In the Supreme Court of Florida

CASE NO. SC00-490

JOHN CASTILLO, a minor by and
through his mother, next friend and
natural guardian, DONNA CASTILLO, and
DONNA CASTILLO and JUAN CASTILLO, individually,

Petitioners,

v.

E.I. DU PONT DE NEMOURS and COMPANY, INC.
and PINE ISLAND FARMS, INC.

Respondents.

ON DISCRETIONARY REVIEW FROM THE
THIRD DISTRICT COURT OF APPEAL

RESPONDENT'S BRIEF ON THE MERITS

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CERTIFICATE OF TYPE SIZE AND STYLE

Respondent is utilizing a 14 (fourteen) point Times New Roman font.

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I. INTRODUCTION AND OVERVIEW[1]

John Castillo is a 5-year old boy born with a birth defect. He was born essentially without eyes. His parents brought this action alleging that his tragic condition was caused when his then pregnant mother was allegedly exposed to a spray cloud that drifted over her from the FARMER'S "u-pick" vegetable field in south Dade County. The Castillo's alleged that the cloud contained Benlate, a fungicide used to control fungus on certain agricultural plants. Du Pont manufactures Benlate.

The FARMER denied that it had used Benlate on the days in question. Both the FARMER and Du Pont denied a causal relation between Benlate and the birth defect.

The Castillo's "story" of the alleged spray incident

[1/] The Respondent, Appellant, Defendant, Pine Island Farms, Inc. shall be referred to as "the FARMER". E.I. Du Pont de Nemours & Company Inc., shall be referred to as "Du Pont". Citations to the record shall be "R._"; citations to the trial transcript shall be "Tr._". All emphasis is supplied unless otherwise indicated.

changed substantially several times before and during trial. However, what remained constant was that the case was completely devoid of any direct evidence of the *actual use* of Benlate on the day of the alleged incident. Therefore, in their flawed attempt to establish an exposure to Benlate, the Castillo's relied wholly upon speculation and conjecture. This involved a pyramid of several layers of unreasonable and impermissible inferences heaped upon yet other unreasonable and impermissible inferences.

The Castillo's then made an ill-fated attempt to demonstrate, "scientifically", that Benlate was the cause of John's birth defect. The Castillo's relied *exclusively* upon the opinion of a pathologist, who used this impermissible pyramid of inferences as his foundation. Upon this unstable foundation, he constructed an unsound theory of causation. In fact, his theory changed substantially from deposition to trial (e.g.

breathed into the lungs became absorbed through the skin). He used rat studies not applicable to humans, which involved force-feeding massive amounts of Benlate. He combined the studies with meaningless litigation-driven tests in which human tissue in lab dishes was literally soaked in Benlate for 24-hour periods.

This parlay of "proofs" involved *a methodology never before (or since) used or accepted by the scientific community*, and a resulting series of unreasonable conclusions. The Trial Court submitted the emotionally charged case to the jury, which awarded the child $4 million. Of the award, 99.5% was attributed to Du Pont, and 0.5% to the FARMER. The District Court of Florida, Third District, agreed with the FARMER, and reversed the case for entry of judgement in favor of the FARMER and Du Pont.

II. STATEMENT OF THE CASE

Mr. and Mrs. Castillo brought an action against the

FARMER and DuPont for themselves, and their five-year old son, John. The Castillo's alleged that John was born with abnormally small eyes (microphthalmia) as a result of Mrs. Castillo's alleged exposure to the agricultural fungicide Benlate on November 1st or 2nd, 1989. She was then six weeks pregnant with John. (R.34-48). The Castillo's claim was ***originally*** predicated on allegations that the FARMER, sprayed Benlate on ***strawberries*** during ***aerial spraying***, and missed**.** (R.34-48). The claim 'morphed' over several years. ***Eventually*****,** they claimed that Benlate drifted across the street during ***tractor spraying*** of ***tomatoes***.[2]

Prior to trial, the FARMER filed a Motion for Summary Judgment. (R.1407-25). It argued a lack of evidence that the alleged cloud contained Benlate. The undisputed facts clearly showed that the FARMER possessed no Benlate to spray on

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[2] The metamorphosis of Mrs. Castillo's "story" paralleled the changes in her expert's theories. It is chronicled more fully below.

November 1st or 2nd, and no tomatoes upon which to spray it. Despite these facts, the Trial Court denied the motion. (R.3588).

Both the FARMER and Du Pont filed a number of motions designed exclude impermissible evidence. The FARMER sought to exclude the testimony of the Castillo's causation witness Dr. Howard (R.2494-2531, 2744-45). This was based upon the principles of *Frye*[3]. The motions also related to evidence of other farmers and farming years. (R.3611-13). The Trial Court denied the *Frye* motion, and deferred on the 'other' farming.

A jury trial ensued. As expected, no one testified that the alleged cloud contained Benlate. Dr. Howard testified as the Castillo's *sole* witness on causation. The FARMER moved for a directed verdict. (R.3854-66). Again, the FARMER argued the absence of evidence of either exposure to Benlate, or 'scientific' causation. (Tr.4498). The Trial Court denied the motion then,

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3/ *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923).

and again at the close of evidence. (Tr.5253). Post-trial motions (R.8814-8977) were denied (R.8813). The FARMER appealed to the Third District Court of Appeal.

The District Court correctly reviewed the "scientific" evidence *de novo* and concluded that the scientific *methodologies and principals* utilized by the Castillo's 'expert' were not generally accepted. It could not pass muster under a proper *Frye* and *Ramirez* analysis. The District Court concluded that the "scientific" evidence should have been excluded.

The District Court also concluded that as to Du Pont, the evidence was insufficient to establish that Mrs. Castillo was actually sprayed with Benlate. But the District Court held that as to the FARMER, the evidence *was* sufficient to establish that Mrs. Castillo was actually sprayed with the chemical.

The Castillo's filed for rehearing in the District Court. The FARMER also filed a Motion for Rehearing. The FARMER

argued that there was no competent evidence that Mrs. Castillo had been sprayed with Benlate. The Motion stated that the District Court's inconsistent finding as to the issue was a misapplication of law and/or misapprehension of fact. The FARMER's motion was not formally disposed of. The FARMER waives no rights thereto. In fact, the FARMER asserts the position of its Motion herein.

III. STATEMENT OF THE FACTS

1. HOW THE FARM OPERATES

A. THE FARM

The location at which Mrs. Castillo claims she and her six-month old daughter, Adriana, were sprayed was a so-called "u-pick" strawberry and tomato field operated by the FARMER("The U-PICK"). It is across the street from a small shopping center located on S.W. 137th Avenue, south of Kendall Drive. (R.901, 904, 982). This was but one of several agricultural fields operated by The FARMER. It represented but

a fraction of the FARMER's total acreage(7 of 200 total acres). (Tr.1119-1121, 2595). The vast majority of The FARMER's acreage consisted of much larger commercial fields in deep south Dade County. (Tr.1119-1121, 2595).

2. THE FARMING SEASON

The 1989/1990 farming season ran from August 1989 through the end of May or beginning of June 1990. (Tr.1081, 3366). In August/September 1989 the FARMER began to clear his fields for the 1989/1990 farming season. (Tr.3366). Several clearing efforts were required at each field to properly prepare the earth for the planting.(Tr.3366).

