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with LAURA MORTON



# INTRODUCTION

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Strategy and gamesmanship in the courtroom can sometimes make or break a case. It isn't unusual for legal teams to hire investigators to hang around within earshot of the jury and strike up a conversation centering around the trial, saying such things as "This case is bullshit," or "The family should really be ashamed of themselves for bringing a case like this."

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While lawyers can't talk to the jurors, some will try to get other people to talk around them. It's awful, disgraceful and, frankly, the worst part of going up against a conglomerate like DuPont. While not all lawyers are ruthless and without moral judgment, many will practice such guerrilla warfare when it comes to a case like this.

This white paper is drawn from my book *Blindsided*, which concerns the groundbreaking

case, which in several respects made legal history, in which I represented the Castillo family against DuPont. The Castillos' son, Johnny, had been born without eyes, as a result of his pregnant mother's exposure to a toxic fungicide manufactured by DuPont.

Other white papers in this series drawn from my book *Blindsided* explored aspects of the legal profession.

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The topics of these papers included the importance of my taking on a case to represent the weak and powerless against the seemingly mighty and all-powerful, the discovery process that uncovers much of what a defendant hopes to hide, and the defense team's stalling tactics, such as the use of the "junk science," strategy among others, that the defendant's legal team used to distort facts in a case.

Here I'm going to present an important aspect of any case—known as the summary. I'm going to recount how I used a particular tactic to present to the jury an easy-to-follow rationale for determining how much to award my clients in damages against the corporate behemoth DuPont.

You will find a fuller narrative, with many more details, in *Blindsided*—but I hope this white paper gives you a sense of how much was at stake, and how my team and I sought justice for our clients.



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# Chapter 1

## Warfare to the End

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The questionable tactics the defense engaged in from the outset of the trial continued right through the very last witness's testimony.

DuPont and Pine Island Farms—the farm that used the toxic fungicide and that was a codefendant in the case—along with their combined counsel, repeatedly took advantage of

Judge Amy Steele Donner's liberal procedures during this trial.

For example, during the usual bickering over the admissible evidence that everyone still had to introduce before jury deliberation began, Judge Donner was being quite generous with all the lawyers, allowing the defendants and plaintiff each to be comfortable with what we had in evidence.

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One by one, defense lawyers Clem Glynn, Doug Chumbley, Greg Gaebe, and David Kleinberg had their turn to go back and forth on items they either did or did not want admitted. My appellate counsel Liz Russo argued for the relevance of using fertilizer records from 1988, '89, and '90 to establish chemical purchasing patterns, which had been questioned in terms of relevance despite testimony about planting patterns and when fertilizer is used.

“Is that it?” Judge Donner asked as we got to the last piece of the evidence.

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“One other thing,” I said, sounding a bit like Lieutenant Columbo just before he was about to solve a big case. “Mr. Gaebe’s exhibits: he’s got blowups of testimony, but some of them are not really testimony. [They’re] just objections back and forth by counsel.”

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I had no idea whether Gaebe knew he did this—if it was intentional or he just thought he could get away with it—but there was no way in hell I wasn't going to call him out on this incredibly low and unprofessional behavior.

***“First of all, objections of counsel do not go into anybody’s evidence,” Judge Donner clearly stated.***

She wasn't very happy with where this was headed. You see, whenever a lawyer believes the rules of evidence have been broken during testimony, he may shout, “Objection, move to strike.” If the judge sustains the objection, the testimony is deemed improper and is stricken from consideration by the jury. Whether or not Gaebe was consciously trying to sneak some of the remarks most advantageous to his defense back into play through these boards, the judge was not having any of it.

***Gaebe tried to explain his way out of this by suggesting I had it all wrong. “What he’s talking about is the evidence in this case, and we were in a sidebar when he made this objection. Now, you know it’s easy for Mr. Ferraro to say he has some colloquy and objections. The fact of the matter is, he’s given you an incomplete representation of what’s in that thing. This is classic Ferraro, okay?”***



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But you have to know Judge Donner was smarter than that.  
**“Excuse me,” she said. “Let me see if I can get this straight, because maybe I’m missing something. You need to answer just one question. Is this trial transcript?” she asked Gaebe.**

**“Yes.”**

**“Is that sidebar?”**

**“No . . . but . . .” Gaebe had been busted.**

His boards included not only references to objections but also sidebar conversations. Those were most definitely off-limits to jurors!

