No. 21-3418

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 Case Nos. 2:17-CV-00998 & 2:13-MD-02433

BRIEF OF *AMICI CURIAE* LAW PROFESSORS IN SUPPORT OF PLAINTIFFS-APPELLEES TRAVIS AND JULIE ABBOTT AND SEEKING AFFIRMANCE OF THE DISTRICT COURT

Alison Borochoff-Porte
POLLOCK COHEN LLP
60 Broad St., 24th Fl.
New York, NY 10004
(646) 827-6259
alison@pollockcohen.com

Gary A. Davis
DAVIS & WHITLOCK, P.C.
21 Battery Park Ave., Suite 206
Asheville, NC 28801
(828) 622-0044
gadavis@enviroattorney.com

Counsel for Amici Curiae Law Professors

DISCLOSURE OF CORPORATE AFFILIATIONS AND FINANCIAL INTEREST

Pursuant to Sixth Circuit Rule 26.1, *Amici Curiae* Law Professors make the following disclosures:

1. No *amicus* is a subsidiary or affiliate of a publicly owned corporation.
2. There is no publicly owned corporation, not a party to the appeal or *amicus*, that has a financial interest in the outcome.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

Treatises

INTEREST OF *AMICI CURIAE*

Amici curiae are professors of civil procedure, complex litigation, torts, and evidence, who have a common professional interest in the proper application of issue preclusion in multidistrict litigation in the federal courts.

Amici curiae ("*Amici*") are the following scholars:

Alexandra D. Lahav, Ellen Ash Peters Professor of Law, University of Connecticut School of Law;

Edward D. Cavanagh, Professor of Law, St. John's University School of Law;

Martha Chamallas, Robert J. Lynn Chair in Law Emeritus, the Ohio State University Michael E. Moritz College of Law;

Edward K. Cheng, Hess Chair in Law, Vanderbilt Law School;

Robin Effron, Professor of Law, Brooklyn Law School;

Richard D. Freer, Charles Howard Candler Professor of Law, Emory University School of Law;

Michael D. Green, Bess and Walter Williams Professor of Law, Wake Forest University Law School;

Jay Tidmarsh, Judge James J. Clynes, Jr. Professor of Law, Notre Dame Law School;

Adam Zimmerman, Professor of Law, Loyola Law School, Los Angeles.

Counsel for all parties consented to the filing of this brief. *Amici* have no direct financial interest in the parties to or the outcome of this case. The parties have granted blanket consent for the filing of this brief. No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund its preparation or submission. No person, other than *Amici* or their counsel, made a monetary contribution to the preparation or submission of this brief. *Amici*'s university affiliations are for identification purposes only.

INTRODUCTION

As multidistrict litigation ("MDL") has increased—one out of every two cases filed in 2020 was part of an MDL—the need to resolve these cases both fairly *and* efficiently has similarly grown.[1] This appeal is

[1] *See* U.S. District Courts—Judicial Business 2020, https://www.uscourts.gov/statistics-reports/us-district-courts-judicial-

(continued…)

about what tools a district judge should have in his or her toolkit to fairly and efficiently resolve such litigation, which can often involve tens of thousands of cases. Issue preclusion is one such tool.

Over forty years ago, the Supreme Court approved the use of non-mutual offensive collateral estoppel in *Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979) ("*Parklane*"). Acknowledging widespread criticism that the prior doctrine of mutuality led to misallocation of judicial and party resources, *see id.* at 328 (quoting *Blonder-Tongue Lab'ys, Inc. v. Univ. of Ill. Found.*, 402 U.S. 313, 329 (1971) ("*Blonder-Tongue*")), the Court granted district courts "broad discretion" to permit plaintiffs' use of prior judgments to estop defendants from relitigating issues that they had

---

business-2020 (last visited Sept. 16, 2021) (listing 470,581 total civil cases in 2020); Judicial Panel on Multidistrict Litigation—Judicial Business 2020, https://www.uscourts.gov/statistics-reports/judicial-panel-multidistrict-litigation-judicial-business-2020 (last visited Sept. 16, 2021) (listing that the Judicial Panel on Multidistrict Litigation transferred 4210 cases for coordinated or consolidated pretrial proceedings and that 227,285 actions were initiated in the transferee districts in 2020); *see also* Elizabeth Chamblee Burch & Margaret S. Williams, *Perceptions of Justice in Multidistrict Litigation: Voices From The Crowd* (Aug. 6, 2021), *available at* https://ssrn.com/abstract=3900527.

already lost, as long as doing so would not be unfair to the defendant, *id.* at 331.

This brief explains why the difficult issue in this appeal is not *whether* non-mutual offensive collateral estoppel can ever apply in a mass tort MDL—it can—but rather *when* it should apply so that the adjudication is fair to both parties. Basic principles of preclusion provide the answer.

ARGUMENT

I. THE APPLICATION OF NON-MUTUAL OFFENSIVE COLLATERAL ESTOPPEL IS DISCRETIONARY AND GUIDED BY FAIRNESS CONSIDERATIONS

A. The doctrine of issue preclusion

The fundamental principle of preclusion is that everyone is entitled to his or her day in court, but only once. *See Taylor v. Sturgell*, 553 U.S. 880, 892–93 (2008) (noting the "deep-rooted tradition" of everyone being entitled to their day in court (citation omitted)); *Blonder-Tongue*, 402 U.S. at 328 (questioning "whether it is any longer tenable to afford a litigant more than one full and fair opportunity" for resolution of an issue). Claim preclusion bars new claims or defenses that parties raised or should have raised in prior litigation. Issue preclusion (or collateral estoppel) is

narrower; it precludes the relitigation of any specific issue that a party *actually did* litigate in a prior case. *See* Richard D. Freer, Civil Procedure § 11.3 (4th ed. 2017).

In order for a court to preclude a party from relitigating an issue that was decided in a prior proceeding, it must find that: (i) the issue in the second proceeding is the *same* one raised and litigated in the prior proceeding, (ii) the issue was *necessary to the judgment* in the prior proceeding, (iii) the prior proceeding resulted in a final judgment on the merits, and (iv) the party to be precluded had a *full and fair opportunity to litigate* that issue. *See Smith v. Sec. and Exch. Comm'n*, 129 F.3d 356, 362 (6th Cir. 1997) (en banc) (citation omitted).

A party who has had a full and fair opportunity to litigate can be bound by a determination even if the other side—plaintiff or defendant—was not part of the first lawsuit. *Parklane*, 439 U.S. at 332–33; *Blonder-Tongue*, 402 U.S. at 329–30. This is called non-mutual issue preclusion. When a plaintiff has lost on an issue against one defendant, and the same exact issue is presented in a second proceeding with a new defendant, the court may preclude the plaintiff from relitigating. This is called *defensive* non-mutual collateral estoppel. When the defendant is a repeat player

and a new plaintiff wants to use a previous finding against them, this is called *offensive* non-mutual collateral estoppel. Trial courts have "broad discretion to determine when [this doctrine] should be applied." *Parklane*, 439 U.S. at 331.[2]

B. The policy goals of issue preclusion

The doctrine of issue preclusion is meant to achieve two goals: "[i] protecting litigants from the burden of relitigating an identical issue with the same party or his privy and . . . [ii] promoting judicial economy by preventing needless litigation." *Id.* at 326 (citation omitted). The reason for permitting non-mutual collateral estoppel is that the party against whom the doctrine is invoked has already had their opportunity to litigate the issue fully. To allow that party to relitigate the same issue repeatedly imposes needless costs on the justice system, other litigants, and lay jurors. Preclusion doctrine allows courts to take these efficiency

[2] Non-mutuality was adopted after many years of criticism of the mutuality doctrine, starting in the 1940s. *See, e.g.*, *Bernhard v. Bank of America Nat. Trust & Savings Ass'n*, 19 Cal. 2d 807 (1942); Brainerd Currie, *Civil Procedure: The Tempest Brews*, 53 Calif. L. Rev. 25 (1965); Edward D. Cavanagh, *Offensive Non-Mutual Issue Preclusion Revisited*, 38 Rev. Litig. 281, 301 (2019) (describing historical development and decline of the mutuality doctrine).

concerns into account, so long as it does not infringe on the fundamental principle that everyone is entitled to his or her day in court. The core of the holding of *Parklane* is that the application of non-mutual offensive collateral estoppel should be guided by fairness considerations.

District courts may consider a number of factors, enumerated in *Parklane* and the Restatement (Second) of Judgments § 29(3) (1982) ("Restatement"), in deciding whether to apply the doctrine. The *Parklane* decision counsels against applying this doctrine (i) where the plaintiff has sought to gain an unfair advantage by "adopt[ing] a 'wait and see' attitude, in the hope that the first action by another plaintiff will result in a favorable judgment;" (ii) where the defendant "[had] little incentive" to mount a vigorous defense in the first action, because the case involved minimal damages and the potentiality of future lawsuits concerning the same issues was unforeseeable; (iii) in the context of inconsistent judgments, where the plaintiff seeks to selectively rely upon a judgment that is "inconsistent with one or more previous judgments in favor of the defendant;" or (iv) "where the second action affords . . . procedural opportunities unavailable in the first action that could readily cause a different result." *Parklane*, 439 U.S. at 330–31 (citations omitted).

The Restatement also lists several factors that courts should consider when subsequent plaintiffs seek to preclude defendants from relitigating an issue. *See* Restatement § 29. Of these factors, two are particularly important in the context of an aggregated mass tort. First, whether the plaintiff is engaging in strategic behavior, such as declining to join a litigation in order to take advantage of wins but not be bound by losses. *See id.* § 29(3). Second, whether there are inconsistent judgments or a strong risk of inconsistent judgments on the issue. *See id.* § 29(4). For example, the Restatement suggests that "ambivalent" judgments should not be given issue preclusive effect, such as for example when the issue "could reasonably have been resolved otherwise[.]" *Id.*, comment g.

These twin concerns animated the "familiar example" described by the late law professor Brainerd Currie and mentioned in a footnote in *Parklane*. *See Parklane*, 439 U.S. at 330 n.14 (citations omitted) (citing Professor Currie's example). Suppose a train crash injured 50 people, each of whom brought a separate suit. If a jury finds for the defendant in the first 25 trials, but for the plaintiff on the 26th, the plaintiff should not be able to use that final favorable verdict against the defendant in trials 27 through 50. *See id.* The lesson of Professor Currie's example is

not that issue preclusion is *never* appropriate in any mass tort context. Rather, it illustrates how courts ought to apply one of the relevant fairness considerations.

II. OFFENSIVE COLLATERAL ESTOPPEL CAN BE APPLIED TO BELLWETHER TRIALS IN MULTIDISTRICT LITIGATION CONSISTENT WITH DUE PROCESS

This appeal arises in the context of cases consolidated for pretrial purposes before a single district court under the auspices of the MDL statute, which permits coordinated, consolidated, and centralized management of "civil actions involving one or more common questions of fact." 28 U.S.C. § 1407(a). The same rules of procedure apply in MDLs as in all other federal litigation. As in all litigation contexts, district courts use their discretion to fairly and efficiently resolve cases. *See generally* Fed. R. Civ. P. 1; 28 U.S.C. § 1407(b).

The management of massive numbers of suits is one of the greatest challenges the federal judiciary faces. There are simply too many cases to hold individual trials. One way to achieve the goals of the justice system is for judges to use bellwether trials. Giving bellwether trials some issue preclusive effect preserves the jury trial right while also

conserving scarce judicial resources. *See* Alexandra D. Lahav, *Bellwether Trials*, 76 Geo. Wash. L. Rev. 576, 577–78 (2008).

A. Judges use bellwether trials to produce information about key issues in the litigation

Bellwether trials serve multiple purposes. Historically, parties have used bellwether trials to form expectations about potential settlement amounts. *See* Judge Eldon E. Fallon, *Bellwether Trials*, 89 UMKC L. Rev. 951, 952 (2021) (describing information obtained in bellwether trials). But this is not their only purpose. Individual trials can determine the fate of a litigation.

Ordinarily, the process for selecting bellwether trials proceeds as follows. Judges select a slate of cases for expedited discovery and allow defendants and plaintiffs to choose a number of those cases (often, six) to proceed as initial bellwether trials. *See* Alexandra D. Lahav, *A Primer on Bellwether Trials*, 37 Rev. Litig. 185, 191 (2018); Fallon, J., *Bellwether Trials*, *supra*, at 953. That was the process used here. *See* DMO34, R.MDL5285, PageID128541–42 (*In re E. I. du Pont de Nemours & Co. C-8 Pers. Inj. Litig.*, No. 2:13-MD-2433, 2019 WL 6310731, at *6–7 (S.D. Ohio Nov. 25, 2019)).

Plaintiffs will typically select the cases that are most likely to result in a verdict in their favor, and defendants will do the same.[3] Although not ideal, this process provides information about outlier cases. With some assumptions, lawyers can use information from plaintiffs' and defendants' best cases to create a matrix of claim values, which can be translated into settlement offers.[4]

B. Bellwether trials can also resolve common issues in an MDL

Mass tort actions "are often characterized by a combination of issues, some that may lend themselves to group litigation (such as the history of a product's design) and others that require individualized presentation (such as the circumstances of individual exposure, causation, and damages)." Manual for Complex Litigation, Fourth, § 22.1 (2004). Common issues, those that "lend themselves to group litigation"

---

[3] While some scholars have advocated that bellwether cases should be randomly selected rather than chosen by the parties, judges have largely rejected this approach. *See* Lahav, *A Primer on Bellwether* Trials*, supra*, at 195–96.

[4] If one assumes a symmetric distribution, outlier cases can be used to calculate the value of all the cases in the litigation. *See* Edward K. Cheng, *When 10 Trials Are Better Than 1000: An Evidentiary Perspective on Trial Sampling*, 160 U. Pa. L. Rev. 955, 964 (2012).

are those amenable to the same answer for every plaintiff. Depending on context, these might include whether the defendant owes a duty, whether the defendant should have foreseen that harm could be caused by its actions, general causation (*e.g.*, whether a drug or chemical is capable of causing a particular adverse effect), or the proper interpretation of a generally applicable settlement agreement. For example, suppose a case involved the question of whether a chemical has a tendency to cause a particular cancer at or above a particular exposure level.[5] The question of general causation, whether the chemical has this tendency *in general* is a question common to the group. By contrast, the question of whether something else might have caused *this* plaintiff's cancer is one of specific causation. The court below specified that the defendant would still be allowed to contest specific causation at trial. *See* DMO34, R.MDL5285, PageID128536 (*In re E. I. du Pont de Nemours & Co. C-8 Pers. Inj. Litig.*, 2019 WL 6310731, at *3).

[5] In this litigation the parties convened a jointly-selected independent panel of epidemiologists to determine whether C-8 was capable of causing the linked diseases among class members, and agreed to be held by the findings of that panel. *See* DMO34, R.MDL5285, PageID128535–36 (*In re E. I. du Pont de Nemours & Co. C-8 Pers. Inj. Litig.*, 2019 WL 6310731, at *3).

The purpose of MDL consolidation is to avoid duplicative litigation. *See* Manual for Complex Litigation, Fourth, § 20.131 ("The objective of transfer is to eliminate duplication in discovery, avoid conflicting rulings and schedules, reduce litigation cost, and save the time and effort of the parties, the attorneys, the witnesses, and the courts."). This same goal animates issue preclusion. Indeed, preclusion is already a key concept in MDL practice, albeit not always by that name.