Between October 3 and 13 of 1989, the FARMER began to create the rows at the U-PICK, cover them with plastic, and apply fertilizer as well as a special pre-planting pesticide, methyl bromide[4]. (Tr.1310-12). Delivery documents from the plastic/fertilizer company, A.F.E.C., establish this undisputed fact. (T.E. "L"). After this process no planting could take place for at least 10 - 14 days. (Tr.1319-20). Methyl Bromide is extremely toxic to tender young seedling plants. (Tr.1319-20).

[4] Methyl Bromide is injected under the plastic as a gas. It is not chemically related to Benlate.

3. PLANTING

The FARMER grew strawberries and tomatoes on many of their fields in the 1989/1990 farming season. (Tr.1313)[5]. The FARMER planted strawberries *before* tomatoes, particularly on the u-pick type fields. In fact, strawberries were planted before tomatoes on the U-PICK in October 1989. (Tr.1320-23). The strawberries were planted on the U-PICK on October 25,1989, either six or seven days before Mrs. Castillo claims to have been exposed to spray drift (Tr.1324, T.E."N" & "6"). The FARMER produced a home video, which recorded the *actual planting* of strawberries on the U-PICK. (T.E. "N"). The evidence also included the invoice and delivery documents from the FARMER's California strawberry plant vendor. (T.E. "6"). This undisputed evidence showed that on October 25th, 1989 there were no tomatoes planted on the U-PICK. (Tr.1325, 1329, 2679,2686; T.E."N"). Therefore, the earliest tomatoes could have been planted was later that day, or some days, perhaps weeks, later. (Tr.1318, 1323, 1324).

Accordingly, on November 1st or 2nd, ***when Mrs. Castillo claims to have been sprayed, the tomatoes on the U-PICK, would have been, at most, 6 or 7 days post planting.***

4. BENLATE APPLICATION

Benlate is not applied to tomato plants until their first bloom 4-6 weeks after planting. (Tr.3474-75, 3558-60). Benlate is not a fungus preventative. It is designed to control fungus on the outside of plants after it first appears. (Tr.3558-60). Fungus on tomato plants does not appear until a first flowering, some 30 days to 6 weeks after planting. (Tr.3558). All farming witnesses testified that ***Benlate is not used on tomatoes for 4-6 <u>weeks</u> after planting*** even then, not unless fungus is present.[6] The FARMER's employees specifically stated that Benlate was not on <u>its</u> tomatoes for 4-6 weeks after planting (Tr.1090, 1333; Tr.2857).

The first *possible* need to use Benlate at the U-PICK, could not have occurred until November 24 at the earliest. (Tr. 3474, 3559, 3567, 3596, 3597, 3610). That is 22 or 23 days <u>after</u> Mrs. Castillo's claimed exposure to the mystery cloud. Regardless of whether there ever was such a cloud, it certainly could not have contained Benlate.

5. FARMER'S STORAGE

The FARMER did not have Benlate in stock on November 1st or 2nd, 1989. Prior to November 1st or 2nd, 1989, the FARMER's last purchase of Benlate, was on May 4th, 1989 towards the end of the prior season. In May 1989 it purchased a small quantity (12 lbs.) (Tr.1083, T.E.20; Tr.1302). This was only enough for a single application upon approximately 12 of the FARMER's 200 acres. (Tr.3602). Some fields were still producing tomatoes that late in the season. (Tr.1081-82). These 12 pounds of Benlate were used in May 1989 before the end of that growing season.(Tr.1083,Tr.1302). When the season did end, in June, all of the FARMER's unused chemicals were returned to the vendor for credit. (Tr.1302, 1306,1307, 2866, 2868, 3608). The FARMER's next purchase of

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[5] Since 1985, Benlate had been used only on tomatoes. It was no longer used on strawberries. (Tr.1301-02). When Mrs. Castillo realized this, it required the change in her story.

[6/] Specifically: Chemical salesmen (Tr.3610), university agriculture professors (Tr.3560), the FARMER's employees (Tr.3475; Tr.1090, 1333; Tr.2857).

Benlate was 60 pounds purchased on December 19, 1989. (Tr.1339, 3594, T.E.20). That was more than 6 weeks after Mrs. Castillo claims to have been sprayed.

B. MRS. CASTILLO'S VERSION(S) OF THE SPRAYING EVENT

Neither Mrs. Castillo, nor any other witness, expert or otherwise, called by any party, testified that The FARMER was spraying Benlate when Mrs. Castillo claims to have been sprayed or that the alleged "foggy mist" contained Benlate.

1.THE TRIAL VERSION

Mrs. Castillo testified at trial that on the day she encountered the mysterious cloud, she was walking with her first child Adrianna in a stroller, she was dressed in shorts and a sleeveless maternity tank-top shirt, and she knew she was pregnant. (Tr.889, 905, 910). She states that it was a windy day, and that the wind was blowing toward her from the direction of the U-PICK. (Tr. 905, 910). She saw the tractor "bucking and jerking" with "tons of this foggy, cloudy misty spray blowing and coming out of it" while she was on the other side of the service station. (Tr.1033-34). She believed it to be an agricultural spray. (Tr.1037-38). Yet, she walked around the station to get closer to it! (Tr.1033-34). She recalled pushing the stroller to the front of the filling station, right to the edge of 137th Avenue, and then watching the tractor "bucking and jerking" with "tons of this foggy, cloudy misty spray blowing and coming out of it" (Tr.907, 908, 914, 1005).

She recalled that the tractor's spray was directed not at the farm, but away from the field and toward the busy street and the shopping center where she stood pregnant and with her six-month-old baby. (Tr.989, 908, 997). She recalled being "mesmerized", essentially transfixed there for two to three minutes, "staring at the spray" while she and her six-month baby were drenched "like you went outside in the rain." (Tr.910-11, 996-1000).

Mrs. Castillo remembered, however, that she did not shower, nor bathe her baby, Adrianna, until the next day. (R.7650). Mrs. Castillo testified that she had no skin or eye irritation from the mist to which she was allegedly exposed, and experienced no difficulty breathing. (Tr.1007-08). Mrs. Castillo's husband testified that Mrs. Castillo had mentioned the incident to him on the evening it occurred out of concern about the effects of the mist on their unborn child. (Tr.4092). Yet, she was forced to admit that, at her next regularly-scheduled appointment with her obstetrician several days later, she made no mention of the drenching incident (Tr.1006) as her obstetrician's notes do not reflect any mention of it.

2. THE DEPOSITION VERSION(S)

Mrs. Castillo's deposition was taken over three sessions prior to trial. In the two sessions conducted in October 1993, she described a tractor enveloped in a foggy mist **on (not off)** the U-PICK. (Donna Castillo depo. 1/21/93 at 147). She

believed that some of the mist must have drifted over toward her, but she made no mention of being wet from the alleged cloud. (id. at 146-48, 202-05). When asked in the deposition whether any of that mist got on her skin, she replied: "I don't know. I can't say for sure". (id. at 203). She was asked whether she remembered "being sprayed physically so that you felt it on your skin" and she answered: "No, I don't remember that". (id. at 204).

