UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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Re: Case No. 19-4226, *In re: E. I. DuPont de Nemours and Co*
Originating Case No. : 2:13-md-02433

Dear Counsel,

The Court issued the enclosed Order today in this case.

Sincerely yours,

s/Jennifer Earl
Case Manager
Direct Dial No. 513-564-7066

cc: Mr. Richard W. Nagel

Enclosure

No mandate to issue

CASE NO. 19-4226

UNITED STATES COURT OF APPEALS
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DEBORAH S. HUNT, Clerk

In re: E.I. DUPONT DE NEMOURS AND COMPANY C-8 PERSONAL INJURY LITIGATION.

E.I. DUPONT DE NEMOURS AND COMPANY,

Petitioner.

ORDER

Before: BATCHELDER, McKEAGUE, and READLER, Circuit Judges.

The petitioner seeks a writ of mandamus to compel the district court to vacate its grant of summary judgment on certain elements of the plaintiffs' cause of action. We DENY the petition.

In its current stage, this mass-tort litigation comprises about 60 separate cases of negligence against E.I. duPont de Nemours and Company ("DuPont"). Shortly after the district court scheduled a jury trial for the first of these cases to begin on January 21, 2020, the Plaintiff Steering Committee ("PSC") moved for summary judgment on certain issues by invoking nonmutual, offensive issue preclusion to adopt jury verdicts and court rulings that were decided against DuPont in three cases by other plaintiffs in earlier stages of this litigation. The district court agreed and granted partial summary judgment to all current plaintiffs on, among other things, (1) the elements of duty, breach, and foreseeability in their negligence claims, and (2) the inapplicability of the Ohio Tort Reform Act in this litigation. *In re E.I. du Pont de Nemours & Co. C-8 Pers. Injury Litig.*, No. 2:13-MD-2433, 2019 WL 6310731 (S.D. Ohio Nov. 25, 2019).

Three weeks later, on December 16, 2019, DuPont petitioned this court for a writ of mandamus to compel the district court to vacate that part of its judgment, so as to hold the plaintiffs to their burden of proof; that is, to require each plaintiff in each of the forthcoming trials to prove

to the jury DuPont's duty and breach of that duty, and the foreseeability of resultant harm to the plaintiff for each negligence claim, and prove to the court the inapplicability of the Ohio Tort Reform Act for each individual plaintiff. DuPont claims the district court was wrong and the judgment invalid for several reasons.

DuPont argues, generally, that offensive issue preclusion is disallowed in mass tort litigation in the Sixth Circuit, *see In re Bendectin Prod. Liab. Litig.*, 749 F.2d 300, 305 n.11 (6th Cir. 1984) (citing *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 330 n.14 (1979)), and that, even if it were allowed, it is improper here because the bellwether trials were not representative of the entire pool of cases, *see In re Chevron U.S.A., Inc.*, 109 F.3d 1016, 1020 (5th Cir. 1997), and because DuPont never agreed that the bellwether trials would have preclusive effect, *see Dodge v. Cotter Corp.*, 203 F.3d 1190, 1200 (10th Cir. 2000). DuPont points to a prior order in which the district court acknowledged that, "DuPont is correct that this [c]ourt has held that its decisions are 'dispositive *only* on the claims' before it and 'instructive to claims filed by other plaintiffs.'" *In re Du Pont C-8 Pers. Injury Litig.*, No. 2:13-MD-2433, 2015 WL 4943966, at *2 (S.D. Ohio Aug. 19, 2015) (citations omitted).

DuPont also argues, specifically as to the district court's analysis of the PSC's motion, that the court was mistaken in its conclusions that (1) the juries in the bellwether trials had found that DuPont owed and breached a duty to the "entire community," rather than to just the named plaintiffs in those cases, *In re Du Pont C-8 Pers. Injury Litig.*, 2019 WL 6310731, at *25; and (2) that it had already ruled on the applicability of the Ohio Tort Reform Act to the later-arriving plaintiffs who had no known injury prior to the Act's inception in 2005, *id.* at *22.

It is noteworthy that DuPont did not move the district court for reconsideration or relief from judgment. Nor did DuPont move the district court to certify the judgment as final and appealable under Federal Rule of Civil Procedure 54(b) or seek interlocutory appeal under 28

U.S.C. § 1292(b). In the ordinary course, one or more of these motions would be the anticipated approach. But in its petition, DuPont points out that such motions are not mandatory before seeking mandamus and insists that they would have been futile, stating that the court responded to DuPont's previous reconsideration motions with admonishment and threat of sanctions.

Due to the impending trial, DuPont requested an expedited decision on its petition. When the PSC had not responded by January 14, 2020, we filed an order requesting that it respond in an expedited manner. The PSC responded on January 15, opposing the petition. We also received an amicus brief from the U.S. Chamber of Commerce in support of DuPont's petition.

The All Writs Act, 28 U.S.C. § 1651(a), authorizes this court to issue writs of mandamus "to the judges of any inferior court to restrain their excesses." *In re Univ. of Michigan*, 936 F.3d 460, 466 (6th Cir. 2019) (quoting 3 Wm. Blackstone, Commentaries on the Laws of England 110-11) (quotation and editorial marks omitted). But "[t]his is a drastic and extraordinary remedy reserved for really extraordinary causes," *Cheney v. U.S. Dist. Court for D.C.*, 542 U.S. 367, 380 (2004) (quotation marks omitted), such as when a "district judge's actions present a clear case of judicial overstep," *Univ. of Michigan*, 936 F.3d at 467. We consider five factors:

> (1) whether the [petitioner] has adequate other means to attain the desired relief,
>
> (2) whether the petitioner will be irreparably damaged or prejudiced if the writ is not granted,
>
> (3) whether the district court's order is clearly erroneous as a matter of law,
>
> (4) whether the district court's order incorporates an oft-repeated error or manifests a persistent disregard of the federal rules, and
>
> (5) whether the district court's order raises new and important problems, or issues of law of first impression.

In re Syncora Guar. Inc., 757 F.3d 511, 515 (6th Cir. 2014) (paragraph breaks inserted); *accord In re Prof'ls Direct Ins.*, 578 F.3d 432, 437 (6th Cir. 2009); *In re Perrigo Co.*, 128 F.3d 430, 435 (6th Cir. 1997); *In re Bendectin Prod. Liab. Litig.*, 749 F.2d 300, 304 (6th Cir. 1984).

For the writ to issue, "the petitioner must satisfy the burden of showing that his right to issuance of the writ is clear and indisputable," *Cheney*, 542 U.S. at 381 (quotation and editorial marks omitted), but he need not satisfy every factor, *Prof'ls Direct*, 578 F.3d at 437; *Perrigo*, 128 F.3d at 435. In its petition, DuPont hammers away at the third factor, but less so for the others. We ultimately find the first two factors the most important to this decision. Because the forth factor does not point strongly either way in the present case, we will not discuss it here.

First and most importantly, this grant of partial summary judgment—as with most grants of partial summary judgment—is reviewable on direct appeal after a final disposition of the case has been reached. *See, e.g.*, *Biegas v. Quickway Carriers, Inc.*, 573 F.3d 365, 374 (6th Cir. 2009) ("Our review [of a grant of partial summary judgment] is limited to the evidence before the district court at the time of its partial-summary-judgment ruling, and we do not consider the evidence introduced subsequently at trial."). That is, DuPont will have a right to appeal after trial and can raise these legal arguments in that appeal. Mandamus is not a substitute for appeal. *Will v. United States*, 389 U.S. 90, 97 (1967); *Bankers Life & Cas. Co. v. Holland*, 346 U.S. 379, 382-83 (1953) ("Its decision against petitioner, even if erroneous[,] . . . is reviewable upon appeal after final judgment. If we applied the reasoning advanced by the petitioner, then every interlocutory order which is wrong might be reviewed under the All Writs Act." (citations omitted)); *Prof'ls Direct*, 578 F.3d at 437 ("With narrow exceptions, a party has no right of appeal until after a final judgment on the merits, and mandamus is not intended to substitute for appeal after a final judgment. Thus, a court may only exercise its mandamus jurisdiction when a party is in danger of harm that cannot be adequately corrected on appeal and has no other adequate means of relief."). The first factor weighs against DuPont's petition.

Likewise, the second factor does not help DuPont. DuPont has not alleged unusual, unreasonable, or irreparable damage or prejudice that will result from the district court's

conducting the trial without litigation of these issues. DuPont claims that undertaking a new, second trial (after prevailing on appeal) would be uneconomical and inefficient. But that is not enough. *See Schlagenhauf v. Holder*, 379 U.S. 104, 110 (1964) ("It is, of course, well settled, that the writ is not to be used as a substitute for appeal even though hardship may result from delay and perhaps unnecessary trial." (citations omitted)). In fact, DuPont appears to concede the availability of a remedy through ordinary appeal when arguing that: "All three of these [upcoming] lengthy and costly trials would likely occur before the district court's clear error could be remedied on a traditional appeal, which would then require new trials in all of these cases." *In re Du Pont C-8 Pers. Injury Litig.*, Sixth Cir. No. 19-4226, Dkt. No. 1-2, "Petition for Writ of Mandamus," at 31 (filed Dec. 16, 2019).

On the third factor, DuPont has made a vigorous and perhaps compelling argument that the district court erred as a matter of law, as recited above, but the clarity or indisputability of that putative legal error is less certain and far from overwhelming. That disputability is critical:

> [A]lthough a simple showing of error may suffice to obtain reversal on direct appeal, a greater showing must be made to obtain a writ of mandamus. Indeed, there must be more than what we would typically consider to be an abuse of discretion in order for the writ to issue. For the writ to issue, then, the district court's error must be *egregious*.

Ohio A. Philip Randolph Inst. v. Larose, 761 F. App'x 506, 513 (6th Cir. 2019) (quoting *In re Motor Fuel Temperature Sales Practices Litig.*, 641 F.3d 470, 487 (10th Cir. 2011)) (quotation marks omitted, emphasis added); *see also Bendectin*, 749 F.2d at 306 n.14 ("Factual errors cannot justify the issuance of the writ."). Even if we assume that the district court's errors were egregious, and therefore DuPont satisfies the third factor, that alone is not determinative.

Finally, as to the fifth factor, DuPont argues that the district court has created "new and important problems" that are "issues of law of first impression," namely that, by applying nonmutual, offensive issue preclusion to these issues in this manner, the court has undermined the

entire bellwether concept in mass-tort litigation and skewed the process to favor the plaintiffs. We are not convinced that this characterization is necessarily accurate but, even assuming it is, this problem is nonetheless susceptible to being remedied on direct appeal. DuPont has not shown that this problem is so urgent that it requires immediate intervention in the form of mandamus.

For these reasons, we conclude that DuPont has not demonstrated a "clear and indisputable" right to a writ of mandamus, *see Cheney*, 542 U.S. at 381, on the district court's grant of partial summary judgment on these issues. We, therefore, DENY the petition.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk