

In the Supreme Court of Florida

CASE NO. SC00-490

JOHN CASTILLO,
DONNA CASTILLO and JUAN CASTILLO

Petitioners,

v.

E.I. DuPONT DE NEMOURS & COMPANY, INC.,
and PINE ISLAND FARMS, INC.,

Respondents.

ON DISCRETIONARY REVIEW FROM THE
THIRD DISTRICT COURT OF APPEAL

**PETITIONERS' REPLY BRIEF TO RESPONDENT DUPONT'S
BRIEF ON THE MERITS**

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CERTIFICATE OF TYPE SIZE AND STYLE

Petitioners are utilizing a fourteen (14) point Times New Roman font in this brief.

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A. OVERVIEW

Respondent DuPont's brief makes four arguments: (1) that this Court should decide that it improperly granted jurisdiction; (2) that there were evidentiary errors at trial that should at least entitle DuPont to a new trial; (3) that Petitioners' scientific evidence was "junk science", and, specifically, the "worst sort of junk science"; and (4) that DuPont had alternative directed verdict arguments that should entitle it to win.

After briefly addressing the fact that DuPont's statement of the case and facts contains inaccuracies and - inexplicably - *credibility* attacks, we address DuPont's first and third arguments together in the initial section of our argument below. Those two arguments concern the Frye issue that is central both to the jurisdiction of this Court and to the appropriate application of Frye in civil toxic tort cases. Ever increasing production of chemical products for use in virtually every aspect of modern human existence has led to countless new, and often unanticipated, adverse effects on human health. The courts of Florida and elsewhere find themselves correspondingly required to handle increasing numbers and varieties of toxic tort cases.

This Court's guidance in Frye cases thus far has been firm and clear, and such continued guidance is necessary. The Third District's decision misapplies Frye and, if left to stand, will create confusion for trial courts grappling with emerging scientific issues. We accordingly address the important Frye aspects of the case in the first part of our argument section below.

DuPont's other arguments are case-specific quibbles over why DuPont thinks it should have a new trial or a directed verdict on alternative grounds. We believe that the record, the jury verdict against DuPont, and the rulings below clearly demonstrate that DuPont is not entitled to a new trial or a judgment in its favor. Those points of lesser significance made by DuPont are addressed briefly in the last part of our argument section below.

B. REPLY TO STATEMENT OF THE CASE AND FACTS

DuPont's statement of the case and facts contains credibility attacks clearly included for no other reason than to prejudice the Court. DuPont is an experienced and sophisticated litigator, fully familiar with standards of appellate review, so DuPont well knows that - except as to the Frye issues which are reviewed de novo - the jury was the only proper audience for its credibility arguments. DuPont is also fully familiar with the record in this case, and thus also knows that its accusations are belied by the record, as has previously been pointed out for them, with full record cites, in these appellate proceedings. (R. 8913-8945). We cannot, in 15 pages, possibly respond to all of the inaccuracies contained in DuPont's brief, but we address the main ones in the brief we have filed in response to Respondent Pine Island and which we here incorporate by reference. The two Respondents have adopted each others' briefs, and both engage in the same improprieties in representing the facts to this Court.

C. REPLY TO ARGUMENT

POINT I

THE THIRD DISTRICT'S DECISION INCORRECTLY APPLIED FRYE TO EXPERTS' CONCLUSIONS RATHER THAN TO THEIR METHODOLOGY THUS CREATING DEVIANT FRYE PRECEDENT AND CONFLICT WITH BERRY v. CSX TRANSPORTATION

The most significant point in the review proceedings before this Court is that the Third District's decision in this case incorrectly applied the Frye test to experts' *conclusions*, rather than to their methodology. The error in that regard - and the confusion that the decision will generate for Florida trial courts and litigants - is compounded by the fact that the opinion as worded appears to *recognize* the principle that Frye applies to methodology and not conclusions, but does not follow that principle. In this section, we discuss the Frye test under the heretofore consistent body of Florida law handed down by this Court, and then the manner in which the Third District's decision muddies the waters.

This Court has been both clear and firm in holding that in Florida the admissibility of experts' testimony as to novel scientific evidence is governed by the Frye test. *McDonald v. State*, 743 So. 2d 501 (Fla. 1999); *Brim v. State*, 695 So. 2d 268 (Fla. 1997); *Hadden v. State*, 690 So. 2d 573 (Fla. 1997); *Hayes v. State*, 660 So. 2d 257 (Fla. 1995); *Ramirez v. State*, 651 So. 2d 1164 (Fla. 1995). In reiterating that rule throughout the cited decisions, this Court has specifically clarified that Frye applies rather than the evidence code rules, *Hadden, supra*, and rather than the (seemingly ever-changing) federal court rules ushered in by the U.S. Supreme Court's decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).¹ *Brim, supra*. After determining whether expert testimony will aid the jury and that the proposed expert is appropriately qualified², Florida trial courts must apply the Frye

¹ *Daubert* and its thousands of progeny have variously been interpreted as both more, and less, liberal than Frye. See, e.g., R. Mangrum, "Kumho Tire Company: The Expansion of The Court's Role in Screening Every Aspect of Every Court Expert's Testimony", 33 Creighton L. Rev 525, 564 (April, 2000). The sheer volume of the case law, law review articles, and other legal commentary discussing how *Daubert* is to be applied is indicative of the uncertainty and controversy the decision has created. Legal commentators have suggested that Frye in updated version - like that fashioned by this Court in Florida - is the far better approach to handling science in the courtrooms. See, e.g., A. Schwartz, "A 'Dogma of Empiricism' Revisited: Daubert and the Need to Resurrect the Philosophical Insight of Frye v. United States", 10 Harv J.Law & Technology 149 (Winter, 1997).

² For whatever inappropriate reasons, DuPont has resurrected a contention that Dr. Howard is not qualified as a teratologist. But ***DuPont's own expert*** had already conceded at the trial level that Dr. Howard *is* qualified, as the Third District pointed out in rejecting this same argument: "Dr. Howard is a fetal toxico-pathologist with the Fetal and Infant Toxico-Pathology Department of the University of Liverpool. He has been involved in work that falls within the realm of teratology and was acknowledged by one of DuPont's experts as being qualified in this area." 748 So. 2d at 1115-16. Dr. Howard has also recently been accepted as a member of the European Teratology Society, as set forth in correspondence from the Society being filed under separate

test "to decide whether the expert's testimony is based on a scientific discovery or principle that is 'sufficiently established to have gained general acceptance in the particular field in which it belongs.'" *Ramirez, supra*, 651 So. 2d at 1167, quoting *Frye v. United States*, 293 F. 1013, 1014 (1923).

To this point, everyone is in agreement that Frye applies in Florida and that the Frye test is as stated in this Court's opinion in *Ramirez* as just set out. The next issue, however, concerns "what must be Frye tested...the opinion testimony of the witnesses or the underlying scientific principle or methodology utilized by the experts in arriving at their opinions." *Berry v. CSX Transportation, Inc.*, 709 So. 2d 552, 565 (1st DCA 1998). It is on this issue that the result of the Third District's decision in this case has created a problem for Florida Frye law. As the *Berry* court pointed out, Frye itself already answered the question in stating the test:

Frye expressly addressed whether it is the expert opinion or the underlying principle and methodology from which the opinion is deduced which must be generally accepted in the scientific community. The Frye court explained: "the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs."

709 So. 2d at 565-66. The *Berry* court went on to discuss various federal cases decided under Frye that had pointed out that it is the principles and methodologies upon which an expert's opinion is based, rather than the opinion itself, that must be generally accepted. *See Berry's* summary of some of those cases, as follows: "*See, e.g., Cella v. U.S.*, 998 F.2d 418, 425 (7th Cir. 1993)"("the Frye standard requires that the reasoning and methodology used by an expert in reaching a conclusion be generally accepted within the relevant scientific community); *Peteet v. Dow Chem. Co.*, 868 F.2d 1428, 1433 (5th Cir. 1989)(as long as expert's methodology is well-

notice of filing.

founded, the nature of his conclusion is generally irrelevant, even if it is controversial or unique); *Osburn v. Anchor Lab, Inc.*, 825 F.2d 908, 915 (5th Cir. 1987)("an expert's opinion need not be generally accepted in the scientific community before it can be sufficiently reliable and probative in support of a jury finding.").