Mrs. Castillo's third deposition session took place 2½ years after the prior sessions, more than six years after the alleged incident, and after the deposition of her expert, Dr. Howard, had been completed. Mrs. Castillo's recollection changed significantly from her prior testimony, receding from the version needed for her expert's inhalation theory, and creating a "factual basis" for his more recently fabricated skin absorption theory espoused at trial. In this third deposition session, now just three weeks before the trial, Mrs. Castillo, for the first time recalled:

> "as I got around the [gas station] pump area I felt wet sprinkles hit my body, on my head, my arms and my shoulders, and I just figured it must have been a sun shower...I assume she [daughter, Adriana] got wet, because I got wet... I remember seeing sprinkles. I mean, it was a wet -- I was very wet, moist wet all over my face, my head, my shoulders, my arms, my legs, very wet..."

(R.7622-23, 7636-37)

> Q:How long after you made the realization that you were getting wet from an agricultural spray did you then move back to the overhang area?

A:A couple of minutes.
(R.7674)

C. THE POST EVENT CONDUCT

John was born on June 15, 1990. (R.889). At the time of his birth, Mrs. Castillo did not consider there to be any connection between his birth defect and her exposure to the alleged cloud during her pregnancy. She made no mention of the incident to any of John's physicians even after John was born without eyes.

In May 1993, about three years after John was born, Mrs. Castillo received a call from John Ashton, a British reporter trying to establish a link between microphthalmia and agricultural sprays in England. (Tr.917, 918, 919, 1052, 1684). He inquired whether she had a child born with microphthalmia, and whether she lived in a farming area -- advising Mrs. Castillo that he suspected a connection between the fungicide Benlate and microphthalmia. (Tr.918). Mrs. Castillo first said that she did not live near a farm. (Tr.1046). In the course of four conversations with Ashton, Mrs. Castillo told him that there was a "u-pick" produce field near her home. She never told Ashton that she had been sprayed; rather, she told him that her only contact with the field was that she had picked strawberries there at one time. (Tr.1046, 1052, 1703-04).[7]

[7/] In the second session of her deposition she denied ever picking strawberries on The U-PICK. (Donna Castillo 10/26/93 deposition at 292).

At trial, Mrs. Castillo attempted to explain away the fact that Mr. Ashton's notes and testimony clearly showed that she made no mention of this supposed drenching incident. (Tr.1703-04). She explained that it was not until later in May 1993, well after her conversations with Ashton, that she saw a television commercial which showed a tractor spraying a farm and said to her husband: "remember the time I told you about the tractor spray. . . .". (Tr.920-21).

But three months after speaking to Mr. Ashton, she filed a complaint, in July 1993, alleging an aerial spraying of strawberries. (R.34-48). Then, nearly a year **after** the remarkable television induced recollection, Mrs. Castillo answered an interrogatory question regarding how the incident occurred. In her response, she said nothing about a tractor or a drenching, merely stating that she occasionally walked past the strawberry farm a few times. (Tr.5078). Apparently, her trial testimony had not yet been concocted to conform to the "expert" opinion of Dr. Howard, which also had yet to be "created" at the time of the interrogatory response.

IV. SUMMARY OF THE ARGUMENT

The District Court correctly ruled that the Trial Court erred in allowing the testimony of Dr. Vyvian Howard, finding that it was not based upon generally accepted scientific methodology, but rather was junk science, contrary to all respectable scientific testimony.

The District Court correctly concluded that the Trial Court committed reversible error in allowing the case to be submitted to the jury on speculation, and an impermissible stacking of inferences as to Dupont, and should have extended the conclusion to the FARMER, but erroneously did not. Each of the foundational inferences, upon which others were stacked, were not proven to the exclusion of other reasonable competing inferences.

The court deprived the FARMER of a fair trial by allowing the jury to be misled by an incomplete and improper reading of its responses to requests for admissions. The FARMER was deprived of a fair trial by the admission of confusing and misleading evidence of what other farmers do in other years on other fields with other crops, and other chemicals. The plaintiff exploited the court's errors, using the impermissible inferences and irrelevant evidence in tandem to fashion misleading and improper jury arguments.

V. ARGUMENT

A. THE DISRTICT COURT CORRECTLY CONCLUDED THAT THE TRIAL COURT ERRED IN ALLOWING PLAINTIFF'S EXPERT ESTIMONY

1. FRYE APPLIED CORRECTLY

Plaintiff's causation expert, Dr. Vivyan Howard, was not qualified under Florida law to testify on the causation of birth defects, nor was his methodology generally accepted in the scientific community. As such, his testimony should have been excluded. Without his testimony, plaintiff's judgement cannot stand.

A generalist physician or scientist is not competent to offer expert testimony in a highly specialized field. *Hayes v. State,* 660 So.2d 257 (Fla.1995); *Ramirez v. State*, 651 So.2d 1164 (Fla.1995); *United Technologies Communications Co. v. Industrial Risk Insurers*, 501 So.2d 46 (Fla. 3rd D.C.A. 1987). Dr. Howard is a pathologist, not specializing in the complex field of teratology, the study of the cause of birth defects.

The standard for admissibility of expert testimony regarding a new or novel conclusion is set forth in *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923). The Florida Supreme Court has adopted and applied *Frye* to preclude litigants from confusing a jury with "junk science". *Hadden v. State*, 22 F.L.W. S55 (Fla. Feb. 6, 1997); *Ramirez*, supra. In order to be admitted, the conclusion must be based on a methodology "generally accepted" in the relevant expert field, here, teratology.

Dr. Howard's methodology is not generally accepted. The Court however did accept it by applying an incorrect standard. The court stated:

> "Well, I'm still a little confused since I'm the one who has to make the decision on this. This is not like the jury.
>
> This is something like the hearing I had before you even came in, which was a probable cause hearing.
>
> There is probable cause for me to let this in. In other words, if I believe that science is reliable and the jury -- it would assist the trier of fact, in Frye, I'm going to let it in...
> (Tr.51)

> ...I have to tell you I find it a human teratogen too, so you are really going to have a problem. I don't know what it is in levels, but I'm going to tell you that if it's a rat teratogen, most probably it's a human teratogen, and I'm going to make that quantum leap."
> (Tr.68).

The FARMER presented the court with affidavit and deposition testimony of a leading teratologist, Dr. Lewis Holmes, chairman of genetics and teratology at Massachusetts General Hospital, Harvard University Medical School (R.3106-10, 3159). Dr. Holmes scoffed not only at Dr Howard's conclusions, but more importantly at the "methodology" used to reach them. (R.3109-10). So did Dr. Robert Brent, the only other teratologist to testify. (R.3092-99)

Similarly, and despite the Castillo's protestations to the contrary, the District Court did focus on the more important 'methodology' used by Dr. Howard. The District Court stated:

> "As long as the **basic methodology** employed to reach such a conclusion is sound, such as use of tissue samples, standard tests, and patient examination, products liability law does not preclude recovery until a "statistically significant" number of people have been injured or until science has had the time and resources to complete sophisticated laboratory studies of the chemical. In a courtroom, the test for allowing a plaintiff to recover in a tort suit of this type is not scientific certainty but legal sufficiency; if reasonable jurors could conclude from the expert testimony that paraquat more likely than not caused *Ferebee's* injury, the fact that another jury might reach the opposite conclusion or that science would require more evidence before conclusively considering the causation question resolved is irrelevant."