“Thereupon the proceedings were had . . .” and, “We went back . . .” were just two examples of how the “evidence” written on the boards began. They were clearly referring to sidebar conversations. “You are not having sidebar before the jury,” Judge Donner said firmly, practically scolding Gaebe.

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***“I agree. I agree.” He was doing his best to backpedal.***

***The judge continued. “That is ridiculous. I am just shocked. That is classic Gaebe, but I am shocked that you would try to put a sidebar in front of this jury. So you go back and you review your material. If it is sidebar, don’t try to show it. That is the reason you have something called a sidebar, Mr. Gaebe.”***

This sidebar sideshow had turned into a courtroom shit show. David Kleinberg was embarrassed enough to stand up and assure the judge they wouldn’t use the boards at all, they’d simply read from the transcripts. As long as they didn’t read anything from the sidebars or colloquy between counsel and the court, I had no objection.

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Of course, I also needed to point out that they couldn't read anything that had been overruled in an objection from their transcript, either, as I suspected they'd try to get away with that, too. I wanted to say, "C'mon, fellas, where's your dignity?"

But I didn't have to.  
The judge clocked them  
pretty good.

Once we got through the final few issues we needed to review before closing arguments, Judge Donner gave us her instructions on how she expected it to go down. I was to go first, with 90 minutes to give my closing. Mr. Gaebe would go next, followed by Mr. Kleinberg and then Mr. Glynn. I would then be allowed one more opportunity to finish up with my rebuttal.

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The courtroom was packed with people and members of the media, complete with cameras, lights, and cables everywhere. They were all present to witness the historic outcome. It was standing-room-only while we waited for the jury to come back into the courtroom.

Judge Donner instructed her clerk, Ray, to bring the jury back into the courtroom to commence closing arguments. It had been a long four-and-a-half weeks for everyone. The jury shuffled in and made its way to the jury box.

