No. 21-3418

In the 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 AND JULIE ABBOTT,
Plaintiffs-Appellees,

v.

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

On Appeal from the United States District Court
for the Southern District of Ohio, Western Division
Civil Cases Nos. 2:17-CV-00998; 2:13-md-02433

RESPONSE BRIEF OF PLAINTIFFS-APPELLEES

Jon C. Conlin
Counsel of Record
F. Jerome Tapley
Elizabeth E. Chambers
Nina Towle Herring
Mitchell Theodore
Brett Thompson
CORY WATSON, PC
2131 Magnolia Avenue
Birmingham, AL 35205
205-328-2200
C8@corywatson.com

Rachel Bloomekatz
1148 Neil Avenue
Columbus, OH 43201
614-259-7611

Matthew W.H. Wessler
Linnet Davis-Stermitz
GUPTA WESSLER PLLC
2001 K Street, NW, Suite 850 North
Washington DC 20006
(202) 888-1741

Counsel for Plaintiffs-Appellees Travis Abbott and Julie Abbott

September 10, 2021

DISCLOSURE OF CORPORATE AFFILIATIONS AND FINANCIAL INTEREST

Under 6th Cir. Rule 26.1, Plaintiffs-Appellees make the following disclosures:

1. Are any parties a subsidiary or affiliate of a publicly owned corporation?

   NO.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome?

   NO.

Dated: September 10, 2021

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STATEMENT IN SUPPORT OF ORAL ARGUMENT

This Court is no doubt familiar with this multi-district litigation (*In re: E.I. du Pont de Nemours and Company C-8 Personal Injury Litigation*) through the previous appeal DuPont brought, briefed, argued, and then withdrew before the Court had an opportunity to issue its decision. *See* Case No. 16-3310 (argued Dec. 9, 2016). A second oral argument would nevertheless aid the Court in understanding this complex case, the overlap between this and the previous appeal, and how the district court's estoppel orders foreclose arguments DuPont seeks to reprise here.

Oral argument would additionally be helpful to contextualize DuPont's view of issue preclusion. Though DuPont insists there can never be nonmutual offensive collateral estoppel in "mass tort litigation" as if it's established law, quite the opposite is true. Based on no more than a single errant footnote, DuPont asks this Court to adopt a rule preventing estoppel in an entire genre of cases—even when no other court has ever adopted such a rule and doing so would contravene fifty-year-old Supreme Court precedent. And oral argument can elucidate the extent of damage to collateral estoppel doctrine and to the ability of district courts to manage multi-district litigation that DuPont's novel proposal invites.

INTRODUCTION

The families in Ohio and West Virginia whose lives were upended by DuPont's decades-long contamination of their water supplies have been enmeshed in one of the region's most resource-intensive legal proceedings for more than twenty years. Five years of state-court litigation gave rise to a class-action settlement, then a seven-year epidemiological study, and after that, at DuPont's request, a federal-court MDL consolidating more than 3,600 cases before a single district-court judge in Ohio. This MDL—which is now over eight years old—has generated more than 5,250 filings, required years of additional court staffing, and produced five month-long jury trials. There has even already been a full-blown merits appeal to this Court—where DuPont sought to test the key rulings underlying all the MDL's cases (including this one)—that DuPont abruptly dismissed after oral argument.

The MDL is now complete—save for this single appeal. DuPont has either tried to verdict or settled every case against it, in the process acknowledging that the cases all "involve[d] the same core factual allegations regarding Dupont's conduct" and raised "similar legal theories of liability." In those cases that reached a verdict before this one, three separate juries heard "largely the same evidence," were given identical jury instructions, and uniformly decided against DuPont—ultimately concluding that the company breached duties it owed "to the entire communities surrounding its Washington Works plant and not just to specific customers of

individual water districts." As a result, when DuPont attempted to relitigate these same issues yet again in this final trial, the district court held DuPont was collaterally estopped from doing so.

DuPont now challenges the district court's application of collateral estoppel here. But collateral estoppel was tailor-made for a case like this one—in which the precise issues were exhaustively and conclusively litigated to judgment—so DuPont resorts to a broadside attack on the doctrine itself. This Court should, in DuPont's view, ban altogether the use of collateral estoppel "in mass tort litigation." That sweeping position, however, is unprecedented. Beyond a stray line of thirty-year-old dictum, no court has ever endorsed, let alone adopted, such a view. It also contravenes Supreme Court precedent, which instructs that it's "unsound" to erect artificial barriers to estoppel. And it is entirely unwarranted. The factors courts *already* examine before applying collateral estoppel are carefully designed to safeguard the rights of the party against whom estoppel would apply. And the district court carefully considered all of them before precluding DuPont from relitigating the same issues it previously litigated multiple times over.

It is time for this case to come to an end. This Court should reject DuPont's last-ditch invitation to rewrite fifty years of settled law governing collateral estoppel in a bid for a do-over in this final case.

STATEMENT OF THE ISSUES

1. Whether the district court properly exercised its broad discretion in estopping DuPont from relitigating the issues of duty, breach, and foreseeability when these identical issues were resolved unanimously in three prior trials where DuPont had a full and fair opportunity to litigate.

2. Whether DuPont is foreclosed from making the same evidentiary challenges it made in the withdrawn *Bartlett* appeal because it did not challenge the district court's order estopping it from relitigating the interpretation and "evidentiary applications" of the *Leach* Agreement.

3. Whether the district court properly granted a directed verdict on DuPont's statute-of-limitations defense because there was no evidence that Abbott either knew of his second cancer or received any information from which he should have known either cancer was related to C-8 exposure two years before filing suit.

STATEMENT OF THE CASE

I. Factual background

A. DuPont contaminates the drinking water in the Ohio River Valley with carcinogen C-8.

C-8 is a carcinogen that accumulates—and persists—in both the environment and the human body. DMO12, R.MDL4306, PageID89514-15.[1] Beginning in 1951, DuPont used C-8 to manufacture Teflon© products at its Washington Works Plant on the bank of the Ohio River, and, for over fifty years, it discharged vast quantities of C-8 into landfills, the air, and the river.

[1] For ease of reference, we denote as "R.MDL" all references to the record of the MDL, No. 2:13-md-2433, and as "R." all references to the record of Abbott's case, No. 2:17-cv-998.

DuPont learned of C-8's dangerous chemical properties and toxicity early on. By the 1960s, DuPont knew C-8 was toxic to animals and could contaminate groundwater, DMO11, R.MDL4235, PageID81772, and it internally classified C-8 as an animal and possible human carcinogen in 1988, Expert Rpt., R.MDL3441-1, PageID59365. DuPont also learned that C-8 remains in human blood for years, recirculating and "re-dosing" the internal organs with each additional exposure, no matter how small. *Id.,* PageID59357, 59362.

Meanwhile, DuPont knew it was contaminating the local drinking water with C-8. DMO11, R.MDL4235, PageID81773. In 1986, DuPont's C-8 supplier warned DuPont to dispose of C-8 only through incineration or secure disposal. Tr., R.191, PageID8143-44. DuPont ignored these warnings and also chose not to adopt a C-8 substitute—even though one was by then available. DMO12, R.MDL4306, PageID89514.

Instead, as DuPont's knowledge of C-8's dangerous properties and toxicity increased, so did its emissions. DMO11, R.MDL4235, PageID81770-73. Between 1984 and 2000, DuPont *tripled* its C-8 discharge from the plant, which then fed into the Ohio River and surrounding communities. DMO12, R.MDL4306, PageID89514. DuPont even tried covering its tracks, withholding toxicity and exposure information from regulators—conduct for which it ultimately paid a $16.25 million penalty. DMO11, R.MDL4235, PageID81776.

Only after lawsuits commenced in the late 1990s did DuPont begin reducing its C-8 emissions. Tr., R.190, PageID8030. But even then DuPont didn't completely eliminate C-8 discharge for years. Tr., R.203, PageID10378.

All told, DuPont's decades-long discharge of C-8 contaminated the aquifers of six water districts and affected approximately 80,000 people. It was an environmental disaster.

B. Abbott suffers testicular cancer twice, disfiguring him in high school and later denying him the ability to father children.

Travis Abbott is one of those people. Growing up in and around Pomeroy, Ohio, he was exposed to contaminated water at home and school for over twenty years—starting at age six. Expert Rpt., R.33-2, PageID341-45.

The first exposure effects appeared in 1994, when, at just 16, he noticed swelling in his left testicle. Tr., R.196, PageID9035. Doctors conducted an orchiectomy (a surgical removal of the testicle) and ascertained that the mass was cancerous. *Id.*, PageID9049-51. Concerned it metastasized, they cut Abbott from sternum to pelvis and removed his abdominal lymph nodes. *Id.*, PageID9054-55. After Abbott made it through the next ten years cancer-free, he learned from his doctors—who knew nothing about DuPont's water contamination—that he was no longer at any greater risk of cancer than anyone else. Tr., R.197, PageID9086-87.

Abbott went to college, got his master's, and became a teacher, and later a principal, near his hometown. He also met and married his wife Julie, and the two planned on having children and raising a family together. *Id.*, PageID9106-11. But in October 2015, Abbott felt a pain in his remaining testicle. *Id.*, PageID9119-20. His doctors again observed a mass, but the only way they could provide a definitive diagnosis was to remove the testicle and review the pathology, which they did on November 16, 2015. Tr., R.219, PageID11762-63; Tr., R.220, PageID11824-25. They then learned that this mass was a second testicular cancer. Tr., R.197, PageID9128; R.220, PageID11798. A year later, doctors discovered the cancer had metastasized into Abbott's lymph nodes, again requiring invasive surgical removal. *Id.*, PageID9128-35. Since then, Abbott has required multiple hospitalizations and is at an increased risk of other cancers. Without testicles, he will also need weekly testosterone injections for the rest of his life and be unable to father biological children. *Id.*, PageID9129-32, 9174, 9185.

