Third District Court of Appeal

State of Florida, July Term, A.D. 2009

Opinion filed December 16, 2009.
Not final until disposition of timely filed motion for rehearing.

Nos. 3D07-2322; 3D07-2318; 3D07-1036
Lower Tribunal No. 01-23796, 01-6932

Agrofollajes, S.A., et al.,
Appellants/Cross-Appellees,

vs.

E.I. Du Pont De Nemours & Company, Inc.,
Appellee/Cross-Appellant.

An Appeal from the Circuit Court for Miami-Dade County, Amy Steele Donner, Judge.

Holland & Hart, and Peter C. Houtsma, Maureen R. Witt, and Marcy G. Glenn; Elizabeth K. Russo; Don Russo, for appellants.

Shook, Hardy & Bacon and Tom Sherouse, Daniel Rogers and Sergio Pagliery; Hicks, Porter, Ebenfeld & Stein, P.A., and Mark Hicks, Dinah Stein, and Gary Magnarini, for appellee.

Before RAMIREZ, C.J., and CORTIÑAS, J., and SCHWARTZ, Senior Judge.

RAMIREZ, C.J.

The plaintiffs appeal the trial court's final judgments and amended final judgments rendered upon disposition of the parties' post-trial motions, including

the plaintiffs' motion for additur, the plaintiffs' motion to set aside verdict on comparative negligence defense and for entry of judgment in accordance with the plaintiffs' motion for directed verdict on said defenses, the plaintiffs' motion to set aside portion of seven verdicts reduced by statute of limitations defense and for entry of judgment in accordance with the plaintiffs' motion for directed verdict on said defense, and the plaintiffs' motion for award of prejudgment interest.[1]

Case numbers 3D07-1036 and 3D07-2322 are appeals from the final money judgments and the amended final money judgments entered in favor of certain plaintiffs. Case number 3D07-2318 is an appeal from judgments entered in favor of the defendant E.I. Du Pont de Nemours & Co. and against certain plaintiffs, based on statute of limitations defenses raised by Du Pont. In addition, Du Pont cross-appeals these judgments. We reverse and remand for new separate trials

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[1] Plaintiffs (collectively referred to as "plaintiffs) are the following: (1) Agrofollajes, S.A.; (2) Desarollo Mundiales, S.A.; (3) Empresas Cavendish, S.A.; (4) Euro Flores, S.A.; (5) Eurofern, S.A.; (6) Expohelechos, S.A.; (7) Flores del Caribe, S.A.; (8) Follajes Las Trojas, S.A.; (9) Follajes de Sarchi, S.A.; (10) Flores y Follajes Las Joyas, S.A.; (11) Helechos de Centro America, S.A.; (12) Helechos de Cuero, S.A.; (13) Helechos de Irazu, S.A.; (14) Helechos del Monte, S.A.; (15) Inversiones Bosqueña, S.A.; (16) Inversiones Senedo, S.A.; (17) Jardin Botanico LDL Costa Rica, S.A.; (18) L.L. Ornamentales de la Montaña, S.A.; (19) Plantas Reales, S.A.; (20) Plantas Tropicales Las Cabuyales, S.A.; (21) Rica Fern, S.A.; (22) Rio de Janeiro, S.A.; (23) Seminole, S.A.; (24) Super Helechos, S.A.; (25) Tico Helechos De Poas, S.A.; (26) Helechos Marme, S.A.; and (27) Tico Verde, S.A.

because the trial court erred in ordering a single, consolidated trial of the claims raised by all twenty-seven plaintiffs.

I. Factual Background

This action involves the mass, consolidated tort cases commenced in 2001 by twenty-seven Costa Rican growers of leatherleaf ferns against Du Pont, alleging product liability caused by Benlate, a systemic fungicide that Du Pont manufactured and marketed. The plaintiffs challenge the trial court's decision to submit Du Pont's statute of limitations defense to the jury; the trial court's decision to deny pre-judgment interest under Florida law or indexation under Costa Rican law to the damages awarded by the jury; as well as the trial court's directed verdict against seven plaintiffs, on statute of limitations grounds.[2] The plaintiffs further allege that the trial court abused its discretion in denying an additur for the plaintiffs' remediation cost and related lost profits. Du Pont cross-appeals the trial court's decision to consolidate the twenty-seven cases, as well as the entry of judgment against it for the remaining twenty plaintiffs. Du Pont further appeals on the grounds that the trial court repeatedly abused its discretion and committed reversible error.

[2] The seven plaintiffs are: (1) Ornamentales de la Montaña, S.A.; (2) Plantas Reales, S.A.; (3) Super Helechos, S.A.; (4) Empresas Cavendish, S.A.; (5) EuroFlores, S.A.; (6) Helechos del Irazu, S.A.; and (7) Inversiones Bosqueña, S.A.

Leatherleaf fern is an ornamental crop, a brightly colored and symmetrically shaped fern that florists use to enhance cut flower arrangements. The plaintiffs are commercial growers of leatherleaf fern in Costa Rica who grow the ferns for a worldwide market, providing ferns mostly for Europe and Japan. The leatherleaf fern is grown from an underground, root-like stem system called a rhizome. After a rhizome is planted, leatherleaf fern fronds grow from it and are harvested every six to eight weeks. The harvesting process involves cutting the fern foliage or fronds from the rhizomes, which remain in the ground. This process is repeated, subsequent fern crops grow in, and the new fronds are likewise harvested. Each rhizome continues to produce successive generations of leatherleaf fern for years, usually decades. During harvesting, the fronds are sorted manually to select out any malformed or discolored fern, and the good fern is sold for distribution to florists. Ferns are propagated using a vegetative reproduction method whereby the rhizomes are divided and planted to establish new fern crops.

A. Du Pont's Benlate Fungicide

Du Pont's agricultural business develops insecticides, herbicides and fungicides for the worldwide market. These products are promulgated for the protection of crops from pests and disease. In 1970, Du Pont introduced the first "systemic" fungicide under its brand name Benlate WP ("Wettable Powder"), containing the active ingredient benomyl. Benlate WP became the world's leading

fungicide, used in more than one-hundred countries in a wide variety of crops. Systemic fungicides are differentiated from conventional fungicides in that while conventional fungicides act outside of the plant, a systemic fungicide is absorbed into the plant and thus protects and cures crops by acting from within the inside of the plant.

In 1987, Du Pont reformulated the Benlate product, introducing Benlate DF ("Dry Flowable"), a dust-free formulation, which like Benlate WP, also contained benomyl as its active ingredient. Consequently, Benlate DF supplanted Benlate WP as the leading fungicide.

B. The Trial

Plaintiff Agrofollajes and the other twenty-six plaintiffs filed their 2001 claims seven months apart in two complaints that contained similar extensive, detailed allegations of plant damage. The Super Helechos complaint was 38 pages long and contained 187 paragraphs of allegations, and the Euro Flores complaint was 37 pages long and contained 174 paragraphs of allegations. The complaints alleged that the plaintiffs' leatherleaf fern plants were damaged by Du Pont because: (1) the Benlate was cross-contaminated with other chemicals that were manufactured at the same facility, and (2) Benlate DF broke down into DBU, a herbicide-like agent called dibutylurea (DBU), which was toxic and caused the plant damage.

