ORIGINAL

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, DONNA CASTILLO and JUAN CASTILLO, individually,

Petitioners,

v.

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

Respondents.

ON PETITION FOR DISCRETIONARY REVIEW FROM THE THIRD DISTRICT COURT OF APPEAL

RESPONDENT'S AMENDED BRIEF ON JURISDICTION

Respectfully submitted,

GAEBE MURPHY MULLEN & ANTONELLI
Attorneys for Respondent,
PINE ISLAND FARMS
420 South Dixie Highway
Third Floor
Coral Gables, FL. 33146
Telephone (305) 667-0223
April 17, 2000

CERTIFICATE OF TYPE SIZE AND STYLE

Respondent, PINE ISLAND FARMS, is utilizing twelve (12) point Courier font in this brief.

TABLE OF CONTENTS

Page

INTRODUCTION

There are no "direct" or even indirect conflicts with the decisions of other district courts or with this Court, and definitely no "express" conflicts. Accordingly, this Court lacks discretionary "conflict review" jurisdiction over this petition under Article V, 3(b)(3) of the Florida Constitution and Fla. R. App. P. 9.030(a)(2)(A)(iv).

The District Court simply found that the Plaintiff's scientific evidence was inadmissible because their experts admitted that the methodology on which they relied was not generally accepted in the scientific community. See Pet. App. 27. That is *Frye*. The opinion is completely consistent with the decisions of other district courts and with those of this Court.

The Petitioner's Jurisdictional brief, impermissibly argues the merits of the case, and 'public policy' and should be stricken. Fla. R. App. P. 9.120(d).

STATEMENT OF THE CASE AND FACTS

Petitioner, Donna Castillo, claims to have been drenched by a misty spray from an agricultural tractor as she was standing, while pregnant, alongside a field operated by Pine Island Farms, Inc. ("Pine Island"). Mrs. Castillo's son, John, was later born with a rare birth defect known as microphthalmia, leaving him blind because his eyes failed to develop properly during gestation. The Castillo family sued Dupont and Pine Island on

negligence and strict liability theories asserting that Mrs. Castillo's exposure to that spray caused her son's birth defect because the spray allegedly contained DuPont's fungicide Benlate. See Pet. App. 2.

At the close of a jury trial, DuPont and Pine Island moved for a directed verdict. The Defendants raised two grounds: (1) that there was no competent evidence that Mrs. Castillo had been sprayed with Benlate; and (2) Plaintiff's expert was barred by *Frye*, because he admitted that his scientific methodology was not generally accepted in the scientific community. The trial court rejected both of those motions and entered judgment in favor of the Plaintiffs for $4 million total. The jury allocated 99.5% of this award against DuPont and 0.5% against Pine Island. See id. at 4.

On appeal by both DuPont and Pine Island, the Third District Court of Appeal ("District Court") reversed this judgment.[1] The District Court held that Petitioners scientific testimony did not comport with *Frye*. It held that the Castillo's experts had "**conceded** at the *Frye* hearing that the direct extrapolation method they used in their study was new and that they were unaware of any scientific study that has ever purported to determine a human teratogenic exposure level in this manner." Id at 27 (emphasis added).

---

[1] Pine Island filed a Motion for rehearing in the District Court arguing that the ruling on whether there was competent evidence that Mrs. Castillo had been sprayed with Benlate was a misapplication of law and/or misapprehension of fact. The motion was never formally disposed of, and Pine Island waives no rights in

Pine Island must point out the inaccuracy contained in the Castillo's "Statement of the Case". The Castillo's "statement" on p. 1 of the "jurisdictional brief" that "the trial court determined that the Castillo's expert's opinions were based upon scientific principals that were sufficiently established to have gained acceptance" is blatantly false. In fact, the Castillo's even had to footnote this ridiculous statement to explain that maybe they "believe" that is what the trial court meant. The positions in these briefs must be confined to the four corners of the opinion, not what the Castillo's think that *maybe* the trial judge might have *meant*, but did not say. The findings on this issue appear at Pet. App. 13, and speak for themselves.

The trial court *did not* determine that the testimony of the Castillo's experts was generally accepted in the scientific community. Rather, the trial court judge had actually declared that such testimony was admissible merely because "I believe that science is reliable." She was personally willing to make the self-described "quantum leap" to human birth-defect causation from the testing of Petitioners' experts. See id. at 13. The District Court ruled this analysis to be reversible error.
The District Court remanded for the entry of judgment in favor of both defendants. See id. at 29. This petition for review has followed.

---

relation thereto.

SUMMARY OF ARGUMENT

The Castillo's have attempted, in vain, to manufacture a conflict, where none exists.

There is no conflict with *Berry v. CSX Transportation, Inc.*, 709 So. 2d 552 (Fla. 1st DCA 1998), rev. denied 718 So. 2d 167 (Fla. 1998). The 'expert' testimony in *Berry* was based upon generally accepted scientific principals and methodology, therefore, admissible. *Berry* holds that conflicts in admissible expert testimony are for the trier of fact. *Berry* is not implicated here, where the Castillo's experts admit that their *scientific methodology was not generally accepted.*

There is no conflict with *Mills v. State*, 476 So. 2d 172 (Fla. 1985), cert. denied, 475 U.S. 1031 (1986), or *Gooding v. University Hospital Building, Inc.*, 445 So. 2d I 0 1 5 (Fla. 1984). The District Court did not apply the higher burden of proof, as the Castillo's cleverly, but erroneously, argue. The standard applied was preponderance standard. This court need only look at Pet. App. at 11 to see this.

ARGUMENT

Standard

In order to invoke the discretionary jurisdiction of this Court the Castillo's jurisdictional brief must show that the opinion of the District Court:

> "directly, and expressly conflict[s] with a decision of another district court of appeal or of the Supreme Court *on the same point of law*". Fla. R. App. P. 9.030 (a)(2)(A)(iv).

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*, 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 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.

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.[2] 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.

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

---

[2] 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)).

human[3] 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 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.

Flawed Policy Argument? - In A Conflict Case?

The Castillo's policy arguments for review are not only improper in a "conflict" jurisdictional brief, but lack merit.

The Castillo's invoke the jurisdiction of this Court claiming a direct and express conflict. Fla. R. App. P. 9.030(a)(2)(A)(iv). Their brief is limited to such discussion. Fla. R. App. P. 9.120(d). It is for the District Court to seek the guidance of this Court on matters of "great public importance". Fla. R. App. P. 9.030(a)(2)(A)(v). A party may not invoke this Court's jurisdiction by claiming public policy. *id.*

---

[3] 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).

The Castillo's argue that "the District Court's decision makes it impossible for a plaintiff to sue the manufacturer of a toxic substance which has caused a human birth defect." Pet. 2. This claim is based on the flawed starting premise that the District Court ruled that only epidemiological studies and not in vivo (animal) and in vitro (test-tube) studies could be used to establish toxic-tort causation. This never happened. In fact the court stated at Pet. App. 27:

> "***We do not*** conclude that epidemiological studies are a mandatory prerequisite to establish a toxic substance's teratogenicity in human beings." (emphasis added).

In fact, epidemiological studies carried out by scientists in Italy and Norway found no link between Benlate and any human birth defect. These studies were considered by the trial judge at the Frye hearing and admitted into evidence before the jury. See Tr., (4/30/96) at 57,87,93,99; Tr. at 4242-43,4653-56,4929-31. Pine Island Farms does not offer these studies as an independent basis for this Court to deny the petition, in violation of the "four corners" principle, but only to counter Petitioners' patent distortion of the record below.

Petitioners position (See Pet. 3) that the District Court's should have admitted their experts' testimony because DuPont relied on the same methodology before the EPA is simply wrong.

DuPont submitted in vitro studies to EPA, but the methodology employed by those studies never extrapolated to a level of exposure that could cause microphthalmia. The District Court recognized the difference which makes the Castillo's position plain wrong. The Petitioners' expert testimony was novel (and therefore inadmissible) because "no scientific, governmental or academic publication had ever before relied on direct extrapolation from in-vitro test results to determine a teratogenic exposure level in a living being." Pet. App. 27. That is the point! That is *Frye*!

CONCLUSION

This Court should deny the petition for review because it lacks jurisdiction. There is no direct or express conflict present.

Respectfully submitted,

GAEBE MURPHY MULLEN & ANTONELLI
420 South Dixie Highway
Third Floor
Coral Gables, FL. 33146
Telephone (305) 667-0223

By: _____
David Kleinberg
Florida Bar No. 765260
Attorney for Respondent,
PINE ISLAND FARMS

CERTIFICATE OF SERVICE

WE HEREBY CERFIFY that a true and correct copy of the Respondent's Brief on Jurisdiction was mailed this 14th day of April, 2000 to: Edward W. Warren, Esq., Jeffrey Bossert Clark, Esq., Kirkland & Ellis, Counsel for Appellant DuPont, 655 Fifteenth Street, N.W., Suite 1200 Washington, D.C.; Arthur J. England, Jr., Greenberg, Traurig P.A., Co-counsel for Appellant Du Pont, 1221 Brickell Avenue, Miami, FL. 33131 and Russo-Parrish Appellate Firm, 6101 SW 76th Street, Miami, FL 33143.

_____
David Kleinberg