failed to cross that threshold. DuPont's emphasis on the factual differences between Travis Abbott's case and those in the *Freeman* and *Vigneron* trials overlooks the factual similarities between Abbott and the plaintiff in *Bartlett*. The record shows that Abbott and Bartlett were exposed to more than 0.05 ppb of C-8 in the Tuppers Plains-Chester Water District for

overlapping periods of time. (R. 33-2, Expert Report, PageID 343-44; MDL R. 2807-8, Expert Report, PageID 42884) Bartlett drank C-8 contaminated water in that district from 1983 to 1989 and 1994 to 2004, while Travis Abbott was exposed from 1983 to 1998 and again from 2000 to 2004. The roughly ten years of corresponding use in the same water district and similar exposure levels undercut DuPont's claim that the juries were not considering comparable facts relevant to duty, breach, and foreseeability. Nor does the record support DuPont's contention that its knowledge of contamination in the *Vigneron* and *Freeman* cases sufficiently distinguishes the prior jury trials. DuPont argued in both *Bartlett* and *Abbott* that it did not know it had contaminated their water and that the contamination did not exceed its internal guidelines. (R. 188, Jan. 24, 2020 Trial Tr., PageID 7684) Nevertheless, the *Bartlett* trial resulted in a jury verdict for Bartlett. The factual identity factor supports the district court's application of collateral estoppel.

The next question is whether the resolution of the precluded issues was necessary to the outcomes in the prior cases. *Goodson*, 443 N.E.2d at 981. There is little doubt that the jury trials' decisions on duty, breach, and foreseeability were necessary to each of the verdicts for the earlier Plaintiffs on their negligence claims. *See Menifee v. Ohio Welding Prods., Inc.*, 472 N.E.2d 707, 710 (Ohio 1984). Ohio applies the standard common law test for negligence claims, which requires a finding on each of those elements. *See id.*

And finally, we consider whether the prior cases reached final judgment on the merits and whether DuPont had a sufficient opportunity to litigate the issues in those cases. *See Walden*, 547 N.E.2d at 966 (quoting *Hicks*, 369 N.E.2d at 778). As to actual litigation, the vast size of the MDL and individual case dockets belie any argument to the contrary. The record is clear that DuPont vigorously contested duty, breach, and foreseeability in all the prior trials. That DuPont settled the *Bartlett* case after the jury verdict and judgment, while the case was pending on appeal, does not change the preclusive effect of the district court's decisions in that case. *See Watermark Senior Living Ret. Cmtys., Inc. v. Morrison Mgt. Specialists, Inc.*, 905 F.3d 421, 426-28 (6th Cir. 2018); *Coal. for Gov't Procurement v. Fed. Prison Indus., Inc.*, 365 F.3d 435, 484-85 (6th Cir. 2005); *see also* Restatement (Second) of Judgments § 13 cmt. g (1982) ("[T]hat the parties were fully heard, that the court supported its decision with a reasoned opinion, that the decision was subject to appeal or was in fact reviewed on appeal, are factors supporting the conclusion that the decision is final for the purpose of preclusion."). Thus, as to the Ohio law that governs issue preclusion, we conclude that the district court's analysis was correct.

b. The *Parklane Hosiery* Considerations

In *Parklane Hosiery*, the Supreme Court provided additional guidance as to the doctrine of nonmutual offensive collateral estoppel. The unique parameters established by the *Leach* Agreement and the resulting MDL play the key role in applying the *Parklane* factors here.

We note first that the *Leach* Agreement created a limited, closed subset of possible plaintiffs from the larger, original *Leach* class. That subset was comprised only of those who had consumed contaminated water in specific water districts or wells for at least one year prior to 2005 and suffered from at least one of the six identified linked diseases, giving them sufficient indicia of injury to move forward with individual suits against DuPont.

The bargained-for exchange that the *Leach* Agreement established informs the application of collateral estoppel here. Every class member agreed to release all claims related to diseases without a Probable Link finding and not to sue DuPont until the Science Panel completed its multiple-year study. DuPont agreed not to contest general causation.[6] In light of the benefits and concessions embodied in the Agreement, we disagree with our dissenting colleague's concern that it is fundamentally unfair to hold DuPont to the terms of the contract that it negotiated and has received the benefit of, especially when DuPont has mounted multiple challenges to the district court's interpretation of the Agreement to no avail. *See In re Deepwater Horizon*, 744 F.3d 370, 377 (5th Cir. 2014) ("There is nothing fundamentally unreasonable about what BP accepted but now wishes it had not.").

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[6] Under Ohio law, "[t]he concept of foreseeability is an important part of all negligence claims, because '[t]he existence of a duty depends on the foreseeability of the injury.'" *Cromer v. Children's Hosp. Med. Ctr. of Akron*, 29 N.E.3d 921, 928 (Ohio 2015) (second alteration in *Cromer*) (quoting *Menifee*, 472 N.E.2d at 710).

Turning to the *Parklane* factors, we note as to the first factor that the MDL gave DuPont a greater measure of power over case scheduling than in normal cases: few concerns about Plaintiffs using a "wait-and-see" approach for another successful action are possible when DuPont was able to select three of the six bellwether cases, including the first-tried case, *Bartlett*. Second, the MDL structure presented DuPont with "every incentive," *Parklane Hosiery Co.*, 439 U.S. at 332, to defend itself vigorously in each of the early trials: the first two bellwether cases tried were selected to inform the resolution of the 3,500 other pending cases, and DuPont knew that the third trial could continue to influence the remaining litigation. Even after the global settlement, DuPont was aware that cases could continue to be filed—cases that would necessarily receive the same treatment as the MDL litigation. As to the third *Parklane* factor, there is no concern about inconsistent verdicts with a previous judgment in favor of DuPont. *Id*. DuPont was not successful at any trial.

Importantly, the district court applied collateral estoppel only after three consistent jury verdicts for the Plaintiffs in the only cases to proceed to trial—the first of which was a bellwether selected by DuPont (*Bartlett*) and then another selected by the Plaintiff class (*Freeman*). DuPont chose to settle the remaining bellwether cases with the Plaintiffs. As to the fourth *Parklane* factor, then, DuPont presented no evidence that it had any procedural opportunities "that could readily cause a different result" in *Abbott* that were not available in the earlier trials. *Id*. at 331. None of the *Parklane Hosiery* considerations weigh against

application of collateral estoppel in these circumstances.

Thus, as to all the factors governing issue preclusion or collateral estoppel, DuPont has received a full and fair opportunity for resolution of its issues—it had its day in court. DuPont's other objections—absence of advance notice of possible preclusive effect, the lack of consideration of representativeness in bellwether selection, and alleged promises of no preclusive effect—are not grounded in our collateral estoppel case law.[7] At bottom, DuPont argues that we should impose further rules constraining the use of nonmutual offensive collateral estoppel, beyond the federal common law and the Supreme Court's instructions in *Parklane Hosiery*. DuPont does not

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[7] We agree with our dissenting colleague, the Manual for Complex Litigation, and the Federal Judicial Center that bellwether trials are most effective when "representative of the range of cases included in the MDL proceeding." Fed. Jud. Ctr., *Bellwether Trials in MDL Proceedings* 22 (2019); *see* Manual for Complex Litigation § 22.315 (4th ed. 2022). What makes a bellwether trial representative, however, is "litigation- and fact-specific." *Bellwether Trials in MDL Proceedings* at 22. Scholars have catalogued the many approaches that courts can take in selecting bellwether plaintiffs: letting one party pick, requiring the parties to agree, allowing the parties to use preemptory strikes against each other's selections, leaving the decision entirely to the court, or some combination thereof. *See generally* Fallon et al., *supra*; Loren H. Brown et al., *Bellwether Trial Selection in Multi-District Litigation*, 47 Akron L. Rev. 663, 670-84 (2015). With the parties' participation and cooperation, the district court here engaged in a lengthy bellwether plaintiff selection process that used some of the same mechanisms that Judge Fallon (who has overseen two MDLs involving over 30,000 claimants each) suggests are most effective. Fallon et al., *supra*, at 2349-50, 2364-65.

offer any cases that create a notice requirement for collateral estoppel, nor does it show that bellwether trials are prohibited from having such preclusive effect. *See, e.g.*, *Silvanch v. Celebrity Cruises, Inc.*, 333 F.3d 355, 359-60 (2d Cir. 2003) (allowing an informal bellwether case to have preclusive effect).

In a similar vein, although both DuPont and our dissenting colleague emphasize the applicability of *In re Chevron U.S.A., Inc.*, 109 F.3d 1016 (5th Cir. 1997), that case involved a proposed trial plan for a *binding* bellwether trial, which informed the Fifth Circuit's stated concerns about applying the trial's outcomes to the full group of claimants. *Id.* at 1018-20; *see* Zachary B. Savage, *Scaling Up: Implementing Issue Preclusion in Mass Tort Litigation Through Bellwether Trials*, 88 N.Y.U. L. Rev. 439, 453-54, 456-57 (2013) (referencing *Chevron* and explaining that binding bellwethers are "conceptually separate" from issue preclusion because "the initial court running the bellwether determines its preclusive effect in advance of any subsequent litigation"). Neither *Parklane Hosiery*—in which the Supreme Court offers the clearest discussion on the limits and considerations for using offensive collateral estoppel—nor the other case law DuPont cites suggests that DuPont's asserted limitations on offensive collateral estoppel exist. *See Parklane Hosiery Co.*, 439 U.S. at 329-31.

Even were we to imagine a fairness issue related to notice, the record does not support DuPont's arguments. The district court did not promise that the general assumptions of litigation—including that issue preclusion is possible—would not apply to the bellwether trials. At most, the district court confirmed

that the bellwether trials would not be "binding bellwethers," meaning that the results of those trials would not automatically be extrapolated to non-bellwether plaintiffs.[8] *See* Alexandra D. Lahav, *Bellwether Trials*, 76 Geo. Wash. L. Rev. 576, 609-10 (2008). The Supreme Court has instructed the courts that the factors articulated in *Parklane* offer the necessary constraints on the use of nonmutual offensive collateral estoppel. We cannot and do not follow DuPont's recommendation to create additional rules restricting the use of the doctrine. We affirm the district court's use of nonmutual offensive collateral estoppel in this case.

2. Application of Collateral Estoppel to the Ohio Tort Reform Act

DuPont also challenges the district court's use of collateral estoppel to preclude the application of the OTRA to Travis Abbott's negligence claims, but the basis for that argument is unclear. DuPont never asserted that the OTRA applied to Travis Abbott's claims, and there would be no grounds for such a contention. The OTRA cap on tort damages has a catastrophic injury exception for those who lose "a bodily organ system," Ohio Rev. Code § 2315.18(B)(3)(a), and no party has

[8] If a bellwether is "binding," the parties designate a subset of overall cases, the results of which are to be extrapolated to the broader whole. Generally, such a procedure requires that the parties "clearly memorialize" an agreement to be bound in future trials, no matter the result, to avoid certain due process concerns. *Dodge v. Cotter Corp.*, 203 F.3d 1190, 1200 (10th Cir. 2000). That procedure was not employed in this MDL, where the parties agreed that the bellwethers would be treated as ordinary trials whose results could be used to inform settlement or the conduct of future trials.

disputed that Travis Abbott's loss of both his testicles qualifies his claims under this exception. The only OTRA challenge in the district court came from the Abbotts, who argued that the law should not apply to Julie Abbott's loss of consortium claim. The district court disagreed and entered an amended judgment applying the OTRA to reduce Julie Abbott's $10 million jury award to the OTRA cap of $250,000. As the district court did not apply issue preclusion on its reduction of Julie Abbott's damages award and neither party has objected to that reduction, the OTRA is not at issue on appeal.

C. DuPont's Evidentiary Challenges Related to Specific Causation

In this appeal, DuPont frames its evidentiary challenges as three broad categories of claims. First, DuPont argues that the district court erred in excluding expert testimony and evidence on the dose-response relationship between C-8 blood levels and testicular cancer. Second, it contends that the district court erred in allowing the Abbotts to offer expert testimony on specific causation that relied—as authorized by the *Leach* Agreement—on the conclusion of the Science Panel that the exposure threshold defining class membership was sufficient to cause testicular cancer. Finally, DuPont asserts that the district court erroneously excluded all testimony on alternative causes of Travis Abbott's cancer.

These challenges are virtually identical to those DuPont raised in the *Bartlett* appeal that was subsequently withdrawn due to the parties' settlement. DuPont argued in *Bartlett* that the district court erroneously interpreted general and specific

causation pursuant to the *Leach* Agreement. DuPont claimed it could not properly contest specific causation in Bartlett's case because it was prevented from offering evidence of Bartlett's C-8 dose and the likelihood that such a dose would cause kidney cancer. The district court's order denying DuPont's motion for a new trial in *Bartlett* concluded that DuPont's "position on causation conflate[d] the . . . definitions . . . set forth in the *Leach* Agreement" and effectively sought to rewrite the provisions about the Probable Link Findings in a way that would allow DuPont to challenge general causation. The court explained that DuPont's position would require plaintiffs not only to prove their individual dose but also whether that particular dose was sufficient to cause the linked disease. Allowing that standard would mean that "the Probable Link Findings may not apply to a particular plaintiff, such as those plaintiffs who were in the lowest exposure groups." In a dispositive order covering all MDL cases, the court concluded that the parties' bargain, expressed in the unambiguous language of the *Leach* Agreement, is that Probable Link Findings apply to any class member with a linked disease. Therefore, a plaintiff is "not required to come forward with evidence proving that [her] individual dosage of C-8 [wa]s sufficient" to cause her disease.

Recognizing that DuPont's evidentiary claims in the Abbotts' case involved interpretation of the *Leach* Agreement—an issue that was already decided in *Bartlett*, *Freeman*, and *Vigneron*—the district court thoroughly explained that its decision on the proper interpretation of the Agreement in those three previous cases was "final and binding." That

interpretation foreclosed DuPont's evidentiary arguments here and the district court therefore rejected the claims. That DuPont appealed *Bartlett* and its interpretation of the *Leach* Agreement, but subsequently withdrew its appeal, had no effect on the finality of the prior three decisions because "those previously appealable issues simply retained their finality for purposes of collateral estoppel." DuPont, the district court concluded, was precluded from raising these same arguments yet again.

In this appeal, DuPont did not challenge the aspect of the district court's order applying collateral estoppel to the interpretation of the *Leach* Agreement. It contested only the application of collateral estoppel to elements of the negligence claims and the OTRA, and its fairness and due process arguments were tailored to the tort claims, not the interpretation of the *Leach* Agreement. Nor did DuPont contest the district court's determinations that: the interpretation of the *Leach* Agreement was necessary to the outcome of the proceedings in the three earlier cases; the same relevant factual circumstances exist; the three cases reached a final judgment on the merits that retained finality even after DuPont withdrew its appeal; or that DuPont had an opportunity to litigate the proper interpretation of the *Leach* Agreement. Indeed, as the district court explained, DuPont's arguments about the *Leach* Agreement "have been made *numerous* times to this Court, as well as before the Sixth Circuit." By not challenging that aspect of the district court's collateral estoppel order in this appeal, the argument that the district court improperly applied collateral estoppel to the contract interpretation issue is forfeited. *See Guyan Intern., Inc. v. Prof. Benefits*

Adm'rs, 689 F.3d 793, 799 (6th Cir. 2012). The district court's interpretation of the Agreement thus remains binding and, as explained above, is dispositive of these evidentiary challenges.

DuPont's challenges, in any event, fail on their own merits. Evidentiary rulings are reviewed for abuse of discretion, *Hurt v. Com. Energy, Inc.*, 973 F.3d 509, 524 (6th Cir. 2020), which "occurs when the district court relies on clearly erroneous findings of fact, improperly applies the law, or uses an erroneous legal standard," *Innovation Ventures, LLC v. N2G Distrib., Inc.*, 763 F.3d 524, 533 (6th Cir. 2014) (quoting *Mike's Train House, Inc. v. Lionell, L.L.C.*, 472 F.3d 398, 405 (6th Cir. 2006)). We address each challenge in turn.

1. Exclusion of DuPont's Dose-Response Testimony and Evidence

DuPont first challenges the district court's evidentiary decisions related to the dose-response relationship between testicular cancer and C-8 blood levels. It argues that the district court excluded "expert opinions on Mr. Abbott's dose and his specific resulting amount of increased risk" based on an erroneous interpretation of the *Leach* Agreement's general causation provision. DuPont asserts that the *Leach* Agreement preserves its right to contest specific causation, and the exclusion of expert testimony on dosage "gutted" that right. For the same reason, DuPont argues that the court erred in allowing the Plaintiffs to tell the jury that 0.05 ppb of C-8 is sufficient to cause Travis Abbott's cancer.

As discussed above, those arguments boil down to whether the district court properly interpreted the

definition of general causation in the *Leach* Agreement, which undisputedly governs how the district court treated causation and dosage evidence. The Agreement gave the Science Panel a clear charge: focus on an identified community and a particular chemical to determine which diseases in the community are linked to C-8 exposure. Once the Science Panel announced such a link, DuPont could not challenge general causation for that disease ("that it is probable that exposure to C-8 is capable of causing" that particular disease) among class members. (MDL R. 820-8, PageID 11804) The *Leach* Agreement drastically limited the persons authorized to bring suit against DuPont through two factors—the condition of class membership (exposure to drinking water with 0.05 ppb of C-8 for at least a year) and satisfaction of the Science Panel's linked-disease finding (development of one of only six linked diseases). The intersection of these two factors shows that the class bargained for and its members could expect that satisfying the Science Panel's linked-disease qualification would preclude the introduction of evidence to suggest that the 0.05 ppb exposure level was insufficient to cause that linked disease.

The district court based its evidentiary decisions that DuPont now seeks to challenge on the conclusion that DuPont's proffered evidence would undermine the bargained-for exchange memorialized in the *Leach* Agreement. Accepting DuPont's position that it could introduce evidence suggesting that exposure to more than 0.05 ppb of C-8 was necessary to cause testicular cancer would have deprived Travis Abbott of DuPont's agreement not to contest general causation once the Science Panel found a probable link. The tradeoff

embodied in the Agreement is that the No Probable Link Findings for 50 diseases applies to all class members with any of those diseases, barring them from bringing suit against DuPont for non-linked diseases regardless of how their individual dose and their related risk of disease were reported and evaluated by the Science Panel. In other words, the vast majority of *Leach* class members would not be allowed to challenge the Science Panel's conclusions with dosage, individual evidence, or scientific advances for any of the 50 non-linked diseases—the benefit that DuPont now argues is its right to challenge for the six linked diseases. The district court did not abuse its discretion in concluding that DuPont could not elicit or proffer evidence that undermined the *Leach* Agreement's general causation bargain, including evidence of specific dosage.

As a factual matter, moreover, DuPont's argument that the district court prohibited "*all*" expert testimony and evidence on the dose-response relationship is incorrect. The court allowed opinions on dose-response data when that evidence was consistent with the *Leach* Agreement and the rules of evidence. The court's limitations on expert testimony targeted testimony that would have suggested Travis Abbott's exposure was too low to cause his cancer, evidence that violated the *Leach* Agreement. When such issues were not present, the district court allowed DuPont to reference Abbott's C-8 dose during the trial.

DuPont makes the broader argument that the district court's decision to allow testimony and statements asserting that the class membership

threshold of 0.05 ppb of C-8 was sufficient to cause Abbott's cancer was an abuse of discretion. This is, yet again, an attempt to challenge a foreclosed issue—the district court's interpretation of the *Leach* Agreement. And even if reconsideration of that interpretation were proper, the jury instructions were clear that specific causation was an issue left to the jury. The instructions stated that the jury must decide whether Abbott proved proximate cause ("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") to find for Abbott on his negligence claim. The district court did not instruct the jury that exposure to C-8 at 0.05 ppb for one year causes testicular cancer or that the 0.05 ppb represented a specific causation standard. The jury instructions instead explained that the jury should "treat as proven in this case that C-8 is capable of causing kidney cancer and testicular cancer." Notably, although the jury found for the Abbotts, it did not reach the same verdict for the Swartzes. This indicates the jury understood that specific causation remained at issue in the Abbott/Swartz trial. The district court did not abuse its discretion in denying DuPont's challenges to dose-response evidence.

2. DuPont's Other Evidentiary Challenges

DuPont next asserts that the district court should have excluded the Abbotts' specific causation expert because his testimony did not consider the Science Panel's dose findings or Travis Abbott's specific dose. The expert in question, Dr. Pohar, used differential diagnosis methodology to reach his conclusions. This

methodology requires the physician to "consider[] all relevant potential causes of the symptoms and then eliminate[] alternative causes based on a physical examination, clinical tests, and a thorough case study." *Best v. Lowe's Home Ctrs., Inc.*, 563 F.3d 171, 178 (6th Cir. 2009) (quoting *Hardyman v. Norfolk & W. Ry. Co.*, 243 F.3d 255, 260 (6th Cir. 2001)). We have "recognize[d] differential diagnosis as 'an appropriate method for making a determination of causation for an individual instance of disease," *id.* (quoting *Hardyman*, 243 F.3d at 260), and have held that "a medical opinion on causation based upon a reliable differential diagnosis is sufficiently valid" under Rule of Evidence 702, *id.* (quoting *Westberry v. Gislaved Gummi AB*, 178 F.3d 257, 263 (4th Cir. 1999)). The record supports that Dr. Pohar ruled out many other potential causes of testicular cancer to reach a reasonable decision that C-8 exposure caused Abbott's case. And Dr. Pohar did not err in *ruling in* C-8 as a potential causal factor because he relied on the Science Panel's determination that C-8 exposure was a probable cause for a class member's linked disease (here, testicular cancer)—a determination to which both parties were bound under the plain terms of the *Leach* Agreement. Allowing this testimony was not an abuse of discretion.