C. MDL judges already use preclusion doctrines or their analogues to resolve mass tort litigation *against* plaintiffs

MDL courts adopt pretrial practices to manage the many cases before them, including master complaints, coordinated discovery, and master summary judgment motions that resolve common issues for all litigants. Decisions related to these practices are adopted on an omnibus basis that affects whether *all* plaintiffs win or lose. To some extent, this system may seem unfair to individual plaintiffs, who are bound by decisions and arguments made by lawyers appointed by the court with whom they have no relationship in cases they do not control. The underlying rationale for applying a functional form of preclusion in MDLs is that if the court has determined that no plaintiff can prove a common

issue then there is no reason for the litigation to proceed. That same rationale is relevant in the context of non-mutual offensive collateral estoppel: in certain circumstances if a defendant *cannot* win on a common issue then there is no reason to relitigate that issue. MDL plaintiffs are regularly barred from relitigating common issues once a judge has issued a final judgment that binds the MDL litigants. *See* William B. Rubenstein, Newberg on Class Actions § 18:47 (5th ed.) ("Some MDLs generate final judgments, for instance, through a summary judgment dismissal."); *see also* Manual for Complex Litigation, Fourth, § 20.132 ("Although the transferee judge has no jurisdiction to conduct a trial in cases transferred solely for pretrial proceedings, the judge may terminate actions by ruling on motions to dismiss, for summary judgment, or pursuant to settlement, and may enter consent decrees." (citation omitted)); *id.* (noting that for cases transferred after the initial transfer of cases to the MDL judge, "rulings on common issues—for example, on the statute of limitations—shall be deemed to have been made in the [later-transferred] action").

Examples of dispositive motions resolving an entire litigation or claim against plaintiffs over a "common issue" in an MDL include *In re Zofran (Ondansetron) Products Liability Litigation*, 1:15-MD-2657, 2021

WL 2209871 (D. Mass. June 1, 2021), where the district court's grant of defendant's motion for summary judgment on federal preemption ended the litigation, and *In re Mirena IUD Products Liability Litigation*, 713 F. App'x 11 (2d Cir. 2017), where the district court's *Daubert* ruling ended the litigation. *See also In re Agent Orange Prod. Liab. Litig.*, 517 F.3d 76 (2d Cir. 2008) (barring claims based on government contractor defense). These summary judgment determinations resolved the litigation in defendant's favor with respect to every action in the MDL, despite the fact that each action was a separately filed suit with its own docket number.

A ruling barring offensive non-mutual collateral estoppel would call this system into question. Permitting preclusion to apply regularly in a manner that constrains many plaintiffs, but prohibiting offensive collateral estoppel when it benefits them raises fairness and reciprocity concerns. The rules do not contemplate a regime where defendants may relitigate any issue in each individual case, while plaintiffs can be precluded *en masse* with a dispositive order.

D. Whether bellwether trials can be given preclusive effect depends on context

When and under what circumstances issue preclusion is fair and efficient can only be determined in a flexible, case-by-case manner in line with *Parklane*. Bellwether trials can be given preclusive effect in cases where the issue to be decided is common to the litigants, the process for selecting cases has been fair, and the judge concludes that future trials will lead to the same outcome.

1. Common issues are good candidates for issue preclusion

Common issues that are general to all plaintiffs, such as whether a duty is owed or general factual findings that may go to breach or causation are good candidates for issue preclusion because they are the same across litigants. *See, e.g.*, *Bifolck v. Philip Morris USA Inc.*, 936 F.3d 74, 82 (2d Cir. 2019) (noting that general factual findings about defendant's knowledge and conduct can be issue preclusive). When applying non-mutual issue preclusion to common issues, however, due process requires that judges take into account relevant fairness considerations.

The most important of the factors articulated in *Parklane* and the Restatement in the MDL context are: (i) the risk of inconsistent

judgments on the issue, (ii) the availability of new scientific evidence, and (iii) whether one party had an unfair advantage in picking the bellwether cases.

First, it is important to consider to what extent the judge, having heard the evidence, believes that there is likely to be disagreement among subsequent juries. *See* Restatement § 29(4). Because judges and juries agree on liability issues most of the time, however, it is very likely that a judge's evaluation after having seen cases to trial will be predictive of future jury decisions. *See* Valerie P. Hans & Neil Vidmar, *The Verdict on Juries*, 91 Judicature 226, 227 (2008) ("[I]n systematic studies spanning five decades, we find that judges agree with jury verdicts in most cases.").

A second important issue for the judge to consider is the availability of new evidence that calls the previous trial findings into question. *See Herrera v. Wyoming*, --- U.S. ---, 139 S. Ct. 1686, 1697 (2019) (collecting cases that note that "changed circumstances" such as changes in law or fact can be grounds for declining to exercise issue preclusion). As a general rule, bellwether trials should not be preclusive when new

evidence comes to light that would significantly alter the outcome of a new trial. There is no allegation of such change in law or fact here.

Finally, the bellwether selection process must be fair.

Other concerns about potentially unfair application of non-mutual offensive collateral estoppel are less relevant to the MDL context. Ensuring that defendants have had a full and fair opportunity to litigate an issue, for instance, is less applicable in MDLs because the stakes are so enormous, defendants are aware of the magnitude of liability they are facing, and they have strong incentives to vigorously litigate every single case. Similarly, the concern that subsequent plaintiffs may adopt a "wait and see" attitude, or attempt to gain a procedural advantage by entering the litigation at a later stage, is not relevant in a case like this one where all the plaintiffs' cases are already before a single court.

2. The number and selection process of bellwether trials needed for issue preclusion to apply is a fact-intensive inquiry

A more difficult issue in the MDL context is how many trials are enough to permit preclusion and how cases ought to be selected for trial. To understand this issue, and to clarify why a large number of randomly selected cases is not always needed in order to satisfy due process and

yield an accurate outcome, a short description of statistical methods is useful.

Imagine that you have an opaque urn filled with marbles. If all the marbles are the same color, you only need to pull one out to predict the rest of the contents of the urn. Common issues are like an urn that is filled entirely with black marbles: you only need one trial to know the outcome of the rest of the cases. By contrast, for individualized questions that vary among litigants, such as specific causation or damages, a larger sample is needed. Those issues are more like an urn filled with marbles of many colors and raise more complex questions of sampling methodology. Statisticians have reliable methods for determining how many marbles one would need to randomly select in order to obtain reliable information about the contents of the urn.[6] Depending on the situation, these methods can be used at trial to extrapolate from a sample to the class as a whole. *See Tyson Foods, Inc. v. Bouaphakeo*, 577 U.S.

[6] Statistically, the sample size required to get good confidence on the truth should be much smaller on dichotomous questions (such as whether a chemical has a tendency to cause cancer or not) than on more subtle questions with more wide-ranging possible answers (such as damages).

442, 455 (2016) (holding that use of statistical evidence is context dependent). But those more complex questions are not relevant here.

For purposes of this appeal, this discussion translates into the following insight: the number of trials needed to determine with reasonable accuracy a particular issue depends on the likely variance of jury outcomes with respect to that issue. For common issues where there is a single answer, even one trial could produce an accurate outcome. Thus, for example, in *In re Chevron U.S.A., Inc.*, 109 F.3d 1016 (5th Cir. 1997), while the appellate court rejected an ambitious bellwether trial procedure intended to extrapolate determinations of liability and damages from 30 trials to 3000 plaintiffs, the Fifth Circuit recognized that "in appropriate cases common issues impacting upon general liability or causation may be tried standing alone[,]" but cautioned that the procedure used must be "reasonably calculated to reflect the results that would be obtained if those claims were actually tried." *Id.* at 1020. In contrast to *Chevron*, the district court's approach here was cautious. There is no proposal here that overall liability and damages be determined by bellwether trials.

There are reasons not to rely on a single jury verdict to determine common issues for all cases in an MDL. One primary concern is that the pressure created by reliance on a single trial can distort the legal process by creating an inexorable pressure on defendants to settle. *See generally Matter of Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1299 (7th Cir. 1995). The American tradition has been to hold decentralized trials, under different legal standards, all over the country. The rise of MDL consolidation has changed that. Low-stakes local trials are simply not an option once litigation has been transferred. Only two percent of cases ever return to their home district. Fallon, J. *Bellwether Trials*, *supra*, at 951 (citation omitted). The result is that each bellwether trial becomes high stakes.

A second concern is about potential bias, stemming from the possibility that a particularly sympathetic plaintiff could sway the jury to find for a plaintiff on a common issue in a case where it might not otherwise. Parties may try to manipulate the process by picking off their opponent's cases (through settlement or voluntary dismissal). Allowing a case selected by the defendant and a case selected by the plaintiff to go forward alleviates this concern. If the two cases come out differently, then

that inconsistency counsels against preclusion. But if both cases come out the same way, the fact that defendants could not prevail in their chosen case would weigh in favor of allowing subsequent plaintiffs to invoke non-mutual offensive collateral estoppel. That is what occurred here. When each side has had the chance to fully litigate a case that was best for them, non-mutual offensive issue preclusion can be an appropriate streamlining procedure.

In sum, as few as two bellwether trials could satisfy due process for issue preclusion purposes if each party had the opportunity to select a case to go to trial and present their evidence in full. Whether that number is sufficient depends on the particular context.

3. A general verdict can be issue preclusive if the plaintiff's win is dependent on proving that issue as a predicate to success

A final consideration in applying collateral estoppel to bellwether trials is whether the verdict is sufficiently informative of the issue to be precluded. This is derived from the requirement that the issue to be precluded be necessary to the judgment. *See* Wright, Miller & Cooper, 18 Fed. Prac. & Proc. Juris. § 4421 (3d ed.). In interpreting this requirement, a court should consider whether the issue was recognized as important

by the parties and as necessary by the court in the first litigation, and whether the second litigation was reasonably foreseeable. Restatement § 27, comment j. In a case where the issue to be precluded is a predicate to plaintiff's success, then general verdicts can be the basis for collaterally estopping further litigation. Whether to utilize general or special verdicts is at the district court's discretion. *See* Fed. R. Civ. P. 49.

A finding that the issue was necessary to the judgment can sometimes be a problem where the scope of the jury's finding is impossible to know. That is an argument raised by Defendant-Appellant DuPont here. *See* Br. of Def.-Appellant E. I. du Pont de Nemours and Company ("DuPont Br."), ECF No. 31, at 19, 24–27. For example, where different theories of negligence were tried, and the verdict was a general verdict, this militates against issue preclusion. *See, e.g.*, *Dodge v. Cotter Corp.*, 203 F.3d 1190, 1197 (10th Cir. 2000) (holding that an issue cannot be given preclusive effect where "it is not possible to know the compass of the [first] jury's finding of negligence"). The fact that there is a general verdict should not be a barrier to preclusion when the issue is a predicate to plaintiff's success. *See, e.g.*, *Ashe v. Swenson*, 397 U.S. 436, 444 (1970) (noting in the context of a criminal proceeding that where a previous

judgment is based upon a general verdict a court should "examine the record of a prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter, and conclude whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration" (citation and internal quotation marks omitted)). Whether the defendant owed a duty of care is an example of such a predicate issue.

III. A CATEGORICAL RULE AGAINST THE APPLICATION OF NON-MUTUAL OFFENSIVE COLLATERAL ESTOPPEL IN MASS TORT MDLS IS INCONSISTENT WITH PRECEDENT

In this appeal, both Defendant-Appellant DuPont and *Amicus Curiae* Chamber of Commerce urge this Court to adopt a categorical rule that non-mutual offensive collateral estoppel cannot be used in mass tort litigation. *See* DuPont Br. at 19; Br. of Amicus Curiae Chamber of Commerce of the United States of America ("Chamber Br."), ECF No. 34, at 2, 5. Such a rule would be fundamentally inconsistent with the holding of *Parklane*. *Parklane* unequivocally rejected bright-line rules. *Parklane*, 439 U.S. at 331 ("[T]he preferable approach . . . is not to preclude the use of offensive collateral estoppel."); *accord In re Air Crash at Detroit Metro. Airport*, 791 F. Supp. 1204, 1214 (E.D. Mich. 1992) ("[T]his court has

rejected [the party's] contention that collateral estoppel should not be applied in mass disaster litigation."), *aff'd sub nom. In re Air Crash Disaster*, 86 F.3d 498 (6th Cir. 1996).

A footnote in *In re Bendectin Products Liability Litigation* ("*Bendectin*"), 749 F.2d 300 (6th Cir. 1984)—a case about a different issue—erroneously stated that *Parklane* had "explicitly stated that offensive collateral estoppel could not be used in mass tort litigation." *Id.* at 305 n.11.[7] But the Supreme Court in *Parklane* unambiguously rejected this approach. The Court stated directly that the doctrine of non-mutual offensive collateral estoppel was discretionary, to be decided in context and upon consideration of case-specific factors. *Parklane*, 439 U.S. at 331 (stating that the "preferable approach" is "not to preclude the use of offensive collateral estoppel, but to grant trial courts broad discretion to determine when it should be applied").

Consistent with *Parklane*, courts have rejected such a blanket approach, including courts in this Circuit. *See In re Air Crash at Detroit*

[7] *Bendectin* was an altogether different case than this one. At issue in the opinion cited, was whether to issue a writ of mandamus over a class certification order. Offensive issue preclusion was not under consideration in the case. *See Bendectin*, 749 F.2d at 305.

Metro. Airport, 776 F. Supp. 316, 325 (E.D. Mich. 1991) ("The contours of when offensive collateral estoppel would be unfair — even in mass tort litigation — should be developed on a case-by-case basis."). Courts do, in appropriate circumstances and in deference to fairness concerns, sanction the application of non-mutual offensive collateral estoppel in mass tort contexts. *See, e.g.*, *Bifolck,* 936 F.3d at 77–78; *In re Methyl Tertiary Butyl Ether (MTBE) Prod. Liab. Litig.*, No. 1:00-1898, MDL 1358, 2007 WL 1791258, at *4 (S.D.N.Y. June 15, 2007); *In re Air Crash at Detroit Metro. Airport*, 776 F. Supp. 316.

The *Parklane* decision and Restatement factors should be applied to MDLs just as they are to other types of litigation. A straightforward application of the existing legal standards is all that is needed in order to reach a fair and efficient decision concerning the application of non-mutual offensive collateral estoppel. Courts already have the necessary tools to determine when issue preclusion is fair.

CONCLUSION

The use of offensive non-mutual collateral estoppel can promote the fair and efficient resolution of complex litigation. It is also consistent with Supreme Court precedent and sound public policy. Accordingly, the well-

considered use of this doctrinal tool should not be categorically barred in mass tort MDLs.

Dated: September 17, 2021

Respectfully submitted,

/s/ Alison Borochoff-Porte
Alison Borochoff-Porte
POLLOCK COHEN LLP
60 Broad St., 24th Floor
New York, NY 10004
Alison@PollockCohen.com
(646) 827-6259

Gary A. Davis
DAVIS & WHITLOCK, P.C.
21 Battery Park Ave., Suite 206
Asheville, NC 28801
(828) 622-0044
gadavis@enviroattorney.com

Counsel for Amici Curiae
Law Professors

CERTIFICATE OF COMPLIANCE

1. This Brief complies with the type-volume limit of Federal Rule of Appellate Procedure 29(a)(5) because it contains 5277 words, excluding words exempted by Federal Rule of Appellate Procedure 32(f) and 6th Circuit Rule 32(b)(1).

2. This Brief complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it was prepared in a proportionally-spaced typeface using Microsoft Word in Century Schoolbook, 14-point font.

/s/ Alison Borochoff-Porte
Alison Borochoff-Porte

CERTIFICATE OF SERVICE

I hereby certify on this 17th day of September 2021, the foregoing Brief of *Amici Curiae* Law Professors in Support of Plaintiffs-Appellees Travis and Julie Abbott and Seeking Affirmance of the District Court was filed electronically via CM/ECF. All parties to the case are registered CM/ECF users and will receive notice of the filing.

/s/ Alison Borochoff-Porte
Alison Borochoff-Porte