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(Cite as: 431 F.3d 353)

United States Court of Appeals,
Ninth Circuit.
LIVING DESIGNS, INC. and Plant Exchange, Inc., Hawai'i corporations, Plaintiff-Appellant,
v.
E.I. DUPONT DE NEMOURS AND COMPANY, a Delaware corporation, Defendant-Appellee.
Anthurium Acres, a Hawai'i general partnership, successor in interest to Island Tropicals; Mueller Horticultural Partners, a Hawai'i limited partnership, Plaintiffs-Appellants,
v.
E.I. Dupont de Nemours and Company, a Delaware corporation, Defendant-Appellee.
McConnell, Inc., a California corporation, Plaintiff-Appellant,
v.
E.I. Dupont de Nemours and Company, a Delaware corporation, Defendant-Appellee.
Living Designs, Inc. and Plant Exchange, Inc., Hawai'i corporations; David Matsuura, individually and dba Orchid Isle Nursery; Stephen Matsuura, individually and dba Hawaiian Dendrobium Farm; Fuku-Bonsai, Inc.; David W. Fukumoto; Living Designs, Inc. and Plant Exchange, Inc.; McConnell, Inc., a California corporation; Anthurium Acres, a Hawai'i general partnership, successor in interest to Island Tropicals; Mueller Horticultural Partners, Plaintiffs-Appellants,
v.
E.I. Dupont de Nemours and Company, a Delaware corporation, Defendant-Appellee.

Nos. 02-16947, 02-16948, 02-16951, 04-16354.
Argued and Submitted July 11, 2005.
Filed Dec. 5, 2005.

OPINION

THOMAS, Circuit Judge.

In these consolidated cases, Plaintiffs Living Designs, McConnell, Inc., Anthurium Acres, Matsuura, and Fuku-Bonsai allege that Defendant E.I. DuPont de Nemours and Company ("DuPont") fraudulently induced the settlement of their prior products liability litigation. We reverse the district court's grant of judgment on the pleadings in favor of DuPont on Plaintiffs' claims under the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-1968 ("RICO"), and the district court's grant of summary judgment in favor of DuPont on Plaintiffs' state tort claims.

I

A

Outside of the agricultural community, plant disease-causing fungi are rarely the subject of casual dinner conversation, much less contentious litigation. Yet to farmers worldwide, the problems posed by white mold, virulent black leg, foot rot, and scab are extremely serious matters. In the late 1950s and early 1960s, DuPont developed a systemic fungicide to combat these problems, which it marketed under the name of Benlate. At the zenith of its use, Benlate was one of DuPont's most successful commercial products.

However, into every product's life, a little rain must fall. In the case of Benlate, the rain became a torrent of litigation alleging that Benlate had become contaminated with the herbicide sulfonylureas ("SUs") during the manufacturing process, resulting in widespread crop damage.

In previous litigation filed in 1992 and 1993, Plaintiffs, who are commercial nurserymen, separately sued DuPont alleging that contaminated Benlate had killed their plants. *Matsuura v. Altson & Bird (Matsuura I)*, 166 F.3d 1006, 1007, *amended by* 179 F.3d 1131 (9th Cir.1999).

> Many similar suits were filed by commercial growers across the nation. In early trials, DuPont falsely represented that soil tests had produced no evidence f contamination. During consolidated discovery proceedings in Hawai'i, which included the [Plaintiffs'] suits, DuPont falsely denied withholding evidence of Benlate contamination, and improperly ***357** invoked work product protection to resist disclosure of testing data.
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> *Id.*

Plaintiffs, represented by Florida attorney Kevin Malone, settled their Benlate product liability cases against DuPont in April of 1994.[FN1] Plaintiffs did not

dismiss their claims with prejudice until October and November of 1994. *Matsuura v. E.I. du Pont de Nemours & Co. (Matsuura III)*, 330 F.Supp.2d 1101, 1120 (D.Haw.2004). After Plaintiffs settled their product liability claims against DuPont, it became clear that DuPont had not revealed to Plaintiffs during discovery damaging test results that indicated that Benlate was indeed contaminated with SUs. There are three different categories of tests concealed, withheld, and lied about by DuPont in the course of litigating Benlate cases across the country.

> FN1. Plaintiff Fuku-Bonsai signed a settlement agreement with DuPont on April 22, 1994. The month prior, on March 6, 1994, Fuku-Bonsai had been forced to file for bankruptcy under Chapter 11. The settlement between Fuku-Bonsai and DuPont was approved by the bankruptcy court on May 16, 1994.

