IN THE DISTRICT COURT OF APPEAL OF FLORIDA
THIRD DISTRICT

CASE NO. 3D07-2322
CONSOLIDATED: 3D07-1036
3D07-2318

E.I. DUPONT DE NEMOURS & COMPANY, INC.,

Defendant/Appellee/Cross-Appellant,

vs.

AGROFOLLAJES, S.A., et al.,

Plaintiffs/Appellants/Cross-Appellees.

APPEAL FROM THE CIRCUIT COURT OF THE 11th JUDICIAL CIRCUIT COURT IN AND FOR MIAMI-DADE COUNTY, FLORIDA
CASE NO. 01-23796
01-6932

APPELLEE/CROSS-APPELLANT E.I. DUPONT DE NEMOURS & COMPANY'S CORRECTED ANSWER BRIEF AND INITIAL BRIEF ON CROSS-APPEAL

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STATEMENT OF THE CASE AND FACTS

This answer and cross-initial brief is filed by E.I du Pont de Nemours & Company, Inc. ("DuPont"), defendant/appellee/cross-appellant. Plaintiffs are 27 Costa Rican fern growers who claim DuPont's Benlate fungicide damaged their crops. DuPont appeals from judgments totaling $24,677,830.70, based on jury verdicts totaling $113,486,696. (R137-34805-885; R149-37894-927).

DuPont is entitled to judgment in its favor. In the alternative the judgments should be reversed and remanded for a fair trial involving one Plaintiff at a time, or, at most, one group of co-managed Plaintiffs.

I. DuPont and Benlate

DuPont's agricultural business has long been a leading developer of insecticides, herbicides, and fungicides that protect crops worldwide from pests and disease. (T.4855-56). In 1970, DuPont introduced the fungicide Benlate WP ("Wettable Powder"). Benlate WP was the first "systemic" fungicide – it protected against and cured plant disease by acting inside the plant. (T.4859-60). Benlate WP, with its active ingredient benomyl, was a breakthrough product that protected hundreds of crops against disease-causing fungi in more than 100 countries. (T.4898). It became the leading fungicide in the world. (T.4861).

Benlate WP and benomyl were widely studied. (T.5178-81; 5194-99; 5237-40; 5244-50; DX93, 95). "[H]undreds and hundreds" of published test reports

showed that Benlate was safe for plants. (*Id.*; T.5282-83; 5295-97; DX93). Benlate WP's field record confirmed the studies. From 1970-1988, there were a total of three complaints of Benlate injury to plants. (T.4901).

Because some customers complained about the dustiness of Benlate WP, DuPont developed a dust-free formulation, Benlate DF ("Dry Flowable"), also with the active ingredient benomyl. (T.4880-81; 4926). DuPont introduced Benlate DF in 1987 (T.4926), and Benlate DF succeeded Benlate WP as a leading fungicide. (T.4953).

Benlate DF contamination and recalls. In 1989, after Benlate DF had been on the market for two years, DuPont received the first plant damage complaints about it. (T.4953-54). DuPont traced these complaints to certain Benlate DF batches, produced by a particular supplier formulator and contaminated with the herbicide atrazine. (T.4958). DuPont informed the EPA, recalled the affected Benlate DF batches, and compensated affected farmers who made claims. (T.4955-59).

Two years later, in March 1991, a formulator advised DuPont of another incident of atrazine contamination. (T.4959-60). DuPont immediately instituted a widely publicized Benlate DF recall.[1] (*Id.*; T.4963; DX172, 173). DuPont investigated the contamination report and grower complaints. (T.4969-70; 3691-92).

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[1] DuPont never again sold Benlate DF in the U.S. market after the March 1991 recall, and soon withdrew it from the Costa Rican market. (T.4964-66).

Benlate WP (the formulation Plaintiffs mainly blame in this case) was never contaminated with atrazine, and remained on the market in the U.S., Costa Rica, and elsewhere until 2001. (T.4967-68; 4979; 5673; 6702).

Benlate claims and settlements. By May 1991, DuPont determined that, despite the widely publicized second contamination report, none of the atrazine-contaminated Benlate DF had been sold to customers. (T.4986). But, meanwhile, many growers asserted claims of crop damage. (T.4969-70).

DuPont undertook an extensive investigation into possible causes of the growers' complaints. (T.4986-93; 5308). While DuPont investigated the complaints, it settled thousands of these claims. (PX41; DX89; T.5308; 5322-24; 2562-64).

DuPont and a team of National Academy of Science members concluded their investigation in late 1992, finding no defect in Benlate after applying it to 300,000 plants in doses of up to eight times the labeled rates. (PX41, DX78 at 4-5; T.5140-45; 5429-30; 5434-43). At this point, DuPont ended its practice of settling growers' claims. (PX41).

Benlate litigation. More than a decade of Benlate litigation ensued after the 1991 recall. Early on, growers alleged that Benlate DF caused plant damage due to

atrazine or other contamination.[2] Later, plaintiffs alleged a different theory of Benlate DF defect: "DBU breakdown." (R51-11053-54). Those plaintiffs claimed that, because of certain inert ingredients in Benlate DF, the active ingredient benomyl broke down into a herbicide-like agent called dibutylurea (DBU) that caused direct, chemical plant injury upon application. (*Id.*).

II. Plaintiffs' Pled and Unpled Claims

The 27 Plaintiffs in this case did not sue until a decade later, in 2001. (R1-47; R26-6345). Their complaints contained extensive, detailed, and familiar allegations that (1) Benlate was contaminated, and (2) Benlate DF broke down into DBU. (R1-47-84; R26-6345-80; R28-6726-64).

In January of 2006, however, a month before trial was then scheduled to begin, DuPont learned at the deposition of Plaintiffs' lead causation expert, Dr. Joseph Kloepper, that Plaintiffs intended to try their cases on a new theory that they had not pled. (R84-20894-95). In contrast to their complaints, Plaintiffs asserted a new theory based on the alleged effect of Benlate on microbes inside the plants. Dr. Kloepper admitted that he had arrived at his conclusions concerning this microbe theory just days before his deposition. (*Id.*; R88-21609-10, pp. 61-62). Over DuPont's objections to this unpled defect allegation and Plaintiffs' proof, the

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[2] *E.g.*, *E.I. du Pont de Nemours & Co. v. Native Hammock Nursery, Inc.*, 698 So. 2d 267, 268 (Fla. 3d DCA 1997); *E.I. du Pont de Nemours & Co. v. Finks Farms*, 656 So. 2d 171, 172 (Fla. 2d DCA 1995).

court permitted Plaintiffs to try their case on the unpled theory. (R51-11052-64; R84-20892-976; 20992-21014; R88-21734-35).

Under this new microbe theory, the cause of plant injury was bacterial infection that resulted from Benlate application to mother plants. (T.2302-04; 3152; 3186; 3238; 3243-46; 4169-71). When the benomyl in Benlate would kill fungi in the target plant, this allowed bacteria to multiply. (T.2302-04; 3323-24; 7428). Transmission of the infection occurred when rhizomes were taken from infected mother plants for vegetative propagation. (T.2302-04; 3152; 3186; 3238; 3245-46; 4169-71).

According to Dr. Kloepper, the resulting infection, which involved the bacteria pseudomonas, is permanent. (T.661; 3132-33; 3152; 3182-86; 3245-46; 4169). Distortions then result, he said, because pseudomonas produce a growth hormone, called indol-acetic acid ("IAA"), inside the plant. (T.3174-85). His theory was based on a theoretical phenomenon called "quorum sensing," whereby the pseudomonas microbes would emit IAA when their numbers reached a critical level. (*Id.*).

Plaintiffs never disclosed this theory to DuPont prior to Dr. Kloepper's 2006 eve-of-trial deposition. (R84-20894-95; R88-21611-22; 21625-37). In a letter sent shortly after the deposition, Plaintiffs' counsel admitted that the case "involves scientific causation opinions concerning the manner in which Benlate causes

damage that are *new in the sense that no claim, lawsuit or deposition...*in the past have ever asserted the very different causation opinions asserted in our case." (R84-20902) (e.s.).

At trial, Plaintiffs premised their case on Dr. Kloepper's microbe theory under which Benlate application and supposed infection occurred long before Plaintiffs purchased their fern rhizomes. (T.3152; 3245-46; 4169). Many Plaintiffs *never even used Benlate.*[3] Plaintiffs contended their rhizomes were already infected and diseased when acquired. (T.3152; 3245-46; 4169).

III. The Consolidated Trial

Despite substantial differences in Benlate use, farm management, growing conditions, and plant disease experiences (T.719-20), Plaintiffs filed their claims in two virtually identical complaints (R1-47-84; R26-6345-80; R28-6726-64). Over DuPont's objections and motions to sever (*e.g.*, R64-13523-42; R100-26428-39; T.13-15), the trial court ordered a single, consolidated trial of all 27 Plaintiffs' claims. (R60-11932-34; R63-13382-84; R85-21226-28; T.202-03).

[3] There was evidence that 13 Plaintiffs never used Benlate, including 10 who admitted to never using it. (T.1790; 1972; 2008; 2023; 2045; 2095-96; 2946; 4294). Others had no documentary proof of Benlate usage (Rica Fern, Empresas Cavendish, Plantas Tropicales los Cabuyales, Follajes las Trojas, Agrofollajes) or did not witness the supposed Benlate applications themselves. (*E.g.*, T.2141).

A. Other Claims and Settlements Evidence as a Feature of Trial

At trial, over objection, Plaintiffs introduced extensive evidence of prior Benlate claims. In opening statement, Plaintiffs' counsel told the jury that other growers had made Benlate claims "in many, many different states," for "all kinds of plants." (T.664; *see also, e.g.*, T.662; 672; 674-75; 682-83). He later showed the jury that 2,058 growers had asserted Benlate claims against DuPont by 1992. (PX115).

Six of the first seven trial witnesses were *non-party* fern growers who claimed Benlate had injured their crops. (*E.g.*, T.836; 934-35; 995; 1024; 1335-36; 1440). These non-party growers detailed their alleged experiences with Benlate and the crop damage and losses they attributed to DuPont. (*E.g.*, T.826-29; 833; 841; 847; 874-75; 902-15; 918-42; 999-1004; 1015-29; 1318-26; 1388-90; 1394-99; 1410-11; 1420-21; 7576-77). Although Plaintiffs' counsel acknowledged the evidence was being used to prove causation (*e.g.*, T.835; 887-88), the court denied DuPont's motions to bar or strike the testimony of these non-Plaintiff growers (*e.g.*, R71-16621-40; R120-30132-36; T.820-21; 830-31; 834-35; 847; 851; 885-89; 904; 907-09; 1027; 1029-31; 1378-79; 2239-40; 2382-85).

The jury also heard about DuPont's settlements of numerous Benlate claims, including testimony about millions of dollars DuPont paid to settle thousands of Benlate claims. (PX41 at 3-4; PX40 at 3; T.682-83; 2562-64; 2572-73; 2577-78;

2602-04). The court denied DuPont's pretrial motions in limine to exclude evidence of settlements as well as its motions for mistrials and to strike testimony about settlements. (R71-16505-10; R120-30110-12; *see also, e.g.*, T.4056; 4149-52; 4070-73).

B. Other Trial Defects

One of DuPont's principal defenses was that the plant distortions Plaintiffs attributed to Benlate were actually caused by fern viruses. (T.3086-88; 5736-39; 6038-40; 6078-79; 6086; 6090-91; 6098-99; DX31 at BOS 113775-76E, DX116 at HDC 261457E, 472E, 474E, 477E, DX121 at HDC 270039, DX140 at HDC 281648E, 652-54E, DX152 at GML 0071E, DX165 at HDC 270048-49E, DX169).

Over objection, Plaintiffs presented undisclosed expert opinion testimony to counter DuPont's virus defense. Dr. Kloepper offered a new undisclosed opinion that he had ruled out virus as a potential cause of the plant problems. (T.3345-52; 3538-39). Plaintiffs also presented surprise testimony from electron microscope expert Dr. Kyung Soo Kim. The court allowed his testimony despite its unequivocal pretrial order limiting Dr. Kim's testimony to rebuttal of DuPont's electron microscope expert Dr. Hanson, a witness whom DuPont did not call at trial. (R90-22154; SR2 ["SR2" refers to DuPont's supplemental record on appeal] 70; R122-30416-20; 30420). Instead of presenting a rebuttal of Dr. Hanson, Dr. Kim testified about a *different* technique for detecting virus, the *light* microscope

technique, and about electron microscope slides that were not in rebuttal to Dr. Hanson. (T.6922-24; 6929-38; 6938-44; 6947-54; 6962-63).

In addition, Plaintiffs presented damages testimony based on a currency conversion methodology not recognized by any controlling legal authorities. (R138-35082, pp. 34-36). This allowed Plaintiffs to overstate their total claimed damages by $79,000,000. Plaintiffs also used improper methodologies for measuring lost profits, and presented those damages to the jury in expert reports containing substantial hearsay. (T.4475-76; 4504-08; PX87-88).

The trial court also gave a legally incorrect "consumer expectation" jury instruction over DuPont's objections. (T.7176-79; 7624).

C. The Verdicts

The jury found against DuPont on negligence. (R137-34805-85). The jury also found Plaintiffs comparatively negligent and that seven Plaintiffs' claims were partially barred by the statute of limitations. (*Id.*). The jury awarded damages for each Plaintiff in identical fractions of the past damages requested (*Id.*; PX87, 88), but rejected Plaintiffs' claims for future damages. (R137-34805-85).

The court granted DuPont's post-trial Motion for Judgment in Accordance with Motion for Directed Verdict against seven Plaintiffs on statute of limitations grounds. Plaintiffs appealed the court's denial of their post-trial motions and the

grant of DuPont's Motion on statute of limitations grounds. DuPont cross-appealed the court's entry of judgments against it for the remaining Plaintiffs. (R149-37829).

SUMMARY OF ARGUMENT

The judgments are the product of a fundamentally flawed trial. First, the court permitted a mass, consolidated trial of all 27 Plaintiffs' disparate negligence claims, creating juror confusion and unfair prejudice. Plaintiffs used the mass consolidation to prove causation, arguing that the only common factor among them was Benlate.

At trial, the court erred by admitting, over DuPont's repeated objections, extensive evidence of past Benlate claims against DuPont by thousands of other growers, purportedly to show "notice." Plaintiffs were never required to establish that those claims had the requisite similarity to Plaintiffs' claims. The claims of growers who were not Plaintiffs were a central feature of the trial. Plaintiffs called six non-Plaintiff growers, who testified in detail about their own alleged problems with Benlate and claims against DuPont. Plaintiffs used this improper evidence to prove causation.

This unfair prejudice was compounded when the court allowed evidence that DuPont had settled thousands of other Benlate claims. This improper evidence suggested to the jury that DuPont had admitted liability.

Reversal is also required due to the court's admission, over DuPont's

objection, of undisclosed opinions of Plaintiffs' experts Dr. Kloepper and Dr. Kim. Those experts' improper surprise testimony attacked DuPont's critical virus defense.

But this Court need not reach the new trial issues because there are two independent grounds for reversing for judgments in DuPont's favor. First, Plaintiffs were improperly permitted to try their case solely on a theory of negligence they never pled and did not disclose until less than two months before trial.

Second, Plaintiffs' unpled negligence theory fails under Florida's economic loss rule because the product Plaintiffs purchased (plant material previously treated with Benlate) injured only itself and did not cause damage to other property. Instead of entering judgment for DuPont based on the economic loss rule, the court accepted Plaintiffs' untimely submission – made during jury deliberations and months after the deadline for notice of the application of foreign law – that the economic loss rule did not apply under Costa Rican law.

The court also committed reversible error in its jury instructions. The court's erroneous "consumer expectation" instruction allowed Plaintiffs to recover on a legally and factually inapplicable product defect theory. The court's damages instruction provided an improper measure of damages. The court compounded this error by allowing Plaintiffs' expert's hearsay damages reports to go to the jury

room during deliberations.

This Court should deny all of Plaintiffs' claims on appeal. The jury properly found that seven Plaintiffs did not timely file their actions under the Costa Rican statute of limitations, and accordingly those Plaintiffs are not entitled to *any* recovery. Further, those Plaintiffs' limitations arguments are waived; Plaintiffs' proposed jury instruction was contrary to Costa Rican law; the instruction given was correct; and the jury's findings were supported by substantial evidence.

In the event this Court does not reverse for a new trial in its entirety, the jury's findings of comparative negligence should not be disturbed. DuPont presented ample evidence of comparative negligence, from poor farm management to the failure to investigate the causes of their problems.

Plaintiffs' additur argument should also be rejected, as the law does not entitle Plaintiffs to an additional $83,000,000 for future lost profits and remediation damages. Plaintiffs waived this argument. It also fails on the merits because there was ample evidence to support the jury's rejection of Plaintiffs' highly speculative future damages claims.

Finally, the trial court correctly denied Plaintiffs' claim for $41,000,000 in prejudgment interest, as neither Florida law nor Costa Rican law permit such damages for these tort claims.

STANDARDS OF REVIEW

A de novo standard of review applies to: (1) directed verdict issues, *see Banco Espirito Santo Int'l, Ltd. v. BDO Int'l, B.V.*, 979 So. 2d 1030, 1032 (Fla. 3d DCA 2008); (2) a trial court's determinations as to the meaning and effect of foreign law, *see Transportes Aereos Nacionales, S.A. v. De Brenes*, 625 So. 2d 4, 5 (Fla. 3d DCA 1993); and (3) a trial court's determination as to the methodology to calculate lost profits, *see RKR Motors, Inc. v. Associated Unif. Rental & Linen Supply, Inc.*, 2008 WL 4862514, *2 (Fla. 3d DCA Nov. 12, 2008).

An abuse of discretion standard of review applies to: (1) a trial court's decision to consolidate actions for trial, *see State Farm Fla. Ins. Co. v. Bonham*, 886 So. 2d 1072, 1074 (Fla. 5th DCA 2004); (2) the admissibility of evidence, *see H & H Elec., Inc. v. Lopez*, 967 So. 2d 345, 347 (Fla. 3d DCA 2007); (3) decisions concerning the qualifications of expert witnesses and the scope of their testimony, *see Town of Palm Beach v. Palm Beach County*, 460 So. 2d 879, 882 (Fla. 1984); and (4) decisions regarding jury instructions, *see H & H Elec.*, 967 So. 2d at 348. A trial court's determination regarding additur may be reversed on appeal only where there is a clear abuse of discretion. *See Arena Parking, Inc. v. Lon Worth Crow Ins. Agency*, 768 So. 2d 1107, 1110 (Fla. 3d DCA 2000).

ARGUMENT ON CROSS-APPEAL

I. THE COURT DENIED DUPONT A FAIR TRIAL BY IMPROPERLY CONSOLIDATING PLAINTIFFS' 27 DISPARATE CLAIMS

The mass consolidation of products liability claims appears to be unprecedented in Florida – and for good reason. Regardless of the merits of an individual claim, the act of aggregating it with other claims for trial "makes it more likely that a defendant will be found liable and results in significantly higher damage awards." *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 746 (5th Cir. 1996); Irwin A. Horowitz & Kenneth S. Bordens, *Mass Tort Civil Litig.: The Impact of Procedural Changes on Jury Decision-Making*, 73 JUDICATURE 22, 24-25 (1989).

Courts striving for efficiency through a consolidated trial must ensure that it will not only be efficient, but fair. *See In re Repetitive Stress Injury Litig.*, 11 F.3d 368, 373 (2d Cir. 1993) ("The systemic urge to aggregate litigation must not be allowed to trump our dedication to individual justice."); *Malcolm v. Nat'l Gypsum Co.*, 995 F.2d 346, 350 (2d Cir. 1993) ("The benefits of efficiency can never be purchased at the cost of fairness.").[4] Consolidation in Florida likewise involves balancing efficiency and fairness. *See State Farm Fla. Ins. Co. v. Bonham*, 886 So. 2d 1072, 1074 (Fla. 5th DCA 2004).

[4] Because Florida Rule of Civil Procedure 1.270 essentially "duplicates" Federal Rule 42, Florida courts look to cases interpreting the federal rule for guidance. *Wagner v. Nova Univ., Inc.*, 397 So. 2d 375, 377 (Fla. 4th DCA 1981).

The court failed to properly balance those competing factors. The inevitable result of the unprecedented consolidation was a confused jury unable to sort out the evidence specific to each claim. The verdicts demonstrate this. Despite the admitted differences in Plaintiffs' claims, the jury found that DuPont was liable on every claim and awarded every Plaintiff the ***identical*** percentage of the past damages they requested. (*Compare* R137-34805-85 *with* PX87).

Reversal for a fair trial is required so that a jury can independently consider each Plaintiff's claim and DuPont's defenses. *See Cain v. Armstrong World Indus.*, 785 F. Supp. 1448, 1456 (S.D. Ala. 1992) (consolidated trial of 13 products liability claims fundamentally unfair; ordering new trial); *Hasman v. G.D. Searle & Co.*, 106 F.R.D. 459 (E.D. Mich. 1985) (denying consolidation of three products liability claims because individual issues predominated); *In re Van Waters & Rogers, Inc.*, 145 S.W.3d 203, 211 (Tex. 2004) (reversing consolidation of 20 claims because "[w]hatever advantage may be gained in judicial economy or avoidance of repetitive costs is overwhelmed by the greater danger an unfair trial would pose to the integrity of the judicial process").

A. Plaintiffs' Pretrial Representations Misled the Court to Believe that Their Claims Had "Many Common Issues"

When Plaintiffs noticed their 27 claims for trial, they represented that a consolidated trial would be more efficient because there were "so many common issues" between their claims. (R53-11345, p.7). DuPont objected; the

circumstances of each Plaintiff's claim were too diverse, making consolidation unmanageable, inefficient, and, most importantly, "fraught with risk of juror confusion." (R46-10092-107; R51-10972-11051; R53-11345, pp. 6-7; SR2 4-16, 23-24). DuPont proposed, instead, that the court schedule a fair and manageable trial involving one fernery or one group of ferneries under common management. (*Id.*).