DuPont also argues that the district court improperly excluded "all opinions that Mr. Abbott's cancer was more likely caused by his pre-exiting germ cell neoplasia in situ (GCNIS) or idiopathic." But the record shows that the district court allowed DuPont to present testimony on alternative causes of Abbott's cancer. A DuPont expert testified as to evidence that GCNIS "nearly always" leads to testicular cancer. The

district court did not allow that expert to testify that GCNIS was the more likely cause because the expert was qualified *only* as a general causation expert, not a specific causation expert. In fact, the court excluded him as a specific causation expert because he did not rule in C-8 exposure as a possible cause, which the *Leach* Agreement required. DuPont, therefore, did not put on a specific causation expert of its own. Nevertheless, the district court allowed DuPont to offer the testimony from multiple experts that most testicular cancer is idiopathic. DuPont was able to and did present evidence of alternate causes for Abbott's cancer but failed to present its own specific causation expert. The district court did not improperly prohibit DuPont from arguing specific causation at trial.

C. The Directed Verdict on DuPont's Statute of Limitations Defense

DuPont challenges the district court's decision to reject its statute of limitations defense as a matter of law. Before the trial, the district court denied DuPont's motion for summary judgment and strongly suggested that Abbott had filed his tort claim for his 2015 testicular cancer within the two-year statute of limitations period. This finding arose from the court's conclusion that the earliest possible "triggering" date was when Abbott received a definitive testicular cancer diagnosis less than two years before he filed his lawsuit. After the parties presented their evidence to the jury, the district court rejected DuPont's arguments that claims related to the 1994 cancer were time-barred. Based on the overwhelming evidence that Travis Abbott did not know about the connection between testicular cancer and C-8 pollution from

DuPont's Washington Works plant and the significant inferences necessary for a jury to conclude otherwise, the district court found that the Abbotts were entitled to judgment as a matter of law on the statute of limitations issue. DuPont challenges two aspects of this decision. First, Dupont argues that the statute of limitations for Abbott's 2015 cancer ran before he received a definitive diagnosis on November 16, 2015. Second, whether Abbott had notice that DuPont was responsible for his bouts of testicular cancers was, according to the company, an issue properly left to the jury.

We review a district court's decision on a motion for judgment as a matter of law de novo, *Hurt v. Commerce Energy, Inc.*, 973 F.3d 509, 516 (2020), and apply the applicable state-law standards for evaluating such a motion in diversity cases, *Morrison v. B. Braun Med. Inc.*, 663 F.3d 251, 256 (6th Cir. 2011). A directed verdict is proper under Ohio law when, "after construing the evidence most strongly in favor of the party against whom the motion is directed, reasonable minds could come to but one conclusion upon the evidence submitted." *Groob v. KeyBank*, 843 N.E.2d 1170, 1173 (Ohio 2006).

Our de novo review focuses on when Travis Abbott knew that his cancer diagnoses could be tied to DuPont's C-8 pollution. Under Ohio law, a cause of action for bodily injury from "exposure to hazardous or toxic chemicals" accrues when:

> the plaintiff is informed by competent medical authority that the plaintiff has an injury that is related to the exposure, or upon the date on which by the exercise of

> reasonable diligence the plaintiff should have known that the plaintiff has an injury that is related to the exposure, whichever date occurs first.

Ohio Rev. Code § 2305.10(B)(1). This law makes two pieces of knowledge critical to pinning down the accrual date: (1) knowledge of the injury; (2) knowledge that the injury is tied to a specific exposure. *Norgard v. Brush Wellman, Inc.*, 766 N.E.2d 977, 979-81 (Ohio 2002); *O'Stricker v. Jim Walter Corp.*, 447 N.E.2d 727, 727 (Ohio 1983). The Ohio Supreme Court has cautioned that this discovery rule "must be specially tailored to the particular context to which it is to be applied." *Norgard*, 766 N.E.2d at 979. The Ohio Supreme Court has also emphasized that "the underlying rationale for the statute of limitations" and public policy considerations require "a liberal interpretation of the time of accrual" for claims alleging latent bodily injuries. *Liddell v. SCA Serv. of Ohio, Inc.*, 635 N.E.2d 1233, 1238 (Ohio 1994).

The statute of limitations challenge to the claims for the 2015 cancer is straightforward to resolve. DuPont asserts that the district court should have left to the jury to decide whether Abbott knew of his 2015 testicular cancer at least by October 2015 when he received an ultrasound and CT scan showing probable testicular cancer. DuPont assumes that Abbott was aware of the link between testicular cancer and DuPont's C-8 pollution, arguing that his suit filed on November 14, 2017, therefore misses the statute of limitations by mere weeks. The district court found as a matter of law that the earliest possible triggering date for Abbott's 2015 cancer was November 16, 2015,

when Abbott received a definitive diagnosis of testicular cancer after an orchiectomy.

At trial, the Abbotts offered uncontroverted testimony from Travis Abbotts' treating physicians that the testicular cancer diagnosis was not finalized until November 16, 2015. Although his doctors informed him earlier that the mass in his testicle was likely cancerous, the diagnosis was not official until his providers had reviewed a pathology report on the removed testicle. Indeed, an earlier diagnosis without the pathology results, according to the uncontroverted testimony, would have contravened the standard of care.

Interpreting the statute of limitations as requiring Abbott to have sued DuPont before an official diagnosis, moreover, would raise significant fairness issues. First, as the Abbotts argue, it would implicitly require Abbott to have had earlier and greater certainty about his medical diagnosis than his treating physicians had prior to November 16, 2015. Second, such a reading would leave *Leach* class members with a difficult choice. The Agreement prohibits class members without a linked disease from suing DuPont. Had Travis Abbott sued without a definitive diagnosis, DuPont would have had every incentive to argue that he was not a qualifying class member under the *Leach* Agreement. DuPont's position would leave *Leach* class members with a choice of suing before a definitive diagnosis with the risk of dismissal for lack of qualifying class membership or suing after with the risk of dismissal under the statute of limitations. Neither the *Leach* Agreement nor the fundamental fairness concerns

underlying Ohio's statute of limitations support such a result. *Cf., e.g.*, *Schmitz v. Nat'l Collegiate Athletic Ass'n*, 122 N.E.3d 80, 87 (Ohio 2018).

The analysis is more fact-intensive for the 1994 cancer than that for the 2015 cancer. There is no debate that Travis Abbott knew of his 1994 cancer well over two years before suing DuPont. The issue is instead when, pursuant to Ohio's discovery rule, Abbott became or should have become aware of the link between that cancer and DuPont's C-8 discharges.

Abbott argues that the statute of limitations began to run as to his 1994 cancer when he actually encountered information that did or should have made him aware of the link between C-8 and the cancer, which he says occurred in October or November of 2015. DuPont suggests that Abbott's actual knowledge of a potential link between C-8 and his cancer is not what triggered his claim's accrual. Rather, there was media coverage of the link between C-8 and testicular cancer and other notice sufficient to make a reasonable person in Abbott's position aware that his cancer was related to C-8 before the fall of 2015.

Abbott's witnesses consistently presented facts to the jury showing that despite media coverage and some relatives' independent lawsuits against DuPont, Abbott was not aware of the connection between testicular cancer and DuPont's C-8 pollution. Abbott testified that he learned about the connection between his cancer and C-8 only a few weeks before filing his lawsuit, when his father told him about a TV ad discussing C-8's tie to testicular cancer and his administrative assistant suggested that he consult a lawyer on the issue. He further testified that he had

not heard about the Science Panel's findings, did not receive notices about a link between C-8 and testicular cancer, and did not subscribe to or read any newspapers discussing the link to C-8.

DuPont did not offer evidence at trial directly refuting the consistent evidence regarding Abbott's lack of knowledge about the link between his cancers and C-8. DuPont presented some circumstantial evidence to support its assertion that Abbott did or should have known about the connection to C-8. For instance, when cross-examining Travis Abbott, DuPont elicited testimony about his 2006 C-8 Health Project paperwork, which included questions about testicular cancer and indicated that the Science Panel was looking into the disease's relationship to C-8 pollution (though, of course, in 2006, there was no established probable link between testicular cancer and C-8). DuPont also provided evidence of local newspaper coverage of both the *Leach* Settlement Agreement and the Science Panel's decisions. At several points, DuPont questioned Travis Abbott and other witnesses about the fact that some members of Abbott's extended family had already sued DuPont on claims related to other linked diseases.

But Ohio's discovery rule does not require that plaintiffs read the news or assume that they have knowledge of their family's legal affairs. Instead, "the statute of limitations begins to run once the plaintiff acquires additional information of the defendant's wrongful conduct" that does or should put that plaintiff on notice that his injury is related to the

conduct.[9] *Norgard*, 766 N.E.2d at 981; *see Browning v. Burt*, 613 N.E.2d 993, 1006 (Ohio 1993) (statute of limitations for negligent credentialing claim against hospital began to run when plaintiffs viewed a television program making them aware that other ex-patients suffered from abnormalities similar to theirs); *Vaccariello v. Smith & Nephew Richards, Inc.*, No. 76594, 2000 WL 1060649, at *5 (Ohio Ct. App. Aug. 3, 2000), *aff'd*, 763 N.E.2d 160 (Ohio 2002) (statute of limitations for bodily injury claim began to run when plaintiff viewed television program in which she learned that a device implanted in her back could be the source of her injury). The question, then, is not whether there was media coverage of C-8's link to testicular cancer, or whether other members of Abbott's family brought claims against DuPont. The question is whether Abbott encountered information that did or should have put him on notice that his cancer was connected to C-8. DuPont did not present evidence that Abbott ever received such information.

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[9] Our dissenting colleague cites *Flowers v. Walker*, 589 N.E.2d 1284, 1287 (Ohio 1992), which found that constructive knowledge of facts was sufficient to start the statute of limitations running for a medical malpractice claim (not a bodily injury claim). Even if applicable, this standard is not inconsistent with the Ohio discovery rule as the district court applied it: like a plaintiff bringing a bodily injury claim, a plaintiff bringing a medical malpractice claim must encounter some information that does or should put them on notice. *See Allenius v. Thomas*, 538 N.E.2d 93, 133 (Ohio 1989); *see also Hambleton v. R.G. Barry Corp.*, 465 N.E.2d 1298, 1300-01 (Ohio 1984) (finding that a party has constructive notice to trigger a statute of limitations if he "*has knowledge of such facts* as would lead a fair and prudent man, using ordinary care and thoughtfulness, to make further inquiry" and "fails to do so" (emphasis added)).

The district court drew a helpful analogy to the *McDonnell Douglas* burden shifting framework common in employment discrimination cases when denying DuPont's motion for summary judgment. DuPont first made a prima facie case that the statute of limitations barred Abbott's claims because the 1994 cancer and news about the link between C-8 and testicular cancer occurred well over 2 years before Abbott filed suit. Abbott then rebutted that assumption by offering proof that he did not know about the link between C-8 and testicular cancer. DuPont did not meet its burden of challenging that rebuttal.

The district court's reasoning is sound. While the jury normally can make credibility judgments, submitting the statute-of-limitations issue to them would have required them to "draw inference upon inference upon inference" to find for DuPont. The record evidence pointed in one direction: Abbott filed his claim less than two years after he became aware of the connection between C-8 and his testicular cancers. We therefore affirm the district court's judgment on the statute of limitations.

III. CONCLUSION

For the foregoing reasons, we AFFIRM the judgment of the district court in full.

ALICE M. BATCHELDER, Circuit Judge, concurring in part and dissenting in part.

Throughout the last decade or so, this multidistrict litigation has generated more than ten thousand record entries, two appeals, and five month-long jury trials. The district court has done a commendable job, and the majority affirms the court's relevant decisions in full, as they relate to Travis and Julie Abbott.

Respectfully, I must dissent. I would hold that, in mass-tort multidistrict litigation, fundamental notions of due process require an additional safeguard before a court can issue a collateral estoppel order against a defendant based upon a small number of potentially unrepresentative bellwether trials. I would also hold that the general verdicts in the three early trials lacked the specificity to bind the thousands of remaining cases. Finally, I would hold that the district court erred, in part, by taking away from the jury DuPont's statute-of-limitations defense.

For the reasons expressed below, I concur in Part II.B of the majority opinion but must respectfully dissent from Parts II.A and II.C.

I.

I'll begin with Part II.A. I agree that nonmutual offensive collateral estoppel does not necessarily violate due process in this context.[1] Nowhere in

[1] The district court and the majority use the term "collateral estoppel," also known as "issue preclusion." *Brownback v. King*, 141 S. Ct. 740, 747 n.3 (2021). Although issue preclusion is the "more descriptive term," *Yeager v. United States*, 557 U.S. 110,

Parklane Hosiery Co. v. Shore, 439 U.S. 322 (1979), did the Supreme Court create a categorical ban on that doctrine in mass-tort litigation. The Court, instead, used "fairness" as its guide to determine when the doctrine is appropriate. I also agree with the majority that the district court was not required to give DuPont advance notice that the bellwether trials could later have preclusive effect.

That said, however, collateral estoppel was not appropriate in this case. The district court used plaintiff-specific verdicts, based on general verdict forms, from three early trials—as to which the court had told the parties from the outset that they would be informational and non-binding—to preclude DuPont from contesting certain liability issues in thousands of potentially different cases. For a court to apply offensive collateral estoppel against a defendant in a mass-tort multidistrict litigation such as this, due process requires an inquiry into the representativeness of the plaintiffs, as well as a faithful adherence to the collateral estoppel rules. Because neither happened in this case, the district court's sweeping estoppel order subverts DuPont's constitutional rights. I would reverse and remand.

A.

It is foundational that all defendants, no matter how unsympathetic or heinous their conduct, retain the full force of constitutional due-process protections. In my view, in the mass-tort bellwether context, the Constitution requires that before a court issues a

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119 n.4 (2009), I will refer to the doctrine as collateral estoppel for the sake of consistency.

collateral estoppel order it must assure that the cases estopped are reasonably representative of the first cases tried. The district court here failed to do that—despite there being thousands of cases at stake—making its estoppel order fundamentally unfair to DuPont in violation of due process.

First, some background on the legal landscape. As the majority describes, in federal diversity actions, state law determines whether collateral estoppel may render a prior decision preclusive on an issue raised in a later case. In Ohio, issue preclusion applies when (1) the issue "was actually and directly litigated in the prior action;" (2) a "court of competent jurisdiction" decided the issue; (3) the "fact or . . . point" in question was "actually and necessarily litigated and determined" as part of a final judgment; (4) "the party against whom collateral estoppel is asserted was a party in privity with a party to the prior action;" and (5) the party against whom estoppel is sought had a "full and fair opportunity" to litigate the issue in the prior action. *State ex rel. Jefferson v. Russo*, 150 N.E.3d 873, 875 (Ohio 2020); *Fort Frye Tchrs. Ass'n OEA/NEA v. State Emp. Rels. Bd.*, 692 N.E.2d 140, 144 (Ohio 1998); *State v. Williams*, 667 N.E.2d 932, 935 (Ohio 1996); *Walden v. State*, 547 N.E.2d 962, 966 (Ohio 1989). This doctrine conserves judicial resources and protects against inconsistent decisions by recognizing that parties should not be able to relitigate the same disagreement in perpetuity. *See Taylor v. Sturgell*, 553 U.S. 880, 892 (2008); *San Remo Hotel, L.P. v. City & County of San Francisco, Cal.*, 545 U.S. 323, 336-37 (2005).

But like all doctrines, it has its limits. In *Parklane*, 439 U.S. at 326, the Supreme Court considered whether a party could use what is called "nonmutual offensive collateral estoppel"—that is, whether a plaintiff can seek to estop a defendant from relitigating an issue that the defendant previously litigated and lost against a different plaintiff. The Court weighed the downsides of allowing the doctrine but ultimately concluded that "the preferable approach . . . is not to preclude the use of offensive collateral estoppel, but to grant trial courts broad discretion when it should be applied." *Id.* at 331. The Court held that, as a guiding principle, "offensive estoppel" should not be applied where it "would be unfair to the defendant." *Id.*

As an example of when it might be unfair, the Court instructed district courts to "avoid reward[ing]" a plaintiff "who could easily have joined in the earlier action" but chose not to "in the hope that the first action by another plaintiff" resolved favorably. *Id.* at 330-31. The Court noted that offensive estoppel may also be unfair where a defendant had "little incentive to defend [an initial case] vigorously," where there are inconsistent prior judgments, or where "the second action affords the defendant procedural opportunities [that were] unavailable in the first action." *Id.* at 330-31. In a footnote, the Court provided an example of when inconsistent prior judgments would render estoppel unfair:

> In Professor Currie's familiar example, a railroad collision injures 50 passengers all of whom bring separate actions against the railroad. After the railroad wins the first 25

> suits, a plaintiff wins in suit 26. Professor Currie argues that offensive use of collateral estoppel should not be applied so as to allow plaintiffs 27 through 50 automatically to recover.

Id. at 330 n.14 (citing Currie, *Mutuality of Estoppel: Limits of the Bernhard Doctrine*, 9 Stan. L. Rev. 281, 304 (1957)). Finally, the Court noted that it did not exhaustively catalogue the factors a district court should consider when reviewing for fairness. *Id.* at 331 ("The general rule should be that . . . where, either for the reasons discussed above *or for other reasons*, the application of offensive estoppel would be unfair to a defendant, a trial judge should not allow [its] use . . . .").

In other cases, the Court has limited collateral estoppel when the doctrine is sought against the government, *United States v. Mendoza*, 464 U.S. 154, 162 (1984), or when there is an intervening change in the controlling facts or legal principles in a case, *Herrera v. Wyoming*, 139 S. Ct. 1686, 1697 (2019) (gathering examples). And "of course," just as any other common law doctrine, collateral estoppel is "subject to due process limitations." *Taylor*, 553 U.S. at 891 (quoting *Richards v. Jefferson County*, 517 U.S. 793, 797 (1996)).

Complicating matters here, though, is that multidistrict litigation ("MDL") courts often use a procedure called "bellwether trials" to help resolve mass-tort litigation, and, at least in theory, the results of those trials can bind future cases under ordinary principles of collateral estoppel. Bellwethers are preliminary trials meant to help the parties gather

information, value the cases, test legal theories, and, ultimately, reach a global settlement with minimal costs. *See* Alexandra D. Lahav, *Bellwether Trials*, 76 Geo. Wash. L. Rev. 576, 577-78 (2008). In practice, their results are generally non-binding absent an agreement to the contrary between the parties. *See* Eldon E. Fallon et al., *Bellwether Trials in Multidistrict Litigation*, 82 Tul. L. Rev. 2323, 2331 n.27, 2337 (2008). And for understandable reasons, there is usually a concerted effort to ensure that bellwethers are representative of the larger group of MDL plaintiffs. That way, the parties and the court can confidently and accurately draw inferences from them.[2] *See In re Depuy Orthopaedics, Inc.*, 870 F.3d 345, 348-49 (5th Cir. 2017) ("Bellwether trials are meant to produce a sufficient number of representative verdicts and settlements to enable the parties and the court to determine the nature and strength of the claims, whether they can be fairly developed and litigated on a group basis, and what range of values the cases may have if resolution is attempted on a group basis."); Zachary B. Savage, *Scaling Up: Implementing Issue Preclusion in Mass*

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[2] In the district court's words, the bellwether trials here were meant to "produce a sufficient number of representative verdicts and settlements to enable the parties and the court to determine the nature and strengths of the claims . . . and what range of values the cases may have." [MDL 5285, PageID# 128541 (quoting *The Manual for Complex Litigation*, § 22.315)]. At another point, when the parties informed the court that they had settled several of the bellwethers, the court stated that it "was, to put it mildly, surprised" because "[f]or over three years the parties had taken the position that the purpose of the bellwether trials was to gather information regarding the valuation of cases." [MDL 4624, PageID# 100953].

Tort Litigation Through Bellwether Trials, 88 N.Y.U. L. Rev. 439, 453 (2013) ("[B]ellwether trials are distinct from ordinary trials because the transferee court selects cases that are similar to the wider group of claims arising from the mass tort. These trials involve similar facts, claims, or defenses as the wider group of cases, and are meant to help achieve global resolution of the litigation."); *see also Grundy v. FCA US LLC*, No. 2:20-CV-11231, 2021 WL 5485821, at *1 (E.D. Mich. Nov. 22, 2021).