1. *Alta Test Results.* The results of tests conducted by Alta Analytical Laboratories ("Alta") showed that farms where Benlate had been used were contaminated with SUs. "Alta laboratories was one of the few laboratories, if not the only one, capable of performing the sophisticated soil and water analysis to determine if Benlate was contaminated with [SUs]." *Matsuura v. E.I. du Pont de Nemours & Co. (Matsuura II)*, 102 Hawai'i 149, 73 P.3d 687, 689 n. 5 (Haw.2003).

2. *Costa Rica field tests.* DuPont conducted field tests of Benlate in Monte Vista, Costa Rica in 1992. During the Costa Rica field tests, the plants treated with Benlate died, demonstrating that Benlate was harmful to plants. DuPont destroyed the plants subjected to these field tests and withheld evidence of the field test results. *Productora de Semillas, S.A. v. E.I. du Pont de Nemours, & Co.*, No. 97-12186 CA 23 (Fla.Cir.Ct. June 30, 2001) (order on Plaintiff's motion to strike defendant DuPont's pleadings and on Plaintiff's motion for sanctions against DuPont for the destruction of the Monte Vista Benlate test).

3. *BAM results.* These tests were performed on behalf of DuPont by A & L Midwest laboratories and by DuPont's in-house testing facilities. These tests also showed that Benlate was contaminated with SUs. *Kawamata Farms, Inc. v. United Agri Products*, 86 Hawai'i 214, 948 P.2d 1055, 1065 (1997) (referring to the Keeler documents).

DuPont first produced Alta test results showing Benlate contamination in May 1994 to Benlate plaintiffs who had not yet settled their cases, such as to plaintiffs in the *Kawamata/Tomono* case,[FN2] over which Judge Ibarra presided in the Third Circuit Court in Hawai'i. *Matsuura II*, 73 P.3d at 689.[FN3]

> FN2. *See Kawamata Farms*, 948 P.2d at 1065. In *Kawamata Farms*, the plaintiffs, sellers and distributors of agricultural products in Hawai'i, alleged that their plants, soil, and farm structures had been damaged by Benlate. In January 1995, a jury issued a verdict in favor of the plaintiffs on their negligence and products liability claims, awarding $1,180,000 in compensatory damages and $1,770,000 in punitive damages.

> FN3. The Hawai'i Supreme Court in *Kawamata Farms*, describes in detail the discovery disputes and Plaintiffs' gradual discovery of withheld evidence in this case. 948 P.2d at 1065-66. Although Plaintiffs in this case state that the Alta test results were produced on May 17, 1994, it should be noted that production of the test results demonstrating the Benlate contamination and DuPont's knowledge of the contamination occurred bit by bit from May through December of 1994.

***358** Contrary to DuPont's prior representations, the tests confirmed that Benlate was contaminated. Additional evidence of Benlate contamination was produced in other Benlate litigation. Two district courts held that DuPont had intentionally engaged in fraudulent conduct by withholding this evidence. *See Kawamata Farms v. United Agri Prods.*, 86 Hawai'i 214, 948 P.2d 1055, 1083, 1087-88 (1996) (imposing $1.5 million punitive sanction for discovery abuse), *aff'd*, 86 Hawai'i 214, 948 P.2d 1055 (Haw.1997); *Bush Ranch v. E.I. DuPont de Nemours & Co. (In re DuPont) ("Bush Ranch ")*, 918 F.Supp. 1524, 1556-58 (M.D.Ga.1995) (imposing sanctions potentially totaling $115 million), *rev'd on other grounds*, 99 F.3d 363 (11th Cir.1996). Although the Eleventh Circuit reversed the Georgia

court on the ground that the sanctions were punitive and the court had not followed applicable criminal procedure, the court noted the "serious nature of the allegations" and stated that it assumed the U.S. Attorney would conduct an investigation, *In re E.I. DuPont*, 99 F.3d at 369 n. 7. On remand, the district court asked the United States Attorney to "investigate and prosecute" DuPont for criminal contempt, *In re E.I. du Pont*, No. 4:95-CV-36 (HL) (M.D.Ga. Nov. 4, 1998) (order referring matter to U.S. Attorney), but the court ultimately approved a civil settlement resolving the matter, which required DuPont and Alston & Bird to make payments totaling $11.25 million, *see In re E.I. du Pont*, No. 4:95-CV-36 (HL) (M.D.Ga. Dec. 31, 1998) (consent order and final judgment).
Matsuura I, 166 F.3d at 1007-08.