The plaintiffs represented to the trial court that consolidation would be more efficient because there were "many common issues" between the claims. Conversely, Du Pont alleged substantial differences in the plaintiffs' Benlate use, farm management, growing conditions, growing practices, chemical uses, periods in which deformities materialized, plant disease problems experienced, and damage claims. Du Pont also proffered different alternative causes for the plant damages at the various ferneries. Du Pont proposed that the court schedule either one fernery or one group of ferneries, under common management, as individual plaintiffs in separate trials. The trial court ordered a single, consolidated trial of the claims by all twenty-seven plaintiffs, and Du Pont timely filed an objection to the consolidated trial as well as motions to sever.

At trial, however, the plaintiffs' opening statement re-characterized the "common issues." The plaintiffs acknowledged instead that there was only one material issue that was common to all the plaintiffs, the use of 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.

The evidence presented at trial substantiated the many differences that existed among the individual plaintiffs. For example, of the twenty-seven plaintiffs, fourteen applied Benlate to their ferns, ten did not, and there was conflicting evidence regarding the remaining three. Those plaintiffs who did apply Benlate had differences in the concentrations used, as well as in the application methods used. Some of the growers, like Follajes Las Trojas, applied Benlate as a drench and dip to rhizomes. Other plaintiffs, like Super Helechos, additionally sprayed the rhizomes. Still others, like Inversiones Bosqueña and Flores del Caribe, also sprayed Benlate on their plants. One plaintiff, Jardín Botánico, did not provide competent evidence that Benlate had been applied to its rhizomes. Jurors considering the claims of plaintiffs who either never used Benlate or used it after 1991 heard evidence of Du Pont's subsequent remedial measures.

Various plaintiffs used numerous chemicals in diverse ways. In addition to Benlate, some plaintiffs, like Rio de Janeiro, Follajes Las Trojas, Inversiones Bosqueña, and L.L. Ornamentales, applied Manzate, Daconil, Vydate, and dozens of other chemicals to their plants and rhizomes. Some, like Inversiones Bosqueña, Super Helechos, and Flores y Follajes las Joyas, used other fungicides that contained benomyl, the same active ingredient as Benlate. In fact, on cross

examination, Inversiones Bosqueña testified that over the years it had used dozens of different types of fungicides in addition to possibly having used twenty or thirty chemicals on its ferns that were not listed as usable for ornamental plants by the Costa Rican Ministry of Agriculture. Inversiones Bosqueña testified that it used Benlate from 1987 to 1999 and that its practice was to keep receipts of the chemicals they bought. However, aside from producing one 1987 receipt for a minute amount of Benlate, none of the dozens of other entries regarding fungicide purchase in Inversiones Bosqueña's records identified Benlate. Instead, Inversiones Bosqueña's records identified the purchases using the generic term "benomyl" or identified purchases made to other manufacturers of benomyl, such as Benocreek. Euro Flores indicated it applied generic benomyl because it was available at a lesser price.

The plaintiffs' ferneries were located in different areas of Costa Rica. Some were situated in higher elevations, while others were located in lower areas. These differences in elevations resulted in ferneries that operated in different climates and different growing environments for the plants. Some plaintiffs, like Helechos de Cuero, Inversiones Senedo, L.L. Ornamentales, and Inversiones Bosqueña, claimed to have a disease, which they referred to as "Mal de Sterloff," a colloquialism named for a local fernery that had similarly experienced problems typified by the characteristic deformities in the ferns. There were also indications

that among some plaintiffs, like Seminole, Expohelechos, Tico Verde, and Jardín Botánico, there were reports of problems controlling pests and fungi. Still other ferneries, like L.L. Ornamentales, Plantas Reales, and Super Helechos, presented issues regarding hurricane damage, flooding, poor sunlight, or poor farm management, such as overharvesting and inadequate drainage.

Of the fourteen plaintiffs that used Benlate, some, like Rio de Janeiro, Follajes de Sarchi, Plantas Tropicales de los Cabuyales, Folajes las Trojas and Helechos del Irazu, claimed that the damage symptoms appeared immediately. At other ferneries, like Euro Flores, Eurofern, Tico Helechos de Poas, Helechos Marme, and Helechos de Cuero, the symptoms plaintiffs attribute to Benlate damage did not appear for years. Another factor that differed among the plaintiffs was the years in which they claimed to have suffered the Benlate damages. These periods ranged from twenty years prior to trial, as in L.L. Ornamentales' case, which claimed to have suffered damages to its plants starting in 1986, to six years prior to trial, as in Desarrollos Mundiales' case, which claimed to have suffered damages starting in 1999. Additionally, at the time of trial, some of the plaintiffs were still in the fern business, while others had closed. The evidence of ongoing operations conflicted for yet other plaintiffs, like Empresas Cavendish, Super Helechos, and Plantas Reales.

Du Pont filed a motion in limine to exclude evidence of Du Pont's 2001 withdrawal of Benlate from the market, a Benlate WP label change, as well as the 1991 recall of Benlate DF. The trial court denied the motion.

After an eight-week trial during which the parties introduced considerable evidence that alleged disparate material facts among the twenty-seven individual plaintiffs, the jury deliberated for five days. The jury found against Du Pont on negligence and awarded each of the twenty-seven consolidated plaintiffs identical awards. The jury awarded every plaintiff the same percentage, sixty percent (60%), of the past damages claimed for both lost profits and tax benefits and denied the plaintiffs all future damages, including the costs of remediation, as well as their lost profits during the remediation process. The plaintiffs did not object to the verdict before the jury was discharged.

C. The Application of the Statute of Limitations Period

In what is a case of first impression for a Florida court, the trial court interpreted the Spanish term "demandable" under Costa Rican law. This issue involved the determination of when time begins to toll under Costa Rican law. The trial court applied a "known or should have known" standard to the ten-year statute of limitations term that is prescribed by Costa Rican law. As a result of this determination, the trial court granted Du Pont's post-trial Motion for Judgment in Accordance with Motion for Directed Verdict against seven of the twenty-seven

plaintiffs, on statute of limitations grounds, and entered judgment against Du Pont for the remaining twenty plaintiffs.

D. Other Claims on Appeal

Du Pont claims that the trial court committed several instances of reversible error. One such instance involves the trial court's decision to allow the plaintiffs to try the case on a theory that was not pled and further was not disclosed until a deposition just two months prior to the start of trial. As previously mentioned, plaintiffs' 2001 complaints proffered two detailed theories alleging that their plants had been damaged by Du Pont because: (1) the Benlate was contaminated, and (2) Benlate DF broke down into DBU. Under the DBU theory, the plaintiffs claimed that Benlate DF was exposed to heat and moisture, which caused the benomyl in Benlate DF to produce two molecules "MBC" and "BIC." The plaintiffs claimed that 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). The plaintiffs alleged that DBU acted as an herbicide to damage plants. In addition, the plaintiffs claimed that the DBU increased as the Benlate DF aged and that Benlate's exposure to hot and humid climates, such as in Costa Rica, accelerate the breakdown process.

At trial in 2006, over Du Pont's objections, the plaintiffs argued a new negligence theory: that Benlate was defectively designed because it had

"dangerous non-target effects on micro organisms" such that it "triggers an opportunistic bacterial infection." The plaintiffs did not move to amend their complaint to include the new theory prior to or subsequent to trial.

The plaintiffs' theory alleged that the bacterial infection had occurred in the fern rhizomes and that these rhizomes had been infected in Florida, the Costa Rican growers' rhizome source. The plaintiffs claimed that this infection happened long before the plaintiffs purchased the fern rhizomes and moved them to Costa Rica to develop their ferneries. The plaintiffs' expert concluded that "the disease had been there since the beginning of fern use in Costa Rica and the beginning of Benlate use in Costa Rica" and that the ferns were "dead on arrival" when they were purchased by the Costa Rican growers because of their exposure to Benlate treatments by the Florida growers. During the period described in the expert's testimony, Benlate WP, and not Benlate DF, was the fungicide sold by Du Pont.