II. Procedural history

A. The *Leach* Litigation and Settlement Agreement

In 2001, impacted families filed a class action against DuPont alleging that it had contaminated their water supplies. DMO34, R.MDL5285, PageID128532. That action resulted in a certified class of approximately 80,000 Ohio and West Virginia residents who were served by six contaminated water districts. *Id.* In 2005, the parties

reached a class-wide settlement—the "*Leach* Agreement"—that not only required DuPont to filter the affected water, but also "fashioned a unique procedure" for resolving class members' individual claims that C-8 contamination had caused personal injury or death. *Id.*, PageID128535.

DuPont did not, and still does not, dispute that it discharged C-8 into the water around the plant or that C-8 could be capable of causing harm to humans at some level of exposure. *Id.*, PageID128534. But, prior to the settlement, it contended that the *Leach* class members' exposure was insufficient to cause harm. Rather than litigate that dispute, the parties agreed to convene a jointly-selected independent panel of epidemiologists (the Science Panel) to determine whether a defined dose-level of C-8 was capable of causing disease among the *Leach* class members. That dose-level was set by the agreed-to class definition: 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, R.MDL820-8, PageID11807.

Per the Agreement, the Science Panel focused on C-8's capacity to cause adverse health effects to *Leach* class members at the C-8 dose-levels actually present in that class. It did not, as epidemiologists often do, study C-8 in the abstract, or examine whether C-8 could cause harm at yet-undetermined levels in the general population. DMO12, R.MDL4306, PageID89501-02. Instead, it conducted an

epidemiological study of the *Leach* class itself, collecting blood samples and medical records from over 69,000 class members (the C-8 Health Project). *Id.* As DuPont itself explained, the Panel then determined whether the class-wide level of C-8 exposure (.05 ppb over a year) was linked to any human diseases that were prevalent in the class (the "Linked Disease[s]"). *See* Mem., R.MDL820-25, PageID12001-02 (The "Science Panel will . . . make a determination of whether it is more likely than not that [C-8] exposure at the levels experienced by residents of communities in West Virginia and Ohio is capable of causing serious latent disease."); Tr., R.MDL820-27, PageID12012-13 (The Panel will resolve "the heart of the question of whether C-8 is related to or causes any human disease in this community with the C-8 at the levels that it is in the water.").

The Science Panel's binding conclusion as to which diseases had a "Probable Link" to C-8 for the class was the linchpin of the Agreement. S.A. § 12.2, R.MDL820-8, PageID11823. A "Probable Link," the Agreement explained, meant "that based upon the weight of the available scientific evidence, it is more likely than not that there is a link between exposure to C-8 and a particular Human Disease among Class Members." *Id.*, S.A. § 1.49. By these terms, a "Probable Link" finding did not vary among class members based on their relative C-8 blood doses. Instead, it was a *class-wide* finding that the class members' exposure (.05 ppb over a year) was "more likely than not" linked with the particular human disease among those class members. *Id.*;

see also DMO1, R.MDL1679, PageID22982. As the district court explained, the *Leach* Agreement "unequivocally" applies the Probable Link Finding to any class member with a Linked Disease. *Id.*

The Agreement was a gamble for both sides. Class members could not file suit until the Science Panel completed its findings. If the Panel determined no "Probable Link" existed for a disease, then class members with that disease were "forever barred" from suit. *Id.*, PageID22977-78. Conversely, if the Panel determined a disease *did* have a "Probable Link," class members with that disease could sue, and DuPont could not challenge whether "it is probable that exposure to C-8 is capable of causing" the Linked Disease for any individual class member—what the parties called "general causation." S.A. § 3.3, R.MDL820-8, PageID11810-11. DuPont could, however, challenge "specific causation"—whether that individual's disease was caused by C-8 exposure or an alternative reason. *Id.*

For seven-plus years, at a cost of $24 million, the Science Panel conducted one of the largest domestic epidemiological studies ever undertaken. DMO34, R.MDL5285, PageID128535. In 2012, it issued No Probable Link Findings for approximately 50 human diseases, forever extinguishing countless potential claims. Conversely, it issued Probable Link Findings for six Linked Diseases, including kidney and testicular cancers. *Id.*

B. The Multi-District Litigation

1. DuPont requests thousands of cases be consolidated in multidistrict litigation because most of the evidence and issues will be the same.

Class members with Linked Diseases then began filing suit. DuPont pushed for an MDL, arguing that the suits all "ar[o]se in the wake of" the *Leach* Agreement, "involve[d] the same core factual allegations regarding DuPont's conduct," and asserted "similar legal theories of liability." Mem., R.JPML1-1, at 3-4. DuPont's motion was granted and the cases were consolidated in the Southern District of Ohio. JPML Order, R.MDL1, PageID1-2.

Outside of this appeal, the MDL is complete. *See* DuPont Opp., R.MDL5390, PageID132278 (noting *Abbott* is now "the only pending case in the MDL"). It included over 3,600 cases, two years of supplementary court staffing, over 5,250 filings, five month-long jury trials (four going to verdicts), a year of appellate litigation, and three aggregate settlements which resolved every known filed or unfiled case (except *Abbott*) for a grand settlement total in excess of $750,000,000. DMO34, R.MDL5285, PageID128532; Mot., R.MDL5387, PageID132178-81.

2. Multiple juries unanimously find DuPont liable.

At the outset, the parties selected six cases to serve as bellwether trials. Each side chose three, with *Bartlett*—DuPont's selection—going first. DMO34, R.MDL5285, PageID128541-42. The first two bellwether trials—*Bartlett* (kidney cancer) and *Freeman* (testicular cancer)—reached plaintiffs' verdicts. *Id.*,

PageID128544-45. The remaining bellwethers were resolved or withdrawn. *Id.* After a five-week trial in the first post-bellwether, *Vigneron* (testicular cancer), the jury also delivered a plaintiff's verdict. *Id.*, PageID128545.

As DuPont anticipated, the evidence, experts, and legal theories substantially overlapped across trials. The parties "adduce[d] largely the same evidence" in each trial regarding DuPont's negligence, *Id.*, PageID128562, and the testimony presented "made clear that the duty DuPont breached was to the entire communities" and "not just to specific customers of individual water districts," *Id.*, PageID128574.

The jury instructions for duty, breach, foreseeability, and causation were also identical. They did not focus on the particulars of any individual case, but generally on whether DuPont should have "foreseen that injury was likely to result to someone in [the plaintiff's] position," and that its conduct "would likely cause injuries." *Id.*, PageID128543-45.

Each time the jury came to the same conclusion: DuPont was liable.

3. DuPont appeals the district court's interpretation of the *Leach* Agreement and exclusion of experts, but dismisses its appeal after oral argument.

After losing *Bartlett*, DuPont appealed. It had argued that, to mount a specific causation defense, it should be allowed to submit testimony demonstrating a class member's specific level of C-8 exposure was incapable of causing their cancer. The district court repeatedly rejected this argument. *See, e.g.*, DMO1, R.MDL1679,

PageID22982-85; DMO1-A, R.MDL3972, PageID68165-75; DMO34, R.MDL5285, PageID128539-41. Adhering to the *Leach* Agreement's "unambiguous" text, it held that "the dosage level that can cause these diseases is a general causation issue," within the meaning of the agreement, "which DuPont clearly agreed to not contest." DMO1, R.MDL1679, PageID22981-82.

This understanding also formed the basis of several evidentiary rulings—principally, the exclusion of expert testimony contesting whether a class member's C-8 exposure was capable of causing their Linked Disease. EMO1, R.MDL4079, PageID71861 (explaining "DuPont ha[d] contractually agreed that its experts must rule in C-8 as a possible cause of [the Linked Disease]").

On appeal, DuPont claimed this interpretation of the 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." DMO34, R.MDL5285, PageID128547. And because that issue was central to the entire litigation, the parties and court waited for the appeal's outcome to put the dispute "to rest." *Id.*, PageID128570.[2]

The parties fully briefed the *Bartlett* appeal and completed oral argument. *Id.*, PageID128532 (citing Oral Arg., No. 16-3310 (Dec. 9, 2016) (Stranch, Donald,

[2] DuPont also appealed the district court's ruling on the applicability of the Ohio Tort Reform Act. DMO34, R.MDL5285, PageID128548.

Batchelder, JJ.)). But "before the Sixth Circuit had the opportunity to issue its decision," DuPont settled all the pending cases and asked the Court to dismiss its appeal. *Id.*, PageID128548. "As anticipated by DuPont," though, that settlement did not "end" the C-8 litigation; more *Leach* class members filed suit as they became sick or discovered the connection between their diseases and DuPont's C-8 contamination. *Id.*, PageID128549 (citing filings acknowledging ongoing liability).

C. The district court collaterally estops DuPont from relitigating the issues it withdrew its appeal of and uniformly lost in the previous trials.

After DuPont withdrew its appeal, and additional post-settlement cancer cases were filed, the district court jointly scheduled the next trial for the Abbotts and another couple, the Swartzes. DuPont immediately renewed its attacks on the district court's interpretation of the *Leach* Agreement and its attendant evidentiary rulings. *Id.*, PageID128553. The court rejected these arguments.

Instead, it granted summary judgment for the plaintiffs based on collateral estoppel. DMO34, R.MDL5285, PageID128582. In a 52-page opinion retracing the history of this litigation and the recurring arguments, evidence, and rulings, the court held that DuPont was precluded from relitigating (1) the interpretation of the *Leach* Agreement and its "evidentiary applications"; (2) application of the Ohio Tort Reform Act; (3) and the elements of duty, breach, and foreseeability. *Id.*

Carefully applying the Supreme Court's canonical decision embracing nonmutual offensive collateral estoppel—*Parklane Hosiery v. Shore*, 439 U.S. 322 (1979)—and Ohio's substantially similar preclusion rules, the district court explained that legally indistinguishable issues had already been decided in each of the prior trials. DMO34, R.MDL5285, PageID128564. To be sure, the court noted, some things would differ across cases—such as age, sex, or medical history. But those differences were "relevant to specific causation" which would remain a "live controversy" in each "upcoming trial[]." *Id.*, PageID128553, 128575.