Now to the merits. In my view, due process requires an additional safeguard before a court can declare mass-tort preclusion on an issue of liability against a defendant: the court must ensure that the sample of bellwether plaintiffs is reasonably representative of the rest.[3] The Fifth Circuit's decision in *In re Chevron U.S.A., Inc.*, 109 F.3d 1016, 1020 (5th Cir. 1997), is instructive. In *Chevron*, a mass-tort case involving an oil spill, the district court planned to conduct a "unitary trial" of 30 bellwether cases, with each side selecting 15 cases out of the 3,000 cases pending. *Id.* at 1019-21. The trial would be preclusive on both "general liability" and "general causation" for the remaining 2,970 plaintiffs. *Id.* at 1019-20. The Fifth Circuit rejected this plan on due-process grounds because it contravened "fundamental fairness" to impose widespread liability against Chevron based on the results of a non-representative sample of plaintiffs. *Id.* at 1019-21. The Fifth Circuit explained

[3] Only two of the three cases that were tried before *Abbott-Swartz* were bellwether trials. But for ease of reference, I will refer to all three as "bellwether trials" and the plaintiffs in them as "bellwether plaintiffs."

that, without a sufficient number of representative trials, the district court's trial plan lacked "the minimum level of reliability." *Id.* at 1020-21; *see id.* at 1019 (noting that the "core element" of bellwether trials is "representativeness"). The court held: "[B]efore a trial court may utilize results from a bellwether trial for a purpose that extends beyond the individual cases tried, it must, prior to any extrapolation, find that the cases tried are representative of the larger group of cases or claims from which they are selected." *Id.* at 1020.

The Sixth Circuit has not had the occasion to address the due-process restrictions on bellwethers. But in the class-action context, we have described bellwethers as "a small number of . . . plaintiffs, who can adequately represent the class, test their claims and legal theories first, before proceeding with the rest of the class." *Abrams v. Nucor Steel Marion, Inc.*, 694 F. App'x 974, 977 n.2 (6th Cir. 2017). It appears that scholars agree with *Chevron* that bellwether trials should be representative, and that a small sample size of bellwether trials has the potential to prematurely "lock in" outlier jury findings. *See, e.g.*, Fallon, *supra*, at 2344 (noting that a "bellwether trial is most effective when it can accurately inform future trends and effectuate an ultimate culmination to the litigation," and that parties should catalogue the entire universe of MDL cases to minimize the risk of trying an anomalous bellwether case); Savage, *supra*, at 463-64 (arguing that collateral estoppel should apply in mass tort litigation but only after "defendants [have] lost a substantial number of bellwether trials," and that the court must "ensure[] that the bellwether trials involved a wide range of plaintiffs—not just the

most sympathetic ones"); Byron G. Stier, *Another Jackpot (in)justice: Verdict Variability and Issue Preclusion in Mass Torts*, 36 Pepp. L. Rev. 715, 739-43 (2009) (exploring "the possibility that the first verdict [in a multidistrict litigation] would be inconsistent with subsequent verdicts"); *see also* Meiring de Villiers, *Technology Risk and Issue Preclusion: A Legal and Policy Critique*, 9 Cornell J.L. & Pub. Pol'y 523, 524 (2000) ("Liberal application of collateral estoppel in product liability . . . has been criticized for putting the survival of entire industries at risk based on a single, possibly erroneous, judgment."); *Ann. Manual Complex Lit.* § 22.315 (4th ed. 2022) (bellwethers are meant "to produce reliable information about other mass tort cases, [so] the specific plaintiffs and their claims should be representative of the range of cases").

I would adopt *Chevron*'s approach and find that it is fundamentally unfair for a small, non-representative sample of bellwether plaintiffs to bind a defendant in thousands of future cases. *Parklane* makes it clear that even when the collateral estoppel requirements are met (which I question here), the invocation of the doctrine should not be allowed if it would be unfair. *Parklane*, 439 U.S. at 331; *see Homaidan v. Sallie Mae, Inc.*, 3 F.4th 595, 600 (2d Cir. 2021) ("Nonmutual offensive collateral estoppel . . . cannot be applied if it would be unfair to the defendant."); *Merial, Inc. v. Sergeant's Pet Care Prod., Inc.*, 806 F. App'x 398, 406 (6th Cir. 2020) ("Courts also must ask, whether it would be otherwise unfair under the circumstances to permit the use of collateral estoppel." (quotation marks omitted)); *Marlene Indus. Corp. v. N.L.R.B.*, 712 F.2d 1011, 1017

(6th Cir. 1983) (collateral estoppel must be "qualified or rejected when [its] application would contravene an overriding public policy or result in manifest injustice" (citation omitted)); *Jack Faucett Assocs., Inc. v. Am. Tel. & Tel. Co.*, 744 F.2d 118, 125 (D.C. Cir. 1984) (where nonmutual offensive collateral estoppel is requested, "'fairness' gains special importance").

Here, the district court made no effort to ensure representativeness in its estoppel order. Neither of the two bellwether trials (*Bartlett* or *Freeman*) appears to be representative of the thousands of then-remaining cases. Nor do they appear to be representative of Abbott's case. Although there was some surface-level discussion of "representativeness" very early on in the MDL proceedings, [MDL 30, PageID# 172; MDL 34, PageID# 218-19; MDL 194, PageID# 3694], the district court ultimately allowed the parties to each select three of their strongest cases for bellwether trials. And the third trial, *Vigneron*, was chosen by plaintiffs after the court clearly rejected any requirement that it be representative. [MDL 4461, PageID# 96026-27]. Indeed, the court instructed plaintiffs to choose one of the "most severely impacted plaintiffs" to go first. [MDL. 4624, PageID# 100962; *see also* MDL 4461, PageID# 96026-27; MDL 4535-2, PageID# 98584 (plaintiffs' brief arguing that "the representativeness of the trial selections should be of no moment")].

The parties argue about whether there are outcome-determinative differences between the bellwether plaintiffs and Abbott. But as Judge Jones stated in her concurrence in *Chevron*, "the determination of reliable representative plaintiffs is

difficult in a toxic exposure case"—it "involves such questions as quantity, geographic proximity, and temporal exposure to the toxic substance, comparative lifestyles, and physical manifestations of exposure." *Chevron*, 109 F.3d at 1022 (Jones, J., concurring). The fact remains that the district court here explored none of these questions in its estoppel order, despite having allowed the parties to cherry-pick "faces from the crowd of plaintiffs." *Id.* Moreover, the estoppel order impacts more than the Abbotts' case—it binds DuPont in countless other cases, too. And it continues to do so as new cases are filed.[4] [6th Cir. R. 69].

I am mindful that the fairness inquiry could be "potentially disruptive" if liberally applied and that collateral estoppel remains a useful trial-management device when used in appropriate cases. *Merial*, 806 F. App'x at 414. But in tension with those concerns is the fundamental and "essential prerequisite of due process" that a party have a full and fair "opportunity to be heard." *Richards*, 517 U.S. at 797 n.4. And it is Statistics 101 that a small, unrepresentative sample cannot yield reliable inferences as to a larger group. Because the district court here failed to assess the representativeness of the bellwether plaintiffs, the court's far-reaching estoppel order deprived DuPont of

[4] I am not confident that, in a toxic-tort MDL case involving thousands of plaintiffs, a small group of bellwether trials can ever be reasonably representative of the larger group. But the difficulty of ensuring representativeness is no reason to do away with the doctrine of collateral estoppel. It merely underscores that, as a practical matter, in rare cases such as this, collateral estoppel will usually be unfair because a court cannot confidently extrapolate findings relevant to, and preclusive upon, the remaining group of cases.

its constitutional right to have an "individual assessment of liability and damages in each case." *Chevron*, 109 F.3d at 1023 (Jones, J., concurring).

This is not to say that DuPont's three losses were outliers. It may very well be that, if given the chance to contest duty, breach, and foreseeability in each successive case, DuPont would still lose. But maybe not. Out of the 3,500 pending MDL cases, only three were tried. And about 75,000 potential lawsuits remained at the time of the estoppel order. Thus, it was too early, and the cases are perhaps too disparate, to tell.

The Abbotts claim that only *binding* bellwethers (where the parties agree in advance that the trials will be preclusive) must be representative. [Appellee's Br. 35]. But the Abbotts do not provide any case support or justification for the claim that binding bellwethers require due-process protections, but potentially binding informational bellwethers do not. The distinction makes no difference. Before a district court allows a bellwether trial to be preclusive on thousands of other MDL cases—whether by binding bellwether (before trial) or by informational bellwether (after trial)—due process requires an inquiry into representativeness.[5] The district court's concern for

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[5] The only case cited by the majority to support giving bellwethers preclusive effect is *Silivanch v. Celebrity Cruises, Inc.*, 333 F.3d 355 (2d Cir. 2003). But that case is a classic example of a binding bellwether, where the parties agreed in advance that the bellwether would decide certain issues in the remaining cases. *Id.* at 359. Moreover, *Silivanch* involved fewer than twenty-two plaintiffs, and the court's discussion of bellwethers was by way of background. The court did not in any

efficiency, while understandable, does not outweigh these overarching due-process concerns. *See In re Nat'l Prescription Opiate Litig.*, 956 F.3d 838, 841, 844-45 (6th Cir. 2020) (emphasizing that "enhancing the efficiency of the MDL as a whole" is not reason to disregard "the same legal rules that apply in other cases," and that "a party's rights in one case [cannot] be impinged to create efficiencies in the MDL generally"); *Chevron*, 109 F.3d at 1022 (Jones, J., concurring) ("Judges must be sensitive to stay within our proper bounds of adjudicating individual disputes. We are not authorized by the Constitution or statutes to legislate solutions to cases in pursuit of efficiency and expeditiousness.").

In the end, the district court has done something that no other circuit court has, to my knowledge, allowed. It is one thing for a district court to bind a defendant in a single case after a handful of informational bellwether trials involving similarly-situated plaintiffs. It is quite another for a court to do so in thousands of future cases and without considering whether those cases involve legally divergent facts. And for a court to change course after it told the parties from the outset that the bellwethers would be informational and non-binding. [MDL 34, PageID# 218-19; *see* MDL 3973, PageID# 68182; MDL 4184, PageID# 80083; MDL 4382, PageID# 93365-66; MDL 4624, PageID# 100947].

In light of the "unique potential for unfairness" at play here, *Jean Alexander Cosms., Inc. v. L'Oreal*

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way speak to the propriety of giving bellwethers (much less *informal* bellwethers) preclusive effect.

USA, Inc., 458 F.3d 244, 248 (3d Cir. 2006), I would remand this case so that the district court can assess in the first instance the representativeness of the bellwether plaintiffs before applying collateral estoppel. *See Bifolck v. Philip Morris USA Inc.*, 936 F.3d 74, 78, 84-85 (2d Cir. 2019) (remanding case for determination of whether application of nonmutual offensive collateral estoppel would be unfair).

B.

I also cannot conclude that the black-letter requirements of collateral estoppel were satisfied in this case. Recall that collateral estoppel requires, among other things, that the precise issue raised in the later case was "actually and directly litigated in the prior action." *Russo*, 150 N.E.3d at 875. . Because the three bellwether trials here used general verdict forms and resulted in plaintiff-specific verdicts, the precise issues of duty, breach, and foreseeability raised in *Abbott* have not been actually litigated and forever decided.

The bellwether trials' general verdict forms are insufficient. "[A] jury speaks only though its verdict," and therefore general verdicts often lack the specificity required to create widespread issue preclusion. *Yeager v. United States*, 557 U.S. 110, 121-23 (2009) (emphasizing that "speculation" and "conjecture" have no place in the issue-preclusion analysis); *United Access Techs. v. CenturyTel Broadband Servs.*, 778 F.3d 1327, 1331 (Fed. Cir. 2015) ("When there are several possible grounds on which a jury could have based its general verdict and the record does not make clear which ground the jury relied on, collateral estoppel does not attach to any of

the possible theories."); *S.E.L. Maduro (Fla.), Inc. v. M/V Antonio de Gastaneta*, 833 F.2d 1477, 1483 (11th Cir. 1987) ("If the jury could have premised its verdict on one or more of several issues, then collateral estoppel does not act as a bar to future litigation of the issues."); *Steen v. John Hancock Mut. Life Ins. Co.*, 106 F.3d 904, 912 (9th Cir. 1997) ("Collateral estoppel is inappropriate if there is any doubt as to whether an issue was actually litigated in a prior proceeding."); *see also In re Piercy*, 21 F.4th 909, 924-25 (6th Cir. 2021) (noting that collateral estoppel determinations cannot be based on gaps in verdict forms); *Black v. Ryder/P.I.E. Nationwide*, 15 F.3d 573, 581-82 (6th Cir. 1994) (clear error where court "engage[d] in pure speculation regarding the basis for the general verdict in the earlier case").

The verdict forms here asked the jury: "Do you find in favor of [the plaintiff] on his negligence claim?" [*See, e.g.*, Freeman, No. 2:13-cv-1103, R. 97, PageID# 1011]. Nothing more. Unlike a detailed special verdict, this type of general verdict does not provide insight into what the jury did, and did not, decide. It leaves the court with questions about what theories of negligence formed the basis for the jury's verdict, and what acts or omissions the jury believed were foreseeable by DuPont. And when we have reasonable doubt as to what the first cases found, we "err on the side of construing [those] prior ambiguous findings or holdings narrowly" for purposes of collateral estoppel. *United States v. United Techs. Corp.*, 782 F.3d 718, 729 (6th Cir. 2015); *see Merial*, 806 F. App'x at 413 (denying collateral estoppel, in the alternative, "on the basis of lack of clarity"); *In re Braniff Airways, Inc.*, 783 F.2d 1283, 1289 (5th Cir. 1986) ("[I]f reasonable

doubt exists as to what was decided in the first action, the doctrine of res judicata should not be applied."); *Harris v. Jacobs*, 621 F.2d 341, 343 (9th Cir.1980) ("If there is doubt on this score, collateral estoppel will not be applied.").

In *Dodge v. Cotter Corp.*, 203 F.3d 1190 (10th Cir. 2000), the Tenth Circuit reversed the district court's application of collateral estoppel in part because the verdict form did not specify which theories the jury relied upon in finding negligence. *Id.* at 1197-98. Similarly, in *Hardy v. Johns-Manville Sales Corp.*, 681 F.2d 334 (5th Cir. 1982), the Fifth Circuit rejected the application of collateral estoppel where a general verdict form was "ambiguous as to certain key issues," including "what the . . . jury decided about when a duty to warn attached." *Id.* at 343-44. The verdict forms here suffer from the same flaw.

The Abbotts do not respond to this argument. And the district court's cited authority is distinguishable. *See Adams v. United States*, 2010 WL 4457452 (D. Idaho Oct. 29, 2010). In *Adams*, the court informed the parties that the bellwether trial would have "preclusive effect," selected a "representative sample" of plaintiffs, and used a 47-question special verdict form to avoid ambiguity on the specific issues being decided. *Id.* at *1-3.

Importantly, the three bellwether trials here also involved distinct, plaintiff-specific facts that bear heavily on negligence. These include each plaintiff's susceptibility and location and the length and timing of his or her exposure to C-8, as well as DuPont's response and its knowledge about which locations were exposed to C-8 (and at what levels) and about the

scientific developments regarding C-8 over the last fifty years. Each of these factual variations can affect the duty and foreseeability elements of negligence. *See Mussivand v. David*, 544 N.E.2d 265, 272 (Ohio 1989) ("The existence of a duty will depend on the foreseeability of the injury to appellee."); *Abrams v. Worthington*, 861 N.E.2d 920, 923 (Ohio Ct. App. 2006) ("In Ohio, the existence of a duty depends upon the foreseeability of injury to the plaintiff."); *Conte v. Gen. Housewares Corp.*, 215 F.3d 628, 636 (6th Cir. 2000) (same); *Est. of Ciotto v. Hinkle*, 145 N.E.3d 1013, 1019-20 (Ohio Ct. App. 2019) ("[F]oreseeability defin[es] the scope and extent of the duty." (quotation marks omitted)); *see also Palsgraf v. Long Island R.R.*, 162 N.E. 99, 100-01 (N.Y. 1928) ("The risk reasonably to be perceived defines the duty to be obeyed . . . . [A plaintiff] must show that the act as to him had possibilities of danger so many and apparent as to entitle him to be protected . . . ."). Any combination of these factual differences could lead a jury to find that a particular plaintiff's injuries were not reasonably foreseeable and, therefore, that DuPont did not owe or breach a duty of care.

Consider location. Abbott grew up and lived in and around Pomeroy, Ohio, which is 56.9 river miles away from DuPont's Washington Works plant in Washington, West Virginia. [Abbott, No. 2:17-cv-998, R. 192, PageID# 8292; R.33-2, PageID# 342-43]. During that time, his water was sourced from wells ranging anywhere from 14 to 56 miles away from source of C-8 emissions. [Abbott R. 192, PageID# 8292; R.33-2, PageID# 342-43; R. 254-3, PageID# 14012]. While Bartlett sometimes drank water from the same source as Abbott (for the years she lived in and around

Tupper Plains, Ohio), [Bartlett, No. 2:13-cv-170, R. 131, PageID# 4530, 4613-14], Freeman and Vigneron drank water sourced from wells much closer to DuPont, only about 1,500 feet away from the Washington Works plant, [Appellant's Br. 29]. Beyond that, as a general matter, the post-2017 plaintiffs, including Abbott and Swartz, appear to have lived farther away from DuPont's plant than the plaintiffs in the earlier trials. [*See* MDL 5208, PageID# 125922-24, 125934-38]. Swartz, for example, lived outside the water districts listed in the Leach Agreement and premised her negligence claim on periodic exposure to C-8, claiming that she occasionally drank contaminated water when visiting the homes of others and during a one-year part-time job. [MDL 5208, PageID# 125922-24; MDL 5278, PageID# 128443-44; Swartz, No. 2:18-cv-136, R. 51-10, PageID# 1411].

If divergent facts in later cases could lead juries to reach different conclusions, then collateral estoppel is inappropriate. *See CHKRS, LLC v. City of Dublin*, 984 F.3d 483, 491-92 (6th Cir. 2021) (finding collateral estoppel inapplicable in a contract dispute because the issue was not "identical" to one that had already been litigated, and noting that an issue cannot be defined "at too high a level of generality" such that it "overlooks the changed facts across" cases); *Est. of Van Dyke by Van Dyke v. GlaxoSmithKline*, 2006 WL 8430904, at *5 (D. Wyo. Nov. 1, 2006) (declining to apply collateral estoppel where each case involved "different facts, doses, time frames, diagnoses, warnings and research"); *Dopson-Troutt v. Novartis Pharms. Corp.*, 2013 WL 5304059, at *2 (M.D. Fla. Sept. 20, 2013) (rejecting collateral estoppel in a toxic exposure case because the plaintiff failed to address

whether "the scientific knowledge relevant in [the second case] . . . would be different" from that in the prior trials).

While there are undoubtedly some similarities among Abbott, Bartlett, Freeman, and Vigneron, there are also plenty of legally significant factual differences that I cannot overlook. *United States v. Stauffer Chem. Co.*, 464 U.S. 165, 174 (1984) (factual differences must be of "no legal significance whatever" for collateral estoppel to apply). But even if I did agree that the differences in *Abbott* have no legal significance at all, I am equally concerned about the thousands of other potentially differently situated plaintiffs who stand to benefit from the court's estoppel order. The district court erred by disregarding these differences.

The verdicts in those early cases did not, as the district court held, "ma[k]e clear that the duty DuPont breached was to the *entire communities* surrounding its Washington Works plant and not just to specific customers of individual water districts." [MDL 5285, PageID# 128574 (emphasis added)]. The juries were asked only about negligence with respect to the particular plaintiff, or someone in the position of the plaintiff. [*See, e.g.*, Freeman R. 97, PageID# 1011 (Verdict Form); R. 102, PageID# 1050 (Jury Instructions) (in deliberating on "the existence of a duty," consider whether a "reasonable prudent person would have foreseen at the relevant time that injury was likely to result to someone in Mr. Freeman's position"); Vigneron, No. 2:13-cv-136, R. 195, PageID# 8617 (same); Bartlett R. 139, PageID# 6205 (same)]. The juries were never instructed about a "community"

theory of negligence. And even if they had been, the general verdict form would still have left it unclear if that theory served as the basis for their decision. *See Loughridge v. Chiles Power Supply Co.*, 431 F.3d 1268, 1287 (10th Cir. 2005) (district court may not, after a verdict, "embrace[] [a theory] not addressed by the jury" because that would be stepping "into the impermissible realm of speculation as to what the jury actually determined").

I also anticipate that this preclusive effect essentially guts the utility of informational bellwether trials. After today, it seems that parties can do nothing—other than not conduct bellwethers at all—to prevent an informational bellwether from becoming binding. Parties can't purposefully select unrepresentative plaintiffs to go first, nor can they purposefully use general verdict forms so that preclusion does not attach. *See* Savage, *supra*, at 464 (suggesting as much); [Appellant's Br. 24]. I suggest that the age of bellwethers will come to an end, as any residual benefit of conducting one will be outweighed by its now-endorsed preclusive consequences.

For all these reasons, the Abbotts cannot show that the three bellwether trials "actually" decided "the precise issues" of duty, breach, and foreseeability for all future MDL cases. I would vacate the district court's estoppel order and remand.

II.

I am pleased to concur in Part II.B of the majority's opinion, which concludes that the district court properly excluded portions of DuPont's expert testimony, properly admitted Abbott's specific

causation expert, and did not exclude all testimony on the potential alternative causes of Abbott's cancer.

I write separately on this point to press one caveat: evidence of a plaintiff's specific dosage or level of exposure to a contaminant is relevant to specific causation, and such evidence does not undermine DuPont's concession on general causation so long as the evidence is used in a way that questions the *likelihood*—and not the *capability*—of harm.[6]

According to DuPont, the Science Panel found "that the amount of risk varies greatly with dose, and that some of [the Panel's] data showed that only 'very high' blood levels of C8 materially increased an individual's risk." [Appellant's Br. at 34; *see* MDL 2813-4, PageID# 46017, 46019; Abbott R. 259-1, PageID# 18432-34]. That makes sense. Increased exposure generally means increased risk of harm. And not every person drinking water contaminated with C-8 over the course of fifty years and in different locations will have the same exposure levels. That's why in toxic exposure cases like this, relative risk analysis is often the meat and potatoes of expert opinions. *Pluck v. BP Oil Pipeline Co.*, 640 F.3d 671, 676-77 (6th Cir. 2011). Therefore, DuPont could have, in theory, elicited expert testimony pointing out that

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[6] The Abbotts briefly argue (and the majority finds) that DuPont forfeited this argument because it "chose not to appeal the district court's collateral estoppel decision on this issue." [Appellee's Br. at 18; *see id.* at 41]. Even if the Abbotts provided a developed forfeiture argument (they do not), their argument fails. The district court did not rely on the estoppel order in making its evidentiary rulings; rather, it relied on its interpretation of the Leach Agreement and the expert opinions specific to Abbott and Swartz.

Abbott apparently had a low dosage level of C-8 in his bloodstream and that it was therefore *unlikely* that C-8 caused *his* cancer. That testimony would have squarely addressed specific causation, not general causation, and would have been admissible.

But that's not quite what DuPont tried to do in the district court. Despite DuPont's characterizations on appeal, from early on DuPont has consistently and repeatedly insisted that it could point out that a plaintiff's C-8 levels could be so low that C-8 was *incapable* of causing his or her cancer. [*See* MDL 1679, PageID# 22980-81; MDL 3972, PageID# 68167-74; MDL 4079, PageID# 71853-55; MDL 4226, PageID# 81635; MDL 4777, PageID# 108871-72, 108895; MDL. 5285, PageID# 128552; MDL 5294, PageID# 128750-58; R. 5305, 128936-39]. As the district court and the majority correctly describe, the Leach Agreement takes that kind of testimony off the table. And even though the court prevented DuPont's proffered causation expert from opining that it was "more likely" that Abbott's cancer had alternative causes—which would appear permissible—there was still no error. DuPont's expert refused to rule in C-8 as a *possible* cause of Abbott's cancer, as the Leach Agreement required, and therefore his testimony was properly excluded. [MDL 5301, PageID# 128860-66; *see* MDL 4079, PageID# 71861 ("DuPont has contractually agreed that its experts must rule in C-8 as a possible cause of [a class member's linked disease]."); Abbott R. 65, PageID# 2065].

All in all, DuPont retained the right to call attention to a plaintiff's C-8 levels in order to contest whether C-8 *likely* caused that plaintiff's cancer. But,

as explained, DuPont tried to do more than that at the district court. For that reason, I concur.[7]

III.

I must dissent in part from Part II.C of the majority's opinion as well. Abbott did not file his federal lawsuit for his 1994 cancer until 2017, and there are good arguments that his claim is time-barred by Ohio's statute of limitations. The district court erred by taking that issue away from the jury.

As the majority explains, Ohio has a two-year statute of limitations on personal injury claims. Ohio Rev. Code § 2305.10(A). It reads:

> [A] cause of action for bodily injury . . . that is caused by exposure to hazardous or toxic chemicals . . . accrues upon the date on which . . . by the exercise of reasonable diligence the plaintiff should have known that the plaintiff has an injury that is related to the exposure.

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[7] It does to some extent concern me, however, that the district court prohibited the jury from reviewing the Science Panel's findings, even though the jury asked to see them. [Abbott R. 187-1, PageID# 6857 ("Can we use/see the 2012 Science Panel Report?"); *see also id.* at 6857 (jury question stating that one juror refused to "consider as fact that the Science Panel determined drinking water containing .05 ppb . . . linked to testicular . . . cancer"]. The jury in the first bellwether trial, *Bartlett*, also asked to see the Science Panel's report, but the district court refused to provide it then as well. [Bartlett R. 146, PageID# 6496 ("Can we see the scientific report that determined 0.05 ppb")].

Id. § 2305.10(B)(1). For the Abbotts' claim to be timely, it must have been brought no later than November 14, 2015, unless tolled.

But in granting the Abbotts' motion for judgment as a matter of law, the district court erroneously required DuPont to present evidence of Abbott's *actual* notice of his injury. [Abbott R. 205, PageID# 10857-59; *see generally id.* at 10837-59; R. 241, PageID# 1222]. The court relied on its prior summary judgment decision, which stated that "constructive notice is not the applicable test." [MDL 5304, PageID# 128912; *see* Abbott R. 205, PageID# 10843]. The court held that DuPont did not present sufficient evidence that Abbott had "actually encountered" information to put him on notice of the potential link between C-8 and his testicular cancer. [MDL 5304, PageID# 128913].

That was wrong. The "should have known" language in the Ohio Revised Code confirms that sufficient evidence of constructive notice can be enough to start the clock. Ohio Rev. Code § 2305.10(B)(1); *see Twee Jonge Gezellen, Ltd. v. Owens-Illinois, Inc.*, 238 F. App'x 159, 162 (6th Cir. 2007) (noting that, under Ohio law, the statute of limitations begins when a plaintiff "discovered or *should have* discovered" both his "injury" and that his injury "was the result of [defendant's wrongful conduct]" (emphasis added)); *Norgard v. Brush Wellman, Inc.*, 766 N.E.2d 977, 979 (Ohio 2002) ("[T]he discovery rule . . . provides that a cause of action does not arise until the plaintiff discovers, *or by the exercise of reasonable diligence should have discovered*, that he or she was injured by the wrongful conduct of the defendant." (emphasis added)); *Flowers v. Walker*, 589

N.E.2d 1284, 1287 (Ohio 1992) ("[*C*]*onstructive* knowledge of facts, rather than *actual* knowledge of their legal significance, is enough to start the statute of limitations running under the discovery rule." (emphasis in original)). The Abbotts do not cite a case that says otherwise.

Evidence of Abbott's constructive notice included (1) that, through local media coverage, it was widely publicized—often on the front page of newspapers—that C-8 was linked to testicular cancer; (2) that Abbott released his testicular cancer information to the "C-8 Health Project" in 2006 to determine if his health had been affected by drinking water containing C-8; (3) that by early 2015, his grandparents, his secretary, and about 3,500 individuals in his surrounding area had sued DuPont for their linked diseases; and (4) that Abbott was a high school principal at a school that held a public meeting about the Science Panel's findings. [Appellant's Br. 50-53; Appellant's Reply B. 23]. Abbott, of course, denies that he ever knew C-8 could cause testicular cancer until two weeks before he filed suit. But self-serving denials are not enough to take a triable issue away from a jury when contradictory circumstantial evidence exists.

Though perhaps weak, there was sufficient evidence of Abbott's constructive notice as it relates to his 1994 cancer to give the statute-of-limitations issue to the jury. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986) ("[T]he weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or for a directed verdict."); *see Groob v. KeyBank*, 843 N.E.2d

1170, 1173 (Ohio 2006) (directed verdict is proper when, "after construing the evidence most strongly in favor of the party against whom the motion is directed, reasonable minds could come to but one conclusion upon the evidence submitted" (quotation marks omitted)). In other words, a reasonable jury could have found that a person in Abbott's position exercising reasonable diligence would have been on notice about his injury and his claim against DuPont prior to November 14, 2015 (two years before he filed suit).

With regard to Abbott's 2015 cancer, however, I agree with the majority that the statute of limitations did not begin to run until after a pathologist removed and examined Abbott's mass and confirmed that it was cancerous.

IV.

For the foregoing reasons, I would reverse the district court's grant of collateral estoppel, as well as the court's grant of judgment as a matter of law as it relates to Abbott's 1994 cancer. I respectfully dissent from those portions of the majority opinion and judgment.

Appendix B

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 21-3418

IN RE: E.I. DU PONT DE NEMOURS & COMPANY C-8 PERSONAL INJURY LITIGATION

TRAVIS ABBOTT; JULIE ABBOTT,

Plaintiffs-Appellees,

v.

E.I. DU PONT DE NEMOURS & COMPANY,

Defendant-Appellant.

Filed: Feb. 1, 2023

Before: BATCHELDER, STRANCH, and DONALD, Circuit Judges.

OPINION

The court received a petition for rehearing en banc. The original panel has reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. The petition then

was circulated to the full court.* No judge has requested a vote on the suggestion for rehearing en banc.

Therefore, the petition is denied.

ENTERED BY ORDER OF THE COURT

[handwritten: signature]
Deborah S. Hunt, Clerk

* Judge Nalbandian recused himself from participation in this ruling.

Appendix C

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO

No. 13-md-2433

IN RE: E.I. DU PONT DE NEMOURS & COMPANY C-8 PERSONAL INJURY LITIGATION

THIS DOCUMENT RELATES TO: *ALL CASES*

Filed: Nov. 25, 2019

DISPOSITIVE MOTIONS ORDER NO. 34

Plaintiffs' Motion for Application of Issue Preclusion/Collateral Estoppel

This matter is before the Court on Plaintiffs' Renewed[1] Motion for Partial Summary Judgment on

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[1] On January 27, 2017, a similar motion was filed on behalf of the Group 1 Plaintiffs in this MDL (Pls.' Mot. For Summ. J. on Pls.' Negligence Claims Pursuant to the Doctrine of Issue Preclusion/Collateral Estoppel, MDL ECF No. 5056.) DuPont did not file a reply to Plaintiffs' motion because a global resolution was reached before DuPont's reply was due. (Feb. 13, 2017 Order, MDL ECF No. 5086) (vacating all then current scheduling orders). Plaintiffs filed a second collateral estoppel motion on April 19, 2019 (MDL ECF No. 5202), and Defendant filed its response on May 19, 2019 (MDL ECF No. 5208). Plaintiffs

the Application of the Doctrine of Issue Preclusion/Collateral Estoppel ("Plaintiffs' Renewed Motion") *(In re: E.I. du Pont de Nemours and Company C-8 Personal Injury Litigation,* 2:13-md-2433, MDL ECF No. 5274), Defendant DuPont de Nemours and Company's ("Defendant" or "DuPont") Memorandum in Opposition to Plaintiffs' Renewed Motion (MDL ECF No. 5278), Plaintiffs' Reply Brief in Support of their Renewed Motion (MDL ECF No. 5280), Defendant's Motion to File Sur-Reply *Instanter* (MDL ECF No. 5281), Defendant's Sur-Reply (MDL ECF No. 5281-1), Plaintiffs' Opposition to Defendant's Motion to File Sur-Reply *Instanter* (MDL ECF No. 5282), and Defendant's Reply Brief in Support of its Motion to File Sur-Reply *Instanter* (MDL ECF No. 5283). For the reasons set forth below, the Court GRANTS both motions. (MDL ECF Nos. 5274, 5281.)

I.

The facts underlying the cases in this multidistrict litigation ("MDL") were first brought before the judiciary over 20 years ago in a West Virginia state court case. The cases involve individual plaintiffs who are all part of a class certified 18 years ago that consisted of approximately 80,000 residents of Ohio and West Virginia who drank water contaminated by releases from DuPont's Washington Works facility. All the cases purport to be subject to a settlement agreement executed 15 years ago ("*Leach* Settlement Agreement") between the class and DuPont. The record in this Court spans six and one-

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withdrew their motion on May 23, 2019, after Pretrial Order No. 51 was issued. (MDL ECF No. 5220.)

half years, requiring two years of supplementary court staffing, docket entries exceeding 5,200 filings, including more than 450 decisions from the Court, four month-long jury trials with three trials going to verdicts all in favor of the plaintiffs-with nearly $9 million in liability damage awards on negligence claims and $11 million in punitive damage awards. DuPont appealed the verdicts in the first trial to the United States Court of Appeals for the Sixth Circuit, the appeal received full briefing, assignment of a judicial panel, and oral argument before the panel. DuPont withdrew the appeal before decision. On the same day the appeal was withdrawn, the fourth trial was ended in its third week without a verdict from the jury. DuPont filed notice with the Security and Exchange Commission ("SEC") of a $670.7 million global settlement of the 3500-plus then-pending cases, all of which were dismissed. Since that time, 50-plus post-settlement cases have been filed in this Court, with over 70 motions currently pending, and the first trial scheduled to commence in less than two months, on January 21, 2020.

In their Renewed Motion, Plaintiffs move for the application of collateral estoppel/issue preclusion on duty, breach, general causation, interpretation of the *Leach* Settlement Agreement, and the inapplicability of the Ohio Tort Reform Act to the cases currently pending before the Court in this MDL. Generally, the doctrine of issue preclusion bars successive litigation of an issue of fact or law actually litigated and resolved in a valid court determination essential to a prior judgment. *Parklane Hosiery Co. v. Shore,* 439 U.S. 322, 326 (1979); *Goodson v. McDonough Power Equip., Inc.*, 2 Ohio St. 3d 193, 195 (1983). "By 'preclud[ing]

parties from contesting matters that they have had a full and fair opportunity to litigate,"' collateral estoppel protects against "the expense and vexation attending multiple lawsuits, conserv[es] judicial resources, and foste[rs] reliance on judicial action by minimizing the possibility of inconsistent decisions." *Taylor v. Sturgell*, 553 U.S. 880, 892 (2008) (alterations in original) (quoting *Montana v. United States*, 440 U.S. 147, 153-54 (1979)).

The Court herein provides an overview of only the aspects of this case necessary to reach the issues presently before it.

A. West Virginia Lawsuits

In 1998, in a case styled *Tennant v. E.I. du Pont de Nemours & Co., Inc.,* No. 6:99-0488 (S.D. W.Va.), discovery brought to light the fact that the drinking water supplies around DuPont's Washington Works facility in Parkersburg, West Virginia were contaminated with a synthetic perfluorinated carboxylic acid and fluorosurfactant also known as perfluorooctoanoic acid or ammonium perfluorooctanoate ("PFOA" or "C-8"). (Pls' Mot. for Partial Summ. J., Bilott Aff. Ex. B, MDL ECF No. 820-4.) C-8 is in "a family of human-made chemicals that do not occur naturally in the environment." (*Public Health Statement* at 3, Dept. of Health and Human Serv., Public Health Service Agency for Toxic Substances and Disease Registry, https://www.atsdr.cdc.gov/toxprofiles/tp200-c1-b.pdf.) C-8 "stays in the body for many years. It takes approximately 4 years for the level in the body to go down by half, even if no more is taken in." *Id.* Testimony before this Court, from experts presented by Plaintiffs and

DuPont, indicates that the stability of C-8 prevents the breakdown not only in the human body, but also in the environment, resulting in half-life residuals of the chemical in a human body for decades of years. (*See, e.g.*, Bartlett Tr. Transcript at 22, *Carla Marie Bartlett v. E.I. du Pont de Nemours and Company,* Case No. 2:13-cv-170, Bartlett ECF No. 127.)

Eighteen years ago, a group of individuals who had ingested the contaminated water in Ohio and West Virginia filed a class action in West Virginia state court: *Leach v. E.I. Du Pont de Nemours & Co.*, No. 01-C-608 (W. Va. Cir. Ct. Wood County Aug. 31, 2001) ("*Leach* Case"). The *Leach* Case plaintiffs alleged that DuPont was liable under a variety of West Virginia common law tort theories for equitable, injunctive, and declaratory relief, along with compensatory and punitive damages, as a result of contaminating with C-8 the drinking water supplies of the communities surrounding Washington Works. DuPont did not, and still does not, dispute that from its Washington Works facility DuPont discharged C-8 into the water, air, and unlined landfills around the facility or that the landfills seeped C-8 into the soil, the Ohio river carried the C-8 down-river, and the air currents carried the ash that fell to the ground, all of which contributed to the contamination of the drinking water reservoirs.

After three years of litigating the *Leach* Case, including widespread discovery, extensive motion practice, and three appeals taken to the West Virginia Supreme Court of Appeals, the parties executed the *Leach* Settlement Agreement to effectuate a class-

wide settlement of the *Leach* Case. (*Leach* Settlement Agreement ("S.A."), MDL ECF No. 820-8.)

In the *Leach* Settlement Agreement, the parties fashioned a unique procedure to determine whether the approximately 80,000 members of the *Leach* Class would be permitted to file actions against DuPont based on any of the human diseases they believed had been caused by their exposure to C-8 discharged from DuPont's Washington Works plant. The procedure required DuPont and the *Leach* Class to jointly select three completely independent, mutually-agreeable, and appropriately credentialed epidemiologists ("Science Panel") to study human disease among the *Leach* Class. The *Leach* Class consisted of those individuals who for at least one year, had "consumed drinking water containing .05 ppb or greater of C-8 attributable to releases from Washington Works." (S.A. § 2.1.1.)

Until the Science Panel reached its conclusions, the *Leach* Class members were not permitted to file any personal injury claims relating to C-8 exposure. For over seven years, the Science Panel conducted a massive epidemiological study costing over $24 million to determine whether any of the diseases suffered by members of the *Leach* Class were linked to their ingestion of C-8.

In 2012, the Science Panel delivered 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 Probable Link Finding means that for each *Leach* Class member it is

more likely than not that there is a link between his or her exposure to C-8 (*i.e.,* drinking water containing at least .05 ppb of C-8 for at least one year) and his or her Linked Disease.

In addition to the seven-year reprieve from defending any litigation related to its discharge of C-8 into the drinking water of approximately 80,000 people, DuPont received the benefit of No Probable Link Findings for 50 diseases also studied by the Science Panel. Once a No Probable Link Finding issued, DuPont was "*forever discharge[d] from any and all claims,* losses, damages, attorneys' fees, costs, and expenses, whether asserted or not, accrued or not, known or unknown, for personal injury and wrongful death .... " (S.A. § 3.3) (emphasis added). In other words, under the terms of the *Leach* Settlement Agreement all of the *Leach* Class members who received a No Probable Link Finding *were prohibited* from filing a personal injury action against DuPont, regardless of whether any other study or expert disagreed with the Science Panel or later scientific studies were at odds with the Science Panel's No Probable Link Findings.

Under the *Leach* Settlement Agreement, the *Leach* Class and DuPont agreed that the members of the *Leach* Class who suffered from a Linked Disease were entitled to have the Probable Link Finding applied to them. That means that it is more likely than not that there is a link between the class members' exposure to C-8 and their Linked Disease, (*i.e.*, the Probable Link Finding), and DuPont agreed not to contest whether C-8 is capable of causing the Linked Disease in that particular class member (general

causation). DuPont retained the right to contest whether C-8 actually caused the Linked Disease in that particular class member (specific causation).

B. DuPont's Request for an MDL

In September 2012, a few months after issuance of the Probable Link Findings, the first case filed by a member of the *Leach* Class pursuant to the *Leach* Settlement Agreement was brought in this Court. At the same time, members of the *Leach* Class were filing cases in the federal district courts in West Virginia and Ohio as well as in state courts in West Virginia and Ohio.

On January 11, 2013, DuPont moved the Judicial Panel on Multidistrict Litigation ("JPML"), pursuant to 28 U.S.C. § 1407, for pretrial consolidation of the *Leach* Class cases, asserting that forming the MDL would "promote the just and efficient conduct of the actions," and because "consolidation in a single District will likely promote early and efficient resolution of all the cases." (Def's Mem. in Support of Mot. for Coordination and Consolidation at 7, JPML ECF No. 1-1.) DuPont argued in favor of consolidation, highlighting:

> The complaints each involve the *same core factual allegations regarding DuPont's conduct*, and also raise the same theories of legal liability.
>
> Transferring the pending and subsequent tag-along cases to one court pursuant to 28 U.S.C. § 1407 will eliminate duplicative discovery, including expert discovery, avoid repetitive and duplicative motion practice and inconsistent rulings on a number of pre-

> trial issues involving discovery and substantive matters, and conserve the resources of the courts and the parties.

Id. at 1 (emphasis added). DuPont continued, stating:

> Transferring the cases to one District for coordinated and consolidated pretrial proceedings will promote the convenience and conserve the resources of the courts, witnesses and the parties. Many witnesses in these cases will be current or former DuPont employees. Absent a transfer, these employees will be subjected to multiple depositions in multiple jurisdictions.
>
> Also, DuPont would be subjected to multiple document requests and other written discovery. Having to undergo such discovery multiple times would be unduly burdensome to the witnesses, the parties, and their counsel. Thus, a transfer will minimize the heavy burden that these cases proceeding separately will otherwise place on the witnesses, the parties, the attorneys, and the courts.

Id. at 6.

Finally, DuPont addressed settlement of the cases, specifically asserting that it sought consolidation so that "[t]he transferee court will be able to explore various alternatives to resolve the case in an expeditious manner." *Id.*

On April 4, 2013, the JPML granted DuPont's request for centralization and chose this Court to preside over the MDL. In its Transfer Order (MDL

ECF No. 1), the JPML indicated that the cases that make up this MDL, *In Re: E.I. Du Pont De Nemours And Company C-8 Personal Injury Litigation*, are a subset of cases that originated in the *Leach* Case. It held:

> On the basis of the papers filed and the hearing session held, we find that these actions involve common questions of fact, and that centralization under Section 1407 in the Southern District of Ohio will serve the convenience of the parties and witnesses and promote the just and efficient conduct of this litigation. All the actions are personal injury or wrongful death actions arising out of plaintiffs' alleged ingestion of drinking water contaminated with a chemical, C-8 (also known as perfluorooctoanoic acid (PFOA) or ammonium perfluorooctanoate (APFO)), discharged from DuPont's Washington Works Plant near Parkersburg, West Virginia. All of the plaintiffs in this litigation allege that they suffer or suffered from one or more of six diseases identified as potentially linked to C-8 exposure by a study conducted as part of a 2005 settlement between DuPont and a class of approximately 80,000 persons residing in six water districts allegedly contaminated by C-8 from the Washington Works Plant. *See Leach v. E.I. Du Pont de Nemours & Co.*, No. 01-C-608 (W. Va. Cir. Ct.). Centralization will eliminate duplicative discovery; prevent inconsistent pretrial rulings; and conserve the resources of the parties, their counsel and the judiciary.

Id. at 1.

C. MDL

Through direct filing, removals, and Conditional Transfer Orders from the JPML, this Court ultimately had over 3,500 cases before it as part of this MDL. Beginning in the first month this MDL was centralized, the Court held monthly Case Management Conferences. The Court managed pretrial discovery and motion practice, issuing hundreds of Dispositive Motions Orders ("DMOs"), Case Management Orders ("CMOs"), Pretrial Orders ("PTO's"), Discovery Orders, Evidentiary Orders, and written and oral Orders on Motions *in Limine,* many of which are specified individually in PTO 51. (PTO No. 51 at 6-15, MDL ECF No. 5214.)

1. DMO 1 and DMO 1-A: Collateral Estoppel and Contract Interpretation

The initial issues brought by the parties to this Court for disposition were issues that impacted all of the plaintiffs that were a part of this MDL. Specifically, Plaintiffs filed a Motion for Partial Summary Judgment (MDL ECF No. 820), asking this Court to apply the doctrine of collateral estoppel to certain issues established in the *Leach* Settlement Agreement. (MDL ECF No. 820-1.) DuPont filed a Counter Motion for Partial Summary Judgment Regarding Application of the *Leach* Settlement Agreement. (MDL ECF No. 1032.) In that motion, DuPont stated:

> DuPont respectfully requests that this Court enter an Order finding as a matter of law that there are no material issues of fact as to the application of the *Leach* Settlement

> Agreement to the individual personal injury and wrongful death actions consolidated in this MDL, and that DuPont's statements of the issues regarding: (1) the definition of "Class Member;" (2) the scope of "General Causation;" and (3) proof of dose required to establish specific causation are accurate.

(Def's Mot. for Summ. J. at 1, MDL ECF No. 1032.)

In reply, Plaintiffs focused on the points of agreement between them and DuPont. (*See* Pls.' Reply at 4-10, MDL ECF No. 1152.) Specifically, that both agreed that the unambiguous language of the *Leach* Settlement Agreement was binding upon all parties to this MDL. *Id.* And, the *Leach* Settlement Agreement dictated the issues of class membership, the scope of general and specific causation, and the application of the Probable Link and No Probable Link Findings as those terms are defined in the Agreement. *Id.*

In deciding these cross-motions for summary judgment, the Court issued its first order on dispositive motions directing it to "ALL CASES," titling it: "DMO 1, Class Membership and Causation." (MDL ECF No. 1679.) In DMO 1, the Court denied DuPont's Counter Motion for Partial Summary Judgment Regarding Application of the *Leach* Settlement Agreement and granted in part Plaintiffs' Motion for Partial Summary Judgment.

With regard to class membership, the Court held:

> As to class membership, both sides agree, and this Court finds, that as part of the individual plaintiffs' cases, they must show that they are a class member and that they have one or more of the Linked Diseases. To prove class

> membership, a plaintiff must show that he or she, "for the period of at least one year," has "consumed drinking water containing .05 ppb or greater of C-8 attributable to releases from [DuPont's] Washington Works" plant from any of the "six specified Public Water Districts" or any of the Covered Private Sources named in the *Leach* Settlement Agreement. (S.A. § 2.1.1.)

(DMO 1, Class Membership and Causation at 7, MDL ECF No. 1679.)

As to causation, the Court reviewed both parties' interpretations of the *Leach* Settlement Agreement and analyses of its application to evidence of general and specific causation and concluded: "For several reasons, DuPont's analysis is not tenable under the *Leach* Settlement Agreement." *Id.* at 9. The Court then provided a detailed interpretation of the *Leach* Settlement Agreement, including the Probable Link Findings and the No Probable Link Findings, general and specific causation, and application of these terms to the members of the defined *Leach* Class.

Thereafter, DuPont filed a document titled: "DuPont's Overview Brief on Causation Issues," which reargued its positions related to interpretation of the *Leach* Settlement Agreement. (MDL ECF No. 2813.) On the same day, DuPont filed a Motion to Clarify DMO 1, which "incorporate[ed] by reference its separate Overview Brief on Causation Issues." (MDL ECF No. 2814.)

After full briefing, the Court issued DMO 1-A, which granted DuPont's Motion "to the extent it requested the Court to clarify DMO 1" and denied the

Motion "in all other regards." (DMO 1-A, DuPont's Motion for Clarification of DMO 1, Class Membership and Causation at 11, MDL ECF No. 3972) ("Nothing DuPont brings before the Court in its Motion for Clarification or Overview of Causation calls into question any of the Court's analysis in DMO 1. However, the Court will provide further explanation of this important issue here and address the arguments DuPont highlights in its current briefing."). The Court then endeavored to articulate in more detail the terms of the *Leach* Settlement Agreement and explain again why DuPont's suggested interpretation was incorrect.

2. Ohio Tort Reform Act

Under the Ohio Tort Reform Act of 2004, effective April 7, 2005, the Ohio Revised Code was amended to, *inter alia*, cap the amount of noneconomic damages recoverable in tort actions and cap the amount of punitive damages. Ohio Rev. Code §§ 2315.1-21. This Court has considered whether this Act applies several times during the pendency of this MDL, and has consistently determined that the Tort Reform Act does not apply. (DMO 10, Order on Application of Ohio Tort Reform Act, MDL ECF No. 4215); (DMO 12, Order on Defendant's Motion for Judgment as a Matter of Law or, Alternatively, for a New Trial and Remittitur, MDL ECF No. 4306); (DMO 18, Order on DuPont's Motion for an Order to Apply Ohio Tort Reform Act, MDL ECF No. 4597); (DMO 23, Order on DuPont's Motion for an Order to Apply Ohio Tort Reform Act, MDL ECF No. 4931); (DMO 29, Order on DuPont's Motion for an Order to Apply Ohio Tort Reform Act, MDL ECF No. 5007).

3. Trials

Within the first few months of this MDL, the Court and the parties focused upon the selection of cases to be utilized as bellwether trials. The Manual for Complex Litigation, a litigation manual produced by federal judges for use by other judges, states that bellwether trials are meant to "produce a sufficient number of representative verdicts and settlements to enable the parties and the court to determine the nature and strength of the claims . . . and what range of values the cases may have." *The Manual for Complex Litigation*, § 22.315.

By February 2014, the parties selected six representative cases to be utilized as the bellwether trials. (CMO 6, Identification & Selection of Discovery Pool Plaintiffs, MDL ECF No. 194); (CMO 7, Selection of the Initial Trial Cases and Expert Disclosures Schedule, MDL ECF No. 602). The Court ultimately accepted the six cases to serve as bellwether trials—three Plaintiffs' Steering Committee ("PSC") choices and three chosen by DuPont. (CMO 2, § VI, ECF No. 30; PTO 19, May 6, 2014 Conf. Order at 2, MDL ECF No. 265); (CMO 7, Selection of the Initial Trial Cases and Expert Disclosure Schedule, MDL ECF No. 602); (CMO 9, Pretrial Schedule for Initial Two Trial Cases, MDL ECF No. 3549); (CMO 10, Pretrial Schedule for Bartlett Trial, MDL ECF No. 4183); (CMO 11, 12, Pretrial Schedules for Wolf Trial, MDL ECF Nos. 4247, 4250); (CMO 13, Pretrial Schedule for Freeman Trial, MDL ECF No. 4263); (CMO 14, Pretrial Schedule for Dowdy Trial, MDL ECF No. 4268); (CMO 15, Pretrial Schedule for Baker Trial; MDL ECF No. 4269).

The first bellwether case was selected by DuPont and involved the claims of Carla Marie Bartlett, who had suffered from the Linked Disease kidney cancer: *Carla Marie Bartlett v. E.I. du Pont de Nemours and Company,* Case No. 2:13-cv-170. Mrs. Bartlett's trial began on September 14, 2015, and lasted approximately one month. The jury found in favor of Mrs. Bartlett on her negligence claim, meaning that they unanimously concluded that she proved by a preponderance of the evidence each of the following: "(1) DuPont owed Mrs. Bartlett a duty of care; (2) DuPont breached its duty of care to Mrs. Bartlett; and (3) Mrs. Bartlett suffered an injury as a proximate result of DuPont's breach of the duty of care." (Final Jury Instructions at 20, Negligence—Generally, Ordinary Care, Bartlett ECF No. 139.)[2] The Court instructed the jury as follows:

NEGLIGENCE-DUTY

To prove the existence of a duty, Mrs. Bartlett must show by a preponderance of the evidence that a reasonably prudent person would have foreseen that injury was likely to result to someone in Mrs. Bartlett's position from DuPont's conduct. In deciding whether reasonable prudence was used, you will consider whether DuPont should have foreseen, under the circumstances, that the likely result of an act or failure to act would cause injuries. The test for foreseeability is not whether DuPont should have

[2] The parties do not dispute that it matters not whether Ohio or West Virginia law applies to an individual Plaintiff's claim because, as this Court has recognized, "[w]ith regard to the issue of duty, the law in Ohio and West Virginia is nearly identical." (DMO 6 at 6, MDL ECF No. 4184.)

foreseen the injuries exactly as it happened to Mrs. Bartlett. The test is whether under the circumstances a reasonably prudent corporation would have anticipated that an act or failure to act would likely cause injuries.

Id. at 21.

NEGLIGENCE-BREACH

> If you find that DuPont owed Mrs. Bartlett a duty, you must next determine whether DuPont breached that duty. A corporation breaches a duty by failing to use ordinary care. As I have just instructed, ordinary care is the care that a reasonably careful corporation would use under the same or similar circumstances.
>
> If you decide that DuPont did not use ordinary care, then DuPont breached its duty of care to Mrs. Bartlett. If you decide that DuPont did use ordinary care, then DuPont did not breach its duty of care to Mrs. Bartlett.

Id. at 22.

NEGLIGENCE-PROXIMATE CAUSE

> Mrs. Bartlett must prove not only that DuPont was negligent, but also that such negligence was a proximate cause of her injuries. 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.

Id. at 23.

NEGLIGENCE-PROXIMATE CAUSE-FORSEEABLE INJURY

> I will now discuss how to determine whether Mrs. Bartlett's injury was the natural and probable consequence of DuPont's conduct. To prove proximate cause, Mrs. Bartlett must show that her injuries were a natural and probable consequence of DuPont's conduct.
>
> For Mrs. Bartlett's injuries to be considered the natural and probable consequence of an act, Mrs. Bartlett must prove that DuPont should have foreseen or reasonably anticipated that injury would result from the alleged negligent act. The test for foreseeability is not whether DuPont should have foreseen the injury exactly as it happened to Mrs. Bartlett. Instead, the test is whether under the circumstances a reasonably careful person would have anticipated that an act or failure to act would likely result in or cause injuries.

Id. at 24.

The Jury found in favor of Mrs. Bartlett on her negligence claim, awarding her $1.1 million and also awarding her $500,000 on her negligent infliction of emotional distress claim. (Jury Verdict, Bartlett ECF No. 142.) The Court accordingly entered judgement in favor of Mrs. Bartlett. (Civil Judgment, Bartlett ECF No. 144.)

On February 3, 2016, DuPont settled the second bellwether case that was scheduled for trial the following month.

On May 31, 2016, a jury was seated for the third bellwether trial, which was the second to be tried: *Freeman v. E.1 du Pont de Nemours and Co.*, 2:13-cv-1103. Mr. Freeman suffered from the Linked Disease testicular cancer. The trial lasted six weeks. The jury instructions were an exact duplicate of those provided in the *Bartlett* trial. (Final Jury Instructions at 19-24, Freeman ECF No. 102.)

On July 6, 2016, the jury delivered a verdict in favor of Mr. Freeman on his negligence claim, awarding him $5.1 million. (Jury Verdict Form For Negligence Claim at 1, Freeman ECF No. 97.) Additionally, the jury answered affirmatively the single interrogatory:

> If you found in favor of Mr. Freeman on his negligence claim, do you find that Mr. Freeman has proven by clear and convincing evidence that DuPont acted with actual malice and that Mr. Freeman has presented proof of actual damages that resulted from those acts or failures to act of DuPont? ("Actual malice" means a conscious disregard for the rights and safety of other persons that has a great probability of causing substantial harm.)

(Jury Verdict Interrogatory at 2, Freeman ECF No. 97.)

The Court therefore moved into phase two of the trial, which lasted less than one (1) day. (Civ. Minutes at 1, Freeman ECF No. 98.) The jury found in favor of Mr. Freeman on his punitive damages claim, awarding him $500,000. (Jury Verdict Form at 1, Freeman ECF No. 100.) The Court thus entered

judgment in favor of Mr. Freeman. (Judgment in a Civ. Case, Freeman ECF No. 101.)

Thereafter, DuPont's counsel informed the Court that the last two bellwether cases had settled. No bellwether cases remained; the parties notified the Court that there were no ongoing negotiations. The Court, therefore, turned its attention to the effective administration of the thousands of cases that constituted this MDL, as explained in CMO 20. (CMO 20, Order on Defendant's Objection to the November 2016 and January 2017 Trial Schedules, MDL ECF No. 4624.)

On July 18, 2016, the PSC selected Kenneth Vigneron, Sr., for the already scheduled November 2016 trial: *Kenneth Vigneron, Sr. v. E. l du Pont de Nemours Company,* Case No. 13-cv-136. (CMO No. 18, Pretrial Schedule for Vigneron Trial, MDL ECF No. 4588.) Mr. Vigneron had suffered from the Linked Disease testicular cancer. Mr. Vigneron's trial began on November 14, 2016, and lasted approximately five weeks. The jury instructions on the negligence claim were the same as those provided in the *Bartlett* and *Freeman* trials. (Final Jury Instructions at 20-24, Vigneron ECF No. 195.)

On December 21, 2016, the jury delivered a verdict in favor of Mr. Vigneron on his negligence claim, awarding him $2 million. (Jury Verdict Form For Negligence Claim at 1, Vigneron ECF No. 176.) Additionally, as was the case in the *Freeman* trial, the jury answered affirmatively the single interrogatory that led to the punitive damages phase of the trial, which lasted less than one day. (Jury Verdict Form For Negligence Claim, Vigneron ECF No. 176 at 2;

Civ. Minutes at 1, Vigneron ECF No. 192.) The jury found in favor of Mr. Vigneron, awarding him $10.5 million in punitive damages. (Jury Verdict Form at 1, Vigneron ECF No. 193.)

The fourth trial began on January 18, 2017: *Larry Ogle Moody v. E.I. du Pont de Nemours Company*, Case No. 15-cv-803. (CMO 19, Pretrial Schedule for Moody Trial, MDL ECF No. 4591.) The plaintiff, Larry Ogle Moody, had suffered from the Linked Disease testicular cancer. During the third week of Mr. Moody's trial, the case was reported settled, and the trial was discontinued at DuPont's request. (Civ. Minutes at 1, Moody ECF No. 60.)

D. Appeal to the Sixth Circuit

On October 27, 2015, DuPont filed in the *Bartlett* case its Motion for Judgment as a Matter of Law or, Alternatively, for a New Trial and Remittitur, which was fully briefed by December 2015. (Bartlett ECF Nos. 151, 158, 159.) DuPont argued that it was entitled to judgment as a matter of law or a new trial. DuPont highlighted this Court's interpretation of the *Leach* Settlement Agreement as set forth in DMO 1 and DMO 1-A, stating:

> Pursuant to Fed. R. Civ. P. 50(b) and Fed. R. Civ. P. 59(a), Defendant E. I. du Pont de Nemours and Company ("DuPont") hereby moves for judgment as a matter of law or alternatively, for a new trial and/or remittitur on Plaintiff Carla Bartlett's claims.
>
> Most fundamentally, the Court's erroneous interpretation of the *Leach* Class Action Settlement Agreement ("*Leach* Settlement") constituted a threshold error that pervasively

> impacted the trial and negated fundamental terms that were the very basis for resolving the *Leach* class action. The Court rewrote the unambiguous agreement not to contest general causation and interjected an improper assumption that a *prima facie* case on specific causation existed-in direct contradiction of both the *Leach* Settlement and the Science Panel's probable link finding.

(Defs Mot. for Judgment and New Trial at 1, Bartlett ECF No. 151.)

In denying DuPont's post-trial motion, the Court explained in detail "why DuPont's position on causation conflates the parties' unambiguous definitions of general and specific causation that they set forth in the *Leach* Settlement Agreement and effectively rewrites the Agreement's provisions related to the function and application of the Probable Link Findings." (DMO 12 at 35, Bartlett ECF No. 161.)

On March 17, 2016, DuPont filed an appeal with the United States Court of Appeals for the Sixth Circuit, bringing four issues before it, with only three being relevant to the issues currently before the Court.[3] *(Barlett v. E.I. du Pont De Nemours and Company,* Sixth Circ. Case No. 16-3310, Appellant Brief.)

As to the first and second issues appealed, DuPont steadfastly presented the argument that this Court's

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[3] DuPont also appealed the jury instructions setting out the law of Mrs. Bartlett's negligent infliction of emotional distress claim. No other MDL plaintiff has alleged a stand-alone claim for negligent infliction of emotional distress.

interpretation of the *Leach* Settlement Agreement was the fundamental error that subjected DuPont to an unfair trial not only in *Bartlett* but also in each and every case that was before the Court in this MDL:

> A threshold contract interpretation error eliminated the heart of a critical defense for DuPont in each of the 3,500 cases in this MDL. ...
>
> The district court's contract interpretation error can best be understood as an improper interpretation of the class definition, the defined terms "Probable Link," "General Causation," and "Specific Causation," and how those terms interrelated and fit in the context of the Agreement.

(*Id.*, Appellant Brief at 1, 18.)

DuPont's second assignment of error related to certain evidence heard by the jury from one of Mrs. Bartlett's expert witnesses, which DuPont tied to this Court's interpretation of the *Leach* Settlement Agreement, titling the section: "The District Court's Erroneous Interpretation Of The Agreement Distorted The Evidence At Trial." *Id.* at 32. Thus, this issue also hinged on whether the Sixth Circuit agreed with DuPont that this Court erroneously interpreted the *Leach* Settlement Agreement.

As to the Tort Reform Act, DuPont's third assignment of error, DuPont argued that this Court erred by refusing to reduce the jury award under the Ohio Tort Reform Act. DuPont asserted that, "[i]f the [Sixth Circuit] agrees with some or all of the arguments [made in this appeal], it would remand for a new trial, clarifying that the Tort Reform Act

applies. If it does not grant a new trial, it would still remand for application of the Act to the jury's verdict reducing the total damages to $250,000." *Id.* at 51 n.4.

DuPont and the PSC on behalf of Mrs. Bartlett fully briefed the appeal, were assigned a judicial panel, and vigorously presented their case at oral argument. *See:* http://www.opn.ca6.uscourts.gov/internet/courtaudio/aucl2.php?link=audio/12-09-2016%20-%20Friday/16-3310%20Carla%20Marie%20Bartlett%2Qv0/o20E%20I%20DuPont%20de%20Nemours%20et%20al.mp3&name=16-3310%20Carla%20Marie%20Bartlett%20v%20E%20I%20DuPont%20de%20Nemours%20et%20al (full transcript of oral argument).

Before the Sixth Circuit had the opportunity to issue its decision on DuPont's appeal, DuPont informed this Court that it had contacted the Sixth Circuit asking it to hold the decision because the *Bartlett* case had been settled along with the other cases in the MDL. On that day, February 13, 2017, the Court was nearing the end of the fourth trial held in this MDL, *Larry Ogle Moody v. E.I. du Pont de Nemours Company,* Case No. 15-cv-803. DuPont asked this Court to wait to inform the litigants of the settlement because DuPont was required to file certain documents with the SEC before publicizing the settlement.

On that same day, February 13, 2017, DuPont filed with the SEC a notice of its settlement, indicating that it would pay $670.7 million to the *Leach* Class,

"half of which will be paid by Chemours[4] and half paid by DuPont." https://www.sec.gov/Archives/edgar/data/30554/000110465917008291/al7-431118k.htm DuPont specified in the SEC Notice how future Washington Works C-8 liability would be paid, stating:

> DuPont and Chemours have also agreed, subject to and following the completion of the Settlement, to a limited sharing of potential future PFOA liabilities *(i.e.,* "indemnifiable losses," as defined in the separation agreement between DuPont and Chemours (the "Separation Agreement")) for a period of five years.
>
> During that five-year period, Chemours would annually pay future PFOA liabilities up to $25 million and, if such amount is exceeded, DuPont would pay any excess amount up to the next $25 million (which payment will not be subject to indemnification by Chemours), with Chemours annually bearing any further excess liabilities.
>
> After the five-year period, this limited sharing agreement would expire, and Chemours' indemnification obligations under

[4] The SEC Notice states that DuPont owned the Washington Works plant during the time period the C-8 was released and the facility "is now owned and/or operated by The Chemours Company." https://www.sec.gov/Archives/edgar/data/30554/000110465917008291/a17-431118k.htm

> the Separation Agreement would continue unchanged.

Id.

II.

As anticipated by DuPont, the C-8 litigation did not end with the global settlement. The JPML continued to conditionally transfer cases to this Court after the global settlement, and the Court currently has over 50 new cases that are a part of this MDL—all cases brought by alleged *Leach* Class members suffering from the Linked Disease testicular cancer and/or the Linked Disease kidney cancer ("Post-Settlement Cases").

DuPont moved the JPML "to vacate [its] orders that conditionally transferred" these actions "for inclusion in MDL No. 2433" for several reasons, but primarily because "pretrial proceedings in MDL No. 2433 [we]re complete." (Transfer Order, MDL ECF No. 5130.) The JPML denied DuPont's request, finding that the actions are "best coordinated by the Honorable Edmund A. Sargus, Jr., who is intimately familiar with the factual and legal issues in this litigation." *Id.* at 1. The JPML highlighted that "these actions will involve similar, if not identical, pretrial motion practice." *Id.* It further found that "[t]ransfer of these actions to the MDL thus will eliminate duplicative discovery, prevent inconsistent pretrial rulings, and conserve the resources of the parties, their counsel, and the judiciary." *Id.* at 2.

Therefore, the Court followed the familiar, well-trodden path, meeting monthly with the parties and issuing numerous management, pretrial, and evidentiary orders directed at the Post-Settlement

Cases. (CMO 24, Management of Newly-Filed, Post-Settlement Cases, MDL ECF No. 5140); (CMO 25, Initial Scheduling of Post-Settlement Cases, MDL ECF No. 5159); (PTO 48, Changed Directions for Selection of Trial Cases, MDL ECF No. 5177); (CMO No. 26, Pretrial and Trial Schedule for Swartz Trial, MDL ECF No. 5185); (CMO No. 27, Pretrial and Trial Schedule for Abbott Trial, MDL ECF No. 5186); (CMO No. 28, Discovery, Pretrial, and Trial Management of the Post-Settlement Cases, MDL ECF No. 5188); (PTO No. 49, Memorializing January 29, 2019 Conference, MDL ECF No. 5191); (PTO 50, Memorializing May 18, 2019 Conference, MDL ECF No. 5197); (PTO No. 51, Consolidation of Cases for Trial, MDL ECF No. 5214); (Discovery Order No. 13, Defendant's Motion to Permit Rule 35 Medical Examination in *Swartz,* 2:18-cv-136, MDL ECF No. 5238); (DMO No. 30, Granting in Part Plaintiffs' Motion for Clarification Regarding the Inapplicability of the Ohio Tort Reform Act, MDL ECF No. 5231); (DMO No. 31, Denying Defendants' Motion to Apply Tort Reform Act to the *Swartz* Case, 2:18-cv-136, MDL ECF No. 5232); (PTO No. 52, Case Selection for Post-Settlement Joint Trial No. 1, MDL ECF No. 5233); (CMO No. 29, Initial Pretrial Schedule for Joint Trial No. 1, MDL ECF No. 5234); (PTO No. 53, Joint Status Report, MDL ECF No. 5236); (DMO No. 32, Defendant's Motion to Reconsider Prior Rulings, MDL ECF No. 5241); (DMO No. 33, Denying Defendant's Motion to Reconsider Prior Rulings on Science Panel, MDL ECF No. 5245); (CMO No. 30, Pretrial and Trial Schedule for Joint Trial No. 1, MDL ECF No. 5248); (PTO No. 54, Clarification of PRO Numbers, MDL ECF No. 5253); (EMO No. 25, Defendant's Motion to

Exclude Corporate Conduct Expert Opinion, MDL ECF No. 5254); (EMO No. 26, Defendant's Motion to Exclude or Limit Dr. Barry S. Levy's Trial Testimony, MDL ECF No. 5255); (Discovery Motions Order No. 16, Plaintiffs' Motion for a Protective Order from Deposition of Bernard Reilly, JDL ECF No. 5256); (Pretrial Order No. 51-A, Consolidation of Cases for Trial, MDL ECF No. 5279).

The first two of the Post-Settlement Cases to be tried have been selected and are currently being prepared for trial. *Angela and Teddy Swartz v. E.I. du Pont de Nemours Company,* Case No. 2:18-cv-136; *Travis and Julie Abbott v. E.I. du Pont de Nemours Company,* Case No. 2:17-cv-998. These two plaintiffs allege that they are members of the *Leach* Class who suffer from kidney and testicular cancers, respectively. The plaintiffs' spouses also bring loss of consortium claims. Mrs. Swartz and Mr. Abbott, as well as the other plaintiffs who have filed Post-Settlement cases, make the same allegations previously made by the 3,500-plus plaintiffs who were part of the global settlement.

Plaintiffs' claims for strict product liability under the Ohio Product Liability Act, Ohio Rev. Code § 2307.71(8), consumer protection claims under Ohio and West Virginia Consumer Sales Practices Act, Ohio Rev. Code§ 1345.01 *et seq.,* W. Va. Code § 46A-6-106(a), trespass to persons, and ultrahazardous or abnormally dangerous activity were precluded from trial based on this Court's grant of summary judgment to DuPont on these claims. (DMO 4, Def's Mot. for Summ. J., MDL ECF No. 3973.) Pursuant to this Court's previous interpretation of the *Leach*

Settlement Agreement, the parties will try their negligence and punitive damages claims.

DuPont utilizes the same defenses it has since the inception of this MDL. In that vein, similar to its requests made before the first trial in this MDL in DuPont's Counter Motion for Partial Summary Judgment (MDL ECF No. 1032), DuPont's Overview Brief on Causations Issues (MDL ECF No. 2813), DuPont's Motion for Clarification Regarding DMO No. 1, Class Membership and Causation (MDL ECF No. 2814), DuPont's Post Trial Motion (Bartlett ECF No. 151), and before the Sixth Circuit (App. No. 16-3310), DuPont again moved the Court to adopt its interpretation of the *Leach* Settlement Agreement. DuPont presented the request as one for this Court to modify its previous interpretations of the *Leach* Settlement Agreement, which, DuPont continues to maintain are mischaracterizations of the terms of the contract. DuPont made its request in two motions: "DuPont's Motion to Exclude Mischaracterizations Related to the Science Panel and the Probable Link Findings from the *Swartz* Case" and "DuPont's Motion for Interpretation of the *Leach* Agreement with Respect to Specific Causation in the *Swartz* Case." (Swartz ECF Nos. 50, 51.)

DuPont framed its request as follows:

> While the Court has previously made various rulings regarding contract interpretation and causation issues, DuPont presents new arguments, new facts, and new case law. DuPont also focuses here on the critical specific causation issues that will be a key part of the *Swartz* trial, and therefore seeks

> modifications of the Court's prior rulings involving contract interpretation in the context of the *Swartz* case.

(DuPont's Mot. for Interp. of the *Leach* Settlement Agreement at 1-2, Swartz ECF No. 51.)

Regardless of how DuPont titled the two motions or couched its arguments in them, there are no "new arguments, new facts, [or] new case law" that impact the Court's interpretation of the *Leach* Settlement Agreement—nor does DuPont claim that there are. Instead, the "arguments" have been made *numerous* times to this Court, as well as before the Sixth Circuit. Nevertheless, even if any of the arguments were considered to be "new," (which they are not) nothing prevented DuPont from previously raising them. Any arguments that were available but not made do not justify this Court revisiting final and binding decisions interpreting the *Leach* Settlement Agreement. DuPont points to no law that supports this proposition.

Additionally, the "facts" that are different between class members (*e.g.*, their age, sex, medical histories, illnesses, water consumption locations, etc.), are relevant to specific causation (which will not be precluded) but have no relevance to the Court's contract interpretation. There are no individualized facts from any of the prior trials that had any effect at all on this Court's interpretation of the *Leach* Settlement Agreement. This Court's interpretation of the *Leach* Settlement Agreement has remained consistent and the Court has applied its interpretation of the Agreement to the facts of each of the four prior cases that went to trial.

Finally, no "new law" issued after this Court's decisions interpreting the *Leach* Settlement Agreement that has changed the applicable legal landscape. Indeed, DuPont does not claim that there is. Rather, DuPont merely contends that it "*presents* . . . new case law." *Id.* at 1 (emphasis added). In other words, the new case law to which DuPont refers is merely a selection of cases that DuPont contends support its position and upon which it previously did not rely. To the extent that DuPont may reference cases issued after this Court's judgment and/or DuPont's appeal, nothing changed the law upon which this Court relied. And, again, DuPont makes no claim otherwise.

Consequently, the day after DuPont filed the two motions asking for modification of the *Leach* Settlement Agreement, this Court denied them both in DMO 32, highlighting that it would not reconsider its contract interpretation. (DMO 32, Defendant's Motion to Reconsider Prior Rulings, MDL ECF No. 5241, Swartz ECF No. 57.) The Court issued DMO 32 before it permitted briefing on the issue, explaining *inter alia* that:

> 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.

Id. at 3.

As to the issue of the Tort Reform Act, Plaintiffs filed a Motion for Clarification Regarding the Inapplicability of the Ohio Tort Reform Act to Plaintiffs' Claims, in which they asked this Court to rule consistently with the prior decisions. The Court granted that motion, indicating that the "Court indeed intends to stay consistent with its prior decisions." *Id.* at 4.

III.

Plaintiffs move for partial summary judgment "[b]ased upon issue preclusion (collateral estoppel), [because] there are no genuine issues of fact relating to duty, breach, and general causation in Plaintiffs' negligence claim, no issues of fact relating to the interpretation of the *Leach* agreement and no genuine issues of fact relating to the inapplicability of the Ohio Tort Reform Act." (Pls' Mot. at 1, MDL ECF No. 5274.) DuPont contends that Plaintiffs' Renewed Motion should be denied because it relies upon the "wrong substantive law," fails to properly apply the law to the facts, and seeks to deprive DuPont of its "fundamental right to defend itself against the individual personal injury actions pending in this MDL." (Def's Mem. in Opp. at 1, MDL ECF No. 5278; Def's Sur-Reply at 1, MDL ECF No. 5281-1.) DuPont also contends that the Court should not even review the substantive arguments in Plaintiffs' Renewed Motion because it is untimely. The Court will address the substantive arguments in this section of this decision and will address the procedural argument below in section V, with Plaintiffs' procedural arguments related to DuPont's request to file a sur-reply.

A. Summary Judgment

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). "A motion for summary judgment is an appropriate vehicle for presenting prior judgments." 18 Moore's Federal Practice § 132.05[27], 132-184 (summary judgment is proper procedure for asserting issue preclusion).

B. Collateral Estoppel

In their Renewed Motion, Plaintiffs initially relied upon federal preclusion law. In its memorandum in opposition, however, DuPont contends that Ohio preclusion law applies. DuPont appropriately addresses both federal and state law, arguing that, under either, Plaintiffs are not entitled to issue preclusion on any of the issues raised in their current motion for partial summary judgment. DuPont bolstered its arguments in its Sur-reply. In Plaintiffs' Reply, they disagree that Ohio law applies, but maintain that even if it did, they are still entitled to issue preclusion. As explained below, however, it is of no moment in the instant analysis because under either federal or state law the doctrine of issue preclusion applies to the issues presented in Plaintiffs' Renewed Motion.

1. Collateral Estoppel/Issue Preclusion

Federal preclusion law "'bars successive litigation of an issue of fact or law actually litigated and resolved in a valid court determination essential to the prior judgment,' even if the issue recurs in the context of a different claim." *Gen. Elect. Med. Sys. Europe v. Prometheus Health,* 394 Fed. Appx. 280,283 (6th Cir.

2010) (citing *Taylor v. Sturgell,* 553 U.S. 880, 891-93 (2008) and *New Hampshire v. Maine,* 532 U.S. 742, 748-49 (2001)). The Sixth Circuit has explained the elements necessary for a prior decision to have preclusive effect:

> (1) the precise issue raised in the present case must have been raised and actually litigated in the prior proceeding; (2) determination of the issue must have been necessary to the outcome of the prior proceeding; (3) the prior proceeding must have resulted in a final judgment on the merits; and (4) the party against whom estoppel is sought must have had a full and fair opportunity to litigate the issue in the prior proceeding.

Nat'l Satellite Sports, Inc. v. Eliadis, Inc., 253 F.3d 900, 908 (6th Cir. 2001) (citations omitted).

Under Ohio law, collateral estoppel applies to an issue that "(1) was actually and directly litigated in the prior action; (2) was passed upon and determined by a court of competent jurisdiction, and (3) when the party against whom collateral estoppel is asserted was a party in privity with a party to the prior action." *State ex rel. Davis v. Pub. Emps. Ret. Bd.,* 174 Ohio App. 3d 135, 144 (Ohio App. 10th Dist. 2007), *aff'd*, 120 Ohio St. 3d 386 (2008) (citing *Whitehead,* 20 Ohio St. 2d 108, paragraph two of the syllabus (1969)).

2. Federal Law

DuPont argues that federal law dictates that state preclusion law applies to judgments of a federal district court when it hears cases in its diversity jurisdiction:

> In determining the preclusive effect of a prior federal-court judgment rendered within the Court's diversity jurisdiction, "the federally prescribed rule of decision [is] the law that would be applied by state courts in the State in which the federal diversity court sits." *Semtek Int'l Inc.*, 531 U.S. at 507-08; *see also Taylor*, 553 U.S. at 891 n.4 (reaffirming *Semtek*); *Leonard v. RDLG, LLC* (*In re Leonard*), 644 F. App'x 612, 616 (6th Cir. 2016) (embracing and applying *Semtek*).

(Def's Mem. in Opp. at 7, MDL ECF No. 5278.)

Plaintiffs disagree, asserting that "*Semtek* involved the preclusive effect of a dismissal with prejudice under Rule 41(b)—*not* issue preclusion—and therefore has limited application to the issue before this Court." (Pls' Reply at 3, MDL ECF No. 5280) (citing *Zanke-Jodway v. Fifth Third Mortg. Co.*, 557 B.R. 560, 565 (Bankr. E.D. Mich. 2016) ("Essentially, *Semtek* means that when a federal court dismisses an action while incorporating state law, it does not necessarily mean that the action is barred from being brought in another state where the law is different.").

In *Semtek* the Supreme Court reaffirmed that it has "the last word on the claim-preclusive effect of all federal judgments." *Semtek Intern. Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 507 (2001). In reviewing precedent, the Court explained that,

> in *Dupasseur* [*v. Rochereau,* 88 U.S. 130 (1874)] the State was allowed (indeed, required) to give a federal diversity judgment no more effect than it would accord one of its

> own judgments only because reference to state law was *the federal rule that this Court deemed appropriate.*
>
> In short, federal common law governs the claim-preclusive effect of a dismissal by a federal court sitting in diversity. *See* generally R. Fallon, D. Meltzer, & D. Shapiro, Hart and Wechsler's The Federal Courts and the Federal System 1473 (4th ed.1996); Degnan, Federalized Res Judicata, 85 Yale L.J. 741 (1976).

Id. at 508 (emphasis in original).

In other words, federal common law applied to the trial court's analysis, and that law dictated that the "claim preclusive effect of the federal diversity court's dismissal was governed by federal rule that in turn incorporated the forum state's law of claim preclusion." *Id.* at 497; *see id.* at 509 ("Because the claim-preclusive effect of the California federal court's dismissal 'upon the merits' of petitioner's action on statute-of-limitations grounds is governed by a federal rule that in turn incorporates California's law of claim preclusion (the content of which we do not pass upon today), the Maryland Court of Special Appeals erred in holding that the dismissal necessarily precluded the bringing of this action in the Maryland courts.").

This Court, however, need not determine whether the federal common law would incorporate Ohio's claim preclusion law under the facts of the cases that make up this MDL because *Semtek* made clear that "[t]his federal reference to state law will not obtain, of course, in situations in which the state law is incompatible with federal interests." *Id.* at 509. In

Semtek, "there [wa]s no conceivable federal interest in giving [the California] time bar more effect in other courts than the California courts themselves would impose." *Id.*

But in the case *sub judice,* Plaintiffs contend that significant federal interests are at issue that could prevent incorporation of Ohio law if it were to dictate a different result than federal law:

> Here, this Court clearly has a compelling and overriding federal interest in the effective and uniform administration of justice. This Court has overseen three trials on identical issues against the same defendant and three separate juries issued identical rulings on the issues that are the subject of Plaintiffs' Renewed Motion. DuPont appealed numerous issues to the Sixth Circuit which heard oral argument on DuPont's appeal. DuPont voluntarily dismissed its appeal and a final judgment has been entered in the three cases that went to trial. This Court clearly has a significant federal interest in administering its docket, streamlining litigation proceedings, conserving judicial resources and preventing "panel shopping."

(Pls' Reply at 4-5, MDL ECF No. 5280.) This Court agrees.

The JPML entrusted these cases to this Court under a uniquely federal statutory scheme with no Ohio law analogue to "promote the just and efficient conduct of this litigation" and "conserve the resources of the parties, their counsel and the judiciary." (Transfer Order at 1, MDL ECF No. 1.) Moreover,

"[o]ne of the strongest policies a court can have is that of determining the scope of its own judgments." *J.Z.G. Resources, Inc. v. Shelby Ins. Co.*, 84 F.3d 211, 214 (6th Cir. 1996) (evaluation application of res judicata). *See also* § 4412 Effect of State Law on Federal Res Judicata Rules, 18B Fed. Prac. & Proc. Juris. § 4472 (2d ed.) ("[S)tate law might not always be incorporated. For example, the federal interest in the integrity of federal procedure might justify enforcement of a federal claim-preclusion rule following dismissal for willful violation of discovery orders despite a contrary state rule.").

As to Plaintiffs' clam that DuPont is panel shopping in the Court of Appeals, the m1dersigned is confident that the Sixth Circuit is better suited to address such concerns.[5] This Court considers the issue only with regard to its own administration of the cases on the Court's docket.

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[5] The Court notes that the Sixth Circuit talces steps to prevent a party from avoiding a particular panel of judges with its rule that subsequent appeals may be returned to the original panel:

> **Subsequent Appeals Returned to Original Panel.** In appeals after this court returns a case to the lower court or agency for further proceedings, or after the Supreme Court of the United States remands a case to this court, the original panel will determine whether to hear the appeal or whether it should be assigned to a panel at random.

6 Cir. I.O.P. 34(b)(2). Under this rule it is unclear whether an appeal in this case would be returned to the same panel, and even if the case did fit within the rule, the assignment is discretionary. Additionally, the Sixth Circuit also limits continuances of oral argument once the names of the panel members are known. *See* 6 Cir. R. 34(b), (d); 6 Cir. I.O.P. 34(a), (c).

It remains that DuPont presented its assignments of error to a panel of the Sixth Circuit. Instead of waiting for a decision, DuPont chose to settle the case. DuPont could easily have excluded the *Bartlett* case from settlement, since it was ripe for decision, pending at that time for over one year at the Sixth Circuit. *(See Sixth Circuit Dramatically Lowers Time to Resolve Appeals,* Squire Patton Boggs Sixth Cir. App. Blog, https://www.sixthcircuit appellateblog.com/news-and-analysis/sixth-circuit-dramatically-lowers-time-to-resolve-appeals/) ("the Sixth Circuit averaged just 9.9 months as of December 2013—and the average for 2014 so far has been just 8.7 months"). DuPont chose not to do so.

In the event of another loss at trial, DuPont has stated repeatedly to this Court in its Post-Settlement filings that it seeks to have the exact same issues brought before another panel of the Sixth Circuit. (*See e.g.*, DuPont's Notice of Preservation of Arguments, Objections, and Positions Set Forth in Previously-Addressed Motion in *Limine*, Swartz ECF No. 92) ("DuPont expressly preserves for appeal all of its positions, objections, and arguments as set forth and incorporated in each of the motions listed above and, to the extent applicable, also preserves all claims of error and its positions, objections, and arguments as to why different rulings should have been made."); (Def's Opposition to Pl's Mot. to Exclude Expert Opinion at 2, fn. 1, Swartz ECF No. 66) ("DuPont continues to preserve, and does not waive, any of its arguments and positions regarding causation and the proper meaning and application of the *Leach* Agreement in these cases, and incorporates by reference all current and prior relevant briefing and

oral arguments in the MDL and the individual cases on these issues.").

All of these claims serve to (1) require considerable analysis and opinion writing from this Court; (2) necessitate further, lengthy, multiple week trials; and (3) involve additional delay on future appeals. All of this docket congestion, delay, and expense could have been avoided had DuPont simply maintained its original appeal. Instead, DuPont voluntarily dismissed a nearly completed appeal and now seeks to avoid the consequences.

DuPont contends that there is no federal interest that warrants setting aside state preclusion principles:

> First, "offensive use of issue preclusion does not promote judicial economy" because it has the ability to "increase rather than decrease the total amount of litigation." 18 Moore's Federal Practice § 132.04[2][c], 132-166; *see also S. Pac. Commc'ns Co. v. Am. Tel.* & *Tel. Co.*, 740 F.2d 1011 (D.C. Cir. 1984) (offensive use of issue preclusion could be employed in a manner that promotes "judicial diseconomy."). Offensive issue preclusion gives Plaintiffs "every incentive to adopt a 'wait and see' attitude, in the hope that the first action by another plaintiff will result in a favorable judgment." 18 Moore's Federal Practice § 132.04[2][c][iii]. The imposition of offensive non-mutual collateral estoppel in this litigation is highly likely to increase, rather than decrease, the total amount of litigation. This is particularly so where

> additional Plaintiffs with claims based on ever more attenuated claims of exposure seek to benefit from determinations reached in earlier trials relying on different plaintiff-specific facts.
>
> Second, PSC's stated interests in judicial economy are present in *every* case in which collateral estoppel might apply. The Supreme Court squarely addressed these interests when it determined that state collateral estoppel law should apply to the judgment of a federal court sitting in diversity, absent specific federal interests that are plainly not present here.