Before trial, both sides conducted discovery and deposed experts regarding Du Pont's disputed defense that the actual cause of the plaintiffs' fern deformities was that the ferns were infected with viruses. During Dr. Joseph Kloepper's deposition, less than two months before the trial, Du Pont learned that the plaintiffs intended to try their cases on the new unpled theory that alleged the adverse effect of Benlate on microbes inside the leatherleaf plants. Dr. Kloepper was the

plaintiffs' expert plant pathologist and microbiologist. However, the plaintiffs had never disclosed that Dr. Kloepper would testify in opposition to Du Pont's virus defense. At his deposition, Dr. Kloepper indicated that he had not done virus testing or analysis and that he did not know whether viruses had harmed plaintiffs' ferneries. Dr. Kloepper also indicated that he had arrived at his conclusions concerning the microbe theory just days before his deposition.

The revelation of the new theory was made only one month before trial. Du Pont requested a ninety-day continuance in order to prepare for plaintiffs' new theory. The trial court denied Du Pont's request. The trial court did, however, allow a thirty-day continuance, for the limited purpose of allowing the parties to resolve an unrelated issue. The trial court subsequently ruled that no further continuances would be permitted.

During the plaintiffs' case in chief and over Du Pont's objection, Dr. Kloepper testified that he now had a "different" opinion than proffered at his deposition. He testified that "there is no virus," and that viruses did not cause plaintiffs' damages. 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. On cross-examination, he admitted that his trial opinions were different than those of his deposition because he had "done more since then."

Du Pont also claims that the plaintiffs' microbe theory fails under Florida's economic loss rule. Du Pont argued that the Florida economic loss rule bars the claims because the product the plaintiffs purchased, rhizomes previously treated with Benlate, caused injury only to itself but did not damage other property. Du Pont argues that under the microbe theory, the Costa Rican growers may have a contract action against the rhizome supplier but not a tort action against Du Pont. Du Pont further contends that the trial court accepted the plaintiffs' submission for notice of the application of foreign law months after the deadline. The trial court allowed plaintiffs to introduce additional proof of foreign law during the trial and also after the trial, when the case had already gone to the jury.

Over Du Pont's objection, the trial court allowed the testimony of electron microscope expert Dr. Kyung Soo Kim, despite having issued a pretrial order that limited Dr. Kim's testimony to rebuttal of Du Pont's electron microscope expert, Dr. Hanson. Du Pont did not call Dr. Hanson at trial. Consequently, Dr. Kim could not rebut Dr. Hanson's testimony. Dr. Kim testified about the light microscope technique, a technique for detecting viruses, and about electron microscope slides. Dr. Kim's testimony included Dr. Hanson's electron microscope slides, which were not in evidence, as well as the work by the plaintiffs' disclosed virus experts, Ethel Sanchez and Dr. Gerardo Martinez, who

were not called to testify. At Dr. Kim's deposition, he testified that he had not heard of Ethel Sanchez and that he had not reviewed Dr. Martinez's report.

Also over Du Pont's objection, the trial court allowed extensive evidence of previous Benlate claims brought against Du Pont by thousands of other growers. The trial court's rationale for allowing this into evidence was that it demonstrated that Du Pont had notice. However, plaintiffs were not required to demonstrate that those thousands of claims were substantially similar to their claims. In a handful of instances where the plaintiffs did attempt to ascertain that the prior claims were substantially similar, the trial court allowed the plaintiffs to make these arguments in front of the jury. This process resulted in the growers from the prior claims, non-parties in the present case, becoming an important feature of the trial.

These non-parties testified for days about how Benlate had allegedly destroyed their crops. The first two witnesses at trial, growers who brought Benlate claims against Du Pont in 1992, did not focus on the notice aspect that their claims provided Du Pont, but instead argued causation. Over Du Pont's objections, they testified in detail how Benlate allegedly ruined their healthy Florida ferneries. The plaintiffs were also allowed to enter photos into evidence of the alleged damage sustained by the non-parties. The plaintiffs' counsel admitted that this prior claims evidence was being presented to the jury as proof of causation.

Using the prior notice rationale, the trial court also allowed the admission into evidence of Du Pont's settlements of claims in other Benlate cases. The plaintiffs exhibited documents and testimony in their opening statement that indicated that Du Pont accepted fault in its payment of these settlements.

II. Issues on Appeal and on Cross-Appeal

On direct appeal, the plaintiffs raise numerous issues. Among these issues, the plaintiffs contend that the trial court's ruling on Du Pont's statute of limitations defense should be reversed. As such, they claim that the trial court erred in setting aside the jury's verdicts for the seven plaintiffs and entering a directed verdict for Du Pont with regard to these seven plaintiffs.

On cross-appeal, Du Pont argues that the trial court denied Du Pont a fair trial by improperly consolidating plaintiffs' twenty-seven disparate claims. Du Pont contends that a new trial is required because irrelevant Benlate claims made by other growers dominated the trial and were erroneously used to prove causation. Du Pont contends that the plaintiffs' introduction of settlements of other Benlate cases mandates reversal. In addition, Du Pont alleges that the trial courts' admission of undisclosed opinions of plaintiffs' experts on key issues requires reversal. Du Pont claims that the plaintiffs' damages awards are fatally flawed. Du Pont contends that the plaintiffs' failure to plead their "microbe shift" liability

theory bars recovery. Du Pont further argues that the trial court committed reversible error when it gave a "consumer expectation" jury instruction.

We note that there are issues raised by the parties on direct appeal and cross-appeal which we do not specifically address. We decline to do so.

III. Legal Analysis

A. The Consolidation Issue

We first Du Pont's consolidation issue raised on cross-appeal. Du Pont argues that the trial court abused its discretion in consolidating the individual claims brought by the twenty-seven plaintiffs against Du Pont. We agree with Du Pont that the trial court erred when it consolidated the individual claims brought by the twenty-seven plaintiffs against Du Pont. Therefore, we reverse and remand for new, separate trials.

In State Farm Fla. Ins. Co. v. Bonham, 886 So. 2d 1072 (Fla. 5th DCA 2004), the Fifth District Court of Appeal provided guidance regarding Florida Rule of Civil Procedure 1.270 by outlining five conditions to consider in determining whether the consolidation or the separation of trials is proper. In State Farm, the district court held:

> In deciding whether to consolidate cases, a trial court must consider: (1) whether the trial process will be accelerated due to the consolidation; (2) whether unnecessary costs and delays can be avoided by consolidation; (3) whether there is the possibility for inconsistent verdicts; (4) whether consolidation would

> eliminate duplicative trials that involve substantially the same core of operative facts and questions of law; and (5) whether consolidation would deprive a party of a substantive right.

Id. at 1075.

In the present case, neither the plaintiffs nor Du Pont dispute that the consolidation of the twenty-seven cases satisfied the first three conditions. Du Pont instead challenges whether the trial court abused its discretion when it determined that conditions (4) and (5) were likewise satisfied and consolidation was proper.

Du Pont claims that facts and questions of law, common to these plaintiffs, did not predominate when balanced against the disparate material facts and questions of law that impacted the individual ferneries. Du Pont asserts that the court abused its discretion with regards to condition (4) and therefore, the consolidation of the twenty-seven claims was improper.