After discussing the Florida Frye case law as well, the *Berry* court concluded: "Thus, we hold that under Frye and its Florida progeny, when an 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." 709 So. 2d at 567. This conclusion comports with this Court's opinion in *Brim, supra*, which, as *Berry* noted, "recognized that Frye allows opposite opinion testimony from experts relying upon the same generally accepted scientific principles and methodologies." *Id.*

The Third District's opinion in this case, as indicated above, appears in some places to recognize that this should be the governing rule. But the Third District's analysis and result nonetheless make it clear that it was, in fact, the *conclusions* reached by the Plaintiffs' experts upon which the Third District based its decision that their testimony should have been excluded, as set forth next. We first pause to note, however, that the Third District was clearly wrong in determining that the testimony of *two* of the Plaintiffs' experts should have been excluded - that of Dr. Howard and that of Dr. Van Velzen. *DuPont never raised a Frye challenge to Dr. Van Velzen.* (R. passim). On the contrary, DuPont's counsel made quite a point of telling the trial court, when the trial court specifically inquired about it, that DuPont's Frye challenge was directed *exclusively* to Dr. Howard *and not to Dr. Van Velzen.* (T. Vol 45, p. 114). Any Frye objection to Dr. Van Velzen's testimony was accordingly waived. *See McDonald v. State*, 743 So. 2d 501 (Fla. 1999). Dr. Van Velzen testified to the general acceptability of both experts' methodologies, including the uses to which they put in vitro testing. (T. Vol. 45, pp.208-209).

To return to the discussion of the Frye issue presented here we note that this case, like *Berry*, is a civil toxic tort case. *Berry* involved railroad workers' suffering from toxic encephalopathy which their lawsuits claimed was caused by chemical organic solvents to which they had been exposed in their workplace. This case involves a child born without eyes, a birth defect known as microphthalmia or anophthalmia, which this lawsuit claimed was caused by a chemical fungicide, Benlate, to which his mother was exposed while pregnant. In both cases, as in all toxic tort cases, there are two causation issues: (1) general causation - which addresses whether the subject chemical or drug is *capable* of causing the particular disease or infirmity; and (2) specific causation - which addresses whether the substance more likely than not did cause the infirmity in the specific individual.

The discussions here can focus on the general causation issue because the methodology utilized by Plaintiffs' expert Dr. Howard in addressing the specific causation issue was undisputedly generally accepted. Dr. Howard approached specific causation precisely as all scientists and doctors do in attempting to ascertain the most likely cause of a specific patient's illness or disease or birth defect, i.e., by using a process of differential diagnosis. "Differential diagnosis, or differential etiology, is a standard scientific technique of identifying the cause of a medical problem by eliminating the most likely causes until the most probable one is isolated." *Westberry v. Gislaved Gummi AB*, 178 F. 3d 257, 262 (4th Cir. 1999). "[T]he differential diagnosis method is scientifically acceptable." *Berry, supra*, 709 So. at 571.³

³ As detailed at some length in our initial brief with citations to the record, Dr. Howard eliminated all known genetic causes of microphthalmia based on the medical records and the genetic testing done on Johnny by genetic experts (and the defense experts agreed with him on that point); eliminated all other known environmental causes (e.g., Rubella, vitamin A, smoking, etc.) (the defense experts also agreed with

On the general causation issue, review of all the cases and all of the scientific and legal articles discussed in all of the briefs filed in this case makes it clear that it is generally accepted that there are three available sources from which to obtain data in seeking to determine whether a particular chemical or drug can cause adverse effects - of whatever kind - epidemiology, in vivo studies (animal testing), and in vitro studies (laboratory testing of the effects of substances on cell systems). Identifying the relevant fields as "toxicology, medicine and pathology, and...primarily teratology, the specialized study of the causation of birth defects", the Third District's decision acknowledged that generally accepted scientific methodology for assessing birth defect causation utilizes these three sources. *Castillo*, 748 So. 2d at 1116.⁴ And, these are *precisely* the sources that were utilized by Plaintiffs' causation expert Dr. Howard in reaching his conclusions as to the general causation issue of whether Benlate - and more specifically its active ingredient benomyl - can cause microphthalmia and anophthalmia in humans.

