No. 17-10894

In the United States Court of Appeals for the Eleventh Circuit

RHONDA WILLIAMS, a single person,

Plaintiff-Appellant,

v.

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

Defendant-Appellee.

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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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;
3. FMRP Inc.;
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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;

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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.

October 30, 2017

/s/ Thomas Burns
Thomas A. Burns

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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_2	Sulfur dioxide.

ARGUMENT AND CITATIONS OF AUTHORITY

I. IN RENDERING GENERAL AND SPECIFIC CAUSATION OPINIONS, DR. MINK EMPLOYED RELIABLE METHODOLOGIES

The point of a *Daubert* inquiry is to exclude junk science, not to ensure all expert opinions are delivered with godlike certainty. *GE Co.* v. *Joiner*, 522 U.S. 136, 154 (1997) (Stevens, J., concurring and dissenting) (a phrenologist would be an example of an unreliable expert). Far from excluding junk science, however, the District Court excluded, in its own words, an "experienced toxicologist with impressive credentials." Doc. 144 at 33. Indeed, Dr. Mink was extraordinarily well-qualified, held very impressive credentials, had published in many peer-reviewed publications, was a member of all the right professional organizations, and never before had his testimony excluded.[1] Williams Br. 6-7.

Notwithstanding Dr. Mink's background, however, the District Court accepted Mosaic's invitation to find his general and specific causation methodologies not merely unreliable, but nonexistent. *See* Doc. 144 at 5. And it did so after *sua sponte* (*see* Doc. 147 at 1 n.1) raising an

[1] Incidentally, while working for the Environmental Criterion & Assessment Office, including as acting director from 1986 to 1988, Dr. Mink formulated the original risk assessment methodology for all EPA health standards. *See* Doc. 103.9 at 47.

argument, based on *McClain* v. *Metabolife Int'l, Inc.*, 401 F.3d 1233 (11th Cir. 2005), that experts cannot rely on regulatory standards.[2]

This was an abuse of discretion because, in so ruling, the District Court "'ignore[d] or misunderst[ood] the relevant evidence" and "base[d] its decision upon considerations having little factual support.'" *Serra Chevrolet, Inc.* v. *GM Corp.*, 446 F.3d 1137, 1147 (11th Cir. 2006) (quoting *Arlook* v. *S. Lichtenberg & Co.*, 952 F.2d 367, 374 (11th Cir.1992)).

A. Mosaic Does Not Dispute Ms. Williams's Argument That This Court Routinely Reverses District Courts That Exclude Experts After Mischaracterizing Their Opinions Or Supporting Evidence

Mosaic does not dispute the major premise of Ms. Williams's argument that this Court routinely reverses district courts for excluding experts when they mischaracterize their opinions or supporting evidence.[3] Instead, Mosaic disputes only her minor premise by arguing

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[2] "[T]his problem, along with many others … might have been avoided had the district court simply held a *Daubert* hearing." *City of Tuscaloosa* v. *Harcros Chems., Inc.*, 158 F.3d 548, 565 n.21 (11th Cir. 1998). Although *Daubert* hearings are "not required," they are "almost always fruitful uses of the court's time and resources in complicated cases involving multiple expert witnesses." *Id.*

[3] *E.g.*, *Seamon* v. *Remington Arms Co., LLC (In re Estate of Seamon)*, 813 F.3d 983, 989-91 (11th Cir. 2016) (vacating gun expert's exclusion when district court mischaracterized his opinions and supporting evidence); *Adams* v. *Lab. Corp. of Am.*, 760 F.3d 1322, 1328-29 (11th

that is not what the District Court actually did.[4] *See* Mosaic Br. 40. Mosaic's contention, however, is mistaken. *See infra* Argument I.B-C.

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

Mosaic defends the District Court's examination of general causation by contending it had discretion to do so and analogizing its hazardous air pollutants to the zinc contained in Fixodent. Mosaic Br. 25-27. It also defends the District Court's general causation ruling by criticizing Dr. Mink's dose-response analysis and his reliance on regulatory standards. Mosaic Br. 28-40. Both gambits fail.

1. The District Court Should Not Have Analyzed General Causation In The First Place

Mosaic argues Ms. Williams "confuses an option for an obligation" to employ the two-category framework, because the *Daubert* inquiry is

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Cir. 2014) (vacating expert's exclusion as "an *ipse dixit* assessment" when record was to the contrary); *United States* v. *Ala. Power Co.*, 730 F.3d 1278, 1284-88 (11th Cir. 2013) (vacating expert's exclusion when district court mischaracterized evidence supporting expert's opinion); *United Fire & Cas. Co.* v. *Whirlpool Corp.*, 704 F.3d 1338, 1341-42 (11th Cir. 2013) (vacating exclusion of a portion of expert's testimony because district court failed to consider evidence supporting it).