The record shows that the claims brought by the twenty-seven plaintiffs, several of which are related entities with common ownership or management, did share some common facts. Among them are: the plaintiffs were all growers of a common crop, leatherleaf fern; the plaintiffs were located in the same country, Costa Rica; the plaintiffs marketed their leatherleaf ferns to common buyers; and all the plaintiffs that a common defendant, Du Pont, damaged their crops with its Benlate product. The record also demonstrates that the trial court relied on these

commonalities in making its decision to consolidate the twenty-seven claims into the present case. However, the record likewise demonstrates that these common issues did not predominate at trial. As plaintiffs' candid opening remark confirmed, other than Benlate, the plaintiffs "don't have anything else in common."

At trial, the plaintiffs argued a theory that the ferns were "dead on arrival" to their Costa Rican ferneries because the rhizomes used to grow those ferns had been damaged by the rhizome providers before they were sold to the Costa Rican growers, a result of exposure to Benlate treatments in Florida. At trial, the evidence presented showed that the symptoms of Benlate damage manifested at different times at different individual ferneries. Illustrative of the disparate experiences: fourteen ferneries claimed that the damage appeared immediately while others claimed that the symptoms did not appear for years.

Du Pont's defense theorized that any damage the ferns sustained was the result of alternative causes, each unique and distinctively affecting individual ferneries. In the alternative, Du Pont alleged that disparate material facts, such as the mitigation practices of the twenty-seven individual plaintiffs, accounted for dissimilar damage to the ferns. Among the disparate material facts presented, Du Pont provided evidence that the plaintiffs' ferneries were located in different areas of Costa Rica and were situated at different elevations, resulting in different

climates and growing environments for the plants. The ferneries also experienced distinctive problems controlling pests and fungus and were subject to unique issues regarding hurricane damage, flooding, poor sunlight, overharvesting and inadequate drainage. Additionally, not all of the plaintiffs alleged having used Benlate at their ferneries and, at the time of trial, some of the plaintiffs were still in the fern business while others had closed, distinctly affecting the amount of damages each fernery could recover. Also of significance when considering Costa Rica's statute of limitations, a significant disparity existed with regards to the number of years plaintiffs claim to have suffered Benlate damages. One grower claimed to have suffered damages to its plants twenty years prior to trial, while another claimed damages only six years prior to trial.

The plaintiffs do not dispute the existence of facts unique to individual ferneries. In fact, the plaintiffs conceded during opening statement that the ferneries had different practices, employees, rhizome sources, rainfall, insect problems, fungus problems, and that the ferneries were subject to different climates. On appeal, the plaintiffs argue that despite the numerous differences articulated and entered into evidence regarding the twenty-seven ferneries, it is the same core of operative facts and questions of law that predominate and, thus, consolidation of the twenty-seven claims was proper. We find this argument unpersuasive.

Florida Courts have noted that Florida Rule of Civil Procedure 1.270 essentially "duplicates" federal rule 42. See Wagner v. Nova Univ., 397 So. 2d 375, 377 (Fla. 4th DCA 1981). See also Higley S., Inc. v. Park Shore Dev. Co., 494 So. 2d 227, 229 (Fla. 2d DCA 1986) (while distinguishing that there is no Florida Rule analogous to rule 81, noted "Rule 1.270 of the Florida Rules of Civil Procedure is a mirror image of federal Rule 42"). As a result, Florida courts may look to cases interpreting the federal rule for guidance. Wagner, 397 So. 2d at 377.

In re Brooklyn Navy Yard Asbestos Litigation (Joint E. & S. Dist. Asbestos Litig.), 971 F.2d 831, 853 (2d Cir. N.Y. 1992), the United States Court of Appeals for the Second Circuit held:

> [W]e are mindful of the dangers of a streamlined trial process in which testimony must be curtailed and jurors must assimilate vast amounts of information. The systemic urge to aggregate litigation must not be allowed to trump our dedication to individual justice, and we must take care that each individual plaintiff's--and defendant's--cause not be lost in the shadow of a towering mass [of] litigation.

In a similar vein, in language very applicable to our case, the Fourth District Court of Appeal stated in Friedman v. DeSoto Park N. Condo. Ass'n, 678 So. 2d 391, 393 (Fla. 4th DCA 1996), "[w]e 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."

Despite the introduction of extensive evidence of disparate material facts among the twenty-seven individual plaintiffs during the eight-week trial, after five days of deliberation, the jury returned identical awards for all plaintiffs against Du Pont. Every plaintiff was awarded the same percentage, sixty percent, of their past damages, and similarly, every plaintiff was denied all future damages.

Du Pont further claims that consolidation was not proper because it was deprived of a substantive right as consolidation of the twenty-seven claims resulted in unfair prejudice to it. Unfair prejudice resulting from consolidation is a broadly recognized principle. The Florida Supreme Court in State v. Williams, 453 So. 2d 824, 825 (Fla. 1984), held that "even if consolidation is the 'most practical and efficient method of processing' a case, practicality and efficiency should not outweigh a defendant's right to a fair trial."

Consolidated claims in circumstances such as those found in the present case, where questions affecting only individual plaintiffs predominate over common questions of law or fact, are likely to lead to juror confusion and unfair prejudice to defendants. As a result, they do not lend themselves to consolidated trials. Jurors confronted with a "dizzying amount of evidence," Malcolm v. National Gypsum Co., 995 F.2d 346, 349 (2d Cir. 1993), are forced to keep track of the disparate issues that uniquely affect the individual plaintiffs.

Here, the jurors were asked to recall a vast assortment of unique facts for each of the twenty-seven plaintiffs. The particulars included each fernery's previous growing history, when the various symptoms manifested, what injuries Benlate allegedly caused, and what damage could be attributed to other causes, as well as numerous other factors that uniquely impacted fern production at each individual fernery. This almost guaranteed incredible juror confusion.

In Cain v. Armstrong World Industries, 785 F. Supp. 1448, 1455 (S.D. Ala. 1992), the United States District Court for the Southern District of Alabama held that "confusion and prejudice is manifest in the identical damages awarded." The verdict here, which awarded identical damages, similarly demonstrates that Du Pont was subjected to juror confusion and prejudice. Despite the diverse experiences of the twenty-seven plaintiffs, all were awarded the same exact percentage of their claimed damages. The common awards by the jury, in conjunction with the vast amount of disparate evidence presented at trial, demonstrate that the consolidation of the twentys-seven claims resulted in a hopelessly confused jury and was inappropriate.

By consolidating the claims, the plaintiffs introduced evidence to the jury that would not have been admissible had the cases been tried separately. Jurors who considered the claims of plaintiffs who had never used Benlate or did not use it after 1991, were allowed to hear evidence of Du Pont's subsequent remedial

measures, even though the measures were inadmissible as to those plaintiffs. This included admitting into evidence Du Pont's 2001 withdrawal of Benlate from the market, a Benlate WP label change, and the 1991 recall of Benlate.

We conclude that the operative facts of the individual plaintiffs were disparate and predominated over the common issues presented at trial and that the consolidation resulted in prejudice to Du Pont. Consequently, we hold that the trial court abused its discretion in consolidating the claims brought by the twenty-seven plaintiffs against Du Pont. We thus reverse and remand these cases, with instructions that, on remand, the claims be severed by individual fernery or group of ferneries, under common ownership or management, as individual plaintiffs in separate trials.

B. The Statute of Limitations Issue

Because we remand these cases to the trial court with instructions that the claims be severed for separate trials, with deference to judicial economy and to aid the trial court on remand, we turn to the statute of limitations issue. The issue for this Court's determination is the time during which a ten-year statute of limitations begins to run under Costa Rican law. This is an issue of first impression in Florida. The plaintiffs contend that the trial court's ruling regarding the statute of limitations should be reversed and that the directed verdict granted in favor of Du Pont with regard to the seven plaintiffs should be reversed.