***“Counsel, the jury is coming in,” Ray announced.***

***“You may be seated. Is the plaintiff ready to proceed?” Judge Donner asked, turning to me.***

***“Yes, Your Honor.”***

***“Is the defendant DuPont ready to proceed?”***

***“Yes, Your Honor,” said Glynn.***

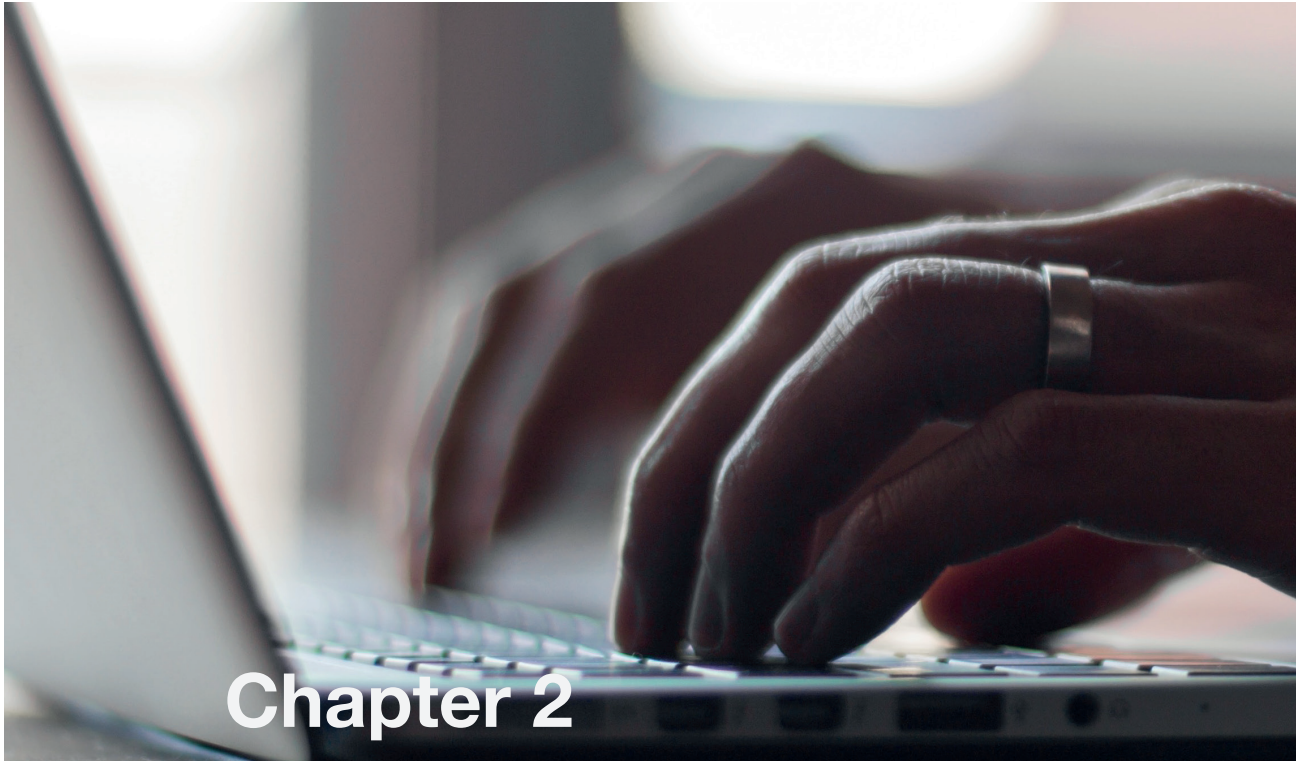
***“Is the defendant Pine Island Farms ready to proceed?”***

***“Yes, Your Honor,” said Gaebe.***

***“The court is ready. You may proceed.”***

**Tensions were high, and my adrenaline was pumping.**

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## Chapter 2

# Presenting My Case

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I stood up from behind the table where I had sat for the last six weeks and looked around the courtroom. I grabbed my yellow legal pad from the table to use for reference, though I knew exactly what I was going to say.

I had gone through this closing in my head over and over. I slowly walked toward the jury and made eye contact with as many jurors as I could. I glanced behind me to find

my 10-year-old son, James, in the crowd. He had come to watch his old man during closing arguments. Seeing his sweet, innocent face in the courtroom was so meaningful to me. Every dad wants to be a superhero to his kid, and this was my chance to show James what I did in the world—how I fought the evil powers to protect people’s rights for the good of us all.



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The other important person in the courtroom that day was Johnny Castillo. By design, I had asked John to be present during opening statements and closing arguments.

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Several colleagues had tried to persuade me to put him on the stand, but I didn't see the value in having this young blind boy testify.

While I had the right to do so, it just didn't feel tasteful or appropriate to me. It was far less intrusive for Johnny and his family to have the jury watch the day-in-the-life video we had made, which was much more powerful for the jury to experience.

I also knew that sometimes these types of cases aren't well served by overexposing the plaintiff. I certainly didn't want the jury to be turned off in some way—or, worse, to be desensitized by seeing the boy in the courtroom every day. Having him there with us now during this pivotal moment meant so much more, and would likely have greater impact.

***“Good afternoon, ladies and gentlemen. I know it’s been a long haul for you. This is now your fifth week in this courtroom, and we appreciate your time and effort. It’s a huge responsibility to be a juror on a case like this, or any other case, and you’ve done a great job of fulfilling it. It’s your determination that decides what is right and fair under the law.”***

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“We’re here to determine liability and damages,” I said. “We are not in this courtroom for sympathy. I will go through each element of the liability and damages in this case.”

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***“In a broad sense, we all know what this case is about,” I continued. “It’s about defendant Pine Island Farms using the Benlate product that was made by the defendant DuPont, which was sprayed on that lady sitting right over there six to seven weeks into her pregnancy and affected her little boy sitting right next to her.***

***“While the defenses will be many, there is one overriding thing we need to look at: Is it a coincidence that Johnny Castillo’s eyes stopped developing or arrested in their development six to seven weeks into the pregnancy at the same time his mom was exposed to Benlate? That is the one overriding factor in this case to keep in mind when we go through the evidence,” I said***

***“When we are finished with closing arguments, which is our interpretation of the evidence, you will retire to the jury room and you will have instructions that Judge Donner will give you.”***

Although I spent the bulk of my 90 minutes going through and reviewing the science of the case, restating the facts to be sure the jury agreed that DuPont and Pine Island Farms were liable, what I also needed the jury to understand was how to calculate damages.

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One part of that calculation is easy—that’s the economic consideration, including the cost of schooling, vocational training, lifelong medical treatment, and day-to-day care for Johnny. The harder part would be getting them to comprehend and assess the noneconomic damages, such as pain and suffering or loss of comfort and support.

Explaining to a jury how to value something of that magnitude isn’t easy. A lot of lawyers pull a number out of the air and hope it sticks. Those numbers, however, are usually random—there is no rational basis or formula used to justify that number. One of the many things my background as a CPA taught me, though, is that numbers become less abstract and are more meaningful to people when they have some sort of connotation to them.



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Chaffin paused. “Yes.”

“And can you tell me, Mr. Chaffin, who uses that number?”

“Just me.”

“No one else uses it?”

“No, just me.”

I got him to admit he was the only user of the number Ashton called. I didn't try to get this background information with interrogatories, because he would have had 30 days to think about his answers and their possible ramifications. Hitting him with it this way was far more productive.

I circled back to the day of the Ashton call.

“Do you recall getting a call from a reporter named John Ashton on this particular day? He had a heavy English accent and the call lasted nearly ten minutes,” I said.

**“No, no recollection of that at all.”**

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## Chapter 3

# A Formula for Compensation

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I believe it is my job to provide the jury with an equation or formula so they can reasonably calculate the proper amount of monetary damages.

I suggest looking at life in units of time, because everything we do is measured that way. We quantify our sleep, work, play, meals, travel—

literally everything we do—in units of time. I use examples of time and compensation the jury can easily comprehend, such as the salaries of a schoolteacher or police officer; and I am always sure to throw in an expert witness who has testified.

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Typically, I pick the pay rate of the scummiest witness presented by the defense without naming him to the jury. In this case, I thought it was Dr. Robert Brent, an expert witness whose testimony we took during discovery. I used his rate of pay as an expert witness of \$750 an hour and said that if the witness spent 100 hours preparing and testifying in the case, he or she would be entitled to \$75,000 for his or her time.

Once a jury hears that, I ask them to consider someone like Johnny Castillo and his circumstances and compare them to the teacher, police officer, or expert witness.

I asked the jury, “What is Johnny’s job? Johnny’s job is to live life—an entire life—with no eyes,” I said. “His job was given to him by DuPont. He doesn’t have the option of quitting, retiring, or refusing to continue that job. He has to live with that job for the rest of his life.”

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I went on to explain that despite the fact that he had no eyes, Johnny's life expectancy wasn't likely to be impaired. There is certainly no reason to believe it will be significantly shorter than that of a healthy, sighted person.

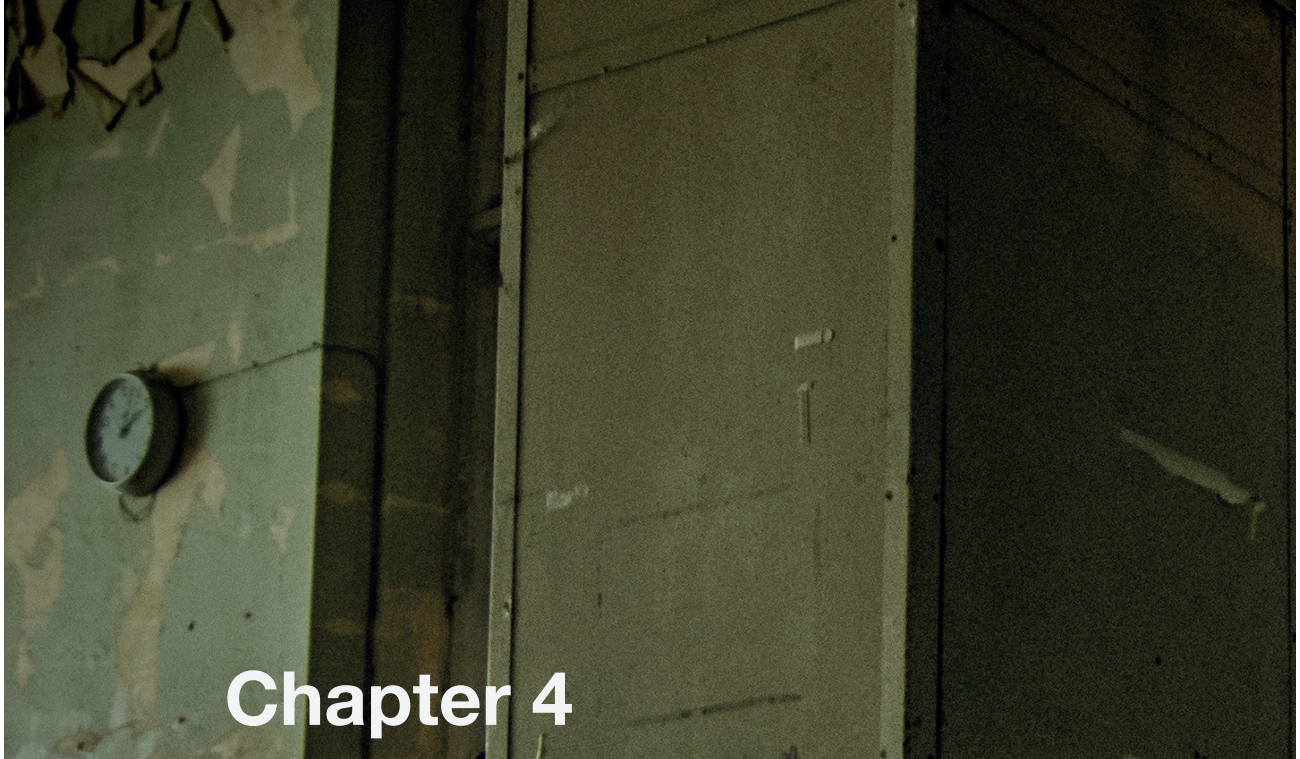
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The life expectancy tables showed that Johnny had at least 70 more years to live in a job he never asked to have.

The number I put out there was somewhere between \$20 and \$30 per hour for Johnny, with a midrange of \$25 per hour. It seemed irrational, if not downright insulting, to believe this was an unfair figure to expect the jury to agree to when deciding damages.

What they had to do in this case was consider the bodily injury sustained by John Castillo and any resulting pain and suffering, disability, physical impairment, disfigurement, mental anguish, inconvenience, and loss of capacity to enjoy life he had experienced since birth or would experience throughout his future.

The jury also had to consider the reasonable value of medical care, hospitalization, and nursing, as well as any other practicable treatment necessary for Johnny, along with any loss of ability to earn money once he reached the age of eighteen.



## Chapter 4

# Further Damages

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Juan and Donna Castillo were also entitled to damages in the form of the reasonable value or expense of hospitalization, medical care, nursing, and necessary or reasonable treatment for their child until Johnny reached the age of eighteen, as well as for loss of companionship, society, love, affection, and solace in the past and in the future due to their child's injury.

I asked for somewhere between \$5 and \$10 per hour for their pain and suffering, loss of affection, and solace. With our strong rationale and numbers in such a reasonable range, how could a jury not respond favorably?

The total damages we were pursuing in this case were in the general range of \$20 to \$30 million. Based on our assessment, that was a fair number to award the Castillos.

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This general range was what I refer to as my playing field. Whenever I win a case, the award usually falls somewhere in that playing field.

I told the jury that, according to our calculations, \$25 million was the amount that took into account all the aforementioned considerations, but they could go higher or lower, or choose their own formula if it was better than the formula I had proposed.



