# Hawaii court released DuPont's test results

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A 1994 ruling by the Hawaii Supreme Court about Georgia soil test results set in motion a four-year controversy in Georgia over whether DuPont and its Atlanta attorneys at Alston & Bird improperly hid evidence in a high-stakes liability trial in Columbus.

The issue was resolved Thursday with a consent decree calling for DuPont to pay $11 million and Alston & Bird to pay $250,000. Both firms denied guilt.

When the Georgia case went to trial in the summer of 1993, the chemical conglomerate faced $430 million in claims from nursery operators, who insisted their plants had been killed by Benlate, a DuPont fungicide. Plaintiffs argued that the Benlate had been contaminated with a DuPont weedkiller.

The company settled the Georgia case for $4.25 million while the jury deliberated.

But the company still faced dozens of other Benlate lawsuits across the country, including the one in Hawaii in which the use of Georgia soil test results was argued.

Plaintiffs in Honololu sought to force introduction of Georgia soil test data they considered vital to their case, while DuPont, which had paid for the tests, fought to withhold the data. When the controversy over the soil test results reached the Hawaii Supreme Court, several powerful industry trade groups hired Kenneth Starr, before he was named special prosecutor, to write a legal brief arguing that the data should be kept under wraps.

The Hawaii Supreme Court ordered it released.

The data included initial results of Georgia soil tests. DuPont had hired Alta Analytical Laboratories of California to test Benlate-treated Georgia soil to see whether it showed traces of weedkillers know as sulfonylureas, or SUs. A thimbleful of SUs can kill two acres of vegetation.

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When the lab's preliminary results showed "suspected" positive findings of SUs in 16 samples, two Alta scientists called three DuPont attorneys at Alston & Bird. One of the scientists wrote notes about the conversation with attorneys Elizabeth Gilley, Todd R. David and J. Kennard Neal.

"They want us to go back (after most of the work is done) and try to confirm (de-firm) suspected positives," said the handwritten notes, which included the parenthetical insertions.

Alta retested the 16 samples and found that four continued to suggest SU contamination. After those four were tested and retested, no traces of SUs were found.

Although U.S. District Judge Robert Elliott had instructed DuPont to provide the Georgia plaintiffs with all Benlate testing data, the defense did not provide the preliminary test results, which showed the highest contamination level.

During the Georgia trial, DuPont used an expert witness with no affiliation to Alta — and no knowledge of the preliminary results — to testify that Alta's summary report indicated no SU contamination.

When C. Neal Pope, an attorney for the Georgia plaintiffs, learned the contents of the documents that DuPont was compelled to release in Hawaii, he filed a civil petition in federal court in Columbus alleging litigation misconduct in the "settled" 1993 case.

Elliott, who had repeatedly scolded DuPont during the 1993 trial for failing to produce certain documents, held a hearing on Pope's allegations in May 1995. Elliott referred to the proceeding as "a fox hunt."

That August, Elliott imposed $115 million in sanctions on DuPont for failing to disclose evidence despite orders by the court to do so.

After attorneys for Starr's Chicago firm argued the sanctions were improper, the 11th U.S. Circuit Court of Appeals in Atlanta overturned them and transferred the case to another federal judge, Hugh Lawson of Macon.

On Nov. 4, Lawson ordered a criminal contempt investigation of DuPont. The consent decree resolves that matter.

In the consent decree, Alston & Bird said it "acknowledges for itself a fundamental misunderstanding of the intent of the court's discovery requirements."

The penalties paid by DuPont and Alston & Bird will be used to promote legal professionalism.