The parties agree that the plaintiffs' negligence claims were brought under Costa Rican law, pursuant to Article 1045 of the Costa Rican Civil Code. Article 1045 of the Costa Rican Civil Code, provided in its English translation, proffers:

> All who through . . . negligence or imprudence, cause injury to another are obligated to repair it together with the losses.

The parties also agree that the statute of limitations, applicable to plaintiffs' claim, is the ten-year statute of limitations provided by Article 868 of the Costa Rican Civil Code. Article 868 of the Costa Rican Civil Code, provided in its English translation, provides that, "Every right and its corresponding action prescribes in ten years. This rule admits the exceptions set forth in the following articles and others established expressly by law, when particular cases require more or less time for prescription."

Article 874 of the Costa Rican Civil Code, further provides that the ten-year statute of limitations begins to run on the date that the cause of action is "exigible" or demandable. Article 874, provided in its English translation, proffers:

> The time limit for the prescription of actions [statute of limitations] shall begin to run from the day the action is demandable.

The only disagreement between the parties with regards to an interpretation of Costa Rican law, is what is meant by "demandable." Making this determination

will decide when the ten-year statute of limitations provided by Article 868 is triggered and whether any of the plaintiffs' actions were time barred.

The parties submitted the declarations and affidavits of their respective experts in Costa Rican law in an effort to aid the court in resolving the "demandable" issue. Du Pont contended that "the statute of limitations term begins to run on the date the injury or damage occurred." Conversely, the plaintiffs submitted that the ten-year term "starts at the moment that the damage and its cause become known, because it is at that time that the possibility of demand reparation emerges." The plaintiffs argued that when a plaintiff must prove not only damages and causation but also culpability, the ten-year statute of limitations does not begin to run until the plaintiff knows that the damage was caused by the defendant's wrongdoing.

At trial, the court did not rule on this issue until the jury instruction conference near the end of the trial. When the court did decide, it crafted its own definition, not one submitted by either of the experts who had testified in support of the plaintiffs' or of Du Pont's argument. The court held that the claims became demandable and the ten-year statute of limitations was triggered when "the plaintiffs 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."

A trial court's determination of foreign law is a question of law over which an appellate court exercises plenary review. Transportes Aereos Nacionales, S.A. v. De Brenes, 625 So. 2d 4, 5 (Fla. 3d DCA 1993). The jury instruction given by the trial judge is a familiar one and appears to be a reasonable common-law resolution to the conflicting positions advanced by the parties. However, while it may arguably be reasonable, it is not a decision based on an interpretation of Costa Rican law and a "[c]ourt must look to foreign law as it is and not as one might believe it ought to be." Tomran, Inc. v. Passano, 391 Md. 1, 20 (Md. 2006). See also Carson v. National Bank of Commerce Trust and Sav., 501 F.2d 1082, 1085 (8th Cir. 1974).

Policy reasons vary as to why certain claims are statutorily time barred. As the Supreme Court held in John R. Sand & Gravel Co. v. United States, 552 U.S. 130 (U.S. 2008), "[s]ome statutes of limitations, however, seek not so much to protect a defendant's case-specific interest in timeliness as to achieve a broader system-related goal." In his Declaration, citing Costa Rica Case No. 120, First Chamber of the Supreme Court, 15:00 hours of July 29, 1992, the plaintiffs' Costa Rican law expert Mr. Alejandro Batalla acknowledged that the purpose of "prescription" in Costa Rican law, or the statute of limitations, is to promote the "juridical value of legal certainty." Mr. Batalla's Declaration also stated that ["p]rescription is an institution created to protect the social order and certainty in

all legal relationships.” Furthermore, Mr. Batalla’s deposition provided that prescription "tends, precisely to eliminate those situations of uncertainty caused by the passage of time within legal relationships . . . It can be asserted, then, that the value protected herein by the law is the legal certainty for which reason the unexpected exercise of a right is to be avoided . . . Justice cannot operate within uncertainty or unstable situations.”

However, Mr. Batalla testified that the ten-year statute of limitations, provided for by Article 874, does not begin to run until the claimant learns of the cause of his damage, even if the claimant does not learn of the cause of damage for 15, 25 or 35 years. Then, once the claimant does learn of the cause, he has an additional ten years to commence an action. Under this interpretation, claimants have no duty of diligence to determine the cause of their damage. Mr. Batalla further testified that under his rationale, even if the plaintiffs learned during the 2006 trial that another product, not Benlate, was the actual cause of their plant damage, the ten-year statute of limitations would begin to run again against a new defendant, and the plaintiffs would be allowed an additional ten years (until 2016) to bring a new action against Du Pont. We find Mr. Batalla’s interpretation of when Article 868’s ten-year statute of limitations is triggered to be inconsistent with his own determination that the purpose of Costa Rica’s prescription policy is to advance legal certainty.

In his Declaration dated February 28, 2006, Mr. Batalla also cited to case number 000291-F-2005, First Chamber of the Supreme Court of Justice, San Jose at 13:45 hours of May 12, 2005 ("Case No. 291"). Case number 291 is not governed by the Civil Code and so it does not involve Article 874 but is instead governed by the General Law of Public Administration which provides that "the right to claim indemnification from the Administration prescribes is four years commencing from the act that causes the liability." Consequently, the statute of limitations applicable to violations governed by the General Law of Public Administration is four years. In comparison, the ten-year statute of limitations, provided by Article 868 and applicable to the present case, is the longest non-criminal statute of limitations under Costa Rican law.

Although case number 291 is governed by a different Costa Rican code than that which governs the present case, it is nonetheless helpful as it contains specific statutory language to create a different triggering event for the statute of limitations period. When discussing case number 291 and its corresponding four year statute of limitations at his deposition, the plaintiffs' expert, Mr. Batalla, cited a second paragraph of Article 198:

> And it says, the second paragraph, "The right to demand indemnification against public officers, the statute of limitation will be four years beginning at the knowledge of the fact that has caused the damage." So, you see, there we have two rules. There we have two rules different, one for the public administration and one for

> the public official, huh? Because the public official may be, in certain cases, according with this law, personally responsible. Okay? So here you have two situations. One that is very clear, [1] against the public administration beginning at the moment when the fact motivates the responsibility. And [2] the other one, beginning when the person knows about the fact that has caused him damage.

As such, the statute added specific language to create different triggering events for the same four-year statute of limitations period, depending on whether the claim was to be commenced against either the public administration (government) or against a public official. For suits against the public administration, the statute of limitations began to run immediately from the moment damage was sustained. For suits against a public officials, specific verbiage was added to trigger the same four year statute of limitations, from the moment "the person knows about the fact that has caused him damage." This distinction was not lost on Du Pont's counsel who further queried Mr. Batalla:

> Q: So when Costa Rican laws want the statute to run when the victim has knowledge of the cause, it does so explicitly, right? Like it did there. You can read that again.
>
> A: Yes.

Unlike the second paragraph of Article 198, Article 874 does not contain specific verbiage which requires that the claimant have knowledge of the cause of the damage to start the ten-year statute of limitations period. Costa Rica is a civil-

law jurisdiction. “It is axiomatic that [in] civil-law jurisdictions, lawmaking is exclusively the function of the legislature.” The legislative code is controlling and jurisprudence is persuasive authority. Transportes, 625 So. 2d at 6. If the Costa Rican legislature had intended the ten-year statute of limitations to start running only when a claimant had “knowledge of damage and cause,” it could easily have done so by adding express language to Article 874 as it did in the second paragraph of Article 198. Accordingly, the trial court did not err in giving the “knew or should have known” instruction, and we affirm the trial court’s rulings with respect to the statute of limitations.