The court also concluded that estoppel would serve the core principles of judicial integrity and economy. It observed the potential for DuPont's panel shopping—as the company "repeatedly" affirmed its intention to relitigate "the exact same issues before another panel of the Sixth Circuit." *Id.*, PageID128559. And, the district court, which had "presided over four trials" and knew "the evidence that was presented," recognized that "[a]pplication of issue preclusion would certainly conserve" judicial resources "by providing substantial trial and pretrial efficiencies." *Id.*, PageID128562, 128578.[3]

[3] Before trial, DuPont petitioned this Court for a writ of mandamus, which this Court denied. Order, No. 19-4226 R.23-1, at 5.

D. The jury finds DuPont liable as to Abbott.

The joint trial commenced in January 2020, lasted over a month, and concluded with a jury verdict for the Abbotts, but not for the Swartzes.

As set forth in the *Leach* Agreement, DuPont was allowed to—and did—present a significant defense that each cancer was not actually caused by C-8 exposure, but by other factors. DuPont elicited testimony about the C-8 dose present in each plaintiff's blood at different times, and explained the half-life of C-8 to suggest it was gone before their cancer diagnoses. Tr., R.190, PageID8069-70; Tr., R.198, PageID9452. DuPont also presented hours of evidence, including expert testimony, detailing potential alternative causes. For Swartz, who suffered from kidney cancer, it presented extensive evidence that her cancer was instead caused by obesity and long-time hypertension—both known risk factors. Tr., R.198, PageID9370-426. For Abbott, it presented testimony that testicular cancer is most often idiopathic or linked to a genetic disorder called "GCNIS." Tr., R.195, PageID8830-35, 8859-60; Tr., R.201, PageID9924-41.

The jury delivered verdicts for Abbott, awarding him $40 million in damages.[4] For Swartz, the jury failed to agree on her kidney cancer's cause, resulting in a mistrial. Judgment, R.Swartz234, PageID12233.

[4] The jury also awarded Julie Abbott $10 million on her loss of consortium claim, which the district court reduced to $250,000 to comport with the OTRA. Order, R.251, PageID12391.

SUMMARY OF THE ARGUMENT

I. DuPont primarily challenges the district court's decision to apply collateral estoppel in this case. But the "offensive" and "nonmutual" form of collateral estoppel—under which a defendant is foreclosed from relitigating issues it previously litigated against a different plaintiff—was made for a case like this one. *See United States v. Mendoza*, 464 U.S. 154, 158 (1984). This MDL was organized based on DuPont's insistence that these cases involved the same core factual allegations and theories of legal liability. The district court then oversaw *three* different month-long trials—the first handpicked by DuPont—through to verdict. At great expense to the judicial system and the parties, those trials exhaustively addressed whether DuPont owed a duty of care to individuals in the *Leach* water districts, whether it breached that duty when it contaminated their drinking water, and whether it should have foreseen resulting injuries. One by one, those three juries resolved each issue against DuPont. So when DuPont sought to litigate them yet again here, the district court properly precluded it from doing so.

Nevertheless, DuPont insists three full bites at the apple isn't enough. It asks this Court to create a special rule barring collateral estoppel in all mass torts cases. That unprecedented argument is foreclosed by Supreme Court precedent. *See Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979). It is also unwarranted because the factors a court must consider before applying the doctrine already safeguard a

defendant from the concerns DuPont identifies. Try as it might, DuPont can't avoid the fact that this is a paradigmatic collateral estoppel case and the district court acted within its "broad discretion" applying estoppel here. *See id.* at 327.

II. Repeating the same arguments it raised—and then withdrew—in the *Bartlett* appeal, DuPont also quarrels with the district court's decision to exclude evidence. *Compare* DuPont *Bartlett* Br., No. 16-3310, at 27-37, *with* DuPont Br. at 33-45. Insisting the district court's interpretation of the *Leach* Agreement was "erroneous" (at 34), DuPont likewise disagrees with the court's attendant evidentiary rulings. But this argument is forfeited. DuPont chose not to appeal the district court's collateral estoppel decision on this issue. *See* DMO34, R.MDL5285, PageID128579. So the court's rulings on the interpretation of the *Leach* Agreement and its "evidentiary applications" remain binding. On that basis alone, the evidentiary challenges should be rejected.

Forfeiture aside, these arguments still fail. DuPont sought to introduce evidence purportedly showing that a class member's C-8 blood level was not capable of causing cancer. But the *Leach* Agreement placed that determination exclusively with the Science Panel, which found "it is more likely than not that there is a link" between class-defined C-8 exposure and testicular cancer. The district court therefore properly excluded DuPont's attempt to contradict this finding. Moreover, DuPont was able to present evidence of alternative possible causes of the plaintiffs'

cancers—and it succeeded in persuading the jury as to Swartz. DuPont's only quarrel here, therefore, is with the jury. That is not valid ground for appeal.

III. Finally, DuPont raises a statute-of-limitations argument. It claims there was enough evidence to reach a jury on whether Abbott had "inquiry notice" that his cancers were caused by C-8 exposure within the two-year limitations period. But "inquiry notice" is not the proper standard under Ohio law. Instead, the limitations period is triggered when the plaintiff "actually encountered" some information to alert him of the potential link between C-8 and his cancers. DMO36, R.MDL5304, PageID128913 (citing Ohio cases). Abbott was not even diagnosed with his second cancer until he was within the limitations period, and it was uncontroverted that Abbott acquired no information from which he knew, or should have known, C-8 caused either cancer until weeks before he filed this lawsuit. DuPont offered only unsupported speculation in response, but that is insufficient to defeat a directed verdict.

ARGUMENT

I. The district court properly estopped DuPont from relitigating issues that were decided in class members' previous trials.

District courts have "broad discretion" in deciding when to apply offensive nonmutual collateral estoppel, *see Parklane*, 439 U.S. at 327, and whether they erred in doing so is reviewed de novo, *Abbott v. Michigan*, 474 F.3d 324, 331 (6th Cir. 2007). The district court's decision to apply estoppel here was correct.

A. Both federal common law and Ohio law recognize nonmutual offensive collateral estoppel.

Courts once insisted that collateral estoppel could be invoked only when there was "mutuality" between the parties—*i.e.*, when both the earlier and the later suits involved the same parties. *See Mendoza*, 464 U.S. at 158. And they once recognized only the "defensive" variety—*i.e.*, when defendants invoked the doctrine against plaintiffs. *Id.* at 158, 159 n.4. But for nearly half a century, federal common law has rejected these artificial barriers as "unsound." *Blonder-Tongue Labs., Inc. v. Univ. of Ill. Found.*, 402 U.S. 313, 327 (1971); *see also Parklane*, 439 U.S. at 331. Instead, the law now recognizes that "the measure of the fairness" of collateral estoppel is simply "the achievement of substantial justice," which may be served just as well by "nonmutual" and "offensive" applications. *Blonder-Tongue*, 402 U.S. at 325; *Parklane*, 439 U.S. at 331. Because Ohio courts have a similar understanding, *see Goodson v. McDonough Power Equipment, Inc.*, 443 N.E.2d 978, 984-85 (Ohio 1983), what law applies here makes no difference. Either way, the district court properly precluded DuPont from relitigating the same issues yet again.[5]

[5] When previously faced with determining the issue-preclusive effect of a federal diversity judgment, this Court held "that the scope and effect of a district court judgment in a diversity action is to be determined by federal, not state, law." *J.Z.G. Res. v. Shelby Ins. Co.*, 84 F.3d 211, 213-14 (6th Cir. 1996); *see also, e.g.*, *GE Med. Sys. Eur. v. Prometheus Health*, 394 F. App'x 280, 283 n.2 (6th Cir. 2010). *Semtek International, Inc. v. Lockheed Martin Corp.*, is not to the contrary, as it decided the unrelated issue of the claim-preclusive effect of a Rule 41(b) dismissal. 531 U.S. 497, 504 (2001); *see Matosantos Com. Corp. v. Applebee's Int'l. Inc.*, 245 F.3d 1203, 1207-08 (10th Cir. 2001). But

1. Federal law recognizes that nonmutual offensive collateral estoppel may serve substantial justice.

Nonmutual offensive collateral estoppel is "firmly fixed in the firmament of federal jurisprudence." *Jack Faucett Assocs., Inc. v. AT&T*, 744 F.2d 118, 125 (D.C. Cir. 1984). Under federal common law, a prior decision has preclusive effect under the following conditions: (1) The "precise issue" raised in the later case was "raised and actually litigated in the prior proceeding"; (2) the "determination" of that issue was "necessary to the outcome of the prior proceeding"; (3) the prior proceeding "resulted in a final judgment on the merits"; and (4) "the party against whom estoppel is sought" 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).

Additionally, the Supreme Court has prescribed four factors to safeguard the rights of the party against whom offensive nonmutual estoppel is sought. *See Parklane*, 439 U.S. at 330-33. *First*, to "avoid reward[ing]" a plaintiff who could have joined the previous action, it's generally unavailable to plaintiffs who adopt a wait-and-see "attitude, in the hope that the first action" resolves favorably. *Id.* at 330. *Second*, it's generally unavailable where a defendant had little incentive to defend an initial case vigorously, such as where the first case involved small damages or future suits were unforeseeable. *Id. Third*, it may be "unfair" if "the judgment relied upon as a basis"

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this Court need not decide this choice-of-law question because, as the district court recognized, it makes no difference what law applies here.

for "estoppel is itself inconsistent with one or more previous judgments in favor of the defendant." *Id. Fourth*, estoppel may be inappropriate if the second action afforded the defendant procedural opportunities unavailable in the first. *Id.*

The Supreme Court has repeatedly rejected requests to condition estoppel on mutuality. Doing so, it has explained, would trigger a perverse effect: A party who had litigated and lost an issue could "relitigate" "identical issues" ad infinitum so long as it did so against a new party—placing the losing party in the same "position" as one who'd litigated an issue for the very first time. *Parklane*, 439 U.S. at 327 (citing *Blonder-Tongue*, 402 U.S. at 329). But the proper use of collateral estoppel is enforced instead with a "most significant safeguard"—ensuring that "the party against whom [it] is asserted had a full and fair opportunity to litigate" the issue previously. *Id.*

The same is true of defensiveness. In *Parklane*, the Supreme Court explained that permitting defendants to relitigate the same issue against a continuing supply of *plaintiffs* can pose just the same problems, crowding dockets with *defendants'* attempts to hunt down a more sympathetic audience for an already settled point. *See* 439 U.S. at 328-30. It concluded that any concerns about the fairness of offensive uses of collateral estoppel were adequately addressed by the safeguards discussed above. *See id.* at 331. The Court's holding was clear: It would not "preclude the use of offensive collateral estoppel" but instead rely on the "broad discretion" of trial courts to

determine when the circumstances of a particular case, including considerations of fairness, warrant its application. *Id.* at 327.

2. Ohio law permits nonmutual offensive collateral estoppel where justice reasonably requires it.

Ohio has adopted the same basic understanding. Under Ohio law, collateral estoppel applies to a fact or issue that was (1) "actually and directly litigated in the prior action" and (2) "passed upon and determined by a court of competent jurisdiction," when (3) "the party against whom collateral estoppel is asserted was a party in privity with a party to the prior action." *Thompson v. Wing*, 637 N.E.2d 917, 923 (Ohio 1994); *see also State ex rel. Davis v. Pub. Emps. Ret. Bd.*, 881 N.E.2d 294, 301 (Ohio Ct. App. 2007); *Daubenmire v. City of Columbus*, 507 F.3d 383, 389 (6th Cir. 2007); *In re Fordu*, 201 F.3d 693, 704 (6th Cir. 1999).

Like its federal counterpart, this standard includes nonmutual and offensive uses. The Ohio Supreme Court has sometimes noted that collateral estoppel "generally" applies only when both parties were "parties to the original judgment or in privity with those parties." *Goodson*, 443 N.E.2d at 984. But it has explicitly recognized that this general understanding should be "relax[ed]" "where justice would reasonably require it." *Id.* And that includes cases where the "party defendant" in a later proceeding "clearly had his day in court on the specific issue" that was first decided in the earlier proceeding. *Id.* When that's so, a non-party—including a "non-party-plaintiff"—can "rely upon the doctrine of collateral estoppel

to preclude the relitigation of that specific issue." *Id.*; *see also Hicks v. De La Cruz*, 369 N.E.2d 776, 777-78 (Ohio 1977) (applying offensive nonmutual collateral estoppel where defendant was "accorded a full and fair day in court" in prior proceeding).[6] That is the same as *Parklane*.[7]

B. The district court correctly applied these principles here.

The district court acted well within its "broad discretion" when it concluded that nonmutual offensive collateral estoppel "should be applied" to the issues of duty, breach, and foreseeability. *Parklane*, 439 U.S. at 327-28.

1. Identity of issues.

The district court properly determined that the same questions of duty, breach, and foreseeability presented here were "raised and actually litigated" to a final conclusion—not just once, but in three prior proceedings. *Nat'l Satellite*, 253 F.3d at 908.

These three issues are both factually and legally identical for the *Leach* class members because they relate to DuPont's conduct and not the individual

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[6] DuPont asserts (at 21 n.5), without explanation, that *Goodson* "limit[ed *Hicks*] to its facts." That's wrong. *Goodson* explained that *Hicks* constituted an *example* of circumstances where justice reasonably requires offensive nonmutual collateral estoppel. 443 N.E.2d at 985.

[7] Even if DuPont were right (at 21 & n.5) that Ohio law somehow requires mutuality in offensive collateral estoppel cases, the plaintiffs themselves are in "privity" with those in the prior cases because they share a contractual relationship with DuPont—the *Leach* Agreement—and a mutuality of interest and identity of desired result with the earlier plaintiffs. *See* DMO34, R.MDL5285, PageID128566-67.

circumstances of each plaintiff. DuPont itself relied on that commonality to request this MDL, explaining to the JPML that each plaintiff's complaint "involve[s] the same core factual allegations regarding DuPont's conduct, and also raise[s] the same theories of legal liability." *See* Mem., R.JPML1-1 at 6. And multiple trials bore that out. The district court, which "presided over four trials, [and] knows the evidence that was presented," observed that the "facts relating to DuPont's negligence were virtually identical." DMO34, R.MDL5285, PageID128562, 128574. The evidence for duty, breach, and foreseeability focused on DuPont's conduct toward the *Leach* class as a whole, without regard to individual plaintiffs' idiosyncratic circumstances. *See, e.g.*, CMO20, R.MDL4624, PageID100970 (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.").

After hearing the same evidence, the court gave each jury the exact same instructions on duty, breach, and foreseeability. Likewise, these instructions weren't plaintiff-specific—they focused on DuPont's conduct and reasonableness. As to duty, each jury considered "whether under the circumstances a reasonably prudent corporation would have anticipated that an act or failure to act would likely cause injuries." DMO34, R.MDL5285, PageID128543. As to breach, each answered whether DuPont exercised "ordinary care"—that is, "the care that a reasonably careful corporation would use under the same or similar circumstances." *Id.* So too

with foreseeability: Each jury determined whether "DuPont should have foreseen or reasonably anticipated that injury would result from the alleged negligent act," *id.*, and the instructions emphasized the test "is not whether DuPont would have foreseen the injury exactly as it happened" to the particular plaintiff before them, *id.*, PageID128544. Instead, foreseeability asks "whether under the circumstances a reasonably prudent person would have anticipated that an act or failure to act would likely result in or cause injuries." *Id.*

Where plaintiff-specific evidence was introduced, it went to the distinct question of specific causation—on which the district court carefully avoided making any estoppel finding. *Id.*, PageID128575.

2. Necessary to the outcome of the prior proceeding.

The determination of each of these issues was also "necessary to the outcome" of all three prior proceedings. *Nat'l Satellite*, 253 F.3d at 908. Each jury reached a plaintiff's verdict on the negligence claim; and duty, breach, and foreseeability are all required findings. *See Menifee v. Ohio Welding Prods., Inc.*, 472 N.E.2d 707, 710 (Ohio 2015); *see also Strahin v. Cleavenger*, 603 S.E.2d 197, 205-07 (W.Va. 2004) (equivalent West Virginia law on negligence).

3. Final judgment on the merits.

All three verdicts forming the basis for the district court's estoppel decision resulted in "final judgment[s] on the merits." *Nat'l Satellite*, 253 F.3d at 908. In each,

the jury's negligence determination was reduced to a final judgment subject to appeal. Though DuPont initially appealed the *Bartlett* verdict, it ultimately dismissed that appeal, and therefore remained bound by the district court's judgment. *See Coal. for Gov't Procurement v. Fed. Prison Indus., Inc.*, 365 F.3d 435, 484 (6th Cir. 2004).

4. Full and fair opportunity to litigate.

Finally, DuPont had a "full and fair opportunity" to litigate the issues of duty, breach, and foreseeability, *Nat'l Satellite*, 253 F.3d at 908—three times over. It exercised that opportunity vigorously, spending approximately $6 million in fees on each month-long trial. DMO34, R.MDL5285, PageID128578. Unsurprisingly, DuPont has never disputed this element.

5. Additional *Parklane* safeguards.

Parklane's additional safeguards all reinforce the conclusion that DuPont was properly precluded from relitigating duty, breach, and foreseeability.

Joinder/Intervention. To start, there was no risk of strategic delay here because the plaintiffs had no mechanism to wait and see how earlier cases turned out—even "had [they] so desired." *Parklane*, 439 U.S. at 332 (this concern absent where plaintiffs could not have joined an action sooner). Ordinarily, plaintiffs have a measure of control over when and how they appear, while a defendant "typically will not have chosen the forum in the first action." *See id.* at 331 & n.15. But an MDL scrambles that setup. By requesting one here, DuPont secured as much or more

influence over the forum than the plaintiffs—it even chose the first trial plaintiff. Remaining plaintiffs then had little choice but to await their trials' scheduling.

Incentives to defend vigorously. DuPont also faced "every incentive" to defend itself vigorously in each of the earlier trials. *Parklane*, 439 U.S. at 332. The company faced significant damages in each suit, a point underscored after each trial's verdict. More importantly, the MDL structure made future trials not just foreseeable, but a near certainty. Two early cases were selected as bellwethers so their outcomes could inform the resolution of the 3,500 further cases that DuPont then was "aware" waited in the wings. *Id.* at 332 n.18. And DuPont knew the third trial—particularly following earlier plaintiffs' verdicts—could exert powerful influence over the remaining litigation. *See* DMO4, R.MDL3973, PageID68181. DuPont also knew cases would continue being filed after the first global settlement—going as far as to make explicit arrangements to divide that liability with a new company it spun off. *See* DMO34, R.MDL5285, PageID128549. Those future cases, it knew, would receive the same pretrial and trial rulings, and the narrow geographic focus of the MDL meant the same judge was likely to preside over most, if not all, of the trials. *See* Transfer Order, R.MDL5130, PageID120616.

Inconsistent judgments. Nor did the district court allow the plaintiffs to cherry-pick a plaintiff's verdict out of an assortment of inconsistent judgments. Instead, it precluded DuPont from continuing to contest duty, breach, and

foreseeability only after those issues had been decided against DuPont three times in a row. The law does not require even that much—in *Parklane*, the Court gave preclusive effect to a single judgment simply because it was "not inconsistent with any previous decision." 432 U.S. at 332. But the district court nevertheless took care to do so here only after numerous consistent verdicts, thereby ameliorating the concern of according preclusive effect to an "erroneous" early determination. *See Goodson*, 443 N.E.2d at 985.

Lost procedural opportunities. Finally, DuPont lost no procedural opportunities in this case that were unavailable earlier—let alone opportunities "of a kind that might be likely to cause a different result." *Parklane*, 439 U.S. at 330.

C. DuPont's arguments that collateral estoppel is improper here are mistaken.

DuPont offers a hodgepodge of theories for why this careful application of collateral estoppel was wrong. It begins by inviting this Court to craft a special rule barring collateral estoppel in mass tort cases. Failing that, DuPont insists the doctrine doesn't belong in this MDL—either because the district court failed to warn preclusion could apply, or because factual differences militate against preclusion. These arguments fail.

1. There is no rule prohibiting offensive nonmutual collateral estoppel in mass tort cases.

DuPont's main argument is as novel as it is misguided. It proposes (at 19) a special rule to categorically bar offensive nonmutual collateral estoppel "in mass tort litigation." Not only does this argument collapse under basic scrutiny, but it runs headlong into controlling Supreme Court caselaw. As DuPont is quick to point out (at 20), MDLs are governed by "the same legal rules that apply in other cases," *In re National Prescription Opiate Litigation*, 956 F.3d 838, 841 (6th Cir. 2020)—and that includes offensive nonmutual collateral estoppel.

a. Both *Blonder-Tongue* and *Parklane* foreclose DuPont's bid for its special rule. In both, the Supreme Court held that erecting artificial bars as to who may invoke estoppel is fundamentally "unsound." *Blonder-Tongue*, 402 U.S. at 327, *see also Parklane*, 439 U.S. at 331. Instead, courts must examine whether estoppel is warranted under the circumstances of each case—regardless of subject matter or type of proceeding.

DuPont nevertheless argues (at 19) that because preclusion in a mass tort "can only go one way—against defendants"—it should be impermissible once the number of individual cases gets too large. The danger, DuPont says (at 20, 25), is that defendants might face such "extortionate" settlement pressure as to turn any use of collateral estoppel into a violation of due process.

This argument makes no sense. DuPont offers no explanation for why mass tort cases should be treated differently from those other contexts where many

plaintiffs assert the same claim. Nor does it explain why this supposed problem is unique to cases involving many plaintiffs, instead of just one or two. And there is none. *Parklane* itself was a class action, and the Court endorsed the use of offensive nonmutual collateral estoppel to preclude the defendant from litigating certain issues against any of the class members. *See* 439 U.S. at 324, 332-33. Class actions, of course, produce at least as much pressure to settle as DuPont insists exists in mass torts. *See AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 350 (2011) (class actions pose a risk of "in terrorem" settlements). So, if DuPont were right that potential liability to many plaintiffs justifies forbidding collateral estoppel, the Supreme Court presumably would have done so in *Parklane*. It did the opposite—explicitly endorsing the doctrine in this context. Settlement pressure has, in short, never been a factor in the collateral estoppel inquiry, let alone one that could foreclose estoppel altogether.

That makes sense. The doctrine *already* protects against the sorts of fairness concerns DuPont insists are special to mass torts. For instance, to guard against the dangers of estoppel that "can only go one way," courts must examine whether plaintiffs have litigated cases in a strategic order or otherwise sought to exploit that asymmetry. Moreover, to prevent plaintiffs with similar cases from hunting for a single favorable ruling to use as a basis for estoppel in subsequent cases, courts must ensure that the favorable ruling is not inconsistent with others coming before it. *See Parklane*, 432 U.S. at 331 n.14. And if, after all this, a court remained concerned with

undue settlement pressure, it should weigh that concern against the risk that endless relitigation of a particular issue could mean some cases simply go untried—allowing a defendant to benefit from the sheer number of people its conduct had harmed. *See* Alexandra Lahav, *Bellwether Trials*, 76 Geo. Wash. L. Rev. 576, 592-93 (2008).

b. The sole authority DuPont—and all its amici—can muster in support of its proposed rule is a single footnote in this Court's decision in *In re Bendectin Products Liability Litigation*, 749 F.2d 300 (6th Cir. 1984), stating that "[i]n *Parklane*" the Supreme Court "explicitly stated that offensive collateral estoppel could not be used in mass tort litigation." *Id.* at 305 n.11. But *Parklane* says nothing of the sort, and no other court has ever read it this way. Just the opposite. Courts in this circuit and elsewhere routinely apply offensive collateral estoppel in mass tort litigation without regard to DuPont's supposed rule. *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) ("The contours of when offensive collateral estoppel would be unfair," in "mass tort litigation as elsewhere," "should be developed on a case-by-case basis."); *Good v. Am. Water Works Co.*, 310 F.R.D. 274, 297 (S.D.W. Va. 2015) (applying nonmutual offensive collateral estoppel in mass tort water contamination litigation); *In re Chinese-Manufactured Drywall Prods. Liab. Litig.*, 2014 WL 4809520, at *12-13 (E.D. La. Sept. 26, 2014) (approving use of offensive nonmutual collateral estoppel in mass-tort MDL).

Nor is there reason to think this Court sought in *Bendectin* to upend this settled understanding. If it had, it would not have hid that "elephant[]" in the "mousehole[]" of a cursory footnote. *Atkins v. Crowell*, 945 F.3d 476, 479 (6th Cir. 2019). Instead, the footnote is dicta, as the district court and other courts have found. *See* DMO34, R.MDL5285, PageID128562-63; *In re Bendectin Cases*, 1986 WL 20466, at *3 (E.D. Mich. May 2, 1986).[8] That's because, although the broad contours of offensive collateral estoppel were discussed in *Bendectin*, the Court had no need to define its outer reach to resolve the unrelated class-certification issue presented.[9]

Undeterred, DuPont and its amici ask this Court to defy Supreme Court precedent in service of a position that no court has ever adopted based entirely on a

[8] Courts relying on *Bendectin* have not given its footnote the broad construction DuPont presses. They interpret *Benedictin* as saying that "offensive collateral estoppel is inappropriate" in *certain* mass-tort litigation—that is, when estoppel would run afoul of the safeguards identified in *Parklane*. *See Hoppe v. G.D. Searle & Co.*, 779 F. Supp. 1425, 1427 (S.D.N.Y. 1997) (prior inconsistent judgments); *Amore v. G.D. Searle & Co.*, 748 F. Supp. 845, 853 (S.D. Fla. 1990) (same).

[9] *Bendectin* concerned a district court's erroneous class-certification decision based partly on the concern that class members could asymmetrically invoke offensive collateral estoppel against the defendant. 749 F.2d at 304-05. This was not a proper basis for class certification, this Court explained, because *Parklane* settled on a different way of "curtail[ing]" the improper uses of offensive nonmutual collateral estoppel—careful application of the criteria it had identified. *Id.* at 305. The point was that mass torts called for careful application of those criteria. That's just how this Court has gone on to apply *Parklane*, emphasizing that "the nub of [its] holding" was "that the decision whether or not to apply collateral estoppel," including offensively, "was left to the *broad discretion* of the district court." *City of Cleveland v. Cleveland Elec. Illuminating Co.*, 734 F.2d 1157, 1165 (6th Cir. 1984).

single line of dictum in one footnote from a 35-year-old case that is, on its face, incorrect. This Court should reject that proposition.

c. As to Ohio law, DuPont's theory makes even less sense. DuPont identifies no case in which Ohio courts have come close to adopting some special rule for estoppel in the mass torts context. To nevertheless impose a novel rule of this Court's choosing would invade the state's "autonomy and independence" to set its own substantive law and raise serious federalism concerns in violation of the basic principles set forth in *Erie Railroad Co. v. Tomkins*, 304 U.S. 64, 78 (1938).

2. The district court was under no obligation to provide DuPont with special "notice" that basic estoppel law would apply or to preselect "representative" cases before applying it.

DuPont next argues (at 22-25) that the mass-tort context introduces two novel "due process safeguards" into offensive nonmutual collateral estoppel doctrine: (1) advance notice that a particular trial could have preclusive effect and (2) advance effort to ensure that any preclusive trial was "representative." It also argues that the lower court promised there would be no preclusion. DuPont is wrong on all counts.

a. There is not, and has never been, a requirement that district courts remind parties they may face the ordinary application of collateral estoppel—in a mass tort case or any other. Nor must courts ensure early cases are "representative" before later giving them estoppel effect. DuPont identifies no case saying otherwise. Instead, its argument misapplies caselaw from a distinct context: Whether, and under what

circumstances, parties to an MDL may agree in advance to be bound by the results of bellwether trials. But what's necessary in that context has no bearing on this one.

A so-called "binding bellwether" is a unique procedure under which parties agree to try a representative subset of overall cases for the explicit purpose of conclusively determining issues for the broader whole. *See* Zachary B. Savage, Note, *Scaling Up: Implementing Issue Preclusion in Mass Tort Litigation Through Bellwether Trials*, 88 N.Y.U. L. Rev. 439, 453-54 (2013). In theory, binding bellwethers can be useful, enabling the parties to approximate the average value of a plaintiff's claim at a fraction of the cost of litigating each case to its conclusion. *See* Lahav, 76 Geo. Wash. L. Rev. at 609-10. But requiring parties to be bound in advance, no matter what happens, can raise serious autonomy and due process concerns—most significantly because they deny non-bellwether plaintiffs "the ability to participate in the bellwethers" yet "force" them to "accept their results." *Id.* at 610. Accordingly, the binding bellwether process requires certain distinct safeguards. Courts must, for instance, ensure the bellwether trials are representative of the whole, typically by obtaining a "randomly selected, statistically significant sample." *In re Chevron U.S.A., Inc.*, 109 F.3d 1016, 1020-21 (5th Cir. 1997) (adding safeguards because the bellwether would resolve liability and damages for nearly 3000 plaintiffs). And parties cannot be caught by surprise: Instead, they must "clearly memorialize" an agreement to be bound by future trials, no matter the result. *Dodge v. Cotter Corp.*, 203 F.3d 1190, 1200

(10th Cir. 2000); *see also* Lahav, 76 Geo. Wash. L. Rev. at 634-37 (describing "model" binding bellwether procedure).

DuPont latches onto the absence of these factors here as proof that the district court made some kind of error. But, as everyone agreed from the beginning, the bellwethers here weren't binding but instead were ordinary trials whose results might inform the conduct of future trials and potentially settlement. *See* CMO6, R.MDL194; CMO7, R.MDL602; *see also, e.g.*, *Silvanch v. Celebrity Cruises, Inc.*, 333 F.3d 355, 359-60 (2d Cir. 2003) (affirming use of informal bellwether for a similar purpose). In that context, no additional "due process" safeguards apply; the Supreme Court has already crafted protections to ensure that estoppel is fair. *See supra* Part I.A.1.

DuPont offers no support for its novel suggestion that binding bellwether procedures must also apply to standard trials. As to notice, DuPont claims (at 23) the Tenth Circuit in *Dodge* has "forbidden collateral estoppel in toxic tort cases without prior knowledge and agreement of the parties." But *Dodge* did no such thing. It considered an application of offensive nonmutual collateral estoppel's ordinary elements and concluded that one was missing—not that *notice* was required and missing. *Dodge*, 203 F.3d at 1199. Though the court noted the parties were not "on notice" that the first jury would decide particular issues as a matter of law for subsequent trials, its point was that any deficiencies in applying collateral estoppel

could not be cured by some prior agreement that the first trial would bind later ones. *See id.* at 1199-2000 ("no indication" that parties agreed to binding bellwethers).[10]

Parklane undermines DuPont's argument too. There, the Supreme Court did not require notice, and the defendant had no more notice of the possibility of estoppel than DuPont did here. Yet that lack of notice did not preclude estoppel; indeed, the Court gave no indication the issue was even worth considering. *See Parklane*, 439 U.S. at 324-37. No doubt, that's because in this context, as throughout common law, parties can't avoid a particular rule just because they weren't reminded of it.

Likewise, DuPont fails to identify any cases holding that collateral estoppel turns on representativeness, citing only the Fifth Circuit's application of the binding bellwether criteria in *Chevron*, 109 F.3d at 1020-21.

b. For the first time on appeal, DuPont further argues (at 23) that its entitlement to notice was frustrated because the district court somehow "assur[ed]" the company "that its decisions would be non-binding in future cases." This argument is forfeited. *McFarland v. Henderson*, 307 F.3d 402, 407 (6th Cir. 2002) ("Issues not presented to the district court but raised for the first time on appeal are not properly before the court.").

[10] DuPont's only other citation was a binding bellwether that gave the parties sufficient notice. *See Adams v. United States*, 2010 WL 4457452 (D. Idaho Oct. 29, 2010).

It also fails on its own terms. The only record evidence DuPont identifies was the court's repeated assurance that the bellwethers conducted in this case would not be binding bellwethers. *See* DMO6, R.MDL4184, PageID80086; DMO20, R.MDL4809, PageID110268; CMO16, R.MDL4382, PageID93365-66.[11] But a statement that there won't be *automatically binding* bellwethers has no bearing on whether the ordinary common-law principles of collateral estoppel may apply.

3. There are no factual differences militating against issue preclusion.

Dupont next insists that certain factual distinctions between Abbott and the previous cases made preclusion improper. But it fails to identify a single outcome-determinative difference. That's unsurprising because, as described above, the duty, breach, and foreseeability jury instructions did not turn on the particulars of any plaintiff's individual circumstances, but instead on the same conduct towards the same class of people. Every *Leach* class member meets the same defined geographic and exposure requirements and all suffered because of DuPont's same acts in poisoning their water from the six *Leach* water districts.

[11] The remarks DuPont points to in a November 2018 status conference are no more help to the company. The court there just assured DuPont it had the "right" to present new arguments on previously decided issues—just as the court had the "right" to reach consistent rulings across the cases. Tr., R.MDL5179, PageID125538-39.

DuPont nevertheless paints Abbott's case as an outlier. It says (at 29-31) Abbott differed from "the earlier *Freeman* and *Vigneron* trials" regarding location, timing, DuPont's knowledge of exposure, level of toxicity, and susceptibility to air emissions. DuPont conveniently omits the *Bartlett* case from this comparison—but this Court should not be misled.

Just like Bartlett, Abbott was exposed to C-8 from living in the Tuppers Plains-Chester Water District, and both their C-8 exposures in excess of .05 ppb occurred during overlapping times. Compare *Bartlett* (exposed from 1983-89 and 1994-2004), Expert Rpt., R.MDL2807-8, PageID42884 with *Abbott* (exposed 1983-98 and 2000-2004), Expert Rpt., R.33-2, PageID343-44. Like in *Bartlett*, DuPont claimed it didn't know its C-8 contaminated Abbott's water until 2001 and that such contamination never exceeded its internal safety guidelines. *See* Tr., R.188, PageID7684; Tr., R.190, PageID8044; Tr., R.Bartlett127-2, PageID3638-39; Tr., R.Bartlett119, PageID2482; Tr., R.Bartlett145, PageID6400. But whether DuPont violated its own metrics was not the question; whether it acted as a "reasonably prudent corporation" was. DMO34, R.MDL5285, PageID128543. Additionally, class members were impacted by DuPont's air emissions even if they were not so close that contaminated rainwater fell directly in their district—because those same emissions still ran to the river and traveled downstream, including to both Bartlett and Abbott. *See* Tr. R.190, PageID7989-90; R.Bartlett127-1, PageID3525-29.

Perhaps the main difference between Bartlett and Abbott's cases was that Abbott's blood levels reflected an even *higher* dose of C-8 than Bartlett's. Compare *Abbott* (C-8 dose of 33.1 ppb) Expert Rpt., R.33-2, PageID345 with *Bartlett* (C-8 dose of 19.5 ppb) Expert Rpt., R.MDL2807-8, PageID42884. But neither that fact, nor the fact that the four plaintiffs suffered from different cancers, matters for duty, breach, and foreseeability. As the district court recognized, all of the differences DuPont raises among the plaintiffs go to the question of specific causation. DMO34, R.MDL5285, PageID128553.

D. DuPont's OTRA arguments are irrelevant.

DuPont next insists (at 32) it should not have been estopped from relitigating the applicability of the OTRA's damages cap. But this argument—even assuming DuPont is correct—has no impact on the outcome of this case. DuPont never argued the OTRA cap applied to Abbott—he undisputedly meets the Act's catastrophic injury exception after losing "a bodily organ system" since both his testicles were removed. Ohio Rev. Code § 2315.18(B)(3)(a); Tr., R.205, PageID10833-35. DuPont did argue the cap applied to his wife's loss of consortium claim—and the court reduced her award to $250,000. DMO43, R.245, PageID12330-32. That's not being appealed. DuPont's argument here is thus irrelevant

II. DuPont's evidentiary challenges are improper and without merit.

DuPont also now repeats the same evidentiary arguments it pursued—and then withdrew—before this Court in *Bartlett* challenging the district court's ruling on dose-response evidence. But DuPont has chosen not to appeal the key part of the district court's collateral estoppel order on this issue, so its arguments are forfeited. And under this Court's deferential abuse-of-discretion review, none of DuPont's other evidentiary complaints warrant a new trial. *See Dortch v. Fowler,* 588 F.3d 396, 400 (6th Cir. 2009) ("This court reviews both the district court's discovery and evidentiary rulings under the abuse-of-discretion standard.").[12]

A. DuPont is precluded from relitigating the *Leach* Agreement and attendant evidentiary rulings because it failed to appeal the district court's collateral estoppel order on this issue.

DuPont's challenge to the district court's dose-response evidentiary rulings is a backdoor attempt to obtain a second appeal of the district court's interpretation of the *Leach* Agreement. This Court should reject it.

[12] DuPont improperly asserts that its evidentiary challenges should receive de novo review, but that standard applies only when parties contest the "scientific[] validity" of an expert opinion, as in the case DuPont cites. DuPont Br. at 34 (citing *Smelser v. Norfolk S. Ry.*, 105 F.3d 299, 303 (6th Cir. 1997)). The district court here made "relevancy determination[s]," which are "review[ed] for abuse of discretion." *Cook v. Am. S.S. Co.*, 53 F.3d 733, 738 (6th Cir. 1995).

Recall that the *Leach* Agreement placed the classwide question of general causation in the hands of the Science Panel—providing that the Panel's "Probable Link Finding" meant it was "more likely than not" that there was a link between a class member's C-8 exposure (.05 ppb for a year) and his linked disease. DMO34, R.MDL5285, PageID128535. Throughout this MDL, the district court applied a simple rule: The parties couldn't elicit testimony that would violate this Agreement.

This restriction cut both ways: Neither party could challenge Probable Link Findings by dissecting the Science Panel report or introducing contrary expert testimony. As to DuPont, the Agreement "unambiguous[ly]" dictated that if the Panel found it was "more likely than not that there is a link between exposure to C-8 and a particular Human Disease among Class Members," DuPont "waived its right to challenge whether it is probable that exposure to C-8 is capable of causing the Linked Disease—*i.e.*, general causation" in any class member's case. DMO1-A, R.MDL3972, PageID68168. For plaintiffs, if the Panel determined a particular disease had no "Probable Link" among the entire class, their claims were "forever barred." *Id.*, PageID68162. Just like DuPont, no class members could dig below the Panel's ultimate findings to show C-8 was linked to their diseases.[13]

[13] For example, because the Panel made a "No Probable Link Finding" for prostate cancer, class members who suffered from prostate cancer could not sue DuPont, even if their blood revealed the highest concentrations of C-8 among the class and even though, at those concentrations, the Science Panel's underlying data

But throughout this MDL, DuPont refused to comply. It sought to elicit expert testimony concerning the "dose-response" relationship necessary to cause the Linked Diseases beyond the defined *Leach* threshold, claiming it was somehow relevant to "specific causation." The district court saw through this ploy. Because the Agreement incorporated the dose concept as a *general* causation issue, the district court excluded DuPont's prohibited testimony. DMO1, R.MDL1679, PageID22981-82 ("The dosage level of C-8 that can cause these diseases is a general causation issue, which DuPont clearly agreed to not contest."); *see also* EMO1, R.MDL4079, PageID71852; DMO1-A, R.MDL3972, PagedID68167-68.[14]

Just as in *Bartlett*, DuPont's evidentiary challenges boil down to its disagreement with the district court's interpretation of the *Leach* Agreement. *See* DuPont Br. at 18, 33-35, 37, 43, 45 (arguing the court's evidentiary rulings were based on its "erroneous rulings" or "error" in "interpret[ing] DuPont's agreement"). But the district court held DuPont was collaterally estopped from relitigating its interpretation of the *Leach* Agreement—including any "evidentiary applications" of that Agreement, DMO34, R.MDL5285, PageID128582—and DuPont has opted not

showed a link between prostate cancer and C-8. EMO28-A, R.MDL5315, PageID128973-74.