Unlike Plaintiffs' request, DuPont's proposal was not unprecedented. In *Ison v. E.I. du Pont de Nemours & Co.*, 2004 WL 2827934 (Del. Super. Ct. Apr. 27, 2004), the court denied a request to consolidate eight Benlate personal-injury claims. To avoid prejudicing the jury against DuPont "based on the commonality of the injuries linked to exposure to Benlate," the court properly balanced efficiency and fairness by ordering the claims tried in pairs. *Id.* at *3-4. As one court observed, "when fewer cases are consolidated for trial, the jury is better able to consider the cases separately and return verdicts based on the facts of each case." *Cain*, 785 F. Supp. at 1456.

In opposing the court's mass consolidation, DuPont detailed myriad differences among Plaintiffs' claims and ferneries, including their different growing practices, different chemical uses, different periods in which deformities materialized, different disease problems, different damage claims, and different alternative causes for their damages. (R64-13523-42). DuPont also emphasized

that prejudice would be inevitable by consolidating claims of two Plaintiffs that had *previously settled their Benlate claims with DuPont.* (*Id.*). The court overruled DuPont's objections and proceeded with a mass consolidated trial based on the "many common issues." (R55-11932-34; R63-13382-84; R85-21226-28).

At trial, the "common issues" Plaintiffs claimed boiled down to just one. Plaintiffs' opening statement emphasized that there is only one supposed issue common among the Plaintiffs – Benlate:

> Somebody I think in jury selection said, "One farm? Two farms? Five farms? But 27 farms?" That's what you're going to hear. ***They don't have anything else in common.*** They're in ***different levels of the country***. They have ***different practices***. They have ***different employees***. They even had ***different sources for their rhizomes***, although they were all treated with Benlate. They have ***different rainfall***. ***Different insect problems*** from time to time. ***Different fungus problems*** from time to time.
>
> ***What is the one thing they have in common? The proof is going to be Benlate.*** That's the chain that links every one of these people that you see in the courtroom today.

(T.719-20) (e.s.).

The evidence confirmed the many differences among Plaintiffs:

Benlate use: Only 14 Plaintiffs applied Benlate to their ferns (T.1481; 1573-74; 1789-90; 1893; 2032-34; 2045-46; 2122-23; 2462; 3004; 4259; 4701; 4775); 10 did not (T.1790; 1972; 2023; 2095-96; 2946; 4294); and for three the evidence conflicted (T.1104; 2008; 2045; 2082-83; 2095; 2775-79; 2809; PX57). Those Plaintiffs that applied Benlate used different concentrations and application

methods; some, like Follajes Las Trojas, applied it as a drench and dip to rhizomes, whereas others, like Super Helechos, additionally sprayed rhizomes, and still others, like Inversiones Bosquena and Flores del Caribe, also sprayed it on their plants. (T.1572-73; 1792; 2122-23; 3004).

They applied Benlate at different times and with varied frequency; some, like Follajes Las Trojas, applied Benlate a few times over a short period, while others, like Desarrollos Mundiales, Helechos del Irazu and Super Helechos, claimed to have applied it extensively for a number of years. (T.1571-74; 1790; 1893). One Plaintiff, Jardin Botanico, had no competent evidence that Benlate had ever been applied to its rhizomes. (T.1949-50; 1972). Its only "proof" at trial that Benlate had ever come in contact with its rhizomes was hearsay testimony from a Plaintiffs' expert, elicited over objection, that Benlate had been applied based on his conversations with rhizome suppliers and review of their records. (T.2313-16).

Chemical use: Plaintiffs used various chemicals in diverse ways. In addition to Benlate, some Plaintiffs, like Rio de Janeiro, Follajes Las Trojas, Inversiones Bosquena, and L.L. Ornamentales, applied Manzate, Daconil, Vydate, and "dozens" of other chemicals to their plants and rhizomes. (T.1488-89; 2038; 1792; 3030-31). Some, like Inversiones Bosquena, Euro Flores, Super Helechos and Flores y Follajes las Joyas, used other fungicides that contained benomyl, the same active ingredient as Benlate. (T.2809; 3032-33; 4313-15; 5706-07).

Location: Plaintiffs' ferneries were located in diverse areas of Costa Rica, some in higher elevations, others in lower areas. The ferneries were thus in different climates, resulting in different growing environments for their ferns. (T.1586-87; 1889-90; 2110; 6768).

Alternative causes: Some Plaintiffs, like Helechos de Cuero, Inversiones Senedo, L.L. Ornamentales, and Inversiones Bosquena, claimed to have a disease they called "Mal de Sterloff," which causes characteristic, unique deformities in ferns. (T.2027-28; 2754-55; 3061-62; 5224-25). Other Plaintiffs, like Seminole, Expohelechos, Tico Verde, and Jardin Botanico reported problems controlling pests and fungus. (T.1957; 1973-80; 2048-50; 2057-60). Still others, like L.L. Ornamentales, Plantas Reales, and Super Helechos, suffered hurricanes, flooding, poor sunlight, or farm management problems like overharvesting and inadequate drainage. (T.1517-18; 1666-75; 1686-91).

Manifestation of symptoms: Of the 14 Plaintiffs that used Benlate, some, like Rio de Janiero, Follajes de Sarchi, Plantas Tropicales de los Cabuyales, Follajes las Trojas and Helechos del Irazu, claimed that damage symptoms began appearing immediately (T.1122; 1799-800; 1822-23; 1896), whereas others, like Euro Flores, Eurofern, Tico Helechos de Poas, Helechos Marme, and Helechos de Cuero, reported that the symptoms they attributed to Benlate did not appear for years (T.2782; 2784; 2795-97; 2808-09; 5219-22).

Duration of damages: The years in which Plaintiffs claimed to suffer Benlate damages ranged from L.L. Ornamentales, which claimed to suffer damages for 20 years starting in 1986, to Desarrollos Mundiales, which claimed to suffer damages for six years starting in 1999. (T.4495; PX87).

Continuing business: By the time of trial, some Plaintiffs were still in the fern business; others, like Euro Fern, Ricafern, Flores del Caribe and Rio de Janeiro, were closed. (T.1116; 2131; 2783-84; 3398; 3401; 4775; 7367). For some plaintiffs, like Empresas Cavendish, Super Helechos and Plantas Reales, the evidence of ongoing operations conflicted. (T.7368-69).

B. Mass Consolidation is Improper Where the Real Common Fact is Use of the Same Product

When the only material fact common among product claims is the product, and thus the only common issue is general causation, mass consolidation is improper. *See, e.g., Ison*, 2004 WL 2827934, *3-4; *Friedman v. DeSoto Park N. Condo. Ass'n*, 678 So. 2d 391, 393 (Fla. 4th DCA 1996) ("We frankly do not see consolidation and a joint trial to be the most appropriate case management alternative because, although there may be a single factual question in common, the majority of the disputed facts and issues are disparate.").

Hasman, 106 F.R.D. 459, is an instructive case involving three plaintiffs claiming similar injuries from the same product. Although the general causation issue was the same in each case, the court concluded that the "desire for judicial

efficiency would not be served" by a consolidated trial because "the unique details of each case would still need to be presented to the jury." *Id.* at 460. The individual issues of specific causation and damages predominated over the common general causation issue, rendering a consolidated trial confusing, unmanageable, and unfairly prejudicial. *See id.* at 460-61.

Similarly, here, although each Plaintiff relied upon the same microbe theory of general causation, the individual issues regarding specific causation and damages predominated over the common issues, as they do in all products liability cases. *Accord Dahlgren's Nursery, Inc. v. E.I. du Pont de Nemours & Co.*, 1994 WL 1251231, *9-12 (S.D. Fla. Oct. 30, 1994) (denying class certification of Benlate plant-injury claims because individual issues of specific causation and damages predominated over the common general causation issue).[5] Mass consolidation in this case required the jury to absorb a barrage of distinct facts for each of the 27 Plaintiffs. "Judicial resources are wasted, not conserved, when a jury is subjected to a welter of evidence relevant to some parties but not others." *Insolia v. Philip Morris Inc.*, 186 F.R.D. 547, 551 (W.D. Wis. 1999).

[5] Although Benlate cases have been consolidated, those were settlement-fraud cases and are thus distinguishable. *See, e.g., Fla. Evergreen Foliage v. E.I. du Pont de Nemours & Co.*, 470 F.3d 1036 (11th Cir. 2006); *Exotics Hawai'i-Kona, Inc. v. E.I. du Pont de Nemours & Co.*, 90 P.3d 250 (Haw. 2004). No reported decisions involve the mass consolidation of Benlate products liability claims.

Instead of fostering efficiency, the consolidated trial unavoidably confused the jury and irreparably prejudiced DuPont. *See Janssen Pharmaceutica, Inc. v. Armond*, 866 So. 2d 1092, 1098 (Miss. 2004).

C. The Consolidated Trial Unfairly Prejudiced DuPont

1. The Consolidation of 27 Disparate Claims Resulted in a Hopelessly Confused Jury

The jury was inundated throughout the nine-week trial with a "spider web" of evidence, *Van Waters*, 145 S.W.3d at 209, from 27 different actions, including fact testimony from 28 different fern growers (both Plaintiffs and non-Plaintiffs). The jury was asked to keep up with prior growing histories, injuries allegedly caused by Benlate and other causes, varying symptom manifestation intervals, and numerous other factors impacting each Plaintiff's unique fern production.

The "dizzying amount of evidence" regarding each Plaintiff's unique claim, *Malcolm*, 995 F.2d at 349, most of which was irrelevant to the other claims, unavoidably resulted in a confused jury and undue prejudice to DuPont. *See Van Waters*, 145 S.W.3d at 208-09, 211 ("Juror confusion and prejudice, under these facts, is almost certain."); *Insolia*, 186 F.R.D. at 551 (finding it "unlikely" jurors will retain a "coherent grasp of the minutiae" of the unique circumstances of three consolidated products liability claims); *Janssen Pharmaceutica, Inc. v. Bailey*, 878 So. 2d 31, 47-49 (Miss. 2004) (reversing because consolidation of 10 products

liability claims resulted in "intolerable" juror confusion and "unfair prejudice" due to the 10 different medical histories, injuries, etc.).

Ultimately, the confused jury threw up its hands, found against DuPont on each claim, and awarded each Plaintiff – no matter how diverse their experience – the exact same percentage (60%) of the past lost profits and lost tax benefits claimed as damages. (*Compare* R137-34805-85 with PX87). *See Malcolm*, 995 F.2d at 352 ("the equal apportionment of liability amounted to the jury throwing up its hands in the face of a torrent of evidence"); *Cain*, 785 F. Supp. at 1455 (finding jury "confusion and prejudice is manifest in the identical damages awarded" to plaintiffs with different claims).

In *Cain*, the court admitted error and found that its consolidation of 13 individual asbestos claims deprived the defense of a fair trial:

> The "Try-as-many-as-you-can-at-one-time" approach is great if they all, or most, settle; but when they don't, and they didn't here, ***thirteen shipyard workers, their wives, or executors if they have died, got a chance to do something not many other civil litigants can do – overwhelm a jury with evidence. Evidence that would not have been admissible in any single plaintiff's case had these cases been tried separately***. As the evidence unfolded in this case, it became more and more obvious to this Court that a process had been unleashed ***that left the jury the impossible task of being able to carefully sort out and distinguish the facts and law of thirteen plaintiffs' cases that varied greatly in so many critical aspects***.

785 F. Supp. at 1457 (e.s.). Here, too, the jury was overwhelmed.

The court gave a standard instruction – that each claim must be considered separately – that was destined to, and did in fact, fail. (T.7639-40). In *Malcolm*, for instance, the Second Circuit held that although "[t]he jury was instructed on several occasions to consider each case separately and each juror was given a notebook for this purpose," 995 F.2d at 349, "the sheer breadth of the evidence made these precautions feckless in preventing juror confusion." *Id.* at 352.

2. Plaintiffs Improperly Used Consolidation to Prove Causation

Florida law prohibits plaintiffs from using the existence of other claims involving the same product to prove causation. (*See* II, *infra.*). A plaintiff cannot prove that a product caused it harm because someone else also claims the product caused them harm. *See id.* This same rationale prohibits the use of consolidated claims to prove causation.

In *Sidari v. Orleans County*, 174 F.R.D. 275, 282 (W.D.N.Y. 1996), for example, the court denied consolidation of two employment discrimination claims arising from the same workplace, finding "consolidation of the two cases would likely be overly prejudicial to the defendants" because "lumping" the claims together "amounts to guilt by association." The *Van Waters* court similarly held that "consolidation risks the jury finding against a defendant based on sheer numbers, on evidence regarding a different plaintiff, or out of reluctance to find against a defendant with regard to one plaintiff and not another." 145 S.W.3d at

211; *see also Hasman*, 106 F.R.D. at 461 (prejudicial spillover from "allegations of defects and adverse reactions not relevant to the particular plaintiff's case").

The *Ison* court recognized this risk in Benlate claims: "[A]ny grouping of those individuals would necessarily lend itself to the argument that a jury would be prejudiced against the Defendant based on the commonality of the injuries linked to exposure to Benlate." *Ison*, 2004 WL 2827934, *3.

Contrary to their pretrial assurances (R77-19653), Plaintiffs used the existence of other claims – including the consolidated claims – to prove causation. Their opening statement, quoted above, highlighted their common connection to Benlate as the only possible explanation for their damages. (T.719-20). Plaintiffs' closing to the jury featured this improper argument:

> I don't know if you remember far back in the jury selection when Mr. Russo was asking you questions, but there was an individual who didn't get selected for the jury, and he said, well, I can believe – maybe there is something – maybe two farms or three farms or four farms, but 27 farms, all with the same problem? . . . . And you cannot explain that because one farm is poorly run, another farm harvests too often and another farm is having a flood and another farm is having insects. That won't work. You have to have another cause, a single cause. What can it be? How will we find that cause?

(T.7432).

Plaintiffs' lead causation expert also improperly used the consolidation of the 27 Plaintiffs to prove causation. Dr. Kloepper admitted he measured microbe levels at only nine Plaintiffs' ferneries. (T.3397-3402). Dr. Kloepper failed to offer

any proof of microbe levels – elevated or otherwise – at the other 18 Plaintiffs' ferneries.[6] (*Id.*). The court thus permitted these 18 Plaintiffs to prove their claims by reliance on evidence specific to the claims of other Plaintiffs. That is an improper use of the consolidation procedure. *See Janssen*, 866 So. 2d at 1101 (noting how consolidation unfairly allows plaintiffs to bolster their claims by combining the strongest aspects of each claim).

3. Consolidation Allowed Plaintiffs to Erroneously Introduce Evidence of Subsequent Remedial Measures

Another of the "extremely prejudicial" consequences of consolidating products liability claims for trial is that "otherwise inadmissible evidence of 'subsequent remedial measures' would be admissible." *Janssen*, 866 So. 2d at 1100-01; *see also Malcolm*, 995 F.2d at 351 (noting that the varied time-frames of the consolidated claims increased the risk of prejudice from date-dependent facts); *Cain*, 785 F. Supp. at 1457 (consolidation unfairly allowed admission of evidence that would have been inadmissible in separate trials).

That "extremely prejudicial" scenario materialized here. The court used consolidation to justify denying DuPont's motion in limine to exclude evidence of

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[6] Those 18 Plaintiffs were Agrofollajes, Desarrollo Mundiales, Empresas Cavendish, Eurofern, Expohelechos, Flores del Caribe, Follajes Las Trojas, Helechos del Irazu, Helechos del Monte, Inversiones Senedo, Plantas Reales, Plantas Tropicales Las Cabuyales, Rica Fern, Rio de Janeiro, Seminole, Super Helechos, Tico Helechos de Poas, and Tico Verde.

subsequent remedial measures, such as the 2001 withdrawal of Benlate from the market, a Benlate WP label change, and the 1991 recall of Benlate. (R71-16525-37; R120-30116-20).[7] Because all 27 claims were tried together, jurors considering the claims of Plaintiffs who did not use Benlate ever or after 1991 heard evidence of subsequent remedial measures *even though the measures were inadmissible as to those Plaintiffs*. (*E.g.*, T.672; 3272-75; PX68, 105, 181; T.3825-27; 3928; 4034-35).

Consolidation deprived DuPont of its right to have the jury properly consider the circumstances of each Plaintiff's claim and not be unduly prejudiced by evidence relevant only to other claims. *See Bonham*, 886 So. 2d at 1074 (courts must consider whether a consolidated trial will deprive a party of a substantive right).

4. Consolidation Unfairly Restricted DuPont's Ability to Introduce Critical Evidence on its Defenses

DuPont was also deprived of a dispositive defense as to two of the 27 Plaintiffs. Those two Plaintiffs, Seminole and Helechos de Irazu, had asserted *and settled* prior Benlate claims against DuPont. (R100-26428-39). DuPont repeatedly

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[7] The court predicated its decision to admit subsequent remedial measures on the fact that, even though the measures were subsequent as to some Plaintiffs, other "Plaintiffs in this case suffered alleged harm due to their continued use of Benlate after the 1991 recall and label change. As to those Plaintiffs, the 1991 recall and label change were not subsequent, and are not inadmissible under section 90.407 as a result." (R120-30119).

requested separate trials on their claims because those settlements were critical to DuPont's defenses of those two Plaintiffs' claims. (*Id.*; T.13-15; 202-03).

The court refused to sever, leaving DuPont with a Hobson's choice. DuPont could either (1) forego use of the evidence that the two Plaintiffs had previously settled their claims against DuPont, or (2) use the settlement evidence and fatally prejudice its defense of the other 25 Plaintiffs' claims. *See Muhammad v. Toys "R" Us, Inc.*, 668 So. 2d 254, 256 (Fla. 1st DCA 1996) (stating evidence of settlements is "patently prejudicial"). DuPont chose the first option. Consolidation effectively, and unfairly, precluded DuPont from introducing evidence of those prior settlements to prove its defenses.

For all of these reasons, reversal is required for a fair trial involving one Plaintiff, or, at most, one group of co-managed Plaintiffs.

II. A NEW TRIAL IS REQUIRED BECAUSE IRRELEVANT BENLATE CLAIMS MADE BY OTHER GROWERS DOMINATED THE TRIAL AND WERE ERRONEOUSLY USED TO PROVE CAUSATION

Florida law is well-settled: if the circumstances of a prior claim are substantially similar to, and not remote in time from, the claim at issue, evidence of that prior claim can be admitted for the limited purpose of showing that the defendant had notice of a potential problem with its product. *See Ford Motor Co. v. Hall-Edwards*, 971 So. 2d 854, 858-59 (Fla. 3d DCA 2007). Prior claims can never be used to prove causation. *See id.* at 858; *Rodriguez v. Loxahatchee Groves*

Water Control Mgmt. Dist., 636 So. 2d 1348, 1349 (Fla. 4th DCA 1994); *A.H. Robins Co. v. Ford*, 468 So. 2d 318, 318 (Fla. 3d DCA 1985).

To admit evidence of a prior claim, the proponent must conclusively prove to the court, outside the jury's presence, that the prior claim is substantially similar to the claim at hand, such that the notice it provided was relevant. *See Ford*, 971 So. 2d at 858-60; *Stephenson v. Cobb*, 763 So. 2d 1195, 1196 (Fla. 4th DCA 2000) (quoting *Lawrence v. Fla. E. Coast Ry. Co.*, 346 So. 2d 1012, 1015 (Fla. 1977)); *Frazier v. Otis Elevator Co.*, 645 So. 2d 100, 101 (Fla. 3d DCA 1994). If the court finds the prior claim is substantially similar, the jury should be told of the existence of that prior claim but not its circumstances. *See Ford*, 971 So. 2d at 860.

In this case, the court refused to follow the black letter law. Over DuPont's objections (*e.g.*, R71-16621-40), the court did not require Plaintiffs to prove outside the jury's presence that the prior Benlate claims they sought to introduce were substantially similar to Plaintiffs' claims. Instead, the court allowed Plaintiffs to advise the jury of thousands of prior Benlate claims never proven to be substantially similar. (R120-30132-36). Compounding the error, as to a handful of prior claims in which Plaintiffs did attempt to prove substantial similarity, the court allowed Plaintiffs to do so in front of the jury. Just like in *Ford*, 971 So. 2d at 860, prior claims "improperly became a 'feature of the trial,'" as non-parties testified for days about how Benlate allegedly destroyed their farms. Plaintiffs admittedly

introduced this prior claims evidence to influence the jury on causation. (*E.g.*, T.835; 849; 888-89; 907-09; 1029-31; 7576-77). Such bootstrapping is forbidden.

Where, as here, other claims (A) are irrelevant, (B) are used to prove causation, and (C) become a dominant feature of the trial, reversal is required. *See Ford*, 971 So. 2d at 858-60.

