

No. 17-10894

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**In the United States Court of Appeals  
for the Eleventh Circuit**

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RHONDA WILLIAMS, a single person,

*Plaintiff-Appellant,*

v.

MOSAIC FERTILIZER, LLC, a Delaware  
corporation doing business in Florida,

*Defendant-Appellee.*

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On Appeal from the United States District Court  
for the Middle District of Florida, Tampa Division  
Case No. 8:14-cv-1748, Hon. Mary S. Scriven

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**APPELLANT'S BRIEF OF  
RHONDA WILLIAMS**

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**CERTIFICATE OF INTERESTED PERSONS  
AND CORPORATE DISCLOSURE STATEMENT**

Pursuant to Eleventh Circuit Rules 26.1-1 and 26.1-3, the following is an alphabetical list of the trial judges, attorneys, persons, and firms with any known interest in the outcome of this case.

1. Burns, P.A. – Appellate counsel for Plaintiff-Appellant;
2. Burns, Thomas A. – Appellate counsel for Plaintiff-Appellant;
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11. Mello, Kimberly S. – Appellate counsel for Mosaic Fertilizer, LLC;
12. Mosaic Fertilizer, LLC – Defendant-Appellee;
13. Mosaic Global Holdings, Inc.;
14. Mosaic Global Operations, Inc.;

15. Phosphate Acquisitions Partners, LP;
16. PRP-GP LLC;
17. Scriven, Hon. Mary S. – United States District Judge;
18. The Green Counselor PLLC – Trial counsel for Plaintiff-Appellant;
19. The Mosaic Company (NYSE: MOS) – Defendant;
20. Torres, Christopher – Trial counsel for Mosaic Fertilizer, LLC and The Mosaic Company;
21. Walker Morgan, LLC – Trial counsel for Plaintiff-Appellant;
22. Walker, William Paul – Trial counsel for Plaintiff-Appellant;
23. Weinstein, David Barnett – Trial and appellate counsel for Mosaic Fertilizer, LLC and trial counsel for The Mosaic Company;
24. Williams, Rhonda – Plaintiff-Appellant;
25. Wilson, Hon. Thomas G. – United States Magistrate Judge.

No other publicly traded company or corporation has an interest in the outcome of this appeal.

June 26, 2017

/s/ Thomas Burns

Thomas A. Burns

## STATEMENT REGARDING ORAL ARGUMENT

Plaintiff-Appellant Rhonda Williams requests oral argument. This toxic tort and property damage appeal arises from three orders.

First, an order (Doc. 144) excluded a toxicologist who would have opined about general and specific causation under *Daubert* and granted summary judgment against five of Ms. Williams's six claims, which either required proof of causation (*i.e.*, negligence, gross negligence, strict liability ultrahazardous activity, and medical monitoring and environmental testing) or required proof that products were placed in a stream of commerce (*i.e.*, strict liability failure to warn).

Second, another order (Doc. 189) denied reconsideration of those *Daubert* and summary judgment rulings.

Third, a subsequent order (Doc. 191) granted a motion in limine and disposed of Ms. Williams's remaining claim regarding damages to her real property (*i.e.*, strict statutory liability for violation of the Water Quality Assurance Act of 1983, Fla. Stat. § 376.302 *et seq.*).

The extensive record, which includes almost 200 docket entries covering approximately 9,500 pages, implicates reams of complicated scientific evidence. Oral argument will assist the Court.

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**TABLE OF ABBREVIATIONS**

COC(s)	Constituent(s) of concern;
EPA	Environmental Protection Agency;
FDA	Food and Drug Administration;
G6PD	Glucose-6-phosphate-dehydrogenase;
HAP(s)	Hazardous air pollutant(s);
IRIS	Integrated Risk Information System;
ISA(s)	Integrated Science Assessment(s);
MSA	Metropolitan Statistical Area;
NAAQS	National Ambient Air Quality Standards;
ppb	Parts per billion;
SO <sub>2</sub>	Sulfur dioxide.

**STATEMENT OF SUBJECT-MATTER  
AND APPELLATE JURISDICTION**

After timely removal from state court under 28 U.S.C. § 1441 and § 1446, the District Court had subject-matter jurisdiction under 28 U.S.C. § 1332(a)(1) because Plaintiff-Appellant Rhonda Williams was a citizen of Florida while Defendant-Appellee Mosaic Fertilizer, LLC and Defendant The Mosaic Company (which is not a party to this appeal), were citizens of Delaware and Minnesota, and the amount in controversy exceeded \$75,000. Doc. 1 at 3-4. This Court has appellate jurisdiction under 28 U.S.C. § 1291 because the District Court entered judgment on January 26, 2017 (Doc. 193), which Ms. Williams timely appealed on February 24, 2017 (Doc. 197).

## **STATEMENT OF THE ISSUES**

1. Did the District Court abuse its discretion when it granted a *Daubert* motion to exclude a toxicologist who would have opined about general and specific causation, commit legal error when it granted summary judgment against all claims that required causation, and abuse its discretion when it denied reconsideration? *See Docs. 144; 189.*

2. Did the District Court err when it excluded Ms. Williams's valuation testimony and granted summary judgment against her remaining statutory claim for damages to real property? *See Doc. 191.*

## **STATEMENT OF THE CASE**

This appeal arises from a \$63 million toxic tort and property damage lawsuit. *See Doc. 174 at 4.* Most of central Florida, including Hillsborough County, lies in an area called the Valley of Bones. *Doc. 89.4 at 51.* It is one of the richest sources of phosphate rock in the world. *Doc. 89.4 at 51.* As a result, Defendant-Appellee Mosaic Fertilizer, LLC, a fertilizer company that mines and processes phosphate rock for use in fertilizer, has mining and processing facilities located throughout the area. *Doc. 24 at 4-7.* These facilities have related stockpiles of toxic waste, called phosphogypsum stacks. *Doc. 24 at 6.*

The phosphogypsum stacks stand over 20 stories high and are over 100 football fields wide. Doc. 147 at 10. At the top is slush water and waste that results from processing the phosphate rock. *See* Doc. 24 at 6. During processing, the rock, which contains lead, cadmium, chromium, uranium, and other toxics, is pulverized and washed with sulfuric acid and ammonia to create the fertilizer. *See* Doc. 24 at 6.

Plaintiff-Appellant Rhonda Williams is a lifelong resident of Progress Village, a neighborhood located immediately adjacent to Mosaic's Riverview facility and phosphogypsum waste stacks. Doc. 24 at 2, 25. Ms. Williams claims Mosaic's Riverview facility has two sources of toxic airborne emissions: the processing plant itself, which releases sulfur dioxide ("SO<sub>2</sub>"); and the phosphogypsum waste stacks, which release heavy metals, particulates, and radioactive isotopes known as hazardous air pollutants ("HAPs"). Doc. 24 at 2. Ms. Williams claims these airborne emissions polluted her home and neighborhood, which harmed her health and devalued her property. Doc. 24 at 32-47.

Based on rulings that excluded Ms. Williams's toxicologist and her own property-damage testimony and evidence, the District Court granted summary judgment against all her claims. Docs. 144; 189; 191.

### *Course Of Proceedings*

Ms. Williams filed a toxic tort lawsuit against Mosaic in Florida state court. Doc. 1.1. Mosaic removed it to federal court based on diversity jurisdiction. Doc. 1.

Thereafter, Ms. Williams filed a second amended complaint that alleged six counts: (1) negligence; (2) gross negligence; (3) strict liability ultrahazardous activity; (4) strict liability failure to warn; (5) strict statutory liability for violation of the Water Quality Assurance Act of 1983, Fla. Stat. § 376.302 *et seq.*; and (6) medical monitoring and environmental testing. Doc. 24. Mosaic filed an amended answer and affirmative defenses (Doc. 77), to which Ms. Williams replied (Doc. 36).

Mosaic moved to exclude Dr. Franklin Mink, Ms. Williams's expert toxicologist, who proposed to opine about Mosaic's general and specific causation of her health injuries. Doc. 89. Ms. Williams opposed. Doc. 103. Anticipating Dr. Mink's exclusion, Mosaic also moved for summary judgment. Doc. 92. Again, Ms. Williams opposed. Doc. 102. Mosaic replied. Doc. 117.

The District Court granted Mosaic's motion to exclude Dr. Mink in its entirety and partially granted Mosaic's motion for summary judg-

ment. Doc. 144. It excluded Dr. Mink because it concluded his methodologies for determining general and specific causation were unreliable per *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993). Doc. 144 at 5-34. In light of Dr. Mink's exclusion, the District Court also granted summary judgment against all claims that required causation as an element (*i.e.*, negligence, gross negligence, strict liability ultrahazardous activity, and medical monitoring and environmental testing). Doc. 144 at 34-36. Additionally, the District Court granted summary judgment against Ms. Williams's claim for strict liability failure to warn (which did not require causation) because it ruled Mosaic's emissions were not products placed in a stream of commerce. Doc. 144 at 36-38.

But the District Court denied summary judgment against Ms. Williams's remaining claim (which also did not require causation) for damage to her real property under strict statutory liability for violation of the Water Quality Assurance Act of 1983, Fla. Stat. § 376.302 *et seq.* Doc. 144 at 38-40. Based on Ms. Williams's testimony that her obligation to disclose the toxins to potential buyers would render her home unsellable, the District Court concluded there was a genuine dispute of material fact for trial. Doc. 144 at 39-40.

Ms. Williams moved for reconsideration (Doc. 147), relying on *McClain v. Metabolife Int'l, Inc.*, 401 F.3d 1233 (11th Cir. 2005), and *Seamon v. Remington Arms Co., LLC (In re Estate of Seamon)*, 813 F.3d 983 (11th Cir. 2016). The motion attached supplemental affidavits from Dr. Mink and Mr. Ungers. Docs. 147.1; 147.2. Mosaic opposed. Doc. 156. It was denied. Doc. 189.

A month before trial, Mosaic moved in limine to exclude Ms. Williams's testimony and evidence regarding property damages. Doc. 171. Ms. Williams opposed. Doc. 181. A week later, Mosaic filed a trial brief arguing that if the District Court granted the motion in limine and excluded Ms. Williams's testimony and evidence, it should reconsider its denial of summary judgment on Ms. Williams's property claim. Doc. 174 at 7-9.

The District Court granted the motion in limine (Doc. 191 at 1-6), reconsidered its denial of summary judgment (Doc. 191 at 6-8), and entered final judgment in Mosaic's favor (Docs. 192; 193). This appeal followed. Doc. 197.

*Statement Of Facts*

**A. Dr. Franklin Mink's Toxicology Opinions**

**1. The Expert Report**

Dr. Franklin L. Mink, Ph.D., was a toxicologist with 38 years' professional experience. Doc. 103.1 at 1. Dr. Mink obtained three advanced degrees from the University of Cincinnati: a B.S. in biology and a minor in chemistry (1979); an M.S. in environmental science and engineering (1980); and a Ph.D. in environmental toxicology (1986). Doc. 103.1 at 28.

Dr. Mink had extensive experience as a researcher and a testifying expert. He taught toxicology courses at several major research universities, including the University of Kentucky, the University of Louisville, and the University of Cincinnati. Doc. 103.1 at 33. He published numerous peer-reviewed articles in toxicology journals. Doc. 103.1 at 33-35. He obtained numerous patents related to his toxicology research. Doc. 103.1 at 35. He was a member of numerous toxicology societies and organizations, such as the American College of Toxicology, the American Chemical Society, the American Board of Toxicology, the National Environmental Health Association, and the Society for Risk Analysis, among others. Doc. 103.1 at 32. He testified as an expert

in dozens of cases. Doc. 103.1 at 38-48. Until this case, no court had ever excluded his testimony. Doc. 103.9 at 228-229. In short, even the District Court agreed Dr. Mink was an “experienced toxicologist with impressive credentials.” Doc. 144 at 33.

To a reasonable degree of scientific certainty, Dr. Mink offered three preliminary opinions:

1) Rhonda Williams has been exposed to significant quantities of regulated pollutants and hazardous materials from both direct and fugitive sources as a result of Mosaic’s operations including phosphogypsum mining, processing, storage, transportation and waste handling operations over her lifetime residence in Pro[gress] Village, Florida primarily through inhalation and dermal exposures.

2) Rhonda Williams has developed significant adverse health effects as a result of these hazardous exposures including G6PD associated pulmonary hypertension and obstructive pulmonary disease resulting in a diminished quality of life and potentially reduced life span.

3) Rhonda Williams has developed significant adverse health effects as a result of secondary effects from therapeutic agents used to treat her diseases/symptoms resulting from these exposures further diminishing her quality of life and threatening her long-term physical and mental wellbeing.

Doc. 103.1 at 3. Dr. Mink based these opinions on his literature review, data collected by various researchers and agencies, Ms. Williams’s medical records, regulatory standards, and so forth. Doc. 103.1 at 4-6.

At the outset, Dr. Mink pointedly noted Ms. Williams was more susceptible to hazardous air pollutants because she suffered from G6PD deficiency, a genetic disorder in which red blood cells break down when the body is exposed to certain substances or infections. Doc. 103.1 at 8-12. In that regard, Dr. Mink noted that sampling of nearby areas by Les Ungers, an industrial hygienist, disclosed hazardous air pollutants:

Sampling of churches surrounding the Riverview, Florida area by Unger[s] and Associates in 2014, supported by the Hillsborough County Florida EPC and USEPA data (2000-2013), indicate the presence of heavy metals, air toxics, radionuclides, sulfur oxides and other hazardous air pollutants consistent with phosphogypsum mining/handling operations at levels significantly above Florida background levels (Chen, 1999). These air pollutants are found in the soil profile and increase with the age of the structure sampled indicating a long-term deposition of fine particulates and aerosols primarily from the uncontrolled stacks, handling and transportation of phosphogypsum at the Mosaic Fertilizer facility. The chemical fingerprint of these constituents sampled in nearby church attics with passive ventilation and Ms. Williams's home are similar to their adjacent soil profiles indicating long-term indoor air exposures of deposited phosphogypsum related chemicals, particulates and radionuclides hazardous to not only Ms. Williams but to the exposed communities as a whole.

Doc. 103.1 at 11. Indeed, "Many of these known ph[osph]ogypsum associated contaminants—including aluminum (AL), arsenic (AS), copper (Cu), boron (B), chromium (Cr), iron (Fe), calcium (Ca), lead (Pb), phos-

phorus (P), potassium (K), silica (Si), sodium (Na) and zinc (Zn)—were found at elevated levels in the immediate vicinity of Ms. Williams home.” Doc. 103.1 at 14-15.

Given Ms. Williams’s G6PD deficiency, her lifetime of exposure to Mosaic’s pollution generally and specifically caused her health to suffer:

Given the toxic nature, dose and exposure of these contaminants by Ms. Williams over a lifetime of exposure has exacerbated her G6PD symptoms including hemolytic anemia and associated pulmonary hypertension significantly increasing her probability of deep lung tissue alteration/scarring reflected by her reduced lung function test. In addition the medications (including respiratory nebulizers) she has required since her childhood to reduce allergy, asthma and respiratory problems directly associated with the effects consistent with contaminants found at her residence and consistent with ph[osph]ogypsum production operations upwind of her lifetime residence have further increased the probability of deeper lung tissue (bronchial/alveolar) scarring by direct contact, increased immune responses and long-term pulmonary hypertension effects.

Doc. 103.1 at 15.

## **2. The Deposition**

Mosaic deposed Dr. Mink at length. Doc. 103.9 at 1-250. He testified he performed the “four basic elements of risk assessment,” which were “a hazard identification,” “an exposure assessment,” “a dose response assessment,” and “a risk characterization.” Doc. 103.9 at 47. In-

deed, Dr. Mink had “helped formulate them” while he was employed by the EPA. Doc. 103.9 at 47.

**a. Hazard Identification**

To perform his hazard identification, Dr. Mink reviewed the literature, including IRIS and Li, to determine the constituents of concern from the processing plant’s smokestacks (*i.e.*, SO<sub>2</sub>) and the phosphogypsum waste stacks (*e.g.*, “arsenic, cadmium, chromium, lead, manganese, nickel, aluminum, phosphorus, zinc, polonium, radium, thorium, uranium and others” (Doc. 103.1 at 7)). Doc. 103.9 at 47-48.

**b. Exposure Assessment**

To perform his exposure assessment, Dr. Mink reviewed air monitoring data, Mr. Ungers’s soil and attic data, and Mosaic’s toxic release inventory. Doc. 103.9 at 50-51.

**c. Dose-Response Assessment**

To perform his dose-response assessment, Dr. Mink relied on data collected through Hillsborough County monitoring, EPA monitoring, Mr. Ungers’s soil and attic data,<sup>1</sup> the EPA’s health-based criteria set

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<sup>1</sup> Mosaic moved to exclude Mr. Ungers’s testimony, but the District Court found it “unnecessary” to decide the issue. Doc. 144 at 8 n.1.

forth in IRIS,<sup>2</sup> Hsing-Wang Li *et al.*, *Impacts of Hazardous Air Pollutants Emitted from Phosphate Fertilizer Production Plants on their Ambient Concentration Levels in the Tampa Bay Area*, 8 AIR QUAL. ATMOS. & HEALTH 453 (2015) (Doc. 103.3), and Jayajit Chakraborty, *Cancer Risk from Exposure to Hazardous Air Pollutants: Spatial and Social Inequities in Tampa Bay, Florida*, 22 INT'L J. ENVTL. HEALTH RESEARCH 165 (2012) (Doc. 103.4). Doc. 103.9 at 24-25.

Dr. Mink did not perform independent calculations. Doc. 103.9 at 24, 143-146. Indeed, he testified there was “no need” to independently calculate Ms. Williams’s doses “[b]ecause they’re already done” by IRIS, the EPA, and Li. Doc. 103.9 at 25-26, 62-63. He made this decision “[i]ntentionally and thoughtfully.” Doc. 103.9 at 146.

In that regard, Dr. Mink explained nobody had (and nobody could) make dose-response calculations as to Ms. Williams herself. Doc. 103.9 at 26. Nevertheless, “[t]hose dose response curves are well known for the general population and sensitive subpopulation, such as children, ... pregnant mothers, nursing mothers, et cetera.” Doc. 103.9 at 25.

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<sup>2</sup> The EPA’s Integrated Risk Information System (“IRIS”) exists to identify and characterize the health hazards of chemicals found in the environment. See EPA, *Integrated Risk Information System*, <https://www.epa.gov/iris>.

Dr. Mink acknowledged it was not possible for anyone to quantify how much more sensitive Ms. Williams's G6PD deficiency made her to Mosaic's pollutants. Doc. 103.9 at 27-29. But because "her general population already has doses calculated" by IRIS, and she was "a more sensitive part" of the general population, "by inference we know—we don't think, we know that she's that—she would be impacted to a greater degree." Doc. 103.9 at 32.

#### **d. Risk Characterization**

To perform a risk characterization, Dr. Mink "looked at the data that were available in toto," including Li, Ungers, and the location of Ms. Williams's home inside the error margin for the non-attainment zone, and compared it to Ms. Williams's health problems.<sup>3</sup> Doc. 103.9 at 63-66. Applying the Bradford Hill criteria, Dr. Mink explained, "You would expect the health effects that she has. And she developed exactly the health effects that are in the literature. So that was our risk characterization in a nutshell...." Doc. 103.9 at 65, 141, 203-204. Other than

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<sup>3</sup> Dr. Mink pointed out that Ms. Williams "resides a little less than 2,000 feet outside" the non-attainment zone, but still "lives, ... went to school, played, drives through, travels in the non-attainment zone." Doc. 103.9 at 66; *see also* Doc. 103.9 at 70 ("SO<sub>2</sub> doesn't know it needs to stop at the border of the non-attainment zone. It's a model. It's an estimate and has an error rate and she's within that error rate.").

SO<sub>2</sub>, Dr. Mink did not draw a causal linkage between specific constituents and specific health maladies; instead, it was a “cumulative” risk and effect. Doc. 103.9 at 156.

When asked hypothetically whether exposure to a constituent of concern below a health-based level could cause injury, Dr. Mink responded:

Well, what little I know from what you told me, my off-the-cuff answer based on my experiences, it by itself by definition would not cause an adverse effect, but it may contribute to a cumulative adverse effect if it has the same target organ effect. I think I testified to that earlier. And I will caveat that to say there are some very sensitive subpopulations that could be affected.

Doc. 103.9 at 198.

**e. Alternative Sources And Causes**

Dr. Mink ruled out alternative sources for the pollution by relying on Li, Chakraborty, air monitoring, and Mr. Ungers’s fingerprinting soil and attic study. Doc. 103.9 at 146-150. In particular, Dr. Mink explained:

Now, how much—the fingerprint is there. We know it’s there. How much came from other sources, well, that’s why the ratios aren’t exactly the same, but if you look at those ratios and the correlations, and you look at the air monitoring data, and you look at the published literature, and you take all those things together as Bradford Hill asks you to do, the

strength of association, the repeatability, the experimental evidence tells you that altogether, and EPA agrees, and the press publicly, the State of Florida agrees, the majority of air pollution in that area is from Mosaic's Riverview plant. So it's greater than 50 percent. How much greater than 50 percent, I have absolutely no idea.

Doc. 103.9 at 149.

Dr. Mink also ruled out alternative causes, such as smoking, illicit drug use, family history, and industrial hygiene. Doc. 103.9 at 158-161, 181-183.

## **B. The *Daubert* Rulings**

The District Court excluded Dr. Mink because it concluded his methodology as to general and specific causation was unreliable. Doc. 144 at 5-34.

### **1. General Causation**

At the outset, the District Court concluded it could not assume general causation because, unlike smoking and lung cancer or asbestos and pleural mesothelioma, it was not generally accepted in the medical community that Mosaic's pollutants could cause Ms. Williams's ailments at any dose. Doc. 144 at 9-10. Performing that analysis, the District Court ruled Dr. Mink's methodology for general causation was unreliable because it did not (1) establish a dose-response relationship or

(2) consider the background risk of Ms. Williams's health problems. Doc. 144 at 10-23.

**a. Dose-Response Relationship**

The District Court thought Dr. Mink failed to establish the dose-response relationship for two reasons: (1) he misplaced his reliance on regulatory standards; and (2) he misplaced his reliance on other scientists' studies. Doc. 144 at 13-22.

**i. Reliance Upon Regulatory Standards**

First, relying on *McClain v. Metabolife Int'l, Inc.*, 401 F.3d 1233, 1249 (11th Cir. 2005), the District Court explained, "toxicologists cannot rely primarily upon government regulatory standards for the purpose of determining dose." Doc. 144 at 14. Accordingly, it found Dr. Mink misplaced his reliance on the National Ambient Air Quality Standards ("NAAQS") and the EPA's health-based criteria because he could not explain precisely how much more sensitive Ms. Williams's GP6D deficiency made her. Doc. 144 at 16-18. In short, the District Court ruled Dr. Mink did not establish "a sufficient scientific basis for using USEPA standards as the basis for establishing a general causation dose for exposure to sulfur dioxide or any of the other constituents." Doc. 144 at

18. Instead, the fact that the EPA had “established 75 ppb as a ‘safe’ level of exposure to sulfur dioxide for the public-at-large does not mean that any amount exceeding that standard is necessarily unsafe or toxic or ... was in fact unsafe or toxic to Plaintiff.” Doc. 144 at 18.

## ii. Reliance Upon Other Studies

Second, the District Court ruled Dr. Mink misplaced his reliance on the Li study (Doc. 103.3)<sup>4</sup> and the Chakraborty study (Doc. 103.4)<sup>5</sup> because it believed they contradicted his conclusions. Doc. 144 at 18-22.

The District Court noted that Li measured hazardous air pollutants at six locations downwind of four different fertilizer plants, includ-

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<sup>4</sup> The Li study had concluded, “phosphate fertilizer plants make minor contributions to the ambient levels of HAP metals compared to other sources for *the general population in the Tampa Bay area*,” which it defined to encompass Tampa, Lakeland, Zephyrhills, and Plant City. Doc. 103.3 at 2 (emphasis added). But it did not measure ambient levels of HAP metals in Ms. Williams’s home or neighborhood in Riverview. See Doc. 103.3 at 2-16.

<sup>5</sup> The Chakraborty study focused on the “Tampa-St. Petersburg-Clearwater Metropolitan Statistical Area (MSA), also known as the Tampa Bay MSA, which occupies approximately 6616 km<sup>2</sup> on Florida’s west central coast.” Doc. 103.4 at 4. It also focused “exclusively on cancer risk” (from which Ms. Williams never claimed to have suffered), not other health risks. Doc. 103.4 at 6. The study’s findings “clearly demonstrate that potential lifetime cancer risks from all emission source categories are distributed inequitably with respect to race, ethnicity and home ownership, after controlling for other relevant explanatory factors and the presence of spatial dependence in the data.” Doc. 103.4 at 15.

ing Mosaic's plant. Doc. 144 at 18. At those locations, which were 3.5 to 15 miles away from the stacks, the concentrations were less than EPA and European regulatory standards. Doc. 144 at 18-19. Accordingly, Li concluded his "results suggest the HAPs emission from phosphate fertilizer plants do not impose an elevated cancer risk or health effects to the general population." Doc. 103.3 at 13. In contrast,

Dr. Mink testified that he relied upon the dose calculations included in Li's Report and he believed Li's study demonstrated that particles from the stacks at the Riverview plant can travel by air to Plaintiff's house and neighborhood. Ultimately, however, Li concluded that the concentrations of HAPs detected in the study were below regulatory levels and did not pose health risks to the general population. These findings undermine Dr. Mink's conclusion that the Mosaic emissions exposed Plaintiff to unsafe levels of chemicals.

Doc. 144 at 19.

For similar reasons, the District Court also ruled Dr. Mink misplaced his reliance on the Chakraborty study (Doc. 103.4). Doc. 144 at 19-22. "His study determined that densely populated tracts containing higher numbers of minorities were most likely to be exposed to cancer risk from all source categories, but notably, industrial facilities—presumably the category in which the Riverview plant would be

placed—contributed the least to cancer risks of the four sources.” Doc. 144 at 20.

The District Court did not explain how two studies that considered the effect of pollutants on the general population of the entire Tampa Bay area, which covered thousands of square miles, could undermine Dr. Mink’s opinion regarding the effect of pollutants on Ms. Williams as she lived in and near her home in Progress Village.

**b. Background Risk Of Disease**

The District Court also considered Dr. Mink’s general causation methodology unreliable because he supposedly failed to consider the background risk of Ms. Williams’s ailments. Doc. 144 at 22-23. The District Court drew that conclusion from Dr. Mink’s deposition answers that he did not at that moment “recall specifically” the exact prevalence in the general population of pulmonary hypertension or obstructive pulmonary disease. Doc. 144 at 22-23. Instead, Dr. Mink responded it was “not large” for pulmonary hypertension and “significant” for obstructive pulmonary disease. Doc. 144 at 23. The District Court never explained how those answers demonstrated Dr. Mink’s “[i]gnorance of the background risk for an illness or disease.” Doc. 144 at 23.

## 2. Specific Causation

Although the District Court deemed it “irrelevant” in light of its general causation ruling, it also rejected Dr. Mink’s specific causation opinions as based on unreliable methodology. Doc. 144 at 23-34.

### a. Failure To Calculate Dose

The District Court reiterated its belief that Dr. Mink’s methodology was unreliable because he relied on regulatory standards and other data rather than performing his own dose-response calculations. Doc. 144 at 24-25. For example, the District Court pointed out Dr. Mink’s admission that he did not personally calculate the amount of SO<sub>2</sub> to which Ms. Williams was exposed, even though he explained “it can’t be done” and that he relied on “inference” from other data instead. Doc. 144 at 25-26. The District Court did not explain how it would be ethical to perform human dose-response testing with these pollutants.

For instance, the District Court noted that Dr. Mink inferred Ms. Williams had “been exposed to anywhere from 75 ppb to 140 ppb of sulfur dioxide based solely on the proximity of her home to the Riverview plant and the fact that the plant historically has exceeded the EPA’s ambient air quality standards.” Doc. 144 at 26. But the District Court

rejected that inference as unreasonable because it distinguished concentration from dose. Doc. 144 at 26. The District Court did not, however, note that the NAAQS had already taken concentration and dose into account. Instead, it abruptly ruled Dr. Mink had “employed no methodology in determining Plaintiff’s dose,” so his methodology was “wholly speculative and unreliable.” Doc. 144 at 28.

**b. Failure To Consider Alternative Causes**

The District Court also believed Dr. Mink failed to rule out alternative causes of Ms. Williams’s ailments by performing a differential etiology. Doc. 144 at 28-32 & n.7. In doing so, the District Court acknowledged Dr. Mink’s testimony that he did consider alternative causes. Doc. 144 at 28.

For instance, for airway remodeling, Dr. Mink considered the alternative causes of “trauma (such as almost drowning), chemical events, fine particulates, toxic chemicals, dust, radioactivity, asthma, bronchitis, chronic obstructive pulmonary disease (COPD), and certain medications.” Doc. 144 at 28. For asthma, Dr. Mink considered “pollen, ragweed, toxic chemicals, obesity, allergies, secondhand smoke, and family history.” Doc. 144 at 28. For pulmonary hypertension, Dr. Mink consid-

ered several risk factors, “including G6PD, asthma, chronic bronchitis, diabetes, and weight gain.” Doc. 144 at 28. Dr. Mink was also aware of Ms. Williams family history of asthma, hypertension, and exposure to second-hand smoke. Doc. 144 at 28.

For all these alternative causes, Dr. Mink testified he had applied the Bradford Hill criteria for causation (Doc. 103.9 at 182-183), which, among other things, required him to assess “specificity,” *i.e.*, “whether there are alternative causes of a condition” (Doc. 144 at 29 n.8). Nevertheless, the District Court concluded Dr. Mink had not performed a differential etiology because, despite testifying he “eliminated causes based on their probability” (Doc. 103.9 at 183), his report did not quantify those probabilities (Doc. 144 at 29).

In so ruling, the District Court did not acknowledge precedent holding such quantification was unnecessary to provide a reliable basis for concluding a substance was a substantial factor in developing a plaintiff’s injury. Instead, the District Court relied on two district court orders that excluded experts who, unlike Dr. Mink, completely failed to consider alternative causes. Doc. 144 at 30-31 (citing *Haller v. Astra-Zeneca Pharms., LP*, 598 F. Supp. 2d 1271, 1278, 1281, 1295 (M.D. Fla.

2009), and *Guinn v. AstraZeneca Pharms., LP*, 598 F. Supp. 2d 1239, 1247 (M.D. Fla. 2009)).

At any rate, from the District Court’s perspective, Dr. Mink “d[id] not know Plaintiff’s actual level of exposure to any of the constituents from Mosaic’s emissions,” “ha[d] not determined which constituents contributed to each of her illnesses,” and “ha[d] not ruled out any pre-existing conditions or other risk factors as possible causes of her illnesses.” Doc. 144 at 32. Accordingly, it concluded the methodology for Dr. Mink’s specific causation opinions were also unreliable. Doc. 144 at 33.

### **3. Reconsideration**

The District Court refused to reconsider its *Daubert* order, ruling it correctly applied *McClain*, but ignoring *Seamon*. Doc. 189 at 2-3.

#### **C. The Property-Damage Rulings**

In an interrogatory response, Ms. Williams had asserted her property “has no value as any sale would require the disclosure of the toxins found in and around the home and the neighborhood.” Doc. 125 at 372. Instead, she did not “believe that a rational, educated person, who had knowledge of the presence of the toxic emissions and their long-term health effects would want to acquire residential property in her neigh-

borhood.” Doc. 125 at 372. At deposition, Ms. Williams reiterated that she stood by her interrogatory response. Doc. 125 at 372-373.

Mosaic moved in limine to exclude Ms. Williams’s property damage testimony and evidence for three reasons. Doc. 171 at 2-5. First, Mosaic contended it was irrelevant because “undocumented damages are not recoverable under chapter 376.” Doc. 171 at 2-3. Second, Mosaic argued it constituted improper lay opinion because it involved elements of exposure science, toxicology, and real estate appraisal. Doc. 171 at 3-4. Third, Mosaic asserted its probative value was substantially outweighed by its danger of unfair prejudice. Doc. 171 at 2-5.

As a final backstop, Mosaic assured the District Court that “[t]he rule that an ‘owner of property is generally qualified to testify as to the value of his own property’ does not affect this analysis.” Doc. 171 at 5 (quoting *Levinson v. Landsafe Appraisal Servs., Inc.*, 558 Fed. App’x 942, 945-46 (11th Cir. 2014)). Instead, “the presumption that an owner is sufficiently familiar with property to give an admissible opinion as to its value is a fragile one,” and it does not apply where the opinion testimony “rests on unsupported speculation.” Doc. 171 at 5 (citing *Levinson*, 558 Fed. App’x at 945-46).

Ms. Williams opposed. Doc. 181. “In a nutshell, Mosaic’s argument is that Ms. Williams’ property value testimony is based on something other than her familiarity with the property.” Doc. 181 at 17. For instance, Ms. Williams agreed with Mosaic’s assertion that she could not testify solely based on speculative factors. Doc. 181 at 18. But she disagreed that her personal familiarity with her home of almost five decades constituted such speculation. *See* Doc. 181 at 18. Additionally, Ms. Williams explained Mosaic was misplacing its reliance on eminent domain law instead of contamination cases. Doc. 181 at 15-16.

Meanwhile, Mosaic had filed a trial brief that asked the District Court to reconsider its denial of summary judgment on Ms. Williams’ property claim. Doc. 174 at 7-9. It suggested the District Court could either grant summary judgment outright or issue an order to show cause why summary judgment should not be granted. Doc. 174 at 7-9.

Five days before trial, the District Court granted the motion in limine and excluded the property testimony and evidence. Doc. 191 at 1-6. In pertinent part, the District Court explained:

The Court acknowledges that “[a] discovery of contamination can stigmatize property.” But, “[a]n opinion as to a decrease in value cannot be a mere surmise that because property is contaminated, it logically follows that the value

of the property is decreased. *There must be a factual basis through evidence of sales of comparable contaminated property upon which to base a determination that contamination has decreased the value of the property.*” Here, other than her personal “belief,” Plaintiff provides no basis for her calculation of stigma damages. Plaintiff admittedly has never attempted to sell her home and has never interviewed any real estate agents or brokers about a potential sale. (Dkt. 102-2 at 72) Thus, her belief that she would be unable to find a willing buyer is based on mere speculation. Moreover, Plaintiff’s testimony as to recent sales in her neighborhood, including one on her block, negates her assertion that her home and homes in her neighborhood are unsellable. Further, neither the Hillsborough County Property Appraiser’s valuation of Plaintiff’s home, which is currently \$49,896, (Dkt. 164 at 4), nor the recent incremental increases in the Property Appraiser’s valuation in recent years support a zero market value assessment of stigma damages. Notably, Plaintiff does not contend that the difference in the Hillsborough County Property Appraiser’s valuation of Plaintiff’s home and the approximate \$90,000 value at which homes in her neighborhood have recently allegedly sold constitute the diminution in value of her home. Instead, she maintains her lay opinion that her home value is zero. Plaintiff has otherwise failed to assert any personal knowledge of the effect of the alleged contamination on her property’s market value. As such, Defendant’s Motion *in Limine* to Exclude Plaintiff’s Stigma Damages must be GRANTED.

Doc. 191 at 5-6 (quoting *Finkelstein v. Dep’t of Transp.*, 656 So. 2d 921, 925 (Fla. 1995) (emphasis added)). Although it considered stigma, the District Court did not consider remediation or replacement for permanent damages. It then proceeded to grant summary judgment as to the stigma claim. Doc. 191 at 6-8.

### *Standard Of Review*

1. Expert exclusion and the denial of reconsideration are reviewed for abuse of discretion. *United States v. Frazier*, 387 F.3d 1244, 1258 (11th Cir. 2004) (en banc) (expert); *Arthur v. Thomas*, 739 F.3d 611, 628 (11th Cir. 2014) (reconsideration). “A district court abuses its discretion if it applies an incorrect legal standard, follows improper procedures in making the determination,” “makes findings of fact that are clearly erroneous,” or “appl[ies] the law in an unreasonable or incorrect manner.” *Klay v. United Healthgroup, Inc.*, 376 F.3d 1092, 1096 (11th Cir. 2004). Summary judgment is reviewed de novo. *Melton v. Abston*, 841 F.3d 1207, 1219 (11th Cir. 2016).

2. Although the granting of a motion in limine is normally reviewed for abuse of discretion, conclusions of law (such as the categorical inadmissibility of a type of testimony) are reviewed de novo. *United States v. Thompson*, 25 F.3d 1558, 1563 (11th Cir. 1994); see also *United States v. Barner*, 441 F.3d 1310, 1315 n.5 (11th Cir. 2006) (“even under an abuse of discretion standard, errors of law receive no deference”). Summary judgment is reviewed de novo. *Melton*, 841 F.3d at 1219.

## SUMMARY OF THE ARGUMENT

1. The District Court abused its discretion when it granted a *Daubert* motion to exclude a toxicologist who would have opined about general and specific causation and denied reconsideration. The toxicologist's methodology for assessing general and specific causation was reliable because he properly relied on regulatory standards and studies to calculate dose, considered the background prevalence of Ms. Williams's diseases, and eliminated alternative causes. Given the toxicologist's mistaken exclusion, the District Court committed legal error when it granted summary judgment against all claims requiring causation.

2. The District Court abused its discretion when it excluded the property owner's property-damage evidence and testimony and erred when it granted summary judgment against the remaining statutory claim for property damage. It was a legal error to which no deference is owed to exclude the property-damage evidence and testimony because the District Court misinterpreted Florida law. At minimum, this Court should certify the question to the Supreme Court of Florida. Given Ms. Williams's mistaken exclusion, the District Court erred when it granted summary judgment against her property-damage claim.

## ARGUMENT AND CITATIONS OF AUTHORITY

### **I. THE DISTRICT COURT ABUSED ITS DISCRETION AND ERRED WHEN IT EXCLUDED DR. MINK'S CAUSATION OPINIONS, DENIED RECONSIDERATION, AND GRANTED SUMMARY JUDGMENT AGAINST ALL CLAIMS THAT REQUIRED CAUSATION**

The District Court abused its discretion when it granted a *Daubert* motion to exclude a toxicologist who would have opined about general and specific causation and denied reconsideration. Relatedly, it committed legal error when, based on the toxicologist's exclusion, it granted summary judgment against all claims that required causation.

#### **A. The *Daubert* Inquiry Requires District Courts To Perform A Gatekeeping Role**

In serving as a gatekeeper for expert testimony under Federal Rule of Evidence 702, district courts must “engage in a rigorous three-part inquiry” that considers whether:

(1) the expert is qualified to testify competently regarding the matters he intends to address; (2) the methodology by which the expert reaches his conclusions is sufficiently reliable as determined by the sort of inquiry mandated in *Daubert*; and (3) the testimony assists the trier of fact, through the application of scientific, technical, or specialized expertise, to understand the evidence or to determine a fact in issue.

*United States v. Frazier*, 387 F.3d 1244, 1260 (11th Cir. 2004) (en banc).

“While there is inevitably some overlap among the basic require-

ments—qualification, reliability, and helpfulness—they remain distinct concepts and the courts must take care not to conflate them.” *Id.* The burden of establishing these requirements rests on the proponent. *Id.* Put otherwise, district courts “must ‘make certain that an expert, whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field.’” *McClain v. Metabolife Int’l, Inc.*, 401 F.3d 1233, 1237 (11th Cir. 2005) (quoting *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 152 (1999)).

Here, there is no dispute Dr. Mink was highly qualified and his testimony would have been helpful to the jury; instead, the dispute concerns only whether his methodology was reliable.

**1. As Part Of That Gatekeeping Role, District Courts Must Assess The Reliability Of An Expert’s Methodology**

In assessing the reliability of an expert’s methodology, courts should consider four factors:

- (1) whether the expert’s methodology has been tested or is capable of being tested; (2) whether the theory or technique used by the expert has been subjected to peer review and publication; (3) whether there is a known or potential error rate of the methodology; and (4) whether the technique has been generally accepted in the relevant scientific community.

*Daubert v. Merrell Dow Pharms.*, 509 U.S. 579, 593-94 (1993). “These factors are not ‘a definitive checklist or test,’ and *Daubert* considerations are ‘applied in case-specific evidentiary circumstances.’” *Chapman v. P&G Distrib., LLC*, 766 F.3d 1296, 1305 (11th Cir. 2014) (citations omitted). Nevertheless, “[f]ailure to satisfy any of the four reliability factors recognized in *Daubert* is sufficient” for a district court to exercise its discretion “to preclude ... general causation experts from testifying at trial.” *Id.* at 1307.

In assessing reliability, courts must take care not to conflate methodology with conclusions. *See id.* at 1305. Although the *Daubert* inquiry is “flexible,” courts must focus “solely on principles and methodology, not on the conclusions that they generate.” *Id.* (citation omitted)). Nevertheless, “conclusions and methodology are not entirely distinct,” and courts may exclude “opinion evidence that is connected to existing data only by the *ipse dixit* of the expert.” *Id.* (citations omitted). That may happen when an “analytical gap between the data and the opinion proffered” is “simply too great.” *Id.* (citation omitted). Ultimately, however, “[v]igorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional

and appropriate means of attacking shaky but admissible evidence.”

*Daubert*, 509 U.S. at 596.

## 2. In Assessing A Methodology’s Reliability, There Are Two Categories Of Toxic Tort Cases

There are two categories of toxic tort cases. *Id.* at 1303. “The first category consists of ‘cases in which the medical community generally recognizes the toxicity of the [substance] at issue’ to ‘caus[e] the injury plaintiff alleges.’” *Id.* For example, “cigarette smoking causes lung cancer and heart disease, too much alcohol causes cirrhosis of the liver,” etc. *Id.* In such cases, “federal judges ‘need not undertake an extensive *Daubert* analysis on the general toxicity question,” *id.* (citation omitted), which simply is “whether a substance has the potential to cause the plaintiff’s injury,” *id.* at 1306. Instead, the sole focus “is ‘individual [*i.e.*, specific] causation to plaintiff,” that is, “was plaintiff exposed to the toxin, was plaintiff exposed to enough of the toxin to cause the alleged injury, and did the toxin in fact cause the injury?” *Id.* at 1303 n.6.

The second category contains cases “where the medical community generally does not recognize the substance in question as being toxic and having caused plaintiff’s alleged injury.” *Id.* at 1303. In contrast to category one, federal judges in category two cases “must assess the re-

liability of the expert's opinion on general, as well as specific, causation.” *Hendrix ex rel. G.P. v. Evenflo Co.*, 609 F.3d 1183, 1196 (11th Cir. 2010).<sup>6</sup>

### **3. This Court Routinely Reverses District Courts That Exclude Experts After Mischaracterizing Their Opinions Or Supporting Evidence**

This Court has routinely reversed district courts for excluding experts when they mischaracterize their opinions or supporting evidence.

For example, in *Seamon v. Remington Arms Co., LLC (In re Estate of Seamon)*, this Court vacated the exclusion of a gun expert because it concluded the district court mischaracterized his opinions and supporting evidence. 813 F.3d 983, 989-91 (11th Cir. 2016).<sup>7</sup> Similarly, in *Adams v. Lab. Corp. of Am.*, it was manifestly erroneous for the district court to exclude an expert on the basis that her opinion was “an *ipse dixit* assessment” when the record was to the contrary. 760 F.3d 1322, 1328-29 (11th Cir. 2014). In *United States v. Ala. Power Co.*, the exclusion of an expert was an abuse of discretion because the district

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<sup>6</sup> Ms. Williams has always contended SO<sub>2</sub> and other hazardous air pollutants were category one.

<sup>7</sup> *Seamon* was decided after Ms. Williams responded to Mosaic's *Daubert* motion. Doc. 103. Ms. Williams cited *Seamon* in her motion for reconsideration (Doc. 147), but the District Court never mentioned it (Doc. 189).

court mischaracterized the evidence supporting the expert's opinion. 730 F.3d 1278, 1284-88 (11th Cir. 2013). And in *United Fire & Cas. Co. v. Whirlpool Corp.*, the exclusion of a portion of an expert's testimony was an abuse of discretion because the district court had failed to consider the evidence supporting that opinion. 704 F.3d 1338, 1341-42 (11th Cir. 2013).

**B. Dr. Mink's General And Specific Causation Opinions Were Based On Reliable Methodologies**

Contrary to the District Court's *Daubert* and reconsideration orders (Docs. 144; 189), Dr. Mink's general and specific causation opinions were based on reliable methodologies.

**1. The District Court Mistook This For A Category Two Case When It Was Actually A Category One Case**

This was a category one case, not a category two case, because it is generally accepted that SO<sub>2</sub> and the other hazardous air pollutants cause acute respiratory hazards.

SO<sub>2</sub> has been shown to be an acute respiratory hazard since before World War II. 46 years ago, Congress agreed SO<sub>2</sub> exposure caused severe health issues when it listed SO<sub>2</sub> as one of only six air pollutants regulated specifically by name in the Clean Air Act, 42 U.S.C.

§ 7403(g)(1). The EPA has spent the subsequent five decades regulating SO<sub>2</sub> at the federal and state level with the help of the scientific and medical communities. *See* 42 U.S.C. § 7402(a)-(b), § 7403.

Additionally, the medical community was and always has been an integral part of assessing, mitigating and treating illness and injury from exposure to SO<sub>2</sub>. Medical textbooks going back decades have routinely discussed SO<sub>2</sub>'s respiratory morbidity. For example, W. RAYMOND PARKES, *OCCUPATIONAL LUNG DISORDERS* 629 (2d ed. 1994) discusses occupational case histories and cites to articles published in 1975 and 1987 regarding the dose response of individuals with and without asthma to SO<sub>2</sub> and impairment of lung function.

And references in medical textbooks are not the only way that SO<sub>2</sub> hazards are known in the medical community. The 24-member Clean Air Scientific Advisory Committee for Sulfur Oxides Primary NAAQS Review Panel is made up of both academic and medical experts. *See* EPA, *CASAC Oxides of Nitrogen Primary NAAQS Review Panel (2013-2016)*, [https://yosemite.epa.gov/sab/sabpeople.nsf/WebCommitteesSubcommittees/CASAC%20Oxides%20of%20Nitrogen%20Primary%20NAAQS%20Review%20Panel%20\(2013-2016\)](https://yosemite.epa.gov/sab/sabpeople.nsf/WebCommitteesSubcommittees/CASAC%20Oxides%20of%20Nitrogen%20Primary%20NAAQS%20Review%20Panel%20(2013-2016)).

Further, the hazardous air pollutants Dr. Mink identified, such as “arsenic, cadmium, chromium, lead, manganese, nickel, aluminum, phosphorus, zinc, polonium, radium, thorium, uranium and others” (Doc. 103.1 at 7), by definition are those that are known in both the scientific and medical community to cause cancer or serious health effects. EPA, *What Are Hazardous Air Pollutants?*, <https://www.epa.gov/haps/what-are-hazardous-air-pollutants>. Each hazardous air pollutant has an IRIS, which includes intensive external peer review by scientists and medical doctors. EPA, *Peer Review Drafts*, [https://cfpub.epa.gov/ncea/iris\\_drafts/pr\\_drafts.cfma](https://cfpub.epa.gov/ncea/iris_drafts/pr_drafts.cfma).

Last, Dr. Mink specifically testified that Ms. Williams’s asthma, and the aggravation other identified diseases, are known hazards of exposure to the SO<sub>2</sub>, particulates, and hazardous air pollutants. Doc. 103.9 at 10, 11, 13, 68, 69, 171, 202, 213, 214.

**2. It Was Appropriate For Dr. Mink To Rely On EPA Regulatory Standards In Calculating Dose**

Dr. Mink’s reliance on EPA regulatory standards in calculating dose was appropriate.

**a. The EPA's Regulatory Standards Are Different From The FDA's Standards Discussed In *McClain v. Metabolife Int'l, Inc.***

The EPA's regulatory standards are unlike the FDA's standards discussed in *McClain*.

*McClain* concerned a dietary supplement containing ephedrine that allegedly caused ischemic strokes and heart attacks. 401 F.3d at 1237. Unlike prescription or over-the-counter drugs, dietary supplements do not require the FDA's pre-market review or approval. U.S. Department of Health & Human Services, National Institutes of Health Information Page on Dietary Supplements, *What you need to know*, [https://ods.od.nih.gov/HealthInformation/DS\\_WhatYouNeedToKnow.aspx](https://ods.od.nih.gov/HealthInformation/DS_WhatYouNeedToKnow.aspx). Further, they are generally considered safe until proven otherwise, and the manufacturers are not required to submit evidence that their products are safe before marketing. *Id.*; see also American Cancer Society, *FDA Regulation of Drugs Verses Dietary Supplements*, <http://www.cancer.org/treatment/treatmentsandsideeffects/complementaryandalternativemedicine/dietarysupplements/dietary-supplements-fda-regulations>.

In addition, there are significant scientific and methodological differences between the two matters that make *McClain*'s holdings inapplicable. The science behind the EPA's health based air quality standards for SO<sub>2</sub> and constituents of concern are factually and scientifically different from the rejected draft FDA drug advisory at issue in *McClain*. It is the difference between a rejected draft regulation and a final rule health standard or chemical assessment summary.

The EPA identified sulfur oxides as a "criteria pollutant" pursuant to the original Clean Air Act of 1970 because sulfur oxides were known to have an adverse effect on the public health and welfare. *See* 42 U.S.C. § 1857c-3(a); 75 Fed. Reg. 35519 (June 22, 2010). The Clean Air Act's mission was to identify and eliminate the serious public health risks presented by emissions of criteria pollutants. In April 1971, the EPA reviewed the state of the science on the serious health risks of SO<sub>2</sub> and promulgated the original SO<sub>2</sub> National Ambient Air Quality Standard ("NAAQS"). 36 Fed. Reg. 8186 (April 30, 1971). In 2008, the EPA completed a multi-year process of reassessing that science with review by the medical community, the scientific community and the public. Based on incontrovertible evidence of serious health impacts, in 2010

the EPA lowered the SO<sub>2</sub> standard from 140 ppb to 75 ppb. 75 Fed. Reg. 35520 (June 22, 2010).

The EPA's 75 ppb NAAQS is based on a peer-reviewed, scientifically established determination of general causation that exposure to SO<sub>2</sub> above 75 ppb unequivocally causes respiratory morbidity. When the NAAQS for SO<sub>2</sub> was lowered in 2010, the EPA relied upon its own document, the Integrated Science Assessment for Sulfur Oxides – Health Criteria (“ISA”) as the foundation for the regulatory action. The ISA was written by the Clean Air Scientific Advisory Committee for Sulfur Oxides Primary NAAQS Review Panel, which consisted of more than 20 of the nation's most prominent scientific and medical experts on sulfur oxides. The ISA is “a concise review, synthesis, and evaluation of the most policy-relevant science, and communicates critical science judgments relevant to the NAAQS review. As such, the ISA forms the scientific foundation for the review of the primary (health-based) NAAQS for SOX.” Doc. 103.5 at 34.

The EPA relied on this critical document when it lowered the SO<sub>2</sub> standard in 2010: According to the EPA:

ISA concluded that there was sufficient evidence to infer a “causal relationship” between respiratory morbidity and

short-term (5-minutes to 24-hours) exposure to SO<sub>2</sub> (ISA, section 5.2). Importantly, we note that a “causal relationship” is the strongest finding the ISA can make. This conclusion was based on the consistency, coherence, and plausibility of findings observed in controlled human exposure studies of 5-10 minutes, epidemiologic studies mostly using 1-hour daily maximum and 24-hour average SO<sub>2</sub> concentrations, and animal toxicological studies using exposures of minutes to hours.

75 Fed. Reg. 35525 (June 22, 2010). Dr. Mink relied on this standard for establishing general causation for Ms. Williams’ exposures to SO<sub>2</sub>. *See* Doc. 103.9 at 82. He also relied on the underlying science the EPA used to promulgate the NAAQS. Doc. 103.9 at 71, 85. By relying on the NAAQS and its underlying science, Dr. Mink stood upon the shoulders of the EPA and its authoritative Clean Air Scientific Advisory Committee, which conclusively determined that SO<sub>2</sub> levels in excess of the NAAQS cause respiratory morbidity. This conclusion and its foundation address the District Court’s concern that Dr. Mink did not personally calculate an SO<sub>2</sub> dose-response curve for Ms. Williams.

Dr. Mink also relied on the ISA’s conclusion regarding epidemiological studies of past SO<sub>2</sub> exposure in populations like Ms. Williams in attainment areas that were designated nonattainment areas after the EPA lowered the NAAQS standard in 2010:

In [our review of] the epidemiologic studies, the SO<sub>2</sub>-related respiratory effects were consistently observed in areas where the maximum ambient 24-h avg SO<sub>2</sub> concentration was *below* the current [pre-2010 and post- 1971] 24-h avg NAAQS level of 0.14 ppm. Potentially susceptible and vulnerable subgroups include asthmatics, children, older adults, and individuals who spend a lot of time outdoors at increased exertion levels.

Doc. 103.5 at 208 (emphasis added) (citations omitted). These conclusions unequivocally supported Dr. Mink's opinion that Ms. Williams has been exposed to harmful levels of SO<sub>2</sub> from Mosaic for at least twenty (20) years, and likely over the course of her lifetime. Doc. 103.9 at 144. Furthermore, the ISA finding negates any inference that Hillsborough County's compliance with the pre-2010 NAAQS of 0.14 ppm is somehow evidence or even "proof" that Ms. Williams was not exposed to harmful levels of SO<sub>2</sub> before 2010 when the standard changed.

The ISA's conclusion was not fantasy. Monitoring data from southern Hillsborough County that Dr. Mink relied upon shows that when the 2010 NAAQS for SO<sub>2</sub> is applied retroactively to existing monitoring data, the monitor closest to Mosaic shows significant violations of the 75 ppb standard going back to 1999, the year monitoring began at that location. Doc. 103.6. These retroactive exceedences between 1999 and 2004 are approximately twice the health-based 75 ppb standard.

Further, according to the EPA and the FDEP, Mosaic is the primary source of the SO<sub>2</sub> in the nonattainment zone.

**b. Dr. Mink Appropriately Relied On The EPA's Regulatory Standards**

Dr. Mink's reliance on the EPA's 75 ppb SO<sub>2</sub> NAAQS to establish general causation was reasonable.

The SO<sub>2</sub> NAAQS was based on a thorough review of scientific and medical literature done by nationally prominent scientists, epidemiologists, and toxicologists, not Dr. Mink alone. The Clean Air Act Committee concluded that exposure to 75 ppb of SO<sub>2</sub> causes (not *may* cause or *can* cause, but actually *does* cause) respiratory morbidity in the general population including asthmatics like Ms. Williams. Dr. Mink's reliance on the SO<sub>2</sub> NAAQS established general causation within a reasonable degree of scientific certainty.

IRIS and the NAAQS ISAs are dose-response assessments based on human studies. EPA, *Sources of Chronic Dose-Response Information*, <https://www.epa.gov/fera/sources-chronic-dose-response-information>.

Neither *McClain* nor *Mitchell v. Gencorp, Inc.*, 165 F.3d 778, 781 (10th Cir. 1998), addressed either. SO<sub>2</sub> levels in excess of the 75 ppb standard causes respiratory morbidity. Doc. 103.5. The NAAQS 75 ppb standard

is a one-hour “average”; applying simple math, 75 ppb can result from a shorter five-minute concentration as high as 900 ppb, if the remainder of the hour is at zero.

This is significant because Hillsborough’s Environmental Protection Commission data shows that when the revised 2010 NAAQS standard was applied retroactively to historic monitor data, there were significantly more violations than previously reported. Ms. Williams has been exposed since birth at levels far greater than today’s regulated SO<sub>2</sub> levels. And unlike *Mitchell*, where there was no medical evidence of exposure, here exposure to SO<sub>2</sub> has been clinically evidenced by the elevated MCV with macrocytosis in Ms. Williams’ blood work reviewed from 1995-2015. Doc. 103.9 at 116.

Further, Ms. Williams’ home is yards from the current modeled boundary where 75 ppb standard is exceeded, and her daily life is in the boundary. Doc. 103.9 at 66. Her exposure is not guesswork, but supported by years of historical actual hard monitoring data of exceedences at or around her neighborhood. Per the EPA and FDEP, Mosaic’s smokestacks at the processing facility are the source of SO<sub>2</sub> in the non-attainment zone. Doc. 103.9 at 66, 70.

As to the hazardous air pollutants, the primary source in the Progress Village neighborhood are Mosaic's massive phosphogypsum waste stacks (which Mr. Ungers fingerprinted to Mosaic). Doc. 103.1 at 11.

Additionally, Dr. Mink unequivocally testified that he relied upon IRIS, and the Li Report for the hazardous air pollutants specific dose response curves. Doc. 103.9 at 63-66. And he did not neglect particulates or the hazardous air pollutants. *See* Doc. 103 at 12-18 (discussing Li study, IRIS, and chromium). Further, Dr. Mink relied on Mr. Ungers's site specific, actual data documenting hazardous air pollutants at Ms. Williams' home, that were consistent with metals found in phosphogypsum rock. Doc. 103 at 18. Here, the evidence of exposure is overwhelming when considering the ISAs, the IRISs, the years of historical monitor data, the medical records, and Mr. Ungers's findings.

In sum, the fact that Dr. Mink cannot pinpoint the specific level of exposure is not fatal to his opinion.<sup>8</sup>

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<sup>8</sup> *E.g.*, *Schultz v. Akzo Nobel Paints, LLC*, 721 F.3d 426, 433 (7th Cir. 2013) (“a reliable expert should consider alternative causes,” but need not “rule out every alternative cause”); *Durkin v. Bayer (In re Trasylol Prods. Liab. Litig.)*, 2010 U.S. Dist. LEXIS 145639, at \*28 (S.D. Fla. Nov. 22, 2010) (“expert ‘need not rule out all possible alternative causes’ for his differential diagnosis to be reliable”); *Louderback v. Orkin Exterminating Co.*, 26 F. Supp. 2d 1298, 1306-07 (D. Kan. 1998)

### 3. The Li And Chakraborty Studies Did Not Refute Or Undermine Dr. Mink's Opinions

Dr. Mink used (not inferred) facts from the Li and Chakraborty studies. The District Court took issue with Dr. Mink's reliance on the Li and Chakraborty studies, ruling his methodology was suspect because those studies contradicted his opinion. Doc. 144 at 21. There is a distinct difference between relying on another expert's study and using another expert's raw data included in a particular study, which is an appropriate methodology. *E.g., Eberli v. Cirrus Design Corp.*, 615 F. Supp. 2d 1357, 1364 (S.D. Fla. 2009) ("an expert's testimony may be formulated by the use of the facts, data and conclusions of other ex-

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(failure to consider threshold levels of exposure does not necessarily render expert's opinion unreliable where temporal relationship, scientific literature establishing an association between exposure and various symptoms, plaintiffs' medical records and history of disease, and exposure to or the presence of other disease-causing factors were all considered); *Bonner v. ISP Techs., Inc.*, 259 F.3d 924, 931 (8th Cir. 2001) ("it was not necessary that [the plaintiff's] experts quantify the amount of [the product] to which she was exposed in order to demonstrate that she was exposed to a toxic level of [the chemical]" as "[i]t is sufficient for a plaintiff to prove that she was exposed to a quantity of toxin that 'exceeded safe levels'"); *Westberry v. Gislaved Gummi AB*, 178 F.3d 257, 265 (4th Cir. 1999) (expert's diagnosis was admissible because it was "clearly ... not a case in which the plaintiff was unable to establish any substantial exposure to the allegedly defective product; "although the physician] did not point to [the plaintiff's] exposure to a specific level," "there was evidence of a substantial exposure").

perts”) (quoting *Ohio Env'tl. Dev. Ltd. P'ship v. Envirotest Sys. Corp.*, 478 F. Supp. 2d 963, 976 (N.D. Ohio 2007)).

Dr. Mink relied upon the IRIS database and the Li Report for specific dose response curves for the hazardous air pollutants as set forth in the IRIS database. Dr. Mink agreed with the methods Li used, the raw data and results he presented, and his risk calculation methods. Doc. 103.9 at 63-64. Dr. Mink disagreed, however, with Li's modeling interpretations, data set limitations, and conclusions based on biased, scored, and partial data sets; in particular, he noted Li's study was funded by The Phosphate Institute, which includes members of Mosaic's executive team on its advisory board. Doc. 103.9 at 64.

However, Dr. Mink's primary criticism of the Li HAPs study was its narrow focus on phosphate facilities' point source emissions (“smokestacks”) while ignoring the air emissions from Mosaic's 800-acre, 200-foot-high phosphogypsum waste piles, the primary source of hazardous air pollutants in Progress Village. Doc. 103.9 at 65. This is so because the purpose of the Li study was to demonstrate that air pollution emission controls on processing smokestacks (not the phosphogypsum waste stacks) in the phosphate manufacturing industry had reduced hazard-

ous air pollutant emissions from the operating plants. Doc. 147.1 at 10-12. Omitting an analysis of the air emissions from the larger, more concentrated phosphogypsum waste piles is the strategy that enabled Li to reach the conclusion he did: *i.e.*, that the phosphate industry's smokestacks do not contribute "significantly" to hazardous air pollution in the area. Doc. 147.1 at 10-12.

When taking into consideration the phosphogypsum waste stacks, Dr. Mink correctly interpreted Li's modeling results to conclude Mosaic was actually responsible for as much as 15-17% of the total hazardous air pollutant emissions in the study area. Doc. 147.1 at 10-12. This is key, because whereas the smokestacks are the primary source of SO<sub>2</sub>, the phosphogypsum waste stacks were a major recognized source of the particulate matter and the constituents of concern. Doc. 147.1 at 10-12.

Dr. Mink used the Chakraborty study in a similar way. Chakraborty studied alternative sources of hazardous air pollutants, including major voluntary mobile sources like automobiles, trains, and trucks. Figure 2 of his article shows that major and minor point sources combined in the Progress Village area are larger than on-road mobile sources (cars, trucks) and only exceeded by non-road mobile sources.

Doc. 103.4 at 11. Like the Li Study, the Chakraborty Study did not look at non-point source, non-road sources such as the Mosaic phosphogypsum waste piles in reaching its conclusions; nor is it at odds with Dr. Mink's conclusions.

**4. Dr. Mink Performed A Differential Etiology When He Considered Background Prevalence And Alternative Causes Of Ms. Williams's Illnesses And Applied Bradford Hill Principles**

“A reliable differential analysis ‘need not rule out all possible alternative causes,’ but ‘it must at least consider other factors that could have been the sole cause of the plaintiff's injury.’” *Chapman*, 766 F.3d at 1308-09 (citation omitted). That is precisely what Dr. Mink did.

When the District Court concluded Dr. Mink was “unaware” of the background risk of Ms. Williams' various diseases, it mischaracterized his deposition testimony and misplaced its reliance on *Chapman*. Doc. 144 at 22-23. Although Dr. Mink did not “specifically recall” those precise numbers at that moment in time, he testified the prevalence in the general population of pulmonary hypertension was “not large” and the prevalence of obstructive pulmonary disease was “significant.” Doc. 103.9 at 159. That testimony satisfied *Chapman's* requirements.

Moreover, Dr. Mink did perform a differential etiology. At deposition, he expressly testified he reviewed medical literature to determine probability of alternative causes and specifically applied Bradford Hill criteria (including strength of association and coherence) and was able to significantly minimize the potential contribution of other causes. Doc. 103.9 at 29, 89, 97-98, 181-183, 207, 212-215. The District Court never explained why it rejected Dr. Mink's Bradford Hill methodology as an illegitimate "alternative attempt" to eliminate alternative causes.

To the contrary, Dr. Mink's Bradford Hill methodology was proper. In *Seamon*, this Court held experts must merely "provide a reasonable explanation as to why the expert 'has concluded that [any alternative cause suggested by the defense] was not the sole cause' of the plaintiff's injury." 813 F.3d at 989 (citing *Guinn v. AstraZeneca Pharm. LP*, 602 F.3d 1245, 1253 (11th Cir.2010)). That is precisely what Dr. Mink did. First he identified co-morbidity based on Ms. Williams' medical records. Next, he investigated the medical literature to determine which co-morbidity factors were plausible alternative causes for Ms. Williams' illnesses. Doc. 103.9 at 181-182. Then, he eliminated those factors based on their likelihood. Doc. 103.9 at 181-182. Ultimately, Dr. Mink found

that more likely than not her injury was caused by her exposure to the SO<sub>2</sub>, particulates, and hazardous air pollutants. Doc. 103.9 at 45, 181-182. While not required by *Seamon*, the District Court's requirement that Dr. Mink perform a differential etiology by ruling out "one-by-one, leaving only one cause remaining" is exactly what he did.

Turning to the final purported fatal flaw, that Dr. Mink failed to memorialize his alternatives analysis in his expert report, this issue turns on the question of whether an expert testimony at trial or in a *Daubert* hearing is limited to the four corners of the expert report. "No language in [Federal Rule of Civil Procedure 26(a)(2)(B)] would suggest an expert's testimony is limited "simply to reading his report." *Thompson v. Doane Pet Care Co.*, 470 F.3d 1201, 1203 (6th Cir. 2006). Instead, the rule "contemplates that the expert will supplement, elaborate upon, explain and subject himself to cross-examination upon his report." *Id.*

Finally, the District Court's reliance on *Haller v. AstraZeneca Pharmaceuticals, LP*, 598 F. Supp. 2d 1271 (M.D. Fla. 2009), was misplaced. There, the expert made no attempt whatsoever to rule out alternative causes for weight gain because he "did not feel he needed or had to do that." *Id.* at 1278. There is no such testimony from Dr. Mink. To

the contrary, he identified and eliminated alternative potential causes for Ms. Williams' illnesses.

**5. Dr. Mink's Opinions Were Not Speculative Or Conclusory**

The District Court took issue with Dr. Mink's purported lack of specificity regarding studies and peer-reviewed literature that demonstrate increased sensitivity of G6PD individuals. Doc. 144 at 17. Dr. Mink listed 18 primary references regarding various aspects of G6PD's etiology, pathology, genetics, etc., on which he relied in his expert report.<sup>34</sup> Dr. Mink was not asked at his deposition to identify articles specifically addressing sensitivity to oxidative stress, which is the hallmark of why G6PD individuals are more sensitive to SO<sub>2</sub> and other oxidative pollutants. It is unjust on that record of omission to take the position that lack of specificity amounts to speculation.

The District Court likewise concluded Dr. Mink's inability to quantify the increased sensitivity of G6PD individuals was "fatal" to his opinion. Doc. 144 at 17. That conclusion was not rooted in law. The District Court cited no precedent for its absolute requirement to quantify increased chemical sensitivity. And the law is to the contrary. *See, e.g., Henricksen v. ConocoPhillips Co.*, 605 F. Supp. 2d 1142, 1161 (E.D.

Wash. 2009) (“proof of ... exposure through specific quantitative measurement is not a requirement”).

Dr. Mink explained, based on scientific studies, that oxidative stress pollutants like SO<sub>2</sub> weaken cells. Doc. 103.9 at 27-29, 38, 155-156. In other words, while the general population can recover from a dose of oxidative stress, it is more difficult for Ms. Williams to do so; and there are no published studies that reliably quantify the difference. Doc. 103.9 at 27-29.

The critical fact is that there actually is a difference in response for G6PD individuals as shown in the medical literature. But precisely how much is not critical, let alone fatal because as a chronic asthmatic with severe asthma she falls into the sensitive subset of the population and the risks to her were considered at the 75 ppb acute level. Thus, her increased sensitivity did not require quantitation as causation is proven at the levels she has been exposed to, with specific clinical evidence in her medical records. Doc. 103.9 at 116, 185.

**C. Without The Exclusion Of Dr. Mink’s Causation Opinions, It Was Error To Grant Summary Judgment Against All Claims That Required Causation**

Absent Dr. Mink’s causation testimony, the District Court was compelled to grant summary judgment against four of her six claims. Doc. 144 at 34-36. To remedy Dr. Mink’s dispositive exclusion, this Court must vacate the summary judgment order. *Seamon*, 813 F.3d at 991 (“because we reverse the district court’s decision to grant the motion to exclude, we also reverse the court’s decision to grant Defendant’s motion for summary judgment”); *see also Rosenfeld v. Oceania Cruises, Inc.*, 654 F.3d 1190, 1192 (11th Cir. 2011) (ordering new trial because exclusion of expert whose testimony could have “prov[ed] the inadequacy of Oceania’s choice of flooring surface” prevented the jury from finding the floor “was necessarily unsafe when wet”); *Proctor v. Fluor Enters.*, 494 F.3d 1337, 1352 (11th Cir. 2007) (ordering new trial when movant carried “the burden of proving that the error ‘probably had a substantial influence on the jury’s verdict’”).<sup>9</sup>

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<sup>9</sup> If this Court affirms Dr. Mink’s exclusion, however, Ms. Williams would not otherwise challenge the entry of summary judgment against her claims for negligence, gross negligence, strict liability ultrahazardous activity, and medical monitoring and environmental testing for lack of causation. *See* Doc. 144 at 34-36. Ms. Williams also does not chal-

**II. THE DISTRICT COURT ERRED WHEN IT EXCLUDED MS. WILLIAMS'S TESTIMONY AND GRANTED SUMMARY JUDGMENT AGAINST HER REMAINING CLAIM FOR PROPERTY DAMAGE**

The District Court erred when it excluded Ms. Williams's property-damage evidence and testimony and granted summary judgment against the remaining claim for damages to real property.

**A. Under Florida Law, Ms. Williams Was Presumptively Competent To Testify About Her Property's Diminution In Value**

Under Florida law, Ms. Williams was presumptively competent to testify about her property's diminution in value due to stigma.

Relevant here, Fla. Stat. § 376.313(3) authorizes plaintiffs to recover "all damages resulting from a discharge or other condition of pollution." To do so, Ms. Williams need only prove the fact of a discharge or other condition of pollution and that it has occurred. *See id.*; *Curd v. Mosaic Fertilizer, LLC*, 39 So. 3d 1216, 1222 (Fla. 2010). Ms. Williams has no burden to prove that Mosaic caused the pollution in question or that Mosaic acted negligently. *See Curd*, 39 So. 3d at 1221-22 (citing *Aramark Uniform & Career Apparel, Inc. v. Easton*, 894 So. 2d 20, 24 (Fla. 2004)).

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lenge the entry of summary judgment against her claim for strict liability failure to warn because Mosaic's emissions are not products placed into the stream of commerce. *See Doc. 144 at 36-38.*

Nothing in the statutory text requires a plaintiff to prove an actual health risk. *See Fla. Stat. § 376.313(3)*. Instead, plaintiffs need not plead and prove a minimum contamination in violation of a regulatory standard and stigma damages to property are recoverable. *Adinolfi v. United Techs. Corp.*, 768 F.3d 1161, 1173-75 (11th Cir. 2014).

Additionally, no court has held that a plaintiff is required to put forth evidence of an “exposure assessment,” “dose reconstruction,” or a “market evaluation” to recover for stigma or diminution under Fla. Stat. § 376.313(3). Such a benchmark is contrary to the law and its far-reaching legislative intent.

To prove damages, Ms. Williams was competent, as an owner, to testify about her property’s value and diminution. *State v. Hawthorne*, 573 So. 2d 330, 333 n.6 (Fla. 1991) (a property owner is “generally qualified to testify as to the fair market value of his property”). Specifically, “cases binding on this court have held that ‘an owner of property is competent to testify regarding its value ...’ even if such testimony is ‘self-serving and unsupported by other evidence.’” *Neff v. Kehoe*, 708 F.2d 639, 644 (11th Cir. 1983) (collecting cases). *Neff* is consistent with the longstanding Florida rule that a property owner’s “presumed famil-

ilarity with the characteristics of the property, knowledge or acquaintance with its uses and purposes, and experience in dealing with it.” *Salvage & Surplus v. Weintraub*, 131 So. 2d 515, 516 (Fla. 3d DCA 1961).

*Dietz v. Consolidated Oil & Gas*, 643 F.2d 1088 (5th Cir. 1981),<sup>10</sup> is illustrative. There, the appellee argued the property owner’s value testimony was based on “speculative factors” and therefore inadmissible. *Id.* at 1094. But *Dietz* rejected that argument because the record did not support it. *Id.* Instead, because the property owner testified he knew about other sales, this Court affirmed its admission because his “opinion testimony was based on more than naked conjecture.” *Id.*

For those reasons, Ms. Williams did not need real-estate appraisal expertise. Instead, she was competent as the owner to testify as to value and diminution. Moreover, Ms. Williams did not have to hold any technical, scientific or specialized knowledge or toxicological expertise to understand that a prospective buyer might be afraid or apprehensive about potential risks associated with these contaminants. It is the very presence of these contaminants, not proof that one will cause a particu-

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<sup>10</sup> In *Bonner v. City of Prichard*, this Court adopted as binding precedent all decisions of the former Fifth Circuit handed down by close of business on September 30, 1981. 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc).

lar adverse health effect, that creates actionable stigma damages and/or diminution in value. *Adinolfi*, 768 F.3d at 1176-78.

**B. The District Court Misapplied Florida Law When It Ruled This Presumption Was Defeated**

The District Court committed a legal error to which no deference is owed when it misplaced its reliance on *Finkelstein v. Dep't. of Transp.*, 656 So. 2d 921 (Fla. 1995), an eminent domain case. There, as part of a condemnation proceeding, the sovereign was looking to pay reduced market value. *Id.* at 922-25. The sovereign argued it should have been able to present evidence at the eminent domain valuation trial as to the property's contamination; the court agreed that it was relevant to the value of the property on the date of taking. *Id.* at 922. It also found that the sovereign bore the burden of proof as to the decreased value. *Id.* at 925. Further, finding that contamination stigmatizes property, *Finkelstein* held it was proper for an expert to consider the contamination as part of its evaluation, but with a caveat, that because contamination is prejudicial, it could not be the feature of the eminent domain valuation trial. *Id.* at 923, 925.

Ms. Williams's case does not concern eminent domain; instead, it arises from Mosaic's contamination. Unlike *Finkelstein*, contamination

is the front and center issue in this action that must be proven. Additionally, *Finkelstein* did not involve the testimony of a property owner. Instead, it concerned evidence from a condemning authority's expert. Moreover, the sovereign's attorney did not even know what facts its expert was basing its valuation opinion on. *Id.* at 925. The District Court misplaced its reliance on *Finkelstein*.

The county appraiser's values and recent sales on which the District Court relied (Doc. 191 at 5-6) did not undermine Ms. Williams testimony because there was no indication that the sellers had disclosed Mosaic's emissions to the buyers. *See Johnson v. Davis*, 480 So. 2d 625, 629 (Fla. 1985) (sellers must disclose material defects). At most, the appraiser values and sales merely created an issue for a jury to resolve.

Ms. Williams's valuation did not lack foundation and was not speculative. She had lived in the home for five decades, was familiar with the local real estate market, and understood how buyers would react to the disclosure of Mosaic's emissions.

**C. Alternatively, Under Florida Law, Ms. Williams Was Not Limited To Recovery Of Remediation Or Stigma Damages, But Could Recover The Full Value Of The Permanently Injured Property**

Ms. Williams explained to the District Court she had two property-damage theories: one for stigma damages (measured by diminution in value) and one for actual contamination (measured by remediation or destruction). *See* Doc. 181 at 4. Contamination is self-explanatory. In contrast, stigma can arise when an owner's property is not contaminated yet, but is sufficiently close to contamination. *Adinolfe*, 768 F.3d at 1175-77.

For example, Ms. Williams is entitled to stigma damages because she resides in a neighborhood in a nonattainment zone where there is SO<sub>2</sub> contamination. Doc. 103.9 at 66, 70. She is also entitled to contamination damages because her home is covered in dust that represents the hazardous air pollutants emitting from the waste stacks. Under both theories, Ms. Williams sought to recover the full value of her property caused by the contamination, which constitutes permanent damage, and the stigma, which is also permanent, caused by the proximity of her home to the nonattainment zone. *U.S. Steel Corp. v. Benefield*, 352 So. 2d 892, 895 & n.11 (Fla. 2d DCA 1977) (when property is per-

manently injured, the proper measure of damages is the full market value of that property, undamaged).

Under the broad definition of damages applicable to Ms. Williams's statutory claim, her recovery is not limited to cost of remediation, but can include economic losses, stigma losses, and diminution of value. *See Adinolfe*, 768 F.3d at 1175-77; *Curd*, 39 So. 3d at 1222; *Clark v. Ashland, Inc.*, 2015 U.S. Dist. LEXIS 41643, at \*10 (M.D. Fla. March 31, 2015). At trial, Ms. Williams would have presented evidence (including Mr. Ungers's testimony) of the continual nature of the pollution that contaminated her property as well as the surrounding Progress Village neighborhood. Because this continual bombardment of contamination permanently damaged her property, Ms. Williams sought destruction damages (which is full value for permanent damage caused by the contamination) and stigma damages (also permanent damage caused by the proximity to the non-attainment zone for SO<sub>2</sub>). *U.S. Steel Corp.*, 352 So. 2d at 895 & n.11.

Although Ms. Williams explained her entitlement to these different types of damages in her trial brief (Doc. 176 at 10-11), the District Court addressed only stigma damages and ignored destruction and re-

mediation damages (*see* Doc. 191 at 6-8). Accordingly, at minimum this Court should vacate and remand so the District Court can consider her entitlement to these damages in the first instance. *See Roofing & Sheet Metal Servs., Inc. v. La Quinta Motor Inns, Inc.*, 689 F.2d 982, 990 (11th Cir. 1982) (remand does “not seriously impair judicial economy” because it would “not involve the district court in redundant proceedings”); *Hulsey v. Pride Restaurants, LLC*, 367 F.3d 1238, 1243-44 (11th Cir. 2004) (absent the “benefit if the district court’s reasoning,” this Court necessarily “commence[s] [such] analysis on appeal at a ‘decided disadvantage,’” much akin to the “proverbial blind hog, scrambling through the record in search of an acorn”).

**D. At Minimum, This Court Should Certify The Question To The Supreme Court Of Florida**

When the outcome of an appeal depends on resolution of unsettled state law, this Court typically certifies questions to the Supreme Court of Florida pursuant to Fla. Const. art. V, § 3(b)(6). *Rando v. GEICO*, 556 F. 3d 1173, 1181 (11th Cir. 2009); *Neumont v. Florida*, 451 F.3d 1284, 1285-86 (11th Cir. 2006) (“Because no controlling Florida Supreme Court authority seems to exist on this question, we certify the issue to the Florida Supreme Court.”). At minimum, this Court should therefore

certify the following question to the Supreme Court of Florida: Does Florida law allow a property owner who has lived in her home for five decades to testify about its value absent contamination, *e.g.*, permanent damage, or diminution of value from toxic emissions?

**E. Without The Exclusion Of Ms. Williams’s Valuation Testimony, It Was Error To Grant Summary Judgment Against Her Property-Damage Claim**

Absent Ms. Williams’s valuation testimony, the District Court was compelled to grant summary judgment against her property-damage claim. Doc. 191 at 6-8. To remedy Ms. Williams’s dispositive exclusion, this Court must vacate the summary judgment order. *Seamon*, 813 F.3d at 991 (“because we reverse the district court’s decision to grant the motion to exclude, we also reverse the court’s decision to grant Defendant’s motion for summary judgment”).

**CONCLUSION**

The Court should vacate the *Daubert* and first summary judgment order (Doc. 144), the order denying reconsideration (Doc. 189), the in limine and second summary judgment order (Doc. 191), and the final judgment (Doc. 193) and remand for further proceedings.

Respectfully submitted,

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**CERTIFICATE OF COMPLIANCE**

1. This brief complies with Federal Rule of Appellate Procedure 32(a)(7)(B)'s type-volume requirement. As determined by Microsoft Word 2010's word-count function, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii) and 11th Circuit Rule 32-4, this brief contains 12,416 words.

2. This brief further complies with Federal Rule of Appellate Procedure 32(a)(5)'s typeface requirements and with Federal Rule of Appellate Procedure 32(a)(6)'s type-style requirements. Its text has been prepared in a proportionally spaced serif typeface in roman style using Microsoft Word 2010's 14-point Century font.

June 26, 2017

/s/ Thomas Burns

Thomas A. Burns

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that I filed the original and six copies of the foregoing brief with the Clerk of Court via CM/ECF and regular mail on this 26th day of June, 2017, to:

David J. Smith, Clerk of Court  
U.S. COURT OF APPEALS FOR THE  
ELEVENTH CIRCUIT  
56 Forsyth Street N.W.  
Atlanta, GA 30303

I FURTHER CERTIFY that I served a true and correct copy of the foregoing brief via CM/ECF on this 26th day of June, 2017, to:

**Mosaic Fertilizer, LLC**

David Barnett Weinstein  
Kimberly S. Mello  
Ryan Thomas Hopper

June 26, 2017

/s/ Thomas Burns  
Thomas A. Burns