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UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

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

TRAVIS ABBOTT; JULIE ABBOTT,
Plaintiffs-Appellees,

v.

E. I. DU PONT DE NEMOURS AND COMPANY,
Defendant-Appellant.

No. 21-3418

Appeal from the United States District Court for the Southern District of Ohio at Columbus.
Nos. 2:13-md-02433; 2:17-cv-00998—Edmund A. Sargus, Jr., District Judge.

Argued: June 10, 2022

Decided and Filed: December 5, 2022

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

COUNSEL

ARGUED: Damond R. Mace, SQUIRE PATTON BOGGS (US) LLP, Cleveland, Ohio, for Appellant. Matthew W.H. Wessler, GUPTA WESSLER PLLC, Washington, D.C., for Appellees. **ON BRIEF:** Damond R. Mace, Aneca E. Lasley, SQUIRE PATTON BOGGS (US) LLP, Cleveland, Ohio, Lauren S. Kuley, Colter L. Paulson, SQUIRE PATTON BOGGS (US) LLP, Cincinnati, Ohio, John A. Burlingame, SQUIRE PATTON BOGGS (US) LLP, Washington, D.C., for Appellant. Matthew W.H. Wessler, GUPTA WESSLER PLLC, Washington, D.C., Rachel Bloomekatz, BLOOMEKATZ LAW LLC, Columbus, Ohio, Jon C. Conlin, F. Jerome Tapley, Elizabeth E. Chambers, Nina Towle Herring, Mitchell Theodore, Brett Thompson, CORY WATSON, PC, Birmingham, Alabama, for Appellees. Brian D. Schmalzbach, McGUIRE WOODS LLP, Richmond, Virginia, Mark A. Behrens, SHOOK, HARDY & BACON, L.L.P. Washington, D.C., Sean P. Wajert, SHOOK, HARDY & BACON, L.L.P., Philadelphia, Pennsylvania, Anne Marie Sferra, Christopher P. Gordon, BRICKER &

ECKLER LLP, Columbus, Ohio, Jeffrey R. White, AMERICAN ASSOCIATION FOR JUSTICE, Washington, D.C., Alison Borochoff-Porte, POLLOCK COHEN LLP, New York, New York, Gary A. Davis, DAVIS & WHITLOCK, P.C., Asheville, North Carolina, for Amici Curiae.

STRANCH, J., delivered the opinion of the court in which DONALD, J., joined in full, and BATCHELDER, J., joined in part. BATCHELDER, J. (pp. 30–46), delivered a separate opinion concurring in part and dissenting in part.

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 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

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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).

[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)

study. For each disease studied, the Science Panel would ultimately issue 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)

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