C. The Prior Claims Issue

We turn next to Du Pont’s issue on cross-appeal regarding the Benlate claims made by growers other than the plaintiffs. We conclude that the trial court committed error when it permitted the introduction of prior claims testimony as evidence. The determination of relevancy is within the discretion of the trial court. Ferradas v. State, 434 So. 2d 24 (Fla. 3d DCA 1983); Nelson v. State, 395 So. 2d 176 (Fla. 1st DCA 1980). However, “a judge cannot simply ‘use his discretion to decide that despite a plain lack of substantial similarity in conditions he will, nevertheless, admit the evidence.’ ” State v. Arroyo, 422 So. 2d 50, 53 (Fla. 3d DCA 1982). The Fourth District Court of Appeal held in Trees v. K-Mart Corp., 467 So. 2d 401, 403 (Fla. 4th DCA 1985), that “[w]here a trial court has weighed

probative value against prejudicial impact before reaching its decision to admit or exclude evidence, an appellate court will not overturn that decision absent a clear abuse of discretion."

The non-party witnesses, whose testimony the plaintiffs in the instant case proposed to introduce, were growers who had brought Benlate claims against Du Pont in 1992. Consistent with section 90.105, Florida Statutes (2001), it was the plaintiffs' burden to prove outside of the jury's presence, substantial similarity between the claims and those in the non-parties' suit, so as to demonstrate that such notice was relevant. We hold that the trial court erred in its decision to allow evidence as to the thousands of prior claims against Du Pont because the plaintiffs failed to establish the prerequisite that the prior claims were substantially similar to those in the instant case. Failure to lay a sufficient predicate establishing substantial similarity renders the evidence irrelevant as a matter of law. See Ford Motor Co. v. Hall-Edwards, 971 So. 2d 854, 860 (Fla. 3d DCA 2007).[3] The record demonstrates that plaintiffs proffered that the only similarity between the many claims is that they involved the same product, Benlate. That is not enough to allow admission here. Evidence should not be admitted unless the product was used in circumstances that were substantially similar. See Frazier v. Otis Elevator Co.,

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[3] The trial court did not have the benefit of our decision in Ford Motor Company at the time during which the trial court entered the orders on appeal in this case.

645 So. 2d 100, 101 (Fla. 3d DCA 1994). See generally Railway Express Agency, Inc. v. Fulmer, 227 So. 2d 870, 873 (Fla. 1969).

The trial court erroneously allowed the non-parties' prior claims testimony because it believed that this demonstrated notice of the alleged defect to the defendant. The trial court held that the testimony would show that "Du Pont knew there was something wrong with Benlate." Assuming arguendo that substantial similarity had been established, which would have allowed the admission of this testimony, the evidence would still not have been admissible with regards to some of the plaintiffs. Approximately fifteen of the plaintiffs had never used Benlate. Consequently, for half of the plaintiffs, the notice introduced by the non-parties' testimony was irrelevant and instead demonstrated another prejudicial effect of the consolidation of these claims against DuPont.

As previously noted, the trial court failed to engage in the requisite analysis to establish that the prior claims were substantially similar. However, the record also demonstrates that had the court engaged in the appropriate analysis, it should have determined that the cause of damages plaintiffs alleged in the instant case was not substantially similar to the alleged cause of damages in the prior Benlate claims. The 1992 claims of the non-party growers were analogous to those which the plaintiffs in the instant action originally pled in their complaints: (1) that the Benlate was cross-contaminated with other chemicals that were manufactured at

the same facility, and (2) that Benlate DF broke down into DBU, which caused plant damage when it was sprayed on the fern crops.

However, the plaintiffs abandoned these two theories at trial and instead argued a substantially different “microbe” theory, that Benlate damaged their fern crops because it "triggers an opportunistic bacterial infection” when exposed to the rhizomes, regardless of whether or not it was ever exposed directly on the ferns. The plaintiffs’ expert also stated that due to the rhizomes exposure to Benlate, prior to their arrival in Costa Rica, the ferns were already "dead on arrival." The plaintiffs’ expert testimony indicates that the alleged Benlate damage was present in the ferns “since the beginning of fern use in Costa Rica," which began years before the 1992 claims.

Dr. Kloepper, plaintiffs’ expert, indicated he arrived at his microbe theory just a few days before his January 19, 2006 deposition. The record indicates that this communication was Du Pont’s first notice that Benlate may pose microbial damage when exposed to rhizomes. Here again, because the testimony introduced by the non-party growers involved a different use of Benlate and a different harm, we hold that the evidence introduced by the prior claims was not relevant to the present action.

Pursuant to section 90.403, Florida Statutes (2001), relevant evidence is inadmissible if its probative value is substantially outweighed by the danger of

unfair prejudice. Here, the probative value of the non-parties testimony was non-existent as it did not serve to prove notice to Du Pont. Because there was no probative value to the testimony provided by the non-party growers, our analysis here is uncomplicated. However, even when the probative value of evidence is undisputed, the trial court must still consider whether its introduction is substantially outweighed by the danger of unfair prejudice. In the present case, the non-parties' testimony was allowed to consume a significant part of the first week of trial. The plaintiffs were further allowed to enter photos into evidence of the alleged damage sustained by the non-parties to reinforce their testimony. "[T]his evidence improperly became a feature of the trial" and was unfairly prejudicial to Du Pont. Ford Motor Co., 971 So. 2d at 860.

Referring to the prior claims' evidence, plaintiffs' counsel initially told the trial court "[w]e don't intend to introduce it for causation." However, evidence of prior claims is not admissible to prove causation or to show negligence or culpability. See Lawrence v. Florida East Coast Ry. Co., 346 So. 2d 1012, 1015 (Fla. 1977); Ford, 971 So. 2d at 858; Rodriguez v. Loxahatchee Groves Water Control Mgmt. Dist., 636 So. 2d 1348, 1349 (Fla. 4th DCA 1994). However, the non-party growers' live testimony did go to causation. At trial, plaintiff's counsel even conceded, "[i]t's part of my evidence on causation." Accordingly, the use of the irrelevant prior claims to prove causation likewise requires reversal.

D. The Settlements Issue

The trial court allowed the plaintiffs to introduce evidence that Du Pont had accepted responsibility for and paid settlements of other Benlate claims because it believed that the settlement of other claims was admissible to show notice. We conclude that this constituted error.

It is well-settled that evidence that a defendant settled other claims involving the same product deprives the defendant of a fair trial. See § 90.408, Fla. Stat.; Ricks v. Loyola, 822 So. 2d 502, 508 (Fla. 2002). Thus, it was error for the trial court to allow this information to be introduced.

This Court has 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 1966). In fact, as Du Pont points out, no decision in Florida has held that settlement evidence can be used to show notice. In limited circumstances, notice can be shown through evidence of a substantially similar claim but not its settlement. Id. at 63. None of these unusual circumstances occurred here. Accordingly, the trial court erroneously ruled in this case that evidence of settlements can be used to show notice to a party that there was a problem with Benlate. This prejudicial evidence of settlements did not allow Du Pont to receive a fair trial.

E. The Expert's Opinion Issue

We also conclude that the trial court reversibly erred when it allowed the introduction of an expert's testimony. This court previously held in Gonzalez-Valdes v. State, 834 So. 2d 933, 935 (Fla. 3d DCA 2003), that "[d]ecisions as to the admissibility of evidence are within the discretion of the trial court and will not be reversed absent a clear showing the trial court abused its discretion." See White v. State, 817 So. 2d 799 (Fla. 2000); Ray v. State, 755 So. 2d 604 (Fla. 2000). Florida's Supreme Court held in Canakaris v. Canakaris, 382 So. 2d 1197, 1203 (Fla. 1980) that "[d]iscretion . . . is abused when the judicial action is arbitrary, fanciful, or unreasonable." In addition, Florida courts have explained that the rules of discovery are intended to avoid surprise and "trial by 'ambush.' ". See Binger v. King Pest Control, 401 So. 2d 1310, 1314 (Fla.1981). In Binger, the Florida Supreme Court emphasized that the "search for truth and justice can be accomplished only when all relevant facts are before the judicial tribunal. Those relevant facts should be the determining factor rather than gamesmanship, surprise, or superior trial tactics." Id. at 1313.

The trial court allowed Dr. Kyung Soo Kim, plaintiff's electron microscope expert, to offer surprise testimony despite having issued a pretrial order that limited Dr. Kim's testimony to rebuttal of Du Pont's electron microscope expert, Dr. Hanson, who was not called at trial. Further, Dr. Kim's testimony exceeded the

scope to which the trial court had limited his testimony. At his deposition, Dr. Kim testified that he had not heard of Ethel Sanchez and had not reviewed Dr. Gerardo Martinez' reports. However, Dr. Kim's trial testimony included work by the plaintiffs' disclosed virus experts, Sanchez and Dr. Martinez, whom Du Pont deposed but the plaintiffs did not call.

Citing section 90.403, Florida Statutes (1995), Florida's Supreme Court held that "[t]he trial court must utilize a balancing test to determine if the probative value of this relevant evidence is outweighed by its prejudicial effect." White, 817 So. 2d at 806. Because we determine that the trial court's admission of Dr. Kim's expert testimony was unreasonable and that the probative value of this evidence was outweighed by its prejudicial effect, we hold that the trial court abused its discretion with respect to this issue.

F. The Claims Not Pled Issue

Du Pont argues on cross-appeal that the plaintiffs' failure to plead their "microbe shift" liability theory bars recovery. We agree.

The Florida Supreme Court held in Arky, Freed, Stearns, Watson, Greer, Weaver & Harris, P.A. v. Bowmar Instrument Corp., 537 So. 2d 561, 563 (Fla. 1988):

> [T]hat litigants at the outset of a suit must be compelled to state their pleadings with sufficient particularity for a defense to be prepared. Our growing, complex society and diminishing resources mandate the requirement that

> litigants present all claims to the extent possible, at one time, and one time only.

"Florida's pleading rule forces counsel to recognize the elements of their cause of action and determine whether they have or can develop the facts necessary to support it, which avoids a great deal of wasted expense to the litigants and unnecessary judicial effort." Cont'l Baking Co. v. Vincent, 634 So. 2d 242, 244 (Fla. 5th DCA. 1994). This principle is well accepted. See E.I. Du Pont de Nemours & Co. v. Desarrollo Indus. Bioacuatico S.A., 857 So. 2d 925, 929 (Fla. 4th DCA 2003), Horowitz v. Laske, 855 So. 2d 169, 173 (Fla. 5th DCA 2003); Robbins v. Newhall, 692 So. 2d 947, 949 (Fla. 3d DCA 1997).

Under Florida law, if a claim is not pled, it is error by the trial court to allow the plaintiffs to argue the unpled issue at trial. Furthermore, "where a claim is not pled with sufficient particularity for the opposing party to prepare a defense, the plaintiff is precluded from recovery on the unpled claim and a directed verdict is properly entered." E.I. Du Pont de Nemours & Co., 857 So. 2d at 929. The remedy for such an error is reversal and on remand plaintiffs are not allowed to amend their unpled claims to argue the same theory at a new trial. The logic for this principle is based on "the interests of judicial economy and finality." Arky, 537 So. 2d 561 at 562. As the Florida Supreme Court explained in Dober v. Worrell, 401 So. 2d 1322, 1324 (Fla. 1981):

> It is our view that a procedure which allows an appellate court to rule on the merits of a trial court judgment and then permits the losing party to amend his initial pleadings to assert matters not previously raised renders a mockery of the "finality" concept in our system of justice. Clearly, this procedure would substantially extend litigation, expand its costs, and, if allowed, would emasculate summary judgment procedure.

The twenty-seven plaintiffs in the present action filed suit against Du Pont in two separate complaints. The "Euro Flores" Amended Complaint, filed on March 21, 2001, and the "Super Helechos" Complaint, filed on October 9, 2001, contained differently numbered but identical allegations. These two suits were consolidated into the present action and, after extensive discovery, the action proceeded to trial in 2006, approximately five years after the Amended "Euro Flores" Complaint was filed.

The issue at the crux of this matter is whether the plaintiffs' microbe shift theory, which they argued at trial and under which they prevailed, satisfied Florida's pleading requirements. The plaintiffs claim that they did satisfy Florida's pleading requirements and cite Florida Rule of Civil Procedure 1.110(b)(2), which requires a pleading to contain "a short and plain statement of the ultimate facts showing that the pleader is entitled to relief." Plaintiffs argue that the microbe shift negligence claim that they argued at trial was adequately embraced within the general negligence pleadings contained in their complaints. Plaintiffs point to six

of the one-hundred, eighty-seven allegations contained in the Euro Flores Amended Complaint in support of their argument:

> 61. . . . In some cases, BENLATE caused gradual injury to plants. In many cases, plants including plaintiffs' ferns, were damaged very slowly and in the beginning imperceptibly. The root system declined or never developed properly, and the ferns weakened to the point that they were unable to withstand their ordinary size. In addition, BENLATE caused leaf deformities, an inadequate and very poor root structure, and low production of leaves per hectare. The restricted growth and plant deformities rendered a high percentage of Plaintiffs' ferns unsaleable . . .
>
> 103. . . . Plaintiffs either purchased rhizomes that had been treated with BENLATE and planted these rhizomes in their ferneries, or treated existing ferns in their ferneries with BENLATE, or both.
>
> 125. BENLATE, when used by Plaintiffs for its intended purpose and in the manner prescribed by DuPont, was defective. This product posed an unreasonable and unexpected threat to Plaintiffs' property.
>
> 126. The unreasonably dangerous condition of BENLATE was due to contamination, decomposition or design defect of the product, or some combination thereof. As a result of the contamination decomposition or design defect, BENLATE was not reasonably suited for its intended use.
>
> 132. DuPont breached this duty [to exercise reasonable care in connection with BENLATE] and was negligent in the manner in which it developed, formulated, manufactured, promoted and sold BENLATE . . . in at least the following respects:

> a. negligent design and formulation of the product, such that it was contaminated with one or more harmful substances, subject to decomposition, or compromised by a design defect, …

We are not persuaded by the plaintiffs' argument that the microbe shift theory was embraced within the general allegations of negligence contained in the Euro Flores Amended Complaint. Thus, we hold, as did the Court in Horowitz, that "[t]he complaint in the instant case falls mightily short." Horowitz, 855 So. 2d 169 at 172-73. We therefore hold that the general allegations were not sufficiently specific to permit Du Pont to prepare a defense as to the microbe shift theory.