him on that); thus leaving only unknown genetic and unknown environmental causes. As defense expert Dr. Holmes had testified, 70% of microphthalmia cases can be attributed to genetic causes by existing testing procedures, and Johnny Castillo did not fall in that group but into the 30%. (R. 8442-44). After eliminating all of the genetic and environmental causes known to cause microphthalmia as potential causes in Johnny Castillo's case, and taking into consideration the exposure to Benlate during the critical eye-formation stage of his fetal development, a substance shown by animal studies to be a teratogen that causes microphthalmia, Dr. Howard had passed the 50% point set by this Court's *Gooding* standard: "In a case where you have a known exposure to a known teratogen, during a window of vulnerability of a fetus for a particular organ and subsequently that organ is damaged, you are out of the realm of possibility and into the realm of probability." (R. 6209).

⁴ Dupont and Pine Island were the appellants in the Third District, and did not arrange to include the Frye and trial exhibits in the record. Because this Court's review is de novo, Petitioners will file the relevant scientific articles and materials with the Court under separate notices of filing, consistent with the dictates of *Brim, supra*.

DuPont has inaccurately stated in its brief that Dr. Howard refused to consider epidemiological studies about benomyl, but that is just not true. Dr. Howard did consider the *very* few such studies as there are in existence, but they have *de minimis* information to offer since benomyl is a toxic chemical specifically known to act as a teratogen which accordingly never was - and never will be - made the subject of epidemiological studies in which pregnant human mothers are *deliberately exposed* to the product. There is a distinct problem with the existing epidemiological studies, which was explained during the *Frye* hearing by Plaintiffs' epidemiology expert Dr. Pollock, Director of the Division of Epidemiology of the University of Florida College of Medicine, and which DuPont very well knows itself. The existing epidemiological studies on benomyl are only ecologic studies, which is one of the *least* reliable forms of epidemiological study for assessing cause-effect relationships (e.g., S.R.38-40), as set forth next.

Because this is not Nazi Germany, as the trial judge put it, the studies which exist on benomyl are not clinical studies in which selected groups of human females are exposed to benomyl in varying dosages during pregnancy - as is done in the rat studies, for example - to see if and how many of their babies will be born with birth defects. Rather, the epidemiological studies (there are three) are merely ecological studies that have only reviewed general birth defect statistics in a given area of a country to see if the incidences of microphthalmia and anophthalmia have changed in the twenty or thirty years since Benlate began being sold as an agricultural fungicide.

The Spagnola study, for example, just entailed reviewing hospital birth records of 18 regions in Italy for a certain time period, counting the instances of children born with anophthalmia or microphthalmia, and then comparing the number with the general statistics as to what percentage of children generally are born with that defect. (S.R. 53, 56-61, 72-79). But, as the defense expert had to concede because it is *inherent in*

the nature of such a study, there is no information in the Spagnola epidemiological study as to whether *any* - even *one* - of the mothers whose childrens' birth records were included in the study *was ever exposed to Benlate*. (R. 8064; *see also* T. Vol. 45, 78). The Norwegian and British studies (the latter was published after the trial) are of the same general type, and have the same limited contribution to make to the general causation inquiry about whether Benlate can cause birth defects in humans.

Since the epidemiological evidence was both scant and marginally useful at best, the only two remaining sources for assessing the general causation issues were in vivo (animal) studies and in vitro studies - and Dr. Howard looked to both. No question has been raised as to the general acceptability of the methodologies utilized in conducting the animal studies, many of which were performed by DuPont itself. They unquestionably showed that benomyl is a teratogen and that one of the specific - and rare - birth defects that it causes is microphthalmia.

Aside from the separate question of translating dosages from animal to human, the in vivo studies provided reliable information as to benomyl's ability to act as a human teratogen. As set out in the most recent edition of the Reference Manual on Scientific Evidence (DuPont's brief refers only to the older 1994 edition), in the chapter and section entitled Reference Guide on Toxicology, Extrapolation for Animal and Cell Research to Humans:

Two types of extrapolation must be considered; from animal data to humans and from higher doses to lower doses. *In qualitative extrapolation, one can usually rely on the fact that a compound causing an effect in one mammalian species will cause it in another species. This is a basic principle of toxicology and pharmacology.*

REFERENCE MANUAL ON SCIENTIFIC EVIDENCE, p. 410 (2d ed. 2000).