Third, PSC concedes that collateral estoppel cannot apply to Plaintiffs' punitive damage claims, and each Plaintiff must still adduce largely the same evidence he or she uses to attempt to prove negligence claims in order to prove entitlement to punitive damages-thus eliminating any claimed trial efficiencies from issue preclusion. (Sur-Reply at 6, MDL ECF No. 5281-1.)

In the first argument, DuPont selectively quotes Moore's Federal Practice. The treatise does not state that "offensive use of issue preclusion does not promote judicial economy." Instead, it states that "offensive use of issue preclusion does not promote judicial economy in the same manner as defensive use does"—a different proposition. 18 Moore's Federal Practice§ 132.04[2][c], 132-166. The treatise then goes on to explain:

> Defensive use of issue preclusion precludes a plaintiff from relitigating identical issues by

> merely "switching adversaries." Therefore, defensive issue preclusion gives a plaintiff a strong incentive to join all potential defendants in the first action if possible. Offensive use of issue preclusion, on the other hand, creates precisely the opposite incentive. Inasmuch as a plaintiff will be able to rely on a previous judgment against a defendant but will not be bound by that judgment if the defendant wins, the plaintiff has every incentive to adopt a "wait and see" attitude, in the hope that the first action by another plaintiff will result in a favorable judgment. Therefore, offensive use of issue preclusion could increase rather than decrease the total amount of litigation, because the potential plaintiffs will have "everything to gain and nothing to lose" by not intervening in the frrst action.

18 Moore's Federal Practice § 132.04[2][c], 132-166.

Unlike many plaintiffs, the plaintiffs before the Court in the Post-Settlement Cases are in a unique position related to any choice or strategy. There is no opportunity to "wait and see" in this action and intervention is simply not an option. These plaintiffs are bound by the *Leach* Settlement Agreement. They must each first suffer from a Probable Link disease. If they do, then each must timely file a negligence action, prove that they were subjected to the C-8 contaminated water for a particular amount of time, during a particular period of time, in a particular water district or wells in a particular geographic area.

These plaintiffs' procedural options are circumscribed by the *Leach* Settlement Agreement.

Further, while the case relied upon by DuPont in the quoted passage above, *S. Pac. Commc'ns Co. v. Am. Tel. & Tel. Co.,* 740 F.2d 1011 (D.C. Cir. 1984), did state that offensive use of issue preclusion could be employed in a manner that promotes "judicial diseconomy," that court went on to conclude:

> Nevertheless, the promotion of judicial economy remains a goal of offensive collateral estoppel. The court decided to leave to the district courts the task of protecting against abuse of the doctrine.

Id. at 1019 n.9 (citing *Parklane Hosiery Co. v. Shore,* 439 U.S. 322,326 (1979)).

Next, DuPont contends that judicial economy does not warrant setting aside state preclusion issues because judicial economy interests are present in every case. DuPont further claims that there will be no efficiencies in future cases because a Plaintiff must still adduce largely the same evidence he or she uses to attempt to prove negligence claims in their attempt to prove their punitive damages claims. This Court has presided over four trials, knows the evidence that was presented, and disagrees. Application of issue preclusion would certainly conserve the resources of this Court, as well as those of the parties, by providing substantial trial and pretrial efficiencies.

Finally, DuPont argues that "[g]overning precedent recognizes that 'the Supreme Court [has] explicitly stated that offensive collateral estoppel could not be used in mass tort litigation,' further undercutting PSC's renewed motion." (Def's Mem. in

Opp. at 2, MDL ECF No. 5278) (citing *In re Bendectin Prods. Liab. Litig.*, 749 F.2d 300,306 n.11 (6th Cir. 1984); *Parklane Hosiery Co.*, 439 U.S. at 330 & n.14). Initially, the Court notes that the statement upon which DuPont relies is dicta. Even if it were not, it is certainly incongruent with the United States Supreme Court pronouncement made in *Parklane Hosiery* that there is no blanket prohibition on the application of collateral estoppel, as is highlighted by the Sixth Circuit:

> The nub of the holding [*in Parklane Hosiery*], however, was that the decision whether or not to apply collateral estoppel was left to the *broad discretion* of the district judge under the applicable circumstances:
>
> > We have concluded that the preferable approach for dealing with these problems in the federal courts is not to preclude the use of offensive collateral estoppel, but to grant trial courts broad discretion to determine when it should be applied.

City of Cleveland v. Cleveland Elec. Illuminating Co., 734 F.2d 1157, 1165 (6th Cir. 1984) (parallel citation omitted, emphasis in original) (quoting *Parklane Hosiery,* 439 U.S. at 331).

In light of the broad grant of discretion which this Court is directed to exercise pursuant to the *Parklane* factors, the Court agrees with our sister district court's assessment of the statement in the footnote in *In re Bendectin Products Liability Litigation:*

> [T]his court is puzzled by the broad comment of the Sixth Circuit in *Bendectin* that, "[i]n

> *Parklane Hosiery* the Supreme Court explicitly stated that offensive collateral estoppel could not be used in mass tort litigation. A close reading of *Parklane Hosiery* reveals that the Court (1) authorized the use of offensive collateral estoppel, and (2) *only mentioned, but did not broadly accept, the arguments that have been advanced against the wholesale application of offensive collateral estoppel.*

In re Air Crash at Detroit Metro. Airport, Detroit, Mich. on Aug. 16, 1987, 776 F. Supp. 316, 324-25 (E.D. Mich. 1991) (citation omitted; emphasis in original). The court continued:

> Accordingly, this court cannot blithely accept the proposition that offensive collateral estoppel is inappropriate because [Plaintiffs] are part of "mass tort litigation." This court interprets *Bendectin* as precluding the utilization of offensive estoppel in a mass tort litigation situation that would be similar to that in Professor Currie's hypothetical and in other situations in which its application would be unfair to the defendant. The contours of when offensive collateral estoppel would be unfair-even in mass tort litigation-should be developed on a case-by-case basis. Invoking the term "mass tort litigation" is meaningless without contextual analysis. The teaching of *Parklane Hosiery* is that the

> issue is delicate and must be handled in this manner. *Id.* at 325.[6]

Consequently, the Court finds that if Ohio preclusion law applied here and if it were to dictate a different result than federal law, reference to state law could not obtain. However, the Court need not cross this bridge because, as shown below, Ohio preclusion law and federal preclusion law both support the application of collateral estoppel.

3. Ohio Law

Ohio's doctrine of collateral estoppel is very similar to the federal doctrine, and "has been explained by [the Ohio Supreme C]ourt to be

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[6] *Parklane Hosiery* provides an example of a situation in which offensive collateral estoppel might be unfair is when

> a railroad collision injures 50 passengers all of whom bring separate actions against the railroad. After the railroad wins the first 25 suits, a plaintiff wins in suit 26. *Professor Currie argues* that offensive use of collateral estoppel should not be applied so as to allow plaintiffs 27 through 50 automatically to recover.

Id. at n. 14 (emphasis added). This example most likely was used to illustrate the potential unfairness of inconsistent judgments. *See, e.g., Glictronix Corp. v. Am. Tel. & Tel. Co.*, 603 F. Supp. 552, 568 (D.N.J. 1984) (Professor Currie's example was to illustrate the potential unfairness of inconsistent judgments); *Robi v. Five Platters, Inc.*, 838 F.2d 318, 329 n.9 (9th Cir. 1988) (same); *Gen. Dynamics Corp. v. AT&T*, 650 F. Supp. 1274, 1285 (N.D. Ill. 1986) (same); *Algie v. RCA Global Commc'n*, 891 F. Supp 839, 856 (S.D.N.Y. 1994) (same); *Wash. Alder LLC v. Weyerhaeuser Co.*, 2004 U.S. Dist. LEXIS 9650, at *10 n.3 (D. Or. 2004) (two verdicts in favor of Plaintiffs support issue preclusion and "Defendant's citation to "Professor Currie's familiar example" is far off the mark.") In this MDL there are no inconsistent judgments on any of the issues that Plaintiffs seek to exclude.

preclusion of the relitigation in a second action of an issue or issues that have been actually and necessarily litigated and determined in a prior action." *Goodson v. McDonough Power Equip., Inc.,* 2 Ohio St. 3d 193, 195 (1983) (citing *Whitehead v. Gen. Tel. Co.,* 20 Ohio St.2d 108 (1969)).

The main difference between Ohio and federal law, in DuPont's view, is that "Ohio law forbids the use of offensive non-mutual collateral estoppel in this MDL." (Defs Sur-Reply at 8, MDL ECF No. 5281-1.) Specifically, DuPont argues:

> Ohio law does *not* permit offensive non-mutual collateral estoppel:
>
> > In Ohio, the general rule is that mutuality of parties is a requisite to collateral estoppel, or issue preclusion. As a general principle, collateral estoppel operates only where all of the parties to the present proceeding were bound by the prior judgment. A judgment, in order to preclude either party from relitigating an issue, must be preclusive upon both.
>
> *Goodson,* 2 Ohio St. 3d 193, *syllabus* at 1.

(Def's Mem. in Opp. at 7, MDL ECF No. 5278.)

DuPont further contends:

> The strict mutuality generally required in Ohio may be relaxed only in rare and narrow circumstances such as where "the party to be precluded had the opportunity to fully litigate

> the issue, and . . . the preclusion is defensive."

Id. at 8 (quoting *Kiara Lake Estates, LLC v. Bd of Park Comm'rs,* No. 2:13-cv-522, 2014 U.S. Dist. LEXIS 23603, at *14 (S.D. Ohio Feb. 24, 2014)).

This Court disagrees with DuPont's assessment.

First, DuPont's statement that "Ohio law does *not* permit offensive non-mutual collateral estoppel" is inaccurate. *Id.* at 7. Indeed, the next quote utilized by DuPont reveals as much—*i.e.*, "the *general rule* is that mutuality of parties is a requisite to collateral estoppel." *Goodson,* 2 Ohio St. 3d 193, *syllabus* at 1 (emphasis added). As explained this year by an Ohio appellate court, *Goodson,* the case upon which DuPont relies, specifically sets out an exception to this general principle:

> An exception to the principle of mutuality may be recognized where it is shown that the party against whom collateral estoppel is asserted "clearly had his day in court on the specific issue brought into litigation within the later proceeding." [*Goodson v. McDonough Power Equip., Inc.,* 2 Ohio St.3d] at 200; *see also Yeager v. Ohio Civil Rights Comm.,* 11th Dist. Trumbull No. 2004-T-0099, 2005-Ohio-6151, ¶40 (nonmutuality may be allowed where justice reasonably requires it).

Schmitt v. Witten, 2018-T-0086, 2019 WL 2172827, at *4 (Ohio App. 11th Dist. May 20, 2019).

Second, DuPont's assertion that mutuality may be relaxed in situations "where 'the party to be precluded

had the opportunity to fully litigate the issue, and . . . the preclusion is defensive" is also an inaccurate statement of law. (Defs Mem. in Opp. at 7, MDL ECF No. 5278.) Ohio law permits more than defensive preclusion. Indeed, as DuPont admits in a footnote, the Ohio Supreme Court in *Goodson* explained that it has permitted the use of offensive non-mutual collateral estoppel "where justice would reasonably require it." *Goodson,* 2 Ohio St. 3d at 199 (citing *Hicks* v. *De La Cruz,* 52 Ohio St. 2d 71 (1977)).

Thus, while Ohio law generally requires mutuality of parties, it makes exceptions when the party against whom estoppel is asserted "clearly had his day in court on the specific issue brought into litigation within the later proceeding" and/or "where justice would reasonably require it." *Id.* at 200.

Moreover, Plaintiffs suggest that here, actual mutuality of parties exists because Ohio defines privity broadly in the preclusion context, referring to "what constitutes" it as "somewhat amorphous." *Brown v. Dayton,* 89 Ohio St. 3d 245, 248 (2000). The Ohio Supreme Court explains:

> A contractual or beneficiary relationship is not required:
>
> "In certain situations . . . a broader definition of 'privity' is warranted. As a general matter, privity 'is merely a word used to say that the relationship between the one who is a party on the record and another is close enough to include that other within the *res judicata*.'

Id. (citations omitted). Indeed, "[p]rivity is defined broadly to include a 'mutuality of interest, including an identity of desired result.'" *Garnet v. Ohio Civ.*

Rights Commn., 2004-T-0099, 2005 WL 3097871, at *6-7 (Ohio App. 11th Dist. Nov. 18, 2005) (quoting *Brown,* 89 Ohio St.3d at 248).

In the instant action, Plaintiffs persuasively argue:

> Therefore, under the relaxed concept of privity that Ohio courts apply for purposes of collateral estoppel, neither a contractual nor a beneficial relationship is necessary. *Brown,* 730 N.E.2d at 962. Even though, Plaintiffs *do* have a contractual relationship with DuPont by virtue of the *Leach* Settlement Agreement, Plaintiffs *also* clearly have a mutuality of interest and an identity of a desired result. All Plaintiffs with cases pending in this MDL allege that they have been injured as a result of drinking water contaminated with DuPont's C-8, have a substantive legal contractual relationship with DuPont by virtue of being *Leach* class members, and share the identity of a desired result - namely damages as a result of contracting cancer. Moreover, DuPont and *Leach* class members are also in privity as they are both bound by the judgement in *Leach* which has preclusive effect on claims between the parties.

(Pls' Reply at 6-7, MDL ECF No. 5280.)

IV.

For collateral estoppel to apply under Ohio and/or federal law, a plaintiff must show that the issue was actually and directly litigated, was necessary to the outcome of the prior proceeding, resulted in a final judgment on the merits, and the party against whom

estoppel is sought had a full and fair opportunity to litigate in the prior proceeding. *Nat'l Satellite Sports, Inc. v. Eliadis, Inc.*, 253 F.3d 900, 908 (6th Cir. 2001); *State ex rel. Davis v. Pub. Emps. Ret. Bd.,* 174 Ohio App. 3d 135, 144, 2007-Ohio-6594, at ¶18. Plaintiffs argue:

> Based upon issue preclusion (collateral estoppel), there are no genuine issues of fact relating to duty, breach, and general causation in Plaintiffs' negligence claim, no issues of fact relating to the interpretation of the *Leach* agreement and no genuine issues of fact relating to the inapplicability of the Ohio Tort Reform Act. Three juries in this MDL already have found that defendant [DuPont] breached that duty by the negligent discharge of C-8 into the environment, and that the C-8 that each Plaintiff, as a *Leach* class member, was exposed to was capable of causing each such Plaintiff's kidney or testicular cancer. Plaintiffs therefore seek to use issue preclusion offensively to preclude DuPont from re-litigating, *once again,* the issues of duty, breach, and general causation with respect to Plaintiffs' exposures to C-8, as *Leach* class members, being capable of causing Plaintiffs' kidney and testicular cancers.
>
> This Court has also ruled numerous times on issues relating to the interpretation of the *Leach* Agreement, including on issues relating to class membership and causation, and the inapplicability of the Ohio Tort

> Reform Act, and further challenges to its prior rulings on these issues are a waste of the Court's and Plaintiffs' time and resources. Indeed, not only has this Court issued numerous rulings on these issues, but DuPont has also fully briefed and argued these issues before the Sixth Circuit only to dismiss its appeal at the eleventh hour. (Joint Mot. to Dismiss Appeal, *Bartlett v. E. L du Pont de Nemours & Co,* No. 16-3310 (6th Cir) [ECF No. 41]). DuPont vigorously fought the three bellwether[7] lawsuits through verdict and post-trial motion, including one appeal to the Sixth Circuit. It had a full and fair opportunity to litigate all liability issues. And the jury's determinations on key issues were reduced to final judgments subject to appeal. To allow DuPont to continually re-argue these issues is an afront to judicial economy and interests of fundamental fairness and finality.

(Pls' Renewed Mot. at 1-2, MDL ECF No. 5274.)

The Court will address Plaintiffs' arguments in three groups: (A) contract interpretation of the *Leach* Settlement Agreement, which includes causation definitions, prohibition of trying general causation, and class membership, and the inapplicability of the

[7] The Court notes that of the six cases chosen to be bellwether trials, only two (2) went to trial with the others resulting in settlements. The third and fourth trials were chosen from a wider range of cases that had not developed as bellwether cases.

Ohio Tort Reform Act; (B) the negligence claims; and (C) a full and fair opportunity to litigate.

A. Contract Interpretation and Tort Reform

There are prior judgments issued in the *Bartlett, Freeman,* and *Vigneron* cases, where the issue of the *Leach* Settlement Agreement was actually litigated and resolved in a judicial determination that was essential to the judgment. DuPont moved to reverse this Court's contract interpretation, first, in DuPont's Motion for Clarification of DMO 1, which led to the issuance of DMO I-A; second, in its post-trial briefing that resulted in DMO 12, and; third, in its appeal to the Sixth Circuit in the *Bartlett* case. DuPont claims that the verdicts stemmed from this Court's interpretation of the *Leach* Settlement Agreement, which—in DuPont's estimation—"constituted a threshold error that pervasively impacted the trial and negated fundamental terms that were the very basis for resolving the *Leach* class action" (Defs Mot. for J. and New Trial at 1, Bartlett ECF No. 15); "A threshold contract interpretation error eliminated the heart of a critical defense for DuPont *in each of the 3,500 cases in this MDL . . . . " (Barlett* v. *E. I. du Pont De Nemours and Company,* Sixth Circ. Case No. 16-3310, Appellant Brief at 1, 18) (emphasis added).

This Court agrees with DuPont that the Court's interpretation of the *Leach* Settlement Agreement was essential to the judgments that were entered in the *Bartlett, Freeman,* and *Vigneron* cases, and impacts all of the other cases in this MDL. And, there exists no tangible argument that the issue was not actually litigated in all the cases. DuPont brought the contract interpretation issue to this Court on

numerous occasions and before the Sixth Circuit as its main assignment of error. Similarly, DuPont litigated the application of the Ohio Tort Reform Act before this Court on numerous occasions and also before the Sixth Circuit.

DuPont does not argue that the issue of contract interpretation or application of the Tort Reform Act was not actually litigated or essential to the judgments entered in each of the three trials. Instead, DuPont's main argument is that "offensive issue preclusion does not apply here." (Sur-Reply at 11, MDL ECF No. 5281-1.) DuPont simply contends that the Court's determination was not a final judgment as to the interpretation of the *Leach* Settlement Agreement or the Tort Reform Act, stating "[t]he *Bartlett* trial verdict did not bind any future case, and there was likewise no appellate decision that could possibly have bound any future case." *Id.* at 14, n.5. DuPont refers to the withdrawn *Bartlett* appeal as the "settlement of an appeal" and the "undecided *Bartlett* appeal," suggesting that these phrases somehow reduce the finality of this Court's Judgments.

This position is inconsistent with the law; it is inconsistent with DuPont's previous conduct in this MDL. That is, this Court has applied the same interpretation of the *Leach* Settlement Agreement to the facts of each of the four prior cases that went to trial and, as DuPont argued to the Sixth Circuit, the interpretation effected "each of the 3,500 cases in this MDL." *(Barlett v. E. I. du Pont De Nemours and Company,* Sixth Cir. Case No. 16-3310, Appellant Brief at 1, 18.) Additionally telling is that after Mrs. Bartlett's case was decided and appealed, the parties

no longer asked the Court to make any changes to its interpretation of the *Leach* Settlement Agreement, recognizing that the *Bartlett* appeal would once and for all put to rest the contract interpretation issue. The same is true of the Tort Reform Act.

Even if, however, the parties had not recognized the impact of this Court's final and binding decisions, the law is clear. This Court's decisions interpreting the *Leach* Settlement Agreement and application of the Ohio Tort Reform Act (and the juries' findings of negligence) became final upon entry of final judgment. "[T]he established rule in the federal courts is that a final judgment retains all of its preclusive effect pending appeal." *Erebia v. Chrysler Plastic Prods. Corp.,* 891 F.2d 1212, 1215 n.1 (6th Cir. 1989) (citations omitted). Thus, this Court's final judgments in all three of the trials held in this MDL have never been anything other than final and binding.

As to the appeal, when DuPont withdrew it, those previously appealable issues simply retained their finality for purposes of collateral estoppel. Moore's Fed. Practice, 3d Ed. § 132.03[4][k][vii] ("Unappealed but appealable findings are given issue preclusive effect") (citing *Partmar Corp. v. Paramount Pictures Theatres Corp.,* 347 U.S. 89, 99 n.6 (1954) (plaintiff did not but might have appealed)). Under Supreme Court and Sixth Circuit precedent, dismissal of an appeal means that the trial court's rulings remain vital and preclusive. When "the losing party has voluntarily forfeited" its appellate rights, it remains bound by the trial court's decision. *U.S. Bancorp Mortg. Co. v. Bonner Mail P'ship,* 513 U.S. 18, 25-26 (1994); *Coal.*

for Gov't Procurement v. Fed. Prison Indus., Inc., 365 F.3d 435, 484 (6th Cir. 2004).