DuPont was first sanctioned by Judge Elliot, who presided over the *Bush Ranch* litigation in the United States District Court for the Middle District of Georgia, on August 21, 1995 for (1) intentionally withholding evidence of the SU contamination of Benlate that was in its possession and which it was ordered to produce and (2) for falsely representing to the court and to plaintiffs that the Alta documents it withheld contained no evidence of SU contamination. *Bush Ranch*, 918 F.Supp. at 1555-1558.

B

After learning that DuPont fraudulently withheld evidence of Benlate's contamination, Plaintiffs filed the instant actions in the United States District Court for the District of Hawai'i, asserting claims under RICO and state common law claims of fraud, conspiracy, misrepresentation, abuse of process, infliction of emotional distress, interference with prospective economic advantage, negligence, and spoliation of evidence. In sum, Plaintiffs alleged that DuPont fraudulently withheld evidence of Benlate's contamination to induce Plaintiffs to settle their underlying Benlate litigation. Plaintiffs allege they were harmed by DuPont's fraudulent conduct "because they would have requested more money or refused to settle had they known about the concealed data." *Matsuura II*, 73 P.3d at 691.

The district court [FN4] granted DuPont's judgment on the pleadings, ruling the suit was barred by releases signed by Plaintiffs as part of their settlement agreements with DuPont. *Matsuura I*, 166 F.3d at 1008. Furthermore, "the court held [Plaintiffs] could have rescinded the settlement agreements because of DuPont's ***359** fraud, but forfeited that remedy by failing promptly to tender the settlement proceeds." *Id.*

FN4. The presiding judge at this stage of the litigation was Hon. David Ezra, Chief Judge of the District of Hawai'i.

Plaintiffs appealed. We reversed, holding that Delaware law controlled and that the Delaware Supreme Court would likely interpret the releases as not barring a claim for fraudulent inducement. *Id.* at 1011. We also held that, under Delaware law, plaintiffs alleging that they were fraudulently induced to settle their claims have a choice of remedies: they may either (1) rescind the settlement agreement or (2) affirm their settlement agreements and sue for fraud. *Id.* at 1012.[FN5]

FN5. Our interpretation of Delaware law was confirmed as correct in *E.I. Du Pont De Nemours & Co. v. Florida Evergreen Foliage*, 744 A.2d 457 (Del.1999).

Proceedings continued on remand in federal court. As summarized by the Hawai'i Supreme Court:

On March 1, 2001, the [Plaintiffs] filed a "Motion for Collateral Estoppel to Preclude Defendant from Re-Litigating Previously Adjudicated Findings of Fraud, Discovery Abuse, and Intentional Withholding of Evidence in the *Kawamata Farms* case" (motion for collateral estoppel). Therein, the [Plaintiffs] seek to preclude DuPont from "re-litigating" the following issues: (1) that DuPont fraudulently and intentionally withheld the Alta test results from Benlate litigants; (2) that DuPont intentionally withheld the Keeler documents from Benlate litigants; and (3) that the Alta test results included analytical findings, which some experts would construe as evidence that Benlate was contaminated with SUs. The [Plaintiffs] claim that issues (1) and (2) have already been decided in *Kawamata Farms* and that issue (3) was decided by the Eleventh Circuit in *Bush Ranch II*.

Matsuura II, 73 P.3d at 691. In response, DuPont filed two "related or counter motions." *Id.* First, DuPont filed a "Motion for Judgment on the Pleadings as to All Plaintiffs' Claims Based on Litigation Con-

duct," asserting that Plaintiffs' claims were barred by the doctrine of litigation immunity and that Hawai'i has not recognized a separate tort of spoliation of evidence. *Id.* Second, DuPont filed a "Motion for Summary Judgment Based on Plaintiffs' Inability as a Matter of Law to Establish Reasonable Reliance," asserting that reasonable reliance is an element of a fraudulent inducement claim and that Plaintiffs were unable, as a matter of law, to establish that they reasonably relied on DuPont's representations made during litigation. *Id.*

On May 10, 2001, less than one week before the hearing on the substantive motions, DuPont filed a motion to certify questions of Hawai'i state law to the Hawai'i Supreme Court. Judge Ezra agreed and certified three questions to the court. *Matsuura II*, 73 P.3d at 692. The Hawai'i Supreme Court responded on July 29, 2003. The questions and the Hawai'i Supreme Court's answers are as follows.

The first question certified asked: "Under Hawai'i law, is a party immune from liability for civil damages based on that party's misconduct, including fraud, engaged in during prior litigation proceedings?" *Id.* at 688. The Hawai'i Supreme Court submitted the following answer: "Under Hawai'i law, a party is not immune from liability for civil damages based upon that party's fraud engaged in during prior litigation proceedings." *Id.* at 700.

The second certified question asked: "Where plaintiffs' attorneys and others have accused the defendant of fraud and dishonesty during the course of prior, related litigation, are plaintiffs thereafter precluded as a matter of law from bringing***360** a cause of action for fraudulent inducement to settle because they should not have relied on the Defendant's representations?" *Id.* at 688-89. The Hawai'i Supreme Court submitted the following answer: "In an action for fraudulent inducement where plaintiffs' attorneys and others have accused the defendant of fraud and dishonesty during the course of prior dealings, plaintiffs are not precluded as a matter of law from establishing that their reliance on the defendant's representations was reasonable." *Id.* at 704.

The third and final certified question asked: "Does Hawai'i law recognize a civil cause of action for damages for intentional and/or negligent spoliation of evidence?" *Id.* at 689. The Hawai'i Supreme Court responded:

> Because the facts alleged cannot support their spoliation claim, this court need not resolve whether Hawai'i law would recognize a tort of spoliation of evidence. Therefore, insofar as the third certified question does not appear to be "determinative of the cause," it was inappropriate for certification under HRAP Rule 13. Accordingly, we decline to answer it.
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> *Id.* at 706 (citations omitted).

Prior to the Hawai'i Supreme Court's response to the certified questions, visiting Judge Manuel Real of Los Angeles, who replaced Chief Judge Ezra as the judge assigned to this case, denied DuPont's motion for continuance of the trial date and for limited stay of discovery pending the Hawai'i Supreme Court's ruling and invited DuPont to refile its motions for judgment on the pleadings and for summary judgment. DuPont refiled its motions. On September 4, 2002, prior to the Hawai'i Supreme Court's ruling on the certified questions, the district court granted DuPont's motions for summary judgment as to Plaintiffs' fraud claim on the grounds that Plaintiffs could not establish reasonable reliance as a matter of law.

After the Hawai'i Supreme Court ruled on the certified questions, Plaintiffs moved to vacate the district court's grant of summary judgment. DuPont filed a counter-motion on July 16, 2003, asking the district court to re-affirm its earlier ruling.

On February 25, 2004, the district court heard these motions and other motions filed by DuPont, which included: (1) a motion for summary judgment on the speculative nature of Plaintiffs' alleged damages; (2) a motion for summary judgment on Plaintiffs' "Alta fraud" claims; (3) a motion for summary judgment on Plaintiffs' "non-fraud" claims; (4) a motion for judgment on the pleadings as to Plaintiffs' RICO claims; and (5) a motion for judgment on the pleadings on Hawai'i's litigation privilege. The district court granted DuPont's motions for summary judgment and for judgment on the pleadings. *Matsuura III*, 330 F.Supp.2d at 1101. The district court instructed DuPont to draft a proposed order, which the district court adopted almost verbatim and then published. Plaintiffs timely appealed.

II

We review a dismissal on the pleadings pursuant to Federal Rule of Civil Procedure 12(c) de novo. *Turner v. Cook*, 362 F.3d 1219, 1225 (9th Cir.2004). Judgment on the pleadings is proper when, taking all the allegations in the pleadings as true and construed in the light most favorable to the nonmoving party, the moving party is entitled to judgment as a matter of law. *See id.* We review a district court's grant of summary judgment de novo. *Yakutat, Inc. v. Gutierrez*, 407 F.3d 1054, 1066 (9th Cir.2005). "We must determine, viewing the evidence in the light most favorable to the nonmoving party, whether there are any genuine issues of material fact and ***361** whether the district court correctly applied the relevant substantive law." *KP Permanent Make-Up, Inc. v. Lasting Impression I, Inc.*, 408 F.3d 596, 602 (9th Cir.2005). We review the district court's exclusion of evidence in a summary judgment motion for an abuse of discretion. *Orr v. Bank of America*, 285 F.3d 764, 773 (9th Cir.2002).

III

The district court erred in granting judgment on the pleadings as to the Plaintiffs' RICO claims.

A

The district court erred in granting judgment on the pleadings as to the RICO claims asserted by Fuku-Bonsai and Matsuura. The elements of a civil RICO claim are as follows: "(1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity (known as 'predicate acts') (5) causing injury to plaintiff's 'business or property.' " *Grimmett v. Brown*, 75 F.3d 506, 510 (9th Cir.1996) (citing 18 U.S.C. §§ 1964(c), 1962(c)).

1

The district court held that Fuku-Bonsai and Matsuura had failed to allege a distinct enterprise. *Matsuura III*, 330 F.Supp.2d at 1129-31. 18 U.S.C. § 1962(c) provides:

> It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

"[T]o establish liability under § 1962(c) one must allege and prove the existence of two distinct entities: (1) a 'person'; and (2) an 'enterprise' that is not simply the same 'person' referred to by a different name." *Cedric Kushner Promotions, Ltd. v. King*, 533 U.S. 158, 161, 121 S.Ct. 2087, 150 L.Ed.2d 198 (2001); *see also Rae v. Union Bank*, 725 F.2d 478, 481 (9th Cir.1984). The term "enterprise" is defined in 18 U.S.C. § 1961(4) as "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity."

Perhaps taking a page out of a John Grisham novel,[FN6] Fuku-Bonsai and Matsuura have alleged that the "person" was DuPont and the "enterprise" consisted of DuPont, the law firms employed by DuPont, and expert witnesses retained by the law firms. To be sure, if the "enterprise" consisted only of DuPont and its employees, the pleading would fail for lack of distinctiveness. *See Cedric Kushner*, 533 U.S. at 164, 121 S.Ct. 2087. However, there is no question that law firms retained by DuPont are distinctive entities. *See United States v. Blinder*, 10 F.3d 1468, 1473-74 (9th Cir.1993). And there is no question that DuPont and the law firms together can constitute an "associated in fact" RICO enterprise. *Id.* at 1473 (Holding that "a group or union consisting solely of corporations or other legal entities can constitute an 'association in fact' enterprise").

> FN6. In his novel *The Firm*, author John Grisham describes a law firm owned by an organized crime family. JOHN GRISHAM, THE FIRM (Doubleday 1991).

The more difficult question is whether the enterprise formed by the group of DuPont, the law firms it employed, and the expert witnesses that the law firms retained is separate and distinct from DuPont, the RICO "person" alleged in Plaintiffs' complaint. We conclude that they ***362** are. The associated in fact enterprise formed by this union is "a being different from, not the same as or part of, the person whose behavior [RICO] was designed to prohibit." *Rae*, 725 F.2d at 481. This is not a situation where the enterprise cannot be either formally or practically separable from the person. *See United States v. Benny*, 786 F.2d 1410, 1416 (9th Cir.1986). DuPont-a company that offers products and services for markets including agriculture, nutrition, electronics, communications, safety

and protection, home and construction, transportation, and apparel-retained law firms for the purpose of defending DuPont in Plaintiffs' lawsuits. These law firms are required to conform to ethical rules and thus are not merely at the beck and call of their clients. As we recently observed:

> Membership in the bar is a privilege burdened with conditions. An attorney is received into that ancient fellowship for something more than private gain. He becomes an officer of the court, and, like the court itself, an instrument or agency to advance the ends of justice.

Gadda v. Ashcroft, 377 F.3d 934, 942-43 (9th Cir.2004) (citations and quotations omitted).

Just as a corporate officer can be a person distinct from the corporate enterprise, DuPont is separate from its legal defense team. *See* *Sever v. Alaska Pulp Corp.*, 978 F.2d 1529, 1534 (9th Cir.1992); *Benny*, 786 F.2d at 1415-16. Indeed, the rules of professional conduct require law firms to be distinct entities and to maintain their professional independence. Model Rules of Prof'l Conduct R. 5.4. In addition, even in the context of the attorney-client relationship, attorneys retain control over important functions; for example, in litigation, the attorney retains control over tactical and strategic decisions. *New York v. Hill*, 528 U.S. 110, 114-15, 120 S.Ct. 659, 145 L.Ed.2d 560 (2000); Model Rules of Prof'l Conduct R. 1.2 cmt. 1. Thus, the litigation "enterprise" necessarily must be distinct from the client retaining legal assistance. In sum, given the allegations of the complaint, the district court erred in concluding that Plaintiffs failed to allege a distinct RICO enterprise.

2

The district court also concluded that the predicate acts alleged by Plaintiffs did not support a RICO claim because (a) the mail and wire fraud predicate acts failed due to Plaintiffs' inability to establish reasonable reliance; and (b) the obstruction of justice predicate acts failed to meet the RICO requirements of direct injury and continuity.[FN7] *Matsuura III*, 330 F.Supp.2d at 1128-29.

> FN7. We hold that the district court did not err in concluding that Plaintiffs failed to allege a direct relationship between the injury and the alleged wrongdoing. Plaintiffs alleged that the predicate act consisted of DuPont's obstruction of justice in the *Bush Ranch* case. "[P]laintiff[s] who complain[ ] of harm flowing merely from the misfortunes visited upon a third person by the defendant's acts [are] generally said to stand at too remote a distance to recover." *Oregon Laborers-Employers Health & Welfare Trust Fund v. Philip Morris, Inc.*, 185 F.3d 957, 963 (9th Cir.1999) (quoting *Holmes v. Sec. Investor Prot. Corp.*, 503 U.S. 258, 268-69, 112 S.Ct. 1311, 117 L.Ed.2d 532 (1992)).

The district court concluded, without analysis, that Plaintiffs were required to prove that they reasonably relied on DuPont's fraudulent misrepresentations to state a meritorious civil RICO case predicated on mail and wire fraud. *Id.* at 1128-29. Under 18 U.S.C. § 1964(c), civil RICO plaintiffs must demonstrate causation, specifically that they were injured "by reason of" the alleged racketeering activity of the ***363** defendant. 18 U.S.C. § 1964(c). "It is well settled that, to maintain a civil RICO claim predicated on mail [or wire] fraud, a plaintiff must show that the defendants' alleged misconduct proximately caused the injury." *Poulos v. Caesars World, Inc.*, 379 F.3d 654, 664 (9th Cir.2004) (citing *Holmes v. Sec. Investor Prot. Corp.*, 503 U.S. 258, 268, 112 S.Ct. 1311, 117 L.Ed.2d 532 (1992)). Although, in some cases, "reliance may be a milepost on the road to causation," *id.* (quoting *Blackie v. Barrack*, 524 F.2d 891, 906 n. 22 (9th Cir.1975))., we have in the past declined to announce a black-letter rule that reliance is the only way plaintiffs can establish causation in a civil RICO claim predicated on mail or wire fraud. *Id.* at 666. We need not address whether this is a case where Plaintiffs can establish causation only by demonstrating that they reasonably relied on DuPont's fraud,[FN8] because Plaintiffs adequately pleaded reasonable reliance in their amended complaint. Plaintiffs alleged in their complaint that they "reasonably relied on [DuPont] to obey statutes, court orders, court rules, rules of evidence, written agreements, representations to the court by officers of the court, and representations made under oath to the court by [DuPont]'s officers and agents." First Am. Compl. ¶ 165. Regardless of whether Plaintiffs were required to plead reasonable reliance to satisfy the causation element of their RICO claims, they did, and thus the district court erred in granting judgment on the pleadings on this question.

> FN8. Indeed, it would be premature for us to do so, as the Supreme Court recently granted a petition for a writ of certiorari to address the following question: "Did the Court of Appeal for the Second Circuit err when it held that civil RICO plaintiffs alleging mail and wire fraud as predicate acts must establish 'reasonable reliance' under 18 U.S.C. § 1964(c)?" *Bank of China, New York Branch v. NBM L.L.C.*, 545 U.S. 1138, 125 S.Ct. 2956, 162 L.Ed.2d 886 (2005).

Although the district court styled its order as one granting judgment on the pleadings, it appeared to be considering this issue on the record. *Matsuura III*, 330 F.Supp.2d at 1128-29 ("As discussed above, Plaintiffs cannot prove that they reasonably relied on DuPont's alleged fraud."). Therefore, we assume that the district court converted the Rule 12(c) motion into a motion for summary judgment.[FN9] If so, then the district court erred, because there were genuine issues of material fact that precluded the grant of summary judgment on this question. The district court held that the Plaintiffs' attorney, Malone, knew or had knowledge of many of the alleged facts indicating fraudulent conduct. However, this is a disputed issue. Plaintiffs tendered evidence that Malone did not know the substance of the evidence that DuPont was withholding at the time of settlement. Therefore, there exists a triable factual issue as to reasonable reliance.

> FN9. If the district court considers matters outside the pleadings, the district court treats the Rule 12(c) motion as one for summary judgment and must give all parties a "reasonable opportunity to present all material made pertinent to such a motion by Rule 56." Fed.R.Civ.P. 12(c). Plaintiffs do not dispute that they received such an opportunity.

In sum, the district court improperly granted judgment on the pleadings on the question of reasonable reliance and, to the extent that the district court converted the Rule 12(c) motion into a Rule 56 motion for summary judgment, it also erred because there were genuine issues of material fact on the question.

3

The district court determined that Plaintiffs did not assert that they had suffered ***364** an injury to their business or property, as required under 18 U.S.C. § 1964(c). *Matsuura III*, 330 F.Supp.2d at 1131. Rather, the district court determined that because Plaintiffs' injury consisted of "a tainted litigation process that diminished their settlements," Plaintiffs suffered "the type of personal injury or injury to an intangible interest not remediable by RICO's civil provisions." *Id.; see also id.* at 1132 (holding that Plaintiffs' allegations "fail to allege a cognizable RICO injury and therefore fail as a matter of law"). Plaintiffs argue that they:

> settled product liability claims, accepted deflated settlements, and dismissed those causes of action, only to find out later that they had been defrauded.[Plaintiffs'] underlying claims were specifically focused on injury to their nursery businesses and their property (including damaged plant inventory) caused by defective Benlate, and DuPont's fraud and racketeering activities further damages those business and property interests when they were duped into accepting low settlements.
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> Brief for Appellants at 75.

This court "typically look[s] to state law to determine 'whether a particular interest amounts to property.' " *Diaz v. Gates*, 420 F.3d 897, 899 (9th Cir.2005) (en banc) (per curiam) (quoting *Doe v. Roe*, 958 F.2d 763, 768 (7th Cir.1992)). "Without harm to a specific business or property interest-a categorical inquiry typically determined by reference to state law-there is no injury to business or property within the meaning of RICO." *Id.* at 900. Financial losses, in and of themselves, are insufficient to confer standing under RICO. *Id.* at 900 n. 1.

Plaintiffs allege that they suffered both a harm to a specific property interest and a financial loss. The harm Plaintiffs allege is fraudulent inducement, which is actionable under Hawai'i law. *Matsuura II*, 73 P.3d at 700-01. The financial loss Plaintiffs claim is that they settled their claims for a smaller percentage of their alleged damages than they could have received absent DuPont's fraudulent inducement. *See Matsuura III*, 330 F.Supp.2d at 1131. Therefore, the district court erred in determining that Plaintiffs' "allegations ... fail to allege a cognizable RICO injury and therefore fail as a matter of law," *Matsuura III*, 330 F.Supp.2d at 1132.

The district court determined that Plaintiffs' RICO claims fail as a matter of law because they are based on immune litigation conduct. *Matsuura III*, 330 F.Supp.2d at 1133. The district court reasoned that (1) Plaintiffs' "RICO claims are based on DuPont's conduct in Benlate litigation;" (2) "federal litigation immunity ... bars subsequent civil litigation based on a party's litigation conduct;" and (3) "there is no stated or clear Congressional intent to abrogate litigation immunity." *Id.* at 1132-33.

Common law immunizes *witnesses* in judicial proceedings from subsequent litigation based on their testimony. *See Briscoe v. LaHue*, 460 U.S. 325, 330-31, 103 S.Ct. 1108, 75 L.Ed.2d 96 (1983); *Franklin v. Terr*, 201 F.3d 1098, 1101 (9th Cir.2000); *Holt v. Castaneda*, 832 F.2d 123, 124 (9th Cir.1987). Plaintiffs allege that DuPont's RICO liability is predicated on its falsification, destruction, and misrepresentation of evidence. DuPont has not cited any federal case which holds that a party's litigation conduct in a prior case is entitled to absolute immunity and cannot form the basis of a subsequent federal civil RICO claim. *See* ***365***Florida Evergreen Foliage v. E.I. Dupont De Nemours & Co.*, 336 F.Supp.2d 1239, 1267 (S.D.Fla.2004).[FN10] In fact, the RICO statute, itself, provides that conduct relating to prior litigation may constitute racketeering activity. 18 U.S.C. § 1961(1)(B) (defining racketeering activity as including an act indictable under 18 U.S.C. § 1512, which relates to tampering with a witness, victim, or informant). Therefore, the district court erroneously determined that Plaintiffs' "RICO claims, which are based on immune litigation conduct, fail as a matter of law." *Matsuura III*, 330 F.Supp.2d at 1133.