Although DuPont's brief discourses at some length about the fact that the dose makes the poison⁵, that proposition is so basic that any toxicologist accepts it as a given, and certainly fetal toxico-pathologist Dr. Howard did in this case. In fact, Dr. Howard's testimony in his depositions, for the Frye hearing, and at trial bear out the meticulous detail with which he approached the issue of dosage. It was in this context that he utilized the DuPont human dermal studies, showing that benomyl can and does cross the skin barrier into the bloodstream, and at a rate of 10-15%. (Tr. 93-94).

Dr. Howard also then used the established half-life of Benomyl as it circulates through the human system taking into account the amount of blood that goes directly to the fetus on the first circulatory paths, as well as the amount that goes through the maternal liver to begin the metabolization process, to determine the amounts of Benomyl that could have crossed the placental barrier into the fetal sac. DuPont's own teratology expert - Dr. Robert Brent, a pediatrician, confirmed that because rat studies have shown that Benomyl crosses the placental barrier in rats, it *will* also cross the placental barrier in humans. (R. 8085-8086).

Although DuPont inexplicably states that Dr. Howard never calculated the area of Donna Castillo's body that would have been covered by the Benlate mist, Dr. Howard testified in detail on that very subject in his depositions - which were introduced at the *Frye* hearing as well as his affidavit testimony - and at trial. (E.g., R. 6079-6083). Dr. Howard had specifically inquired about Mrs. Castillo's height, weight,

⁵ On the subject of dosage, DuPont - presumably for dramatic effect - continues to make the absurd statement that Mrs. Castillo would have to drink 2 to 4 gallons of Benlate to replicate the dosages administered in the rat gavage studies performed by DuPont's Dr. Staples. In fact, the conversion calculations, which were confirmed by Dr. Stadler, DuPont's senior research toxicologist and trial representative, show that the equivalent gavage dose in a human would be 1/6th of an ounce based on the 1982 Staples study LOEL dosage of 62.5 mg per kg per day, and 1/40th of an ounce based on the 1980 study LOEL dosage of 10 mg per kg per day. (Tr.3809, 3873).

and what clothing she was wearing on the date in question - it was a warm day in early November in South Florida, and she was wearing a sleeveless shirt and shorts - so that he could calculate what portion of her body mass would have been covered with the spray. (R. 6079-6083). Matching that information with the DuPont dermal studies allowed Dr. Howard to determine the biologically plausible route and dose by which the benomyl could have traveled through the maternal bloodstream and into the placenta. (R. 6079-6089; Tr. 2944-2992, 3048, 3134-3135).

Dr. Howard had also obtained Mrs. Castillo's medical records which showed that she was 6-7 weeks pregnant on the day that she was showered by the mist from the Benlate spray drift. (T.932, 2215). The fetus at that stage is tiny and consists mainly of rapidly dividing cells engaged in the process of organogenesis, or organ formation. DuPont's own studies and DuPont's own expert have confirmed that benomyl crosses the skin barrier into the maternal bloodstream and thereafter travels from the maternal bloodstream across the placental barrier into the placenta where the fetal cells are engaged in the process of forming organs. Dr. Howard next utilized the other recognized tool for obtaining information with which to assess a substance's potential for acting as a human teratogen - i.e., he used in vitro testing to study the effect of benomyl at the cell level, which is exactly the generally accepted usage for such tests. "In vitro research concerns the effects of a chemical on human or animal cells, bacteria, yeast, isolated tissues, or embryos." Reference Manual on Scientific Evidence, *supra*, p. 410.

As detailed in our initial brief, Dr. Howard performed in vitro testing on human and animal cell lines to determine at what level neurite growth inhibition would take place, and Dr. Van Velzen performed studies on human fetal cells to determine at what dosage the benomyl can cause cell death.

The methodology and protocols used by Drs. Howard and Van Velzen in conducting their in vitro studies have not been questioned at any point in these

proceedings. In fact, Dr. Howard's in vitro studies - performed in collaboration with his colleagues in the Department of Pharmacology and Department of Pathology at the University of Liverpool, United Kingdom - were peer-reviewed and published. See *McLean, Howard, et al., The Effect of Benomyl on Neurite Outgrowth in Mouse N.B. 2A and Human SH - SY5Y Neuroblastoma Cells In Vitro*, NEUROTOXICOLOGY 19(4-5):1998, pp. 629-632. The results of the in vitro studies - and DuPont has performed similar in vitro studies on Benomyl (T. Vol. 45, p. 150) - showed that Benomyl can cause human fetal cell death at the extremely low dose of 20 parts per *billion*. And, as Dr. Howard's studies showed, benomyl can cause neurite outgrowth inhibition at levels as low as 3 parts per billion.

In reaching his general causation conclusion that benomyl can act as a human teratogen, Dr. Howard used what the Reference Manual 's "basic principle of toxicology and pharmacology" referenced above, i.e., that "in qualitative extrapolation, one can usually rely on the fact that a compound causing an effect in one mammalian species will cause it in another species". Dr. Howard utilized that basic principle and combined it with data generated in various in vitro studies, with data from the DuPont dermal studies, and with knowledge acquired from his own background and experience as a medical doctor and fetal toxico-pathologist (which had acquainted him with, inter alia, principles of biology, toxicological half-lives, and the maternal and fetal circulatory systems in pregnant women). From those combined sources of information, all of which are generally accepted in the relevant field of teratology as being appropriate sources of information for assessing potential human teratogenicity, Dr. Howard concluded that it was biologically plausible for benomyl to have reached the developing fetal cells in sufficient doses - 100 parts per billion or more - to interfere with their process of development and organogenesis. Again, the in vitro test results showed that neurite growth would be inhibited at concentrations of 3 parts per billion, and that at 30 parts per billion cell death would occur.

The in vitro tests were performed using generally accepted methodologies, and were used in the generally accepted manner, i.e., *not* as DuPont argues and the Third District inaccurately stated, as a novel "direct extrapolation from in-vitro test results to determine a teratogenic exposure level in a living being", *see* 748 So. 2d at 1120, but as one piece of information to be utilized in the analytical process of reaching a conclusion on the issue of general causation. When specifically asked whether he was using the in vitro test results *in and of themselves* as the basis that benomyl acts as a teratogen in humans at given levels, he just as specifically - and correctly - answered that had not but had used the generally accepted methodology of looking to all of the available sources of information: "In a topic like this, you would always take as much information as is possible from all sources. So we have animal studies which prove conclusively that benomyl is a teratogen and is capable of damaging the development of the eye, and we translate now information from studies on human cells and incorporate all this information together to come to a decision." (R. 6206).

Moreover, the final '*extrapolation*' that actually was drawn by Dr. Howard, i.e., his *conclusion* that Benomyl can act as a human teratogen, was just that - his conclusion. The principles and methodologies utilized by Dr. Howard in reaching his conclusion were - as any review of his depositions, the Frye hearing, and the trial testimony will confirm, with all of the details there is not room to include within appellate briefs - generally accepted. Frye inquiries by nature are directed to novel issues, and the purpose of the Frye rule is to ensure that there is reliable scientific methodology behind the novel conclusions as science marches ever forward in Miami, Florida 33131 expanding the frontiers of human knowledge. As this Court stated in *Brim, supra*: "We...emphasiz[e] again that the Frye test is utilized in Florida to guarantee the reliability of *new or novel scientific evidence*." 695 So. 2d at 271.

In sum, on the general causation issue, both the Plaintiffs' and the Defendants'

experts derived their opinions from the same generally-accepted methodology, to wit, through review of (1) such epidemiological studies as were available, (2) in vivo studies, and (3) in vitro studies. The experts simply disagreed on how to interpret the data obtained from these sources. The concluding remarks of the *Berry* opinion underscore the clear conflict between *Berry* and the Third District's decision in this case:

[T]he trial in the instant case will be primarily a so-called "battle of the experts." *The fact that the experts have all derived their opinions from the same generally-accepted methodology, the epidemiological studies contained in the record, but simply disagree upon how to interpret the scientifically (and legally) reliable data, is not a valid reason for excluding the plaintiffs' experts' opinions altogether.*

709 So. 2d at 571. Referring to the Plaintiffs' expert's conclusion as an "extrapolation" does not erase the obvious, to wit, that the Third District has incorrectly used Frye to exclude an expert's *conclusion*. The decision conflicts with *Berry*, and blurs the purpose of Frye. This Court's acceptance of jurisdiction was appropriate, and the guidance the Court can provide by removing the decisional conflict will spare the trial courts in this state the difficult and judicial labor-intensive tasks of trying to reconcile the irreconcilable and/or of trying to decide which of the two decisions to follow.

POINT II

DUPONT IS NOT OTHERWISE ENTITLED TO A NEW TRIAL OR JUDGMENT

There was evidence to support the jury's finding that Benlate is a defective product because its risks outweigh its benefits. Undisputed evidence showed that Benlate has been proven a teratogen in animal studies thus at a minimum posing the risk that it is a human teratogen, and additional trial evidence showed that there are other fungicides available that are: (a) just as effective as Benlate, and (b) *not*

teratogens. (Tr. 2607-2608, 2786-2787, 4963). DuPont had no entitlement to a directed verdict in light of this evidence. The risk of causing birth defects clearly exceeds the benefits of an easily replaceable fungicide. *See Adams v. G.D. Searle & Co., Inc.*, 576 So. 2d 728 (Fla. 2d DCA 1991). Neither was DuPont entitled to a directed verdict based on its federal preemption argument. The federal statute in question is directed to labeling and preempts failure to warn claims, but not the common law strict liability and negligence claims that were submitted to the jury.

It was the Defendants themselves who affirmatively provided the jury with the most extensive references to the subject of 'clusters' at trial, including by playing portions of John Ashton's videotape discussing the subject and an extensive defense-oriented discussion of 'clusters' volunteered by DuPont's expert. (Tr. 1582-1583, 4818-4819).

Finally, in our reply to Pine Island's brief we detail the ample evidence - *not* inferences - that supported the jury's finding that Benlate was sprayed on the field and date in question, evidence that is entirely independent of Mr. Chaffin's *admission* of that fact. Moreover, DuPont is in no position to disclaim Chaffin's admission. DuPont had no knowledge of, and nothing to do with, the subject U-Pic field down in Homestead, Florida. Had DuPont chosen to remain an outsider to the issue it may have had an argument to make about not being bound by Chaffin's admissions. But, DuPont has chosen instead to interject itself and to rely on Chaffin's *favorable-to-DuPont* testimony at trial and throughout these appellate proceedings. Under such circumstances, adoption of the parts should compel adoption of the whole. *Saudi Arabian Airlines Corporation v. Dunn*, 438 So. 2d 116 (Fla. 1st DCA 1983).

CONCLUSION

Based on the foregoing facts and authorities and on those set out in Petitioners' jurisdictional brief and initial brief on the merits, Petitioners respectfully submit that the Court should reverse the decision of the Third District with directions to remand the

case to the trial court for reinstatement of the judgment entered on the jury verdict in favor of the Plaintiffs/Petitioners.

Respectfully submitted,

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of Petitioners' Reply Brief in Opposition to Respondent DuPont's Brief on the Merits was mailed this 27th day of November, 2000 to: Edward W. Warren, Esquire, Christopher Landau, Esquire, Jeffrey Bossert Clark, Esquire, Kirkland & Ellis, Counsel for Respondent E. I. DuPont de Nemours & Company, Inc., 655 Fifteenth Street, N.W., Suite 1200, Washington, D.C. 20006; Arthur J. England, Jr., Esquire, Greenberg Traurig, P.A., Co-Counsel for Respondent E. I. DuPont de Nemours & Company, Inc., 1221 Brickell Avenue, Miami, Florida 33131; David Kleinberg, Esquire, Gaebe, Murphy, Mullen & Antonelli, Counsel for Respondent Pine Island Farms, Inc., 420 South Dixie Highway, 3rd Floor, Miami, Florida 33146; and Martin S. Kaufman, Esquire, Atlantic Legal Foundation, 205 East 42nd Street, 9th Floor, New York, New York 10017.