[14] DuPont's casual citation to a Panel member's affidavit (at 36) is both improper and irrelevant. The district court has already explained the factual, legal, and procedural failures of this proffer. Tr., R.197, PageID9061-63; Order, R.MDL5391, PageID132292-95.

to challenge that order on appeal here. The district court's interpretation of the Agreement, therefore, remains binding, and DuPont cannot evade it by framing its challenge as a novel evidentiary one. DuPont's failure to challenge that collateral estoppel order is alone dispositive of all its dose-response evidentiary challenges.[15]

B. The district court properly rejected evidence as to dose-response because it violated the *Leach* Agreement.

Even on their own terms, DuPont's challenges fail.

DuPont's Experts—DuPont argues (at 37-38) that "the court prevented DuPont's experts from giving causation opinions" based on dose-response data, but the court *did* allow DuPont to introduce expert testimony when doing so was consistent with the *Leach* Agreement and the rules of evidence.

For starters, the district court did not prevent all testimony about the dose of C-8 in plaintiffs' blood. DuPont remained free to—and did—refer to Abbott's C-8 dose throughout trial. *See, e.g.*, Tr., R.190, PageID8042-45 (testimony regarding concentrations and length of C-8 exposure, and whether exposure was higher than DuPont's internal guidelines).

[15] Even if DuPont had appealed that issue, the district court was right: All the *Parklane* factors counsel in favor of estopping DuPont from trying to press this argument yet again. As the court and parties agreed, the district court's interpretation of the *Leach* agreement pervaded the entire MDL, was essential to the judgments entered in the three trials, and was fairly and fully litigated. DMO34, R.MDL5285, PageID128569-71.

DuPont complains that the district court imposed unreasonable constraints on its expert's testimony, but it was DuPont that decided not to retain a specific causation expert, not the district court. DuPont Br. at 33-49. DuPont retained only rebuttal experts, and the court only precluded testimony that C-8 exposure of .05 ppb over a year is incapable of causing testicular cancer or that Abbott's C-8 dose was too low to be capable of causing his cancer—because that testimony would attack general causation and was barred by the Agreement. Under Federal Rule of Evidence 702, expert testimony that does not relate to any "disputed" factual issue in the case is "not relevant and ergo not helpful." EMO1-A, R.MDL4226, PageID81635 (citing *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 590-91 (1993)) Because the Agreement resolved the dose-response causation issue, any contrary dose-response testimony did not go to a disputed fact and was therefore "irrelevant." EMO1, R.MDL4079, PageID71854.

Abbott's Expert—DuPont also contends (at 39-42) that Abbott's specific causation expert, Dr. Pohar, should have been excluded because he relied on the Probable Link Finding and Abbott's status as a class member—rather than his C-8 blood-level—in opining that C-8 exposure caused his testicular cancer. There was no error.

In reaching his conclusions, Dr. Pohar followed the well-established differential diagnosis methodology. That methodology required him to consider

multiple potential causes of Abbott's cancers, ruling in and excluding different possibilities until settling on a substantial contributing cause. EMO31, R.108, PageID3822-25. The Science Panel—agreed-upon experts who performed one of the "largest epidemiological studies ever conducted"—had already concluded that, for each class member suffering from testicular cancer, C-8 exposure was a probable cause. So the district court reasonably held, "without question, Dr. Pohar did not err in relying on" the Panel's study "in ruling in C-8 as a potential causal factor in differential diagnosis." *Id.*, PageID3827. After ruling out all other potential causes based on his scientific knowledge and experience, Dr. Pohar then reasonably opined that Abbott's 20-year exposure to the C-8 contaminated water was the substantial contributing cause.

Counsel Statements—DuPont finally argues (at 43-45) that the court impermissibly allowed Abbott's counsel to "repeatedly and prejudicially state that exposure to .05 ppb of C8 was enough for C8 to be a likely cause of his cancer." DuPont claimed the .05 ppb metric was applicable only to class membership, not causation. But this too contradicts the general causation definition in, and district court's interpretation of, the Agreement. The definition of "Probable Link" in the Agreement is "it is more likely than not that there is a link between exposure to C-8 and a particular Human Disease *among Class Members*"—with "class members" defined as those with .05 ppb exposure over at least a year. Thus, as the district court

recognized, .05 ppb was the relevant and stipulated general causation dose metric. There was no error in allowing the jury to hear what the parties already agreed: This exposure was capable of causing cancer.

C. The district court allowed DuPont to present evidence of alternative causes of Abbott's testicular cancers when such evidence comported with the Agreement.

Contrary to DuPont's arguments (at 45-49), the district court permitted DuPont to elicit extensive testimony of alternative causes of both plaintiffs' cancers in the Swartz-Abbott trial, drawing a line only when testimony violated the Agreement. There was no abuse of discretion.

The record in this case is replete with evidence DuPont introduced to show the plaintiffs' cancers could have resulted from alternative causes (or were idiopathic). DuPont's experts testified at length about Swartz's obesity and hypertension and how both were significant causal factors for kidney cancer. *See, e.g.*, Tr., R.200, PageID9793-95, 9797-98. And the jury agreed with DuPont, refusing to return a plaintiff's verdict as to the specific cause of her kidney cancer.

DuPont also presented extensive evidence regarding other potential causes of Abbott's testicular cancer—the jury just didn't agree. DuPont argues that "the most relevant alternative cause for Abbott" was GCNIS, a genetic condition it insists (at 46) it was barred from arguing was an alternative cause. Hardly. DuPont's counsel questioned the experts on the topic extensively, including their own Dr. Nichols, who

told the jury all about GCNIS and how it "nearly always" leads to testicular cancer. Tr., R.201, PageID9927, 9974-75.

The district court only prevented Dr. Nichols from opining that it was "more likely" that Abbott's cancer was caused by GCNIS than C-8 exposure. But that's because Dr. Nichols wasn't qualified as a specific causation expert and refused to "rule in" C-8 exposure as a *possible* cause of Abbott's testicular cancer as the *Leach* Agreement required. *See* EMO32, R.MDL5301, PageID128866; *see also* EMO1, R.MDL4079, PageID71861 ("DuPont has contractually agreed that its expert must rule in C-8 as a possible cause of [a class member's linked disease].").[16]

Likewise, DuPont's complaint (at 49) that the district court "barred" it from arguing Abbott's cancer was "idiopathic"—*i.e.*, without a known cause—falls flat. The jury, as DuPont concedes (at 48), heard from multiple experts that the majority of testicular cancers are idiopathic. *See* EMO5, R.MDL45332, PageID98556 (ruling that experts "may say that there is no known cause in the majority of cases").

[16] DuPont complains (at 47) that the district court limited testimony about GCNIS because it excluded "historic slides from the 1994 orchiectomy" that, in DuPont's view, "plainly show [Abbott has] GCNIS." But DuPont fails to mention that it did not request the slides or retain an expert to explain them until after the close of discovery and the deadline for dispositive motions briefing. The district court exercised its "broad discretion" to exclude this untimely report from an undisclosed expert. EMO33, R.126, PageID4418 (quoting *Estes v. King's Daughters Med. Ctr.*, 59 Fed. App'x 749, 753 (6th Cir. 2003)). DuPont only has itself to blame.

Bottom line: Trial gave DuPont ample opportunity to argue the plaintiffs' cancers had alternative causes. It did that successfully for Swartz. But for Abbott, the jury did not agree. DuPont's quarrel is with the jury, its own missed disclosure deadlines, or its own Agreement. And none are bases for a new trial.

III. DuPont's statute of limitations challenge fails both legally and factually.

DuPont finally challenges the district court's decision that the company's limitations defense could be rejected as a matter of law. But, as the district court correctly explained, DuPont was wrong on the legal standard, and its evidence fell far short of creating a triable issue. Tr., R.205, PageID10837-59; DMO36, R.131, PageID4873-78.

"This Court reviews de novo a district court's decision to grant or deny a motion for judgment as a matter of law," and, in diversity cases, it employs the standard from the state whose substantive law governs the action. *Morrison v. B. Braun Med. Inc.*, 663 F.3d 251, 256 (6th Cir. 2011). Under Ohio law, a 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." *Groob v. KeyBank*, 843 N.E.2d 1170, 1173 (Ohio 2006). DuPont cannot meet that standard.

A. DuPont misapprehends Ohio's statute of limitations law.

DuPont argues (at 51) that a "reasonable person" would have had "'an indication'" that testicular cancer was related to C-8 by 2015, two years before Abbott filed his lawsuit, because the Panel's findings were "widely publicized." This argument rests on an "inquiry" or "constructive" notice standard that imputes knowledge based on publicity or knowledge of others. *See* DuPont Br. at 53 (citing *Hughes v. Vanderbilt Univ.*, 215 F.3d 543, 548 (6th Cir. 2000) (applying federal constructive notice standard)).

That is not the correct standard. Under Ohio law, a cause of action for bodily injury "caused by exposure to hazardous or toxic chemicals" accrues on "the date on which by exercise of reasonable diligence the plaintiff should have known" he "has an injury that is related to the exposure." Ohio Rev. Code § 2305.10(B)(1). As Ohio courts have recognized, this statute incorporates a discovery rule with a "two-pronged test—*i.e.*, discovery not just that one has been injured but also that the injury was caused by the conduct of the defendant." *Norgard v. Brush Wellman, Inc.*, 766 N.E.2d 977, 979-81 (Ohio 2002).

Inquiry or constructive notice—either of one's injury or that one's injury was caused by a defendant's conduct—is not sufficient to satisfy this discovery rule. DMO36, R.MDL5304, PageID128912; Ohio Rev. Code § 2305.10(B)(1). Instead, Ohio courts have consistently held that the plaintiff must actually "acquire additional

information" alerting him that the defendant's wrongful conduct could be linked to his injury before the limitations period begins running. *Norgard*, 766 N.E.2d at 979-81; *see also Browning v. Burt*, 613 N.E.2d 993, 1005-06 (Ohio 1993); *O'Stricker v. Jim Walter Corp.*, 447 N.E.2d 727, 730-32 (Ohio 1983).

In this case, then, the statute of limitations began to run when Abbott "*actually encountered* some information that should have alerted him of the potential link between C-8 and his testicular cancer." DMO36, R.MDL5304, PageID128913 (emphasis added). So DuPont needed to introduce plausible evidence that Abbott acquired such information by November 14, 2015—two years before he filed this lawsuit. Complaint, R.1, PageID1-17 (filed Nov. 14, 2017). It didn't.

B. DuPont offers no evidence that Abbott knew or should have known, prior to the limitations period, that his cancers could be linked to C-8.

On the proper legal standard, DuPont's argument fails. It offered no evidence Abbott knew, or had any information that should have alerted him, that either of his cancers could be linked to C-8 prior to the limitations period.

Fact witnesses painted a clear picture: Abbott filed this lawsuit a *few weeks* after he first learned about a possible link between C-8 and testicular cancer. That's when two things happened—his father told him about a TV ad suggesting a link between C-8 and testicular cancer, Tr., R.196, PageID9020-25, 9029; Tr., R.197, PageID9150-53, 9181-5, 9239, and his administrative assistant suggested he investigate C-8 and

consult a lawyer, Tr., R.197, PageID9151-2, 9185-6; Tr., R.196, PageID8913-16; *see also* Tr., R.196, PageID8983. Before then, Abbott knew nothing about the issue—nor had he received information that should have prompted him to discover it.

DuPont doesn't show otherwise. It argues (at 52) that the "media extensively covered" the Science Panel's findings. But Abbott's claim could not accrue by newspaper headlines alone; the question is whether he actually read those headlines or even received this coverage—and there is no evidence of either.

To the contrary, Abbott's uncontroverted testimony was that prior to November 2017, he heard nothing about the Science Panel's findings, received no notices, and read nothing in newspapers—because he didn't subscribe to any. Tr., R.197, PageID9117-18, 9226-35. Nor did he know anything about lawsuits his assistant, grandparents, or other unspecified "individuals from [the] community" had filed against DuPont. DuPont Br. at 53; Tr., R.197, PageID9232-4.

DuPont also contends (at 54-55) the jury should have been allowed to discredit Abbott. Yet DuPont offered no evidence undermining either Abbott's or the corroborating witnesses' testimonies. Rank speculation that a witness is lying is not enough to defeat a directed verdict. *Ruta v. Breckenridge-Remy Co.*, 430 N.E.2d 935, 938 (Ohio 1982) (directed verdict proper when party failed to introduce evidence of sufficient probative value on the legal question presented).

The only information DuPont identifies Abbott actually received was the C-8 Health Project paperwork he signed in 2006. But that paperwork did not provide the requisite "additional information" because it explicitly *disclaimed* any link between diseases and C-8. DuPont itself did the same thing. Thus, as the district court explained, it would be "illogical" for a jury to find Abbott "should have known about the link between C-8 and his testicular cancer." DMO36, R.131, PageID4869; *see also Grimme v. Twin Valley Cmty. Loc. Sch. Dist. Bd. of Educ.*, 878 N.E.2d 1096, 1099 (Ohio Ct. App. 2007) (explaining that it is "nonsensical" to attribute to a plaintiff "certain knowledge of an injury-causing condition" while the defendant "maintains that no such condition exists").

Lastly, DuPont highlights notices distributed as part of the *Leach* litigation. But none show Abbott actually had information which would have alerted him either of his cancers were linked to C-8. The 2004 notice from the *Leach* Agreement only announced there would be a study—not that there were any disease links.[17] DuPont further argues (at 52) that in 2014 "a notice was mailed to all class members, including Mr. Abbott, explicitly stating that the Science Panel found a Probable Link between

[17] Plus, the parties' joint stipulation states: "[A] Direct Settlement Notice was *not* mailed to Travis Abbott, or to . . . the address which Travis Abbott was residing at the time of the mailing." Tr., R.204, PageID10815; *see also* Declaration, R.170-1, PageID6499.

C8 and testicular cancer." But that argument is misleading because, as DuPont admitted to the court, the jury never heard any evidence suggesting as much.[18]

C. Abbott timely filed this lawsuit as soon as he learned (or should have learned) that his remaining testicle had a cancerous tumor.

And there's more. Abbott did not even receive his second cancer diagnosis until November 16, 2015—less than two years before filing suit.

The record establishes that, following the onset of testicular pain in 2015, Abbott promptly visited the emergency room, saw a succession of treating physicians, and underwent every recommended test and procedure. *See* Tr., R.197, PageID9119-29. Some doctors suspected that the mass might be cancerous, but none could know until reviewing pathology after removing the testicle. Diagnosing Abbott's testicular mass as cancerous beforehand, his treaters unanimously testified, would be "incorrect" and "against the standard of care." Tr., R.218, PageID11722-23, 11727; Tr., R.219, PageID11740, 11763-64; Tr., R.220, PageID11824-25. Thus, Abbott did not

[18] At trial, DuPont admitted that there was no evidence in the record that Abbott had ever received this 2014 notice or that it had been mailed to him. Tr., R.202, PageID10199-10201. At first the company suggested it might call a witness to establish the point. *Id.*, PageID10200. But it never did. Instead, at the very end of trial, it asked the court to take judicial notice of a newfound declaration that purportedly supported its view. Tr., R.204, PageID10580-10585. But the court refused to entertain this last-ditch effort, explaining why judicial notice of the contested point would be improper. *Id.*, PageID10580; *see also* Tr., R. 205, PageID10842-47.

receive his diagnosis until after the surgery on November 16, 2015—within the limitations period.

DuPont, however, maintains (at 55) that "the date of diagnosis is not the appropriate date" to toll the statute of limitations, if from some earlier "cognizable event" Abbott "should have become aware" he had been injured. But the only event DuPont identifies—"a doctor insisting on the removal of a cancerous testicle"—presupposes the mass was, in fact, cancerous. *Id.* at 56. None of his physicians were willing or able to say so, and, as the district court observed, "it would be illogical to hold Abbott to a higher degree of knowledge" than them. DMO36, R.131, PageID4869 (quoting *Cacciacarne v. G.D. Searle & Co.*, 908 F.2d 95, 97-98 (6th Cir. 1990)); *see also Liddell v. SCA Servs. of Ohio, Inc.*, 635 N.E.2d 1233, 1239 (Ohio 1994) (plaintiff "could not, and did not" discover his cancer until after his biopsy and diagnosis). Likewise, Ohio law is clear that "suspicion is not sufficient to trigger the discovery rule." *Colby v. Terminix Int'l Co.*, 1997 WL 117218, at *3 (Ohio Ct. App. Feb. 10, 1997). And there is a difference "between knowing that one has cancer, and knowing that one *may* have cancer." DMO36, R.131, PageID4868-9 (citing *Burgess v. Eli Lilly & Co.*, 66 Ohio St. 3d 59 (Ohio 1993)). The district court did not err.

CONCLUSION

This Court should affirm.

Respectfully submitted,

/s/ Jon C. Conlin
Counsel of Record
Jon C. Conlin
F. Jerome Tapley
Elizabeth E. Chambers
Nina Towle Herring
Mitchell Theodore
Brett Thompson
CORY WATSON, PC
2131 Magnolia Avenue
Birmingham, AL 35205
205-328-2200
C8@corywatson.com

Rachel Bloomekatz
BLOOMEKATZ LAW LLC
1148 Neil Avenue
Columbus, OH 43201
614-259-7611
rachel@bloomekatzlaw.com

Matthew W.H. Wessler
Linnet Davis-Stermitz
GUPTA WESSLER PLLC
2001 K St NW, Suite 850 North
Washington, DC 20006
607-316-1499
matt@guptawessler.com

Counsel for Plaintiffs-Appellees
Travis Abbott and Julie Abbott

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because this brief contains 12,860 words, excluding the parts of the brief exempted by Rule 32(f). This brief complies with the typeface requirements of Rule 32(a)(5) and the type-style requirements of Rule 32(a)(6) because it has been prepared in proportionally spaced typeface using Microsoft Word in 14-point Baskerville font.

Dated September 10, 2021

/s/ Jon C. Conlin
Jon C. Conlin

CERTIFICATE OF SERVICE

I hereby certify that on September 10, 2021 I electronically filed the foregoing brief with the Clerk of the Court for the U.S. Court of Appeals for the Sixth Circuit by using the CM/ECF system. All participants are registered CM/ECF users and will be served by the appellate CM/ECF system.

/s/ Jon C. Conlin
Jon C. Conlin

DESIGNATION OF RECORD

In addition to the documents previously designated by Defendant, Plaintiffs hereby designate the following filings in the district court's record for Case No. 2:17-cv-998 and Case No. 2:13-md-2433 as relevant pursuant to Sixth Circuit Rule 28:

From the *Abbott* Case (Southern District of Ohio, Case No. 2:17-cv-00998):

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820-27	Trial Transcript for *Jack w. Leach, et al v. E.I. Dupont De Nemours and Company* in the Circuit Court of Wood County West Virginia on February 28, 2005	12012-13
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3441-1	Expert Report of Steven Amter	59357, 59362, 59365
3972	Dispositive Motions Order No. 1-A, regarding Defendant's Motion for Clarification of Dispositive Motions Order No. 1, Class Membership and Causation	68162, 68165-75
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4235	Dispositive Motions Order No. 11, regarding Defendant's Motion for Judgment as a Matter of Law on Punitive Damages	81770-73, 81776
4306	Dispositive Motions Order No. 12, regarding Defendant's Motion for Judgment as a Matter of Law or, Alternatively, for a New Trial and Remittitur on Plaintiff Carla Bartlett's Claims	89501-02, 89514-15
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5130	Transfer/Consolidation Order No. 126	120616
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5391	Opinion and Order, regarding Plaintiff's Renewed Motion to Seal the Improperly Obtained Affidavit of Science Panelist, Dr. Savitz as a Request for Sanctions for Repeated Violations of this Court's Orders	132292-95

From the *Swartz* case (Southern District of Ohio, Case No. 2:18-cv-00136):

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From the *Bartlett* case (Southern District of Ohio, Case No. 2:13-cv-00170):

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127-1	Jury Trial Transcript for September 21, 2015	3525-29
127-2	Jury Trial Transcript for September 21, 2015	3638-39
145	Jury Trial Transcript for October 6, 2015	6400

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