748 So.2d 1108 at 1120.

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> "*Ferebee* stands for the proposition that courts should be very reluctant to alter a jury's verdict when the causation issue is novel and "stand[s] at the frontier of current medical and epidemiological inquiry." If experts are willing to testify to causation in such situations **and their methodology is sound**, the jury's verdict should not be disturbed."

748 2d 1108 So. at 1120.

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> "Based on the record in this case we hold that plaintiffs' scientific evidence, and the conclusions it embraces, should have been excluded, ***as the methodology used to obtain them is not generally accepted*** in the relevant scientific community."

748 So.2d 1108 at 1121

The issue of Dr. Howard, and his inadmissible "junk science" is being briefed fully in the contemporaneously filed Brief by DuPont. To save judicial effort, and avoid duplicity, the FARMER adopts as it's own those portions of DuPont's Brief addressing the admissibility and effect of Dr. Howard's testimony.

2. No Conflict with *Berry*

Berry holds that so long as contending experts use generally accepted

scientific methodologies, the fact that their conclusions differ goes to the weight of the evidence. See *Berry v. CSX Transportation, Inc.*, 709 So. 2d at 567 ("we hold that, under *Frye* and its Florida progeny, when the expert's opinion is well-founded and based upon generally accepted scientific principles and methodology, it is not necessary that the expert's opinion be generally accepted as well.")

The District Court's decision here does not "expressly and directly" conflict with *Berry*. In fact, it cited *Berry* many times in the opinion. See Pet. App. 15, 16 n.9, 22 n. 1 6, 23. Here, the District Court (just like the *Berry* Court) held that in order to be admissible, the scientific opinion must be based on **methodologies** that are generally accepted in the scientific community. In this case, the Castillo's experts themselves admitted that their **methodologies** were new and therefore not generally accepted. Hence, there is no conflict with the *Berry* rule. It is not admissible, and never reaches the trier of fact.

3. No Conflict with *Mills* or *Gooding*

The scientific evidence put forward by the Castillo's was tested under *Frye* using a preponderance-of-the-evidence standard.[8] The District Court never stated or even implied that a higher standard would be implied. In fact they rejected, by implication, the very notion. See Pet. App.25.

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[8] See Pet. App. 11 ("The general acceptance under the *Frye* test must be established by a preponderance of the evidences) (quoting *Murray v. State*, 692 So. 2d 157, 163 (Fla. 1997)); see also id at 28 (quoting with approval from the application of the preponderance standard in *Merrell Dow Pharms. Inc. v. Havner*, 953 S.W.2d 706, 727-28 (Tex. 1997)).

The Castillo's cleverly attempt to create a conflict here, where none exists. In order to do that they first engage in a confusing and irrelevant discussion of general vs. specific causation, then they take one word out of context. The *Mills* and *Gooding* and *Berry* cases decide causation (specific, general or otherwise) on a preponderance standard. So did the District Court here. The difference is that in *Mills* and *Gooding* and *Berry* the opinion of the experts were all based on generally accepted scientific methodology. The **product** of the methodology (the opinion on causation) need only meet the preponderance standard. But the **methodology** must be generally accepted. The excerpt they cite from *Berry* regarding the epidemiological studies does not show any conflict at all. If the **methodology** is accepted (epidemiological studies are) they need only show causation more likely then not as opposed to absolutely and definitely. In this case, the Castillo's expert's methodology of extrapolation from in vitro directly to human[9] is *by admission* not accepted and therefore the Castillo's did not show causation by any standard.

The Castillo's, in desperation, quote one word, "actually", out of context and ignore specific discussion of the preponderance standard elsewhere in the opinion. Their premise is based on the word "actually" in the following passage:

"The general causation question at issue

9/ See pet. App. 24 citing *Wade-Greaux v. Whitehall Labs*, 874 F.Supp 1441 (D.V.I.), aff'd 46 F.3d 1120 (3rd Cir. 1994).

> addresses whether Benlate has the capacity to cause the birth defect of microphthalmia in humans, and the specific causation inquiry relates to whether Benlate actually caused John Castillo's microphthalmia". Pet. App. 16.

This just does not equate to a higher standard. Read it for what it is: a simple discussion in a 29-page opinion, which sets forth the standard in several other passages.

B. THERE WAS LEGALLY INSUFFICIENT EVIDENCE FOR A JURY TO CONCLUDE THAT MRS. CASTILLO WAS SPRAYED WITH BENLATE

1. *VOELKER* GENERALLY

Not one witness, expert or otherwise, called by any party, testified that the FARMER was spraying Benlate when Mrs. Castillo claims to have been sprayed or that the "foggy mist" contained Benlate**.** Nor was there any evidence of Benlate in the bodies of either Mrs. Castillo or her child. Nor was there any documentary evidence, or photos of the FARMER spraying Benlate - or even having it - on November 1st or 2nd, 1989. Rather, the "evidence" was at best speculation wholly dependent on inadmissible evidence and an impermissible pyramiding of inference upon inference upon inference.

More than forty years ago, the Supreme Court of Florida adopted an evidentiary rule designed to protect against verdicts or judgments based on speculation, or derived from impermissible inferences. One inference cannot be piled on another inference in order to reach the ultimate conclusion necessary to the existence of liability, unless the prior inference is established ***to the exclusion*** of any other reasonable theory. *Voelker v. Combined Insurance Company of America*, 73 So. 2d 403 (Fla. 1954). That restriction on inferences has been routinely applied by this court, and by other district courts of the state. *E.g.*,

Gaidymowicz v. Winn-Dixie Stores, Inc., 371 So. 2d 212 (Fla. 3d DCA 1979) (to use one inference as a basis for another inference, the first inference must outweigh ***all*** reasonable inferences to the contrary); *Asplundh Tree Experts v. Mason*, 22 Fla. L. Weekly D329 (Fla. 1st DCA Jan.31, 1997); *Silver Springs Moose Lodge No. 1199 v. Orman*, 631 So. 2d 1119 (Fla. 5th DCA 1994); *Reaves v. Armstrong World Industries*, 569 So. 2d 1307 (Fla. 4th DCA 1990).

In *Asplundh*, the plaintiff sought compensation for the death of his herd of buffaloes. He alleged that the defendant sprayed a pesticide on a grassy right-of way near the herd. The herd died of catarrhal fever. Plaintiff's expert stated that the grass must have wilted because it contained nitrites, a byproduct of wilting, which nitrites cause stress, which lowers the buffaloes immunity, which allowed the animals to get the fever. The *Asplundh* court held that the evidence was speculative, and constituted an impermissible pyramid of inferences. It reversed the lower court's denial of defendant's motion for directed verdict.

In *Asplundh* the plaintiff "did not establish that any of the buffalo ate the wilted grass [as here plaintiff cannot show she was sprayed with Benlate]; did not establish that the buffalo ingested nitrites in amounts sufficient to cause immuno-suppression [as here, there is no evidence of the amount of Benlate either ingested, or necessary to cause cell death in a live pregnant human being]; and did not establish how the buffalo acquired the fever". The Plaintiff's expert acknowledged

that there were other potential sources of stress to cause immuno-suppression [as here, genetics were unanimously accepted as a potential cause].

As did the Plaintiff's in *Asplundh,* the Castillo's offered no direct testimonial or documentary evidence of Benlate use at the U-PICK on November 1st or 2nd. They instead argued an intricate series of inferences[10] to defeat the FARMER's Motion for Summary Judgement and thereafter, Directed Verdict.

Those inferences, the circumstantial evidence from which they are derived[11], and the equally, if not more reasonable inferences to the contrary are set forth below. Unless the Castillo's desired inference was proven to the exclusion of all alternative reasonable inferences, the court could not allow the case to be decided by the jury.

[10/] The legally insufficient argument, together with an inaccurate and misguided recitation of the record evidence is found on page 4481 - 4491 of the trial transcript. It was repeated to the jury in the closing arguments.(Tr.5320-23).

[11/] Much of the circumstantial evidence used to reach the impermissible inferences, was itself inadmissible as irrelevant, and confusing under F.S. 90.402, 403. See sec. "V.B.2".

2. THE INFERENCES THAT THE FARMER HAD BENLATE ON NOVEMBER 1ST OR 2ND, 1989

The evidence showed that on November 1st or 2nd, 1989 the FARMER had not yet purchased any Benlate during the 89/90 growing season. (T.E.20). The **evidence** showed that The FARMER's last Benlate purchase before the alleged incident was mere 12 pounds[12] back in May, 1989, towards the end of the prior growing season (T.E.20) when the last acres of tomatoes were to be harvested. The Castillo's seek the **inference** that it was not used, but rather was purchased in advance for the next growing season. The equally plausible **alternative inference** is that it was used, as the witnesses in fact testified (Tr.1302), and therefore not available on November 1st, 1989.

The **evidence** showed that The FARMER returned all unused chemicals for credit at the end of the year, and that no Benlate was returned for the summer 1989 off-season. The fact that no Benlate was returned is consistent with the undisputed testimony that it was used. However, the Castillo's elicited **evidence** that *one* of the reasons unused chemicals were returned was to avoid theft. They ignored the other considerations for returns such as return of money and spoliation. They argued that since there hasn't been a theft problem for The FARMER, the FARMER might have kept the chemicals. But, of course, the evidence showed

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[12] / Compared to a purchase of sixty pounds on 12/19/89 more than six weeks after the alleged "drenching incident". (Tr.1339; T.E. 20).

actual returns of items other than Benlate. (Tr.1307, T.E.20). The Castillo's seek an **inference** that since it was not returned, it was saved for the next year. The equally plausible **alternative inference** is that it was used, as testified (Tr.1302), and not available on November 1st, 1989.

The **evidence** showed that the price of Benlate went up one dollar per pound from May 1989 to December 1989. The Castillo's speculated, and sought an **inference** that the FARMER predicted the future price increase and thus pre-purchased twelve pounds, a fraction of the annual usage of Benlate, to save twelve dollars. The equally plausible **alternative inference** is that The FARMER knew nothing of the future price hike, and simply bought what they needed to finish the season, as testified (Tr.1302). Query: why try to save 12 dollars on a 12 pound purchase, when the first purchase alone in the next growing year was sixty pounds, and a single application over the 200 acres of farm land would require over 200 pounds of the chemical?

In sum, the foundational inference that The FARMER had Benlate on November 1st or 2nd (itself a pyramid of inferences) was speculative. Clearly, it was not proven to the exclusion of other competing inferences.

3. THE INFERENCES THAT TOMATOES WERE GROWING ON THE U-PICK ON NOVEMBER 1ST OR 2ND, 1989

The **evidence** showed that The FARMER received staggered shipments of tomato plants throughout the fall of 1989 for planting in various locations, and that The U-PICK would require approximately 10-15 thousand plants. One of the shipments contained 11,412 plants and was received on September 19th, 1989. (Tr.1121-23). The Castillo's seek an **inference** that because this shipment was approximately equal to The U-PICK'S requirements, it was planted on The U-PICK. They then infer that the plants would be six weeks old on November 1 or 2 and therefore ready for treatment with Benlate. The far more reasonable **alternative inference**, and the only one supported by the evidence is that the 11,412 tomatoes were planted on another field, which had been properly prepared. It is an undisputed fact that the rows of The U-PICK were not yet formed, and the plastic and fertilizer not laid (a prerequisite for planting) until October 3rd through 13th, 1989. (Tr.1319-20, T.E."L"). Thus, this shipment of plants could not have been, and was not, planted at The U-PICK in September, 1989. (Tr.2652-53).

For the painfully obvious reasons set forth in the preceding paragraph, the non-speculative, competent evidence showed that there were 4 - 6 week old tomatoes on The U-PICK on November 1st or 2nd. Indeed it is disproved by a clear and convincing standard. Therefore, the Castillo's take an alternative approach.

They acknowledge and accept the unmistakable and conclusive video tape **evidence**, which showed that on October 25th, 1989 there were no tomatoes on The

U-PICK. The Castillo's thus seek the **inference** that since The FARMER could possibly have planted the tomatoes that day or the next, there were one-week-old tomato plants on The U-PICK on November 1st or 2nd. The equally plausible **alternative inference** is that The FARMER planted them in November or even December, the last planting months.

In sum, the foundational inference that tomato plants were growing on the U-PICK on November 1st or 2nd (itself a pyramid of inferences) was speculative. Clearly, it was not proven to the exclusion of other competing inferences.

4. THE INFERENCES THAT THE FARMER USED BENLATE ON NOVEMBER 1ST OR 2ND

Even allowing for the improper speculation that tomato plants as old as one week might have been growing at the U-PICK on November 1st or 2nd, the Castillo's are still faced with an insurmountable obstacle. All farming witnesses[13], called by any party, testified that ***Benlate is not used on tomatoes for 4-6 weeks after planting*** and even then, not unless fungus is present.

Therefore, the Castillo's seek yet another speculative inference. **T**his one is that on November 1st or 2nd, the FARMER sprayed tomato plants, which were at most one week old with a fungicide. But even that is not enough. The Castillo's must seek the additional untenable inference *that the fungicide was Benlate.* To

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[13] / See footnote 6, above.

attempt this argument, the Castillo's distort the record **evidence** testimony of Eddie Sanders (The FARMER's employee) and also Robert McMillian (an agricultural professor called by the Castillo's). Eddie Sanders and Robert McMillian testified that it is *conceivable* that one may apply fungicide to a tomato plant after he first week or two, *but only a manzate*, copper or other topical fungicide (Benlate is a systemic fungicide). (Tr.3474-3476, 3557-3566)[14]. The Castillo's advance the distorted and wholly unsupported inference that Benlate is used in the first week, from the testimony of Sanders and McMillian. This is despite all of the undisputed testimony from all farming witnesses, including these two, that **Benlate is not used until plants are 4-6 weeks old**. Clearly the equally plausible *alternative inference* is that no fungicide was needed or sprayed, and that no Benlate was indicated for spraying on a one-week-old plant.