Further, the "settlement" of Mrs. Bartlett's claim while the case was on appeal simply has no impact on the finality and preclusive effect of this Court's Judgment. Indeed, the Sixth Circuit explains that when a party "voluntarily abandon[s] their request for reversal of the district court's decision . . . [the losing party] ha[s] lost their ability to contest the merits of [that] dispute." *Remus Joint Venture v. McAnally,* 116 F.3d 180, 185 (6th Cir. 1997). When a party decides to settle a case rather than complete an appeal, "[t]he judgment is not unreviewable, but simply unreviewed by his own choice." *Id.*

Moreover, the Sixth Circuit has recently held that a district court's judgment can still have issue-preclusive effect even if the judgment was set aside by the trial court at the request of the parties as a condition of settlement. *Watermark Senior Living Ret. Communities, Inc. v. Morrison Mgt. Specialists, Inc.,* 905 F.3d 421, 426-28 (6th Cir. 2018). In *Watermark Senior Living Retirement Communities,* the Sixth Circuit observed:

> [J]udgments may retain their finality and preclusive effect when they are set aside or vacated upon settlement. . . . In such circumstances, the losing party acquiesces in the court's decision, even if he disagrees with it. The party has had his day in court and waived his right to an appeal. That is all that is required. "One bite at the apple is enough."

Id. at 427 (citations omitted).

Here, this Court's judgment was not vacated nor set aside. Undoubtedly then, DuPont has acquiesced in this Court's decision, even though DuPont disagrees with it. DuPont has had its day in court and has waived its right to appeal.

DuPont's final argument is that the "PSC is trying to improperly convert the undecided *Bartlett* appeal into the law-of-the-case for all subsequent individual cases, despite the fact that the Sixth Circuit has expressly rejected applying law of the case across different cases." (Defs Sur-Reply at 12, MDL ECF No. 5281-1.) This argument is a red herring. Plaintiffs have not suggested that this Court's prior rulings are "law of the case," nor could they. "The doctrine of the law of the case is similar [to the doctrine of issue preclusion] in that it limits relitigation of an issue once it has been decided, but the law of the case doctrine is concerned with the extent to which the law applied in decisions at various stages of the same litigation becomes the governing principle in later stages." 18 Moore's Federal Practice § 134.04[1], 134-52.3 (citing *Christianson v. Colt Indus. Operating Corp.,* 486 U.S. 800,816 (1988)). The law of the case doctrine is simply inapplicable here.

B. Negligence

Plaintiffs argue that "[t]he precise/identical issue of negligence in Plaintiffs' cases was raised and litigated in the *Bartlett, Freeman,* and *Vigneron* cases and this finding of negligence was necessary to support each verdict." (Pls' Renewed Mot. at 7-8, MDL ECF No. 5274.) DuPont responds that "[i]ssue preclusion does not apply unless-at a minimum-the plaintiff can show that all of the factual differences

'are of no legal significance whatever in resolving the issue presented' and here, Plaintiffs cannot "meet this high standard." (Def.'s Memo. in Opp. at 17, MDL ECF No. 5278) (citing *United States* v. *Stauffer Chem. Co.,* 464 U.S. 165, 172 (1984)). Specifically, DuPont contends that Plaintiffs' "relevant water districts and time periods at issue in prior trials were different. The constantly changing state of the science, the changing knowledge over time, and the specific risks to any Plaintiff at the specifically relevant time and in a specific area are fundamental to the duty issues." *Id.* at 17. DuPont further argues that some of the plaintiffs in the Post-Settlement cases have filed loss of consortium claims, which "distinguishes that case from the first three trials." *Id.* Additionally, DuPont contends that "binding DuPont to the results of two bellwether trials and one non-bellwether trial would be fundamentally unfair." (Def's Mem. in Opp. at 25.) And finally, DuPont maintains that "a number of Plaintiffs in the post-global settlement cases have sued an additional defendant, Chemours-an independent company that never used C-8 at the Washington Works facility or elsewhere and was not a defendant in the pre-GSA cases." *Id.* at 18. DuPont's arguments are not well taken.

The Court finds that Plaintiffs have shown that any factual differences between the Pre-and Post-Settlement cases are of no legal significance in a jury's consideration of a negligence claim. That is, the issue of negligence was actually and directly litigated in four prior trials, with three consistent verdicts. The fourth settled after four weeks of trial. As can be seen in the jury instructions *supra,* each jury was consistently instructed and each found that DuPont

owed a duty to a particular *Leach* Class member, that it breached that duty, and that DuPont should have foreseen or reasonably anticipated that injury would result from the alleged negligent act.

Specifically, the "test" for duty "is whether under the circumstances a reasonably prudent corporation would have anticipated that an act or failure to act would likely cause injuries." (Final Jury Instructions at 21, Negligence - Duty, Bartlett ECF No. 139); (Final Jury Instructions at 20, Negligence–Duty, Freeman ECF No. 102); (Final Jury Instructions at 21, Negligence–Duty, Vigneron ECF No. 195). And for breach, the jury was required to determine whether DuPont exercised "ordinary care," which was defined as "the care that a reasonably careful corporation would use under the same or similar circumstances." (Final Jury Instructions at 22, Negligence–Breach, Bartlett ECF No. 139); (Final Jury Instructions at 21, Negligence- Breach, Freeman ECF No. 102); (Final Jury Instructions at 22, Negligence - Breach, Vigneron ECF No. 195).

Finally, the jury had to determine whether Plaintiffs proved foreseeability, that is, whether they "prove[d] that DuPont should have foreseen or reasonably anticipated that injury would result from the alleged negligent act." (Final Jury Instructions at 21, Negligence–Proximate Cause–Foreseeable Injury, Bartlett ECF No. 139); (Final Jury Instructions at 24, Negligence–Proximate Cause–Foreseeable Injury, Freeman ECF No. 102); (Final Jury Instructions at 23, Negligence–Proximate Cause, Foreseeable Injury, Vigneron ECF No. 195). Again, the instructions made clear that the jury was determining not only whether

DuPont's conduct caused injury to the individual plaintiff, but also to those who, like the *Leach* Class members, were in similar positions to Plaintiffs: "The test for foreseeability is not whether DuPont should have foreseen the injury exactly as it happened to [the plaintiff]. Instead, the test is whether under the circumstances a reasonably careful person would have anticipated that an act or failure to act would likely result in or cause injuries." (Final Jury Instructions at 21, Negligence–Proximate Cause, Foreseeable Injury, Bartlett ECF No. 139); (Final Jury Instructions at 21, Negligence–Proximate Cause–Foreseeable Injury, Freeman ECF No. 23); (Final Jury Instructions at 23, Negligence–Proximate Cause, Foreseeable Injury, Vigneron ECF No. 195).

The testimony that was presented at the *Bartlett, Freeman* and *Vigneron* trials and the resulting verdicts made clear that the duty DuPont breached was to the entire communities surrounding its Washington Works plant and not just to specific customers of individual water districts. The facts relating to DuPont's negligence were virtually identical. The experts in each trial testified about how DuPont's conduct affected surrounding communities—all six of the water districts and private wells subject to the *Leach* Settlement Agreement—and not just to the individuals who were in a particular water district. The factual differences highlighted by DuPont (*i.e.,* water districts, diseases, and the timing and duration of C-8 exposure) go to specific causation, which is a live controversy that will be vigorously litigated in the upcoming trials, as will any loss of consortium claims, and punitive damages claims.

Meanwhile, the conduct supporting DuPont's negligence in the *Bartlett, Freeman,* and *Vigneron* cases is the same conduct in the Post-Settlement Plaintiffs' cases. As this Court noted previously, evidence "related to DuPont's conduct of releasing the C-8 from the Washington Works plant" is "*the same evidence that will be utilized in every single trial held in this MDL.*" (CMO 20 at 33, ECF No. 4624.) "Not only will this evidence be consistent through each and every trial, it is also overwhelmingly the majority of all evidence that will be offered at each and every trial that will be held in this MDL." *Id.* The negligence phase of each prior case has taken substantial time at trial, and each verdict included a finding of negligence.

The addition of the entity that purchased Washington Works, Chemours, and was spun off from DuPont itself to, *inter alia,* take some or all of the C-8 liability from that facility is of no legal significance whatever in resolving the negligence issues under consideration here. Chemours' conduct is not *per se* at issue in this litigation. Instead, Chemours is, at best, merely an indemnitor of DuPont.

DuPont's argument that being bound to the result of three trials, two of which were bellwethers, misses the mark. While in certain factual situations courts have found it unfair to bind parties to a bellwether verdict, *Auchard* v. *TVA,* No. 3:09-CV-54, 2011 U.S. Dist. LEXIS 14771, at *11 (E.D. Tenn. Feb. 2, 2011), others have focused on whether a party had a full and fair opportunity to litigate, *Adams v. United States,*

No. CV 03-49-E-BLW, 2010 U.S. Dist. LEXIS 116051, 2010 WL 4457452 (D. Idaho Oct. 19, 2010).[8]

While this Court did hold two bellwether and two non-bellwether trials, every Plaintiff in this MDL is a member of the *Leach* Class and are subject to the *Leach* Settlement Agreement. Both Plaintiff class and DuPont benefit from the *Leach* Agreement and this Court's rulings related to what the trials under the Agreement will entail. Thus, to the extent that the bellwether process could impact the application of collateral estoppel, it does not do so here. The important aspect of the analysis is whether DuPont had a full and fair opportunity to litigate.

In the context of an MDL, the need to try multiple bellwether cases to facilitate settlement of all cases is an important component of the handling of a large number of related cases. *See The Manual for Complex Litigation,* § 22.315 (bellwether trials are meant to "produce a sufficient number of representative verdicts and settlements to enable the parties and the court to determine the nature and strength of the claims . . . and what range of values the cases may have"); Alexandra D. Lahav, *Bellwether Trials,* at 577-78, The George Washington Law Review (2008) ("Judges currently use bellwether trials informally in mass tort litigation to assist in valuing cases and to

[8] In *Adams v. United States,* DuPont actually argued that issue preclusion from bellwether trials was inappropriate, even though the court had previously suggested that some of the issues may be precluded in future trials. The *Adams* court found that issue preclusion applies to findings of bellwether trials where "DuPont had a full and fair opportunity to litigate" the relevant issue. *Adams,* 2010 U.S. Dist. LEXIS 116051, at *24.

encourage settlement."). Applying collateral estoppel in an MDL before most or all bellwether cases are tried would not promote judicial economy insofar as a global settlement could be frustrated. But here, DuPont lost the first bellwether trial, filed an appeal, and asked to stay the remaining cases, which the Court refused. DuPont then simply settled the only remaining bellwether cases, leaving no such cases outstanding. These facts are further reasons to apply collateral estoppel, when no bellwether cases remain unresolved.

C. Full and Fair Opportunity to Litigate

As does federal law, Ohio law focuses on the "main legal thread which runs throughout the determination of the applicability of . . . collateral estoppel, [which] is the necessity of a fair opportunity to fully litigate and to be 'heard' in the due process sense." *Goodson,* 2 Ohio St.3d at 200-01. The Ohio Supreme Court cautions:

> Collaterally estopping a party from relitigating an issue previously decided against it violates due process where it could not be foreseen that the issue would subsequently be utilized collaterally, and where the party had little knowledge or incentive to litigate fully and vigorously in the first action due to the procedural and/or factual circumstances presented therein.

Id. And, non-mutuality of parties is acceptable in Ohio when the party against whom estoppel is asserted "clearly had his day in court on the specific issue brought into litigation within the later proceeding" and/or "where justice would reasonably require it." *Goodson,* 2 Ohio St. 3d at 200.

The United States Supreme Court similarly cautions:

> There are two situations in which it may be unfair to apply offensive issue preclusion: (1) where the defendant in the first action had little incentive to defend vigorously, particularly if future suits were not foreseeable; and (2) where the second action "affords the defendant procedural opportunities unavailable in the first action that could readily cause a different result."

Guy, 257 F. App'x. 965 (quoting *Parklane Hosiery Co.,* 439 U.S. at 330-31).

None of these situations is even arguably present here—nor does DuPont claim that any are present. No doubt, DuPont had every incentive to vigorously defend the first three trials in this MDL, knowing that there were over 3,500 cases that would be impacted by the outcomes of those cases. And, obviously future suits were foreseeable in that there were over 3,500 cases in line in this MDL-all of which would be tried in this Court or in the Southern District of West Virginia. This MDL is geographically limited to only two districts because of the *Leach* Case from which this MDL *was* born and the Settlement Agreement by which these cases are bound. DuPont has known since it moved the JPML for consolidation that there would never be the "nuclear option" available such that it may have the opportunity to potentially re-argue pretrial and trial rulings made by this Court in other trial courts across the country. Indeed, as the JPML itself has recognized, "the transferee judge has indicated his willingness to seek an inter-circuit

assignment to conduct trials in West Virginia should the need arise." (Transfer Order at 2, MDL ECF No. 5130.) Consequently, there is no question that DuPont had strong motivation to defend vigorously and that it fully understood that future suits were not only foreseeable, but likely.

Further, DuPont made clear in its SEC filing that there was potential liability well into the future, dividing the responsibility for the potential future liabilities between it and Chemours. Finally, the Post-Settlement cases do not afford the parties any procedural opportunities that were unavailable in the *Bartlett, Freeman,* and/or *Vigneron* trials that could readily cause a different result.

Since the inception of this MDL six and one-half years ago, the pretrial motion practice and the trials were aggressively litigated by competent counsel on both sides. The trials alone were billed at approximately $6 million per side in attorney fees and over $1 million in costs. (Pl's Mot.. for Determination of Atty. Fees and Costs, Freeman ECF No. 147.) Given the caliber and number of counsel, the length of this action, a settlement of over $670 million, nearly $50 million in attorney fees and $4 million in costs for the trials, and a fully briefed and argued appeal before the Sixth Circuit, the time has come to conserve judicial resources as well as those of the parties.

The Ohio Supreme Court advises that, when balancing "[t]he benefits garnered from applying collateral estoppel in any cause . . . against the costs associated with its application[,]" "[t]he major risk linked to such an application is that of an erroneous determination in the first case." *Goodson,* 2 Ohio St.

3d at 201-02. In the instant action, there was not only a "first case," but a second case and a third case that all resulted in the same verdicts on a *Leach* Class members' negligence claim.

The policy guiding the application of collateral estoppel in any given case is one of fundamental fairness. As the Supreme Court observed:

> But as so often is the case, no one set of facts, no one collection of words or phrases, will provide an automatic formula for proper rulings on estoppel pleas. In the end, decision will necessarily rest on the trial courts' sense of justice and equity.

Blonder-Tongue Laboratories, 402 U.S. at 333-34.

After reviewing the situations in which it may be unfair to apply offensive collateral estoppel, the Supreme Court stated:

> We conclude, therefore, that none of the considerations that would justify a refusal to allow the use of offensive collateral estoppel is present in this case. Since the petitioners received a "full and fair" opportunity to litigate their claims in the SEC action, the contemporary law of collateral estoppel leads inescapably to the conclusion that the petitioners are collaterally estopped from relitigating the question of whether the proxy statement was materially false and misleading.

Parklane Hosiery Co., 439 U.S. at 332-33.

Similarly, in the instant action, this Court concludes that none of the considerations Ohio or

federal courts find would justify refusal to allow the use of offensive collateral estoppel are present. Since DuPont has received a "full and fair" opportunity to litigate the proper interpretation of the *Leach* Settlement Agreement, application of the Ohio Tort Reform Act, and negligence with three separate juries finding DuPont liable for the same conduct that is at issue in this motion, the contemporary law of collateral estoppel leads inescapably to the conclusion that DuPont is collaterally estopped from relitigating these issues. DuPont has had its day in court on these issues, and in view of the entire record before this Court, justice and equity demand application of issue preclusion as requested by Plaintiffs in their Renewed Motion.

V.

The Court will next address Defendant's Motion to File, *Instanter,* a Sur-Reply (MDL ECF No. 5281), and Defendant's arguments that Plaintiffs' Renewed Motion was untimely.

A. Sur-Reply

DuPont filed a Motion for Leave to File, *Instanter,* a Sur-Reply (MDL ECF No. 5281), Plaintiffs then filed a Memorandum in Opposition (MDL ECF No. 5282), and DuPont filed its Reply (MDL ECF No. 5283). Pursuant to S.D. Ohio Local R. 7.2(a)(2), a party may seek leave of the Court to file a sur-reply in support of its opposition to a motion "for good cause shown." Good cause exists for a sur-reply where a party seeks to "respond to an argument raised by [a party] for the first time in its reply brief." *Net.Jets Large Aircraft, Inc. v. United States,* 2017 U.S. Dist. LEXIS 49232, at *12, (S.D. Ohio Mar. 21, 2017) (citing *Burlington Ins.*

Co. v. PMI Inc., 862 F. Supp. 2d 719, 726 (S.D. Ohio 2012)).

DuPont contends that Plaintiffs raised new arguments in their Reply, necessitating the need for it to file a sur-reply. This Court disagrees; however, the Court will provide to DuPont the opportunity it requests to address the issues before the Court. Thus, the Court **GRANTS** DuPont's Motion for Leave to File, *Instanter,* a Sur-Reply. (MDL ECF No. 5281.)

B. Timeliness of Motion

It is not disputed that Plaintiffs filed their Renewed Motion after the deadline set by this Court. DuPont contends that Plaintiff untimeliness is a "fatal defect" requiring denial of its request for partial summary judgment. (Defs Mem. in Opp. at 1, MDL ECF No. 5278.) This Court, however, disagrees.

Unlike certain defenses that must be raised by the parties, the doctrine of collateral estoppel is one in which "the judiciary retains an independent interest" so that it can "prevent[] the misallocation of judicial resources." *Sioux Nation of Indians,* 448 U.S. at 433. The Sixth Circuit sanctions, indeed encourages, a court to *sua sponte* raise the doctrine "in the interests of, *inter alia,* the promotion of judicial economy." *Holloway Const. Co. v. U.S. Dept. of Lab.,* 891 F.2d 1211, 1212 (6th Cir. 1989) (citing *Sioux Nation of Indians,* 448 U.S. at 432; *Commissioner v. Sunnen,* 333 U.S. 591,597 (1948)). As the Supreme Court explained in its assessment of a *sua sponte* dismissal based on res judicata:

> The Court of Claims itself has indicated that it would not engage in reconsideration of an

> issue previously decided by the Court of Claims without substantial justification:
>
> > "It is well to remember that res judicata and its offspring, collateral estoppel, are not statutory defenses; they are defenses adopted by the courts in furtherance of prompt and efficient administration of the business that comes before them. They are grounded on the theory that one litigant cannot unduly consume the time of the court at the expense of other litigants, and that, once the court has finally decided an issue, a litigant cannot demand that it be decided again." *Warthen v. United States,* 157 Ct. Cl. 798, 800 (1962).
>
> It matters not that the defendant has consented to the relitigation of the claim since the judiciary retains an independent interest in preventing the misallocation of judicial resources and second-guessing prior panels of Art. III judges when the issue has been fully and fairly litigated in a prior proceeding.

Sioux Nation of Indians, 448 U.S. at 432-33 ("This result is fully consistent with the policies underlying res judicata: it is not based solely on the defendant's interest in avoiding the burdens of twice defending a suit, but is also based on the avoidance of unnecessary judicial waste.") (citing *Sunnen,* 333 U.S. at 597; *Blonder-Tongue Laboratories, Inc.,* 402 U.S. at 328; *Parklane Hosiery,* 439 U.S. at 322).

As can be seen from the Court's analysis above, it is clear that DuPont is asking to "unduly consume the time of the Court at the expense of other litigants," because this Court and three juries have "finally decided" the issues of interpretation of the *Leach* Settlement Agreement, including the definitions and evidentiary applications of general and specific causation, class membership, application of the Ohio Tort Reform Act, and DuPont's negligence. DuPont, however, continues to "demand that [these issues] be decided again." *See id.* This DuPont cannot do.

The Court gave its attention fully to this MDL and has done what the JPML asked of it: to conduct the cases in a "just and efficient" manner. (Transfer Order at 1, MDL ECF No. 1; Transfer Order at 2, MDL ECF No. 5130.) The Court owes the same to the other cases before it, including a major MS-13 gang case involving five murder charges with 26 defendants, 16 of whom allegedly committed death-penalty-eligible crimes, the *In re: Davol, Inc./C.R. Bard, Inc. Polypropylene Hernia Mesh Products Liability Litigation Hernia* that currently consists of over 4,500 cases, and over 200 other civil cases, as well as over 100 criminal matters. It is incumbent upon this Court to protect its ability to give the same prompt and efficient administration of the cases before it that it has provided to DuPont.

VI.

For the reasons set forth above, the Court **GRANTS** Plaintiffs' Renewed Motion for Summary Judgment on the Application of the Doctrine of Issue Preclusion/Collateral Estoppel (MDL ECF No. 5274), and **GRANTS** Defendant's Motion to File, *Instanter,* a Sur-Reply (MDL ECF No. 5281). The issues that

remain for trial are: specific causation, damages, and, if malice is found by the jury, punitive damages, and in some cases loss of consortium.

IT IS SO ORDERED.

[handwritten: 11-25-2019	[handwritten: signature
DATE	Edmund A. Sargus, Jr.
	United States District Court Judge

Appendix D

RELEVANT CONSTITUTIONAL PROVISION

U.S. Const. amend. V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.