IN THE SUPREME COURT OF FLORIDA
TALLAHASSEE, FLORIDA

AMERACE CORPORATION a Delaware corporation,	:	
Petitioner,	:	
and FLORIDA DEFENSE LAWYERS ASSOCIATION, *amicus curiae*	:	
v.	:	CASE NO. SC00-565
GARY E. STALLINGS and VERA J. STALLINGS, his wife,	:	
Respondents.	:	

REVIEW FROM THE DISTRICT COURT OF APPEAL,
SECOND DISTRICT, STATE OF FLORIDA

ANSWER BRIEF OF RESPONDENTS GARY E. STALLINGS AND VERA J. STALLINGS

ROBERT FRASER, ESQUIRE
Florida Bar No.: 218529
DANIEL F. PILKA, ESQUIRE
Florida Bar No.: 442021
PILKA & ASSOCIATES, P.A.
Post Office Box 3470

Brandon, Florida 33509-3470
(813) 653-3800
Attorneys for Respondents

PREFATORY STATEMENT

Petitioner AMERACE CORPORATION will be referred to in this brief as "AMERACE." Respondents GARY E. STALLINGS and VERA J. STALLINGS, his wife, will be referred to as "the STALLINGS" or individually by name as appropriate. GARY STALLINGS' employer, The Tampa Electric Company, will be referred to as "TECO."

Citations to the record on appeal will be referred to as "Vol." for volume followed by the page number of the record.

The STALLINGS will follow the format provided by AMERACE in its initial brief on the merits. In other words, it will discuss the issues raised by AMERACE in Argument I and II even though this Court granted jurisdiction only on the basis of the issue contained in Argument III.

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STATEMENT OF THE CASE AND OF THE FACTS

STATEMENT OF THE CASE:

GARY E. STALLINGS and VERA J. STALLINGS, his wife, filed an Amended Complaint seeking damages for the injuries he sustained when Defendant AMERACE CORPORATION'S electrical terminator separated, causing him injuries. The STALLINGS sought recovery on the bases of negligence and strict liability. (Vol. 2: 271-275) AMERACE filed an Answer. (Vol. 2: 280-284)

The Amended Complaint made the following allegations:

COUNT I
STRICT LIABILITY

> 11. Plaintiff GARY E. STALLINGS realleges, adopts and incorporates by reference paragraphs one through ten of the General Allegations as though fully stated herein.
>
> 12. The terminator utilized by Plaintiff GARY E. STALLINGS was in a defective condition unreasonably dangerous to the user when placed in the stream of commerce.
>
> 13. The terminator manufactured by Defendant AMERACE CORPORATION did not undergo a substantial change of condition affecting the defective condition in which

it was sold.

WHEREFORE, Plaintiff GARY E. STALLINGS demands judgment for damages, costs and a trial by jury on all issues so triable.

Under general allegations, the Amended Complaint alleged:

9. The terminator injured Plaintiff GARY E. STALLINGS because it:

(a) was not designed by Defendant to carry electrical surges without disintegrating. In the areas of disintegration known as "notching" the terminator separated, causing an electrical arc.

(b) was not completely covered, permitting its exposed metal to corrode and making it more likely to disintegrate, separate and arc.

(c) was distributed without warning users of its dangerous propensities.

(d) was distributed without providing instructions for users to cover exposed metal parts with tape or other protective coverings. (Vol. 2: 271-275)

The trial began on June 8, 1998 and concluded on June 13, 1998 with a verdict for the STALLINGS. The verdict awarded $1-million, but found Mr. Stallings' employer 60 percent at fault. It also awarded $250,000.00 for medical bills even though the evidence supported only about one-fifth of that amount. (Vol. 12; Vol. 10: 1919-1920)

During trial the court heard extensive argument on AMERACE'S Motion for Directed Verdict. The trial court granted the motion with respect to the STALLINGS' allegations that AMERACE failed to warn consumers regarding the dangers of its terminators. The

trial court took AMERACE'S argument against the strict liability count under advisement. (Vol. 15: 535-559; Vol 10: 1905-1918)

The STALLINGS accepted a remittitur of $196,940.02 when the jury awarded $250,000.00 for past medical bills since the parties stipulated that the past medical bills totaled $53,059.98. (Vol. 11: 2216) AMERACE filed a Renewed Motion for Directed Verdict, Motion for Judgment Notwithstanding the Verdict, Or in the Alternative, Motion for New Trial on June 22, 1998. (Vol. 10: 2022-2031) The STALLINGS filed a motion to tax costs and prejudgment interest on June 30, 1998. (Vol. 10: 2032-2039) The trial court took AMERACE'S motion under advisement before entering a Final Judgment for the STALLINGS on November 18, 1998. (Vol. 11: 2217) An Amended Final Judgment which included the STALLING'S costs was entered on December 22, 1998. (Vol. 11: 2220-2221) The Amended Final Judgment denied the STALLINGS' prayer for interest between the date of the verdict, June 13, 1998, and the date of the initial Final Judgment, November 18, 1998.