[4] Hence, Mosaic has waived any arguments about the major premise and cannot present them for the first time at oral argument because, even for an appellee, that "'comes too late.'" *Hamilton* v. *Southland Christian Sch., Inc.*, 680 F.3d 1316 (11th Cir. 2012) (appellee waived argument by omitting it from answer brief); *La Grasta* v. *First Union Sec., Inc.*, 358 F.3d 840, 847 n.4 (11th Cir. 2004) (same).

flexible. Mosaic Br. 25-26. But, while describing that categorical framework (*see* Mosaic Br. 26), Mosaic omits the most important language:

> This two-part designation for toxic tort cases is devised to further the interests of judicial economy. There is *rarely* a reason for a court to consider opinions that medical doctors routinely and widely recognize as true, like cigarette smoking causes lung cancer and heart disease, too much alcohol causes cirrhosis of the liver, and that the ingestion of sufficient amounts of arsenic causes death.

McClain, 401 F.3d at 1239 n.5 (emphasis added). Here, there was no reason for the District Court to consider general causation opinions about the dangers of SO_2 and HAPs, which the EPA and medical doctors routinely and widely recognize as true. *See* Williams Br. 33-35 (collecting authorities).

Even if no case has yet held a district court abused its discretion in misapplying *McClain*'s categorical framework (*see* Mosaic Br. 26), that means little: "'The easiest cases don't even arise. There has never been ... a section 1983 case accusing welfare officials of selling foster children into slavery; it does not follow that if such a case arose, the officials would be immune from damages [or criminal] liability.'" *Edwards* v. *Shanley*, 666 F.3d 1289, 1298 n.5 (11th Cir. 2012) (quoting *United States* v. *Lanier*, 520 U.S. 259, 271 (1997)). Nobody could seriously ar-

gue a district court has discretion to exclude an expert who wished to opine that smoking caused cancer for lack of general causation.

Mosaic's only substantive argument why the District Court properly treated this as a category two case is to draw an analogy between millions of consumers enjoying the benefits of Fixodent despite its zinc and hundreds of individuals enjoying the fresh air in Progress Village despite Mosaic's release of criteria air pollutants, including sulfur oxides and hazardous air pollutants. *See* Mosaic Br. 27 (citing *Chapman* v. *P&G Distrib., LLC*, 766 F.3d 1296, 1304 (11th Cir. 2014)). The analogy is tortured: millions of voluntary consumers are different from hundreds of captive residents; and an over-the-counter denture adhesive, which requires no pre-market FDA approval and is presumed to be safe for human consumption,[5] is different from SO_2 and HAPs that

[5] Decades ago, the FDA approved Fixodent and other denture adhesives as Class I medical devices. *See, e.g.*, FDA, Notice and Recommended Action to Denture Adhesive Manufacturers (Feb. 23, 2011), *at* https://www.fda.gov/downloads/MedicalDevices/ResourcesforYou/Industry/UCM244652.pdf (last visited Oct. 30, 2017) (explaining new denture adhesives need not obtain premarket approval, but can instead proceed via 510(k) submissions under 21 C.F.R. § 807.92(a)(3)); *see also* FDA, *What does it mean for FDA to "classify" a medical device?*, *at* https://www.fda.gov/AboutFDA/Transparency/Basics/ucm194438.htm (last visited Oct. 30, 2017) ("dental floss is classified as Class I device").

the EPA has identified as extremely harmful, and known to cause cancer, adverse health effects, and death.

Mosaic's argument on general causation then boils down to harmlessness. *See* Mosaic Br. 26-27. Ms. Williams agrees it would be harmless to exclude an expert for rendering an unreliable general causation opinion, but only if his specific causation opinion were also unreliable.

Nevertheless, Ms. Williams is required on appeal to challenge all grounds for a judgment. *Sapuppo* v. *Allstate Floridian Ins. Co.*, 739 F.3d 678, 679-83 (11th Cir. 2014). And in the same way the District Court thought "discussion of Dr. Mink's specific causation analysis shines further light on the flaws in his methodology and further supports the exclusion of his testimony" (Doc. 144 at 23), discussion of the order's shortcomings in analyzing Dr. Mink's general causation methodology throws the District Court's flawed reasoning into sharp relief.

2. The District Court's General Causation Analysis Misunderstood *McClain* v. *Metabolife Int'l, Inc.*

Mosaic contends Dr. Mink's reliance on regulatory standards in calculating dose was inappropriate, because the EPA's standards were protective rather than predictive. *See* Mosaic Br. 28-40. It is mistaken.

As such, Mosaic's efforts to cram Dr. Mink's testimony into *McClain*'s rubric fall short.

a. Dr. Mink Understood NAAQS

Mosaic argues Dr. Mink misunderstood NAAQS. *See* Mosaic Br. 30-36. It is incorrect.

Mosaic claims NAAQS are "intentionally protective" and based on "cost-benefit analysis." Mosaic Br. 30. But under the Clean Air Act, EPA "may not consider implementation costs in setting primary and secondary NAAQS." *Whitman* v. *Am. Trucking Ass'ns*, 531 U.S. 457, 486 (2001). Moreover, protectiveness is not mutually exclusive from inferring causation: either way, the standards derive from EPA's analysis of the causal relationship (including Bradford Hill) between respiratory morbidity and short-term SO_2 exposure. *See* Doc. 103.5 at 42-43, 200.

That is, purporting to explain why EPA chose 75 ppb, Mosaic cherry picks some quotations and provides an incomplete picture. *See* Mosaic Br. 34-35. A more complete picture, however, emerges from looking at EPA's Integrated Science Assessment for Sulfur Oxides ("ISA") itself. *See* Doc. 103.5.

The ISA explains, "Evaluation of the health evidence, with consideration of issues related to atmospheric sciences, exposure assessment, and dosimetry, led to the conclusion that there is *a causal relationship between respiratory morbidity and short-term exposure to* SO_2." Doc. 103.5 at 200. That conclusion was not, as Mosaic implies, based exclusively on animal studies. Instead, it was "supported by the consistency, coherence, and plausibility of findings observed in the human clinical, epidemiologic, and animal toxicological studies." Doc. 103.5 at 200; *see also* Doc. 147.1 at 7.

Importantly, Ms. Williams is an eggshell plaintiff. *See* W. PAGE KEETON *ET AL.*, PROSSER AND KEETON ON THE LAW OF TORTS § 43, at 291-92 (5th ed. 1984). For instance, counsel could not wear cologne or perfume at her deposition. Doc. 125.1 at 54-55. Not only is she sensitive as an asthmatic, but she is especially sensitive due to her G6PD. Doc. 103.9 at 98. Based on his literature review, Dr. Mink opined SO_2 in excess of 75 ppb would cause "irritation in the general population," "potentially serious irritation of asthmatics," and, for an asthmatic with G6PD like Ms. Williams, "a possibility of fatal effects." Doc. 103.9 at 69.

Additionally, Mosaic confines itself to a temporal snapshot that obscures the full story by contending her daily activities do not *presently* take her inside the nonattainment area because she is now confined to her house. *See* Mosaic Br. 9-10, 42-43. But she used to be young and healthy, and throughout her life, she regularly spent time in the nonattainment area. *See* Doc. 103.9 at 66 ("she has lived for almost half a century in the nonattainment area").

Ultimately, Mosaic asserts the "foundational premise" of Dr. Mink's SO_2 opinion is "verifiably false." Mosaic Br. 35. Therefore, it reasons, Dr. Mink "significantly overestimated the toxicity of ambient SO_2." Mosaic Br. 36. But that is not a *Daubert* argument regarding a methodology's reliability: although the *Daubert* inquiry is "'flexible,'" courts must focus "'solely on principles and methodology, not on the conclusions that they generate.'" *Chapman*, 766 F.3d at 1305 (citation omitted). Under *Daubert*, "it is not the role of the district court to make ultimate conclusions as to the persuasiveness of the proffered evidence." *Quiet Tech. DC-8, Inc.* v. *Hurel-Dubois UK Ltd.*, 326 F.3d 1333, 1341 (11th Cir. 2003). Instead, persuasiveness goes to the ultimate issue for the jury to decide after the "the traditional and appropriate means" of

attacking evidence via "[v]igorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof." *Daubert* v. *Merrell Dow Pharms.*, 509 U.S. 579, 596 (1993).

b. Dr. Mink Understood IRIS

Mosaic argues Dr. Mink misunderstood IRIS. *See* Mosaic Br. 36-40. It is incorrect.

Despite acknowledging IRIS chemical summaries "contain dose-response assessments," Mosaic claims they "are *not* designed to predict actual dose-response curves in humans." Mosaic Br. 36 (emphasis in original). But every IRIS is based on dose-response calculations, and it is impossible for a dose-response calculation that is itself based on causal relationships to be only protective, not predictive. Moreover, Dr. Mink intentionally chose curves so there would be no dispute about him independently calculating dose responses. Docs. 103.9 at 24; 147.1 at 9. In other words, Mosaic's point goes to weight, not admissibility. *E.g.*, *Quiet Tech. DC-8, Inc.*, 326 F.3d at 1345 ("'in most cases, objections to the inadequacies of a study are more appropriately considered an objection going to the weight of the evidence rather than its admissibility'").

Mosaic also claims IRIS is unhelpful because it partly relies on rat studies, which are "secondary" methodologies that cannot independently support a general causation opinion. Mosaic Br. 37. But double-blind human studies with HAPs would be unethical and illegal. *E.g.*, *In re Denture Cream Prods. Liab. Litig.*, 795 F. Supp. 2d 1345, 1356 (S.D. Fla. 2011) ("it is unethical to randomly assign a human individual a potentially harmful dose of a suspected toxin"); *McBride* v. *Houston County Health Care Auth.*, 2015 WL 3648995, at *4 (M.D. Ala. 2015) ("Unethical human testing is not a prerequisite under *Daubert*."). Moreover, Mosaic cherry picks one example, when most IRIS summaries are supported by many human and epidemiological studies.[6] Each IRIS considers all available data, including human, epidemiological, and animal studies.

Mosaic also argues Dr. Mink did not link specific HAPs to Ms. Williams's specific adverse conditions or identify any HAP concentration that exceeded metrics. Mosaic Br. 37. But it is consistent with Bradford

[6] *E.g.*, Arsenic (smelter workers), Cadmium (smelter workers), Chromium (human occupational), Lead (children and occupational exposures), Manganese (occupational exposures), Nickel (refinery workers), Zinc (human occupational), and Radium/radionuclides (human exposures). Docs. 147 at 8 n.17; 147.1 at 18-31.

Hill to combine all potential sources of causation to derive a causal relationship. *See* Doc. 147.1 at 13.

Mosaic suggests Dr. Mink ignored the physiological disease process. Mosaic Br. 38. But that is precisely why scientists consider Bradford Hill factors and perform a differential etiology: "Although the drawing of causal inferences is informed by scientific expertise, it is not a determination that is made by using an objective or algorithmic methodology," so experts use Bradford Hill factors "to support the existence of causation in the absence of any epidemiologic studies finding an association." FEDERAL JUDICIAL CENTER, REFERENCE MANUAL ON SCIENTIFIC EVIDENCE 599 n.141, 600 (3d. ed. 2011) (collecting cases). Relatedly, Mosaic's contention that Dr. Mink never considered background risk or performed a differential etiology (*see* Mosaic Br. 40-41, 44-45) is wrong. That is precisely what Dr. Mink did. *See* Williams Br. 47-50.

Mosaic contends the difficulty of quantification does not help Ms. Williams because law lags science and that Dr. Mink's quantification was inadequate. Mosaic Br. 38-40. But again, those are not *Daubert* arguments; they are merits arguments. *See supra* Argument I.B.2.a; *see also* Williams Br. 50-51.

C. Dr. Mink's Specific Causation Opinions Were Based On Reliable Methodologies

Mosaic contends Dr. Mink's specific causation opinions were inadmissible because his dose assessments and differential etiology were unreliable. *See* Mosaic Br. 42-45. Again, it is mistaken.

First, Mosaic contends Dr. Mink's dose assessments were unreliable due to an "unbridgeable analytical gap" between Ms. Williams residence outside the SO_2 nonattainment area and Dr. Mink's opinions. Mosaic Br. 42-43. This, however, is the same temporal snapshot problem. *See supra* Argument I.B.2.a. Although EPA lowered the standard in 2010, historically Mosaic was a regular violator of the higher SO_2 standard. Docs. 103 at 15; 103.6.

Second, Mosaic contends the HAPs were below IRIS values according to Li. Mosaic Br. 43-44. But Li studied Mosaic's smokestacks, not phosphogypsum waste stacks, so Li did not consider the area's single largest source of HAPs. Accordingly, Dr. Mink relied on the published underlying emissions data and IRIS dose-response calculations, not Li's targeted conclusions. *E.g.*, Docs. 103 at 15-18; 103.9 at 147; 147 at 10, 17 & n.44; 147.1 at 3, 18; *see also* Doc. 102 at 6-7.

II. THE EXCLUSION OF MS. WILLIAMS'S TESTIMONY WAS AN ABUSE OF DISCRETION

To understand how the District Court misconstrued the law concerning an owner's ability to testify about the value of her own home, the order itself (Doc. 191) is a good place to start.

A. The District Court's Choice To Follow *Levinson*, *Trailer Ranch, Inc.*, And *Finkelstein* Instead Of *Dietz* And *Neff* Was An Elementary Reversible Error

In its order, the District Court acknowledged the general presumption that owners can testify about value without qualifying as experts. Doc. 191 at 3 (citing *Neff* v. *Kehoe*, 708 F.2d 639, 644 (11th Cir. 1983), *Dietz* v. *Consolidated Oil & Gas*, 643 F.2d 1088, 1094 (5th Cir. 1981),[7] and *Kestenbaum* v. *Falstaff Brewing Corp.*, 514 F.2d 690, 698 (5th Cir. 1975), *modified on other grounds en banc*, 575 F.2d 464 (5th Cir. 1978)); *accord* Fed. R. Evid. 701 cmt. ("most courts have permitted the owner or officer of a business to testify to the value or projected profits of the business, without the necessity of qualifying the witness as an accountant, appraiser, or similar expert"). It also explained that general rule was "based on an owner's presumed familiarity with the

[7] 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).

property." Doc. 191 at 3 (citing *Salvage & Surplus, Inc.* v. *Weintraub*, 131 So. 2d 515, 516 (Fla. 3d DCA 1961)). So far, so good: the parties agree those are accurate statements of the law. *Compare* Williams Br. 54-55, *with* Mosaic Br. 47.

But then, the District Court diverged from Ms. Williams's position and adopted Mosaic's. Specifically, citing an unpublished case from this Court—which, in turn, had relied on dictum from a Florida state case—the District Court explained the general presumption "is a fragile one." Doc. 191 at 3 (citing *Levinson* v. *Landsafe Appraisal Servs., Inc.*, 558 Fed. App'x 942, 945 (11th Cir. 2014),[8] and *Trailer Ranch, Inc.* v. *Levine*, 523 So. 2d 629, 632 (Fla. 4th DCA 1988)).[9] Then, the District Court stated the general presumption does not apply where an owner lacks "'such familiarity'" with her property (Doc. 191 at 3 (quoting *B&B Tree*

[8] Although expressly acknowledged by the District Court (Doc. 191 at 3 n.2), Mosaic does not mention *Levinson* is merely persuasive authority. *See* 11th Cir. R. 36-2; *accord Bonilla* v. *Baker Concrete Const., Inc.*, 487 F.3d 1340, 1345 n.7 (11th Cir. 2007) ("[u]npublished opinions ... are persuasive only insofar as their legal analysis warrants"); *Twin City Fire Ins. Co.* v. *Ohio Cas. Ins. Co.*, 480 F.3d 1254, 1260 n.3 (11th Cir. 2007) (an unpublished opinion is persuasive "only to the extent that a subsequent panel finds the rationale expressed in that opinion to be persuasive after an independent consideration of the legal issue").

[9] *Trailer Ranch, Inc.* cited no authority for its dictum that the general presumption is "fragile."

Serv., Inc. v. *Tampa Crane & Body, Inc.*, 111 So. 3d 976, 978 (Fla. 2d DCA 2013))), or bases her valuation "'solely on speculative factors" (Doc. 191 at 4 (quoting *Kestenbaum*, 514 F.2d at 699)).

Ms. Williams disagrees with *Trailer Ranch, Inc.*'s dictum that the general presumption is "fragile" or *Levinson*'s nonbinding adoption of it[10]—after all, how could a *general* presumption accurately be called *fragile* without the exceptions swallowing the rule? But she does agree that an owner cannot testify to valuation when she lacks adequate familiarity with her property (*e.g.*, an absentee landlord who had never seen the property) or bases her valuation *solely* on speculative factors (*e.g.*, a first-time farmer who just converted her land's use from wheat to corn and sought to estimate the income it would now derive without any supporting experience or data). Otherwise, owners can and regularly do testify about valuation.

In any event, the circumstances about which Mosaic complains (*i.e.*, no familiarity or pure speculation) are not present here. Even

[10] Relatedly, Mosaic's citation to *FDIC ex rel. Gulfsouth Private Bank* v. *Amos* (Mosaic Br. 48) is inapposite, because that case affirmed exclusion of an owner's valuation testimony when he "submitted no evidence, such as an affidavit, that there was more than a 'possibility' that he was 'sufficiently familiar with the [p]roperty.'" 2017 WL 3278871, at *5 (11th Cir. 2017).

where an owner's valuation testimony "may have been sketchy," "may have been based on poor memory," and "may have been wrong," it is most assuredly "not speculative" so long as it is "based on recollection rather than mere hypothesis and conjecture." *Dietz*, 643 F.2d at 1094. Indeed, owners can testify about their homes' valuations "even if such testimony is 'self-serving and unsupported by other evidence.'" *Neff*, 708 F.2d at 644 (collecting cases).[11]

Dietz is instructive, because there this Court affirmed the admission of an owner's lay opinion because it was "more than naked conjecture"—not inadmissible speculation—when he had "testified that he personally knew of standing crops of other farmers that had been sold" and that "that value of standing crops is often computed at twice the amount of growing costs." 643 F.2d at 1094. Like that owner, Ms. Williams had lived her entire life in her home[12] and had personal

[11] *Accord 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"); *Salvage & Surplus, Inc.*, 131 So. 2d at 516 (a property owner has "presumed familiarity with the characteristics of the property, knowledge or acquaintance with its uses and purposes, and experience in dealing with it").

[12] As a lifelong resident, Ms. Williams was born after the first phosphogypsum stack was built in the 1950s but before the second

knowledge of both its appraised value and recent sales in her neighborhood.[13] *See* Doc. 181 at 6.

As such, there was no serious dispute that Ms. Williams could testify about the valuation of her home *without* stigma or contamination damages. *Compare* Doc. 171 at 15, *with* Doc. 181 at 6. Nor was there any dispute that stigma and contamination *could* decrease the value of property. *See* Doc. 191 at 5. Instead, the only dispute was whether Ms. Williams could offer a lay opinion about the *amount* of the difference, if any, between the valuation of her home *without* stigma or contamination (*i.e.*, roughly $90,000 in her view) and its valuation *with* stigma or contamination (*i.e.*, $0 in her view).[14] *See* Doc. 191 at 4.

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phosphogypsum stack was built in the 1980s. *See* Doc. 24 at 7. As such, she had personal experience with how much dust they spewed.

[13] In addition to her own testimony, Ms. Williams would have called Kimberly Fleming, a real estate agent who just a few months before trial sold the home a few doors down from Ms. Williams, to testify a seller did not disclose and that a buyer was unaware of Mosaic's contamination. And Michael Price, a pastor in the community, who would have testified about the community's lack of knowledge of contamination, including the toxicity of the dust in the air and the proximity or toxicity of the SO_2 nonattainment zone. But her third amended damages disclosure, which identified those witnesses, was never filed on the district court's docket.

[14] At a more fundamental level, as Ms. Williams previously explained (Williams Br. 55-56), the very notion that *only* an expert could opine on the effect of stigma or contamination on a home's value is odd.

Answering that question, the District Court concluded her lay opinion was inadmissible because it "lacks foundation and was purely speculative."[15] Doc. 191 at 4. But the basis for that ruling was the District Court's misplaced reliance on a state case for the proposition that Ms. Williams could not testify about the valuation of her home with or without contamination absent "'evidence of sales of comparable contaminated property.'" Doc. 171 at 4, 14 (quoting *Finkelstein* v. *Dep't of Transp.*, 656 So. 2d 921, 925 (Fla. 1995)).

That reliance on and misinterpretation of *Finkelstein* was no accident. Below, Mosaic had expressly argued Ms. Williams could not testify about the valuation of her home with or without contamination ab-

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The point of expert testimony is to assist the trier of fact. *See* Fed. R. Evid. 702(a). To assist a trier of fact, expert testimony must "concern[] matters that are beyond the understanding of the average lay person." *United States* v. *Frazier*, 387 F.3d 1244, 1262 (11th Cir. 2004) (en banc). But ordinary people buy homes literally every day, with and without contamination, so it was impossible for Ms. Williams's valuation testimony to have been "beyond" an average juror's understanding.

[15] In doing so, the District Court based its ruling exclusively on Federal Rule of Evidence 701 and simply did not rule on Mosaic's alternative arguments that her testimony was irrelevant (*see* Fed. R. Evid. 402) or had probative value that was substantially outweighed by its danger of unfair prejudice (*see* Fed. R. Evid. 403). *Compare* Doc. 171 at 1 (moving for exclusion under Rules 402, 403, and 701), *with* Doc. 191 at 2 (acknowledging bases for Mosaic's motion). Mosaic does not press any of those alternative grounds for affirmance here (*see* Mosaic Br. 45-50), so it has waived those argument. *See supra* note 4.

sent "'evidence of sales of comparable contaminated property.'" Doc. 171 at 4, 14 (quoting *Finkelstein*, 656 So. 2d at 925). In response, Ms. Williams distinguished *Finkelstein*. Doc. 181 at 15-16. But Mosaic's argument carried the day, and the District Court, unsurprisingly, placed its express reliance on *Finkelstein*. Doc. 191 at 5.

On appeal, Ms. Williams argued that reliance and misinterpretation of *Finkelstein* was an error of law to which no deference is owed. Williams Br. 56-57. But Mosaic does not respond to that argument; indeed, Mosaic does not even cite *Finkelstein* in this Court. Instead, Mosaic now takes the position that only federal law, not Florida law, governs the admissibility of evidence in federal court. Mosaic Br. 45-46.

Of course, that is true, at least "[f]or the most part." *Monarch Ins. Co. of Ohio* v. *Spach*, 281 F.2d 401, 408-09 (5th Cir. 1960).[16] Generally, evidentiary questions are procedural rather than substantive under *Erie R.R. Co.* v. *Tompkins*, 304 U.S. 64 (1938), and its progeny, and as such they usually present issues of federal law rather than state law. But that is not always the case. For instance, "[s]ome state evidentiary rules," such as evidentiary rules regarding collateral sources or witness

[16] *See supra* note 7.

competency, "are substantive in nature, and transcend the substance-procedure boundary, creating a potential *Erie* conflict." *McDowell* v. *Brown*, 392 F.3d 1283, 1295 (11th Cir. 2004). Likewise, other seemingly procedural issues actually concern substantive law rather than procedural law, in which case state law, not federal law, governs. *E.g.*, *Jones* v. *United Space Alliance, LLC*, 494 F.3d 1306, 1309 (11th Cir. 2007) (Florida's offer-of-judgment statute is "substantive for *Erie* purposes").

At any rate, it is certainly awkward for Mosaic to successfully persuade the District Court to ground its ruling in state law (*see* Doc. 171 at 8), the interpretation of which Ms. Williams disputed (*see* Doc. 181 at 15-16), then on appeal take the contrary position that state law is irrelevant (Mosaic Br. 45-46), while (inconsistently) continuing to cite *Levinson* and *Trailer Ranch Inc.* for a dictum that derives solely from a state case (Mosaic Br. 48). *Cf. Ajaka* v. *Brooksamerica Mortg. Corp.*, 453 F.3d 1339, 1343-44 (11th Cir. 2006) (judicial estoppel bars inconsistent positions in different tribunals).

Whether *Finkelstein* was binding or merely persuasive, the point is the District Court misplaced reliance on it when it concluded Ms. Williams's home valuation lacked foundation and was too speculative be-

cause it lacked evidence of sales of comparable contaminated property. Doc. 191 at 5. In addition to misinterpreting *Finkelstein*, that ruling was certainly inconsistent with this Court's decisions in *Dietz* and *Neff*, and that is all that matters. *See* Williams Br. 55-57.

Dietz had permitted an owner to testify about valuation without evidence of comparable sales. 643 F.2d at 1093-04. Indeed, that owner's testimony expressly conceded his valuation was somewhat inaccurate, and it appeared that "precise data may have been available from books of account" the owner "had examined sometime before trial." *Id.* at 1093. Nevertheless, under Rule 702, that owner's testimony was good enough to present to a jury: it bears repetition that even where an owner's valuation testimony "may have been sketchy," "may have been based on poor memory," and "may have been wrong," it is "not speculative" so long as it is "based on recollection rather than mere hypothesis and conjecture." *Id.*

Neff, in turn, reversed the exclusion of an owner's testimony about his coin collection's valuation. 708 F.2d at 643-44. And it did so even though "[a]ccurate valuation of coins requires a fair amount of technical proficiency and [the owner] did not assert otherwise." *Id.* at 643.

Dietz and *Neff* are the law, and the District Court simply refused to apply it. Put otherwise, under *City of Prichard* and the prior-panel-precedent rule, *Dietz* and *Neff* were the only precedents the District Court had to obey. *Smith* v. *GTE Corp.*, 236 F.3d 1292, 1302-03 & n.11 (11th Cir. 2001) (explaining prior-panel-precedent rule). Its choice to follow *Finkelstein* instead of obeying *Dietz* and *Neff*—at Mosaic's invitation, no less—was an elementary reversible error of law. *Cf. Lopez* v. *Smith*, 135 S. Ct. 1, 5 (2014) (per curiam) (summarily reversing Ninth Circuit for following its own precedent instead of the Supreme Court's).

B. Mosaic Misplaces Its Reliance On The Seventh Circuit's Decision In *Cunningham* v. *Masterwear Corp.*

For similar reasons, Mosaic misplaces reliance on *Cunningham* v. *Masterwear Corp.*, 569 F.3d 673 (7th Cir. 2009). *See* Mosaic Br. 46.

Cunningham involved a different situation in which an owner sought only to "repeat" his real estate agent's valuation and what prospective buyers had told the real estate agent. *Id.* at 675. But those obviously hearsay facts were inadmissible as lay opinion testimony because they were not within the owner's personal knowledge. *Id.* at 676; *accord* Fed. R. Evid. 701(a) (lay opinions must be "rationally based on

the witness's perception," not hearsay).[17] Here, however, Ms. Williams would have opined about facts that were obviously within her own personal knowledge as the owner of a home for several decades: her home's value without contamination; recent sales in the neighborhood (about which there was no indication that the sellers had disclosed contamination); and her home's value with contamination.

Additionally, *Cunningham* is distinguishable for another reason: namely, it had also held the owner "could not offer a responsible opinion about the *cause* of a change in the value of his property." *Id.* at 676 (emphasis in original). But Ms. Williams's claim, in contrast, did not require proof of causation.

Some explanation is in order. *Cunningham* involved a "suit for common law nuisance," one element of which is causation. *Id.* at 674-75 (affirming exclusion of owner's valuation testimony because "causation

[17] Indeed, even experts are forbidden from serving as mouthpieces for otherwise inadmissible hearsay. *Compare United States* v. *Floyd*, 281 F.3d 1346, 1349 (11th Cir. 2002) ("hearsay testimony by experts is permitted if it is based upon the type of evidence reasonably relied upon by experts in the particular field"), *with United States* v. *Scrima*, 819 F.2d 996, 1002 (11th Cir. 1987) (affirming exclusion of expert accounting testimony where proponent "made no showing that qualified accountants customarily rely on statements to casual business acquaintances when calculating net worth").

turns out to be the plaintiffs' Achilles heel"). But Ms. Williams's property damage claim did not arise from a common law claim that required proof of causation. Instead, it was grounded in strict statutory liability for violation of the Water Quality Assurance Act of 1983, Fla. Stat. § 376.302 *et seq*.

Critically, that statutory scheme does not require proof of causation. *Aramark Uniform & Career Apparel, Inc.* v. *Easton*, 894 So. 2d 20, 26 (Fla. 2004) ("the statute creates a cause of action for strict liability regardless of causation"); *Curd* v. *Mosaic Fertilizer, LLC*, 39 So. 3d 1216, 1222 (Fla. 2010) ("section 376.313(3) creates a cause of action for strict liability regardless of causation"); *accord Adinolfe* v. *United Techs. Corp.*, 768 F.3d 1161, 1176-78 (11th Cir. 2014) (it is the very presence of contaminants, not proof that one will cause a particular adverse health effect, that creates actionable stigma damages or diminution in value). For that reason, unlike the owner in *Cunningham*, Ms. Williams could prevail without having to opine there was a causal linkage between the

value of her home without contamination or stigma and the value of her home with contamination or stigma.[18]

C. Mosaic's Discussion Of Three Premises Is Misguided

Attempting to justify the exclusion of Ms. Williams's valuation testimony as inadmissible lay opinion, Mosaic divides it into three premises. Mosaic Br. 46. This effort fails.

The first premise (*i.e.*, that hazardous sulfur emissions and phosphogypsum dust continually bombard her home) is both within her personal knowledge (because she has lived there all her life and has seen, breathed, and smelled it every day) and is something that would also be established by the testimony of Les Ungers (*see* Docs. 90 (Exs. A-C); 147.2), whom the District Court did not exclude (Doc. 144 at 8 n.1).

The second and third premises (*i.e.*, that recent sales do not take account of the contamination and that her home would be worthless if she had to disclose the contamination) is also well within her personal knowledge as an owner. She lives in the neighborhood; as such, she

[18] To the extent *Cunningham* implied such a causation requirement, it contradicts Rule 701. *See* Fed. R. Evid. 701 cmt. ("most courts have permitted the owner or officer of a business to testify to the value or projected profits of the business, without the necessity of qualifying the witness as an accountant, appraiser, or similar expert").

knows what her home costs and what other homes do cost. *See supra* Argument II.A-B. And to the extent she lacks sufficient knowledge of the circumstances that affect value, that is an appropriate question for cross-examination: "'The weight of such testimony is, of course, affected by the owner's knowledge of circumstances which affect value, and as an interested witness, it is for the jury to evaluate the credibility of his testimony.'" *Dietz*, 643 F.2d at 1094 (citation omitted).

D. Mosaic's Assertion That Ms. Williams Cannot Recover Contamination Damages, As Opposed To Stigma Damages, For Failure To Plead And Disclose That Theory Of Damages Is Factually And Legally Wrong

Finally, Mosaic argues Ms. Williams is not entitled to recover contamination damages, as opposed to stigma damages, because she supposedly did not plead that theory of damages or disclose it in discovery. *See* Mosaic Br. 48-49. Mosaic is mistaken.

1. Parties Need Not Plead Theories Of Damages, And The Complaint Sought Contamination Damages In Any Event

As to pleading, the Federal Rules of Civil Procedure do not require plaintiffs to plead theories of damages; instead, they merely require plaintiffs to plead claims. *See* Fed. R. Civ. P. 8(a) (complaint must contain "a short and plain statement of the claim," not each theory of dam-

ages). Moreover, Count Five of the operative complaint expressly sought damages for "diminished value to property" (Doc. 24 at 42), which would include both contamination and stigma damages. In other words, both the major premise (plaintiffs must plead theories of damages) and minor premise (Ms. Williams did not plead a theory of damages for contamination damages) of Mosaic's failure-to-plead argument are wrong *See* Mosaic Br. 48-49. This undermines Mosaic's syllogism.

Relatedly, Mosaic's citations—without explanatory parentheticals—to *White* v. *Beltram Edge Tool Supply, Inc.*, 789 F.3d 1188 (11th Cir. 2015), and *Reider* v. *Philip Morris USA, Inc.*, 793 F.3d 1254 (11th Cir. 2015), are inapposite. *See* Mosaic Br. 49. *White* involved a plaintiff who failed to plead a claim, not a theory of damages. 789 F.3d at 1199-200. And Ms. Williams is mystified by Mosaic's citation to *Reider*, which merely held "a party's post-trial claim that a jury verdict is inconsistent does not preserve for appeal the separate and legally distinct claim that the verdict was the result of an unlawful jury compromise." 793 F.3d at 1256-57. If Mosaic means to rely on *Reider* to contend Ms. Williams did not preserve her argument about contamination damages, it is mistaken: both Mosaic and the District Court were clearly on notice that Ms.

Williams sought to recover contamination damages because she said exactly that. Doc. 181 at 5 ("This continual bombardment of contamination has permanently damaged her property, thus, she is seeking the full market value—absent the damage—for her residence.").

2. Mosaic's Failure-To-Disclose Argument Is Premature And Incorrect

Regarding Ms. Williams's supposed failure to disclose her contamination damages theory, it is true that "all federal courts have the power, by statute, by rule, and by common law, to impose sanctions against recalcitrant lawyers and parties litigant.'" *Serra Chevrolet, Inc.*, 446 F.3d at 1147 (quoting *Carlucci* v. *Piper Aircraft Corp.*, 775 F.2d 1440, 1446 (11th Cir.1985)). Among other sanctions, codified by Federal Rule of Civil Procedure 37(b)(2), a district court may "in its discretion" (1) establish facts, (2) strike claims or defenses, or (3) strike pleadings. *See Stuart I. Levin & Assocs., P.A.* v. *Rogers*, 156 F.3d 1135, 1140 (11th Cir. 1998).

But to tee that issue up, Mosaic would need to move for sanctions on remand seeking to exclude Ms. Williams's supposedly undisclosed theory of contamination damages. Otherwise, there would be no order—and therefore no exercise of district court discretion—to which this

Court could defer. *Cf. Walter* v. *Avellino*, 564 Fed. App'x 464, 466 (11th Cir. 2014) (when "district court has never denied a motion to amend the pleadings," "we have no district court order to review on this issue").[19] In other words, Mosaic's argument is premature: a litigant cannot take a mulligan before it has shanked a shot.

Once again, however, this Court need not even consider the issue, because Ms. Williams never failed to disclose. To the contrary, her disclosures indicate she always and consistently disclosed her theories of damages based on both contamination and stigma. *See* Docs. 163 at 1; 171 at 5-8; 176 at 4-5.

E. Mosaic's Attempt To Distinguish *U.S. Steel Corp.* v. *Benefield* Falls Flat

Drawing a distinction without difference about *U.S. Steel Corp.* v. *Benefield*, 352 So. 2d 892, 894 (Fla. 2d DCA 1977), Mosaic argues Ms. Williams "mistakes *permanent* injury for *total* injury." Mosaic Br. 49 (emphases in original). That is not so. The phosphogypsum stacks will remain near Ms. Williams's home forever. As such, Ms. Williams can never remediate the HAPs they spew, so she can never enjoy or use her

[19] Unpublished Eleventh Circuit opinions "may be cited as persuasive authority." 11th Cir. R. 36-2.

property for its intended purpose. Put otherwise, her damage is both permanent and total, and she is entitled to her property's full value.

CONCLUSION

The Court should vacate the orders on appeal and judgment (Docs. 144; 189; 191; 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 6,491 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 Schoolbook font.

October 30, 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 30th day of October, 2017, to:

David J. Smith, Clerk of Court
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ELEVENTH CIRCUIT
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I FURTHER CERTIFY that I served a true and correct copy of the foregoing brief via CM/ECF on this 30th day of October, 2017, to:

Mosaic Fertilizer, LLC

David Barnett Weinstein
Kimberly S. Mello
Ryan Thomas Hopper

October 30, 2017

/s/ Thomas Burns
Thomas A. Burns