UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS

Civil Action
No. 82-1672-S

SKINNER, D. J.
and a jury.

ANNE ANDERSON, ET AL

V.

W. R. GRACE & CO., ET AL

77TH DAY OF JURY TRIAL

APPEARANCES:

Schlichtmann, Conway & Crowley (by Jan Richard Schlichtmann, Esquire, Kevin P. Conway, Esquire, and William J. Crowley, III, Esquire), on behalf of the Plaintiffs.

Charles R. Nesson, Esquire, on behalf of the Plaintiffs

Herlihy & O'Brien (by Thomas M. Kiley, Esquire), on behalf of the Plaintiffs.

Hale & Dorr (by Jerome P. Facher, Esquire, Neil Jacobs, Esquire, Donald R. Frederico, Esquire, and Deborah P Fawcett, Esquire), on behalf of Beatrice Foods.

Foley, Hoag & Eliot (by Michael B. Keating, Esquire, Sandra Lynch, Esquire, William Cheeseman, Esquire, Marc K. Temin, Esquire), on behalf of W. R. Grace & Co.

Courtroom No. 6
Federal Building
Boston, Massachusetts
9:00 a. m., Monday
July 14, 1986

P R O C E E D I N G S

(CONFERENCE IN THE LOBBY)

THE COURT: There was some suggestion counsel wanted to see me.

MS. LYNCH: Yes, your Honor. I will address one matter and Mr. Cheeseman another.

We became aware late on Friday that the EPA had just released the results of June 1985 tests on wells, particularly on Wells S-4 and S-5, which you may recall were wells that Mr. Schlichtmann had questioned Dr. Guswa about, since they're sort of in the northern -- above Wells G and H, below 128. The point of Mr. Schlichtmann's line of questioning was that the EPA in the April and May 1985 samples had not found with any degree of reliability the presence of complaint chemicals. The June samples, which were withheld by the EPA until last week, showed the presence of complaint chemicals. We would ask that the record be re-opened in order to permit these two pages, which are the test results from NUS on S-4 and S-5 to be admitted into evidence. This is the affidavit of Dr. Guswa simply identifying the NUS test results, putting them in the context that I have just put to the Court.

We don't know, frankly, why they weren't released earlier. Apparently, the lab work was done mostly as of January. We think it is relevant. We think that these

cc-pf
E

(IN OPEN COURT)

THE COURT: Good morning, once again, counsel. Good morning, ladies and gentlemen.

We are now at the point in the trial which I described to you -- how many months ago it was I don't know that we started this -- where the evidence is closed and now the lawyers have the opportunity to argue to you to try to persuade you to a particular view about the evidence and to persuade you to draw conclusions and make inferences from the evidence that you have seen and heard.

The order is reversed at this point, and the defendants go first and the plaintiff comes at the end, plaintiffs' argument. So we'll start with Mr. Facher, then Mr. Keating, and then finally Mr. Schlichtmann.

Now, I urge you to pay close attention to what these attorneys say to you since they have spent many, many months with this evidence and they are familiar with it and they have analyzed it and it's very likely that what they will say will be helpful to you in making your own decision. But keep in mind that the decision is yours. Listen to the lawyers, but remember that it is your memory of the evidence and your evaluation of the evidence that counts.

Now, how we are going to work this around the lunch hour I'm not sure. It depends how these arguments

go. We'll get all three arguments in today, so we'll be here into the afternoon quite substantially. Tomorrow morning, I will give you the instructions on the law, and then you are in business to decide this case.

The six regular jurors have all stayed healthy and attended, so they will decide the case, decide this part of the case. The alternate jurors will stand by. They will not participate unless somebody in the original group becomes disabled. This is something of a frustration, but it is the way the rule is set up, and that's the way we have to do it. However, you will have to be available, and we'll work that out when the deliberations begin.

Well now, I urge you to give your attention to these lawyers. And the first argument will be by Mr. Facher.

MR. FACHER: Thank you, your Honor.

Good morning, ladies and gentlemen. When we were last together, we were tramping through the fields and streets of East Woburn, taking a look at some of the places, things that are important in this case. And I think it was appropriate that we ended the evidence with a view because it will put in perspective now for you a lot of the things that you have heard, a lot of the exhibits that you will be looking at. And we will be talking about and I'll be talking about in the next -- I don't want to say

few minutes because it's going to be closer to two hours, so I have to warn you. But we will be talking about, in a sense, what you saw on the view because what we will be talking about in the next couple of hours are what chemicals did one see on the 15 acres, what deep underground ground-water did one see on the 15 acres, what bizarre movement of this underground water sideways and northeast did one see when one was on the 15 acres.

And we'll be talking about how was the tannery negligent; what did the tannery do; if no one else could foresee these chemicals deep in the ground or foresee or know about this bizarre movement of water sideways, what did the tannery do wrong? That's going to be one of the things I'll be talking about in the next couple of hours.

end E

F

MC/kr

First, I would like to express my thanks to the jury. It has not been my practice over the last 30 years or so to thank juries for service. Jury duty is an obligation of citizenship, like voting, being in the Army, giving blood, it is not something that one is thanked for because it is a duty to do it.

This has been a very exceptional case, the longest case on a civil case that any of us have ever tried in our careers, and this jury was selected after the longest process of selection that I have experienced or any counsel have experienced in a civil case. It is a very unusual jury selection and a very unusual case.

I think it is appropriate to thank you for your service and for your attention, and I think that is probably one of the few things all counsel in the courtroom will agree on.

Well, where do we start when we are trying to figure this case out? It's very difficult to sum up 75 days of evidence. It may even be difficult to remember the names of all the witnesses. You certainly can't remember all the evidence. So I would like, instead of talking about who said what and giving you a laundry list of evidence and witnesses and a chronology of events, I would like to talk to you about the issues and how, perhaps, I can give you some assistance in

deciding the case.

Obviously, I would like you to decide it in favor of Beatrice, but foremost, I would like to suggest things you ought to consider, however you decide the case. And I'm going to begin where I began four months ago, on March 10th, which was also a Monday, and I said to you then and I say to you now, this is a specific case about specific chemicals on specific property during a specific period of time.

It is not a case about industrial waste of solvents or sludge and all of the rest of the slogans and generalities that you have been hearing in the last several months.

It is a case about four chemicals and whether they were on a certain piece of property between the period 1968 to 1979. The period has been somewhat shortened now. We will talk to you about that later. It is now '68 to '79. Whether these four chemicals were on that property, and then whether they moved off that property in a way contrary to nature, under a river and into two wells, which are north and northeast, and then, even then whether the plaintiff -- I beg your pardon, whether the tannery was responsible for that condition on the property and was responsible and knew about or should have known about this bizarre way the water was going to

move, even if you believe it moved that way.

The Judge, the Court is going tc ask you four specific questions and they are going to be about whether these four chemicals were on the property during this period and whether they moved in a certain way to the wells and whether they contributed to the wells and then whether the tannery was responsible.

The first question is going to be whether during this period chemicals were disposed of on this property, these chemicals on this property during this period, and the question will say, whether these chemicals then substantially contributed to the contamination of the wells.

So in the first question that the Judge asks you,you are going to have to consider: Were the chemicals there in the period? Did they move in this bizarre way? And did they substantially contribute to the contamination of G and H? That's going to be the first question.