A. The Court Admitted Evidence of Thousands of Other Benlate Claims Without Proof that Those Claims Were Substantially Similar and Therefore Relevant

Plaintiffs introduced, over objection, documentary evidence of other claims (*E.g.*, PX73 (citing 1,324 Benlate complaints as of July 1991), 41 at 4 ("DuPont began to get plant damage complaints"), 52 (dozens of growers "plan to sue DuPont"), 166 ("Assistance To Legal And Outside Attorneys On 'Benlate' Claims And Litigation"), 181 (claim regarding 64,000 poinsettias), 98 ("Benlate Complaints" at two Indianapolis greenhouses "at or near 6 figures")), including a document disclosing ***2,058 Benlate claims*** made in the U.S. and abroad by 1992 (PX115; T.4070-71; 2603-04).[8] Plaintiffs also introduced, over objection, prior

[8] Like many of the documents Plaintiffs admitted into evidence, PX115 was especially prejudicial in that it was prepared by Crawford & Company, a claims adjustor that DuPont hired to settle claims. (T.2562, 5322-23). The document is a report "from the Crawford claims system" and clearly indicates on the heading that it was prepared for litigation and settlement: "Crawford and Company; Privileged and Confidential; Attorney Work Product: Attorney Client Communication; This Report Was Developed At The Request Of The DuPont Legal Department." (*See also* R71-16511-24; R120-30125-25A).

claims through their expert, Dr. Harry Mills, who described those claims as evidencing a "terminal cancer on the plants" and how "[t]he growers and consultants and everybody else was really just devastated...." (T.2240-41).[9]

A new trial is required because Plaintiffs never proved that the prejudicial laundry list of thousands of other claims that they introduced through DuPont documents and Plaintiffs' experts were substantially similar to Plaintiffs' claims so as to provide relevant notice. *See Ford*, 971 So. 2d at 859 ("[F]ailure to lay a sufficient predicate establishing substantial similarity between the accidents renders the evidence irrelevant as a matter of law.").

The only thing known about those other claims is that they involved the same product, Benlate. But that is not enough. *See Auto Specialties Mfg. Co. v. Boutwell*, 335 So. 2d 291 (Fla. 1st DCA 1976) (holding it error to admit evidence of prior accidents involving same product where their circumstances were not proven substantially similar), *disapproved on other grounds by Goodyear Tire & Rubber Co. v. Hughes Supply, Inc.*, 358 So. 2d 1339 (Fla. 1978).

In *Ford*, for instance, the prior claims involved rollovers of the same model Ford Explorer, but this Court held that, even though those prior claims involved the

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[9] Plaintiffs could not have proven those claims were substantially similar to their claims. The 2,058 claims, according to Plaintiffs' own expert, were dissimilar to Plaintiffs' Costa Rican fern claims, as they occurred "across a wide geographic area; and across a broad, diverse set of plant species." (T.4070-73). Only about 6% involved leatherleaf ferns. (*Id.*).

same product, the plaintiff still needed to prove the circumstances of those prior accidents were substantially similar to the accident at hand. 971 So. 2d at 859-60. Here, like in *Ford*, the court "never inquired into the general characteristics" of the prior claims. *Id.* at 860. And here, like in *Ford*,"[n]o precautions or measures were taken to ensure that the other accidents were not too remote in time or that the conditions of the accidents were similar." *Id.* A new trial is required. *Id.*

B. Detailed Evidence of Other Benlate Claims From Non-Party Growers Was Improperly Used to Prove Causation

The court made the already unfair trial even worse with respect to the half-dozen prior claims that the jury heard about through live testimony. Rather than requiring the predicate showing of substantial similarity outside the jury's presence, the court allowed Plaintiffs to detail the other claims during trial. Despite those details, Plaintiffs never demonstrated that those claims were substantially similar.

Instead, these non-party growers testified extensively, over objection, about how their plants were healthy and bountiful in the "pre-Benlate era" and how they became distorted and unsalable as a result of Benlate use and how their plants are still suffering today. *See infra.* Plaintiffs used these details to prove causation.

The first two witnesses at trial were not Plaintiffs or their experts, but non-party growers John Newbold and Raiford Hagstrom who had brought Benlate claims against DuPont in 1992. Their testimony did not focus on the notice their claims provided to DuPont. Instead, their testimony went directly to causation.

Over DuPont's repeated objections (*e.g.*, R71-16621-40; R120-30132-36; T.820-21, 830-31; 834-35; 847; 851; 885-89; 904; 907-09), they explained in detail how Benlate allegedly devastated their previously healthy Florida ferneries. (*See*, *e.g.*, *infra*, T.826-29; 833; 841; 847; 874-75; 902-15; 920-32; R121-30192-205; PX2, 3 (non-plaintiffs' photographs admitted to buttress their testimony), 6, 7, 8 (photographs from Crawford and Co., DuPont's claims adjustor, documenting Hagstrom's prior Benlate claim); 1 (correspondence Hagstrom sent DuPont regarding irrelevant details of his claim), 4, 5 (correspondence Crawford and Co. sent Hagstrom and Newbold about their claims)). The jury then heard similar "before-and-after-Benlate" testimony from non-party Florida growers William Puckett, John Marsell, and Steven Schuman, as well as testimony about how causes other than Benlate had allegedly been disproved or excluded.[10] Plaintiffs

[10] Again, this evidence was admitted over DuPont's additional repeated objections. (*See*, *e.g.*, T.1027; 1029-31; 1378-79; 2239-40; 2382-85). Puckett, who made a Benlate claim in the early 1990s, provided detailed explanations about how, in the old days, "Leatherleaf was very nice," with "[h]eavy foliage, nice hard stems" but after Benlate there were distortions, like crooked stems and leaves. (T.1015-25; 1032). That testimony was followed by numerous photographs of Florida ferns showing irregularities, with his statement that "we never had that type of a thing prior to the applications of Benlate." (T.1027-29; *see also* PX9 (production records to bolster Puckett's testimony)). Marsell described ferns pre- and post-Benlate application, including the distortion problems that developed after Benlate application, stating that "it never has, even today" gone away. (T.1318-26). Plaintiffs also were permitted, over objection, to play a video of ferns owned by Schuman that purported to show problems on a non-Plaintiff farm after Benlate was applied. (T.1378-79). Schuman testified that the fernery he began running in 1977 no longer exists because of "too many bad leaves and distortions and

elicited other causation testimony from these non-party growers on their attempts to rule out alternate causes. If there was any doubt, Plaintiffs' counsel expressly admitted that "[i]t's part of my evidence on causation." (T.835).

During closing, Plaintiffs detailed the alleged plant deformities reported in the round of Benlate claims made in 1991, explaining that non-Benlate causes had been ruled out, and stating: "Benlate is the cause, and DuPont's negligence is the cause." (T.7472). Plaintiffs' closing also pointed to the testimony they elicited from non-party growers to support their causation argument:

> What they came and said, there was a pre-Benlate era, WP only, which means they were having problems with distortions and production, not like the pictures -- remember the pictures of the guys in the bad clothes from the '60s and early '70s. That's what Leatherleaf used to look like. They told you. They know their farms and they know their crop. It doesn't look like that anymore, and it didn't look like from the time that WP was being applied. That's what the testimony was.

(T.7576-77). This use of other claims to prove causation requires reversal. *See Ford*, 971 So. 2d at 858; *Rodriguez*, 636 So. 2d at 1349; *A.H. Robins*, 468 So. 2d at 318.

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problems" allegedly caused by Benlate. (T.1388-90; *see also* PX20, 21 (correspondence between Crawford and Co. and Shuman regarding details of his prior Benlate claim)).

C. Other Benlate Claims Were an Improper Feature of the Trial

As in *Ford*, the details of other growers' Benlate claims "became a feature of the case." 971 So. 2d at 856. Admitting the circumstances of prior claims distracts the jury with collateral matters and often results in unnecessary mini-trials about the validity of the prior claims. *See Zayres Dep't Stores v. Fingerhut*, 383 So. 2d 262, 265 (Fla. 3d DCA 1980); *Short v. Allen*, 254 So. 2d 34 (Fla. 3d DCA 1971); *De Pue v. Sears, Roebuck & Co.*, 812 F. Supp. 750, 753-54 (W.D. Mich. 1992).

A jury thus may be told only of the existence, but not details, of a substantially similar prior claim. *See Olson v. Ford Motor Co.*, 410 F. Supp. 2d 855, 864 (D.N.D. 2006) ("[T]he introduction into evidence of the specific details of the customer complaints would not only be a waste of time, it would confuse and mislead the jury and be prejudicial to [defendant]."); *Ford*, 971 So. 2d at 860 (citing *Volkswagen of Am., Inc. v. Gentry*, 564 S.E.2d 733, 741 (Ga. Ct. App. 2002), and *Ray v. Ford Motor Co.*, 514 S.E.2d 227, 231 (Ga. Ct. App. 1999)).[11]

In *Short*, this Court held that the admission of other-claims evidence "would have served to impose upon the jury the need to decide a collateral issue having slight, if any, relevance to the case at hand, and more apt to confuse than to assist

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[11] *See also Henderson v. Ill. Cent. Gulf R.R. Co.*, 449 N.E.2d 942, 945 (Ill. App. Ct. 1983) ("The proponent may not, however, introduce details of the prior accidents when he is offering the evidence only to show the generally hazardous nature of the site. Those details are irrelevant; they unfairly prejudice the jury against the defendant; and their introduction is grounds for reversal.").

the jury in its determination of the issues which were properly before it in this case." 254 So. 2d at 36. That is what occurred here.

Beginning in opening, Plaintiffs informed the jury that other growers made Benlate claims "in many, many different states," for "all kinds of plants." (T.664; *see also, e.g.*, T.662; 672; 674-75; 682-83). Plaintiffs then introduced the litany of other claims evidence discussed above. Plaintiffs also elicited testimony about other growers' Benlate complaints from their expert Dr. Channing Robertson (T.4040-41; 4056; 4070-73), and introduced evidence of up to 1,000 Benlate claims through DuPont's William Reische. (T.2572-78; *see also* T.2562-63; 2567-69; 2600; 2602-04; 2610-11). Other Benlate claims also became a feature of Plaintiffs' closing to argue causation. (*E.g.*, T.7576-77; 7472).

In the end, just as in *Ford*, 971 So. 2d at 859, references to other claims "were not isolated. On the contrary, they were widespread throughout the trial and, at no time did the plaintiff lay a sufficient foundation." Plaintiffs also wrongly used other claims to prove causation. Each ground independently requires a new trial.

III. PLAINTIFFS' INTRODUCTION OF SETTLEMENTS OF OTHER BENLATE CASES MANDATES REVERSAL

After convincing the court to deny DuPont's motion in limine to exclude settlement evidence (R71-16505-24; R78-19940-43; R120-30110-12; R78-19944-47; R120-30125-25A), Plaintiffs prominently displayed documents and testimony in opening statement that DuPont had accepted responsibility for and paid

settlements of other Benlate claims. (*E.g.*, R125-30928-29, 31865; PX40 at 3; T.682-83). The court allowed Plaintiffs to do so on the flawed rationale that settlement of other claims was somehow admissible in this case to show notice. This Court should reverse for a new trial devoid of unfairly prejudicial evidence.

Evidence that a defendant settled other claims involving the same product deprives the defendant of a fair trial. *See* § 90.408, Fla. Stat.; *Muhammad v. Toys "R" Us, Inc.*, 668 So. 2d 254, 256 (Fla. 1st DCA 1996) (evidence of settlements with third parties is "patently prejudicial" and requires reversal), *approved by Ricks v. Loyola*, 822 So. 2d 502, 508 (Fla. 2002) (mere suggestion to jury of party's settlement warrants new trial, despite curative instruction); *see also Waytec Elec. Corp. v. Rohm & Hass Elec. Materials, LLC*, 255 Fed. Appx. 754 (4th Cir. 2007) (affirming exclusion of manufacturer's settlements with others complaining about the same alleged product defect).

This Court has long held that evidence of a defendant's settlement with another claimant alleging liability for the same actions is "***immediately and completely destructive to the possibility of a fair trial***." *City of Coral Gables v. Jordan*, 186 So. 2d 60, 62 (Fla. 3d DCA) (e.s.), *aff'd*, 191 So. 2d 38 (Fla. 1966). In *Jordan*, the estate of a motor scooter passenger who died in a collision elicited testimony at trial that the scooter driver had settled with the defendant. This Court explained that "it is a practical impossibility to eradicate from the jury's minds the

consideration that where there has been a payment there must have been liability." *Id.* at 63 (e.s.) (quoting *Fenberg v. Rosenthal*, 109 N.E.2d 402, 405 (Ill. App. Ct. 1952)). A defendant's settlement of a negligence claim wrongly suggests to the jury that the defendant was negligent. *See Taylor Imp. Motors, Inc. v. Armstrong*, 391 So. 2d 786, 787 (Fla. 4th DCA 1980); *see also Charles B. Pitts Real Estate, Inc. v. Hater*, 602 So. 2d 961, 963 (Fla. 2d DCA 1992) (defendant's "settlement of a closely related issue in [an] earlier case" with a third party "is quite analogous to a settlement with a codefendant" and thus properly excluded from evidence).

Despite these settled principles of Florida law, the court ruled that "evidence of settlements can be used to show notice to a party that there was a problem with Benlate." (R120-30111; T.5316-17).

No decision in Florida has ever held that settlement evidence can be used to show notice. In certain limited circumstances notice can be shown through evidence of a substantially similar claim but not its settlement. As this Court explained in *Jordan*, "settlement with third persons may not be shown ***except under unusual circumstances***. Such unusual circumstances exist where some species of fraud or other questionable practice is indulged in to procure or influence such testimony." 163 So. 2d at 63 (e.s.) (quoting *Fenberg*, 109 N.E.2d at

405). No "unusual circumstances" exist here to authorize admission of DuPont's settlement of Benlate claims.[12]

Plaintiffs' injection of DuPont settlements into the trial starting in opening statement took advantage of the court's erroneous rulings and destroyed any possibility of a fair trial.[13] Plaintiffs published an exhibit that informed the jury that ***DuPont had established a link between Benlate and crop damage***, that ***DuPont had accepted responsibility***, and that ***DuPont had settled complaints***. (T.682-83; R125-30928-29, 31865 (Ex. 20); PX40 at 3). Plaintiffs' counsel also

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[12] An unusual circumstance authorizing admission of settlement evidence is a Mary Carter agreement, where the settlement is necessary to provide context for the testimony and arguments of a party who has settled but is still participating in the trial. *See Ward v. Ochoa*, 284 So. 2d 385, 387-88 (Fla. 1973); *Imperial Elevator Co. v. Cohen*, 311 So. 2d 732, 734 (Fla. 3d DCA 1975). Absent a Mary Carter agreement, witness credibility alone does not warrant admission of settlement evidence. *See Ashby Div. of Consol. Aluminum Corp. v. Dobkin*, 458 So. 2d 335, 336-37 (Fla. 3d DCA 1984); *but see Saleeby v. Rocky Elson Constr., Inc.*, 965 So. 2d 211, 215-16 (Fla. 4th DCA 2007), *rev. granted*, 977 So. 2d 577 (Fla. 2008). The only other circumstances where settlement evidence has been held proper in Florida are where liability has been admitted, *see, e.g., Bankers Trust Co. v. Basciano*, 960 So. 2d 773, 789-80 (Fla. 5th DCA 2007), or where liability in the case at hand is entirely different than the liability the jury infers from the prior settlement, *see Ritter v. Ritter*, 690 So. 2d 1372, 1376 (Fla. 2d DCA 1997); *Rease v. Anheuser-Busch, Inc.*, 644 So. 2d 1383, 1388-89 (Fla. 1st DCA 1994) (settlement concerned "an entirely different and collateral matter").

[13] Plaintiffs' argument below, that DuPont also mentioned settlements, is frivolous because once (a) the court denied DuPont's motion to exclude settlement evidence and (b) Plaintiffs immediately told the jury about DuPont's settlement of Benlate claims in opening statements, DuPont was entitled to respond by placing such evidence in context in an attempt to deflect the prejudice. (*E.g.*, T.682-83; 752-54).

explicitly told the jury during opening that there would be evidence that other growers "fought and fought and fought" DuPont and DuPont "resolved" some of their claims. (T.682-83). Plaintiffs began the trial by putting prejudicial settlement evidence before the jury.

Plaintiffs compounded the prejudice of this evidence during their case. Over objection, they asked their expert Dr. Robertson to interpret the settlement document Plaintiffs' counsel had shown in opening statement. Robertson's "expert" interpretation of the document was that DuPont concluded that Benlate was the cause of damage *and therefore* determined to settle claims. (T.4056).

In their opening, Plaintiffs also published misleadingly redacted settlement-related testimony of a DuPont employee (R125-30929-33, 31866-72 (Exs. 21-23)),[14] and misleadingly redacted settlement-related evidence from DuPont's claims adjuster.[15]

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[14] Plaintiffs' published excerpt of prior testimony of Morris Bailey, who headed DuPont's claims resolution process, was misleading because it redacted Bailey's discussion of "settlements," thereby re-crafting the evidence and changing its meaning. (T.688-89). Plaintiffs' excerpt led the jury to believe that Bailey testified DuPont management would have been "idiots" if they provided claimants with all of the information DuPont had regarding Benlate. (*Id.*). Forced to respond, DuPont provided jurors with Bailey's actual testimony, in context, that "we were idiots" "because we settled millions – hundreds of millions of dollars worth of complaints without any evidence." (T.772-73).

[15] Plaintiffs showed a chart indicating that ornamentals made up 83.17% of "total dollars." (R125-30932, n.6, 31873 (Ex. 24)) (Power-Point slide: "Benlate Heavily Affects Ornamentals"). But the entire document from which this slide was taken

Plaintiffs then used DuPont's effort to provide context to justify a prejudicial mini-trial on DuPont's settlement practices. For example, Plaintiffs introduced (i) evidence that DuPont "pa[id] claims" and was "aware of the potential for the imposition of legal liability" and thus "began a claims process to review and adjust claims" (PX41 at 3-4), (ii) testimony about DuPont's settlement practices from non-Plaintiff grower witnesses John Newbold (T.836-37; 841-44), Ray Hagstrom (T.943-46), John Marsell (T.1335-36), and Steven Shuman (T.1445-50), (iii) calls that other growers made to DuPont complaining about Benlate (*e.g.*, T.3691-725), (iv) DuPont attorney-client communications about litigation strategy (*e.g.*, PX80), (v) testimony from a DuPont chemist about the claims resolution process (*e.g.*, T.2572-78; *see also* T.2562-63; 2567-69; 2600; 2602-04; 2610-11), and (vi) testimony from a principal of one Plaintiff (Bill Rhodes) about his prior Benlate settlement (T.2468-74).

This prejudicial settlement evidence ensured DuPont would not receive a fair trial. A new trial on liability is required.

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shows that the document was created for settlement purposes. (*Id.*; R125-31874-82 (Ex. 25)) (Plaintiffs' Premarked Trial Exh. 3392). Compounding the problem, Plaintiffs redacted the phrase, "Reserves Data from Crawford 7/27/91" – which would have made clear that the "% total dollars" was not of claims and settlements. Plaintiffs were able to create their own document and their own argument about it: "Look at how much damage is being done to ornamental plants like leatherleaf fern. The ornamental plants are getting it right in the nose, they're getting knocked out 83 percent." (T.675).

IV. THE COURT'S ADMISSION OF UNDISCLOSED OPINIONS OF PLAINTIFFS' EXPERTS ON KEY ISSUES REQUIRES REVERSAL

A critical issue at trial was whether Plaintiffs' alleged fern damage was caused by plant viruses, which had nothing to do with Benlate. Both sides disclosed experts to testify on the subject. DuPont prepared for and presented its case at trial on the understanding that Plaintiffs' expert disclosures were complete and accurate. But the court permitted Plaintiffs to elicit virus-related opinions from experts Drs. Kloepper and Kim that had never been disclosed and, in the case of Dr. Kim, were elicited in violation of a pretrial order.

A. New Expert Testimony at Trial Requires Reversal

A trial court abuses its discretion when it allows an expert to offer new opinions and testify to work performed after his deposition. *Binger v. King Pest Control*, 401 So. 2d 1310, 1313-14 (Fla. 1981) (new trial required where testimony from undisclosed impeachment witness was allowed, despite fact that need for the witness was foreseeable); *Garcia v. Emerson Elec. Co.*, 677 So. 2d 20, 21 (Fla. 3d DCA 1996); *Tetrault v. Fairchild*, 799 So. 2d 226, 227 (Fla. 5th DCA 2001). "All the discovery rules and the extensive efforts of parties to discover the other party's case would be for naught if one side were able to wait until after the trial started to establish key pieces of evidence such as what occurred here." *Owens-Corning Fiberglas Corp. v. McKenna*, 726 So. 2d 361, 363 (Fla. 3d DCA 1991).

B. Dr. Kloepper's Undisclosed Opinions

Before trial, both sides conducted discovery and disclosed experts related to DuPont's contention that Plaintiffs' ferns were infected with viruses. Dr. Kloepper, Plaintiffs' expert plant pathologist and microbiologist, was ***not*** one of the experts disclosed to testify about virus. (R86-21284-85). He admitted in his deposition on January 19, 2006 (less than two months before trial) that he did **no** virus testing or analysis and that he did not know whether viruses harmed Plaintiffs' ferneries. (R88-21594-665, pp. 53-55, 59, 92, 273-74). In his deposition, Dr. Kloepper testified:

> Q. Do you know if any ferns at any of the plaintiffs' ferneries are infected with viruses?
>
> A. I don't know. I -- I can't say that I know. ...
>
> * * *
>
> Q. If I asked this already, I apologize. I just want to make sure I'm understanding. Am I right that you, yourself, did not do any virus testing or virus work in the case?
>
> A. I did not.
>
> * * *
>
> Q. Did you do anything to rule out a virus being the cause of any symptoms at any farm of any plaintiff?
>
> A. I did not. ...

(*Id.* at 54; 59; 92). Dr. Kloepper's deposition notes listing the opinions he expected to offer at trial also did not include the word "virus." (*Id.* at 63-65). He represented

that he had described all of the opinions that he had expected to testify to at trial. (*Id.* at 273-74).

But at trial, during Plaintiffs' case, Dr. Kloepper was permitted to testify over objection that he now had a "different" opinion – that "there is no virus," and that viruses did not cause Plaintiffs' damages. (T.3345-52; 3538-39). Dr. Kloepper then went on to explain, over objection, why he believed Plaintiffs' ferns were not affected by a virus. (T.3345-52; 6865).