This is one of several blocks that should cause the pyramid to crash and fall to the ground. The Castillo's had no evidence that <u>any</u> fungicide, much less Benlate, was sprayed or needed to be sprayed on November 1st or 2nd. However, the Trial Court erroneously allowed the Castillo's to attempt to bolster and support the failing pyramid, through more distortion of the record.

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[14] / The foundational testimony about what some farmers do on some plants, sometimes, is inadmissible, irrelevant and confusing. F.S.90.402,403,406.

To do this, the Plaintiff misled the jury by carefully selecting and reading the FARMER's responses to fourteen specific Requests for Admissions. (Tr.1573-79). The Castillo's had asked the FARMER, in 73 separate requests, to admit to the use, from November 1st - 9th, of numerous fungicides and pesticides.(A.3). The FARMER denied using each and every fungicide or pesticide during the relevant time period. (A.3). But what wasn't read was the 30th paragraph of the Request for Admissions which asks about Benlate use from November 1st - 9th. (A.3) The FARMER had also denied using Benlate during that time frame. The Castillo's refused to read this request or its response. The undue prejudice of this attempt to mislead and confuse was compounded when the court refused to allow the Benlate denial to be read to the jury.

From this rather tainted "**evidence**", the Castillo's then sought the ultimate **inference** that it had to be Benlate which was sprayed on November 1st or 2nd, because the FARMER denied using all the other chemicals, but not Benlate. (Tr.5311, 5320) Obviously, the far more reasonable **alternative inference** is that no fungicide was needed or used, much less Benlate which simply is not used on a one week old tomato plant, and which use was in fact denied.

As to each of the inferences necessary to reach the conclusion that Mrs. Castillo was exposed to Benlate, there were several far more reasonable inferences to the contrary. In many instances the undisputed evidence refuted the Castillos'

inference, or proved the contrary inference, outright. (i.e., there could not be a September planting on The U-PICK). See, *Paniello v. Smith*, 606 So.2d 626 (Fla. 3rd D.C.A. 1992), citing, *Child v. Child*, 474 So.2d 299(Fla. 3rd D.C.A. 1985), *rev.den*. 484 So2d 7 (Fla. 1986) (contrary and conclusive direct evidence overcomes circumstantial evidence); and also *Alan & Alan v. Gulfstream Car Wash*, 385 So.2d 121 (Fla. 3rd D.C.A. 1980); *Hurst v. Austudillo*, 631 So.2d 380 (Fla. 3rd D.C.A. 1994).

In sum, starting with only the evidence that a small amount of Benlate was purchased by The FARMER in May 1989 for the prior growing season, one cannot reach a conclusion that the mist to which Mrs. Castillo claimed she was experienced on November 1st or 2nd contained Benlate. It can only be done by piling inferences upon a successive stack of at least eight other inferences. None of these foundational or successive inferences exist to the exclusion of other equally reasonable hypotheses, upon a distorted record.

The pyramid, or better yet, the house of cards must fall. The liability verdict against the FARMER should not have survived either the Motion for Summary Judgment, or the motion(s) for directed verdict. Instead, the court committed reversible error when it allowed the jury to "indulge in the prohibited mental gymnastics of constructing one inference upon another". *Food Fair Stores, Inc. v. Trusell*, 131 So.2d 730, 733 (Fla.1961).

The District Court correctly determined that the evidence was insufficient.

The Castillo's have argued that it was for the jury to decide if the inferences were reasonable, plausible, proven to exclusion, or otherwise within the *Voelker* standard. This ignores the Trial Court's role under *Voelker*: to prevent jury speculation as to these issues. Under *Voelker* the trial court decides as a matter of law whether the case is built on an impermissible stacking of inferences, and rank speculation. Since it was a matter of law for the court, then this Court may pass on the correctness of the decision without deference to, or invading the province of the jury.

However, even if, *arguendo*, the issue had been for the jury to decide, then the Trial Court compounded its error by refusing to give the jury the FARMER's requested *Voelker* instruction. (Tr.4594). The jury could not possibly have known how to properly evaluate the competing inferences under a *Voelker* analysis without a legal instruction which informed them of the standard. Even then the jury lacked the sophistication, and judicial temperament which the *Voelker* court presumes a trial judge would have. Instead, the jury was left to conclude that any remotely possible inference was sufficient. Clearly, this is the definition of rank speculation, the antithesis of *Voelker,* and a misstatement of the plaintiff's burden of proof.

Both the FARMER's owner and field manager denied the use of Benlate on November 1st or 2nd, 1989. The Castillo's attempted to rebut that with the deposition testimony of John Ashton, the British reporter who first suggested to Mrs. Castillo that her son's condition might have been caused by exposure to Benlate. Mr. Ashton testified that he had a telephone conversation with the field manager, which took place in May 1993. (Tr.1598-99). The phone call, nearly four years after the alleged spray incident, was conducted "cold", on the field manager's cellular phone, in his pickup truck, while out in a field, without any records. (Tr.1600-01). Ashton's recollections, unsubstantiated by written notes, were part of his deposition 17 months later. Ashton, in the deposition testified that he had been told by The FARMER's field manager, that "the potential was there" for a use of Benlate on tomatoes during the growing season, which ran from November to April of any given year. (Tr.1593).

Ashton admits to tricking the field manager by asking questions under false pretenses. (Tr.1610). Ashton lied to the field manager, telling him that he was investigating crop damage caused by Benlate. (Tr.1610). This was known to the field manager to be the subject of substantial litigation. Due to claimed unfair prejudice to DuPont, the crop damage aspect of Ashton's conversation, and the trickery and deception it entailed, was not presented to the jury. (Tr.1112-18, 1644).

Giving Ashton's testimony the benefit of every doubt, he only recalled that he was told Benlate had been used in the "fall of 1989" and in "November of 1989". (Tr.1598, 1600), He had also been told that the time in November when The FARMER might use Benlate "would vary." (Tr.1593). The Castillo's then seek the **inference** that Benlate was used *the first two days of November*, 1989. The equally plausible *alternative inference* is that it "might" have occurred, if at all, on one of the other 28 days later in the month of November. It is rank speculation to conclude from this imprecise and vague hearsay statement, contrary to the direct testimony and documentary evidence that Benlate had been sprayed on November 1st or 2nd. *Rafferman v. Carnival Cruise Lines*, 659 So. 2d 1271 (Fla. 3d DCA 1995), n.1; *Vecta Contract Inc. v. Lynch*, 444 So. 2d 1093 (Fla. 4th DCA 1984); see *Florida Rate Conference v. Florida Railroad and Public Utilities Commission*, 108 So. 2d 601 (Fla. 1959).

If, *arguendo*, one could accept Mrs. Castillo's wildly unbelievable, litigation concocted tale, she still had the burden of proving that she was sprayed with Benlate on November 1st or 2nd, 1989 in order to have the case decided by a jury. That burden was not met. Yet the Trial Court abdicated its responsibility and sent the case to the now sympathetic jury.

C. THE FARMER WAS DEPRIVED OF A FAIR

TRIAL DUE TO COURT ERROR IN ALLOWING MISLEADING AND IRRELEVANT EVIDENCE

1. THE REQUEST FOR ADMISSIONS ERROR MISLED THE JURY

The Trial Court allowed the jury, to be misled when it allowed the Plaintiff's attorney to cherry-pick fourteen of The FARMER's responses to 73 specific Requests for Admissions. (Tr.1573-79, A.3). The requests, sought to have the FARMER admit to using numerous fungicides and pesticides during November 1st - 9th. (A.3). The FARMER denied using each and every form of fungicide or pesticide during that time. The Plaintiff's published to the jury the denials as to all chemicals other then Benlate. But what wasn't read was the 30th paragraph of the Request for Admissions which asks about Benlate use from November 1st - 9th . The FARMER also denied using Benlate during that time frame. The Castillos refused to read this request or its response.

The FARMER asked leave of the court to read the Benlate denial at the same time as the Castillos read the other chemical denials. This was an attempt, in fairness, to avoid the incorrect, misleading and unduly prejudicial appearance that The FARMER acknowledged using Benlate, and the misleading and unduly prejudicial appearance that the denial in the FARMER's court testimony was a recent fabrication. The following colloquy occurred:

> FARMERS attorney: Your Honor, Mr. Ferraro gave me, I believe the requests for admissions he intended to read. I would like at the same time to read requests for admissions from the same---
>
> THE COURT: No. There is no such thing. **You put it in on your case. No problem**.
> (Tr.1571).

However, when the time came during the FARMER's case, the Trial Court reversed field. It refused to allow the FARMER to read the Benlate denial response. Of course the response would have explained, clarified, and provided context, as fairness would require, and which the judge had promised.

> FARMER"S attorney: The request for admissions, remember when in his case in chief he read, "Did you use Manex on this field in 1989?" All I want to do is read his request of admissions to me that he did not read. It is a fairness rule.
>
> THE COURT: I understand that, but I have never heard of that done before. So at the moment, the answer is no.
> (Tr.5038).

The FARMER later asked again to no avail. (Tr.5311). Of course the Trial Court's error was exploited by the Castillo's attorney in closing argument. He used the incomplete and misleading discovery response to argue to the jury that Benlate was the only fungicide used by the FARMER before November 10, 1989. He even had a large blow-up demonstrative aid to press the point. Such implication or inference is clearly not supported by, and is contrary to the evidence. The Trial

Court's error in refusing a fair Admission reading resulted in the Castillo's improper closing argument:

> "The Benlate is the only possible fungicide before November 10th, 1989. No other fungicide used before that time...
> (Tr.5311)
> ... Furthermore, we have the request for admissions which is the response. I read that in the record very early in the case.
> That's when Pine Island was served with a request to admit the use of other fungicides well before the beginning of this trial and at that time they answered those requests for admission and they said on each and every other fungicide that we would not have been using them before November 10th of 1989.
> **Now, of course, they're in court now saying we didn't use Benlate until December 19th of 1989**".
> (Tr.5320).

Another example of the uneven playing field upon which the FARMER was playing was when the Trial Court refused to allow the FARMER to cross examine Dr. Howard, Plaintiffs' causation witness, about calculations and drawings he and plaintiffs' counsel made during direct examination. These large writing tablet papers were intentionally destroyed or hidden away during the lunch break between direct and cross-examination. The court refused to compel production of them to allow questioning by the FARMER. (Tr.3190-91).

2. IRRELEVANT AND CONFUSING EVIDENCE

ON OTHER FARMING MATTERS

The Castillo's were permitted to compound the admissions error when, over objection, they presented irrelevant and confusing evidence regarding farming conduct other than activities by this FARMER, on this field, in the year in question. These errors were further compounded when the evidence was then used to support the pyramid of inferences discussed above. The FARMER filed a Motion in Limine to exclude such evidence. The court deferred ruling on this before trial. The FARMER repeatedly and contemporaneously objected to such evidence during trial. This evidence was inadmissible as irrelevant, and tending to confuse or mislead. F.S.A. ss.90.402, 90.403, 90.406.

Where a predicate of similarity between the collateral incident (here planting, spraying, growing, harvesting) cannot be shown to be substantially similar to the incident at issue (these plants, on this field, in 1989) the disputed evidence is irrelevant and immaterial. It's admission "would likely introduce collateral issues and mislead the jury from the matter directly in controversy". *I.B.L. Corporation v. Florida Power & Light Company,* 400 So.2d 1288 (Fla. 3rd D.C.A. 1981); *Lawrence v. Florida East Coast Ry. Co.* 346 So.2d 1012 (Fla. 1977).

The Castillo's argued that the disputed evidence was admissible as "Routine Practice", presumably under Rule 406. This is demonstrated by the argument of

counsel and the Trial Courts apparent confusion during objections and side-bar colloquy.(Tr.1073, 3413-16, 3420, 3421).

However there was no showing of a predicate that a "routine practice" ever existed. Such "routine"ness was expressly denied by the very witnesses called by the Castillo's. (Sanders at Tr.3400-01; Macmillan at Tr.3586, 3598; Chaffin at Tr. 1082-03, "It actually depends on each year and it depends on the weather. So, it's a very difficult question to answer"; R. Castillo at 3624, - no knowledge of spraying in 1989).

This error was fundamental because the testimony was used to support the impermissible pyramid of inferences. This deprived the FARMER of a fair trial.

For example, Plaintiff elicited, over objection, testimony about when tomatoes were *generally* last planted on *any* field, in *any* year (Tr.1078-80). They were also permitted to examine the witnesses regarding the time of the longest harvest on *any* field, at *any* time (Tr.1081). These vague "sound bites" are generalities about farming matters, which vary depending on rain, heat, cold, disease, soil conditions and many other variables of nature. The evidence serves no purpose other than to confuse the jury. That is precisely how the Castillo's used the evidence. The Castillo's attorney spoke to the jury in closing argument:

> "In May of 1989 they said we [The FARMER] must have used it. We must have used the Benlate, but when you stop and think about the testimony, certain things just don't

> make sense and that could be calculated from the growing cycle...
>
> The growing cycle. We asked Mr. Chaffin, well, when do you stop planting and he said January 1.
>
> We asked Mr. Chaffin how long -- This is when we had the little back and forth on how long from planting to harvest and he kind of was just slipping on the definition of harvest, but it's 65 to 70 days until the harvest.
>
> And let's give Mr. Chaffin his interpretation as to how long harvest is. Harvest is six to eight weeks[15] and if you add up the harvest period and you add up the 65 to 70 days, there weren't any more tomatoes after April 27th, 1989.
>
> Why did they buy the Benlate?
>
> Well, there was a price increase in Benlate. If you look at the records, you'll see the price of Benlate went up a dollar from the spring to the fall.
>
> This is just an interpretation of the evidence we're offering you. We're not saying this is the only interpretation.[16]...
>
> Mr. Wishart said it was December 19th, definitely December 19th, <u>which would be contrary to the farm practice</u>..." (Tr. 5323-34)

The Castillo's were allowed to elicit testimony and records about purchases of Benlate, in *other* years, (Tr.3514) and about purchases of *any* chemicals from S & M (Tr.1188, 1398-1404, 1416-1419, 1438-39)[17]. The Castillos' attorney again used the inadmissible, irrelevant evidence to encourage the jury to draw

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[15] / This is a blatant and intentional misrepresentation of the record. The testimony from Mr. Chaffin was 8-12 weeks, allowing tomatoes well into the end of May. (Tr.1078-81, specifically 1080 at line 24-25). Once corrected the question which follows becomes easy to answer: To spray on the last 12 acres of tomatoes.