Now, there are two defendants in this case, two separate defendants. Their situations are entirely different. Their geography is different, the topography is different, the location is different, the facts and circumstances concerning use of chemicals is different, the effect of the river is different. The

ordinary course of water flow is different. These are different defendants. And I am speaking now only for Beatrice, and Beatrice is a defendant. They bought the property in the end of '78. You remember, they had it for four months before the wells closed. They may have been in the wrong place at the wrong time, but they are a defendant and they are defending this case.

The conduct that we are talking about that is now clear to you is the tannery conduct. The conduct is, what did the tannery do? Because the tannery was there before the sale, after the sale, and today. The tannery has been in Woburn for 70-some years, 75 years, so it is the tannery conduct that is being charged with negligence.

Let us start by talking about the first question, how I can help you to answer the first question. The first part of the first question is going to be: Was there disposal of these chemicals? You've got to find that in 1968 to 1979, chemicals were disposed of on this property. You start with some very basic and undisputed facts. One, there is no evidence anywhere in this courtroom, in any chalk or in any exhibit or in any testimony, of any chemical contamination by these chemicals of this property, 1968 to 1979. No evidence. Nobody has presented any evidence because there is no evidence.

End F

The first exhibit, or chalk, I guess -- and I'm not going to spend a lot of time trying to put these things together, lug them over here, but the first exhibit that I made or did with Mr. Drobinski consisted of an entirely blank piece of paper, which represented all the chemical information that there was about this property from 1964 to '79. You start with the fact that there is no hard evidence. Fact Two. The tannery did not use trichloroethylene which is the major villian, allegedly, in this case. They did not use it. They've never used it. There's no evidence that they used it. They don't use it in tanning. They used miniscule quantities of two other chemicals in a way that there was no waste. There's no data, no evidence of chemical use.

There's no evidence of any chemical disposal by the tannery. Think of it. Not one witness, not one document, not one chalk, not one inference that anybody from the tannery disposed of any of these chemicals on this property in this period. You've heard an awful lot of sludge evidence and a lot of waste evidence. You've heard a lot of supposed dump evidence, but you haven't heard and there doesn't exist anything to show that the tannery disposed of any chemicals on this property. Or even any barrels, for that matter, when you think about it. If you think about it, there is no evidence of any disposal at any

time by this tannery of anything on this property.

And that's the reason you had to have this elaborate, extremely elaborate charade of an investigation by Drobinski: Because he was trying to show and is still trying to show by no evidence whatever that chemicals were on this property 20 or 25 years ago. If the plaintiff had one witness, one document, one chalk, one exhibit that demonstrated that the tannery put one drop of TCE on this property, you would have heard that witness in five different versions. You would have seen 10 different photographs blown up 10 different times. You would have heard the kind of thing you heard about Grace when they were trying to prove chemical contamination by Grace. If the plaintiff had one evidence of one drum in the back or one ditch or one trench or one backhoe or one guy digging or one drain, you wouldn't have needed the three months of elaborate charade that Drobinksi went through. But you did not hear any evidence like that.

What you heard was a very valiant attempt to blur a very important distinction. And that distinction is a distinction between 1985 and 1965. Everything that the plaintiff did, all of his chalks, all of the chemical analyses, all of the tests, was 1985 data. And all of that demonstrated what I conceded to you was the fact, when I talked to you four months ago, that the property was

contaminated in '85. And there's no question about that. And so the plaintiff went through this elaborate investigation to prove what I'd already conceded: That the property was contamined in '85.

You heard a lot of evidence, some evidence from people who were children at the time they observed these events, from 8-year-old kids on bicycles, from people zipping through the property, childhood, boyhood adventures, floating barrels down the river, all that kind of stuff. None of that, I remind you, had anything to do with seeing chemicals on this property in that period.

So the plaintiff had a very serious problem that faces a lot of lawyers that try cases. The problem was they had no evidence. How do you make up for the gap? How do you blur the distinction between '85 and '65? Well, it's easy. You find somebody to give an opinion. If you find somebody to give an opinion, then you can argue the opinion is evidence, then you can substitute the opinion for fact, and then you can find liability.

So the plaintiff found, engaged Mr. Drobinski. Mr. Drobinski gave an opinion. Drobinksi's opinion, you know see, is at the heart of the plaintiffs' case. If you do not accept Drobinski's opinion, there is no case. If you do accept his opinion, there's still no case. But if you don't accept his opinion, there is no case.

Why is that? Because Drobinski is the witness who, in an extremely clever and ingenious opinion which I'll tell you about in a moment, talks about what he thinks the activities were on the property 20 years ago. Not what the chemicals were. What the activities were. That's the opinion that Drobinski is going to use, is going to give. Drobinski's opinion, when you think about it -- perhaps some of you made a note because it took him ages before he got it into evidence -- Drobinski's opinion was not that there were chemicals on this property. He didn't say, "In my opinion TCE was disposed of on the property in such-and-such a place in such-and-such an amount," or even "was disposed of on the property near this debris pile or that debris pile."

Drobinski's opinion was about activities. The question was asked of him, "When in your opinion did the activities commence that resulted in what you saw on the property when you went out there." In other words, another distinction to be blurred, the distinction between chemicals and activities, the distinction between barrels, seeing barrels and seeing chemicals.

I imagine all of us have been more observant of barrels lately than we've ever been in our lives, and we begin to see them everywhere and we begin to peer into them. And we begin to see trucks of barrels being

transported. We've all become barrel conscious. But barrels and debris are not chemicals. This is not a barrel case. It's not a debris case. It is a chemical case about specific land during a specific period.

So Drobinski gives you an opinion. And even if the opinion is something that you want to give weight to, it was not done in any kind of scientific or accurate way. I mean, what scientific method did Mr. Drobinski follow in looking backwards? What was the science by which he gave his opinion? There was no science. His opinion, which will be greatly lauded by the plaintiffs, was nothing more than a guess. The law talks about speculation, conjecture. It was just a guess. He eyeballed what he saw. He said, "Damn, that looks old, must have been there a long time. Therefore, activities must have been going on a long time." Therefore you're supposed to believe the missing link, that chemicals were disposed of. It was pure and simple fortune-telling in a very unique way.

end G

He got out his crystal ball or his crystal rock, if that is what geologists use. He rubbed it, he looked into it, and he saw the past, and then he told you, "I can see the past in my crystal rock."

Now, if you believe that is an opinion, you have to think about what a scientific opinion is because you have heard some real scientists in this case, you have heard some good scientists, you have heard about scientific methods. If you think that is an opinion in this case, think about whether it is reliable or not, even if you don't believe it is crystal ball gazing. Think about how he went about it.

He started out by reaching a conclusion that he wanted to reach. Then, he decided that he would test the places where he knew he would find contamination. Then he decided to ignore the spots that might prove the opposite. What am I talking about? He ignored all the northern sources, ignored UniFirst, ignored Hemingway, he ignored the sewers, he ignored the floods. You have all seen evidence of that. He had a result in mind that he wanted to reach and he reached it.

He dug wherever he felt like digging, where he knew in advance by the sniffer that there was going to be contamination. He set up an elaborate survey which proved absolutely zero, except there was contamination

on the land.

There were nine debris piles. Of the nine debris piles, none of them showed any chemical contamination. Seven of them, they didn't even bother to test. That is how important they were. And you saw some of those debris piles, if you want to call them debris piles. Some of them are mounds. Some of them are bulldozed. Nine of them, and none of them came up with any chemical contamination.