AMERACE filed a timely Notice of Appeal on January 13, 1999. (Vol. 11: 2231-2233) The STALLINGS filed a timely Amended Notice of Cross-Appeal on January 21, 1999. (Vol. 11: 2236) The STALLINGS' cross-appeal sought review of the trial court's denial of their claim for interest between the date of the

verdict and the entry of final judgment. (Vol. 11: 2236)

The Court of Appeal Decision:

The Second District Court of Appeal affirmed the judgment against AMERACE without discussion in an opinion filed January 12, 2000. The same opinion reversed the trial court's failure to award interest on the verdict. (AMERACE'S Appendix) AMERACE sought and obtained review in this Court on the basis that the Second District's prejudgement interest decision allegedly conflicted with decisions rendered by the First District Court of Appeal.

STATEMENT OF THE FACTS:

Mr. Gary Stallings suffered substantial burns on September 25, 1992 when a terminator manufactured by AMERACE separated while he stood less than a arm's length from it. The separation caused the 7,620 volts the terminator was carrying to arc and engulf him in a fireball of at least 8,000 degrees Fahrenheit. (Vol. 12: 79, 89; Vol. 13: 195-196; Vol. 15: 667)

The terminator had been inserted in its place on a new power pole after being moved from another pole. (Vol. 12: 127) Mr. Stallings was not touching the terminator when it separated and nothing hit it. It simply fell apart. (Vol. 13: 196)

The Terminator:

AMERACE first manufactured its 16 THG terminator in 1977 and

had made no significant changes to the device before the trial in 1998. AMERACE could not estimate the age of the separated terminator. (Vol. 14: 414) AMERACE recognized that the terminator would be subject to lightning in its usual position near the top of a power pole, that lightning could cause an electrical arc around the terminator and that the arcs, known as "flashovers," could cause melting. (Vol. 14: 423-424) AMERACE also recognized that a terminator would cause an arc if it separated while energized. (Vol. 14: 484)

AMERACE elected to construct the portion below the terminator's "probe" with aluminum. At least one other manufacturer of terminators, General Electric, used only copper in its probes, which were exposed to the elements in both models. (Vol. 15: 573) Defendant recognized before September 25, 1992 that copper melts at 1,981 degrees Fahrenheit while aluminum melts at 1,200 degrees Fahrenheit. (Vol. 14: 484)

The evidence reflected that many different brands of terminators with exposed aluminum had notched, the prelude to separation, at about the same time AMERACE'S terminator separated and injured Mr. Stallings. (Vol. 14: 501-505; 507-511) AMERACE'S terminator separated at a point immediately above its polymer rain cap, the lowest uncovered point of the aluminum below the probe. (Vol 2: 372) The portion of the aluminum

below the probe covered by the rain cap showed none of the corrosion or notching exhibited in the portion exposed to the elements. (Vol. 13: 309) Given the arcane nature of the equipment at issue, please see a drawing in the record for a depiction of the terminator. (Vol. 9: 1710)

The terminator connected underground wires to overhead power lines. The overhead power line connected to the pole with a "stirrup" at the top. The electricity flowed through the "stirrup" and through a fused cut-out, a box-like apparatus which contained a device for throwing out a "door" in the event of overvoltage. (Vol. 12: 82) A small charge inside the cut-out exploded in the event of overvoltage, causing the door to blow open and break the connection, much like a circuit breaker in a home. (Vol. 13: 286-287) The probe of the terminator fit into the bottom of the fused cut-out, completing a circuit from the overhead lines to the underground wires. (Vol. 12: 82) The probe of the terminator which separated was fastened securely in the cut-out when it fell apart at the top of the polymer rain cap. (Vol. 12: 127; Vol. 13: 230)

The Accident:

The accident occurred as a three-man TECO crew finished moving the wires and connecting pieces from an old pole to a new pole as part of a road-widening project. (Vol. 12: 80; Vol. 13:

216) The old pole resembled a "T" and was known as a cross-arm construction. The new pole consisted of a single horizontal piece jutting away from the road at the top of the vertical pole and was known as an alley arm. All of the overhead wires or "phases" had been moved. TECO lineman Keith D. Clemmons was securing the wire closest to the pole, "A" phase. (Vol. 12: 90-91, 97) Mr. Stallings stood in another bucket a few feet away, slightly below Mr. Clemmons' level, when the accident occurred. (Vol. 12: 91)

Before moving anything, Mr. Stallings and Mr. Clemmons ascended the old pole in separate buckets and visually inspected for cracked insulators, loose connections, smoked insulators, blown arresters or any damage to the cross arm. They looked primarily at connections. Connections posed the most problems since they could arc if loose. (Vol. 13: 192-193) Neither man noticed any notching or other problem on the three sets of wires or equipment between the overhead wires and the underground wires, including the terminators. (Vol. 12: 110; Vol. 13: 192) Before Mr. Stallings' accident on September 25, 1992, TECO had experienced no problems with notched terminators. (Vol. 14: 512)

The Experts:

Mr. Seuss:

After the accident and Mr. Stallings' removal to Tampa General Hospital by helicopter, TECO investigated the cause of the separated terminator. (Vol. 12: 140; Vol. 14: 512) It retained Mr. Manfred Seuss, a metallurgical engineer in New Berlin, Wisconsin. Mr. Seuss possessed bachelor's and master's degrees in metallurgical engineering from the University of Wisconsin. The STALLINGS introduced the testimony of Mr. Seuss during trial.

Mr. Seuss conducted two investigations. (Vol. 2: 353-355) The first consisted of examining the separated terminator and its two companions as well as four others. (Vol. 2: 354, 363) The second investigation involved examining another notched terminator and a new terminator manufactured by 3M. (Vol. 2: 382) The damaged terminators were uniformly notched above the rain cap on exposed aluminum. (Vol. 2: 371-373) Notches did not form where the terminator was covered. (Vol. 2: 373) In his opinion, the notching occurred when the uncovered aluminum melted after being exposed to extremely high transient currents, probably lightning. (Vol. 2: 369)

He noted severe corrosion in the area of the notches. (Vol. 2: 378) He testified that the oxide film created by corrosion provided high resistance which, when high current flowed through it, would create more heat than aluminum without corrosion.

(Vol. 2: 394) Corrosion and the oxide film, then, exacerbated the heat effect of lightning. (Vol. 2: 401)

In addition, Mr. Seuss testified that the failure to cover the terminator with tin plating made corrosion more likely given Tampa's climate. (Vol. 2: 400) Copper also was more resistant to corrosion than aluminum, transmitted electricity at least as well and melted at a temperature 781 degrees Fahrenheit higher than aluminum. (Vol. 2: 405-407)

Mr. Darlington:

The STALLINGS retained Mr. Albert Darlington as an expert. AMERACE'S brief suggests that Mr. Darlington knew little of the dynamics presented by this case. Actually, Mr. Darlington had worked as an electrical engineer at TECO for 37 years. He received a Bachelor's Degree in Electrical Engineering from the University of Florida in 1958 and was licensed as an electrical engineer by the State of Florida. (Vol. 13: 239-240)

He began his career at TECO as a laborer in a line truck. He had worked in TECO's distribution, transmission, generation and system protection divisions. He had taught system protection at the University of South Florida as an adjunct professor since 1991 and had taught electrical concepts at TECO beginning in 1965 or 1966. (Vol. 13: 239-243)

Mr. Darlington conducted between 50 and 75 investigations

into problems with TECO's system, including 10 to 20 cases involving electrical arcs. (Vol. 13: 243-246) He had studied galvanic corrosion in college physics courses and encountered it during his years with TECO. (Vol. 13: 248) He described galvanic corrosion as the process which occurs when one of two metals suspended in a liquid disintegrates, creating an electrical current. A household battery provided the most commonplace example of galvanic corrosion since it generates energy as a result of one metal's disintegration. (Vol. 13: 250-251)

He also encountered galvanic corrosion in his work with TECO. For one example, distribution wires to homes usually consist of aluminum while the wiring in the homes consists of copper. TECO installed aluminum wire above the copper wire so that galvanic corrosion did not occur. If it did occur, the aluminum deteriorated, weakening the connection. (Vol. 13: 251-252) For another example, galvanic corrosion necessitated protection to keep underground cables from rusting. (Vol. 13: 248)

Mr. Darlington performed no experiments in preparation for his testimony because recreating the galvanic corrosion effect on the terminator would require between five and 15 years. (Vol. 13: 254) In preparation for his testimony he read the

accounts of witnesses at the scene of the accident, studied the notched terminators and the one that separated and reviewed the report of Mr. Seuss. He also visited the accident scene, reviewed AMERACE'S installation instructions for the terminator and looked at photographs of the accident scene. (Vol. 13: 254)

Mr. Darlington built a replica of the pole where the accident occurred for use at trial. Once the three terminators were placed on the replica, Mr. Darlington sprayed water on the most vertical one and noted that the water pooled at the top of the rain cap. (Vol. 13: 339)

Although, Mr. Darlington did not consider himself an expert in chemistry or metallurgy, (Vol. 13: 298,301) his physics courses in college included the study of galvanic corrosion as part of his engineering curriculum. (Vol. 13: 303-304) Furthermore, he testified without contradiction that galvanic corrosion is generally recognized in the scientific community. (Vol. 13: 253) Finally, as an electrical engineer he also had to consider the effects of galvanic corrosion during his 37 years with TECO. (Vol. 13: 305)

Upon his background, experience and education Mr. Darlington opined that copper salts dripped from the equipment above the terminator and pooled on the top of the rain cap, eating through the aluminum over time. He noted that the covered portion of

the terminator remained bright, shiny and unnotched while the uncovered portion corroded. (Vol. 13: 309-310, 328-329) He did not consider lightning a likely source of the notching since the fused cut-out was designed to break the connection when it encountered the onslaught of the amperage present in a stroke. (Vol. 13: 313-314, 331)

Mr. Darlington testified that the terminator would not have deteriorated if covered. (Vol. 13: 328-329) Thus, Mr. Darlington testified that leaving the probe of the terminator uncovered constituted a design defect.

Mr. Pearson:

AMERACE retained the services of Mr. Paul Pearson, an electrical engineer with 30 years' experience, including 27 years with Florida Power Corporation. (Vol. 15: 625) Mr. Pearson testified at some length regarding lightning. (Vol. 15: 627-636) In Mr. Pearson's opinion, lightning flashed over the terminators in TECO's system, causing an arc burn and damage. (Vol. 15: 657-658) Mr. Pearson agreed that lightning in the vicinity of elevated electrical wires would be expected. (Vol. 15: 658-659)

He had no reason other than an inspection of the terminators involved in the case that lightning hit anywhere near the terminator at issue. (Vol. 15: 659) He assumed that the

terminator at issue had been flashed over on at least one occasion by lightning, but he had no way of knowing whether it had been subject to several strikes in its vicinity. (Vol. 15: 662)

Dr. Caulfield:

AMERACE also retained the services of Dr. Edward M. Caulfield, a professional engineer with experience in material science. (Vol. 15: 676) Material science studied the dynamics necessary for a particular material to fail and included mechanical metallurgy. (Vol. 15: 680) He agreed with Mr. Pearson's opinion that the notching on the terminators in TECO's system resulted from electrical arcing. (Vol. 16: 713-714)

Mr. Caulfield did not believe galvanic corrosion played any part in the notches on the terminators. (Vol. 16: 710-711) He also recognized, though, that the pieces above the terminator consisted of copper and that fragments of it could drip onto the rain cap and rest on it. He did not believe the copper moisture would have sufficient potential to eat away at the aluminum, however. (Vol. 16: 717-718)

SUMMARY OF THE ARGUMENT

A trial court is governed by the abuse of discretions standard in determining the topic upon which any given expert may testify. When a novel scientific principle becomes

involved, though, the abuse of discretion standard no longer governs and the party opposing introduction of the opinion is entitled to a *de novo* review. The review determines whether the novel scientific principle meets the standard of *Frye v. United States,* 293 F. 1013 (D.C. Cir. 1923).

To have a trial court determine whether testimony regarding a novel scientific principle should be admitted into evidence, the opponent must make an objection that the evidence offered is unreliable. The trial court below provided AMERACE with wide latitude in attacking the opinion of Mr. Albert Darlington, an expert retained by the STALLINGS. AMERACE, however, attacked only Mr. Darlington's expertise, not whether galvanic corrosion posed a novel scientific principle. Therefore, AMERACE effectively waived its objection to Mr. Darlington's testimony and its entitlement to *de novo* review. As a consequence, Mr. Darlington's testimony should be evaluated under the abuse of discretion standard.

Contrary to AMERACE'S contention, nothing in *Frye* requires Mr. