Case No. 11-10035-DD

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

GUILLERMO RAMIREZ,

Appellant,

vs.

E.I. DU PONT DE NEMOURS & COMPANY,

Appellee.

On Appeal from the United States District Court
for the Middle District of Florida

Case No. 8:09-cv-00321-VMC-TBM

BRIEF OF APPELLEE

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CERTIFICATE OF INTERESTED PERSONS

Counsel for Appellee E.I. du Pont de Nemours & Company certifies that the following persons and entities have or may have an interest in the outcome of this case:

Covington, The Honorable Virginia M. Hernandez, U.S. District Court Judge

Dandar & Dandar, P.A., Counsel for Appellant

Dandar, Kennan G., Esq., Counsel for Appellant

Dandar, Thomas J., Esq., Counsel for Appellant

E.I. du Pont de Nemours & Company (stock symbol "DD"), Appellee

McCoun, The Honorable Thomas B., III, U.S. Magistrate Judge

Moss, Edward A., Esq., Counsel for Appellee

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By: /s/ Daniel B. Rogers
DANIEL B. ROGERS

CORPORATE DISCLOSURE STATEMENT

Appellee E.I. du Pont de Nemours & Company states that it does not have a parent corporation and that no publicly traded corporation owns 10% or more of Appellee's stock.

By: /s/ Daniel B. Rogers
DANIEL B. ROGERS

STATEMENT REGARDING ORAL ARGUMENT

Appellee does not believe oral argument is necessary in this case. If the Court grants Appellant's request for oral argument, then Appellee would request equal time.

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STATEMENT OF THE ISSUES

I. Whether the district court properly allowed DuPont's expert, Samuel Cohen, M.D., Ph.D., to testify that Benlate did not cause Plaintiff's tumors, where Dr. Cohen is an expert in cancer causation, he relied upon materials that experts in his field would reasonably rely upon, and his opinions and reliance materials were properly disclosed under Rule 26.

II. Whether the jury's verdict was inconsistent and against the great weight of the evidence simply because it found Benlate defective but not a legal cause of Plaintiff's tumors.

STATEMENT OF THE CASE

I. COURSE OF PROCEEDINGS AND DISPOSITION BELOW

This appeal arises from a defense verdict and judgment in a product liability case. [DE 163] Appellant/Plaintiff Guillermo Ramirez, a farmer, claimed his exposure to Benlate, an agricultural chemical marketed by Appellee/Defendant E.I. du Pont de Nemours & Company ("DuPont"), caused him to develop kidney cancer, a head/neck tumor, and a pancreatic tumor. [DE 3]

Plaintiff's Complaint asserted two counts against DuPont – strict liability and negligence – and alleged that the Benlate Plaintiff used was contaminated with the chemical atrazine, which caused his tumors. [Id.] Plaintiff's sole causation expert, Robert Bloome, D.O., broadened the alleged causes to include Benlate itself (and its active ingredient benomyl) and the chemicals chlorothalonil and flusilazole, other contaminants found in Benlate. [DE 33 at 6] DuPont's causation expert, Samuel Cohen, M.D., Ph.D., disagreed and provided the jury with a detailed explanation of how these chemicals could not have possibly caused Plaintiff's tumors. [DE 169 at 141-94]

Following a six-day trial, the jury found Plaintiff failed to prove causation and returned a defense verdict. [DE 159] On the strict liability count, the jury found that, although Benlate may have been defective, it did not cause Plaintiff's injury. [Id. at 1] Similarly, on the negligence count, the jury found that, although

DuPont may have been negligent, its negligence did not cause Plaintiff's injury. [Id. at 2]

Post trial, Plaintiff moved for judgment as a matter of law or new trial on three grounds: (1) the verdict was inconsistent because it found Benlate defective but not the cause of Plaintiff's injury; (2) the verdict was against the great weight of the evidence; and (3) Dr. Cohen was not qualified. [DE 165] The district court denied Plaintiff's post-trial motion. [DE 174]

Although the court found "unquestionably some merit" to DuPont's position that Plaintiff had not timely raised and thus waived these arguments, the court nevertheless addressed their lack of substantive merit. [Id. at 5, n.1] The court rejected Plaintiff's inconsistent verdict argument, agreeing with DuPont that "the jury could have determined that while Benlate may have been contaminated and may have caused plant damage (and was therefore defective) it did not cause Plaintiff's injuries." [Id. at 5] The court rejected Plaintiff's great weight of the evidence argument, finding "the jury was presented with numerous plausible reasons for determining that Benlate did not cause Ramirez's cancer." [Id. at 7] Finally, the court rejected Plaintiff's attacks on Dr. Cohen as either inaccurate or going to the weight, not the admissibility, of his expert opinions. [Id. at 10] This appeal followed. [DE 175]

II. STATEMENT OF THE FACTS

A. Plaintiff's Farming and Chemical Usage

Plaintiff began working on farms in 1971 at the age of 16 and did so until 1998. [DE 167 at 50-51] He farmed a variety of crops, including strawberries, tobacco, and corn. [Id. at 52] He did not begin applying agricultural chemicals, however, until 1989. [Id. at 53, 58-59] At that time, Plaintiff's principal crop was strawberries. [DE 166 at 165, 173] He used a combination of chemicals on his plants, including Benlate, Bravo 720, Captec, copper, Lanate, Monitor, and methyl bromide. [DE 167 at 67-69, 73-74, 91]

Plaintiff took several precautionary measures when mixing and applying these chemicals. He covered his entire body in protective equipment, including a jumpsuit, gloves, boots, glasses, and a mask. [DE 170 at 244-47] He applied the chemicals using a tractor with long, hydraulic booms extending from the sides that sprayed the chemicals onto the crops. [DE 166 at 175-76; DE 167 at 96-97] While spraying, Plaintiff sat in the tractor, which had an enclosed, air-conditioned cab. [DE 170 at 42-43] Sometimes Plaintiff would apply the chemicals, but sometimes his brother-in-law would do so. [Id. at 41]

B. Plaintiff's Claimed Crop Damage

One evening in March 1991, Plaintiff noticed issues with his strawberry plants. [DE 166 at 186; DE 167 at 115; DE 170 at 249-51] So, that night,

Plaintiff's brother-in-law sprayed the plants with Benlate, Captan, and other chemicals.[1] [DE 170 at 42-43, 250-51] The next morning, Plaintiff claimed the strawberries had brown spots, were "bruised," and were "all messed up." [DE 166 at 189; DE 170 at 250-51]

Plaintiff contacted his chemical salesman, who came out to Plaintiff's farm and asked for his boxes of Benlate. [DE 166 at 189, 190-93] Plaintiff gave the salesman five of his seven boxes, retaining two. [Id. at 193] There was no evidence at trial that any of those seven boxes were ever tested and thus no evidence of what, if anything, was actually in Plaintiff's Benlate. [DE 166-171]

C. Benlate

It was around this time in early 1991 that DuPont learned that at least one lot of Benlate had been contaminated with a small amount of atrazine. [DE 170 at 51, 62] This was the second time Benlate had been recalled as a result of atrazine contamination; the first occasion was in 1989. [DE 168 at 192] After the 1989 recall, DuPont had implemented a procedure to monitor every lot of Benlate for atrazine, which is how it identified atrazine in Benlate in 1991. [Id. at 194]

[1] At trial, Plaintiff backtracked on his deposition testimony and asserted that he – not his brother-in-law – was the one who sprayed that night. [DE 170 at 250-51] This conflicting testimony must be resolved in DuPont's favor as the prevailing party below. *See Mee Indus. v. Dow Chem. Co.*, 608 F.3d 1202, 1211 (11th Cir. 2010), *cert. denied*, 131 S. Ct. 936 (2011).

DuPont immediately notified the EPA of the atrazine contamination, recalled the product, and notified its customers. [Id. at 190; DE 170 at 52, 57]

Investigation revealed that the highest level of atrazine in any 1991-recalled Benlate lot was six parts per million (6 ppm), and only eight of the 1,140 recalled lots contained atrazine at that level. [DE 170 at 81; DE 168 at 195] That was much less than 100 ppm of atrazine in Benlate, which was a level the EPA determined to be of no "unreasonable risk to human health." [DE 170 at 81] By contrast, the popular home-use product Weed and Feed contains 13,000 ppm of atrazine, and some commercial products applied to corn (Plaintiff worked on a corn farm) contain 900,000 ppm of atrazine. [Id. at 101-02; DE 167 at 52]

Further investigation revealed that some of the 1991-recalled Benlate was also contaminated with the chemicals chlorothalonil and flusilazole. [DE 170 at 51, 64] Although some Benlate had 787 ppm of chlorothalonil, that Benlate never left the warehouse; the highest level of chlorothalonil in a Benlate lot that was actually shipped to market was 300 ppm. [Id. at 66, 81; DE 168 at 187] The highest level of flusilazole identified in Benlate was 422 ppm.[2] [DE 168 at 187]

[2] Plaintiff attempts to make much of the insignificant fact that flusilazole was never registered for regular use in the U.S. [IB at 7, 10] Flusilazole was registered and widely used in other parts of the world and was even granted an experimental use permit in the U.S. [DE 168 at 177-78, 191, 198] Due to the small market for the product in the U.S., however, DuPont made a business decision not to pursue the enormous expense associated with U.S. registration. [Id. at 199, 202]

Again, DuPont immediately informed the EPA of its findings. [DE 170 at 64] The EPA then analyzed the health risks associated with these contaminants. [Id. at 53-55] In doing so, the EPA assumed the highest potential exposure (applying it for 35 years from an open tractor), assumed maximum application rates, and assumed that the contaminants were found at their highest reported levels. [Id. at 55-56] Based on these conservative assumptions, the EPA concluded that the "occupational risks from exposure to Benlate contaminated with chlorothalonil and flusilazole are negligible." [Id. at 56; Pl. Ex. 25 at 8]

The EPA noted that "[t]hese results are . . . not unexpected given the low levels of contamination reported in Benlate." [Id.] In fact, the highest level of chlorothalonil in any 1991-recalled Benlate lot (787 ppm) was ***1,900 times lower*** than the 540,000 ppm of chlorothalonil in Bravo 720, a chemical Plaintiff used regularly and the EPA deemed safe to use. [DE 168 at 206; DE 170 at 103-04] Similarly, the highest level of flusilazole in any 1991-recalled Benlate (422 ppm) was ***300 times lower*** than the 250,000 ppm of flusilazole in Punch, used regularly and safely by farmers in other parts of the world. [DE 170 at 111]

The EPA also studied the health effects of benomyl (the active ingredient in Benlate) and concluded that it does not pose an unreasonable risk to health if used properly. [Id. at 70] The EPA stated, "[w]e are not aware of any long-term adverse health effects to any DuPont employee during 11 years of manufacturing

benomyl, and we anticipate none as long as exposures to these substances are within AEL [acceptable exposure limits]." [Id. at 71; Pl. Ex. 28 at 1]

D. Plaintiff's Myriad Medical Problems

Plaintiff, unfortunately, has a history of medical problems. His medical records reflect that he is a morbidly-obese diabetic with a history of smoking,[3] high blood pressure, high cholesterol, acute diverticulitis, and noncompliance with treatment.[4] [DE 170 at 253-61; Def. Ex. 1/Z at SFBH-MR-00147 and Def. Ex. 1/LL at Moffit-MR-00005-00010] Plaintiff also has a family history of cancer, in addition to a family history of diabetes, kidney disease, liver cirrhosis, and high blood pressure. [DE 170 at 256; Def. Ex. 1/MM at SFBH-00172; Def. Ex. 1/B at Moffitt-MR-00002] For example, medical records revealed that Plaintiff's mother suffered from breast cancer and received as many as 15 sessions of radiation treatment.[5] [DE 170 at 257, 258; DE 168 at 168] Plaintiff's grandmother also

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[3] At trial, Plaintiff contended that he smoked only once at the age of 15, but his medical records show a "[h]istory of smoking abuse" and that he smoked a pack-a-day for eight years. [DE 166 at 211-12; DE 167 at 123-25; DE 170 at 255-57; Def. Ex. 1/LL at SJH-00195-00197; Def. Ex. 1/B at Moffitt-MR-00002; Def. Ex. 1/LL at Moffitt-MR-00008] This conflict in the evidence must be resolved in DuPont's favor. *See Mee Indus.*, 608 F.3d at 1211.

[4] Plaintiff's medical records include notations such as "[g]lucose 561 on 7/30 after Subway sandwich and large soda. Felt bad and called ambulance. Noncompliance with meds. Using insulin in p.m. only!" [DE 170 at 261; Def. Ex. 1/NN at SCHC-MR-00039]

[5] Plaintiff denied his mother had cancer. [DE 167 at 173-74] This conflict in the evidence must be resolved in DuPont's favor. *See Mee Indus.*, 608 F.3d at 1211.

suffered from breast cancer. [DE 170 at 258; Def. Ex. 1/MM at SJH-MR-00012] Plaintiff's father, who was diagnosed with kidney disease at approximately the same age as Plaintiff, died as a result of complications from diabetes. [DE 170 at 256-57; Def. Ex. 1/MM at SJH-MR-00012]

Despite this medical history and the EPA's findings that Benlate was safe, Plaintiff's causation expert Dr. Bloome claimed Plaintiff's March 1991 Benlate use caused him to develop tumors. [DE 167 at 228] In 2007, Plaintiff was diagnosed with kidney cancer. [DE 166 at 207; Def. Ex. 1/Y at TGH-MR-712] About a year later, doctors found a tumor in the back of Plaintiff's head, where it meets the neck. [DE 166 at 208-9; Def. Ex. 1/Z at SFBH-00214] That head/neck tumor appears benign, however. [DE 169 at 157-58, 191; Def. Ex. 1/B at Moffitt-MR-00018] In the months leading up to the September 2010 trial, doctors found a pancreatic tumor. [DE 169 at 158; Def. Ex. 1/B at Moffitt-MR-00363]

E. The Battle of the Experts

At trial, each side presented competing experts on the dispositive issue of whether Benlate and its contaminants caused Plaintiff's tumors.

1. Plaintiff's Causation Expert Dr. Bloome

Dr. Bloome is an osteopathic, family-practice physician. [DE 167 at 178-80, 182, 193, 290] He is also an environmentalist who used to own a small farm, where he farmed hay and animals and started his own zoo. [Id. at 184-85, 194,

236] Although he practiced for a short time at a cancer center, his role was to supervise the administration and treat the side effects of chemotherapy. [Id. at 187-88] Dr. Bloome is now a hospitalist. [Id. at 189] His only published work did not concern chemicals or cancer causation but, instead, the manipulation of human feet. [Id. at 285] Plaintiff's counsel nevertheless retained Dr. Bloome to target Benlate and "determine if there is a correlation with [Plaintiff's] diagnosis to his use of DuPont products, particularly Benlate." [DE 168 at 43]

Given his lack of experience in the area of chemicals causing cancer, DuPont cross-examined Dr. Bloome at trial to uncover how he came to be an expert in this case. The jury heard that Dr. Bloome: (i) had treated employees of Plaintiff's counsel; (ii) had a history of being an expert for Plaintiff's counsel; (iii) had even been represented by Plaintiff's counsel in three different lawsuits; and (iv) performed all of his examinations of Plaintiff at the law office of Plaintiff's counsel. [DE 167 at 189-90, 193-94, 273-78, 292; DE 168 at 15] Perhaps as a result of this close relationship, the jury heard that Plaintiff's counsel had not paid Dr. Bloome for his $30,000 worth of work in this case. [DE 167 at 268-69]

Consistent with the purpose of his retention, Dr. Bloome opined that Plaintiff's tumors were caused by exposure to contaminants in Benlate—specifically, atrazine, chlorothalonil, and flusilazole. [Id. at 228, 253] He quickly arrived at this opinion after only three days of reviewing Plaintiff's medical

records and other documents. [DE 168 at 31-32] He based his opinion on animal studies showing these chemicals, at a high enough dose, can cause certain kinds of tumors in certain kinds of animals. [DE 167 at 235] For example, studies show that atrazine causes leydig-cell tumors to develop in rat testes. [DE 169 at 181-83] Even though Plaintiff did not have leydig-cell tumors or tumors in his testes, Dr. Bloome relied upon these animal studies to opine that atrazine must have caused Plaintiff's kidney, head/neck, and pancreatic tumors. [DE 167 at 226, 231, 235]

Dr. Bloome conceded that to undertake a proper causation analysis, he needed to quantify Plaintiff's level of exposure to the allegedly harmful chemical. [DE 168 at 62] He admitted, however, that he could not quantify the exposure unless he knew the number of days Plaintiff was exposed, how much of the contaminant he applied, and how much of the contaminant entered his system; Dr. Bloome had none of this information. [Id.] He, for example, had no evidence that Plaintiff's Benlate had, in fact, been contaminated with chlorothalonil or the level of such alleged contamination. [Id. at 52] Perhaps as a result of this lack of information, Dr. Bloome suggested that "this quagmire of inappropriate chemicals [i.e., a mix of Benlate, atrazine, chlorothalonil, and flusilazole] . . . is most likely the problem." [Id. at 54] But he conceded that there have been no studies showing the effects of combining these chemicals. [Id. at 116]

Dr. Bloome's ultimate reasoning for why Benlate caused Plaintiff's tumors was simplistic: "there's no other thing that I could come up with most likely to cause his situation now." [DE 167 at 228] Dr. Bloome offered this reason despite his knowledge of Plaintiff's poor medical history, family history of cancer, and other risk factors not associated with Benlate. [Id. at 261-64; DE 168 at 16-18, 21-22, 26-30]

2. DuPont's Causation Expert Dr. Cohen

Dr. Cohen has M.D. and Ph.D. degrees in cancer research. [DE 169 at 142] He is board certified in anatomic and clinical pathology and practices medicine and teaches at the University of Nebraska Medical Center and Eppley Cancer Center. [Id. at 141-42] Dr. Cohen focuses his research on how chemicals can cause cancer. [Id. at 142, 144-45] He has published over 300 peer-reviewed articles and been an editor for numerous peer-reviewed journals in the fields of toxicology and cancer research. [Id. at 143-44] He is a fellow of the U.S. Academy of Toxicological Sciences and the International Academy of Toxicologic Pathology. [Id. at 144-45]

Dr. Cohen regularly serves on committees and panels for the world's most prominent scientific and health organizations, including the World Health Organization, the National Institute of Health, the Food and Drug Administration, and the Environmental Protection Agency. [Id. at 147-50] For the last 12 to 14 years, he has been on an international panel developing a framework to assess how

chemicals can cause toxic effects (e.g., cancer) in animals and how to use that information to evaluate risk in humans. [Id. at 149-50] The EPA now uses this framework extensively in evaluating farming chemicals. [Id. at 150-51]

At trial, Dr. Cohen explained that he has experience identifying, diagnosing, and determining the proper treatment for the three kinds of tumors Plaintiff developed. [Id. at 157] He opined that Plaintiff could not have developed these tumors from exposure to Benlate, atrazine, chlorothalonil, or flusilazole. [Id. at 161, 180] Dr. Cohen provided the jury with a thorough explanation for how he arrived at this opinion. [Id. at 161-94]

Dr. Cohen first walked the jury through the science of how chemicals can (and cannot) cause cancer in humans. [Id. at 166-80] The first step is to determine the chemical's "mode of action" – i.e., how it causes cancer in lab animals. [Id. at 165-69] The next step is to evaluate whether that mode of action can occur in humans, as chemicals do not always react in human systems the same way they do in animal systems. [Id. at 168-75] If the mode of action is relevant to humans, the final step is to determine the dose at which the toxic effect develops. [Id. at 175-76] Animal studies are used to identify the highest dose a lab animal can be exposed to ***without*** causing a toxic effect. [Id. at 176-77] "Safety factors" are then applied to extrapolate that information from animals to humans and set safe levels of human exposure that have "a large margin of safety built into it." [Id. at 177,

184] "[B]y the time the EPA is done with it, you end up with a thousandfold risk factor at a minimum that's applied . . . to set the standards for exposure to humans." [Id.] As long as a human is exposed to less than the threshold dose established by application of those safety factors, there is "no risk for developing the tumor" from exposure to that chemical. [Id. at 177-78, 184]

Dr. Cohen then applied this analytical framework to each of the chemicals Plaintiff claimed caused his tumors. [Id. at 180-94] With respect to atrazine, Dr. Cohen explained that it could not have caused Plaintiff's tumors because the mode of action by which atrazine causes testicular tumors in lab animals is not relevant to humans. [DE 169 at 180-82] Dr. Cohen knows this because he served on an EPA committee that reviewed atrazine and came to that conclusion. [Id. at 180] He explained that "[a]ll of the agencies I'm aware of in the world that have reviewed it have come to that conclusion and considered that it's not a cancer causing chemical with respect to human[s]." [Id. at 181]

With respect to Benlate, chlorothalonil, and flusilazole, the mode of action in animals may possibly be relevant to humans, so Dr. Cohen proceeded to the next step in the analysis – whether Plaintiff was exposed to a high enough dose of those chemicals to cause harm. [Id. at 182-87] With respect to Benlate, Dr. Cohen opined that, assuming Plaintiff was exposed to the maximum levels of Benlate permitted by the EPA, his exposure did not cross the threshold of where harm

could occur. [Id. at 184] Indeed, the EPA exposure models assume 35 to 40 years of exposure, and the length of Plaintiff's exposure never approached that level. [Id. at 185] As for chlorothalonil and flusilazole, they were present in Benlate at much lower levels than in products in which they were the active ingredient and deemed safe to use. [Id. at 185-86] Hence, Dr. Cohen testified that Plaintiff's "exposure to these products was well below the amount that would be allowed by the EPA" and "well below the level that would be needed to even potentially cause tumors." [Id. at 187]

Dr. Cohen confirmed his opinion by his review of Plaintiff's medical records. [Id. at 187-88] Based on the modes of action of these chemicals, routine blood tests would have shown toxicity in Plaintiff's system before the tumors developed. [Id. at 188] Plaintiff's many blood tests showed no evidence of toxicity, "indicating that he was well below any toxic exposure to these chemicals." [Id. at 188]

After considering the foregoing evidence, the jury sided with DuPont and found DuPont and its product Benlate did not cause Plaintiff's injuries. [DE 159]

III. STANDARDS OF REVIEW

Plaintiff argues that the district court should have granted his request for judgment as a matter of law, granted his request for a new trial, and stricken the testimony of DuPont's expert Dr. Cohen.

This Court reviews a district court's decision on a motion for judgment as a matter of law *de novo*. *See Mee Indus. v. Dow Chem. Co.*, 608 F.3d 1202, 1210-11 (11th Cir. 2010), *cert. denied*, 131 S. Ct. 936 (2011). The Court "consider[s] all the evidence, and the inferences drawn therefrom, in the light most favorable to the nonmoving party. [It] then determine[s] whether, in this light, there was any legally sufficient basis for a reasonable jury to find in favor of the nonmoving party." *Advanced Bodycare Solutions, LLC v. Thione Int'l., Inc.*, 615 F.3d 1352, 1360 (11th Cir. 2010). In reviewing the record, the Court "must disregard all evidence favorable to the moving party that the jury is not required to believe." *Mee Indus.*, 608 F.3d at 1211 (quoting *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150, 120 S. Ct. 2097, 2110 (2000)).

This Court "review[s] rulings on the admission of evidence and motions for new trial for abuse of discretion." *Milennium Partners, L.P. v. Colmar Storage, LLC*, 494 F.3d 1293, 1301 (11th Cir. 2007) (quoting *Ad-Vantage Tel. Directory Consultants, Inc. v. GTE Directories Corp.*, 37 F.3d 1460, 1463 (11th Cir. 1994)). A district court abuses its discretion if it makes "a clear error of judgment" or

"applie[s] an incorrect legal standard." *Id.* (quoting *Peat, Inc. v. Vanguard Research, Inc.*, 378 F.3d 1154, 1159 (11th Cir. 2004)). An abuse of discretion requires reversal only if the appellant establishes that the "erroneous ruling resulted in 'substantial prejudice.'" *Conroy v. Abraham Chevrolet-Tampa, Inc.*, 375 F.3d 1228, 1232 (11th Cir. 2004) (quoting *Piamba Cortes v. Am. Airlines, Inc.*, 177 F.3d 1272, 1305 (11th Cir. 1999)).

SUMMARY OF THE ARGUMENT

Plaintiff has not provided this Court with any reason to disturb the jury's verdict and the defense judgment for DuPont. His contention that the district court should have stricken the testimony of DuPont's expert Dr. Cohen is baseless. Contrary to Plaintiff's claim, DuPont timely and properly disclosed Dr. Cohen's reliance materials. Equally meritless is Plaintiff's contention that Dr. Cohen's opinions were inadmissible under *Daubert*. Dr. Cohen had the requisite expertise in the subject matter, as one of the world's leading experts in cancer and chemical causation, and he considered the type of scientific and factual information that experts in his field would reasonably rely upon. The opinions he offered at trial were not speculative, and he did not make improper assumptions. The district court did not abuse its discretion in refusing to strike Dr. Cohen's opinions.

The district court also correctly rejected Plaintiff's groundless argument that the jury's verdict was inconsistent and contrary to the great weight of the evidence. Contrary to Plaintiff's belief, a finding that a product is defective does not require a finding that the product also caused the claimed harm. For example, here, the jury could have found Benlate harmed plants and was thus defective, yet not the cause of Plaintiff's tumors. Moreover, based on Dr. Cohen's opinions, Plaintiff's limited, if any, exposure to Benlate, and Plaintiff's many risk factors for cancer, the verdict is consistent with – not contrary to – the great weight of the evidence.

ARGUMENT AND CITATIONS OF AUTHORITY

I. THE DISTRICT COURT CORRECTLY ALLOWED DR. COHEN TO TESTIFY THAT BENLATE DID NOT CAUSE PLAINTIFF'S TUMORS

Plaintiff claims he is entitled to judgment as a matter of law or a new trial because (i) DuPont's expert witness Dr. Cohen relied upon documents that DuPont allegedly did not timely disclose to Plaintiff and (ii) Dr. Cohen's opinions were supposedly not admissible under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786 (1993).

Plaintiff waived his right to request judgment as a matter of law on these points because he never sought that relief during trial. There is also no basis for a new trial because Plaintiff's arguments simply lack merit. DuPont did disclose Dr. Cohen's reliance documents to Plaintiff in his expert report, which was served many months before trial and well before the discovery deadline. Furthermore, Dr. Cohen's opinions far exceeded the reliability threshold required under *Daubert.*

A. Plaintiff Waived His Request for Judgment As A Matter Of Law

Plaintiff's request for judgment as a matter of law is not preserved because he never made a timely motion for judgment as a matter of law during trial at the close of the evidence. *See Blasland, Bouck & Lee, Inc. v. City of N. Miami*, 283 F.3d 1286, 1300 (11th Cir. 2002) ("For a court to be obligated to consider a post-trial motion for judgment as a matter of law, the moving party must have made a

motion for such a judgment under Rule 50(a) at the close of all the evidence. By failing to make a motion for judgment as a matter of law at the close of all the evidence, [the moving party] forfeit[s] its right to have the court consider its post-trial motion for judgment as a matter of law.") (citations omitted).

The first time Plaintiff even raised the specter of moving for judgment as a matter of law was after the verdict was read, after the jury was excused, and as the Court was preparing to adjourn the trial. [DE 171 at 193] At that time, Plaintiff's counsel stated, "Well, when you reserved ruling on the motions, we didn't get to make our motion for a directed verdict." [Id.] The record belies that statement. At no point during trial did the district court ever prevent Plaintiff from making a Rule 50(a) motion. In fact, the court noted as it was adjourning the trial that it did not think Plaintiff made a timely Rule 50(a) motion and, in its order on post-trial motions, observed "there is unquestionably some merit to DuPont's waiver arguments." [DE 171 at 193; DE 174 at 5, n.1] Accordingly, any argument from Plaintiff seeking judgment as a matter of law has been waived.

B. Plaintiff's Argument That DuPont Did Not Properly Disclosure The Materials Reviewed By Dr. Cohen Is Meritless And Waived

Plaintiff claims DuPont did not comply with its Rule 26 disclosure requirements because, "[w]hile Dr. Cohen's report cites to DuPont documents and treatises, those were not timely produced by DuPont." [IB at 16] Plaintiff made this argument in a motion in limine to strike Dr. Cohen's testimony. [DE 109 at 2]

The district court denied Plaintiff's motion. [DE 135] This Court should easily find no abuse of discretion in that ruling.[6]

1. Plaintiff's Disclosure Argument Is Meritless

DuPont complied with its Rule 26 obligations. It provided Plaintiff with Dr. Cohen's expert report on February 18, 2010. [DE 129-1] That was almost seven months before trial and well before the April 1, 2010 discovery deadline.[7] [DE 37 at 2] Dr. Cohen's report revealed the basis for his opinions and detailed (by title, date, author, and length) the documents that Dr. Cohen reviewed in connection with formulating his opinions. [DE 129-1 at 11-12] So, contrary to Plaintiff's claim, Dr. Cohen's reliance documents were disclosed as required by Rule 26.

Plaintiff appears to believe that Rule 26 required DuPont to actually furnish Plaintiff with a copy of every document cited in Dr. Cohen's report, without Plaintiff ever requesting a copy of them. Plaintiff, however, has not cited any authority that would require DuPont do more than what it did—provide a detailed description of the documents reviewed by its expert. Rule 26(a)(2)(B), governing

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[6] Plaintiff also asserts that "Dr. Cohen's report did not state he was making assumptions that all contaminants never exceeded the level considered by the EPA to be safe to humans." [IB at 16] Dr. Cohen's report did not make such a statement because Dr. Cohen never made such assumptions. This issue is discussed in Section I(C)(2) below.

[7] The court extended the discovery deadline to May 7, 2010 "for the limited purpose of deposing Dr. Robert Bloome." [DE 42]

expert witness reports, does not require a party to produce copies of the materials its expert reviewed, and DuPont has not identified any case law requiring it.

Under such circumstances, the district court did not abuse its discretion in denying Plaintiff's motion in limine and allowing Dr. Cohen to testify. Plaintiff has not shown the district court made a clear error in judgment or applied an incorrect legal standard. *See Milennium Partners*, 494 F.3d at 1301. Even if he had made such a showing, Plaintiff has not established that the manner in which DuPont disclosed Dr. Cohen's reliance materials "resulted in substantial prejudice." *Conroy*, 375 F.3d at 1232. Nothing would have changed in the presentation of Plaintiff's case at trial if he had Dr. Cohen's reliance documents sooner. As such, there is no basis to reverse for a new trial.

2. Plaintiff Waived His Disclosure Argument

Plaintiff had Dr. Cohen's report for almost seven months before trial but sat on his hands and waited until one week before trial to complain that he had not been furnished with copies of each document cited in that report. He has only himself – not DuPont – to blame for the fact that he did not have these documents sooner.

Plaintiff could have done a number of things to obtain the documents cited in Dr. Cohen's report: (i) deposed Dr. Cohen or served a subpoena on him for the documents; (ii) served timely requests for production on DuPont for the

documents; or (iii) informally requested the documents from DuPont's counsel. If Dr. Cohen and DuPont had, for some unknown reason, refused to produce the documents, Plaintiff could have moved to compel. At bottom, Plaintiff could – and should – have moved to compel if he believed DuPont had, for any reason, not met its Rule 26 obligations with respect to its disclosure of Dr. Cohen's opinions.

Plaintiff did none of these things. Instead, he waited until the eve of trial, months after the close of discovery, to complain. His last-minute motion in limine to strike Dr. Cohen's testimony was simply too late.

As a procedural matter, Plaintiff filed his motion after the district court's deadline for filing motions in limine. The district court denied Plaintiff's motion on this basis. [DE 135 at 2] This was not Plaintiff's first violation of the court's deadlines. Plaintiff, for instance, failed to timely disclose his first and second expert witnesses. [DE 32 at 7; DE 44 at 1-2] The district court acted well within its discretion in refusing to consider another untimely request for relief. *See United States v. Gonzalez*, 414 Fed. Appx. 189, 202 (11th Cir. 2011) (no abuse of discretion in denying as untimely a pretrial motion filed three weeks after motion deadline and only one week before trial, even though the movant knew about the grounds for the motion well before the deadline); *Sosa v. Airprint Sys., Inc.*, 133 F.3d 1417, 1418-19 (11th Cir. 1998) (no abuse of discretion in denying as untimely a motion filed after the deadline established in the scheduling order).

More fundamentally, the law requires that before a party can move to strike untimely disclosed witnesses or documents, the party must first make a good faith effort to get this information from the other party without court intervention. *See Esrick v. Mitchell*, No. 5:08-cv-50-Oc-10GRJ, 2008 WL 5111246, *1 (M.D. Fla. Dec. 3, 2008) (citing Fed. R. Civ. P. 37(a)(1) and M.D. Fla. Local Rule 3.01(g)). If this good faith effort fails, the party must move to compel. *See id*. (citing *Barron v. Fed. Reserve Bank of Atlanta*, 129 Fed. Appx. 512, 519 (11th Cir. 2005)).

Here, before he moved to strike Dr. Cohen's testimony based on DuPont's purported non-disclosure of documents, Plaintiff neither made a good faith effort to obtain the documents nor moved to compel their production. Plaintiff's actions thus mirror those not countenanced in *Bailey v. Final Touch Acrylic Spray Decks, Inc.*, No. 6:06-cv-1578-Orl-19JGG, 2008 WL 312773, *1-*2 (M.D. Fla. Feb. 4, 2008):

> Plaintiff made no attempt, either formal or informal, to compel better disclosures. Had Plaintiff sincerely wanted information to determine whether additional depositions were necessary, he would have sought that information during discovery. Plaintiff's decision to make this objection two weeks before trial raises the inference that the plaintiff is not as concerned with obtaining the information as he is with holding in abeyance a putative discovery violation for the strategic purpose of using it late in the proceedings as a basis to prevent defendant from defending the claims against it.

(Internal citation and quotation omitted).

For these reasons, the Court should hold that the district court did not abuse its discretion in rejecting Plaintiff's meritless and waived disclosure argument.

C. Dr. Cohen's Opinions Are Admissible Under *Daubert*

Plaintiff argues that Dr. Cohen's testimony should have been stricken under *Daubert* because (1) he relied on "rank speculation," (2) he assumed that Benlate was safe, and (3) he failed to perform a differential diagnosis. All three of these arguments are meritless, and the first two were waived because Plaintiff failed to timely raise them below.

1. Dr. Cohen's Testimony Was Not Speculative

Plaintiff claims that Dr. Cohen's testimony was speculative and based on limited data. Nothing could be further from the truth. Dr. Cohen has M.D. and Ph.D. degrees in cancer research and has dedicated his career to determining the cause of cancer, especially how/whether chemicals can cause cancer. [DE 169 at 142-58] He thus brought with him to this case a unique body of scientific knowledge particularly germane to the analysis of whether the chemicals Plaintiff claims he was exposed to caused his tumors. In fact, Dr. Cohen even had previous experience studying some of these chemicals. [Id. at 152, 180]

Dr. Cohen testified that, in reaching his opinions this case, he did not only review documents provided by DuPont, he also reviewed an extensive amount of other materials, including scientific literature and EPA documents about Benlate,

atrazine, chlorothalonil, and flusilazole, Plaintiff's medical records, and all of the depositions taken in the case. [DE 169 at 160-61] To the extent Plaintiff believed this was not a sufficient basis for Dr. Cohen to render his opinions, Plaintiff was free to (and tried to) impeach Dr. Cohen on those grounds at trial. [DE 169 at 253-55] Such challenges go to the weight and not admissibility of Dr. Cohen's opinions. *See Jones v. Otis Elevator Co.*, 861 F.2d 655, 663 (11th Cir. 1988) ("weaknesses in the underpinnings of [an] expert's opinion go to its weight rather than its admissibility").