FN10. The two cases cited by DuPont-*United States v. Pendergraft*, 297 F.3d 1198 (11th Cir.2002), and *Raney v. Allstate Ins. Co.*, 370 F.3d 1086 (11th Cir.2004)-are inapposite, as they deal with whether certain conduct is wrongful within the meaning of the Hobbs Act, 18 U.S.C. § 1951, which criminalizes interfering with commerce through the use of threats or violence. In *Pendergraft*, the Eleventh Circuit held that defendants' "threat to file litigation against Marion County, even if made in bad faith and supported by false affidavits, was not 'wrongful' within the meaning of the Hobbs Act." 297 F.3d at 1208. In *Raney*, the Eleventh Circuit, relying on *Pendergraft*, affirmed the dismissal of plaintiff's RICO claim because conspiracy to extort money through the filing of malicious lawsuits is not wrongful within the meaning of the Hobbs Act, 18 U.S.C. § 1951, and therefore plaintiff failed to allege a predicate act cognizable under RICO. 370 F.3d at 1088.

B

The district court erred in holding that the statute of limitations precluded relief as to Plaintiffs Living Designs, McConnell, Inc., and Anthurium Acres. Living Designs, McConnell, Inc., and Anthurium Acres did not file their complaints asserting their RICO claims until, respectively, September 24, 1999, May 5, 2000, and September 21, 2000. The district court determined that Plaintiffs had constructive notice of DuPont's fraud no later than August 21, 1995, the date that DuPont was sanctioned for fraud by Judge Elliott in the *Bush Ranch* case. *Living Designs, Inc. v. E.I. du Pont de Nemours & Co.*, No. 99-00660 MLR/LER (D.Haw. Sep. 5, 2002) (order granting DuPont's motion for summary judgment as to plaintiffs' RICO claims based on the statute of limitations). Therefore, the district court concluded that Plaintiffs' RICO claims were barred by the four year statute of limitations. *Id.*

The limitations period for civil RICO actions begins to run when a plaintiff knows or should know of the injury which is the basis for the action. *Id.* at 1109. Thus, Plaintiffs' RICO claims accrued when Plaintiffs had actual or constructive knowledge of DuPont's fraud. "Ordinarily,[this court] leave[s] the question of whether a plaintiff knew or should have become aware of a fraud to the jury." *Beneficial Standard Life Ins. Co. v. Madariaga*, 851 F.2d 271, 275 (9th Cir.1988). "The plaintiff is deemed to have had constructive knowledge if it had enough information to warrant an investigation which, if reasonably diligent, would have led to discovery of the fraud." *Pincay*, 238 F.3d at 1110 (quoting *Beneficial Standard Life*, 851 F.2d at 275) (internal quotation marks omitted).

Plaintiffs have tendered sufficient evidence to raise a genuine issue of material fact as to when they knew of or should have discovered the fraud. The district court relied solely on the entry of Judge Elliot's sanction order. However, the district court erred in determining that, as a matter of law, the attention

received by Judge Elliott's ruling could be imputed to the Plaintiffs. *O'Connor v. Boeing North American, Inc.*, 311 F.3d 1139, 1152-53 (9th Cir.2002) ("The district court erred in concluding as a matter of law that newspaper reports concerning the Defendants' facilities were sufficiently 'numerous and notorious'***366** to impute knowledge of them to Plaintiffs. The district court held that a 'reasonable, prudent subscriber' of newspapers in the area, and a 'reasonably diligent person living in the area for a substantial period of time between' 1989 and 1991 would have become aware of the release of contaminants from SSFL. This evaluation of the awareness in Plaintiffs' various communities of a specific fact or event was uniquely an issue for the jury to resolve."). Further, Plaintiffs tendered evidence that their attorney did not realize the import of the order until much later. This, along with other evidence in the record, is sufficient to create a triable factual issue as to whether these parties should have known about the alleged fraud when Judge Elliot's sanction order was issued.

C

For these reasons, the district court erred in granting judgment on the pleadings as to the RICO claims. We express no opinion on the merits of the claims, but simply conclude that DuPont is not entitled to judgment on the pleadings for the reasons given by the district court.

* * * *

REVERSED AND REMANDED.

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Living Designs, Inc. v. E.I. Dupont de Nemours and Co.
431 F.3d 353, RICO Bus.Disp.Guide 10,975, 35 Envtl. L. Rep. 20,246, 05 Cal. Daily Op. Serv. 10,160, 2005 Daily Journal D.A.R. 13,922