Dr. Kloepper's trial testimony contradicted his deposition testimony that he would not offer any virus-causation opinions and that he did not plan any post-deposition work. (R88-21594-665, pp. 54; 59; 92; 273-74). On cross at trial, he *admitted* that the scope of his trial opinions was different than those at his deposition because he had "done more since then." (T.3537-39).

Dr. Kloepper's post-deposition work and undisclosed virus opinions are the kind of prejudicial trial ambush that the Florida Supreme Court prohibited in *Binger*, 401 So. 2d at 1313-14.

C. Dr. Kim's Undisclosed Opinions

The trial court also committed prejudicial error by permitting Plaintiffs to call Dr. Kim during their rebuttal case to offer undisclosed expert opinions in response to DuPont's virus causation evidence. (T.6922-7008).

Both sides disclosed experts designated to testify about scientific methods to detect virus. There are two distinct virus diagnostic techniques using a microscope: light microscopy and electron microscopy. Each discipline requires specialized knowledge. Plaintiffs designated Dr. Kim, whom they disclosed late, to discuss *only electron microscope slides* in response to DuPont's electron microscope expert, Dr. Hanson. The court issued an order specifically limiting Dr. Kim's testimony to this subject. (R122-30416-20). Despite Plaintiffs' designation and the court's pre-trial order, at trial the court permitted Dr. Kim to testify beyond that limited subject.

1. Plaintiffs' Designation and the Court's Pre-Trial Order Limited Dr. Kim's Expert Opinion to Rebuttal of Dr. Hanson's Electron Microscope Slides

Two months before trial and after the discovery cutoff, over DuPont's objections, Plaintiffs were allowed to substitute Dr. Kim for their already-disclosed and deposed electron microscope expert, Ethel Sanchez. (R100-26392-95; R122-30420). Plaintiffs claimed they needed an expert to respond to the electron micrographs provided by Dr. Hanson, one of DuPont's experts, and that Sanchez was too busy. (SR2 58-60; R88-22118-21). Plaintiffs' witness disclosure for Dr. Kim specifically represented: "The subject matter of the testimony of Dr. Kim is electron microscopy results on distorted fern samples." (R90-22154). The court

allowed Plaintiffs to substitute Dr. Kim, but specifically limited his testimony to "the electron microscope and a review of the slides." (SR2 70-71).

DuPont moved in limine to ensure that Dr. Kim's testimony was limited to the electron micrographs (if any) presented by Dr. Hanson at trial. (R100-26392-95). The court granted the motion, expressly limiting Dr. Kim's testimony to: rebuttal of Dr. Hanson; electron microscopy slides/photographs provided to Plaintiffs at Dr. Hanson's deposition; and electron microscopy slides/photographs about which Dr. Hanson provided testimony during trial. (R122-30420).

2. At Trial, the Court Reversed Itself and Allowed Dr. Kim to Testify About Electron Microscope Slides that Were Not in Rebuttal to Dr. Hanson

With Dr. Kim listed solely as a rebuttal witness, DuPont chose not to call its only electron microscopic expert, Dr. Hanson, at trial. But despite the court's earlier order holding that "Dr. Kim's testimony is limited to rebuttal of Dr. Hanson" and the materials he provided, the court reversed its prior ruling and, over objection, allowed Plaintiffs to call Dr. Kim in rebuttal as the last witness of the trial. (T.6610-39; 6922-24). Dr. Hanson's electron microscope slides were not in evidence for Dr. Kim to rebut, since DuPont had elected not to call Dr. Hanson.

The court allowed Dr. Kim to testify, over objection, about electron microscope slides that ***he*** brought to trial showing images of various viruses. (T.6922-23; 6929-38). He was allowed to explain the effect of the presence of

virus in a cell (T.6928-29), how various viruses present themselves in micrographic imaging (T.6931-37; 6958) and in ferns (T.6954), and that he did not see the presence of such viruses in the fern pictures that he saw in this case. (T.6953-60).

The electron microscope slides that he referenced included not only Dr. Hanson's (which were not in evidence), but work done by *Plaintiffs*' own previously designated virus experts – Ethel Sanchez and Dr. Gerardo Martinez. (T.6953-59). Plaintiffs elected not to call those experts about their own slides, but instead had Dr. Kim explain their work. Dr. Kim was never disclosed as an expert to discuss the electron microscope slides of Sanchez or Martinez. At his deposition, Dr. Kim testified that he had never heard of Sanchez and did not review Martinez's reports. (R102-26848 & 857 (pp. 10, 46)).

Dr. Kim's testimony contradicted the court's order that he would be allowed to testify only in rebuttal to Dr. Hanson's slides. (R122-30420). By the time the court permitted the undisclosed testimony, DuPont had rested its case and its witnesses had been discharged. (T.6542; 6610-11). Allowing this testimony was reversible error. *See Baptist Hosp., Inc. v. Rawson*, 734 So. 2d 1157, 1158-59 (Fla. 1st DCA 1999).

3. The Court Reversed Itself and Allowed Dr. Kim to Testify About Light Microscope Slides for Which Plaintiffs Had Designated A Different Expert

Contrary to his explicit disclosure and the prior court order, Dr. Kim also testified at length about *light* microscope slides. DuPont had presented its virus defense through the testimony of Dr. Gary Simone, whose opinions were based on his fully disclosed light microscope slides. (T.6484-85). Dr. Simone did not base any of his opinions on electron microscopy. (*Id.*; T.6100-05).

Plaintiffs designated an expert, Dr. Polston, to testify about light microscopy and to rebut Dr. Simone's testimony. (R86-21287). DuPont deposed Dr. Polston on her opinions about Dr. Simone's light microscope slides. (T.6923; 6939-40).

But at trial, Plaintiffs chose not to call Dr. Polston, the expert they designated on light microscopy. Instead, over DuPont's objection, they had Dr. Kim offer undisclosed opinions about Dr. Simone's light microscope work. Dr. Kim's testimony – again in violation of the court's order and contrary to his expert disclosure limiting his opinions to electron microscopy – included extensive criticism of Dr. Simone's light microscopy methodologies and opinions. (T.6924; 6927-28; 6938-44; 6947-53; 6956-58; 6962-63). Allowing this testimony was error. *See, e.g., Gonzalez v. State*, 777 So. 2d 1068, 1070 (Fla. 3d DCA 2001) (reversing where testimony of substitute expert improperly allowed); *Bashure v. Lindamood*, 503 So. 2d 368, 369 (Fla. 1st DCA 1987) ("The manner in which the

rebuttal witness was called operated to surprise the objecting parties with no opportunity to cure the prejudice.").

DuPont never had the opportunity to depose Dr. Kim on his undisclosed opinions. The admission of Dr. Kim's testimony on rebuttal was prejudicial error requiring reversal.

V. PLAINTIFFS' DAMAGES AWARDS ARE FATALLY FLAWED

The final judgments predicated on the jury's past lost-profit awards totaling $113,486,696 cannot be sustained. All of Plaintiffs' damage awards were fatally flawed and excessive because Plaintiffs' expert used the "breach-day" currency conversion methodology instead of the applicable "judgment-day" rule and because expert reports prepared by Plaintiffs' damages expert were erroneously admitted as purported summary evidence. Certain Plaintiffs' damages theories were legally deficient because Plaintiffs used the wrong measure of damages. DuPont is entitled to a directed verdict or, alternatively, a new trial.[16]

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[16] *See Morgan Stanley & Co., Inc. v. Coleman (Parent) Holdings Inc.*, 955 So. 2d 1124, 1131 (Fla. 4th DCA 2007) (defendant entitled to DV where there was no proof of correct measure of damages; moreover, new trial remedy would improperly give plaintiff a second bite at the apple); *Kind v. Gittman*, 889 So. 2d 87, 90 (Fla. 4th DCA 2004) (reversing and remanding for entry of judgment for defendants where there was no proof of the correct measure of damages); *Teca, Inc. v. WM-Tab, Inc.*, 726 So. 2d 828, 830-31 (Fla. 4th DCA 1999) (same),

A. All Plaintiffs Failed to Apply the Judgment-Day Conversion Rule and Therefore Presented an Improper Measure of Damages

Plaintiffs used, over objection, a legally erroneous "breach-day" currency conversion methodology instead of the applicable "judgment-day" rule. This error overstated total claimed damages by some $78.9 million. (R129-32858). Reversal is required. *See City of Key West v. Duck Tours Seafari, Inc.*, 972 So. 2d 901 (Fla. 3d DCA 2007) (reversing where plaintiff used improper damages methodology).

The longstanding judgment-day rule requires that losses denominated in foreign currency be converted into U.S. dollars ***at the time of judgment*** irrespective of whether the foreign currency suffered any devaluation against the dollar. *See Die Deutsche Bank Filiale Nurnberg v. Humphrey*, 272 U.S. 517, 519 (1926); *Ingersoll Milling Mach. Co. v. Granger*, 833 F.2d 680, 692 (7th Cir. 1987) (following "widely accepted practice of employing the judgment-day rule"). The judgment day rule applies when foreign law governs the cause of action. *Budejovicky Budvar, N.P. v. Czech Beer Imps., Inc.*, 2006 WL 1980308 *5-*6 (D. Conn. July 12, 2006) ("when an obligation is governed by foreign law, the conversion from the foreign currency into dollars is to be made at the rate of exchange prevailing at judgment"); Restatement (Second) of Conflict of Laws §144 (1971) ("When in a suit for the recovery of money damages the cause of action is governed by the local law of another state, the forum will convert the

currency in which recovery would have been granted in the other state into local currency as of the date of the awards.").[17]

Plaintiffs' damages expert Steve Rosenthal disregarded the circumstances of this case when he failed to apply the judgment-day rule. Relying on Plaintiffs' financial records, stated in Costa Rican colones, Rosenthal calculated Plaintiffs' alleged lost fern lost profits on an annual basis. Instead of aggregating each Plaintiff's losses in colones over the claimed damage period (1986 to 2005) and then converting the total lost profits in colones to dollars at the time of judgment, however, Rosenthal improperly converted the colones to dollars on an annual basis. (T.4596-97).

Given the nearly ten-fold devaluation of Costa Rica's currency in relation to the U.S. dollar over the claimed 20-year damage period (T.4659), Rosenthal's method grossly overstated Plaintiffs' damages. The court erred in overruling DuPont's objection to and motion to strike Rosenthal's testimony, which was based on a legally erroneous methodology. (T.4474-75; 4683-84; R126-32127-30).

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[17] *See also In re Good Hope Chem. Corp.*, 747 F.2d 806, 809-12 (1st Cir. 1984) (parties' choice of law determines application of judgment-day versus breach-day rule); *Conte v. Flota Mercante Del Estado*, 277 F.2d 664, 670 (2d Cir. 1960); *Chantier Naval Voisin v. M/Y Daybreak*, 677 F. Supp. 1563, 1571-72 (S.D. Fla. 1988); *Vlachos v. M/V Proso*, 637 F.Supp. 1354, 1376-77 (D. Md. 1986) (judgment-day rule applies where foreign law governs plaintiff's personal injury claim).

Plaintiffs conceded below that "whether or not you should convert on an annual basis or convert at the end of the damages" was a "question of law" for the court and not one of fact for the jury. (T.7288).

Plaintiffs have no legal or equitable right to have DuPont account for their local currency's change in value vis-à-vis the U.S. dollar. Plaintiffs are Costa Rican businesses located in Costa Rica that allegedly lost profits in Costa Rican colones. The only reason the colones are even converted to dollars is because "[j]udgments for money damages must be rendered in the currency of the forum." *Chantier*, 677 F. Supp. at 1571. Converting the colones at the time of judgment under the judgment-day rule is fair and equitable. *See Humphrey*, 272 U.S. at 519.

B. Certain Plaintiffs Used an Erroneous Measure of Damages

Plaintiffs' use of a legally inapplicable valuation method mandates reversal. Plaintiffs requested lost profits for five growers (including Eurofern and Rio de Janeiro) that admitted they already went out of business. (T.4693). Rio de Janeiro, for example, closed down its operations in about 2001/2002. (T.1116). In spite of this, Plaintiffs sought and calculated past lost profits up through 2005 (and future lost profits through 2010) on the speculative basis that these five growers' businesses would have continued but for DuPont's negligence. (T.4695-96).

As DuPont argued below, however, Plaintiffs could not seek lost profits but at most the market value of the businesses, which Plaintiffs failed to prove.

(T.7359-73). Thus, DuPont is entitled to a directed verdict or new trial. *See City of Key West*, 972 So. 2d at 903 ("Only continuing businesses are entitled to recover lost profits attributable to a defendant's acts."); *Montage Group, Ltd. v. Athle-Tech Computer Sys., Inc.*, 889 So. 2d 180, 193-196 (Fla. 2d DCA 2004) (defendant entitled to DV where plaintiff offered no proof as to value of destroyed business).

C. Plaintiffs' Expert Reports were Inadmissible and Insufficient to Establish Damages

DuPont is also entitled to judgment in its favor as a result of Plaintiffs' reliance on the improperly admitted and prejudicial damages charts (28 exhibits) detailing Rosenthal's lost profit "compilation and analysis," which were based on hearsay. (PX87-88, 136-63; T.4548-54; 4575-83; R123-30560). The charts were thus part of Rosenthal's expert report which, as the trial court itself ruled, was inadmissible. (T.3197: "An expert's report is not admissible in evidence.").

The court improperly allowed Plaintiffs to admit the charts into evidence as summary evidence under section 90.956, Fla. Stat., and rely heavily on them at trial. (*E.g.*, T.4474-76; 4515-20; 4526-55; 4578-80; 7485-89). Because the charts contained Rosenthal's lost profits opinions, theories, and projections, they were clearly not "summaries" under section 90.956 and were not admissible. *See Batlamento v. Dove Fountain, Inc.*, 593 So. 2d 234, 240 (Fla. 5th DCA 1991) (jury award based on written damage summary introduced into evidence under §90.956 was improper; remanding for reduction of award by damage summary amounts not

otherwise proven by competent evidence). Courts interpreting section 90.956's federal counterpart, Rule 1006, have rejected similar attempts to introduce damage calculations as summaries. *See Eichorn v. AT&T Corp.*, 484 F.3d 644, 650 (3d Cir. 2007) ("The plaintiffs' proffered calculations are better described as a synthesis rather than a summary of the charts and other evidence on which Mr. Crowley relied. The calculations went beyond the data they summarized and included assumptions, inferences and projections about future events, which represent Mr. Crowley's opinion, rather than the underlying information."); *Gomez v. Great Lakes Steel Div. Nat'l Steel Corp.*, 803 F.2d 250, 257-58 (6th Cir. 1986) (reversing judgment for plaintiff where damage "summary" which projected future events and economic losses was erroneously admitted into evidence).

Decisions in Florida have likewise held that damage reports created in anticipation of trial are inadmissible hearsay. *See Beckerman v. Greenbaum*, 439 So. 2d 233, 235 (Fla. 2d DCA 1983) ("computation of profit on sale" record prepared by party's accountant in anticipation of trial to summarize prior transaction was inadmissible). Moreover, expert reports are not rendered admissible by the fact the expert testifies at trial. *See McElroy v. Perry*, 753 So. 2d 121, 126 (Fla. 2d DCA 2000) ("We do not suggest that if an expert testifies, his written report, which is hearsay, becomes admissible.... Moreover, the error is

compounded because once admitted into evidence, the jury takes the expert's written opinion into the jury room for further review during deliberation[.]").

Rosenthal's damage charts were also inadmissible because they were derived from inadmissible evidence. Summaries may be admissible "if the documents upon which they are based are admissible." *See* C. Ehrhardt, *Florida Evidence* § 956.1 p.1077 (2007 ed.).[18]

Here, Rosenthal drew from an array of inadmissible hearsay evidence in compiling his damage charts. For example, the variable cost computations in Rosenthal's individual lost profit summaries were based on interviews with farm managers – rank hearsay. (*E.g.*, PX153, Sch.JAR-1 n.6) ("per conversation with grower"). Rosenthal relied on other inadmissible documents (such as sales summaries) which were created by Plaintiffs in anticipation of litigation and were not business records. (*E.g.*, PX141, Sch.PLA-1 n.4). *See Stambor v. One Hundred Seventy-Second Collins Corp.*, 465 So. 2d 1296, 1297-98 (Fla. 3d DCA 1985) (report created in anticipation of litigation was inadmissible hearsay).

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[18] *See also* 1 Fla. Prac. Evidence § 956.1 (2007 ed.) ("[I]f the documents upon which the summary is based are hearsay, [§]90.956 does not overrule a hearsay objection."); *Peat, Inc. v. Vanguard Research, Inc.*, 378 F.3d 1154, 1158-65 (11th Cir. 2004) (reversible error to admit summary; "Rule 1006 is not a back-door vehicle for introduction of evidence which is otherwise inadmissible."); *Conoco, Inc. v. Dep't of Energy*, 99 F.3d 387, 393-94 (Fed. Cir. 1996) (error to admit summaries based on hearsay).

The court never should have admitted this portion of Rosenthal's expert report into evidence. The jury's damages awards predicated on this improper evidence must be vacated.

VI. PLAINTIFFS' FAILURE TO PLEAD THEIR "MICROBE SHIFT" LIABILITY THEORY BARS RECOVERY

DuPont is entitled to a judgment in its favor based on Plaintiffs' failure to plead the only theory that they advanced at trial – "microbe shift."

A. Plaintiffs Never Pled The Only Theory They Advanced At Trial

Plaintiffs' complaints set forth a detailed theory of liability ***that was entirely unrelated to the claims that were tried.*** The *Super Helechos* complaint was 38 pages long with 187 paragraphs of allegations, yet none of those paragraphs mentioned a microbial shift or facts supporting such a theory. The *Euro Flores* complaint was similarly lengthy (37 pages, 174 paragraphs) and it did not refer to Plaintiffs' microbe shift theory.

Instead, the complaints contained extensive, detailed allegations of an entirely different theory of why Benlate was allegedly defective – the "DBU theory."[19] Under their DBU theory, Plaintiffs claim that Benlate DF was exposed to heat and moisture, causing the benomyl in Benlate DF to produce two molecules – "MBC" and "BIC." (R28-6736, ¶¶ 47-51). "When the BIC molecule is exposed

to heat and moisture, butylamine is formed. Butylamine then bonds with BIC molecules remaining in the product to form dibutylurea ('DBU')." (*Id.* at ¶ 48). DBU, according to Plaintiffs, has herbicidal effects and directly damages plants. (*Id.* at ¶ 49). Plaintiffs also claimed that the DBU increased with the age of the Benlate DF, and "hot and humid climates, such as in Costa Rica, accelerate the breakdown process." (*Id.* at ¶ 51).

The DBU theory that Plaintiffs alleged was virtually identical to Benlate DF claims previously asserted and tried by other plaintiffs in South Florida. (R134-33895-96). The two most recent and only Benlate cases tried before this trial judge focused exclusively on this DBU/Benlate DF theory.

At trial, however, Plaintiffs abandoned the DBU (Benlate DF) theory they had pled. They exclusively argued that all Benlate was defectively designed because it has "dangerous non-target effects on microorganisms" such that it "triggers an opportunistic bacterial infection." (T.7427-28). They claimed this infection arose in the rhizomes from which the fronds were vegetatively propagated and caused a long term, persistent change. (T.2302-04; 3152; 3186; 3238; 3245-46; 4169-71). Plaintiffs' expert concluded that "the disease had been there since the beginning of fern use in Costa Rica and the beginning of Benlate

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[19] The complaints also contained detailed allegations about a second possible defect theory that Benlate was contaminated with sulfonylureas during the manufacturing process (the "SU" theory). Plaintiffs did not try to prove the SU theory at trial.

use in Costa Rica." (T.3342-43; *see also* 3243-45). Plaintiffs' theme was that the rhizomes were first infected in Florida, and then moved to Costa Rica by Florida growers. (*E.g.*, T.662). Benlate WP, not Benlate DF, was on the market during that time. (T.4861-62). And, according to Plaintiffs' experts, the ferns were already "dead on arrival" when purchased because of those Benlate treatments. (T.3152; 3245-46, 4169).

Thus, Plaintiffs' proof at trial was limited to the harm Benlate WP did by affecting microbes and causing infection, not the pled theory that Benlate DF tended to break down into DBU and cause direct, herbicidal harm to plants.

Plaintiffs never moved to amend their complaints before, during, or after the trial. DuPont never acquiesced to the trial of Plaintiffs' unpled claims. (R134-33893-912). To the contrary, DuPont continuously objected. Yet the court permitted Plaintiffs to try and recover on a theory of liability they never pled. (T.112; 7283-84).

B. Plaintiffs Are Not Entitled to Recover On An Unpled Theory

"It is well settled that a defendant cannot be found liable under a theory that was not specifically pled." *Michael H. Bloom, P.A. v. Dorta-Duque*, 743 So. 2d 1202, 1203 (Fla. 3d DCA 1999). "[L]itigants at the outset of a suit must be compelled to state their pleadings with sufficient particularity for a defense to be prepared." *Arky, Freed, Stearns, Watson, Greer, Weaver & Harris, P.A. v.*

Bowmar Instrument Corp., 537 So. 2d 561, 563 (Fla. 1988); *see also Ails v. Boemi*, 990 So. 2d 540, 548 (Fla. 2d DCA 2008) ("It is axiomatic that a party may not be held liable on an issue that was neither pleaded nor tried by consent.").