First, general allegations of negligence in complex cases do not subsume all theories of how a defendant was negligent. A plaintiff must "plead more than the naked legal conclusion that the defendant was negligent." Arky, 527 So. 2d 211 at 213. See Woodcock v. Wilcox, 98 Fla. 14, 122 So. 789 (Fla. 1929) (pleadings must contain ultimate facts supporting each element of the cause of action); Clark v. Boeing Co., 395 So. 2d 1226, 1229 (Fla. 3d DCA 1981) (affirming dismissal of strict liability count charging defendant with selling aircraft "in an unsafe, defective condition" where plaintiff failed to plead ultimate facts); Rice v. Walker, 359 So. 2d 891, 892 (Fla. 3d DCA 1978) (affirming dismissal where plaintiff alleged various components were unsafe but the facts of such defects were not stated); Maiden v. Carter, 234 So. 2d 168, 169 (Fla. 1st DCA 1970) (complaints

must allege ultimate facts as distinguished from legal conclusions which are insufficient).

Second, "Florida uses what is commonly considered as a notice pleading concept and it 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, and to enable the court to decide whether same are sufficient." Rios v. McDermott, Will & Emery, 613 So. 2d 544, 545 (Fla. 3d DCA 1993). To demonstrate the proper application of this concept, we need only contrast the allegations that the plaintiffs' claim embraced their microbe shift theory with plaintiffs' allegations that Benlate decomposed to form DBU and damage plants. The DBU allegations are contained within the same Euro Flores Amended Complaint:

> 50. When BENLATE 50 DF is exposed to heat and moisture, benomyl, the active ingredient, decomposes to produce the following two molecules: (1) methyl benzimidazole carbamate ("MBC") and (2) butylisocyanate ("BIC").
>
> 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").
>
> 52. DBU is a known phytotoxin, capable of damaging certain kinds of plants.

> 53. At all relevant times, DUPONT was aware of this natural breakdown process which transforms its BENLATE fungicide into a compound toxic to plants.

The plaintiffs' DBU theory allegations were sufficiently particular to allow Du Pont to prepare a defense on that topic. However, as a consequence of the plaintiffs' DBU pleadings, the defense was misled into believing that was the theory that plaintiffs would argue at trial. Instead, plaintiffs argued an entirely different and complex theory. The present action is indistinguishable from Arky, where plaintiffs pled a theory of negligence in great detail, but recovered on a completely different theory.

The, plaintiffs failed to advise Du Pont that they intended to argue their microbe theory for more than four years. At his 2003 deposition, plaintiffs' expert Dr. Mills, indicated that outside the context of this litigation he had been conducting research on how Benlate affects soil microbes and causes distortions in ferns. However, Dr. Mills failed to mention that his work had been commissioned by the plaintiffs, and the plaintiffs did not convey that this was the theory, rather than the DBU theory as pled in the complaints, that they would argue at trial.

In fact, in July 2004, Du Pont served plaintiffs with interrogatories in an attempt to identify the theory of negligence plaintiffs planned to argue. Du Pont asked how Benlate harmed the plaintiffs' plants. Again, plaintiffs failed to advise Du Pont that they would rely on the theory that Dr. Mills discussed in his 2003

deposition. Instead, plaintiffs objected that the interrogatories "prematurely call[ed] for expert conclusions" and repeated their general allegation that "Benlate was defective due to contamination, decomposition, or a manufacturing or design defect."

In August 2005, Du Pont was still unclear as to which theory the plaintiffs would argue at trial. Du Pont moved to compel more detailed discovery responses. In October 2005, Du Pont moved to preclude discovery regarding the unpled claims and filed a notice of its non-consent to the trial of unpled claims. The court denied Du Pont's motions, ruling that Du Pont would have to get this information when it deposed the plaintiffs' experts. However, expert disclosures did not begin until December 19, 2005, and the deposition of the person who turned out to be plaintiffs' chief causation expert, Dr. Joseph Kloepper, was not held until January 19, 2006, less than one month before the scheduled trial date.

During this deposition, the plaintiffs first disclosed that they intended to assert a theory of negligence at trial that was effectively different from the DBU theory they had pled. Dr. Kloepper disclosed at his deposition, that based on the alleged results of the testing he had just completed, he planned to testify at trial that all types of Benlate cause harm to plants by killing fungi inside the plant. This, in turn, causes an increase in populations of bacteria and results in internal bacterial infection. Under this new theory, the bacterial infection produces

excessive levels of of IAA (indoleacetic acid) inside the plant, which can result in plant injuries quickly or years later. Dr. Kloepper admitted that, when he was contacted by the plaintiffs' counsel in June 2005, his own data and conclusions from prior cases did not support this microbe shift theory.

Dr. Kloepper's theory, disclosed shortly before trial was new, unpled and also different from the prior theories that had been referred to by Dr. Mills. Dr. Kloepper, who was never designated to testify about viruses, disagreed with Dr. Mills' prior work.

Du Pont moved for a ninety-day continuance to allow its experts to assess and consider these opinions and formulate their own opinions. At a hearing on this motion, the trial court expressed concern that requiring plaintiffs to amend the complaint to conform to this newly-discovered and unpled theory "would obviously have serious ramifications for a trial date that's allegedly set for two weeks from now." The trial court granted a thirty-day continuance for the primary purpose of allowing the parties to resolve a wholly unrelated issue, but ruled that "[n]o further continuances will be permitted."

We do not evaluate the proceedings for a determination as to whether plaintiffs deliberately misled Du Pont as to what negligence theory they would argue at trial. We merely observe that as a result of plaintiffs' delay in communicating this information to Du Pont, DuPont was obviously prejudiced.

Under the controlling authority of Arky, we hold that the generalized allegations, legal conclusions, and description of injuries that plaintiffs relied on as evidence that they adequately pled their microbe shift negligence theory is misplaced. The plaintiffs failed to meet the particularity requirement that would allow Du Pont to be prepared to defend against whatever negligence theory the plaintiffs ultimately argued at trial. The plaintiffs thus are not entitled to recover on this unpled theory.

G. Erroneous "Consumer Expectation" Jury Instruction Issue

We further agree that the trial court committed error when it instructed the jury on the plaintiffs' negligence claim. The negligence claim submitted to the jury alleged that Du Pont negligently designed Benlate. The trial court instructed the jury that it could find Du Pont negligent only if it found Benlate defective. The trial court told the jury that it could find Benlate defective using either the "consumer expectation" or the "risk-utililty/risk-benefit" tests. The jury was instructed as follows:

> 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.

The court gave this instruction over Du Pont's objection that the "consumer expectation" test could not be used as an independent basis for finding a product defective, especially in the case of a complex product like Benlate.

The Restatement (Third) of Torts: Products Liability rejects the "consumer expectations" test as an independent basis for finding a design defect. See Restatement § 2, comment g. In addition, this Court has applied the Third Restatement in Kohler Co. v. Marcotte, 907 So. 2d 596, 598-600 (Fla. 3d DCA 2005). Accordingly, we reverse on this issue because in giving the instruction, the trial court permitted the jury to make the finding that Benlate was defective under an inappropriate test.

IV. CONCLUSION

We reverse the trial court's final money judgments and amended final money judgments rendered upon disposition of the parties' post-trial motions and remand to the trial court for new individual trials and for further proceedings consistent with this opinion. The trial court may choose to schedule either one fernery or one group of ferneries, under common management, as individual plaintiffs in separate trials. In addition, we affirm the directed verdicts granted in Du Pont's favor, with respect to the following seven plaintiffs: (1) Ornamentales de la Montaña, S.A.; (2) Plantas Reales, S.A.; (3) Super Helechos, S.A.; (4) Empresas Cavendish, S.A.; (5) EuroFlores, S.A.; (6) Helechos del Irazu, S.A.; and (7) Inversiones Bosqueña, S.A.

Reversed and remanded.