John Castillo v. E.I. Du Pont de Nemours & Co.

NEXT CASE ON THE COURT'S ORAL ARGUMENT CALENDAR, CASTILLO VERSUS Du PONT. MR. PERWIN.

THANK YOU, YOUR HONOR. MAY IT PLEASE THE COURT. MY NAME IS JOEL PERWIN. I AM HERE WITH JIM FERRARO AND ANA ALEXANDER FOR THE PLAINTIFFS, THE PETITIONERS. CLEARLY HIM GOING TO SPEND ALMOST ALL OF MY LIMITED TIME ON THE FRYE QUESTION. I WOULD ASK YOUR INDULGENCE, WITH AN ONE-MINUTE PREFACE ON THE DISTRICT COURT'S ALTERNATIVE NEW TRIAL RULING, IN A SINGLE FOOTNOTE, NOTE THREE AT PAGE 1111, OF THE COURT'S OPINION, AN ISSUE WHICH THE COURT MIGHT NOT OTHERWISE REACH, AND IF WE PREVAIL ON THE FRYE ISSUE, WHICH WOULD CONFINE US TO A SIX-MONTH RETRIAL ON THE BASIS OF AN EVIDENTIARY RULING MADE IN LIMINE, ON THE BASIS OF EVIDENCE WHICH THE DEFENDANT SAID THEY WERE GOING TO PUT IN. IT IS THAT CLUSTERS EVIDENCE, THAT STUDY OF THE POSSIBILITY OF CLUSTERS OF MICROTHALMIA OF CHILDREN IN LONDON.

THAT WAS PRETTY HEAVY STUFF, THOUGH, WASN'T IT?

I DON'T THINK IT WAS HEAVY AT ALL. IN FACT IT WAS MINOR PART OF THE TRIAL, BUT THE KEY POINT IS THAT THE RULING IN LIMINE, WHICH YOU WILL FIND AT 632 TO 664 AND 722 OF VOLUME 28 OF THE LLIV OF THE RECORD, WAS MADE IN ANTICIPATION OF THE DEFENDANT'S DECLARATION THAT THEY WERE GOING TO PUT IN THAT EVIDENCE. THEY WERE GOING TO PUT IN THAT ITALY STUDY, SPAGNOLI STUDY, WHICH WAS CREATED AND DESIGNED TO TEST THE CLUSTERS THESIS.

BUT IF WE ARE TALKING ABOUT PREJUDICE, YOU WOULD CHENLT ON -- COMMENT ON IT. I REALIZE WE DON'T WANT TO CHANGE YOUR ORDER OF ARGUMENT IN FOCUSING ON -- BUT IN TERMS OF PREJUDICE, REFERRING TO THE FACT THAT, WELL, THE REASON THAT I RECOGNIZE THIS CLAIM OR BROUGHT THIS ACTION OR WHATEVER, IS BECAUSE I HEARD THAT THERE WERE ALL THESE CHILDREN, SOMEPLACE ELSE, THAT WERE EXPOSED TO THIS AND SUFFERED THESE TERRIBLE CONSEQUENCES.

JUDGE, NUMBER ONE THAT, IS NOT THE CONTEXT IN WHICH WE PUT IT IN. NUMBER TWO, IF THAT WAS PREJUDICIAL, IT WAS AT THE DEFENDANT'S DOING. THEY SAID, IN LIMINE, THEY WERE GOING TO PUT IN THIS EVIDENCE, IN THE FORM OF THE STUDY, DESIGNED TO TEST THAT THESIS. YOU COULDN'T SANITIZE THAT STUDY, TO TAKE OUT ITS VERY PURPOSE, AND THEY DECLARED, PRETRIAL, WE ARE PUTTING THIS IN, AND THE JUDGE SAID, WELL, IF YOU ARE GOING TO PUT THIS IN, OF COURSE THE PLAINTIFFS CAN PREEMPT IT, BY REFERRING TO THIS STUFF AND TRYING TO REBUT IT IN THEIR OWN CASE, SO IF IT WAS PREJUDICIAL, JUSTICE ANSTEAD, IT WAS SELF-INFLICTED BY THE DEFENDANTS, AND IT WOULD BE A TRAGEDY, IF WE SHOULD PREVAIL ON THE FRYE ISSUE, WHICH I AM GOING TO MOVE TO VERY QUICKLY, AND THEN HAVE TO RETRY, FOR SIX MONTHS, A CASE ON THE BASIS OF VERY INCONSEQUENTIAL EVIDENCE, NOT INTRODUCED AS THE REASON FOR OUR LAWSUIT, BUT INTRODUCED AS THE REASON FOR A STUDY, WHICH THEY WANTED TO PUT IN. AND THERE IS A LOT OF OTHER ARGUMENTS IN THE BRIEFS.

BEFORE YOU MOVE ON TO THAT, WOULD YOU JUST HIT ONE MOMENT --.

OKAY.

-- THE HEARSAY ISSUE, THE EVIDENCE THAT THE THIRD DISTRICT SAID WAS NOT ADMISSIBLE AGAINST Du PONT, THE EVIDENCE CONCERNING MR. CHAPLAIN'S STATEMENT THAT BENLATE HAD BEEN SPRAYED ON THIS YOU-PECO IT FARM.

YES, YOUR HONOR -- YOU-PICK YOU-PICK-IT FARM.

YES, YOUR HONOR. WE OVERWHELMINGLY PROVED THAT BENLATE WAS SPRAYED, WITHOUT ANY EVIDENCE. IT WAS PINE ISLAND, THEY ARE RIGHT ABOUT THAT, AND IT DID NOT COME IN AGAINST Du PONT, AND WE RECENTLY CREATED A PRIMA FACIE CASE, SEPARATE AND APART IN IT, THAT BENLATE WAS SPRAYED AND SPRAYED ON MRS. CASTILLO, AND THE CHAPIN ADMISSION WAS UTTERLY IRRELEVANT TO THAT EVIDENCE, AND I CAN GO THROUGH IT RIGHT NOW OR I CAN GO THROUGH IT WHEN I GET TO MY OUTLINE, AFTER I TALK ABOUT FRY. -- ABOUT FRYE. WITH YOUR PERMISSION --

OKAY.

-- LET ME GO IMMEDIATELY TO THE FRYE. IT IS A TERATIGEN IN ANIMALS. CAPABILITY IS THE GENERAL QUESTION. IS IT CAPABLE OF BEING A HUMAN TERATAGEDY? THE COURT TOOK THE POSITION THAT, GIVEN THE PRESENT STATE OF TECHNOLOGY, NOBODY CAN PROVE THAT IT IS. IT IS JUST IMPOSSIBLE TO PROVE THAT IT IS, SO WE CAN CONTINUE TO MARKET THIS HORRIBLE, DEFORMING PRODUCT, BECAUSE NOBODY CAN CATCH US. AND THAT IS THE GRAVAMENT OF THEIR POSITION THAT THEY ARE ASKING THIS COURT TO RATIFY. WE BELIEVE THAT WAS TRAGIC FUNDAMENTAL ERROR, AND, OF COURSE THE QUESTION BOILS DOWN TO THE PARAMETERS AND THE LIMITS OF THE PRETRIAL FRYE INQUIRE, THAT IS -- INQUIRY THAT ISAL GAITED TO THE -- THAT IS ALLOGATED TO THE TRIAL COURT. EVERYBODY AGREES, THAT WITH THE POSITIONS FOUND IN FRYE THAT, THE ULTIMATE CONCLUSION OF THE EXPERT IS OUTSIDE THE FRYE ANALYSIS, AND, OF COURSE, IT HAS TO BE THAT WAY, BECAUSE FRYE, AND ITS AND LOG, FEDERAL AND LOG, DALBERT, ARE DESIGNED TO TEST NEW CONCLUSIONS. THIS COURT HAS SAID THAT FOUR OR TIME TIMES, IN RIM, ROMER-AND NELSON. -- ROMERO AND NELSON. FRYE TESTS AREN'T DESIGNED TO TEST OLD CONCLUSIONS. THEY ARE DESIGNED TO TEST NEW CONCLUSIONS. THEY MAY BE RESULTS THAT NOBODY HAS TESTED BEFORE. THE ESTABLISHMENT OF THE CONCLUSION OFFERED BY THE EXPERT IS OFFERED OUTSIDE THE FRYE ANALYSIS, SO WHAT WE HAVE COME DOWN TO, IS THE QUESTION OF WHAT IS THE CONCLUSION AND WHAT IS THE METHODOLOGY. THAT IS THE KEY TO THIS WHOLE CASE. THE DEFENDANT'S POSITION IS THAT THE -- WHAT THEY CALL LINKAGE OR DERIVATION FROM WHAT EVERYBODY ADMITS ARE ESTABLISHED METHODOLOGIES IN THIS CASE, IN VITRO TESTS, EPIDEMIOLOGICAL TESTS, THEY ARE ALL ESTABLISHED. BOTH SIDES ARE ON. THAT WHERE WE DIFFER IS WHETHER THE FRYE ANALYSIS CONTINUES TO THE EXPERTS THEY CALL IT LINKAGE. I CALL IT DERIVATION, IT TO THE EXPERT'S CONCLUSION THAT THESE TESTS STAB ISSUING TERATIGEN IN ANIMALS ARE ACKNOWLEDGING THE NOVEL CONCLUSION, ALTHOUGH I AM GOING TO GET TO THE BOUGHT POINTE THAT IT IS NOT NOVEL AT ALL TO THE LINKAGE TO TERATIGEN.

YOU ARE SAYING THE LINKAGE IS METHODOLOGY.

ABSOLUTELY. AND I HAVE TWO RESPONSES. IF THAT IS TRUE, WHAT IS THE LEFT FOR THE JURY TO DO, OUTSIDE THE FRYE ANALYSIS? THE WORDS? THE THREE WORDS THAT THE EXPERT SAYS? IF THE EXPERT'S REASONING FROM ESTABLISHED METHODOLOGY TO ACKNOWLEDGED CONCLUSION IS WITHIN THE RUBRIC OF THE FRYE ANALYSIS, WHAT IS LEFT FOR THE JURY? PLEASE TELL US, I IMPLORE THE DEFENDANTS, HOW, FORMULA WISE, HOW IS THE CONCLUSION THAT THIS IS FOR THE JURY AND NOT THE FACT FOR THE COURT. POINT TWO, THIS IS NOT A NOVEL POINT. YOU ARE NOT BEING ASKED TO DECIDE THIS FOR THE FIRST TIME. YOU HAVE, ALREADY, DECIDED IT, IN THE BRIM CASE IN 1997, CITED AT PAGE 340 AND 43 OF OUR BRIEFS. INDULGE ME, PLEASE, TO QUOTE ONE SENTENCE. QUOTE, WE MAY ALLOW MULTIPLE REASONABLE DEDUCTIONS, WHEN ALL ARE BASED ON GENERALLY ACCEPTED PRINCIPLES. MULTIPLE, REASONABLE DEDUCTIONS. THAT

IS WHAT THEY CALL LINKAGE, WHEN ALL ARE BASED ON GENERALLY-ACCEPTED PRINCIPLES. THAT HOLDING OBLITERATES THE CENTRAL ARGUMENT WHICH THE DEFENDANTS OFFERED IN THIS CASE AND CONVINCED THE THIRD DISTRICT COURT TO ADOPT.

AS I UNDERSTAND A PART OF THIS ARGUMENT, IT IS THAT THESE TESTS, THE IN VITRO TESTING, THE RAT STUDIES, EPIDEMIOLOGICAL STUDIES, AND IN ALL OF THESE TESTS, THERE WAS SOMETHING EXTRAPOLATED, OUGHT OF ALL OF -- OUT OF ALL OF THESE TESTS, TO COME TO SOME CONCLUSION, AND THAT THIS EXTRAPOLATION IS REALLY WHAT IS AT ISSUE HERE, WHETHER THAT IS A PROPER METHOD TO USE TO GET TO THIS CONCLUSION. IS THAT NOT THE ARGUMENT OR IS THAT PART --

THAT IS THE ARGUMENT, AND IT IS NOT A METHOD. IT IS THE CONCLUSION. EXACTLY WHAT I QUOTED TO YOU FROM THIS COURT'S PRIOR OPINION. THE EXTRAPOLATION, THE DERIVATION FROM THE ACCEPTED METHODOLOGY TO THE WORDS THAT FORMULATE THE CONCLUSION, IS THE CONCLUSION! NOW IT IS AVAILABLE FOR TESTING BY THE JURY, IN A BATTLE OF EXPERTS, BUT IT IS NOT WITHIN THE FRYE RUBRIC.

WOULD YOU --

YES.

FINISH.

I WANT TO MOVE FURTHER AND SAY THAT, EVEN IF IT IS, I WANT TO SHOW YOU, CONCLUSIVELY, THAT EVEN IF IT IS WITHIN THE FRYE RUBRIC, WE ESTABLISHED, CLEARLY, AND I HOPE TO USER SATISFACTION, THAT THE TESTS -- I HOPE, TO YOUR SATISFACTION, THAT THE TESTS ARE GENERAL-ACCEPTED METH ON THEOLOGIST, AND I THINK YOU WILL ACCEPT THE PHILOSOPHICAL CONCLUSION, IF YOU DO MOVE TO THE NEXT STEP THAT, YOU CONCLUDE WITH THE TRIAL JUDGE THAT, IF YOU DO INCLUDE THAT DERIVATION WITHIN THE FRYE ANALYSIS, WE DID IT. I DON'T SEE HOW WE COULD HAVE DONE IT BETTER.

LET ME STOP YOU THERE THE.

GO AHEAD.

YOU HAVE BEEN TALKING ABOUT FRYE, AND THAT IS, WE HAVE SAID OVER AND OVER, THAT WE ARE ADHERING TO FRYE, THIS 1920 CASE OUT OF WASHINGTON, D.C.

D.C.

YOU HAVEN'T MENTIONED DAL BERT.

NO. -- DALBERT.

NO.

WHAT WOULD BE -- FIRST OF ALL, IS IT YOUR VIEW THAT THE THIRD DISTRICT ESSENTIALLY DAM DALBERT TYPE OF ANALYSIS, AND IF YES OR NO, HOW WOULD THE TWO APPROACHES VARY, IN TERMS OF WHAT A TRIAL JUDGE WOULD BE DOING AND WHAT AN APPELLATE COURT WOULD BE DOING?

YES. ANSWER ONE, YES, THE DISTRICT COURT DID READ THE DECISION CITED IN THE DISTRICT COURT AND CITED BY THE DEFENDANTS. VIRTUALLY EVERYONE OF THEM ARE BENDICTIN CASES, DECIDED IN FEDERAL COURTS, UNDER DALBERT. THAT IS ALL THEY GOT, AND BENDICTIN IS DIFFERENT, BECAUSE IT HAS BEEN TESTED, AND TESTED AND TESTED AGAIN, AND EVERY SINGLE

STUDY HAS SAID IT IS NOT A HUMAN CARCINOGEN. EVERY SINGLE TEST, AND DALBER. IT IS DIFFERENT, JUSTICE PARIENTE, DIFFERENT IN TWO-WAYS. IT IS SWISHY. YOU ARE GOING TO FIND QUESTIONS ON DALBERT. THANK GOD WE ARE NOT DEBATING DALBERT HERE. BUT IT IS GLEANED DIFFERENTLY IN TWO-WAYS. AND THAT IS WHAT THIS COURT HAS ACCEPTED. AFTER DETERMINING, NUMBER ONE, THE REALIBILITY OF THE METHODOLOGY, WHICH ALLOWS THE COURT TO, ALSO, INQUIRE WHETHER THE EXPERT'S CONCLUSIONS, THEMSELVES, MAY BECOME GENERALLY ACCEPTED. THAT IS A STEP THAT FRYE DOESN'T EMBRACE.

ISN'T THAT THE CRITICAL DISTINCTION IN THIS CASE, THEN?

ABSOLUTELY.

SO IF YOUR PREMISE, IN THIS CASE, IS THAT FRYE DOESN'T REQUIRE THE TRIAL COURT TO BE THE GATEKEEPER FOR THOSE LINKAGES.

CORRECT.

AND SORT OF TRUST THE JURY TO MAKE THAT DECISION AND HAVE THE WEAKNESSES COME OUT IN CROSS-EXAMINATION, THEN, WHEN THE -- WHEN AN APPELLATE COURT DOES THAT SECOND STEP, AT LEAST IN THE STATE OF FLORIDA, THEY ARE TREADING ON SOMETHING THAT THE JURY SHOULD BE DETERMINING.

EXACTLY. AND DALBERT ALLOWS IT. NUMBER TWO, DALBERT, ALSO, IF YOU LOOK AT 146 OF DALBERT, AND, ALSO, CITED IN G VERSUS JOINER, CITED AT -- VERSUS JOYNER, CITED AT AMICUS BRIEF 216, THE GAP BETWEEN THE METHODOLOGY, THE -- ACCEPTABLE OR NOT, AND THE CONCLUSION ARE TWO SEPARATE AND IT IS FOR THE JURY OR NOT. THANK YOU.

LET ME ASK YOU THIS ANOTHER WAY, THAT IF THE TESTS PROVE THAT THIS CHEMICAL IS USED ON RATS AND THE RATS DIE, HAS THE FRYE TEST BEEN SATISFIED, AT THAT POINT?

YES. BECAUSE THE RATS STUDIES, WHICH ARE IN VITRO STUDIES, THE IN VITRO STUDIES IN THE PETRI DISH, THE EPIDEMOLOGICAL STUDIES, ALL EXPERTS, EVERYBODY PUT TOGETHER --

EVERYBODY AGREES THAT, IF YOU USE ENOUGH OF THIS CHEMICAL ON RATS, THEY WILL DIE.

AND IF YOU USE IT --

AND THAT SATISFIES THE FRYE TEST.

IF YOU USE AMOUNTS EQUIVALENT TO MINISCULE DOSAGE IN HUMANS -- DON'T LET THEM TELL YOU THE EVIDENCE WAS CONTRARY TO THAT, THEY ARE JUST CONCEALING THE PLAINTIFF'S EVIDENCE, CONTRARY TO MINISCULE DOSES, WELL BELOW WHAT SHE GOT, YOU HAVE ESTABLISHED THE METHODOLOGY AND THE EXPERT'S DERIVATION TO THAT METHODOLOGY, NOVEL OR NOT, IS FOR THE JURY, FOR THE BATTLE OF EXPERTS IN THE JURY. WHAT IS LEFT FOR THE JURY, IF WE DON'T HAVE IT?

BUT YOU PUT IN ANOTHER ELEMENT THAT I DIDN'T PUT IN, A MINISCULE AMOUNT. IS THAT PART OF THE FRYE TEST?

THE QUESTION OF THE AMOUNT --

THE QUANTITY OF IT?

THE QUESTION OF THE AMOUNTS AND WHETHER THEY TRANSLATE TO HUMAN DOSAGES, IS OUTSIDE THE FRYE ANALYSIS BUT TESTED THOROUGHLY, IN THE BATTLE OF THE EXPERTS BY

THE JURY! IF YOU PROVE THAT THERE ARE CERTAIN AMOUNTS THAT ARE -- TERANOGENIC IN ANIMALS, AND THE EXPERTS SAYS, ACCORDING TO THESE RESPECTED AUTHORITIES, I CAN MAKE THE LINKAGE, YOU HAVE, THEN, SATISFIED FRYE, BUT PLEASE ALLOW ME TO GET TO THE NEXT STEP, IF YOU GO THERE. WE ESTABLISHED THAT THESE METHODOLOGIES ARE USED AND ACCEPTED FOR THAT JUMP. WE DID THAT. WE SATIESFIED THE TEST. LET ME GET TO IT, PLEASE. THE STATE OF CALIFORNIA, HAS DECLARED THAT BENLATE IS A KNOWN HUMAN TERATOGEN. POINT ONE. THEY HAVE MADE THAT DECLARATION AS A MATTER OF LAW. THEY DID IT --

WAS THAT MADE RECENTLY, OR WAS THAT --

IT WAS --

-- MADE AT THE TIME OF THIS TRIAL?

AT THE TIME OF THE APPEAL, AND, REMEMBER, ALL OF THIS IS DE NOVO. THEY DID IT, ACCORDING TO THE AUTHORITIES WE SENT UP YESTERDAY, SUPPLEMENTAL AUTHORITIES, IN PART ON THE BASIS OF A 1994 EPA ADDITION TO THE LIST OF CHEMICALS, QUOTE, KNOWN -- REMEMBER WE ARE TALKING ABOUT CAPABILITY -- QUOTE, KNOWN, CLOSE QUOTE, TO -- OR, QUOTE, REASONABLY ANTICIPATED TO CAUSE HARM IN HUMANS, CLOSE QUOTE. SO LET'S GO TO WHAT THE EPA HAS DONE. BETWEEN '77 AND '82, THE EPA ESTABLISHED A REBUTTABLE PRESUMPTION THAT BENLATE WAS A HUMAN TERATOGEN, HUMAN, UTILIZING THE VERY TESTS, JUSTICE SHAW, IN VIT -- IN VITRO RAT TAKESS THAT WERE A PART OF WHAT WE UTILIZED. THEY WITHDREW THAT PRESUMPTION AFTER '82, AGAIN, UTILIZING THE SAME TESTS, AND THEN, AS I SAY, IN '94, THEY CAME BACK THE OTHER WAY AND ADDED BENLATE TO THE LIST OF OF CHEMICALS KNOWN OR REASONABLY ANTICIPATED TO CAUSE HARM IN HUMANS. THEY GAVE A LIST OF THOSE HARMS AND ONE OF THEM WAS TERATOGENICITY. THEY KEEP --

IN THE EXTRAPOLATION PHASE, DO YOU NEED EXPERT TESTIMONY, OR IS THIS FACTUAL MATTERS THAT CAN BE DETERMINED BY THE FACT FINDERS?

YOU NEED EXPERT TESTIMONY FOR THE JURY. THAT IS WHY WE HAVE JURIES. AND -- BUT ALL OF THESE TESTS, IT IS LESS RELEVANT THAT THEY AGREED WITH OUR EXPERTS, WHO ARE NOT OUT THERE ALONE. THEY AGREED WITH US ON ALL OF THESE POINTS. OH, ANOTHER ONE IS THE REFERENCE MANUAL ON SCIENTIFIC EVIDENCE AND OUR REPLY BRIEF TO DEPONTE, AT -- TO Du PONT AT NINE, QUOTE, IT IS BASIC TOXICOLOGY THAT A COMPOUND CAUSING AN EFFECT IN ONE MAMMIL A. AN SPECIES WILL -- MIMMILIAN SPECIES WILL CAUSE IT IN ANOTHER SPECIES. IT CAME OUT THAT THEY USED THE SAME METHODOLOGY TO DETERMINE HUMAN TERATOGENICITY. WE ARE IN AND OUT OUT THERE ALONE. OUR EXPERTS ARE NOT OUT THERE ALONE. WE HAVE GOT THE ENVIRONMENTAL PROTECTION AGENCY, THE LEADING AGENCY IN THE COUNTRY, UTILIZING THIS TEST TO DETERMINE TERACITY. WE WIN. I DON'T THINK YOU SHOULD GO THAT THIRD STEP, AND IF YOU TAKE THE THIRD STEP, WHICH I AM NEVER GOING TO GET TIME TO GET TO, IS TO FIND MICROMANAGEMENT CONCLUSION. SHOULD YOU TEST RATS OR RABBITS? MULTIPLE OR SINGLE MALFORMATIONS SHOULD IT HAVE? IS THERE A TRANSLATION BETWEEN ANIMAL STUDIES AND HUMAN STUDIES?

YOU ARE WELL INTO --

I AM WAY INTO T I KNOW. ON HE HAVERY ONE OF THOSE -- ON EVERYONE OF THOSE, THEIR REPRESENTATION, WHICH IS THE EVIDENCE THEY PUT IN, IS FALSE, AND IN OUR BRIEFS WE GIVE YOU THE CONTRADICTORY EVIDENCE, WHICH THEY HAVE NOT GIVEN YOU, AND THAT IS WAY OUTSIDE THE FRYE ANALYSIS, ANYWAY. THANK YOU FOR YOUR INDULGENCE.

MR. WARREN.

THANK YOU. MAY IT PLEASE THE COURT. I AMED WARREN, REPRESENTING -- I AM ED WARREN,

REPRESENTING MY CLIENT, Du PONT, AND MY CLIENT, DAVID KLEINBERG, WILL TAKE THREE MINUTES THIS MORNING. I WANT TO ADDRESS THREE ISSUES THIS MORNING. FIRST OF ALL, THERE IS NO EXPRESS AND DIRECT CONFLICT, BETWEEN THE THIRD DCA DECISION HERE AND THE FIRST DCA DECISION IN THE BERRY CASE. -- -- IN THE BARRY CASE. THOSE TWO CASES ARE FULLY CONSISTENT AND, INDEED, MUTUALLY REINFORCING. SECONDLY, THE THIRD DCA'S OPINION PROPERLY APPLIED RAMIREZ, AND THIS COURT'S OTHER FRYE CASES, WHEN IT REJECTED PLAINTIFF'S EXPERT TESTIMONY, BECAUSE THE METHODOLOGY EMPLOYED, AS DISTINGUISHED FROM THE OPINION EXPRESSED, WAS NOT GENERALLY ACCEPTED. AND, THIRD, APART FROM FRYE, THE DECISION BELOW MUST BE AFFIRMED AS TO Du PONT, FOR THE EVIDENTIARY REASON ALREADY MENTIONED, AND THIS COURT WOULD, ALSO, NEED TO REACH THE TWO FEDERAL PREEMPTION-LIKE QUESTIONS, WHICH WERE NOT ADDRESSED BY THE LOWER COURT, THE THIRD DCA, SPECIFICALLY THE DEFECT AND MISUSE ISSUES. THIS COURT WOULD HAVE TO ADDRESS THEM ORALITYTIVELY REMAND TO THE THIRD DCA. NOW, IF I CAN TURN, AND JUDGE PARIENTE, I THINK THIS ADDRESSES, THIS PARTIALLY, IN ADDRESSING YOUR POINT ABOUT THE THIRD DCA DECISION, THERE, REALLY, IS NO CONFLICT BETWEEN THIS CASE AND THE BARRY CASE, AND YET THIS CASE WAS BROUGHT TO THIS COURT ON THE GROUND, AND THESE WERE THEIR WORDS, THAT IT WAS EXPRESSLY AND DIRECTLY IN CONTRADICTION WITH THE BARRY CASE FROM THE FIRST DCA. I WANT THE COURT TO READ, AND I AM SURE YOU WILL, THE THIRD DCA OPINION, VERY CAREFULLY, BECAUSE WHAT YOU WILL SEE IS THAT OUR OPINION MENTIONS, NOT JUST MENTIONS BUT CITES, PROVINGLY, FIVE TIMES, THE BARRY -- APPROVINGLY, FIVE TIMES, THE BARRY DECISION.

IT BRINGS WITHIN IT, DOES IT NOT, THE EXTRAPOLATION, WHEREAS THE BARRY CASE DOES NOT BRING THE EXTRAPOLATION WITHIN THE DALBERT OR WITHIN THE ANALYSIS WITHIN THE METHODOLOGY ANALYSIS?

IT DOES -- IN THAT SENSE, BOTH CASES DEAL WITH METHODOLOGY. IN THE BARRY CASE, WHAT THE COURT WAS TALKING ABOUT IS WHETHER STANDARD EPIDEMIOLOGY, METHODOLOGY COULD BE ACCEPTED, IF THE WITNESS WAS TESTIFYING TO THAT. IN THIS CASE, THE COURT CITES BARRY, AND I WANT TO QUOTE IT. THIS IS WHAT OUR COURT SAID. WHEN THE EXPERT'S OPINION IS BASED ON GENERALLY ACCEPTED PRINCIPLES AND METHODOLOGY, IT IS NOT NECESSARY THAT THE EXPERT'S OPINION BE GENERALLY ACCEPTED AS WELL. OUR COURT, THEN, LOOKED AT METHODOLOGY. HERE IS WHAT THE COURT SAID --

AND THEN DID IT NOT, THOUGH, GO ON TO HOLD THAT THE OPINION MUST COME WITHIN THAT METHODOLOGY? THAT IS ESSENTIALLY WHAT THE THIRD DISTRICT HAS HELD, ISN'T IT?

NOT AT ALL. TOO IS NOT? YOUR HONOR, LET ME BE VERY CLEAR ABOUT THIS. IT USED BARRY, FOR THE VERY PROPOSITION WE ARE TALKING ABOUT HERE, AND LET ME QUOTE IT ONE MORE TIME. IT REJECTED THEIR ARGUMENT THAT WHAT WE WERE ASKING FOR WAS APPROVAL OF THE OPINION, AND IT SAID, NO, WHEN THE EXPERT'S OPINION IS BASED ON GENERALLY-ACCEPTED PRINCIPLES AND METHODOLOGY, IT IS NOT NECESSARY THAT THE EXPERT'S OPINION BE GENERALLY ACCEPTED AS WELL. NOW, THIS CASE WAS FRAMED AND DECIDED, IN TERMS OF METHODOLOGY, AND WHAT THE COURT SAID, FIRST OF ALL, LET ME STRESS, AGAIN, BACK TO JUDGE PARIENTE, THE THIRD DCA WENT RIGHT THROUGH THE SAME KIND OF ANALYSIS ASSIST BARRY, CITING RAMIREZ, BRIN, HADDEN. THE FAMILIAR CASES WERE USED ONLY AS SECONDARY AUTHORITY, AND ON THE QUESTION OF THE REALIBILITY OF THE METHODOLOGY, THE DALBERT ANALYSIS AND THE FRYE ANALYSIS ARE IDENTICAL FORM NOW, WHAT THE COURT SAID IS Du PONT'S PRIMARY ARGUMENT, AND, AGAIN, I AM QUOTING, CONCERNS THE METHODOLOGY USED BY DR. HOWARD, IN REACHING HIS CONCLUSION THAT BENLATE IS A HUMAN TERATOGEN, WHICH CAUSED JOHN CASTILLO'S MICROTHALMIA.

DOES THAT NOT MEAN EXTRAPOLATION?

THAT MEANS THE METHODOLOGY EQUALS THE EXTRAPOLATION.

SO THE QUESTION THEN BECOMES ARE WE USING METHODOLOGY TO DESCRIBE THE EXTRAPOLATION, OR IS THE EXTRAPOLATION OPINION?

NO. LET ME TELL YOU WHAT THE METHODOLOGY WAS, AND I THINK YOU WILL SEE THE POINT. THERE WERE TWO QUESTIONS THAT WERE PRESENTED, AND THIS IS EXACTLY WHAT THE COURT SAYS, AND SAYS BOTH HAVE TO BE FRYE TESTED. IS, IS BENLATE A HUMAN TERATOGEN, AND WHAT IS THE LEVEL AT WHICH IT HAS THE TERATOGEN EFFECT? IN OTHER WORDS WE HAVE TO DETERMINE, BOTH, THAT IT IS A HUMAN TERA T. O -- TERATOGEN AND WHAT IS THE AFTER LEVEL TAKE IS THE -- WHAT IS THE LEVEL THAT IS THE AFFECTED LEVEL? AND THE COURT SAID, ON THIS QUESTION OF IS THIS HUMAN TERATOGEN SOMETHING THAT MIGHT HAVE CAUSED JOHN CASTILLO'S MICROTHALMIA, THEIR PROCEDURE IS THEY SAID WE WILL DO AN IN VITRO STUDY, AND WHAT THEY DID WAS SOAKED HUMAN LUNG TISSUE IN BENLATE FOR 24 HOURS, AND AS A CONSEQUENCE OF THAT, REACHED A LOW-EFFECT LEVEL, OF 20 PARTS PER BILLION, AND THE QUESTION IS WHETHER AN IN VITRO STUDY, WHICH ISLY OKAY FOR DECIDING -- WHICH IS PERFECTLY OKAY FOR DECIDING WHETHER YOU ARE GOING TO MEASURE SOME SUBSTANCE BUT IS NOT PERFECTLY OKAY FOR IF YOU ARE ESTABLISHING A PARTICULAR LEVEL, AND WHAT THEY DID WAS THEY ESTABLISHED SOME LEVEL, AND MADE A DETERMINATION, BY EXTRAPOLATION, AGAIN, BY DETERMINING THAT MRS. CASTILLO MAY HAVE BEEN EXPOSED TO HAVE PARTICULAR LEVEL. LET ME TALK ABOUT THE METHODOLOGY, THE IN VITRO STUDY.

YOU SAID THAT USING THE IN VITRO METHOD IS NOT A GENERALLY-ACCEPTED WAY TO MAKE THIS DETERMINATION. NOW, IS THAT -- DID THE JUDGE, THE TRIAL JUDGE FOUND THAT IT WAS. CORRECT? IN THE FRYE INQUIRE?

-- IN THE FRYE INQUIRY?

I THINK, IF YOU WILL READ THE THIRD DCA'S OPINION, YOU WILL SEE THE TRIAL JUDGE VERY MUCH MESSED UP THE APPLICATION OF FRYE, BUT THE POINT IS THAT, AS THE COURT SAID, THE PLAINTIFFS, THEMSELVES, CONCEDED, AND I WANT YOU TO LOOK, WHEN YOU GET A CHANCE, AT PAGES -- PAGE 1121 OF THE DECISION, BECAUSE, AGAIN, I AM QUOTED. THEY CONCEDED THAT THIS WAS NOT A GENERALLY-ACCEPTED METHODOLOGY. THEY CONCEDED THAT IT HAD NEVER BEEN ACCEPTED BY ANY GOVERNMENT AGENCY OR ANY SCIENTIFIC ORGANIZATION.

THAT IS USING IN VITRO, TO DETERMINE HUMAN TOXICITY?

NOT HUMAN TOXICITY. TO DETERMINING WHETHER OR NOT SOMETHING IS A HUMAN TERATOGEN AND AT ATICTIC ALREADY LEVEL. IN OTHER WORDS -- AND AT A PARTICULAR LEVEL. IN OTHER WORDS YOU NEED TO BE ABLE TO DETERMINE WHAT IS THE LOW EXPOSURE LEVEL, AND HOW DO YOU DETERMINE THAT SOMEONE HAD THAT EXPOSURE?

HOW DO YOU GO ABOUT, IN 2001, SAYING THAT THIS HAD A TOXICITY HE HAVE SNECKT.

HUMAN TERATOGEN.

I CAN'T SAY THAT. I AM SORRY.

WE HAD, FROM DR. HOLMES, WHO LAID OUT THIS CITE EARIA, ONE OF THE PROBLEMS IS THIS. YOU HAVE 2000 SUBSTANCES THAT ARE TERATOGENIC TO ANIMALS AND A VERY SMALL HANDFUL THAT ARE SHOWN TO BE A HUMAN TERATOGEN, SO WHAT YOU KNEE TO DO IS MAKE THIS JUMP. WHAT YOU DO IS GET HUMAN CONSISTENCY STUDIES AND OFTEN YOU GET CONFIRMATORY HUMAN EVIDENCE, SUCH AS THALIDOMIDE, WHICH IS WHAT WE ARE ALL FAMILIAR WITH. IT IS A STARTING POINT.

SO WE DON'T, REALLY, ISOLATE ONE PARTICULAR TYPE OF METHODOLOGY. WHAT THIS EXPERT DID WAS LOOK AT ALL THREE. IS THAT CORRECT?

LET ME SAY THAT NO TWO PARTIALLY, WHAT YOU SAID, AND THAT IS THAT THE IN VITRO STUDY IS NEVER AN APPROPRIATE TOOL FOR EXTRAPOLATING, TO DETERMINE A DOZE IN HUMANS, AND LET ME ---A DOSE IN HUMANS, AND LET ME -- MY COLLEAGUE, HERE, WAS CITING THE FEDERAL REFERENCE MANUAL ON EVIDENCE, AND LET ME CITE TO PAGE 410 IN THAT REFERENCE MANUAL, AND WE WILL BE GLAD TO PROVIDE A COPY OF THIS TO THE COURT. CRITERIA FOR THE RELIABILITY OF AN IN VITRO STUDY INCLUDE WHETHER THE TEST HAS COME THROUGH A PUBLISHED PROTOCOL, IN WHICH MANY LABORATORIES ARE USING THE SAME IN VITRO METHOD ON A SERIES OF UNKNOWN COMPOUNDS, PREPARED BY A REPUTABLE ORGANIZATION, LIKE NIH, TO DETERMINE THE CONSISTENCY AND ACCURATELY MEASURE TOXICITY. THAT, OBVIOUSLY, HASN'T HAPPENED HERE. IT IS CONCEDED THAT IT HASN'T HAPPENED HERE.

BUT AS I UNDERSTAND THEIR ARGUMENT, HOWEVER, IS THAT THEY DIDN'T JUST TAKE THIS IN VITRO TEST, ALONE, TO COME TO THIS CONCLUSION, THAT THEY USED ALL OF THE OTHER THING, THE RAT STUDY, EVEN YOUR OWN EPIDEMIOLOGICAL STUDY, AND THAT, TOGETHER, THEY USED THIS INFORMATION TO COME UP WITH THE HUMAN DOSAGE, ET CETERA.

BUT THE QUESTION IS, ONCE AGAIN, METHODOLOGY. WHAT YOU HAVE TO DO IS YOU HAVE TO -- THERE IS NOTHING WRONG WITH STARTING WITH WHAT WAS A RAT DEVAGE STUDY AND WHAT YOU DO, TO UNDERSTAND THAT, IS YOU TAKE A TUBE AND PUT IT DOWN THE RAT'S MOUTH AND PUT THE STUFF IN IT.

MY QUESTION IS WAS ANYTHING WRONG WITH EACH OF THE DIFFERENT METHODS?

YES. YES. YES! THE IN VITRO STUDY IS THE REAL PROBLEM HERE. WHAT DR. HOWARD DID --

BUT DIDN'T THEY ADMIT THAT, ALONE, THIS STUDY WOULD NOT BE SUFFICIENT, BUT BY PUTTING IT WITH THE OTHER STUDIES THAT WERE DONE, WE CAN MAKE THESE CONCLUSIONS THAT THEY REACHED.

BUT THE PROBLEM IS THAT IT IS LOGICALLY CENTRAL TO DETERMINE TWO PROPOSITIONS, AND THIS IS EXACTLY WHAT THE COURT, BELOW, SAID, THE THIRD DCA. IS IT A HUMAN TERATOGEN, HOW DO WE DETERMINE THAT, AND THEN AT WHAT DOSE IS IT A HUMAN TERATOGEN. THAT IS, REALLY, 9 KEY. THE -- THE KEY. THE KEY MISSING LINK, HERE, IS THE DOSE. IF YOU LOOK AT THE RAT STUDY, YOU ARE TALKING ABOUT 30 PARTS PER MILLION. HOW DO YOU GET FROM 30 PARTS PER MILLION TO 20 PARTS PER BILLION? YOU USE THE IN VITRO STUDY. THAT IS WHAT THEY DID. THE IN VITRO STUDY IS THE CRITICAL METHOD LOGICAL LINK THAT REQUIRES THEM TO MAKE A CASE HERE, AND WHAT THEY SAID IS THAT IT IS NOT GENERALLY ACCEPTED. THAT IS WHAT THE FEDERAL EVIDENCE MANUAL SAID, AS I JUST READ IT TO YOU.

JUSTICE SHAW, I THINK, HAD A QUESTION.

IDEALLY, HOW WOULD YOU MOVE, IN YOUR OPINION, FROM USE OF THE FRYE TEST THAT HAS BEEN USED ONLY ON AND MALLS, TO THE -- ON ANIMALS, TO THE HUMAN EQUATION. HOW WOULD THAT IDEALLY WORK?

WHAT YOU HAVE TO DO IS YOU, IN MANY CASES, IF YOU ARE WILLING TO MAKE THE ANIMAL-TO-MAN JUMP, THAT IS THAT AN ANIMAL TERATOGEN IS A HUMAN TERATOGEN, THEN YOU MAKE AN EXTRAPOLATION, BASED UPON THE DOSE IN THE ANIMAL STUDY. YOU DON'T USE THE IN VITRO STUDY TO FILL IN THE GAP, TO GO FROM A PARTS PER MILLION TO PARTS PER BILLION, TO TAKE 1,000 TIMES LESS DOSE AND SAY THAT IT TERATOGENIC. THAT IS WHAT HAPPENED HERE. BUT IF WE ARE PREPARED TO SAY THERE IS A DOZEN ANIMAL STUDIES OR FIVE OR WHATEVER, AND THEY ARE ALL CONSISTENT AND WE ARE PREPARED TO MAKE THE JUMP, WHICH EPA, I KNOW

INSD DENTLY HASN'T -- WHICH, INCIDENTALLY HASN'T MADE IN THIS CASE, AND I WANT TO TAKE ONE SECOND ON THAT --

YOU BETTER MANAGE YOUR COLLEAGUE'S TIME THERE OR HE IS GOING TO BE OUT.

THAT IS THE TIMER.

THAT IS INTO HIS TIME. LET ME SUGGEST THIS. EPA, IN THE THING THAT HE REFERRED TO, AS WELL AS IN THE CALIFORNIA SITUATION, IS SIMPLY TALKING ABOUT AN INFORMATIONAL REQUIREMENT. WHAT EPA SAYS IS THAT, WHEN WE REGULATE A SUBSTANCE, WE HAVE A MUCH HIGHER THRESH HOLE, AND IN THE -- THRESHOLD, AND IN THE BENLATE CASE, THE PESTICIDE, IT IS HELD THAT IT IS NOT UNREASONABLY DANGEROUS, THERE WAS A THOROUGH INVESTIGATION AND A CONCLUSION THAT EVEN WOMEN PESTICIDE APPLICATORS ARE NOT REQUIRED TO HAVE A WARNING ABOUT POTENTIAL RISKS TO THE FETUS.

THANK YOU.

THANK YOU, SIR. GOOD MORNING. MY NAME IS DAVID KLEINBERG ON, BEHALF OF THE RESPONDENT PINE ISLAND FARMS. I WOULD LIKE TO TAKE THE VERY BRIEF TIME I HAVE BEFORE YOU, AND I WOULD LIKE TO TAKE THAT TIME TO FOCUS ON THE ISSUE OF WHETHER THERE WAS LEGALLY-SUFFICIENT, AND INDEED THERE WAS LEGALLY INSUFFICIENT PROOF OF EXPOSURE TO BENLATE ON, SPECIFICALLY, NOVEMBER 1 AND 2, WHEN 24 INCIDENT IS ALONGED TO HAVE OCCURRED. -- ALLEGED TO HAVE OCCURRED. OBVIOUSLY IF THERE IS NO EXPOSURE, THEN THESE HEAD I ISSUES, IN TERMS OF FRYE AND PARTS PER BILLION, HAS CLEARLY BECOME ACADEMIC.

THE THIRD DISTRICT FOUND THAT THERE WAS SUFFICIENT EVIDENCE, CORRECT?

NO, INDEED, THE THIRD DISTRICT SUFFICIENTLY FOUND THAT THERE WAS AN IN DURABLE STACKING OF PYRAMID EVIDENCE UNDER VOKER, AND THAT THERE WAS NO SUFFICIENT EVIDENCE AS TO THE HAPPENING OF THE INCIDENT, KEY POINT, SPECIFICALLY ON NOVEMBER 1 AND 2, WHEN IT IS CLEAR THAT THOSE ARE THE ONLY TWO DAYS IN THE HISTORY OF MANKIND THAT ARE RELEVANT TO THIS INQUIRE, NOVEMBER 1 OR 2.

IS THIS ISSUE, ALSO, TIED IN WITH THE HEARSAY ISSUE? AND I THOUGHT THE THIRD DISTRICT SAID, AS REGARDS TO YOUR CLIENT, THAT THAT WAS AN ADMISSION AND COULD, IN FACT, WAS PROPERLY ADMITTED AGAINST YOUR CLIENT?

YES, MA'AM. LET ME ADDRESS THAT, IF I MAY. OBVIOUSLY, JUSTICE --

ISN'T THAT PART OF WHETHER IT HAPPENED, SPECIFICALLY THE EVIDENCE CLAIM. ARE THOSE NOT JUST PART OF THE SAME CLAIM?

NO. TO ANSWER YOUR QUESTION, WAS, YES, THEY SAID THESE THINGS. THE ANSWER TO YOUR QUESTION IS NO, AND I THINK YOU HAVE, REALLY, TOUCHED UPON IT. THE ISSUE HERE IS WHETHER OR NOT THE STATEMENT, AND I THINK IT HAS BEEN I AM PLOL CHARACTERIZED AS -- HAS BEEN IMPROPERLY CHARACTERIZED AS AN ADMISSION, BUT WHETHER THE STATEMENT INDICATE THAT BENLATE WAS USED ON NOVEMBER 1 OR 2, AND WHAT THIS COURT MISUNDERSTANDS, BECAUSE IT WAS ULTIMATELY LOST BY OTHER THINGS THAT WERE DONE BY THE TRIAL JUDGE, AND I THINK IT WHAT IS CLEAR ERROR, IS THIS STATEMENT HAS TO BE CONSIDERED IN THE CONTEXT OF WHAT WAS SAID, WHEN AND HOW IT WAS SAID, AND, ALSO, IN THE CONTEXT OF THE CLEARLY LOWER COURT, THE TRIAL COURT, IN ALLOWING THE MISUSE OF REAL ADMISSIONS AND REAL DENIALS. MR. CHAFFIN MADE A STATEMENT, ACCORDING TO THE TESTIMONY, AND ACCEPT THAT IT BE TRUE AT THIS MOMENT, MADE A STATEMENT TO THE BRITISH REPORTER. MR. CHAFIN WAS SITTING IN A PICKUP WITH A CELL PHONE, IN THE IN MIDDLE OF A FIELD, FIVE YEARS AFTER THIS INCIDENT WAS ALLEGED TO HAVE OCCURRED, WITHOUT THE

BENEFIT OF ANY DOCUMENTATION, AND WHAT HE SAID WAS, YES, THERE IS A POTENTIAL THAT BENLATE MAY HAVE BEEN USED IN THE BEGINNING OF THE GROWING SEASON, IN NOVEMBER OF 1989.

ARE WE, REALLY, TALKING ABOUT ADMISSIBILITY HERE OR WEIGHT? IF YOU ARE TALKING ABOUT ALL OF THE CIRCUMSTANCES SURROUNDING HOW WE GAVE THE -- HOW HE GAVE THE STATEMENT AND WHEN HE GAVE THE STATEMENT, AREN'T WE, REALLY, TALKING ABOUT WHAT KIND OF WEIGHT THE JURY SHOULD GIVE TO THIS, CONSIDERING THOSE CIRCUMSTANCES?

NO, MA'AM, AND I WILL TELL YOU WHY. I AM NOT SAYING THAT IT IS NOT TECHNICALLY A HEARSAY EXCEPTION, UNDER 803.18. THAT IS NOT MY POINT. I AM NOT SAYING IT IS INADMISSIBLE, EITHER. WHAT I AM SAYING IS, SUMING IT TO BE TRUE, GIVING IT 100 PERCENT OF THE WEIGHT YOU NEED TO GIVE IT, DOES THAT STATEMENT PROVIDE ANY EVIDENCE, LEGALLY-SUFFICIENT EVIDENCE, WITHOUT STACKING PYRAMIDS, THAT THE BENLATE WAS USED ON NOVEMBER 1 OR 2 OF 1989, AND IN ORDER TO UNDERSTAND THAT, YOU HAVE TO UNDERSTAND THE ENTIRETY OF THE VOLKER PYRAMID THAT THE THIRD DISTRICT COURT PROPERLY RECOGNIZED WAS CLEAR LEGAL ERROR, AND YOU, ALSO, HAVE TO UNDERSTAND IT IN THE CONTEXT OF ANOTHER LEGAL ERROR, WHICH WAS NOT EVEN ADDRESSED BY THE THIRD DISTRICT THAT DIDN'T HAVE A NEED TO PASS ON IT, AND THAT WAS THE NEED FOR ADMISSIONS UNDER THE EVIDENCE CODE 108. WHAT HAPPENED WAS THE PLAINTIFF SUBMITTED A REQUEST FOR ADMISSIONS, NOT JUST STATEMENTS, REQUESTS FOR ADMISSIONS. DID YOU USE, AND THEY WENT THROUGH A LITANY. DID YOU USE COPPER, THIS PESTICIDE, THAT HERBICIDE, AND THEY LISTED 74 ITEMS. DID YOU USE THEM NOT SOMETIME VAGUELY IN THE BEGINNING OF THE GROWING SEASON IN NOVEMBER. DID YOU USE THEM ON THE DAY MS. CASTILLO SAID, AND THAT THE EVIDENCE SUPPORTS HAD TO BE THOSE TWO SPECIFIC DAYS WHEN THE EYES WERE FORMING, DID YOU USE IT ON THOSE TWO DAYS? AND WHAT HAPPENED WAS THE FARMER, THEN NOT IN A PICKUP TRUCK AND HAVING A FULL OPPORTUNITY TO EXAMINE RECORDS, INCLUDING A VIDEOTAPE OF THE FARMING FIELD IN QUESTION, TAKEN SIX DAYS BEFORE THE INCIDENT, WHICH SHOWED THERE WAS ABSOLUTELY NO TOMATO PLANTS, PERIOD, WHATSOEVER, MUCH LESS FOUR TO SIX WEEK OLD PLANTS, AND WHAT THE COURT DID WAS ALLOW THE PLAINTIFF TO READ ALL EXCEPT FOR THE DENIAL OF THE USE OF BENLATE ON THE DAY IN QUESTION. THE SPECIFIC DAY IN QUESTION. AND THE DEFENDANT ASKED AND THEY ASKED AND THEY ASKED AGAIN, AND THE COURT REFUSED TO ALLOW IT. THE PLAINTIFF, THEN, CREATED THE INFERENCE, WHICH -- OR SOUGHT THE STACKING OF INFERENCES, WHICH THE TRIAL COURT GOT HUNG UP ON, AND TO A LESSER EXTENT, THE DISTRICT COURT OF APPEALS GOT HUNG UP ON.

DID HE MAKE THAT, AT SOME POINT, THE DENIAL IN COURT, THAT BENLATE HAD BEEN USED ON THIS YOU-PECO IT FARM?

HE DID NOT -- YOU-PICK-IT FARM?

HE DID NOT, THROUGH TESTIMONY, DIDN'T STATE THAT WE DID USE BENLATE ON THOSE DAYS. YES, MA'AM. HOWEVER, THE RULE OF FAIRNESS, WHICH IS CODDFIED IN 90.108, STADZ THAT THESE ADMISSIONS, THIS DOCUMENT, HAS TO BE READ IN ITS ENTIRETY, AND IT WAS. THERE IS NO WAIVER ISSUE HERE, CONTEMPORANEOUSLY, NOT SIX WEEKS LATER, WHEN THE DEFENDANTS PUT ON THEIR CASE, AND THE, QUOTE, ADMISSION THAT YOU ARE TALKING ABOUT WAS, THEN, USED TO LEAP UP, AND THE DEFENDANTS, IN THEIR CLOSING ARGUMENT, MAKE STATEMENTS, AND I CITED TO IT. IT IS AT PAGE, TRANSCRIPT PAGE 5320. IT IS, ALSO, REFERRED TO, EXTENSIVELY IN MY BRIEF, THEY MAKE THE CLOSING ARGUMENT AS FOLLOWS. BENLATE IS THE ONLY POSSIBLE FUNGICIDE TO BE USED BEFORE NOVEMBER 10, 1989, BECAUSE BECAUSE NONE OTHER WAS USED. WE ASKED THEM FOR REQUESTS FOR ADMISSIONS. WE ASKED THEM TO REQUEST FOR ADMISSIONS, AND THEY DENIED THE USE OF EACH AND EVERY OTHER FUNGICIDE AT THAT TIME, AND NOW THEY ARE IN COURT SAYING WE DIDN'T USE IT UNTIL LATER. SO THEY GIVE -- MY TIME IS UP, I SEE. THEY GIVE INFERENCE OF RECENT FABRICATION, WHICH IS CLEARLY INAPPROPRIATE.

I SEE MY TIME IS UP. I APOLOGIZE FOR THAT. I WOULD ASK THAT THE COURT DISMISS THIS WRIT OF CERTIORARI AS IMPROPERLY GRANTED, BECAUSE THERE IS NO CONFLICT WITH BARRY. I WOULD ASK THAT THE COURT AFFIRM AND ALLOW THE THIRD DISTRICT COURT OF APPEALS' OPINION TO STAND, AS TO THE PYRAMIDING OF INFERENCES AND TO NECESSARILY QUASH THE PARTICULAR REFERENCE TO WHAT HAS BEEN REFERRED TO AS IMPROPERLY AS AN ADMISSION BY MR. CHAFIN AS TO AN ADMISSION ON THE DATES IN QUESTION.

THANK YOU.

I WANT TO TALK ABOUT THAT ONE POINT, JUST LAST POINT ON THE GENERAL CAUSATION ISSUE, AND THAT IS THE DOSAGE. THEIR WITNESS ADMITTED THAT THE DOSAGES WHICH WERE DEMONSTRABLE IN THE IN VITRO AND IN VIVO AND OTHER STUDIES-ON WE NEVER RELIED ON JUST -- STUDIES -- WE NEVER RELIED ON JUST ONE, TRANSFERRED TO HUMAN BEINGS, AND LOOK AT OUR WITNESS, STALLER, THAT MADE THOSE MATHEMATICAL TRANSLATIONS THAT BENLATE REACHED HER BLOODSTREAM, AND WE DID THAT MATH MATTCALLY, AT 100 PARTS PER MILLION, GIVEN THE AMOUNT SHE WAS EXPOSED TO. HARD TEST THAT THERE WAS CELL INTEGRATION OF CELL GROWTH AT 3 PARTS PER BILLION AND THEN A TEST AT 20 PARTS PER BILLION. THE AMOUNT SHE GOT, TRANSLATED FROM THE AMOUNTS IN 9 RATS WERE DONE, AND THEY WERE -- IN THE RATS WERE DONE, AND THEY WERE MINISCULE AS TO THE AMOUNTS SHE GOT IN HER SKIN AND BLOODSTREAM, AND WE TOOK IT BICEPED METHODOLOGY -- TOOK IT, BICEPED METHODOLOGY, ALL THE -- BY ACCEPTED METHODOLOGY, ALL THE WAY TO THE CELL LEVEL.

PLEASE RESPOND TO THE JURISDICTIONAL ARGUMENT.

IT IS A NO-BRAINER. BARRY CONFLICTS WITH THE DISTRICT COURT DECISION. THEY, BOTH, STATE THE SAME PRINCIPLE, BUT THEY APPLY THAT PRINCIPLE DIFFERENTLY TO ANALOGOUS FACTS, AND THIS COURT HAS SAID, IN A VARIETY OF CASES, THAT IS CONFLICT. THEY SAY, OVER AND OVER AGAIN, JUST LIKE BARRY, OH, WE ARE ONLY LOOKING AT METHODOLOGY, AND THEN THEY DON'T DO IT. THEY GO BEYOND METHODOLOGY AND THEY LOOK TO CONCLUSION. THEY DO EXACTLY WHAT THE BARRY COURT REFUSED TO DO. THAT IS CONFLICT. LET ME MOVE, QUICKLY, TO THE ISSUE OF SPECIFIC CAUSATION, WHICH JUSTICE QUINCE ASKED AT THE VERY BEGINNING, AND THAT IS WHETHER SHE WAS SPRAYED WITH BENLATE. FORGET THE CHAFIN ADMISSION. THROW IT OUT. FORGET THE REQUESTS FOR ADMISSION THAT WE PUT IN. THEY WERE CUMULATIVE. THROW IT OUT. WE PROVED THAT SHE WAS SPRAYED WITH BENLATE IN OTHER WAYS. WE PROVED, BY DIRECT EVIDENCE, THE DISTRICT COURT SAID THAT, ABSENT CHAFIN, THERE WAS NO DIRECT EVIDENCE. WE PROVED, BY DIRECT EVIDENCE, AND IT WAS MRS. CASTILLO'S TESTIMONY, AND IT WAS VERY SPECIFIC, ON NOVEMBER 1 AND 2, SHE WAS SPRAYED BY AN ODE OR LESS, COLORLESS LIQUID FROM A YOU-PICK TRACTOR ON THOSE DATES. THAT WAS RICH, DIRECT EVIDENCE. THAT WASN'T CIRCUMSTANTIAL, AND THE FATAL ERROR WHICH THE DEFENDANTS MADE IN THIS CASE, ABSOLUTELY FATAL, WAS THAT THEIR SOLE RESPONSE, THEIR SOLE RESPONSE TO THAT DIRECT EVIDENCE WAS MRS. CASTILLO IS A LIAR. SHE IS NOT TELLING THE TRUTH. THEY DIDN'T SAY WE WERE SPRAYING SOMETHING ELSE. THEY DIDN'T SAY IT MAY HAVE BEEN A DIFFERENT DATE. THEY DIDN'T SAY IT MAY HAVE BEEN AN INSECTICIDE AND NOT A FUNGICIDE. THEY SAID IT DID NOT HAPPEN. SHE IS A LIAR. AND THE JURY BELIEVED HER, AND THEREFORE IT IS A PREDICATE OF THIS ANALYSIS, BY DIRECT TESTIMONY, THAT IT WAS A TRACTOR. IT WAS ON THOSE DATES, AND IT WAS AN ODE OR LESS AND COLORLESS LIQUID -- -- AN ODORLESS AND COLORLESS LIQUID.

WHAT I UNDERSTAND THAT COUNSEL WAS JUST ARGUING THAT THERE WAS NO LINKAGE, SPEAKING OF LINKAGE.

THAT ISIOUS WHERE I AM GOING. THERE WAS TONS OF LINKAGE. THERE WAS TONS OF POSSIBILITIES THAT COULD HAVE BEEN SPRAYED. WATER, NUT RINTSZ AND FUNKY SIDES, WHICH WAS BENLATE. WATER PENNSYLVANIA BECAUSE IT WAS TRACTOR. WATER IS NOT SPRAYED WITH

A TRACTOR. NUTRIENTS. THAT SYSTEM. IT IS OUT. THE REPLY TO PINE ISLAND AT 9 TO 14 AND MOST PARTICULARLY OUR MOTION FOR REHEARING IN THE DISTRICT COURT, WHERE WE HAD A LOT MORE SPACE AND LAID THIS OUT WITH GREATER SPECIFICITY.

I BELIEVE YOUR TIME IS UP.

OH, BROTHER. LOOK AT THE LINKAGE. NOT BY CIRCUMSTANTIAL BUT DIRECT EVIDENCE. IT IS ALL IN THE BRIEFS AND THEREFORE MADE THE SPECIFIC CASE FOR WAS INDICATION EXTRINS I CAN TO THE -- EXTRINSIC TO THE CASE. THANK YOU, YOUR HONORS.

THANK YOU.