Arky establishes that Plaintiffs failed to plead the only theory on which they recovered, and thus as a matter of law barred from any recovery. As explained in this Court's intermediate decision, defendant Bowmar filed a counterclaim against *Arky Freed* for legal malpractice alleging specific theories of negligence, such as the firm's assignment of Bowmar's case to an inexperienced attorney and having paralegals review critical documents. 527 So. 2d 211 (Fla. 3d DCA 1987). "Conspicuously absent from the counterclaim was an allegation – or even an allusion to an allegation – that would have apprised Arky Freed of the real thrust of Bowmar's claim: that the firm negligently failed to present a 'cover' defense in the underlying action." *Id.* at 212. Rather, it was not until close to trial that Bowmar disclosed through "long-overdue answers to expert interrogatories...that it intended to prove at trial, not the allegations set forth in its counterclaim, but, instead, Arky Freed's failure to raise a 'cover' defense." *Id.*

The rule from *Arky* is clear: general allegations of negligence in complex cases do not subsume all theories of *how* a defendant was negligent. *See Robbins v. Newhall*, 692 So. 2d 947, 949-51 (Fla. 3d DCA 1997) (reversal required where medical malpractice plaintiff tried her case based on a theory of negligence –

removal of too much bone and cartilage – that had not been pled in her complaint); *Aills*, *supra* (where complaint specified grounds for defendant's medical negligence but did not include post-operative care, it was reversible error for plaintiff's counsel to assert negligence in the post-operative care in closing argument).[20]

Here, as in *Arky*, Plaintiffs pled a theory of negligence in great detail, but recovered on a completely different theory. Like the counterclaimant in *Arky*, 527 So. 2d at 212, Plaintiffs claimed below that the microbe theory was subsumed within their general allegations of negligence. This was a reference to their complaints' conclusory allegation, after hundreds of detailed paragraphs regarding the DBU theory, that DuPont was negligent in its "design and formulation of the product such that it was...compromised by a design defect." (R28-6751). But just as this Court held that in a legal malpractice case one must plead more than "the naked legal conclusion that the defendant was negligent," *id.*, this Court has also held that it is insufficient in a products liability action to merely allege that a product is defective without identifying specific facts constituting the alleged defects. *See Clark v. Boeing Co.*, 395 So. 2d 1226, 1228-29 (Fla. 3d DCA 1981) (complaint alleging that product had defective design and was in defective

[20] *See also S. Motor Co. of Dade County v. Doktorczyk*, 957 So. 2d 1215, 1218 (Fla. 3d DCA 2007); *Viterra Energy Servs., Inc. v. Gateway GP Sawgrass Mills, Inc.*, 858 So. 2d 1208, 1209 (Fla. 4th DCA 2003); *Bogosian v. State Farm Mut. Auto. Ins. Co.*, 817 So. 2d 968, 970-71 (Fla. 3d DCA 2002).

condition without adequate warnings failed to set forth ultimate facts and constituted mere conclusions warranting dismissal); *Rice v. Walker*, 359 So. 2d 891, 892 (Fla. 3d DCA 1978) (complaint alleging that product was defectively manufactured without specifying defects did not state cause of action; though plaintiff alleged various product components were unsafe, "the facts constituting such defects were not stated nor did the plaintiff allege facts showing how, as made, any such components were defective or dangerous to the user...").[21]

The *Arky* pleading requirement has been applied in the precise context of a Benlate products liability action. *See E.I. Du Pont de Nemours & Co. v. Desarollo Industrial Bioacuatico S.A.*, 857 So. 2d 925 (Fla. 4th DCA 2003) (reversing judgment against DuPont where complaint alleged that DuPont was negligent in design, formulation, manufacture, testing and distribution of Benlate, but plaintiff relied at trial and recovered on a failure to warn theory). The *Desarollo* Court held that, under *Arky*, the plaintiff could not recover on a negligence claim that failed to plead the specific theory of negligence advanced at trial. *Id.* at 929-30. Moreover,

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[21] *See also Rios v. McDermott, Will & Emery*, 613 So. 2d 544, 545 (Fla. 3d DCA 1993) ("[I]t is a fundamental rule that the claims and ultimate facts supporting same must be alleged. The reason for the rule is to appraise [sic] the other party of the nature of the contentions that he will be called upon to meet...."); *Triana v. Fi-Shock, Inc.*, 763 So. 2d 454, 458 (Fla. 3d DCA 2000) ("litigants at the outset of a suit must be compelled to state their pleadings with sufficient particularity for a defense to be prepared").

Judge Stone noted in a specially concurring opinion that, under *Arky*, reversal was not dependent on any showing of prejudice. *Id.* at 931.

Here, too, DuPont need not establish prejudice. Reversal for a judgment in DuPont's favor is required because Plaintiffs recovered on a theory that was neither pled nor acquiesced to at trial.

C. DuPont Is Not Required To Show That It Was Prejudiced, But Even If It Were, The Record Establishes Such Prejudice

Even if prejudice were required, the record overwhelmingly demonstrates that DuPont was significantly prejudiced in its ability to develop its legal defenses and prepare for trial by Plaintiffs' failure and refusal to identify their claim.

Plaintiffs hid the ball from DuPont for more than four years. As noted, the 2001 and 2002 complaints made no mention of the microbe theory. Below, Plaintiffs pointed out that during a 2003 deposition relevant to DuPont's motion to dismiss based on *forum non conveniens*, Dr. Mills indicated that he had been conducting research outside the context of this litigation on how Benlate affects soil microbes and causes distortions in ferns. (R38-8608-77, pp. 11-13, 17-27, 30, 64-72, 76). But Dr. Mills did not say that this work had been commissioned by Plaintiffs, nor did Plaintiffs represent that this was the theory they would advance at trial instead of the DBU theory pled in their complaints.

In July of 2004, DuPont made its first unsuccessful attempt to identify Plaintiffs' intended theory of negligence by serving interrogatories asking Plaintiffs

how Benlate harmed their plants. (SR2 133-48, #17). Instead of advising DuPont that they would rely on the theory that Dr. Mills discussed in his 2003 deposition, Plaintiffs objected that the interrogatories "prematurely call[ed] for expert conclusions," and that they had already alleged that "Benlate was defective due to contamination, decomposition, or a manufacturing or design defect." (*E.g.*, SR2 149-76, #17).

Still unclear on the theory Plaintiffs would advance at trial, DuPont moved to compel more detailed discovery responses (8/2005), moved to preclude discovery regarding unpled claims (10/2005), and filed a notice of its non-consent to the trial of unpled claims. (R46-10120; R51-11093-99). The court denied DuPont's motions, ruling that DuPont would have to get the sought-after information when it deposed Plaintiffs' experts. (SR2 218-24).

Despite DuPont's best efforts to obtain expert disclosures well before trial, Plaintiffs actively and successfully resisted. Expert disclosures did not begin until December 19, 2005, less than two months before the trial was then scheduled to start. (R55-11932-34; R84-20893). DuPont took the deposition of the person who turned out to be Plaintiffs' chief causation expert, Dr. Joseph Kloepper on January 19, 2006, less than one month before the scheduled trial date. (R84-20894-95).

It was during this belated deposition that Plaintiffs first disclosed, through Dr. Kloepper, that the theory of negligence they intended to assert at trial was

fundamentally different from that which had been pled. In contrast to the Benlate DF based DBU theory, Dr. Kloepper disclosed for the first time in his deposition that, based on the alleged results of testing he had just completed, he planned to opine at trial that all types of Benlate cause harm to plants by killing fungi inside the plant which causes an increase in populations of bacteria and a resulting internal bacterial infection. Under his new theory, the bacterial infection produces excessive levels of IAA inside the plant, which can result in plant injuries quickly or years later. (R84-20894-95; R88-21611-22; 21625-37). Dr. Kloepper admitted that when he was contacted by Plaintiffs' counsel in June of 2005, his own data and conclusions from prior cases did not support this microbe shift theory. (R88-21596).

The theory Dr. Kloepper disclosed right before trial was not only new and unpled, but was also different than the prior independent theories referred to by Dr. Mills. In fact, Dr. Kloepper has disagreed with Dr. Mills' prior work. (R88-21596). Significantly, Plaintiffs' counsel stated in a letter that this case "involves scientific causation opinions concerning the manner in which Benlate causes damage that are new in the sense that no claim, lawsuit or deposition...in the past have ever asserted the very different causation opinions asserted in our case." (R84-20902).

Because trial was scheduled to start less than a month after Dr. Kloepper's deposition, when DuPont first learned Plaintiffs would be relying on his new

microbe testing and opinions, DuPont moved for a 90-day continuance in order to allow its experts to "assess and consider these opinions in formulating and issuing their own opinions" (which may have required DuPont to hire additional experts), and to also allow DuPont to address other unresolved pretrial issues. (R84-20896; 20992-21014; SR2 247-48). At a hearing on this motion, the court expressed concern that requiring Plaintiffs to amend their complaints to conform to this newly-disclosed and unpled theory "would obviously have serious ramifications for a trial date that's allegedly set for two weeks from now," granted a 30-day continuance for the limited primary purpose of allowing the parties to resolve a wholly unrelated issue regarding a litigation consultant, but ruled that "[n]o further continuances will be permitted." (R88-21734-35; SR2 338).

Like the denied continuance in *Arky*, the 30-day continuance here was inadequate to permit DuPont to prepare a defense to Dr. Kloepper's newly-disclosed and unpled theory. As DuPont's counsel advised the court: "We need to get all of the testing documents. ... We need to inspect the test plants and materials. Based on that inspection, we need to do all the appropriate testing, ourselves, to analyze what [Dr. Kloepper] has done. We need to evaluate the results of all of this and determine if other investigations are necessary; and after that, formulate opinions." (SR2 248).

DuPont never had time to mount a defense to the microbe theory, and Plaintiffs took full advantage of this. Their repeated theme during trial was that DuPont "the science company" had not conducted microbe scientific studies like Plaintiffs had, and thus did not exercise reasonable care (*e.g.*, "The science company is silent on the science." T.7592). (*See also*, *e.g.*, T.7471; 7452-54; 7575-78).

If it were necessary for DuPont to show prejudice, the record reflects that DuPont suffered substantial prejudice in preparing its defenses because of Plaintiffs' failure to plead the microbe-shift theory they advanced at trial. Under *Arky*, DuPont is entitled to judgment in its favor.

VII. THE ECONOMIC LOSS RULE BARS PLAINTIFFS' CLAIMS

A. The Court Should Reverse For a Directed Verdict In DuPont's Favor Based on the Economic Loss Rule

Plaintiffs' claims are barred by Florida's economic loss rule, which prohibits a recovery of tort damages where "there is a defect in a product that causes damage to the product but causes no personal injury or damage to other property." *Indem. Ins. Co. of N.A. v. Am. Aviation, Inc.*, 891 So. 2d 532, 536 (Fla. 2004). "[A] manufacturer in a commercial relationship has no duty under either a negligence or strict products liability theory to prevent a product from injuring itself." *Id.* at 541.

Under Plaintiffs' theory, the economic loss rule applies because the allegedly defective product (a fern rhizome previously treated with Benlate) caused damage

only to itself by failing to produce marketable leatherleaf ferns. According to Plaintiffs, the rhizomes they purchased were "*dead on arrival*" based on earlier Benlate applications and any further Benlate applications were like "shooting a dead person in the head again." (T.4169). Because the product injured only itself, the economic loss rule precludes recovering in tort. *See, e.g., King v. Hilton-Davis*, 855 F.2d 1047, 1050-54 (3d Cir. 1988) (holding economic loss rule barred tort action against a chemical manufacturer where the plaintiffs claimed that the seed potatoes they purchased had been harmed by a previous chemical application); *In re StarLink Corn Prods. Liab. Litig.*, 212 F. Supp. 2d 828, 841-42 (N.D. Ill. 2002) (economic loss rule barred tort claim for contaminated seed).

Plaintiffs argued below that Benlate caused harm to property "other than itself," *i.e.* Plaintiffs' fern rhizomes and leaves. The *King* court rejected a similar argument, reasoning that in determining whether a product "injures only itself," courts must look to the product purchased by the plaintiff (*e.g.*, fern rhizomes), and not the product sold by the defendant (*e.g.*, Benlate). 855 F.2d at 1051. Florida applies the same rule: "[T]o determine the character of a loss, one must look to the product purchased by the plaintiff, not the product sold by the defendant." *Casa Clara Condo Ass'n v. Charley Toppino & Sons, Inc.*, 620 So. 2d 1244, 1247 (Fla. 1993) (citing *King*); *accord Fishman v. Boldt*, 666 So. 2d 273, 274 (Fla. 4th DCA 1996).

As in *King*, this case involves Plaintiffs' "disappointed economic expectations" about the crop grown from the "product" they purchased. Plaintiffs may have a contract action against the rhizome supplier but have no tort action against DuPont. Consequently, the court erred when it denied DuPont's motion for directed verdict based on the then unchallenged Florida economic loss rule made at the close of Plaintiffs' case-in-chief. (R127-32162-65; T.4852; 4867; 6541). *See, e.g., Tiger Point Golf & Country Club v. Hipple*, 977 So. 2d 608, 609-10 (Fla. 1st DCA 2007) (reversing plaintiff's judgment because defendant's motion for summary judgment should have been granted).

B. Plaintiffs' Untimely Notice and Proof of Foreign Law Does Not Save Plaintiffs' Tort Claims

When the court ruled on DuPont's motion for directed verdict at the close of the case (R132-33501-04; T.7133) and its post-trial JNOV motion (R138-35063-72), it never reached the merits of DuPont's economic loss rule defense. Rather, it accepted Plaintiffs' contention, raised for the first time *after* the case was submitted to the jury, that Costa Rican law rather than Florida law governed this affirmative defense, that Costa Rica did not recognize the Florida economic loss rule, and that the law governing the case should be changed after the trial was complete. (R135-34103-04, 34129-33; R149-37950-52). These rulings were erroneous and require reversal.

1. Plaintiffs Waived Any Reliance on Costa Rican Law

Plaintiffs never suggested before or even during trial that Costa Rican law barred DuPont's economic loss rule defense. First, Plaintiffs waived their right to avoid that defense by failing to file a reply in avoidance arguing that this defense was inapplicable under Costa Rican law. *See* Fla. R. Civ. P. 1.100(a) ("If an answer...contains an affirmative defense and the opposing party seeks to avoid it, the opposing party *shall* file a reply containing the avoidance.") (e.s.). Second, the pretrial submissions of Plaintiffs' Costa Rican law experts, Alejandro Batalla and Gino Cappella, never mentioned the economic loss rule. (R58-12399-407; SR 541-51). Third, when Plaintiffs' foreign law experts were deposed at length on matters of Costa Rican law that allegedly differed from Florida law, the economic loss rule was again never discussed. (R101-26601-58; R119-29866-911). Before trial began, in February 2006, the court noted that "all" requests for application and proof of foreign law "have already been provided." (R85-21231).

DuPont was entitled to rely on the law as submitted and briefed by the parties before trial, just as Florida law contemplates. § 90.203, Fla. Stat. *See Bould v. Touchette*, 349 So. 2d 1181, 1186 (Fla. 1977) ("A party cannot complain on appeal of the adoption of a rule of damages in accordance with the theory upon which he tried the cause, although it was the wrong rule."). Because Plaintiffs failed to provide any notice and proof before or during trial that Costa Rican law

differed from Florida law with respect to the economic loss rule, Plaintiffs assented to the application of Florida's economic loss rule and waived their right to rely on any contrary Costa Rican authorities. *See Bennett v. Morales*, 845 So. 2d 1002, 1004 (Fla. 5th DCA 2003) (litigant waived right to seek application of foreign law after failing to raise that foreign law when issue arose during trial); *Gustafson v. Jensen*, 515 So. 2d 1298, 1300 (Fla. 3d DCA 1987) ("[W]here a party seeking to rely upon foreign law fails to demonstrate that the foreign law is different from the law of Florida, the law is the same as Florida.").

2. Notice and Proof of Foreign Law After the Case Is Submitted to the Jury is Not Reasonable Notice

Over DuPont's objections, the court accepted Plaintiffs' post-trial proof that Costa Rican law precluded the economic loss rule defense, finding that DuPont had adequate notice. (R135-34103-04, 34129-33; R146-36770-86; R149-37950-52).

But foreign law cannot be applied unless a party gives "reasonable notice" of its application and proof of its variance with Florida law. *See Kingston v. Quimby*, 80 So. 2d 455, 456 (Fla. 1955); *Schubot v. Schubot*, 363 So. 2d 841, 842 (Fla. 4th DCA 1978); *accord* § 90.203, Fla. Stat. To constitute reasonable notice, foreign law must be raised and proven *prior to trial. See DP Aviation v. Smiths Indus. Aerospace & Defense Sys. Ltd.*, 268 F.3d 829, 845-49 (9th Cir. 2001) (finding proof of foreign law on the legal issue of prejudgment interest untimely because raised for the first time after trial); *Semo Aviation, Inc. v. S.E. Airways Corp.*, 360

So. 2d 936, 941-42 (Ala. 1978) (same: first day of trial); *Godinger Silver Art Co., Ltd. v. Olde Atlanta Mktg., Inc.*, 604 S.E.2d 212, 215 (Ga. Ct. App. 2004) (same: after trial); *In re Marriage of Mulvihill*, 471 N.E.2d 10, 11 (Ind. Ct. App. 1984) (same); *Frericks v. Gen. Motors Corp.*, 336 A.2d 118, 123-24 (Md. Ct. App. 1975) (same: on appeal). Plaintiffs' notice and proof of foreign law *after trial* was *per se* unreasonable.

Like in *DP Aviation*, this Court should "see no reason in law or policy to condone a belated notice of contention of application of foreign law on an issue that reasonably can be anticipated." 268 F.3d at 848.[22]

3. If Prejudice is Necessary, Plaintiffs' Untimely Notice and Proof of Foreign Law Clearly Prejudiced DuPont

The court's decision to reopen the foreign law issues after the case went to the jury resulted in severe and undue prejudice to DuPont. Had DuPont known the court would disavow its pretrial foreign law deadlines and allow additional proof of foreign law during trial, DuPont would have defended the case differently. DuPont would have noticed and proven that Costa Rican law, like Florida law, precludes the recovery of remote economic losses. Florida law does so through the economic loss rule; Costa Rica does so through its requirement that damages be the

[22] That a foreign law determination is a question of law does not excuse Plaintiffs' failure to provide timely notice of their argument that Costa Rican law barred DuPont's economic loss rule defense. *See DP Aviation*, 268 F.3d at 845-49.

"immediate and direct" result of the defendant's negligence. Without the Florida economic loss rule, DuPont would have tailored its evidence and argument to show that Plaintiffs' harm was indirect and non-immediate.[23]

DuPont had no opportunity to make this argument, however, because it was not timely notified that Costa Rican law could and would be reopened during or after trial. The court failed to recognize this inequity. Instead, the court accepted DuPont's proof that the "immediate and direct" doctrine applied and then ruled ***as a matter of law*** that "Plaintiffs' damages were the immediate and direct result of DuPont's action of negligently formulating Benlate so that it was harmful to plants." (R149-37952). That was error as the court was not entitled to substitute its own judgment for that of the jury on the fact-intensive issue of whether Plaintiffs' alleged harm was direct and immediate. *Cf. Penske Truck Leasing Co. v. Moore*, 702 So. 2d 1295, 1298 (Fla. 4th DCA 1998) (issue of proximate cause "was one to be determined by the jury upon proper instruction").

DuPont is entitled to a directed verdict because Plaintiffs' claims are barred by Florida's economic loss rule. In the alternative, DuPont is entitled to a new trial

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[23] As DuPont's Costa Rican law expert Diego Baudrit Carillo explained, the "immediate and direct" requirement under Article 704 of the Costa Rican Civil Code bars Plaintiffs' claims based on their latent infection/dead-on-arrival theory: "Plaintiffs could not have been immediately and directly damaged by the application of the Benlate to the rhizomes because they did not own the rhizomes at the time that Benlate was applied and allegedly injured them. Therefore, under Costa Rican law, Plaintiffs cannot recover damages from DuPont." (R146-36704).

to present evidence and arguments that it would have offered had it known that new aspects of Costa Rican law could be noticed, proven, and applied during trial.

VIII. THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN GIVING A "CONSUMER EXPECTATION" JURY INSTRUCTION

The negligence claim submitted to the jury alleged that DuPont negligently designed its product Benlate. The court thus instructed the jury that it could find DuPont negligent only if it found Benlate defective. The court erred, however, in its product defect instruction by telling the jury it could find Benlate defective using ***either*** the "consumer expectation" or the "risk-utility/risk-benefit" tests.[24] The court gave this disjunctive instruction over DuPont's objection that the "consumer expectation" test could not be used as an independent basis for finding a product defective, especially a complex product like Benlate. (T.7176-79; 7624).

The Restatement (Third) of Torts: Products Liability rejects the "consumer expectations" test as an independent basis for finding a design defect. *See* Restatement § 2, cmt. g. This Court has already applied the Third Restatement, *see Kohler Co. v. Marcotte*, 907 So. 2d 596, 598-600 (Fla. 3d DCA 2005), and the propriety of adopting the Third Restatement is currently before the Supreme Court. *See Liggett Group, Inc. v. Davis*, 973 So. 2d 467 (Fla. 4th DCA 2007), *questions*

[24] The jury was told: "A product is unreasonably dangerous because of its design if the product fails to perform as safely as an ordinary consumer would expect when used as intended or in a manner reasonably foreseeable by the manufacturer, or the risk of danger in the design outweighs the benefits." (T.7640-41).

certified, 973 So. 2d 684 (Fla. 4th DCA 2008), *rev. granted*, 978 So. 2d 160 (Fla. 2008). The trial court's error in giving the "consumer expectation" instruction over DuPont's objection requires reversal because it permitted the jury to make the essential finding that Benlate was defective under an inappropriate test. *See, e.g.*, *Schindler Corp. v. Ross*, 625 So. 2d 94, 95-96 (Fla. 3d DCA 1993).