2. Dr. Cohen Did Not Assume Benlate Was Safe

Contrary to Plaintiff's assertion, Dr. Cohen did not "assume the Benlate was safe" by "assum[ing] the amount of each contaminant was not high enough to cause harm to humans." [IB at 17] Instead, in arriving at his opinions, Dr. Cohen construed the facts in a light most favorable to Plaintiff and made reasonable assumptions that favored Plaintiff—not DuPont.

As Plaintiff notes, there is no evidence of the actual quantities of atrazine, chlorothalonil, and flusilazole in Plaintiff's Benlate. Neither DuPont nor Plaintiff presented evidence that Plaintiff's seven boxes of Benlate had been tested. Plaintiff argues that, without such evidence, Dr. Cohen lacked a sufficient basis for his opinion. But the same could be said for Plaintiff's expert Dr. Bloome, who

likewise lacked such evidence. Accepting Plaintiff's argument would require exclusion of both side's experts, resulting a defense judgment by default.

In any event, Dr. Cohen reasonably addressed this lack of evidence by assuming that Plaintiff's Benlate had the maximum levels of atrazine, chlorothalonil, and flusilazole ever found in any lot of 1991-recalled Benlate. [DE 169 at 211-12] Dr. Cohen assumed they were present at maximum levels, giving Plaintiff the benefit of the doubt, even though there was no proof that Plaintiff's Benlate was contaminated with anything. Dr. Cohen cannot be faulted for making this assumption in Plaintiff's favor. The court did not abuse its discretion in allowing Dr. Cohen to testify based on reasonable assumptions that helped, rather than prejudiced, Plaintiff's position at trial.

3. Dr. Cohen Did Not Need To Perform A Differential Diagnosis

At trial, Dr. Cohen opined that Benlate and any contaminants in Benlate did not cause – and could not have caused – Plaintiff's injuries. [DE 169 at 161, 180] Plaintiff argues that Dr. Cohen's methodology was supposedly flawed because he did not perform a differential diagnosis to determine the actual cause of Plaintiff's tumors. [IB at 17, 19] This argument makes no legal or factual sense. As the district court aptly found:

> DuPont did not have the burden to prove—and its expert did not need to testify about—what actually caused Ramirez's injuries. That was a burden to be shouldered by Ramirez and his expert, Dr. Bloome. . . .

> The fact that Dr. Cohen did not opine as to the cause of Ramirez's injuries is of no matter and is not a basis for the exclusion of Dr. Cohen.

[DE 174 at 11-12] Plaintiff has not shown any abuse of discretion in that ruling.

4. Plaintiff Waived His *Daubert* Challenges

Although Plaintiff's arguments are easily disposed of based on their lack of substantive merit, the arguments also fail procedurally. Plaintiff did not file a *Daubert* motion challenging Dr. Cohen's opinions by the deadline set by the district court for such motions. The only *Daubert* challenge Plaintiff made before trial was as part of his last-minute motion in limine to strike Dr. Cohen's opinions, which was itself untimely. [DE 109 at 4; DE 135] That motion attacked Dr. Cohen for not performing a differential diagnosis, but it never argued that Dr. Cohen's testimony was speculative or that he improperly assumed Benlate was safe. [DE 109] Plaintiff also never made those arguments during trial, raising them for the first time in his post-trial motion. [DE 165] That was too late; the arguments had been waived. *See Quiet Tech. DC-8, Inc. v. Hurel-Dubois UK Ltd.*, 326 F.3d 1333, 1350 (11th Cir. 2003) (rejecting *Daubert* challenge on appeal where "no new grounds for excluding [expert's] testimony under *Daubert* came to light during the trial").

II. THE JURY'S VERDICT WAS NOT INCONSISTENT AND NOT AGAINST THE GREAT WEIGHT OF THE EVIDENCE

Plaintiff contends the district court erred in denying his post-trial request for judgment as a matter of law on legal cause because, according to Plaintiff, the jury's finding that Benlate was defective but not the cause of Plaintiff's cancer was inconsistent and contrary to the great weight of the evidence. Plaintiff is wrong on both accounts.

A. The Jury's Verdict Was Not Inconsistent

Plaintiff contends that because the jury found Benlate unreasonably dangerous to the user and therefore defective, it had no choice but to find Benlate a legal cause of Plaintiff's tumors. Its findings that Benlate was defective but not a legal cause of Plaintiff's tumors were thus inconsistent and a product of jury confusion. Plaintiff's argument fails procedurally and substantively.

1. Plaintiff's Argument Is Not Preserved

At no time after the jury returned its verdict did Plaintiff object to the verdict or raise a concern about an inconsistency before the jury was discharged. Plaintiff thereby waived his right to complain about an alleged inconsistency in the verdict. *See Walter Int'l Prods., Inc. v. Salinas*, No. 09-15971, 2011 WL 3667597, *15 (11th Cir. Aug. 23, 2011) ("We have held that if the party challenging this type of verdict has failed to object before the jury is discharged, that party has 'waived the right to contest the verdict on the basis of alleged inconsistency.'") (quoting *Mason*

v. Ford Motor Co., 307 F.3d 1271, 1275-76 (11th Cir. 2002)). This Court has held it is too late to raise an inconsistent verdict argument in post-trial motions. *See id.*

Castle v. Leach Co., 4 F. Supp. 2d 128 (N.D.N.Y. 1998), is on point. In that product liability case, the plaintiff sought a new trial by reason of an inconsistent verdict because the jury found the product defective but not the proximate cause of the decedent's death. The court found the plaintiff waived the request for a new trial by not objecting at the charge conference to the verdict form submitted to the jury and then not objecting to the answers returned by the jury or moving for resubmission to resolve the alleged inconsistency. *See id.* at 130-31. Similarly, here, Plaintiff did not object to the verdict form during the charge conference or at any time after the jury returned its verdict. He therefore waived any argument that the verdict is inconsistent or a product of confusion.

2. The Verdict Was Not Inconsistent

Plaintiff wrongly believes that because the jury determined Benlate was "unreasonably dangerous to the user," the jury must have meant it was dangerous to Plaintiff's health. According to Plaintiff, "the only alleged unreasonably dangerous condition of the product was that it causes cancer." [IB at 20] Plaintiff's argument is contrary to both the law and the facts.

As a matter of Florida law, strict liability claims can seek compensation for personal injury ***or*** property damage. *See, e.g., Fla. Power & Light Co. v.*

Westinghouse Elec. Corp., 510 So. 2d 899, 902 (Fla. 1987); *Rose v. ADT Sec. Servs., Inc.*, 989 So. 2d 1244, 1248 (Fla. Dist. Ct. App. 2008); *Cunningham v. Gen. Motors Corp.*, 561 So. 2d 656, 658-59 (Fla. Dist. Ct. App. 1990); *Cedars of Lebanon Hosp. v. European X-Ray Distribs.*, 444 So. 2d 1068, 1071 (Fla. Dist. Ct. App. 1984). It is therefore inaccurate for Plaintiff to suggest that because the jury determined Benlate was unreasonably dangerous to the user, it was inherently deciding that Benlate was unreasonably dangerous to Plaintiff's physical health. As the district court recognized, the jury may have determined that Benlate was defective because it caused Plaintiff's plant damage rather than Plaintiff's tumors. [DE 174 at 5-6]

Furthermore, accepting Plaintiff's argument – that a finding of defect equates to a finding of causation – would eliminate the independent element of causation altogether. But Florida law clearly distinguishes between these elements and requires a plaintiff in a product liability case to prove both. *See Cassisi v. Maytag Co.*, 396 So. 2d 1140, 1143 (Fla. Dist. Ct. App. 1981) (stating that whether a products case sounds in negligence or strict liability, the plaintiff must prove "(1) that a defect was present in the product; (2) that it caused the injuries complained of; and (3) that it existed at the time the retailer or supplier parted possession with the product"). That is why this Court's Pattern Jury Instructions, from which the verdict form in this case was drawn, provides separate interrogatories for the

distinct defect and causation elements in its model strict liability verdict form. *See* Eleventh Circuit Pattern Jury Instructions (Civil Cases) (2005) at 482-85, 492-96.

The district court relied on all of these reasons in denying Plaintiff's post-trial motion on this ground. [DE 174 at 5-6] That ruling was not error.

B. The Jury's Causation Verdict Was Not Against the Great Weight Of The Evidence

Plaintiff argues the jury's verdict that Benlate did not cause Plaintiff's tumors was against the great weight of the evidence. Plaintiff is wrong. The jury had multiple reasons to conclude that Benlate did not cause Plaintiff's injuries. Plaintiff simply disagrees with the verdict, which is not a basis for reversal.

First and foremost, the jury heard detailed testimony from Dr. Cohen about why Plaintiff's exposure to Benlate and its contaminants atrazine, chlorothalonil, and flusilazole could not have possibly caused Plaintiff's tumors. [DE 169 at 183-184, 185-187] While Plaintiff argues that Dr. Cohen's opinions should have been excluded from evidence, his attack on Dr. Cohen fails.

Plaintiff claims that Dr. Cohen did not know about the full extent of Benlate contamination and thus incorrectly limited his opinions to only Benlate, atrazine, chlorothalonil, and flusilazole. Relying on rebuttal testimony from non-expert Tom Greenhalgh, Plaintiff contends that the 1991-recalled Benlate supposedly had 23 different contaminants in it. [IB at 22] Mr. Greenhalgh, however, provided no testing or other scientific evidence to support his testimony. Even if he presented

proof that there were 23 different contaminants in Benlate (he did not), neither Dr. Bloome nor any other expert provided a causal link between those other alleged contaminants and Plaintiff's tumors. Hence, there was no reason for Dr. Cohen to even discuss them, much less explain how they did not cause Plaintiff's tumors.

Even without Dr. Cohen's testimony, the record fully supports the jury's finding that Benlate did not cause Plaintiff's tumors. For example, the jury heard no evidence of testing that proved Plaintiff's Benlate was even contaminated, much less the level of such contamination. [DE 166-171] Plaintiff's only evidence in this regard was to point to crop damage allegedly caused by spraying Benlate one night in March 1991. At best, that testimony may have supported a finding that Benlate was unreasonably dangerous to Plaintiff's plants and thus defective. However, no qualified witness ever informed the jury that, because the plants exhibited harm after being treated with Benlate, exposure to that Benlate was also at a level sufficient to cause human harm. Rather, the jury heard testimony that, even if Plaintiff's Benlate had been contaminated, it would not have been at a level that would have caused Plaintiff's tumors. [DE 169 at 183-184, 185-187; DE 170 at 95-96]

The jury also heard that Plaintiff's exposure to Benlate and anything harmful in Benlate was minimal, if at all. Plaintiff testified that, when he sprayed Benlate, he wore protective clothing from head to toe, covering almost every inch of his

body, and sat in a tractor with an enclosed, air-conditioned cab. [DE 167 at 26; DE 170 at 42-43, 243-246] Plaintiff also testified that his brother-in-law was the one who sprayed the Benlate that allegedly harmed his crops. [DE 170 at 40-42]

In addition to learning about Plaintiff's limited exposure to Benlate and any alleged contaminants in Benlate, the jury also heard about Plaintiff's history of medical problems, unrelated to Benlate, which could have contributed to the development of his tumors. Plaintiff, for example, had a family history of cancer, diabetes, and kidney disease, was morbidly obese, had high blood pressure, and had a smoking history that included a diagnosis of COPD. [DE 170 at 253-265] The jury heard that these were risk factors for cancer. [DE 168 at 21; DE 169 at 192, 224-25]

Any of these bases would have been sufficient alone to support the jury's verdict that Benlate did not cause Plaintiff's injuries. Taken together, however, they conclusively disprove any claim that the jury's causation verdict was against the great weight of the evidence. As the district court found in its order denying Plaintiff's post-trial motion on this issue, "the jury was presented with numerous plausible reasons for determining that Benlate did not cause Ramirez's cancer." [DE 174 at 7] Plaintiff has shown no error in that finding.

CONCLUSION

For the foregoing reasons, this Court should affirm the final judgment entered for DuPont.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 8,059 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman font.

By: /s/ Daniel B. Rogers
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CERTIFICATE OF SERVICE

I certify that, on this 7th day of October, 2011, a copy of the foregoing Brief of Appellee was sent by U.S. Mail to all parties listed below and by Federal Express to Clerk of the Court.

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