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Further, I challenged my opponents to present a better formula than mine. If they did, I told the jury they should use that formula over mine. I am not a lawyer who just picks numbers out of thin air. I understand that without a meaningful explanation, the jury is less likely to accept your numbers. I answer all the questions and concerns I can possibly anticipate when I lay out a formula the way I do.

Although I thought I had done a really good job throughout the trial, there was still one juror who left a seed of doubt that we would take this all the way home. I knew the other jurors got it, but I had my concerns about him, a realtor who never wanted to serve on this jury. Still, I had no regrets, no fear that I had missed something along the way. I was prepared to live with the result.

Now all I had to do was wait and see what DuPont and Pine Island Farms were going to say in their closing arguments.





## Chapter 5

# For the Defense

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Counsel for Pine Island Farms spent the bulk of its allotted time talking about when they spray their fields and what their planting patterns are, and overstating how they primarily bought chemicals such as Benlate from a different supplier than the one we had records for. Of course, they liked the supplier whose records had all been destroyed by Hurricane Andrew, because with no records it's hard to

prove anything had been bought in the time frame in question.

As expected, DuPont attacked the science and the caliber of our witnesses.

I did what I could in my rebuttal to combat the positions both defendants had taken not only throughout the trial but also now in their last-ditch efforts during closing arguments.

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I made a point of saying to the jury that no one came in for the defense and did any testing the way we had done with Dr. Van Velzen. They could have done the same thing we did, but chose not to. Instead, they relied on previous studies, most of which weren't necessarily in their favor.

We finished closing arguments in time to meet Judge Donner's request to adjourn by 5:30 p.m. that Wednesday night. It had been a long haul for everyone.

And now it would become a nail-biting waiting game to see who won the credibility war with the jury.



## Chapter 6

# A Convincing Argument

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This wasn't going to be a complete slam dunk for the Castillos, but I felt we had laid out a really good and convincing argument and a relatively easy formula to help the jury calculate damages if they agreed that the Castillos were due monetary compensation.

This was a big and important case—one that wasn't important only to my clients but also important to the planet.

We were asking for big money, somewhere around \$25 million in damages. Whether we would get the full amount would be determined in the jury room. It was pretty much out of our hands at this point. There was certainly one skunk in the jury box I had to worry about—that damned realtor—but even so, I felt pretty good as Judge Donner gave the jury its final instructions before dismissing them.

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We received word that the jury had reached a verdict sometime around 5:00 p.m. I immediately called the Castillos to let them know so they could quickly make their way to the courthouse.

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So much time had passed after the asking of the economic question that we had no idea how it would go.

The atmosphere in the courtroom was intense. You could feel the anticipation in the air. Once again there was standing room only in the gallery. All three major networks were there to cover the verdict, as well as Court TV, which had been in the courtroom for the entire five weeks.

Judge Donner addressed the jury foreperson, Maria Miranda and, as was customary, she asked if the jury had reached a verdict.

“Yes we have, Your Honor.”

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*“Would you please give your verdict to the clerk,” the judge said. Ms. Miranda handed the jury decision to the clerk, and the judge asked the clerk to publish it for the record.*

*“In the case of John Castillo, a minor; Donna Castillo; and Juan Castillo versus DuPont and Company and Pine Island Farms, we the jury return the following verdict.*

*“Was there negligence on the part of Pine Island Farms, which was the legal cause of damage to plaintiffs?*

*“Yes.*

*“Did the defendant DuPont place the fungicide Benlate on the market with a defect, which was a legal cause of damage to the plaintiffs?*

*“Yes.*

*“Was there negligence on the part of the defendant DuPont, which was the legal cause of damage to the plaintiffs?*

*“Yes.*

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***“State the percentage of any responsibility that you charge to defendant Pine Island Farms:***

***“\$20,000, which is 0.5 percent***

***“Defendant DuPont:***

***“\$39,800.”***

***Something was wrong; these numbers made no sense.***

***“Let me see that . . .” Judge Donner said as she angrily grabbed the document from the clerk. “It’s \$3,980,000.”***

It was a \$4 million dollar  
decision for the plaintiff.

The courtroom erupted with cheers.

We had just made legal history.