He took 19 auger samples in 600,000 square feet of property, and four of them came up with recent contamination.

He blurred the distinction between '85 and '65 by never giving you any dates. You won't find a date if you turn it upside down. That is why I kept reminding witnesses of dates. You won't find a date on these chalks, you won't find a date on these cross sections, that is because you are supposed to forget it is '85.

Were there distortions? Did he deal in distortions with you? Did he bring in a distorted chalk? Did we point out the scales, which we later had to change? Then we say the way geologists do it is this way. Were there photographs blown up? Were there photographs staged?

There are little footnotes added to chemical reports that no chemist or scientist ever saw on a report.

Do you remember that little footnote about the leather-like smell added at the last minute on a report that we didn't get until two days after the trial had started and we had to stop and take a special deposition? Remember the examination suggesting that he had withheld information from us on the first deposition or the last deposition in February? These are indications of unreliability.

You remember the 20-foot error on the blue Mediterranean chalk, a giant thing with the whole blue Mediterranean Ocean, and on the lunch hour somebody had to come in and add 20 feet, a 20-foot error in a key exhibit? Does that sound to you like a reliable scientific approach?

He didn't know that the city owned the land where Debris Pile F was located. He didn't know one thing about tannery operations, a man who is supposed to be investigating the tannery as a source of contamination didn't know what kind of tannery, didn't know whether we used chemicals, didn't know the operations, wouldn't know a vegetable tanner from a hide tannery, a cowhide from a pigskin. Does that sound like good scientific approach?

Missed the whole reports of the Aberjona River Commission, who studied this area 10 years, approximately five years after the wells were put in.

H4

Put on the board maximum concentrations, maximum concentrations. Now, is that your idea of maximums when you only have one reading? How do you say that is a maximum? I always thought you needed at least two, maybe three, high, higher, highest.

Fifty-six wells were tested, only once, 29 on the Beatrice site and 27 on the Grace site, and those maximums or minimums, if you want, were used. They were used to make all kinds of exhibits, cross sections, sticks flying up into the air, rivers going this way and that way. Does that sound reliable?

You can make your own exhibit when you go into the jury room. You can take the minimums and discover all those sticks become little toothpicks or non-existent. Is that the kind of scientific approach that makes for a reliable opinion, if you think that guess was an opinion?

Now, what else about Drobinski? He did not level with you. He was not candid with you. And I think you have to think back on his testimony as a whole. He was not an easy witness to cross-examine. He was well-programmed and he had a lot of computer information in his head, and he had to be examined on these small points so that you can see, when we put it all together, what the indicia of credibility, what the indicia of

believability is all about.

Credibility is not about people who are liars, or people who are perjurors, people who fall down on the witness stand and slobbering that they did it just before the commercial. That is not what credibility is all about. I have never seen a witness in my life fall down in front of the stand or stand up, "I did it, I did it, please, Perry, let me go from this cross-examination." That is not the way it works. Cross-examination is so long and so tedious, and I admit, it is long and tedious -- just as tough on us -- because you have to pull from the witness little indicia of believability.

You have to say to yourself: Does that sound right? Is that somebody I really believe? Does that make any sense? Is that the way it happened? That is what credibility means in a real courtroom. And it means that for Drobinski and it means that for our friend, Dr. Pinder, when we get to his testimony.

Was he candid with you? And about the first five minutes, I think, of Mr. Drobinski's testimony, he admitted to you that he had told two different stories under oath.

Now, everybody makes mistakes. I agree with that. It is not all that easy to be cross-examined.

I agree with that. Probably lawyers can mix up anybody, probably they can even mix up themselves, as you have probably observed. But you don't make mistakes about testimony under oath. When you give it in a sworn deposition and it is important, you don't make a mistake. And you don't make a mistake when you are making sworn applications to state authorities about whether you have a degree or not. Everybody makes mistakes, but do you really make a mistake under oath when you write down to the State of Oregon, I had a master's degree in '76, when you know you haven't got it?

There is a reason why you have to say that. You don't put down 1976 for a reason. You are looking to be qualified as a geologist by a state, and you have to have a degree. He had no degree in geology, so it meant something to put '76, it counted. It wasn't a slip of the tongue or a slip of the mind. It meant something. When you sign your name to an application under oath, it is the same oath you take on the witness stand, to tell the truth.

Is it a little thing? Maybe. Maybe it is excusable. Maybe everybody does it. But does that make a witness believable? There was a lie in that application. There was a lie in that deposition. He said he had a degree and he didn't. Maybe that is no big

H7

deal, but take it with the rest I have been telling you: The little distortions everywhere permeated his testimony. This constant attempt always to bend the facts, bend them in his direction, not give them to you straight, but bend them in his direction.

Found a piece of leather. That was supposed to suggest to you: Ah-hah, leather, the tannery. He didn't check it out. He wants you to think it was tannery leather. It wasn't.

Did he have a soil chemist come in? No soil chemist.

So the Oregon application and the way he carried out his investigation shows you here is somebody that will bend the facts.

And when I had him on the stand, perhaps you will remember, I asked him about the staged photograph, about the caps, the pesticide caps. Did you stage that photograph? Did you clean them up and turn them over and put them in this photograph and blow them up?

Incidentally, you won't find a date on any of those photographs. They are all '85, but nobody is leveling with you so you can remember they're '85. There are a lot of photographs in this case and some of them are really within the period, like the DeFeo investigation, that Aberjona River Commission, those photographs are really within the period, but these weren't.

End H

ec-pf I

But I asked him, "You said on the deposition you turned over the caps, staged the photograph. You said in the courtroom you didn't turn over the caps and didn't stage the photograph." Or words to that effect. "You told two different stories under oath. Which one of these stories you told under oath is true?" About one minute of warning. He said, "I don't know." He couldn't tell you which story was true. He told two stories. Before he answered, the Judge said, "Just answer the question yes or no." He couldn't tell you which story was true. Is that the kind of reliable testimony you're looking for? When something important is at stake, when you're being asked to hold a company liable for deaths and injuries, do you rely on guesswork, do you rely on witnesses who don't level with you, do you rely on witnesses who don't tell you about chemicals but only tell you about activities and leave you to try and guess or blur the distinction between today and two decades ago?

Well, the Beatrice evidence is quite the other way, and I'll talk about that a little later. But, basically, there was scientific evidence this property was not contaminated. It came from Dr. Braids. There was eyewitness evidence that the property was not contaminated. It came from the people who stomped through the area of the Aberjona River Valley for months, it came from the town,

it came from the DEQE, from the state authorities that put in wells and that don't put in wells near areas that are supposed to be contaminated. I'll talk about that a little more. It came from the Woodward-Clyde report that you have that talks about off-site contamination. It came from the Waldorf memorandum about the sludge and sewer overflows. More on that a little later.

If you accept -- and I urge you not to accept -- Mr. Drobinski,it still doesn't move the ball very much. If you find that Drobinski's testimony is not reliable or if you can't figure it out or if you find the property was not contaminated with these chemicals during this period, then the case is over as far as Beatrice is concerned and as far as the tannery is concerned.

Since I don't know which way you're going to consider the issues or in what order, I think you should consider them in the order in which the Judge gives them to you; that is, was there contamination, was there movement, was there negligence.

If you do give any credit to Drobinski, the ball doesn't move very much because you have only found the property was contaminated. And now the contamination is supposed to move and it's supposed to move against the laws of nature: Sideways. I said it in my opening; I'll say it in my closing.

And if the closing sounds like an opening, that's what it's supposed to sound like because a closing is nothing more than an opening with the proof that I said I was going to produce. A closing is nothing more than a lawyer keeping his promise to the jury about what he was going to prove.

Well, if you find contamination, if you don't find it with a crystal ball and you find it with scientific evidence, you still have to deal with this bizarre problem of water movement. And, once again, when we get to that problem, we discover what the basic facts are. Fact Number 1, there is no data. There is nothing in the period 1964 to 1969 about water movement. Fact Number 2, you discover that Beatrice is a very, very, very unique site. Not because it was a swamp next to a railroad track surrounded by junk business. It was unique that way, too. But because it was unique hydrologically. It was flat, flat as a pancake, had a gradient -- I forgot to use these words. I'll use a couple of them, but I try not to. It had a gradient of .001. That's one one-thousandth of a foot. One one-thousandth of a foot gradient. We are talking flat, pancake, billiard table. I mean, it would take a century for Dr. Pinder's cream to roll down one one-thousandth of a foot gradient. That's an exaggeration for purpose of effect. I didn't do the calculation.

We are talking about property that is separated by a river and, here again, you're talking about separate defendants. We're talking about property that's separated by a river. We're talking about property that had two wells. The river didn't separate Grace from the wells. The river separated Beatrice from the wells. And Beatrice had two pumping wells. Now you've got four wells to contend with on flat property. Not a slope, but flat property.

And what else have you got to contend with? You've got to contend with nature. For 10,000 years, whenever the glacial deposit receded, that water has been flowing north to south parallel to the river down to the south into Winchester and into the Mystic Lakes. Very complex property from a geological and hydrogeological standpoint. Not a slope, something flowing down a slope, but flat property separated by a river.

And it's a real river and a swamp, believe me. It was low when we saw it, but you've heard testimony that it came up to the road. You've heard testimony that people floated down there in barrels. You've heard testimony of automobiles halfway in the river. And you've heard testimony about how much volume of water went by Olympia Avenue at the top and at Salem Street at the bottom. Don't be misled by the day we were out there. It was a river

all right, and it went up and it went down. And it complicated life.

Those are the facts. And there was nothing else, once again, nothing else, no data. So what did the plaintiff have to do? Well, we had to find another opinion. We have to go out and get an opinion, once again, that looks backwards. And we have to find some connection; in this entire complex area, we have to find some connection. And we'll give you the opinion. That will be the connection. You add that opinion to Drobinski's opinion. You'll have an opinion on an opinion, and that's the way you will find Beatrice liable. That's the plan. That was the tactic. And that's what was presented to you.

The second opinion was done by Dr. Pinder. He certainly had distinguished academic qualifications.

Incidentally, Drobinski had very few qualifications and very little experience. He'd never been in charge of any major investigation. He was doing all this for the first time. He wasn't even the witness that was supposed to testify. End of parentheses.

But, anyway, Dr. Pinder had some distinguished academic credentials. He didn't get his hands very dirty during this investigation, did he? He didn't know much about what the real-life conditions were during this investigation, did he? And maybe he got the seat of

his pants shiny working at the computer or doing his triangles, playing with arrows, but he didn't have much hands-on experience to tell you about in this case.

Before I get to that, once again, the plaintiff had to recreate history, had to look into the crystal rock and tell which way the water flowed under 1968 to 1979 conditions. Nobody had any data on that. So they did a pump test. The immortal pump test you heard so much about. And the purpose of the pump test -- I'm not telling you anything new -- was supposed to be to recreate history. In other words, we don't know what happened, so let's try and get the facts back as close as we can to what happened back in 1968 to 1979 and we'll recreate history.

But they didn't recreate history. When you look at the evidence, Dr. Pinder -- before I talk to you about his credibility and his believability -- Dr. Pinder used a pump test which didn't recreate history, didn't mimic the conditions. G and H were pumped and the entire pump test consisted of G and H pumping together. None of it consisted of G pumping alone or H pumping alone. Only the two of them pumping together.

end I

Now, the pump test is not very important from Grace's point of view, but it is very important from Beatrice's point of view because no way in the world does water go sideways in that valley. So the pump test had to be the basis for the recreation of history, so that Pinder could give his opinion and when added to Drobinski's opinion, could make the case.

It doesn't matter that Grace, which has a different topography and a different water table and a different direction of the water. But it matters mightily for Beatrice. That is why you didn't hear any opinions by Drobinski about Grace, and you didn't hear any real opinions about water movement from Pinder about Grace.

Beatrice, they had to get the water over there. Now, the pump test didn't recreate conditions because Pinder himself said that it was the exception and not the rule for these two wells to be pumping together. They didn't pump together very often. He said they only pumped together four months out of 15 years. Now, that is not a representative pump test.

G, you can look at the pumping records -- Another witness said it might have been a year -- the pumping records are in there. Like everything else in this case, numbers mean perhaps what people want them to mean. But the fact is that G was on alone most of the

time and not with H. And the pump test reported the results of G and H together, and that's not the way it was in history.

So Pinder starts his opinion with a very basic flaw. The flaw is he didn't recreate history right. He didn't tell you about G alone, only G and H together.

Now, what else, what really is the problem in addition to that with Pinder's testimony? He ignored the most important single fact. I'm sure you picked it up even before I did on cross-examination. He ignored the river. He ignored the river. All he did was draw his triangles, make his arrows, talk to his computers, do his computations, but he ignored the river. And you observed that he ignored the river when we first asked him about the river on cross-examination, and he hesitated, and first he thought that the river was only measured down at Salem Street. He only thought there was one measurement point. He didn't even know about the USGS flow data.

Then we pointed out that 600 gallons per minute was being lost by the river, and that's when Pinder began to make up testimony. Right before your very eyes he made up the explanation. "Oh, well, it's not that the river is losing water, it is just that it's not gaining water." You remember that. I bet we went round

and round for three days about what happened to the 800,000 gallons a day that left that river during the pump test. And then he said, "Well, I've been thinking about that. It is the kind of thing that comes to you in the shower." It didn't come to him in the shower. It came to him on the stand. If it came to him in the shower, so be it.

"I've been thinking about that. The river doesn't lose, it just doesn't gain." We know it didn't gain 900, and there was a jury question about it. It didn't gain 900, and it lost 600, so there is 1,500 gallons. Pinder couldn't account for it.

So then we got into the peat theory. Then we got into another made-up piece of testimony.

The peat sealed the river, the peat was an impenetrable barrier, and the river never got through the peat. And maybe if it got through, some itty-bitty molecule might have pierced the well 10 years later.

Round and round we went. My questions, the judge's questions, Mr. Keating's questions. We finally wound up, I think, I'm not sure, it took 10 to 20 years for any river water to reach the well because of the impenetrable peat that we brought in when Mr. Koch testified, and it looks like this, and you can see the water. You can see the water oozing out of it. It

wouldn't take half an hour for the water to get through that peat. That is the impenetrable peat.

Now, I don't know whether you believe that or not, but that was his testimony. That was his testimony. Nothing left the river, but it would take 20 years and that the peat was impenetrable.

Well, the one thing you have to remember about Pinder, Dr. Pinder, excuse me, is that his whole testimony was based on an assumption. The first five minutes or so, maybe later than that, he told you that he was assuming the contamination first because Mr. Schlichtmann told him to assume it, and later because he bought Drobinski. So everything he said depends upon what Drobinski said. If Drobinski is not believed, you don't even bother with Pinder. But Pinder accepted this crystal rock gazing about the past and assumed contamination, and then he put it in the water, and then he got this bizarre water movement.

The first thing he testified to was wrong. It wasn't 30 seconds of cross-examination, mistake one,"I miscalculated the chemicals. I figured it out in my head, didn't bring my notes," whatever the explanation was. Again, very early in the cross-examination.

Then he told me on the deposition, and I relied on it and told you in the opening that he was

going to say it took 18 months for these chemicals. Perhaps you may remember my saying it. That is what he swore to on the deposition. He came into this courtroom and gave you two, three, four different travel times and he explained and constantly explained the fact that Dr. Pinder's entire testimony was more of an explanation than it was a question-and-answer session. He explained he didn't mean 18 months, he meant within 18 months, and the preposition "within" was very important and it was an envelope, and in the envelope -- I can't repeat it all.

Anyway, each of you have your favorite Pinder story or favorite Pinder evidence. There is enough for everybody. Anyway, he changed that sworn testimony. It is humorous, but it is serious. He changed that sworn testimony. He said 18 months, and I asked him, and you probably observed me by this time, I don't ask one question where six will do. I asked him several different times about the 18 months, and I didn't use "within." We talked about prepositions, and Dr. Pinder is a great man for semantics, as you remember. But I asked him about it on the deposition. It would take 18 months, wouldn't it, and this would take 18 months? And he answered all those questions on the deposition.

When he got into this courtroom and he

discovered that G and H weren't pumping together 18 months, a little calculation was in order, and that is when you got, for the first time from Pinder, all of these calculations about the new calculations about the chemicals getting to the wells in this shorter period of time, in this bizarre sideways, under the river, up to the well movement. That is when you got it for the first time.

Mr. Keating, the same thing happened to him.

Well, what else can I tell you about Dr. Pinder? He undoubtedly was not a man used to having his opinions challenged. I doubt in his classroom life he has ever been cross-examined, and he didn't sound like a witness who was used to having his opinions challenged. Did he answer any question in the five days that we were with him? Did he answer any question yes or no? Did he answer any question in a simple, direct way? How many questions he could have said yes or no were answered by "I am not unpersuaded that this conclusion is unsupported"? How many times did you hear about the spirit and the context of what he was saying in order to explain some plain contradiction until somebody asked him -- maybe it was me, maybe it was the Judge -- "Would you please listen to the words and answer the question. It is made up of words. It is not made up

of spirit. It is made up of words. Just answer."

Did you get straight answers? Undoubtedly, he is a good classroom scientist. I'm sure his students learn a lot from him, but he didn't do much homework and he didn't do much work in this case. He didn't look at the peat, because, if he looked at it, he wouldn't have talked to you about impenetrable seals. He didn't look at the Aberjona River Commission. He didn't look at any of the northern sources. He couldn't even tell you the streets. Maybe we can chalk that up to absent-minded professors. I think at least anybody who testifies should know the names of the street north and south. And he didn't know about the river. He was simply not credible.

He even admitted and then took it back that Beatrice, the tannery, could not have contributed to the present contamination of the wells. You see, the wells were also found contaminated in '85, Wells G and H, and you have to think about that.

The one thing that is true about that is there is no way in the world that Beatrice could have been responsible for that contamination because, for seven years, the water flow was north to south and the wells were not pumping. There is no way in the world that anything found today in the wells could be attributed

to Beatrice, no way, no possible way. The flow is north to south for seven years, flowing down the valley on both sides. No pumping, and everybody admits that if the stuff got there, it has to be a bizarre movement resulting from pumping, and resulting from pumping at rates that were not the rates historically. You can't add G and H together and then say G and H make a thousand, a thousand gallons a minute, that is the way it was 20 years ago. That wasn't the way it was.

All of this time Wells 1 and 2 are pumping, making life very, very complicated to figure out this site. Pinder made no real attempt to find out anything about Riley Wells 1 and 2. He said, "Oh, Riley told me they pumped 250 gallons per minute." That was enough for him. In fact, he didn't know one existed.

When you look at the Woodward-Clyde report, which is Exhibits 678, 679, you will discover the wells pumped from 600 to 700 gallons per minute when they were pumping and that they captured the contamination on that property. You see, that is what the plaintiff has to worry about and that is why Dr. Guswa, who was a solid scientist, couldn't give an opinion about the Beatrice site because you have complication. You have Riley wells pumping 600, 700 gallons per minute, the two of them. Woodward-Clyde's report says so. You have

their effect taking the contamination from the site. How is it going to get to the other side? We will come to that in a minute.

But Pinder says the water went sideways. Pinder's opinion, I suggest to you, not only is based on very, very skimpy work, but it is not reliable, he is not reliable.

Again, I am not talking about lying to you or any of that. It is just a question of reliability. Do you believe it? Did he do enough work? Do you know he made up his mind, and he told you he made up his mind on December 10th, when I first examined him as to what his opinion was. That was before the pump test was over. He said, "Oh, I knew what to expect, I knew about the pump test."

Now, you can't rely on snap judgments in a matter that really matters, in something as serious as this, where you are keeping people in a case which involves serious deaths and injuries. You can't rely on opinions based on opinions, neither one of which was scientifically valid.

End J

Did either of these experts help you on concentrations or amounts or exact places, sources? Think about it. You're going to have to answer a question about whether Beatrice substantially contributed to the contamination of G and H. Even if you find that contamination existed, even if you find the bizarre movement is what Pinder said it was, you're still going to have to find a substantial contribution.

What evidence do you have of that? Nobody in this case has told you what amount of TCE, what amount of TCA and what amount of perc was placed where. Oh, you heard, as far as Beatrice -- again, they think they have evidence about Grace. I think I heard stuff about trenches and pits, I think I heard stuff about its coming from the middle of the building, I think I heard stuff about a plume is exiting the southwest corner, I think I heard all that. But I didn't hear any of that -- and I'm not suggesting it makes any sense for Grace, either -- but I didn't hear any of it about Beatrice. Where, how much, when?

There are two "when" questions that the Judge is going to ask you. Two "when" questions. When did this stuff get here, to the wells? When did the contamination get to the property? Those are questions Pinder didn't answer because they couldn't answer. Those

are questions Drobinski couldn't answer. He couldn't even say, in all honesty, they were chemicals. He had to hide behind "there were activities."

So now we have an invalid opinion based on another invalid opinion. Pinder is buying Drobinski, and Drobinski is looking into his crystal ball. And if you believe them both, it still doesn't move the case. You can find contamination, you can find the bizarre movement deep in the water under the river. You still do not find that the tannery is responsible.

Why not? Because of something very basic in our law, something that's very fair and just. In order for Beatrice or the tannery or you or anybody else to be liable, you have to be at fault. You have to do something wrong. You can't be liable without, in this case, without some fault. Lawyers call it negligence. Further refined as the lack of due care. But you got to do something wrong.

What is it that the Riley Tannery did wrong? Because we're talking about tannery conduct. So if you buy contamination, if you buy water movement, you still have to find that we did something wrong. What is it that the tannery did wrong? There's no evidence they used any of these chemicals, no evidence they were in the waste. All of that stuff you were told in the opening is not in the case. Chemicals were not in the tannery waste. The tannery

did not dispose of these chemicals. That's not in the case. No evidence the tannery did any dumping.

What is it that was negligent? What did Riley do wrong besides operate a good tannery for 71 years in a town that he cared about? Well, you'll be surprised at what this case has boiled down to against Beatrice. It's boiled down to this: Riley is supposed to be responsible for the acts of trespassers coming on his property, putting things on the property. Let's call it barrels if you want, call it debris if you want. Putting things on his property. And he's supposed to know or foresee that trespassers with barrels means chemicals, means these chemicals, means contamination. And he's supposed to foresee the acts of trespassers in contaminating his property, contaminating water and contaminating the drinking supply. That's what he's supposed to foresee. He's supposed to foresee -- if there were trespassers and if they did come on the land; you didn't hear any direct evidence of that -- that trespassers brought chemicals and dumped chemicals and this was a big risk of danger to the drinking water supply, that strangers to his land were putting things on his land that were injuring other strangers to his land that drank the water.

Think of that. That's the plaintiffs' case. I kid you not. That's what it boils down to. Because

there's no evidence of disposal, no evidence of use. It all comes down to there must have been a lot of barrels there, that means there must have been a lot of chemicals, that means there must have been a lot of water contamination. Riley, before he is held liable, has to know or he should know that that's the kind of risk you run.

Now, we're not talking about people that come on the land and trip on barrels, cut themselves or fall in a hole, something like that, that kind of landowner's liability. We're talking about foreseeing injury to water users. Strangers coming on the land injuring strangers to the land. And that's what the negligence is supposed to be. He's supposed to foresee that risk because you don't have any evidence of any direct conduct by the tannery itself. And not only are you supposed to find that trespassers came on the land, but they came on the land with chemicals. Where is that evidence? Where is the evidence of trespassers? There's kids on bicycles, ages 8 to 12, zipping through the land. Is that evidence? Any evidence at all of trespassers?

There is a legal theory -- possible, anything is possible -- there is a legal theory you can be held liable if people create dangerous conditions on your land and you don't do anything about it. But who knows about chemicals? Who knows about groundwater? How many

chemicals did we see two weeks ago? How much groundwater did we see going sideways two weeks ago?

Every time you look at the Department of Public Works construction in the cities and endless reconstruction of Route 128, which never has ceased in my lifetime, barrels are everywhere. This is not a barrel case. This is not a good housekeeping case. This is not an untidy land case. This is a chemical case. How could Riley know or foresee the consequences?

The river ran north to south, the groundwater ran north to south. The land is flat. How would he know? Is that just an argument? No. Because there's evidence, there's evidence, not crystal ball evidence but eyeball evidence. There's evidence, there's three solid pieces of evidence to demonstrate to you that in no way anyone can foresee, anyone could be negligent, even if somebody came on the property and put barrels on the property or put whatever was put on the property. No way.

What is that evidence? Let's think about it. In 1964, the tannery had been in Woburn 50 years. An engineer surveyed the area, did pump tests and proclaimed that the area was suitable for two wells, G and H. Did they foresee, did they know, was the engineer wrong, was the town wrong, was the Department of Public Health wrong?

If you don't look at anything else in this case, I'd like you to look at three or four letters. You knew I couldn't get through this argument without at least one chalk. I'd like you to look at three or four letters. These are all in evidence and these are just excerpts.

The first one was Exhibit B-4. December 3, 1963. It talks about G and H. 16 is G and H.

"The results from test wells at Site 8 and 16" -- that's G and H -- "showed generally the water from all three sites is of suitable quality for public water purposes." Does that sound like something next to a dump, something next to property that's going to contaminate it?

1964, an engineer writing to the Woburn mayor, "In summarizing the test wells" -- these are the same kinds of tests that we had in '85, the test well investigation -- "In summarizing a test well investigation, we feel that the city is fortunate in finding an additional groundwater supply of good quality." "An additional groundwater supply of good quality" says Whitman and Howard. Did they foresee bizarre water movement? Did they foresee chemical contamination. These are wells in the same place they are today, the 15 acres is just where you saw it, Wells G and H are just where you saw them.

July 1964. "The areas at Site 16 are satisfactory from a sanitary point of view in that there are

no immediate sources of pollution in the general area." Nickerson, sanitary engineer from where? Department of Public Health. Does he foresee connections? Does he foresee contamination? Does he foresee bizarre movement going under the river? These are public officials and engineers charged with the duty of protecting water. Riley wasn't charged with any public duty about water supplies.

And finally, July 23rd from the Department of Public Health, July 23, '64, Exhibit B-8. "Analysis of samples of water collected during the pumping test" -- same kind of tests -- "show the water to be relatively hard but otherwise of a good chemical quality and suitable for public water supply purposes." Is the Department of Public Health in a better position to foresee and know than Riley? Are they putting wells in near a dump or a contaminated area?

That's very credible evidence done at the time. This is not crystal rock gazing. This is hard data about why those wells went in and where they went in.

Fourteen years later, G and H pumping off and on, pumping off and on, complaints about the water, all the things that happened, 14 years later another engineering firm -- now we have the third agency: Whitman and Howard, the Department of Public Works, of Public Health, the Town of Woburn -- 14 years later the engineers say to the City of Woburn you can put a new well between G and H.

end K

L

MC/kr

"We recommended" -- This is Dufresne and Henry Engineering -- "We recommend the construction of an additional gravel-packed well between G and H so that the full capacity of the groundwater resource, which exist in the Aberjona River Valley, can be utilized."

The Aberjona River Valley. Does that sound right that that engineer foresaw any connection? Does that sound like contamination is going to reach those wells? Why in Heaven's name would departments charged with the health of the citizens put a well there if they could foresee any connection between those two properties? There was a river in between. There was no natural slope to the wells. There was a river. The natural slope and the natural flow was north to south down the river and into the valley and out the Mystic Lakes.

And, finally, the DEQE, the agency charged with the protection of water supply in the Commonwealth of Massachusetts, June 8, 1978, "The Department has reviewed the results of the prolonged pumping test. The department hereby approves the result of the pumping test" -- the same test -- "and the well may be constructed."

Is the DEQE putting in new wells in a contaminated area? Does the DEQE foresee risk to water users at this site? Does the DEQE find there are any dumps, pollutants, contaminated areas? That is evidence

from real people doing real tests in the period we're talking about. That isn't all. We actually have a survey of this area. We actually had, in 1970 and '71, the Aberjona River Valley Commission made up of three state agencies and three towns, and they walked this area for months.

I'm not going to get out these big maps. They walked these areas for months, looking for pollution, looking for pollution, looking for contamination. One hundred fourteen different sources, they found. And you will find it in their report, Pages 92, 93, 94, 30 on a page, 40 on a page, they are over there somewhere. One hundred fourteen sources and not one of them was Riley. That tannery had been there 50 years and was not a source of any contamination or pollution. This was eye-witness testimony. These were not kids riding motorbikes through the field. One of them was an engineer and is an engineer, a city engineer for the City of Melrose, Mr. Warrington. The other was an employee of the DPH, the Department of Public Health, on leave. The study was being done under the auspices of Tufts University.

1971 -- Between '64, when they put in the wells and there wasn't anything that anybody worried about; '78, when they wanted to put in another well, they couldn't do it because of money but there wasn't anything to worry

about. There was a survey saying that Riley was not the source. In fact, it was the best area they looked at.

These are professional people. Today they are professional engineers. The city engineer was on the site to look for sewer problems. He did not see serious problems. DeFeo, D-e-F-e-o, who was the DEQE, did not see any problems. Mr. Warrington didn't. If the state didn't, two city engineers didn't, and the Aberjona Commission made up of two agencies and four cities didn't, what do you want from Riley? What is the tannery supposed to have done to know that there were chemicals in the groundwater, if they were there, and I don't think they were, and that the groundwater could move in this bizarre way? How could you hold Riley, to continue to hold them responsible for deaths and injuries when they couldn't possibly know or foresee nor should they have known that there was a risk?

The people charged with the responsibility of protecting the water in the Commonwealth of Massachusetts didn't say there is a risk to water users, don't put the well there because it is near the 15 acres. What do you want from Riley? Is he held or is it held to a higher standard? Are you going to hold somebody responsible for something that they had no way of knowing and could not foresee?

L4

You put weed control on your lawn, pesticide on your lawn and try to get rid of the crabgrass and you water your lawn. Are you going to be liable for contaminating the well of a neighbor five blocks away? Is that what you think about when you are watering your lawn? And that isn't this case.

This case is some trespasser came on your lawn and turned on your hose and you are responsible for the trespasser who turned on the hose, who watered the lawn, and let the chemicals seep into the ground-water, seep five blocks north or a half mile north or whatever the distance sideways. Is that the way you find liability? Is that the kind of evidence on which you hold people responsible for deaths and injury?

Now, those are the three major areas that you have to be thinking about. Were specific chemicals contaminating this land at this time? Did they get to the wells in this period? Did they make a contribution enough to contaminate it? And was Riley at fault?

Well, Mr. Schlichtmann, as you heard the Judge say, speaks last, and I have no opportunity to rebut or contradict anything he says, so I'm going to ask you to listen carefully and remember the evidence as he tells it to you.

There was a great deal of talk about

hypotheticals and possibilities. You remember all those questions. We don't deal with hypotheticals and possibilities now. Now is the time that we deal with evidence. You are going to have to listen carefully for evidence, not for words like industrial waste, public health, chlorinated hydrocarbons, and all the kind of words that have blurred the issue rather than clarified it. We are talking about specific chemicals on a specific property during a specific time here.

And as I have done from time to time throughout this case, I'll preview a little bit for you what Mr. Schlichtmann may say to you, and you can think about it in advance. There will be some mention to you about a Maher letter, probably a name you remember, M-a-h-e-r. Maher was a well driller; he built the Riley wells. And in '68, there was a letter from him, a two-page letter, and there was a question about whether it was ever received, but it is in evidence. And in the letter Maher says Wells 1 and 2 is static level and Well 1 and 2 was somewhat lower. I think it was 10 feet. I'm not sure. And this can be attributed, have some effect, because there are other wells pumping in the area. And you can infer the other wells he was talking about were G and H. It doesn't say so, and from that, from that 10 or 12 words, it's going to be argued to you that we are supposed to

have known there was chemical contamination that could reach the groundwater and get into the deep groundwater and move sideways to the wells. Well, that is the Maher letter. You will hear more about it and you can take a look at it yourself.

You will hear a lot about drawdown. The one thing that is clear in this case is that drawdown is not flow movement. Drawdown says nothing about direction. All it says is the level dropped. You cannot tell, no hydrologist will testify or has testified that drawdown tells you anything about water direction, and this is a water direction case, if you find contamination. But drawdown is another one of those words that the plaintiff likes to use to blur rather than illuminate the facts.

Drawdown simply means in the general aquifer, the water level, the static water level is going down. It does not tell you anything about movement and no hydrologist worth his rock salt will say the opposite.

Now, what else will you hear about? You will hear about Mr. Kelliher. I wonder if you remember him. He was on very early. He was a DEQE employee and went out to investigate some barrels in 1980. You will see the report. In 1980, 15 months after the wells were closed, and his report does say, "I see chemical residues." He

67

did no tests, he could identify nothing. He knew there were millions of chemicals in the world. He eyeballed the area and concluded chemical residues.

You also may remember, he didn't know north or south, he didn't know where the Riley well was located, and he didn't know anything about when the wells had closed.

He also had the benefit of hindsight, namely, the wells had already closed, so everything he looked at was chemicals.

There were also Hemingway barrels nearby that you should think about. Mr. Kelliher is somebody whose map will be shown to you, probably, and he made a significant observation. He marked "dump area" on the map. But where did he mark dump area on the map?

He marked dump area on the map by Wells G and H. That's where he marked dump area. So if you're going to use Drobinski's logic, if G and H is a dump area and you saw it, you want to do your own crystal ball gazing. G and H, you could argue, was contaminated by itself, but that is not the way to decide a case. That is guesswork, that is speculation. You are not allowed to guess.

Well, I saw those bleachers at G and H, I saw those barrels at G and H, I saw those pipes at G and H, therefore, there must have been chemicals at G and H.

You are not allowed to do that. That is guesswork; that is what Drobinski did on the 15 acres.

End L

You'll also hear from Mr. Schlichtmann about statutes. There are some regulations and statutes -- and I can't read them to you, the Judge will tell you about them -- in the Commonwealth which Mr. Schlichtmann will urge were violated by the tannery. And that's supposed to substitute for the negligence that Mr. Schlichtmann couldn't prove by fact. Technically, legally, violation of a statute can be negligence. But ask yourself as you listen to these statutes that deal with discharging of things into the waters of the Commonwealth and some obscure regulations: Did Riley violate them, did he know about them, was there any conduct -- the tannery operations are not in this case. There is no chemical use by the tannery, and there is no chemical disposal. So there are no violations of these statutes. But that's up to you to determine. You'll have to determine whether you want to think about statutory violations as technical indicators of negligence or whether you're interested in the facts, whether you're interested in people who were on the site, people who saw what was going on.

You heard a lot of dump evidence. The word dump was all over this courtroom. Any evidence whatsoever that the 15 acres was any kind of a dump? Any official letter, any letter from the Attorney General, anything from the City, anything from anybody except the adjectives that Mr. Schlichtmann applies. Does the City put a new well,

two new wells near a dump? Does the State of Massachusetts put a new well near a dump? There were dumps in Woburn, you bet, and you can see some of them in the pictures that were provided. And remember those are '71 pictures, not '85 pictures. '71 pictures. You'll see the dump, you'll see the litter. You'll see the bleak, stark, dead areas. You'll see the blackened, huge blackened shores. Was that your view of the 15 acres?

Well, what has been the defendants' evidence, what has been Beatrice's evidence? I'd like to make something clear to you. I know it's late and I've been talking for a while, but this may be one of the most important things I'll have to say. The plaintiff has the burden of proof in this case. And I'd like you to listen to the Judge when he tells you that. It will be early, probably, in his instructions, and it may only take a minute or two, but it could be the most important thing in this case. The plaintiff has to prove every fact by a preponderance of the evidence. The Judge will explain that. It's not beyond a reasonable doubt, but it's by a preponderance of the evidence, evidence which makes you say yeah, that's the way it happened; yeah, that makes sense, evidence which convinces you that that's probably the way things occurred. The plaintiff has to prove everything: The contamination, the movement, the negligence, all of that

by a preponderance of the evidence.

Beatrice does not have to prove anything. It may surprise you to learn that this case did not require a single witness from Beatrice. The entire burden of proof is on the plaintiff, where it should be. They are charging people with serious conduct resulting in deaths and injuries, they say, and they have to prove it. But I don't think you would be content with just a technical case and lawyers saying well, they had the burden and they didn't prove it, so let's all go home. We put on evidence. We have no burden, but we put on evidence because we want to try and help explain or suggest an explanation for what occurred.

And the contamination evidence was effectively rebutted by the testimony of Dr. Braids. Do you remember Dr. Braids? The only soil chemist that testified in this case. His testimony was uncontradicted. Didn't come in pairs. One soil chemist. Weston didn't have one, the plaintiff didn't put one one. Dr. Braids was one of the most straightforward and credible witnesses in the case. He was sincere, he answered the questions directly and told you, based on scientific principles, about the appearance of vinyl chloride on the Beatrice site and what it means. Vinyl chloride is not a product anybody in this case used. It could only have been a breakdown product. It's the final breakdown product of tetra -- I can't even

say it anymore. Perc. It's the final breakdown product. There's the tetrachloroethylene. If you want to look at the chemistry, there it is. It's the final breakdown product. And it appears no later than three to six years after these chemicals start to appear, the parent chemical. So that in Dr. Braids' opinion, the appearance of vinyl chloride meant that the earliest contamination was in the fall of 1979, and it could have even been later than that, been up to '82. This was based on science, not a crystal ball.

Now, he did the computation, and he told you about the microorganisms, and he was doing the computation for the first time. There's no question about that. But it was a computation based on scientific principles, on ancient scientific principles, on studies, and on his getting his hands dirty and on dealing with laboratory results. Drobinski didn't do it. What science did Drobinski rely on? Dr. Braids was uncontradicted. Nobody came in and said he was wrong. Sure, there was an attempt to cross-examine him, an attempt to suggest isn't it a wonderful coincidence it was 1979. What was the basis of his opinion? It was science, and he gave it to you straight. Koch, Ellis Koch came in and told you about the effect of the water, 800,000 gallons of water a day, I think, coming out of that river in a stream, like a

showerhead on both sides of the river, creating a mound of water. And when you look at the numbers, you will find that S-82 shallow is the highest point in the river, 42½, and everything goes down from there.

And, incidentally, Dr. Pinder, of course, played many games with these figures. You remember that, with arrows, with sticks, with triangles. All of that only demonstrates he can make these numbers do anything. But what was reality was 800,000 gallons of water coming out on both sides of the river as a result of pumping, 800,000 gallons of water that Dr. Pinder said didn't exist. Dr. Pinder said nothing existed for 10 to 20 years.

And then there's the Woodward-Clyde report. We haven't said much about it. You ought to take a look at it. There are two of them, and they point out what the effect was of the Riley wells. The effect of the Riley wells was to capture the contamination on the 15 acres, first by going up to about the middle of the property and taking all the contamination, and then because the water flowed from the north to the middle and then went into the effect of the Riley wells. So it captured the contamination. That's the reason Pinder didn't pinpoint a source. That's the reason Drobinski can't tell you where the contamination was or what chemical: Because the Riley wells, when they are pumping, capture the contamination in connection with

the normal flow of the water north to south.

What else did we show? We told you about sewerage. And we have an exhibit from the DEQE, handwritten notes from Mrs. Waldorf about sewer overflows in '82. We've told you about floods. And there was a great flood in '79. We pointed out all of the northern sources: The Hemingway barrels, 390,000 parts per billion from a barrel. That was actual fact. No similar evidence on the Riley property. We've told you about the chemical contamination of this valley for 150 years. With all of this evidence, how could Riley know or foresee the bizarre water movement? How could anybody see from looking at a barrel or looking at a brick or looking at wood that the property was contaminated?

You have to believe Drobinski, you have to believe Pinder, and you have to find that Riley should have seen, foreseen this terrible risk that strangers were creating for other strangers. Those three things are part of the plaintiffs' case, and the plaintiff cannot prevail without proving them to you.

Now, in summing up Beatrice's position on the case, you have to remember it's the plaintiffs' job to prove the contamination. They didn't prove it, these chemicals in this period. Our evidence suggests to you there was no contamination in this period. They have to

prove to you the bizarre water movement. They didn't prove it by Pinder's opinion. Our evidence suggests to you that there was no bizarre water movement contrary to nature. They've got to prove to you that Riley was negligent and he could have foreseen the conduct of trespassers contaminating with chemicals, contaminating groundwater, and moving the groundwater sideways. Who can foresee when you look at a barrel that a water supply can be contaminated? There's no basis for holding Beatrice in this case.

The aerial photographs, another one of the many things where people see what they want to see. You can go back to the jury room, you can make these triangles and have great fun making triangles, you can draw arrows, you can do computations, you can make them go any way you want them to go. Aerial photographs, if you want to see a barrel. If you want to see a tank, you will see a tank. If you want to see the MDC putting in sewer pipe, you'll see the MDC putting in sewer pipe. If you want to see just a black object, you'll see a black object. Drobinski does miracles with aerial photographs. He sees things flowing. He sees white sand -- you were up there. You saw the sandy nature. He sees that not as sand but as white material sinisterly flowing towards the river. Well, you see what you want to see.

But the plaintiff has the burden, and on

Drobinski's opinion, you shouldn't hold Beatrice. On Pinder's opinion, you shouldn't.

end M

N

MC/kr

On Pinder's opinion, you shouldn't hold Beatrice. And on trying to figure out why, in Heaven's name, Riley should foresee these dire consequences when the state and the city and the engineers couldn't, on that basis you shouldn't hold Beatrice or Riley liable.

Riley has been a tanner in that city for 71 years and would like nothing better than to go back to being a tanner, and I would ask this jury to send Riley out of the courtroom and back to the tanning business. They did nothing wrong, and they should not be held liable for these dire consequences.

The case is in your hands now, and I would not want it in any better hands. Thank you.

THE COURT: May I see counsel briefly as to scheduling, please?

(CONFERENCE AT THE BENCH AS FOLLOWS:

MR. KEATING: It would be my suggestion that we break for an early lunch and come back at 1:15 or whatever. I don't know how long Mr. Schlichtmann is going to be. I won't be too long, but I certainly don't think I will be through by one. If it would be okay.

THE COURT: We would have to give them about a 15-minute break now or 10 minutes, because they have been here for nearly two hours.

MR. KEATING: I would just --

THE COURT: And I think we can't -- with all these people here, we are not going to be able to get started until 25 past, I shouldn't think.

MR. KEATING: What about taking an early lunch and pick up at 1 or 1:15?

THE COURT: No, say 1 o'clock.

MR. KEATING: That is fine with me.

MR. SCHLICHTMANN: If you want to take a break now --

MR. KEATING: I would just as soon have --

THE COURT: Well, we have to take some kind of break, and it makes it too late. I don't think these bladders can keep going forever.

MR. KEATING: You say one, your Honor?

THE COURT: One o'clock.

END OF CONFERENCE AT THE BENCH.)

THE COURT: Well, the shift in our starting time has somewhat thrown the original schedule off. I think probably we ought to take some kind of a break now. We wouldn't be able to get started for another, certainly, 15 minutes by the time everybody gets in and out. I think the sensible use of time now would be to take a lunch break and plan to start promptly at one o'clock. We have Mr. Keating and Mr. Schlichtmann yet to go this

afternoon, and I think that will give us time to accomplish that. So we will take the noon recess.

One o'clock. I hope one o'clock sharp.

(Noon recess.)

End N