ARGUMENT/ANSWER BRIEF ON APPEAL

I. THE TRIAL COURT'S RULINGS AND JURY'S FACTUAL FINDINGS REGARDING THE STATUTE OF LIMITATIONS SHOULD BE AFFIRMED

The request by seven Plaintiffs for judgment as a matter of law "based on a series of incorrect rulings concerning the statute of limitations" is without merit. (I.B. 19). The court's rulings and jury findings in favor of DuPont should be affirmed for numerous reasons: (1) Plaintiffs waived their directed verdict and insufficiency of evidence arguments; (2) Plaintiffs' proffered "actual knowledge" jury instruction was contrary to Costa Rican law; (3) the court's "knew or should have known" jury instruction was correct; (4) the jury's statute-of-limitations findings are fully supported by record evidence; and (5) the trial court properly barred the seven Plaintiffs' entire claims based on the jury's interrogatory verdict that these Plaintiffs' claims became "demandable" prior to the relevant limitation dates.

A. Background

It is undisputed that the applicable 10-year statute of limitations began to run when Plaintiffs' claims became "demandable" ("exigible" in Costa Rican Civil Code's Spanish text) and further that the Code does not define the term "demandable." (R132-33541-42) (Articles 868 & 874). The only dispute was how to define "demandable" for the jury's factual determination. (T.7353-58; 7396-98).

The court correctly rejected Plaintiffs' proffered "knew of the damage and its cause" instruction because it was an inaccurate statement of Costa Rican law and would lead to absurd results. (R135-34173-74; R149-37748-49). The court cogently reasoned:

> ... Under Plaintiffs' theory, the statute of limitations would essentially never begin to run, where damages are on-going. There would be no "stopping point" from which the final damage occurred, especially in a case like this. Also, Plaintiffs could not produce for this Court any Costa Rican case law which addressed the lengthy statute of limitations as applied to long-term damages. As stated during argument, Plaintiffs' theory would allow them to pursue additional litigation against another producer of benomyl, until 2016, if they had learned during [the 2006] trial that that producer actually caused their damages. The purpose of a statute of limitation is to *limit* a claimant's ability to sue, to put an outer bound on the time after which the cause becomes *demandable*. [Trial Transcript, 7199:16-15; 7200:1-9.] Plaintiffs' theory would leave that outer bound indefinite and continually re-starting at best.

(R149-37748-49) (second brackets in original).

Based on its analysis of Costa Rican law, the court determined that the following "knew or should have known" jury instruction was appropriate: "The

plaintiffs' claims are demandable when the plaintiff knew, or by the exercise of due diligence, should have known that their leatherleaf ferns were exhibiting the deformities or problems which they allege were caused by Benlate." (T.7644).

The court clarified that the statute of limitations was not triggered by the first sign of a deformity but rather when Plaintiffs had actual or constructive knowledge of a sufficient accumulated level of damage, a determination that was left to the jury. (T.7313-14).

Plaintiffs were given a full opportunity to argue their position on the statute of limitations to the jury. (T.7629-32). Plaintiffs never moved for a new trial on the grounds that their proffered "knew of the damage and its cause" instruction was improperly denied; that the instruction given was incorrect or misleading; or that the jury's findings on limitations were contrary to the manifest weight of evidence. Rather, Plaintiffs moved for a directed verdict contending that their legal theory was controlling law and that there was "no evidence that any Plaintiff had any knowledge of Benlate's harmful effect prior to 1991." (T.7407; R134-33916).

B. Plaintiffs' Arguments Are Waived/Procedurally Barred

To preserve a directed verdict/JNOV issue for appellate review, a plaintiff must move for directed verdict at the close of defendant's case and again at the close of all of the evidence. *See Baker v. Deeks*, 176 So. 2d 108, 110 (Fla. 2d

DCA 1965) ("Inasmuch as the plaintiffs failed to move for a directed verdict at the close of the defendant's case, we cannot pass on the question.").

Here, Plaintiffs did not move for directed verdict at the close of DuPont's case on May 8, 2006. (T.6738-40). Rather, they waited until after their rebuttal evidence, just prior to closing arguments, to announce that they *would be* filing a motion for directed verdict on the statute-of-limitations issue. (T.7407; R134-33913-22; *see also* T.7150-51). Plaintiffs were already too late. This Court should reject Plaintiffs' argument below that the admission of DuPont's documentary evidence at the end of the case "created an out-of-the ordinary procedural situation" which excused Plaintiffs' failure to move for directed verdict when DuPont rested (at which time DuPont renewed its own timely motions for directed verdict). (R145-36598-600; T.6738-39).

Further, it is well settled that an appellate court may only consider the specific arguments raised in a motion for directed verdict. *See Gen. Dynamics Corp. v. Wright Airlines, Inc.*, 470 So. 2d 788, 789 (Fla. 3d DCA 1985) (party waived arguments not specifically presented in its motion for directed verdict). Here, Plaintiffs' written motion for directed verdict never challenged the court's "knew or should have known" instruction in any fashion. (R134-33916-19). Thus, Plaintiffs waived any challenge to the sufficiency of the evidence underlying the jury's statute-of-limitation findings predicated on the court's unchallenged

instruction. *See Guadagno v. Lifemark Hosps. of Fla., Inc.*, 972 So. 2d 214, 219 (Fla. 3d DCA 2007).[25]

C. Plaintiffs' Proposed "Actual Knowledge" Jury Instruction Was Properly Rejected by the Trial Court

Even if Plaintiffs' directed verdict arguments had been preserved, they are unavailing on the merits. Plaintiffs have no right to a directed verdict unless the standard set forth in their proffered jury instruction was a correct statement of law. *See Olsten Health Servs., Inc. v. Cody*, 979 So. 2d 1221, 1227 (Fla. 3d DCA 2008). Plaintiffs' "knew of the damage and its cause" jury instruction was not an accurate statement of Costa Rican law. (T.7374; R135-34173-74). As the trial court ruled, Plaintiffs' proposed definition of "demandable" failed to incorporate any duty of due diligence. Further, even if Costa Rican law recognized such an "actual knowledge" standard, the court properly rejected it where it would lead to absurd results, be "repugnant to common sense," and be contrary to Florida public policy. *See Brown & Root, Inc. v. Ring Power Corp.*, 450 So. 2d 1245, 1247-48 (Fla. 5th DCA 1984).

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[25] While Plaintiffs did object to the court's instruction at the charge conference, they did so only on the alleged basis that it was worded incorrectly and not on the basis that there was insufficient evidence to support such a "knew or should have known" instruction. (T.7379-7402). Plaintiffs' limited objection did not preserve the sufficiency of evidence arguments advanced on appeal.

Further, if "causation" were relevant to the jury's factual determination as to when Plaintiffs' claims became demandable, it was not, as Plaintiffs proposed, when they acquired actual knowledge that Benlate caused their fern/production losses. Rather, as the trial court suggested, it was at most when a sufficient period of time of observable damage indicated that it "was damage *possibly* from Benlate." (R149-37749) (e.s.).[26] From that point, Plaintiffs would have had 10 long years to investigate and determine what the actual cause of damage was before bringing suit against DuPont. As Plaintiffs concede, statute of limitation issues in "creeping disease" cases are for the jury to decide. (I.B. 45).[27] None of Plaintiffs' Costa Rican decisions involve "creeping diseases." None of the decisions involve lengthy 10-year statutes of limitations applied to long-term damages. (R149-37748-49). Thus, whatever relevance 'causation' had in the Costa Rican decisions cited by Plaintiffs is not controlling here.

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[26] *Cf. Carter* v. Brown & Williamson Tobacco Corp., 778 So. 2d 932, 937 (Fla. 2000) ("In products liability actions involving latent or creeping diseases ... '[T]he action accrues ... 'only when the accumulated effects of the deleterious substance manifest themselves [to the claimant],' in a way which supplies some evidence of causal relationship to the manufactured product.'"); *Tanner v. Hartog*, 618 So. 2d 177, 181 & n.4 (Fla. 1993) (statute of limitations begins to run when plaintiff has notice of "reasonable possibility"--not a "probability"--that injury was caused by medical malpractice).

[27] *See Celotex Corp. v. Copeland*, 471 So. 2d 533, 539 (Fla. 1985); *Barnes v. Clark Sand Co., Inc.*, 721 So. 2d 329, 332-33 (Fla. 1st DCA 1998).

Furthermore, unlike an action tried in Florida where the jury determines statute of limitations issues, Costa Rica does not have jury trials. Thus, Costa Rican prescription case law does not turn on the critical distinction between the roles of the court and jury as finder of fact. In this case, the jury considered all of the facts and circumstances surrounding Benlate in determining the statute of limitation issues.

The limitations period began to run on Plaintiffs' claims, at the very least, when Plaintiffs had actual or constructive knowledge of a sufficient amount of observable damage allegedly caused by Benlate. (T.7313-14; 7644). The court's instruction was appropriately worded and did not result in any prejudicial error. Plaintiffs' argument to the contrary is flawed in several ways. (I.B. 25-33).

First, Plaintiffs ignore that Costa Rica has a civil law system where legislative code provisions are controlling. *See Transportes Aereos Nacionales, S.A. v. De Brenes*, 625 So. 2d 4, 6 (Fla. 3d DCA 1993) ("It is axiomatic that in civil-law jurisdictions, lawmaking is exclusively the function of the legislature."). Had the Costa Rican legislature wanted to peg the 10-year limitations period under Article 874 to "knowledge of damage and cause," it could have done so in express language. The Costa Rican Civil Code broadly provides for the prescription of both the right and the action. (R132-33541) (Article 868). Significantly, the 10-year statute of limitation is the longest known to Costa Rican civil law. (SR 5-6).

"Extinctive prescription ... is founded in the social need of not keeping legal relationships open for indefinite periods of time." (R132-33544) (Batalla Decl.). Plaintiffs' open-ended interpretation of "demandable" undermines the Costa Rican legislative purpose of prescription. (R132-33525-26, 33548-49).

Second, Plaintiffs' contention that the Costa Rican decisions cited in their brief are "controlling" is patently erroneous. (I.B. 25). Not only are they distinguishable, but Costa Rican judicial decisions have no "precedential" value in the first instance. *See Transportes*, 625 So. 2d at 6. Indeed, Plaintiffs conceded this very point below. (R142-36096) ("Costa Rica is a civil law country where the statutory provisions are the law; case law is not treated in the precedential manner that it is in common law countries.").

Third, Plaintiffs disregard that only a narrow class of Costa Rican Supreme Court decisions may be considered as "persuasive authority." DuPont's Costa Rican law expert, Mr. Baudrit, an Alternate Justice of the First Chamber of the Costa Rican Supreme Court, testified that Costa Rican judges may consider "the reiterated decisions by the Supreme Court cassation chambers." (R77-19806-13) (Baudrit C.V.); R120-30056-57) (Baudrit Dep.). Significantly, none of Plaintiffs' cases fit this description/requirement.

Moreover, Plaintiffs' brief fails to discuss the only Supreme Court "cassation" decision cited below. *See Decision No.459-F-2003*, Division One of

the Supreme Court of Justice, 10:30 hours, July 30, 2003. (R132-33528-29; R142-36008-09). There, the Costa Rican Supreme Court, on a motion for cassation, considered whether the applicable statute of limitations began to run at the time of the act which caused the damage or at the time the plaintiff subsequently learned of the act. *Decision No.459-F-2003*, pp. 2-4. Consistent with the policy interests underlying statute of limitations, the Supreme Court held that the prescription period began to run from the act and not "from the moment at which the affected party becomes aware of the generating act" (*id.* at 4):

> This Court has repeatedly set down the foundations of the statute of limitations. It has indicated among other factors the certainty of legal relationships, for said principle seeks to eliminate uncertainty.... To accept the Plaintiffs' thesis would cause uncertainty, since the commencement of the statute of limitations would be subject, not to an objective fact, as the Law provides, but to a subjective criterion, thus coming into conflict with the very foundation of the principle of law with which we are concerned here.

Id. at 5.

Fourth, even if Plaintiffs' Costa Rican cases are considered, the only decision dealing with the 10-year statute of limitations and term "demandable" under Articles 868 & 874 supports DuPont. (I.B. 27-28; R142-36006-08). *See Decision No.77*, First Court of Costa Rican Supreme Court, 15:30 hours, July 12, 1995. There, plaintiffs suffered damage when an earthquake destroyed their house. The Court held that the 10-year prescription period began when the earthquake hit ("when the damages occurred"), since "[p]rior to that occurrence, ... [plaintiffs] had

not experienced any damages to their interests." *Id.* at ¶V. The Court did not suggest that the prescription period would only start upon completion of any post-damage analysis of the home's construction materials to determine the actual cause.

Plaintiffs' other Costa Rican cases involve differently worded statutes of limitation which are not based on the term "demandable," different factual circumstances, and far shorter limitations periods.[28] Several of Plaintiffs' cases do not involve any limitations issues at all.[29] Further, none of Plaintiffs' cases expressly disavow a "known or should have known" standard. Plaintiffs cannot cite any case applying a 10-year statute of limitations where the statute did not begin to run at the time the claimant had been damaged. (R142-36003).[30]

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[28] *See Final Ruling 291-F-2005*, First Chamber of Costa Rican Supreme Court, 13:45 hours, May 12, 2005 (4-year period under G.L.P.A. Art.198; license suspension); *Final Ruling 29*, First Chamber of Higher Court of Justice, 14:30 hours, May 14, 1993 (3-year period under G.L.P.A. Art.198; medical malpractice); *Final Ruling 702-F-2007*, First Chamber of the Supreme Court, 10:20 a.m., Sept. 25, 2007 (same); *Final Ruling 606-F-2002*, First Chamber of Costa Rican Supreme Court, 4:10 p.m., Aug. 7, 1992 (same); *Final Ruling 376-F-2006*, First Chamber of Costa Rican Supreme Court, 14:20 hours, Nov. 9, 1990 (3-year period under G.L.P.A. Art.198; hospitalization after traffic accident).

[29] *See Final Ruling 34-F-91*, First Chamber of the Costa Rican Supreme Court, 14:25 hours, Mar.22, 1991; *Final Ruling 320*, First Chamber of the Costa Rican Supreme Court, 14:20 hours, Nov. 9, 1990; *Final Ruling 582-F-03*, Agricultural Court of the Second Judicial Circuit of San Jose, 2:15 p.m., Aug. 29, 2003.

[30] Plaintiffs' added suggestion that this Court should use an English dictionary to interpret the meaning of original Spanish text in the Civil Code and divine Costa Rican legislative intent is equally meritless. (I.B. 33).

Thus, the trial court was correct in rejecting Plaintiffs' expert's "knew of the damage and its cause" standard/instruction, which would lead to absurd results.[31] Under Plaintiffs' theory, even if a claimant has been suffering damages for 10, 25 or even 35 years, the statute of limitations would not begin to run until the claimant knows of the cause of damages. (R120-30014-51, p. 42). The trial court's application of a "known or should have known" standard to a lengthy 10-year period furthers the policies underlying Costa Rican prescription, and is consistent with American notions of equity and limitations law.

Finally, the trial court was correct in determining that the term "demandable" was not subject to a perfect "bright-line" test. (R149-37750). Because the court's flexible instruction adequately guided the jury, and because Plaintiffs were given full opportunity to argue their position, Plaintiffs' directed verdict arguments fail. *See H & H Elec.*, 967 So. 2d at 349 (instructions were not misleading particularly where court allowed parties to argue relevant issue to jury).

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[31] *See Mobile Marine Sales, Ltd. v. M/V Prodromos*, 776 F.2d 85, 91-92 (3d Cir. 1985) (affirming trial court's holding and rejecting plaintiffs' expert's opinion of Panamanian law); *Faggionato v. Lerner*, 500 F. Supp.2d 237, 244 (S.D.N.Y. 2007) ("a court may reject even uncontradicted expert testimony and reach its own decisions on the basis of independent examination of foreign legal authorities").

D. Ample Evidence Sustains the Jury Verdict for DuPont on the Statute of Limitations Issues

Plaintiffs' sufficiency of the evidence arguments fail on the merits as well. (I.B. 34-38). Plaintiffs are entitled to "a directed verdict only where no proper view of the evidence could sustain a verdict in favor of the nonmoving party" (DuPont). *See Banco Espirito Santo Int'l, Ltd. v. BDO Int'l, B.V.*, 979 So. 2d 1030, 1032 (Fla. 3d DCA 2008); Rule 1.480, Fla.R.Civ.P.

The trial court correctly ruled that Plaintiffs fell short of showing that there was no evidence to support a verdict for DuPont. (R149-37753-54). Indeed, Plaintiffs seem to concede this elsewhere in their brief.[32]

Florida courts have repeatedly found directed verdicts improper on statute of limitations issues. *See Carter*, 778 So. 2d at 937; *Leyte-Vidal v. Murray*, 523 So. 2d 1266, 1267 (Fla. 5th DCA 1988) (reversing directed verdict for plaintiff on statute of limitations where issue as to notice was for jury to decide); *Weiner v. Savage*, 407 So. 2d 288, 289 (Fla. 4th DCA 1981) (holding that the time plaintiff was on notice for statute of limitations was jury question precluding directed verdict). It would have been especially improper to grant a directed verdict in this case given the voluminous evidence supporting the jury's findings.

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[32] *See* I.B. 39-40 (asserting that "the jury's determination regarding what percentage of their leatherleaf fern the Seven Plaintiffs knew or should have known was exhibiting deformities or problems before 1991 was a factual determination that the court was not free to disregard").

Here, there was abundant evidence that each of the seven Plaintiffs knew of their fern damage and was on inquiry notice of its cause prior to March 21, 1991 or October 9, 1991.

Limitations period beginning March 21, 1991: L.L. Ornamentales, Helechos del Irazu, Super Helechos & Plantas Reales: These farms sought damages beginning in 1986, 1989, 1988 and 1990, respectively. (PX87). The planting of these farms took place from 1984 to 1987, with Benlate, along with other chemicals, being applied to the ferns during those farms' first few years. (T.1480-89; 1567-74; 1589-90; 1658; 1813-14; 1889-93; 1924; 1931-32; 2033-34; 2664-65).

All of these farms were aware of damages prior to March 1991. The first full production at L.L. Ornamentales occurred in approximately 1987, and almost immediately the farm was replanted because it could not meet productivity projections due to deformed leaves. (T.2665-68). Replantings occurred from 1987 through 1991. (T.2667). At Helechos del Irazu, leaves had been distorted since 1987. (T.1896). Super Helechos had "nice production" for two to three years after first planting (until approximately 1989), but then began to see deformities in the ferns and their production levels steadily decreased. (T.1595-1602). Plantas Reales' former agricultural manager, Mr. Berrocal, testified that all Costa Rican

fern farms, including Plantas Reales, were having serious problems with deformities dating back to 1987. (T.1813-14; 1832).

Based on the foregoing evidence, the jury could have easily concluded that these Plaintiffs should have been on notice prior to March 21, 1991 to investigate whether an agrichemical such as Benlate was a cause of the damage to their ferns.

In fact, L.L. Ornamentales began to investigate their problems after the third year of production. (T.1490-91). In 1989 or 1990, the fernery was visited by a representative from a Benlate distributor; the fernery management "spoke to him about the time that we had been applying [Benlate], which was one of our concerns...." (T.1492). Further, the owner of Helechos del Irazu testified that he consulted with another family in the fern business, the Marsells, and generally followed their advice regarding the use of Benlate. (T.1898-1900). He was aware that the Marsells had problems with Benlate in the past (1987). (T.1901; 1323-24). Super Helechos stopped using Benlate after the March 1991 recall because the farm's technical people were "scared." (T.1610-11). Finally, Mr. Berrocal of Plantas Reales testified that when he started in the fern business in 1987, he tried different tests to determine the cause of deformities. (T.1833; 1882). In his conversations with other growers, the only common denominator was Benlate. (T.1881-82).

Limitations period beginning October 9, 1991: Empresas Cavendish, Inversiones Bosquena & Euro Flores: These farms claimed damages beginning in 1989, 1988 and 1990, respectively. (PX87). The first plantings of these farms took place from 1986 to 1989, with Benlate being applied during those farms' first few years. (T.2771; 2776; 3002-04; 3031; 4713; 4721-23).

All of these farms were aware of damages prior to October 1991. Empresas Cavendish started producing in 1989, but never reached expected production levels. (T.4724-26; 4731-32). The farm's owner testified that his ferns were deformed and that many leaves were non-salable. (T.4743-45). The jury heard testimony and saw a feasibility study that showed anticipated production at Inversiones Bosquena for the years 1988-1993. (T.3000-01; PX65 at BOS 110833-34). Distortions in the leaves were visible when they began to grow, and when the farm began harvesting it could not meet the production levels called for by the feasibility study, even during the first few years of production (*i.e.*, 1988-1990). (T.3007). Deformities at Euro Flores were visible in 1991. (T.2795-96).

There was also sufficient evidence for the jury to have concluded that these farms should have been on notice to investigate whether an agrichemical such as Benlate was a cause of the damage to their ferns prior to October 9, 1991. The unexplained production losses alone should have put the farms on notice to investigate the chemicals they were putting on their ferns.

In addition, the owner of Empresas Cavendish, Mr. Manners, testified that in investigating the cause of his fernery's problems, Benlate was on his radar screen, particularly when he heard rumors that some lots of Benlate had been contaminated with atrazine. (T.4733-34). The atrazine contamination occurred in 1989 and March 1991. (T.4955-58; 4975-76). Additionally, Mr. Manners had been friends with Dr. Mills for over fifteen years. Dr. Mills visited Empresas Cavendish throughout the 1990s, and Mr. Manners used Dr. Mills' laboratory to analyze the cause of the deformities. (T.4763-66). Dr. Mills testified that in 1989 or 1990, he conducted tests and began to suspect that Benlate was the cause of the problems. (T.2241; 2251-52).

Inversiones Bosquena replanted to try to eliminate the deformities, using various replanting methods, even methods that were "unimaginable, or unthinkable, to try to maintain a certain productivity and to diminish the waste." (T.3004). Having found no other cause of the symptoms, this evidence was sufficient to put the farm on notice to investigate the "dozens" of chemicals it was using on its ferns, including Benlate, prior to October 9, 1991. (T.3030-31). The trial testimony also established that after 1990 or 1991, Euro Flores applied generic benomyl instead of Benlate, purportedly because benomyl was available at a lower cost. (T.2809). The jury was free to disbelieve the explanation for why Euro Flores stopped using Benlate at that time.

E. The Seven Plaintiffs' Damage Claims Were Barred in Their Entirety Based on the Jury's Findings

The trial court correctly barred the seven Plaintiffs' entire claims based on the jury's interrogatory verdict determination that their "claim bec[a]me demandable prior to" the relevant limitation dates (March 21 & October 9, 1991). (R149-37952-53). Question 4a on the verdict form, which asked what percentage of the claim became demandable prior to the relevant limitation date, was given to preserve the issue for the court's further consideration. Plaintiffs expressly agreed that the jury's answer to question 4a would not preclude the trial court from subsequently deciding whether Plaintiffs' entire claim would be barred by any given percentage finding:

> MS. RUSSO: ... [T]he Court would be able to determine whether that finding by the jury means that the plaintiff has no claim or only part of their claim ....
>
> * * *
>
> THE COURT: ... I agree. That way the Court can make whatever corrections are necessary and we will not have done anything that is irrevocable. ...

(T.7348-49; *see also* R149-37952 n.3).

Contrary to Plaintiffs' argument on appeal, the trial court did not set aside or nullify the jury verdict in any way. (I.B. 39-46). Rather, the trial court entered judgment for DuPont precisely because of the jury findings. (R138-35072-74). As the court correctly concluded: "...[B]ecause the jury made the determination that seven of the Plaintiffs knew, or should have known, that their ferns were exhibiting

deformities or problems prior to ten years before filing their lawsuits, those seven Plaintiffs' claims are barred in their entirety." (R149-37952-53).

Plaintiffs ignore the well-settled rule that "the statute of limitation begins to run against the injured party from the time the injury was first inflicted, not from the time the full extent of such injuries has been ascertained." *Kolnick v. Fountainview Assoc., Inc.*, 737 So. 2d 1192, 1193 (Fla. 3d DCA 1999) (e.s.). Each Plaintiff asserted a single negligence cause of action seeking a single amount of past lost profits. The jury's determination that the remaining portion of the seven Plaintiffs' damage actions became demandable after the limitation dates does not save their claims. *See Tobin v. Damian*, 772 So. 2d 13, 16 (Fla. 4th DCA 2000) ("The fact that appellant may not have known the full extent of the injury did not toll the period of limitations."); *Carter v. Cross*, 373 So. 2d 81, 82-83 (Fla. 3d DCA 1979). Plaintiffs neither filed nor had the right to file separate damage actions for each of the "countless individual leatherleaf fern plants." (I.B. 42).

Plaintiffs' contention that the jury's percentage findings were "the same as finding the amount of damages to be awarded to a plaintiff" is equally baseless. (I.B. 44). Plaintiffs are confusing two distinct concepts: the occurrence of a single demandable claim and the extent of damages. Because each Plaintiff asserted but one negligence claim seeking but one amount of past lost profits, the jury's determination that the statute of limitations began to run on some portion of the

seven Plaintiffs' damage claim bars the entire claim. *See Tobin*, 772 So. 2d at 16; *Kolnick*, 737 So. 2d at 1193; *Carter*, 373 So. 2d at 82-83.

II. THE JURY'S FINDINGS ON COMPARATIVE NEGLIGENCE WERE FULLY SUPPORTED BY THE EVIDENCE

The trial court correctly rejected Plaintiffs' motion for directed verdict on comparative negligence: "DuPont's evidence provided the jury with a sufficient basis to find Plaintiffs comparatively negligent"; "ample evidence was presented regarding multiple sources of comparative fault." (R149-37732-34).

A. Plaintiffs Waived this Issue

Plaintiffs failed to move for a directed verdict at the conclusion of DuPont's defense case. (T.6738-40). Plaintiffs' motion for a directed verdict after their rebuttal case was too late. They had already waived their right to seek a directed verdict on DuPont's affirmative defenses. *See Baker*, 176 So. 2d at 110.

B. Affirmance is Required if There is *Any* Evidence Supporting the Jury's Finding

A jury's finding of comparative negligence must be affirmed if there is ***any*** evidence in the record to support it. *See Terry Plumbing & Home Servs., Inc. v. Berry*, 900 So. 2d 581, 584 (Fla. 3d DCA 2004); *see also Martinez v. Poly-Ply Corp.*, 883 So. 2d 327, 329-30 (Fla. 3d DCA 2004); *Howell v. Winkle*, 866 So. 2d 192, 195 (Fla. 1st DCA 2004).

DuPont was entitled to prove its comparative negligence defense using

Plaintiffs' own witnesses and evidence. (R149-37735). *See Langmead v. Admiral Cruises, Inc.*, 610 So. 2d 565, 566-67 (Fla. 3d DCA 1992) ("Where an inference of comparative fault is possible from a plaintiff's own evidence, a defendant need not present further evidence of comparative fault in order to survive a motion for directed verdict.").[33]

C. DuPont Argued and Proved Comparative Negligence

Plaintiffs claim they are entitled to a directed verdict because DuPont did not argue comparative negligence to the jury and because the jury's finding that Benlate caused their damages supposedly precludes a finding that anything else caused them harm. Plaintiffs are wrong.

First, DuPont did argue comparative negligence. In opening and closing, defense counsel argued that Plaintiffs engaged in negligent acts including poor farm management practices, poor disease and pest control, negligent farm maintenance, and unreasonably failing to investigate causes of plant disease and production problems. (T.803-11; 818-19; 7534-36; 7557-69). That DuPont put comparative negligence squarely before the jury is shown by Plaintiffs' counsel's own statement in closing: "DuPont says that the growers are negligent. They say

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[33] Plaintiffs provide no support for their suggestion that DuPont was required to present expert testimony or a quantification of Plaintiffs' negligence in a set dollar amount or as a percentage of damages. (I.B. p. 49).

it's the growers' fault." (T.7490).

Second, at Plaintiffs' request, the trial court gave "concurring" and "intervening" cause jury instructions that Benlate need not be the sole cause of decreased fern production to find DuPont liable. (T.7154; 7642). Even if it believed DuPont's negligence was one cause of Plaintiffs' damages, the jury was permitted to find that Plaintiffs' own negligence was a contributing legal cause of the damage. *See Perzinski v. Chevron Chem. Co.*, 503 F.2d 654, 660 (7th Cir. 1974) (in farmer's suit alleging yield reduction caused by defendant's herbicide, jury fairly found comparative negligence: "there may be more than one cause of a decreased crop yield").

Third, there was competent substantial evidence to support the jury's comparative negligence findings, including poor farm management, failure to mitigate damages, and knowing use of diseased rhizomes.

1. Negligent Farm Management

Plaintiffs' mismanagement of their farms provided grounds for a finding of comparative negligence. *See Sidran v. E.I. DuPont de Nemours & Co., Inc.*, 925 So. 2d 1040, 1044 (Fla. 3d DCA 2003) (DuPont was entitled to defend Benlate product-defect action by introducing evidence that plaintiffs' plant damage was caused by "[plaintiffs'] misuse of another fungicide"), *citing Carnival Cruise Lines, Inc. v. Levalley*, 786 So. 2d 18, 19 (Fla. 3d DCA 2001).

The trial was replete with evidence that Plaintiffs failed to properly manage farm problems, and that these problems contributed significantly to Plaintiffs' losses. For instance, numerous Plaintiff ferneries failed to appropriately treat pests and diseases that were affecting production and frond quality, such as anthracnose, a common fungus. (DX1, 10, 15, 17; T.1214-22; 2048-50; 2057-66). Defense expert Dr. Simone observed anthracnose in all 24 ferneries that he visited, and testified that Plaintiffs were not controlling it properly. (T.5997; 6002-08, 6030).

Some Plaintiffs (*e.g.*, Tico Verde, Expohelechos, Rio de Janeiro & Seminole) lost production to worms, mites, and leaf spot, problems which could have been controlled by proper training of farm workers. (DX1; T.2048-50; 2058-62). Some of Plaintiffs' ferneries (Seminole, Jardin Botanico & Plantas Reales) were quarantined by the Costa Rican government due to their failure to control insects. (DX18, 39, 43; T.1726; 1973-80; 2064-65). These quarantines affected production. (T.1973-80).

At Helechos de Cuero, Plaintiffs' expert Dr. Martinez observed disease symptoms associated with sanitary problems. (T.6424). Dr. Banks, a weed scientist, visited the Plaintiff farms and testified that poor weed management on some farms was likely hurting production. (T.5766; 5943-45).

Mr. Sterloff, who represented Agro Follajes, Flores y Follajes, Helechos del Monte, and Helechos de Centro America, admitted that the farm manager for his

farms from 1995 to 2003, Mr. Hidalgo, who now owns and manages Plaintiff Jardin Botanico, was incompetent. (T.1959-61; 4303-04). The owner of Tico Helechos de Poas, Mr. Mata, admitted that from 1995 to 2000, the prior owner of his farm had failed to properly care for the farm. (T.2814).

Management reports of L.L. Ornamentales spanning nearly a decade showed that its decreased production was caused in part by the farm's aging infrastructure, poor irrigation and drainage systems, diseases and plagues, and problems with the saran covering. (DX4, 10; T.1509-11; 1522-23; 1541). These internal farm reports showed that L.L. Ornamentales could have improved fern production simply by planting new ferns and taking other steps to mitigate the effects of the farm's age. Poor drainage in the area Plaintiff chose to plant was also noted by a scientist as a cause of the problems in a report to Inversiones Bosquena. (T.3066-67).

At Super Helechos and Plantas Reales, agricultural managers reported to senior management in 1993 that the farms were failing to take appropriate precautions to combat repeat flooding, overharvesting, an anthracnose attack, and excessive moisture. (T.1688-89; DX15). The managers recommended measures such as drainage cleaning and control of overharvesting. (T.1689). The evidence showed that by 1994, these problems were not resolved. (DX16; T.1693-94). Reports from 2000 and 2001 showed that problems still continued due to lack of mulch, poor soil and drainage, age, disease, inadequate maintenance, and poor

farm management. (DX17, 18; T.1700-09; 1721-29).

2. Negligent Failure to Mitigate Damages

"[T]he doctrine of comparative negligence subsumes the concept of mitigation of damages." *Jacobs v. Westgate*, 766 So. 2d 1175, 1180 (Fla. 3d DCA 2000), *citing Ridley v. Safety Kleen Corp.*, 693 So. 2d 934 (Fla. 1996). *See also Perzinski*, 503 F.2d at 660 (affirming jury verdict finding as comparative negligence plaintiff's "failure to cultivate after damage became obvious"). Plaintiffs conceded that they had a duty to mitigate their damages (R134-33915-16), and the jury was instructed accordingly. (T.7646-47).

The evidence supported the jury charge. Plaintiffs filed suit in 2001 and 2002 blaming Benlate for production losses, yet for nearly six years failed to take the very steps they claimed were necessary to mitigate the fern damage and loss of production. (*E.g.* T.3013-14; 3021-22). Their own experts testified that steps such as solarization and tissue culture would have reduced deformities. (T.3326-34).

In addition, although Plaintiffs alleged that Benlate causes harm, many of them (Agrofollajes, Empresas Cavendish, Helechos del Irazu, Desarrollos Mudiales, Helechos de Centro America, Helechos del Monte, Super Helechos, Follajes de Sarchi, Flores y Follajes, Plantas Reales & Rica Fern) continued using Benlate and benomyl products after hearing about its alleged effects and even for months or years after they filed the instant lawsuit. (T.1563; 1662-63; 1864-70;

1904-05, 1924, 1929-32; 4258; 4312-13; 4740-42; DX67). The jury could have concluded that Plaintiffs who continued to use the very product they alleged to be defective were comparatively negligent. *See Gonzalez v. G.A. Braun, Inc.*, 608 So. 2d 125, 126 (Fla. 3d DCA 1992).

The jury could have also found Plaintiffs comparatively negligent for not conducting a full and timely investigation into the cause of, and potential solutions for, their claimed fern problems. Sixteen of the 27 Plaintiffs did finally *begin* such an investigation in 2004, *decades after* many of them allegedly started experiencing their problems. (T.2829-35; 2855-57). The jury likely faulted the remaining nine Plaintiffs for not being involved in that investigation at all and faulted the 16 Plaintiffs who started investigating in 2004 for not starting sooner.

The University of Costa Rica study eventually funded by those sixteen Plaintiffs investigated causes for their crop disease. (DX23, 24, 52; 2692-93; 2749-50). The researchers presented a report to these Plaintiffs in June 2005 identifying possible causes of the ferneries' damages (T.1846; 1854; DX25), many of which were within Plaintiffs' ability to control, such as: excessive moisture, soil type, herbicidal residue, shade, insects, fungi, bacteria, virus, spore management, and the natural aging of crops. (DX25 at HDC 288689-731E).

Instead of completing the study, however, Plaintiffs halted funding of it despite warnings of the researchers. (T.2874-77; 3086-90; 3096-97; DX60, 31 at

BOS 113775-76E). Plaintiff L.L. Ornamentals recognized that the research being conducted by the University of Costa Rican conflicted with the lawsuit against DuPont. (DX49, 662A, 60, 62; T.2753-56; 2794; 3089-90). Plaintiff Helechos de Cuero went so far as to keep the virus findings secret through confidentiality agreements. (T.6175-76; DX117, 138). The jury was thus entitled to infer that even those Plaintiffs who actually tried to investigate the causes of their problems were still comparatively negligent because they started late and then unreasonably stopped searching for every cause, including concurring and intervening causes of their plant problems, even though further research may have given them critical guidance in preventing at least some of their damages.

3. Negligent Use of Diseased Rhizomes

All Plaintiffs used vegetative propagation (growing new plants out of old ones) to plant, replant, and expand their ferneries. (T.3245; 3407). This method can spread disease and resulting deformities through the transmission of bacteria or virus. (T.2872; 3245-46; 6209-13; DX25 at HDC 288717E). Plaintiffs used this method *even though they knew or should have known* that the source plants had alleged diseases, deformities and production problems. (*E.g.*, T.2872; 3073-74; DX25).

There was abundant evidence that Plaintiffs' ferns were infected with viruses, and that the viruses caused the kinds of deformities claimed in this case.

(DX116 at HDC 261472-78E, 118, 120, 122 at HDC 276589-90, 123, 134, 136-37, 140-41, 143-144; T.6036-37). In addition to testimony from DuPont's experts that viruses were causing the claimed fern problems, the jury also heard that experts in Costa Rica and Europe retained by some Plaintiffs also believed that viruses were the cause. (T.2829-35; 2855-57; 3086-87; 5738-39; 6389; DX31, 52, 116, 121, 140, 152, 164-65, 169). The jury could have reasonably concluded that Plaintiffs themselves were responsible for not treating and, in fact, spreading the infections, whether bacterial or viral, that contributed to their claimed fern deformities.

There was also evidence that Plaintiffs negligently purchased rhizomes from other ferneries that were suffering from Mal de Sterloff. (T.1477; 1483; 2785-86; 2915). In addition, when Plaintiffs started their farms, many of them knowingly purchased their rhizomes from the very farms that had filed earlier lawsuits against DuPont alleging fern damage. (T.1324-25; 1349; 2462-63). One Plaintiff (Super Helechos) purchased all of its starter rhizomes from a farm that it knew was "having a lot of problems." (T.1596-98). Plaintiffs continued to use rhizomes from plants with known deformities and low production to plant other ferneries or for replanting (T.1832-33; 2667-68; 2743-44; 2780-83; 2805; 2923-24; 1548; 4262-63) when the evidence showed the proper method was to discard the leaves and burn the rhizomes (T.2103; 2898). Given the open and obvious nature of the problems at many of the supplier farms, the jury could have determined that

Plaintiffs were comparatively negligent in choosing to start their farms from ferneries that were already experiencing disease of one sort or another. *See Fipps v. Glenn Miller Constr. Co., Inc.*, 662 So. 2d 594, 596 (Miss. 1995).

The trial court correctly found "ample evidence" of comparative negligence. Plaintiffs are not entitled to a directed verdict on that issue.

III. PLAINTIFFS ARE NOT ENTITLED TO ADDITUR

Plaintiffs request an additur of an additional $**83,011,237** for alleged lost future profits and soil remediation on top of the jury's verdict of $113,486,696 in past lost profits. (R141-35877-78 & Exh. A). Plaintiffs' argument is groundless both procedurally and substantively.

"Appellate decisions reversing the denial of a motion for additur are rare and generally limited to situations where the amount of damages awarded is 'so inadequate as to shock the judicial conscience of the court'." *Basel v. McFarland & Sons, Inc.*, 815 So. 2d 687, 697 (Fla. 5th DCA 2002). "[W]here the evidence is conflicting and the jury could have reached its verdict in a manner consistent with the evidence, it is error for the trial court to veto the jury verdict by granting a motion for additur." *Ortlieb v. Butts*, 849 So. 2d 1165, 1167 (Fla. 4th DCA 2003).

A. Plaintiffs Waived the Additur Argument

Plaintiffs' additur issue is a disguised "inconsistent verdict" argument. Plaintiffs argue that the jury's finding that DuPont's negligence was a legal cause of

Plaintiffs' past lost profits is irreconcilable with the jury's finding that Plaintiffs did not incur future damages. Where a party complains about a jury's decision to award nothing for a particular item of damages, the courts have characterized such argument as premised on an inconsistent, and not inadequate, verdict. *See Kmart Corp. v. Bracho*, 776 So. 2d 342, 343 (Fla. 3d DCA 2001) (reversing order granting new trial based on inadequacy of verdict because "the defendant did not preserve an objection to the claimed error by requesting a re-submission to the jury to correct the alleged mistake"); s*ee also Sweet Paper Sales Corp. v. Feldman*, 603 So. 2d 109 (Fla. 3d DCA 1992) (plaintiff not entitled to relief from verdict awarding past damages, but $0 for future damages, where plaintiff failed to object to verdict when it was returned).

"To preserve the issue of an inconsistent verdict, the party claiming inconsistency must raise the issue before the jury is discharged." *Fla. Dep't of Transp. v. Stewart*, 844 So. 2d 773, 774 (Fla. 4th DCA 2003). This procedure allows the jury to "correct" the inconsistency. *Id.* A party who fails to timely object to an inconsistent verdict "may not circumvent [this rule] by later arguing the verdict is inadequate or contrary to the manifest weight of the evidence." *Id. See also Delva v. Value Rent-A-Car*, 693 So. 2d 574, 577 (Fla. 3d DCA 1997).

Here, as in *Kmart*, Plaintiffs failed to preserve its disguised "inconsistent verdict" argument by objecting to the verdict before the jury was discharged. (T.7759-76).

B. Plaintiffs Have No Legal Entitlement to Future Damages

Plaintiffs also are not entitled to an additur on the merits. Plaintiffs ask this Court to award them future remediation damages and lost future profits – damages that are inherently speculative. *See Allstate Ins. Co. v. Manasse*, 707 So. 2d 1110, 1111 (Fla. 1998).

Because of the speculative nature of future damages, juries are afforded considerable discretion in assessing and rejecting such damages. *See Dyes v. Spick*, 606 So. 2d 700, 704 (Fla. 1st DCA 1992) (jury had "great latitude" in its ability to reject Plaintiffs' claims for future damages); *see also H.B.'s Enters., Inc. v. State Road Dep't*, 214 So. 2d 513 (Fla. 1st DCA 1968) (jury was entitled to reject "the somewhat speculative and vague testimony of appellant's witnesses as to their opinion on the business damage to appellant's remaining land"). In *Manasse*, *supra*, the Supreme Court agreed that, given the speculative nature of future damages, ***juries are not required to award such damages even where they have awarded past damages***. 707 So. 2d at 1111.[34]

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[34] *See also Basel*, 815 So. 2d at 698 (rejecting plaintiff's claim for entitlement to additur on future economic damages); *Frei v. Alger*, 655 So. 2d 1215, 1216 (Fla. 4th DCA 1995).

Here, the jury was unquestionably entitled to reject Plaintiffs' claims for future damages.[35] As the trial court determined, "[a]mple evidence was presented both supporting and disproving future damages and remediation costs." (R146-36852).

Plaintiffs' argument that their evidence of future damages was "undisputed" is incorrect. As discussed below, there was substantial evidence at trial contradicting Plaintiffs' claims for remediation and lost future profits. Plaintiffs also ignore the long-standing law of Florida that the trier of fact is not bound by unrebutted expert opinion testimony. *See Thompson v. Dep't of Children & Families*, 835 So. 2d 357, 360 (Fla. 5th DCA 2003).[36]

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[35] The cases cited and discussed on pages 54 and 55 of Plaintiffs' brief, *see, e.g., Vega v. Travelers Indemn. Co.*, 520 So. 2d 73 (Fla. 3d DCA 1988), involve facts that are fundamentally dissimilar to this case. Those cases address inadequate awards (primarily for ***past*** damages) where the damages were uncontroverted by the evidence. Not one of those cases involved a claim of insufficiency of an award for ***future*** damages where the sole evidence supporting such damages was the impeached and controverted opinion of an expert.

[36] *See also Basel*, 815 So. 2d at 697 (in rejecting argument that jury was required to accept experts' testimony on damages, recognizing "principle that a jury is not required to accept even uncontroverted opinion evidence from an expert"); *Republic Servs. of Fla., L.P. v. Poucher*, 851 So. 2d 866, 871 (Fla. 1st DCA 2003) ("A jury is free to reject even uncontradicted expert witness testimony.").

1. Evidence that Remediation Was Not Necessary or Would Not be Performed

There was considerable evidence that Plaintiffs' proposed remediation would be unnecessary or ineffective. For example, there was evidence of the following: Benlate's alleged effects are not long-term, in which case remediation would be unnecessary (T.2370-71; 2348-50; 2431-32; 3520-24; 5182-94; 5673-76; 5688-93; 5811-13; 5822-23); soil replacement would be ineffective (T.1539-40; 1776-79; 2686-90; 5417-22; 5673-76; 5688-93; 5865-68; 6222-23); Plaintiffs did not need to replace their plants and rhizomes (T.5481-82; 5866-68; 6222-23); and Plaintiffs' ferns were infected with viruses, making remediation futile. (T.6039-40; 6063-78; 6092-98; 6222-23).

The jury also could have chosen to reject Dr. Kloepper's remediation testimony, (*see* T.3371-72; 3395-402; 3406-09; 3418-19; 3426-30; 3437-43; 3447-48; 3453-58; 3463-66; 3470-76; 3488-93; 3517-18), or determined that remediation would not be performed. Despite the filing of their lawsuits in 2001 and 2002, by the time of trial none of the Plaintiffs had begun a remediation program on ***any portion*** of their ferneries.

2. Evidence that Need to Remediate Was Not Due to Benlate Use

The jury was also permitted to find that if remediation was appropriate for Plaintiffs' ferneries, it was not because of Benlate. *See Republic Servs. of Fla.*, 851

So. 2d at 872-73. Plaintiffs' experts agreed that the continuous use of the same soil, without rotation, can lead to harmful organisms in the soil or a loss in production. (T.2332-34; 3493).

3. Closed Ferneries Were Not Entitled to Remediation

A number of Plaintiffs had either closed their farms or claimed that they were in danger of closing their ferneries. (R142-36041 & Exh. A). Any fernery that had closed or which the jury believed would close in the near future was not entitled to future lost profits or remediation damages. *See Sostchin v. Doll Enters., Inc.*, 847 So. 2d 1123, 1128 (Fla. 3d DCA 2003) (explaining that a defunct business is not entitled to lost profits damages). Thus, an additur is legally barred.

IV. THE TRIAL COURT PROPERLY DENIED PLAINTIFFS' MOTION FOR AWARD OF PREJUDGMENT INTEREST OR INDEXATION

A. Prejudgment Interest

1. Costa Rican Law Controls

Despite the fact that Plaintiffs agreed that Costa Rican law governed their negligence claims including the element of damages, and that Costa Rican law does not recognize prejudgment interest, Plaintiffs contended they were entitled to an additional $41,004,645 in *Florida* prejudgment interest based on the jury's $57,868,253 lost profit findings. (R141-35822-48). Plaintiffs asserted that Florida law applied because prejudgment interest is a procedural issue for choice-of-law

purposes. (R141-35822-30). The court disagreed and determined that Costa Rican law applied because prejudgment interest is a substantive right. (R149-37737-46).

The trial court's ruling was correct. Prejudgment interest is an element of damages and thus substantive. *See Argonaut Ins. Co. v. May Plumbing Co.*, 474 So. 2d 212, 214 (Fla. 1985) ("Florida has adopted the position that prejudgment interest is merely another element of pecuniary damages"). Thus, Costa Rican law controls. *Herndon v. Gov't Employees Ins. Co.*, 530 So. 2d 516, 517-19 (Fla. 5th DCA 1988) (foreign law governing plaintiff's cause of action, and not Florida law, governed whether prejudgment interest was recoverable).[37]

Plaintiffs' attempt to characterize Florida prejudgment law as "predominantly procedural" is baseless. (I.B. 55-64). In determining that the issue of "standing" was substantive and not procedural so as to require the application of foreign law, the court in *Siegel v. Novak*, 920 So. 2d 89 (Fla. 4th DCA 2006), explained that "[s]ubstantive law generally relates to the rights and duties of a cause of action, while procedural law involves the 'machinery for carrying on the suit.'" *Id.* at 93. *See also Alamo Rent-A-Car, Inc. v. Mancusi*, 632 So. 2d 1352, 1358 (Fla. 1994) (right to punitive damages is substantive and not procedural).

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[37] *See also Hawkins Sandblasting, Inc. v. Jacksonville Shipyards, Inc.*, 668 So. 2d 1042, 1044-48 (Fla. 1st DCA 1996) (federal prejudgment interest law, and not Florida law, applied to damage claim governed by substantive maritime law).

Florida state and federal courts have repeatedly ruled that the substantive law governing the plaintiff's action governs prejudgment interest. In *Herndon*, for example, the Fifth District rejected application of Florida prejudgment interest law where foreign (North Carolina) law governed the action. 530 So. 2d at 517-19. Similarly, in *Hawkins Sandblasting*, the First District found that federal and not Florida prejudgment interest law applied to plaintiff's maritime action. 668 So. 2d at 1048. The U.S. Eleventh Circuit has likewise held that Florida prejudgment interest law controls where Florida's substantive law applies to the underlying cause of action. *See, e.g., KMS Restaurant Corp. v. Wendy's Int'l, Inc.*, 194 Fed. Appx. 591, 593-94 n.2 (11th Cir. 2006); *Am. Dredging Co. v. Lambert*, 153 F.3d 1292, 1297 (11th Cir. 1998).

Florida is thus in line with the majority of jurisdictions, which have squarely held that where prejudgment interest is deemed an element of damages, it is substantive and not procedural for choice-of-law purposes. *See AE, Inc. v. Goodyear Tire & Rubber Co.*, 168 P.3d 507, 511-12 (Colo. 2007) ("[W]e agree with the majority of jurisdictions that the choice of law governing the cause of action in a tort case also governs the determination of prejudgment interest."); *Cooper v. Ross & Roberts, Inc.*, 505 A.2d 1305, 1307 (Del. Super. 1986) ("[T]he majority view...is that prejudgment interest... is substantive, and the state whose laws govern the substantive legal questions also govern the question of

prejudgment interest."); *In re the Exxon Valdez*, 484 F.3d 1098, 1101 (9th Cir. 2007); *Johnson v. Cont'l Airlines Corp.*, 964 F.2d 1059, 1064 (10th Cir. 1992); *Tenn. Carolina Transp., Inc. v. Strick Corp.*, 196 S.E.2d 711, 722 (N.C. 1973).

Plaintiffs' reliance on out-of-state case law adopting the "minority" view is misplaced. In the few jurisdictions holding that prejudgment interest is procedural for choice-of-law purposes, the courts have expressly found that prejudgment interest (1) is not an element of damages; (2) was adopted as a procedural rule, and not substantive common law, pursuant to the court's rule-making power; and/or (3) was specifically promulgated by the state's legislature as a procedural mechanism for the purpose of promoting settlement. *See, e.g., Maddox v. Am. Airlines, Inc.*, 298 F.3d 694, 698 (8th Cir. 2002).[38]

But in Florida, the opposite is true: none of the methodology or "ministerial duties" involved in awarding prejudgment interest arise until substantive law determines whether there is a "right" to such interest. (R149-37739-42). Moreover,

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[38] *See also Rhode Island Charities Trust v. Engelhard Corp.*, 267 F.3d 3, 8 (1st Cir. 2001) (Rhode Island legislature's purpose in enacting statutory interest provisions was to accelerate the settlement of cases sounding in tort); *Yohannon v. Keene Corp.*, 924 F.2d 1255, 1264-68 (3d Cir. 1991) (Pennsylvania rule governing prejudgment interest was adopted by Pennsylvania Supreme Court under its power to make rules of procedure and was thus procedural for choice of law purposes); *Zaretsky v. Molecular Biosystems, Inc.*, 464 N.W.2d 546, 548-51 (Minn. 1990) (Minnesota prejudgment interest statute incorporating offer-counteroffer provisions was intended by Minnesota legislature to encourage settlements and thus was procedural for choice-of-law purposes).

because Florida expressly rejects the delay-in-payment "penalty" theory, Florida is not the situs of any "second wrong." (I.B. 60). The Florida Supreme Court would have to overrule more than 115 years of settled common law before any court could consider Florida prejudgment interest "predominantly procedural."[39]

As the trial court recognized: "This Court determined that Costa Rican tort law applied, and Plaintiffs agreed." (R149-37742). Plaintiffs admit that there is no basis for prejudgment interest in Costa Rican law. (R141-35836). Their back-door attempt to obtain prejudgment interest by application of Florida law is meritless and must be rejected.

2. Plaintiffs Are Not Entitled to Prejudgment Interest Even if Florida law Applied

Even if Florida law had applied, Plaintiffs' request for prejudgment interest should be rejected. (R142-36054-59). First, Plaintiffs' unliquidated lost-profit claims did not constitute out-of-pocket pecuniary losses. Second, damages were

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[39] The Florida decisions cited by Plaintiffs are inapposite. *See BDO Seidman, LLP v. British Car Auctions, Inc.*, 802 So. 2d 366, 368 (Fla. 4th DCA 2001) (holding that Florida offer of judgment statute on its face applied to pending actions, thus rendering a substantive-versus-procedural conflict of laws analysis unnecessary); *Collins Moving & Storage Corp. of S. Carolina v. Kirkell*, 867 So. 2d 1179, 1181-82 (Fla. 4th DCA 2004) (holding that federal statutes at issue (Carmack Amendment & 28 U.S.C. §1961) acknowledged a state's right to control the issues of both pre- and post- judgment interest awards); *A.R.A. Servs., Inc. v. Pan Am. World Airways, Inc.*, 474 So. 2d 396, 396 n.1 (Fla. 3d DCA 1985) (in affirming trial court's prejudgment interest award, this Court merely commented in footnote that, in other states, the rationale underlying "court rules or statutes mandating the award of prejudgment interest is to encourage settlements").

never fixed as of any specific prior date. And third, Plaintiffs' expert's prejudgment interest calculations were otherwise fatally defective. This Court can affirm the denial of prejudgment interest on this basis as well. *See Arthur v. Milstein*, 949 So. 2d 1163, 1166 (Fla. 4th DCA 2007) (under "tipsy coachman" doctrine, appellate court can affirm trial court that "reaches the right result, but for the 'wrong reasons' so long as 'there is any basis which would support the judgment in the record.'").[40]

Pursuant to Florida's "loss theory," "when a verdict liquidates damages on a plaintiff's out-of-pocket, pecuniary losses, plaintiff is entitled, as a matter of law, to prejudgment interest at the statutory rate from the date of that loss." *Argonaut*, 474 So. 2d at 215. "There are two prerequisites to the award of prejudgment interest...: (1) Out-of-pocket pecuniary loss, and (2) a fixed date of loss." *Underhill Fancy Veal, Inc. v. Padot*, 677 So. 2d 1378, 1380 (Fla. 1st DCA 1996). "Prejudgment interest is generally not awarded in tort cases, because damages are generally too speculative to liquidate before final judgment." *Id.*

Here, Plaintiffs failed to establish either prerequisite. Plaintiffs did not seek any out-of-pocket "replacement cost" of the physically damaged ferns/rhizomes or

[40] The trial court never reached these issues, of course, based on its ruling that Florida law was not applicable.

any "before/after" difference in their value.[41] Plaintiffs only sought consequential lost profits from the ferns' decreased frond production. Florida courts have repeatedly held that a damage award based on such unliquidated lost-profit claims is not subject to prejudgment interest. *See Miami-Dade County Sch. Bd. v. J. Ruiz Sch. Bus Serv., Inc.*, 874 So. 2d 59, 65 (Fla. 3d DCA 2004); *Jones v. Sterile Prods. Corp.*, 572 So. 2d 519, 520 (Fla. 5th DCA 1990). "[D]amages are not liquidated" where, as here, "the ascertainment of their exact sum requires the taking of testimony to ascertain the facts upon which to base a value judgment." *Bowman v. Kingsland Dev., Inc.*, 432 So. 2d 660, 663 (Fla. 5th DCA 1983), *Accord Perdue Farms Inc. v. Hook*, 777 So. 2d 1047, 1054 (Fla. 2d DCA 2001).

Similarly, prejudgment interest cannot be awarded where, as here, it is impossible to determine any fixed date of loss. While Plaintiffs claimed their ferneries sustained lost profits over a 20-year period, the jury *rejected* their argument in part and only awarded a portion of the claimed past damages. Based on the undifferentiated verdict and record, neither the trial judge nor clerk of court can engage in any "purely ministerial duty" of making a simple "mathematical computation." *See Argonaut*, 474 So. 2d at 215.

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[41] *See Palmas y Bambu, S.A. v. E.I. DuPont de Nemours & Co.*, 881 So. 2d 565, 583 n.15 (Fla. 3d DCA 2004); *Ocean Elec. Co. v. Hughes Labs., Inc.*, 636 So. 2d 112, 114-16 (Fla. 3d DCA 1994).

For the same reason, Plaintiffs' calculation of prejudgment interest on an annual basis was fatally flawed. Plaintiffs offered the after-the-fact guess of a non-testifying litigation-consultant, Mr. Wilson. (R141-35969-71). Wilson speculated that the jury awarded a fixed portion of Plaintiffs' requested damages for each and every year during the claimed 20-year damage period (1986-2005). (*Id.*). The jury made no such apportionment, however, and Wilson's theory is pure conjecture.

The cases cited by Plaintiffs below are distinguishable and failed to support Wilson's analysis. Unlike the present situation, those cases involved: (a) physical damage to property on a date certain prior to trial; (b) actions where the plaintiff sought the before/after or replacement value of property damaged on a date certain prior to trial; and/or (c) actions on a contract where damages were ascertainable on a date certain prior to trial.[42]

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[42] In *Charles Buzbee & Sons, Inc. v. Falkner*, 585 So. 2d 1190 (Fla. 2d DCA 1991), for example, plaintiff's damages became liquidated for prejudgment interest purposes when plaintiff, a tomato farmer who lost part of his crop due to defendant's negligence, was provided an end-of-season accounting report and distributed net proceeds from the sale of the tomatoes. At that point, plaintiff "realized in dollars the degree of loss he sustained." *Id.* at 1191. In *Sostchin v. Doll Enters., Inc.*, 847 So. 2d 1123 (Fla. 3d DCA 2003), this Court reversed a speculative lost profit award and remanded for a new trial. *Id.* at 1124-29 & n.1. The Court then merely stated in a footnote that "if lost profits prior to the date of judgment are appropriately proven, prejudgment interest on such amounts is recoverable." *Id.* at 1127 n.7. In *Ulano v. Anderson*, 703 So. 2d 1149 (Fla. 3d DCA 1997), this Court held that, pursuant to the parties' contract, plaintiff was entitled to 40% of distributed profits during the contractual period. Based on these facts, plaintiff was entitled to prejudgment interest "from the date of the commencement of the [contract] action." *Id.* at 1150. In *A.R.A. Servs.*, where

B. Indexation

The court likewise properly rejected Plaintiffs' alternative post-trial request for an $18,983,102 "indexation" award under Costa Rican law. (R149-37743-45; R141-35839). Plaintiffs' assertion that Florida prejudgment interest and Costa Rican indexation "protect the same interests" is erroneous. (SR 549; I.B. 66). Indexation and Florida prejudgment interest are fundamentally different.

According to Plaintiffs' own Costa Rican law expert, Mr. Batalla, indexation "aims to compensate the loss of value of money due to inflation" in Costa Rica. (SR 549) (e.s.). Plaintiffs' litigation consultant, Mr. Wilson, calculated the requested indexation amount based solely on changes in the Costa Rican Consumer Price Index. (R141-35822-48, Exh. B). A Costa Rican judge can allegedly use indexation to adjust a damage award in colones upwards to account for the lost value of colones in the Costa Rican economy. *See* Resolution No. 106, First Chamber of Costa Rican Supreme Court, Nov. 16, 1994 (quoted in 2nd Dec. of Batalla, SR 549 & n.36).

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defendant's air-conditioning hose was sucked into plaintiff's aircraft due to defendant's negligence causing extensive property damage, prejudgment interest was found recoverable from the date of the accident. 474 So. 2d at 397. And in *Indian River Colony Club, Inc. v. Schopke Constr. & Eng'g, Inc.*, 619 So. 2d 6, 7-9 (Fla. 5th DCA 1993), the court held that breach of contract damages for lost profits over the remainder of the contract constitute liquidated damages if such damages are due as of a date certain pursuant to the contract.

Florida prejudgment interest, on the other hand, is not based on inflation – much less *Costa Rican* inflation. Rather, Florida prejudgment interest is based on the principle that interest is the "natural fruit of money." *See Argonaut*, 474 So. 2d at 214. Pursuant to Florida's loss theory, had a plaintiff not sustained a pecuniary out-of-pocket loss at a prior point in time, that plaintiff could have invested the money and received interest. *See Gilchrist Timber Co. v. ITT Rayonier, Inc.*, , 472 F.3d 1329, 1332 (11th Cir. 2006). Thus, the trial court was correct in concluding that "the principles of indexation in Costa Rica is not akin to Florida prejudgment interest." (R149-37743) (e.s.).

Further, Wilson's (Plaintiffs') post-trial attempt to reconvert the jury's U.S. dollar-based damage awards back into Costa Rican colones for indexation purposes was entirely speculative. (R141-35822-48, Exh. B). Since the jury did not determine Plaintiffs' damages on an annual basis, it was impossible to calculate indexation from "the date of injury" based on changes in the Costa Rican Consumer Price Index from 1985 through 2005. (*Id.*; I.B. 66). *See* Case No. 519-F-2005, First Chamber of Costa Rican Supreme Court, Jul. 20, 2005, at ¶XI (to index monetary obligations, the Costa Rican Consumer Price Index for each damage period must be used).

Thus, the trial court correctly held that the use of Costa Rican indexation under these circumstances (even if it was otherwise applicable) would be "contrary

to Florida public policy." (R149-37743). *See Brown & Root, Inc. v. Ring Power Corp.*, 450 So. 2d 1245, 1247-48 (Fla. 5th DCA 1984) (declining to apply foreign law which is contrary to public policy in Florida).

Plaintiffs' argument, and Wilson's calculations, also failed because Costa Rican law does not clearly allow "non-conventional" indexation (the only type of indexation at issue) back to the date of loss/injury under similar facts. In Case No. 1016-F-2004, First Chamber of Costa Rican Supreme Court, Nov. 26, 2004, the Court for the first time, in dicta, merely recognized the possibility of non-conventional indexation for the period of time from the entry of judgment until the judgment was affirmed (became final). (R142-36052-54). Plaintiffs' expert cited no Costa Rican tort case under Costa Rican Civil Code Section 1045 (extra-contractual liability) applying non-conventional indexation back to the date of loss/injury. (R119-29866-901, pp. 113-14; R119-29902-11, ¶19).

Under similar facts, non-conventional indexation at most might be allowed from the date of judgment when the obligation is liquidated and the amount of damages becomes fixed and certain. (*Id.* ¶18; R149-37744-45). However, as indexation during that time period merely duplicates post-judgment interest (R149-37745), Plaintiffs affirmatively assert on appeal that "they do not seek indexation of the damages award" for "the period following entry of judgment until issuance of the appellate court's decision." (I.B. 69-70).

Finally, the entire indexation issue is procedurally waived because the damage calculations Plaintiffs presented to the jury admittedly failed to consider inflation. (I.B. 65, 68; T.4598).[43] Costa Rican indexation allegedly makes a plaintiff whole by accounting for inflation. It is well settled, however, that whether and how inflation affects damages is part of the damage determination by the jury. *See Delta Airlines, Inc. v. Ageloff*, 552 So. 2d 1089, 1093 (Fla. 1989).[44] Plaintiffs cannot wait until after trial to fill holes in their evidentiary proof.

Accordingly, Plaintiffs' post-trial request for an $18,983,102 indexation award was properly rejected below.

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[43] During trial, the court precluded Rosenthal from offering new testimony that the losses "were brought forward in terms of real dollars to take into account inflation" because this new inflation opinion had not been timely disclosed to DuPont. (T.4598-99). Plaintiffs never moved for a new trial claiming the court abused its discretion in excluding any evidence regarding inflation.

[44] Whether a Costa Rican judge would index a judicial award in a Costa Rican case is immaterial because there are no jury trials in Costa Rica. *See Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 252 n.18 (1981). In an action tried in Florida courts, however, defendants have a constitutional right to a jury determination of all disputed issues of fact including how inflation affects plaintiffs' damages, and irrespective of whether a Costa Rican judge would determine the matter in an action filed in Costa Rica. *See* Fla. Const. Art. I §22; *see also Ma rshall v. Arzuaga*, 828 F.2d 845, 847-50 (1st Cir. 1987) (where negligence action is tried in federal court under substantive law of Puerto Rico, litigants have right to a trial by jury of damage issues irrespective of fact that Puerto Rico, being a civil law jurisdiction, never uses juries in civil cases).

CONCLUSION

WHEREFORE, based upon the above facts and authorities, E.I. du Pont de Nemours & Company, Inc., respectfully requests that this Court deny all of Plaintiffs' claims on appeal, and on cross-appeal reverse the Final Judgments of the trial court below and remand for a judgment in DuPont's favor or, alternatively, a new trial on all remaining matters, or a new trial on damages.

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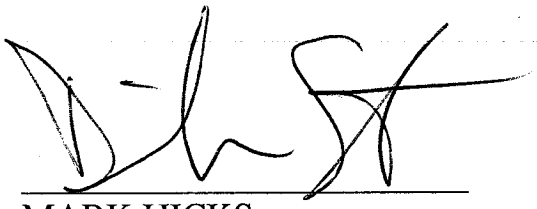
BY: 

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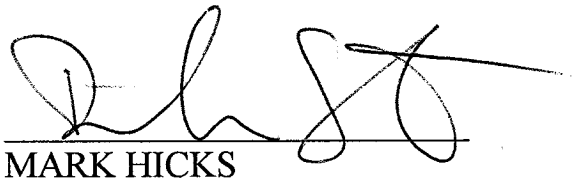
BY: 

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