[16] / Could there be a better example of a *Voelker* error? The Plaintiff's jury argument concedes that competing inferences have not been excluded.

[17] / This improper, speculation about what may have been purchased from S & M Chemicals was also engaged in by the Court (Pre-Trial hearing 4/29/96 transcript, page 86).

speculative and impermissible inferences. In closing arguments the Castillos' attorney states:

> "They bought Benlate in September of 1988 from Helena. So, apparently it was not farm practice to start using Benlate in December of 1989. It was farm practice to start using it in September of the growing season each year."
> (Tr.5320-21, line 14).

In the very next breath the Castillo's utilize this impermissible inference to encourage the Jury to engage in perhaps the most pernicious speculation. The next sentence in his closing argument was:

> "Did they buy it from S&M?" (Tr.5321, line 15)

The Castillos' attorney continued the blatant exploitation of clearly inadmissible, irrelevant evidence:

> "Now, the Helena records clearly showed that Benlate was used in 1989. You have the May purchase, May 4th purchase, and you have the December 19th purchase of Benlate.
>
> We don't have to necessarily prove the source of the Benlate. We just have to prove it's there. It's not beyond a reasonable doubt. It's based on your own reason and common sense and when you take the Helena records which is the only records that you will get in this case and you look at '89 and you look at '89, the bells will ring. At that point they clearly were using Benlate as early as September of 1989."[18]
> (Tr.5321-22).

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[18] / This is precisely what *Voelker* seeks to avoid.

A particularly egregious example involves irrelevant testimony by the chemical salesman about the mere possibilities of mixing of other chemicals in a single spray in *any* years*, any* chemicals, by *other* farmers.[19] (Tr.3602-03). This irrelevant, confusing testimony produced the following arguments, to the court and the jury:

By Ms. Russo, to the court, as to Directed Verdict:

> "We know from the other testimony about the routine farming practices that you would be putting your fungicide in, because it is within the first week. And we also know from the testimony of both Mr. Daniels from Helena Chemicals and from Mr. Castillo that you can mix the fungicides and the insecticides.
>
> So regardless of whether an insecticide may also have been thrown in, we know you would have been using the fungicide, that Benlate was the only one that could have been being used and the insecticide, that becomes an irrelevance."
>
> (Tr.4488).

By Mr. Ferrarro, to the jury, as closing argument,

> "Now, Dan Daniels from the chemical company came in and testified and said Trigard could be mixed with other fungicides which makes sense if you take the testimony of Eddie Sanders that the U-Picks are secondary. They're not going to go out there and spray on a daily basis. They're

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[19/] The Farmers spray employee, when questioned by the Castillos, testified that The Farmer did not mix.(3376-77).

> "Question: And with that being the case, isn't it the practice at the farm to mix chemicals together, such as fungicides and insecticides and sometimes even nutrients if that is what is sometimes used? Answer: Mr. Chaffin, he doesn't go for that too much. No, he doesn't like that."(Tr.3377)

> going to mix the chemicals because it saves time and money.
>
> That was as of November 1, November 2. It's clear that they were spraying a fungicide on that day that could have possibly included Trigard. That's the inescapable conclusion.
>
> (Tr.5318-19).

Yet other examples involve irrelevant testimony from Dan Daniels, a Helena Chemical salesman. He was asked about the first possible use of Benlate by *any* farmer, in *any* year, at *any* field. (Tr.3595-98). The Castillo's were permitted to inquire about Benlate used to mix in with their seeds when germinating plants away from the fields. (Tr.3596-99).[20] The Plaintiffs asked Mr. Daniels about fungicide (other than Benlate) used prophylactically in 1996, and also about Benlate being used prophylactically way back in the mid-1970's. (Tr.2606-07). The plaintiff combined these irrelevant and confusing evidentiary snippets with their old stand-by misrepresentation about *any* fungicides sprayed on new tomatoes, *any* field, *any* time. (Tr.3395-96).[21]

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[20] / This is just one instance of a pattern of general "any year", "any field" question , followed by a question referring to this field, this year, but on a different topic.(Tr.3395-96, 3421-22, 3425-28)

[21] / There was other inadmissible evidence.(When strawberries can be planted on any field, any year (Tr. 1072-3); purchases of other farming materials for other reasons (Tr.1091-92); spraying in other years w/o reference to what is being sprayed (Tr.3378-81); when any fungicide first used on any field by any farmer in any year (3539-42); why any other farmers buy any chemicals for any crop to store chemicals (Tr.3581); spraying of any fungicides in 1996 (Tr.3628); other farmers tractors routinely spray off crop lines to check nozzles).

The offspring of this illicit union of incomplete Admissions reading, inadmissible evidence, and impermissible inference is best exemplified in the following argument made to defeat the FARMER's Motion for Directed Verdict:

> " We have evidence from the spray manager at the time, Eddie Sanders, he was the spray manager in 1989, and also from plant pathologist, Dr. McMillan of the University of Florida, that as a matter of routine practice tomatoes are sprayed with fungicides within the first week of when they are put in, when they're planted. That would put a week later, a week after the planting date of October 25th or 26th at November 1st or 2nd.
>
> Then the question becomes, all right, if that is as a routine matter they're sprayed with fungicide, what evidence do we have that the fungicide that was used at the time was Benlate?
>
> The first evidence in that regard would be Mr. Ashton's testimony that Mr. Chaffin said that he used Benlate on that field in November of 1989, ... (Tr.4480-81)
>
> ... We also have admissions by Pine Island that they did not use any other fungicide on those dates. So if we combine the routine practice of putting the fungicide on within a week with the fact that there was no other fungicide and the admission by Mr. Chaffin that Benlate was used during that period of time, we have now evidence that Benlate was the one that was used." (Tr.4481-82).

The Trial Courts error of allowing misleading incomplete "admissions", and irrelevant and confusing other farming "practices" was forcefully exploited by the Plaintiff's to confuse the court and the jury. Such evidence was unduly prejudicial to the FARMER particularly when used to support inference upon inference. This

volatile combination of inadmissible evidence, and exploitative argument undoubtedly operated to deprive the FARMER of a fair trial.

VI. CONCLUSION

This is a tragic case of a severely disabled child, exploited before a jury overwhelmed with sympathy, who passionately re -distributed wealth in the absence of any evidence of liability. More, it is a troubling string of errors by the Trial Court below, exploited by the Plaintiff's and their counsel, unfettered, which allowed this travesty to occur.

The District court, applying the correct legal standard held that the creative, "junk science" together with metamorphic testimony was insufficient. The District Court refused to extend a human tragedy into a legal travesty.

Respectfully submitted,
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