When the clerk finished reading how the jury came up with their number and decision, as expected, Judge Donner polled them to make sure it had been a unanimous decision.

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Judge Donner thanked the jury for its effort, for taking time away from their jobs, their families, and their busy lives. She reminded them that they had every right after the trial to choose whom they spoke to and whom they didn't. They were perfectly welcome not to speak with the lawyers on the case or the media. This was their choice alone to make.

As we closed things out, Judge Donner was extremely gracious in showing her gratitude to the jury. I was also grateful and very proud of the decision they made. I took a moment to enjoy the victory, even though everything in my experienced gut told me it would be short-lived. DuPont was surely going to file for an immediate appeal.

When court was adjourned, the atmosphere in our camp was really festive.

We had been waiting for two days while the jury deliberated, and though we had hoped and prayed they'd deliver a verdict in our favor, one never really knows how these types of cases will end. Everyone was thrilled with the outcome—at least, everyone from the plaintiff's point of view.



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Back then I liked to wear suspenders in court, especially during trial. It was a look that became synonymous with me, and, I suppose, Larry King. A lot of lawyers made fun of me for it, but I didn't care.

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In fact, I thought the suspenders were my good luck charm—and this time they really were, because somehow, against all odds, we had landed this verdict. It was nothing short of miraculous.

When I returned to my office that night, the atmosphere was euphoric. The first thing I did was light up a big cigar. My staff was passing around champagne, and all the major TV and cable networks were setting up for post-trial interviews. The energy was almost overwhelming.

After all the interviews I retreated back into the sanctity of my office. I leaned back in my soft, supple leather chair, put my feet up on my desk, and gazed at the Miami skyline. As I sat, I took it all in—the verdict, the victory, and the view.

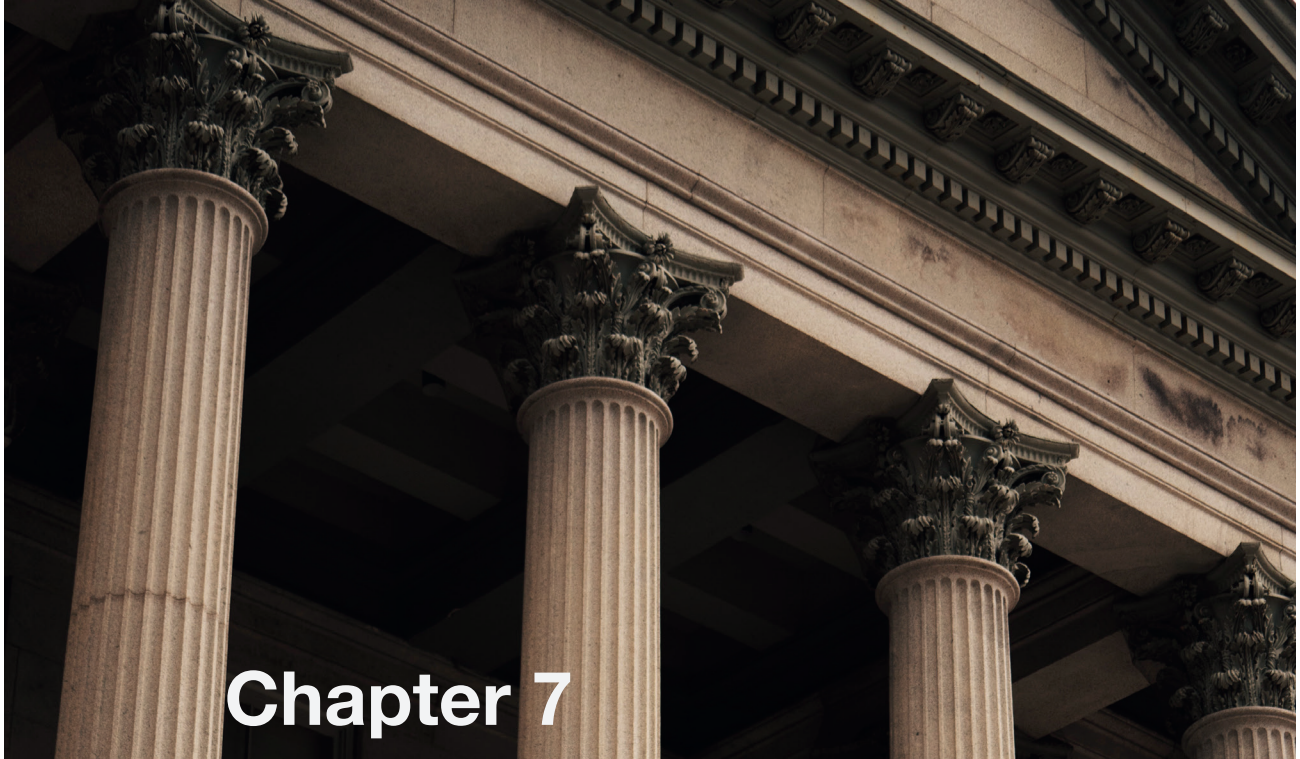
I'd come a long way from my early days of practicing law, and yet moments like these never get old. As I was contemplating what had just happened, I was also thinking about what was to come next. But there would be time for that later. Right now I wanted to breathe in these few moments of peace I allowed myself that night.

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The verdict was on the front page of the Miami Herald the following day and became international news because of its global implications.

I received interview requests from all over the world, including from a very young Dan Abrams for Court TV; one from Night & Day magazine, which is equivalent to the New York Times Magazine; and the top-rated Austrian news magazine show, which I was told was like being profiled for 60 Minutes. These news outlets were eager to hear from us and excited to help the Castillos share their story of triumphant conquest over DuPont.

It was all very exciting, and a bit daunting, too, because I knew round two of the fight would soon be upon us.



## Chapter 7

# Headed for Appeal

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As I predicted, it didn't take long for the defendants to file an appeal. The road ahead wasn't going to be a smooth one by any means; our win in Judge Donner's courtroom didn't guarantee a victorious outcome in another courtroom. Though we celebrated the milestone for everything it represented, we had a lot of work to do to ensure that our success stuck. There was no more time to bask in the media spotlight. We had to prepare for the next phase, and so we did.

But in the end, years later, after a reversal on appeal, against great odds, the Florida Supreme Court had reinstated our verdict in its entirety. This win at the Florida Supreme Court was a landmark decision that would shape how trial courts admitted scientific evidence for years to come. The decision was over 40 pages long and, page by page, it completely undressed and dismantled DuPont. The decision was not simply of great public importance. It was monumental!



## The End of the Ordeal

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I could hardly wait to call the Castillos to share this great news. I was so excited I could barely dial the phone. It had been just over ten years and this grueling marathon had finally come to a victorious end.

I felt a whirlwind of emotions—for the Castillos, for myself, for the trial judge who had been overturned, and for the good that will come from this decision for so many people going forward.

Probably the greatest satisfaction I got from the entire case was hearing Donna cry when I told her we had finally won, once and for all.

This was the end of the Castillo case for DuPont. They would finally have to pay, and by this time, several years after the trial, enough interest had accrued during all the appeals that the payment was for just under \$7 million.

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When all was said and done, the family received more than \$4 million. It wasn't the \$25 million we almost got at trial. However, it was enough money for the Castillos to live as happily as possible and to send their son to Perkins or a similar school for the blind. After the trial, the Castillos moved to Massachusetts, where Juan continued his career as an accountant and Donna continued to care for their son.

Our success paid dividends for the Castillo family in other ways, too, as Johnny was able to fine-tune his other senses and become a gifted singer and musician. Ten years after the trial, the Boston Red Sox invited him to sing the national anthem on Easter Sunday at a Red Sox home game. One of my only regrets is not finding out about him singing until after it happened.

Our case was the first jury verdict in history affirmed on appeal against a chemical company for causing a birth defect where the plaintiff actually won. However, the real rewards for my team and me in winning the Castillo case came when DuPont finally took Benlate off the market in 2000 and in knowing the Castillos would finally be able to get on with their lives.

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Having a hand in both outcomes was extremely humbling and gratifying. You can read much more about my background, about this trial and its consequences, in *Blindsided*.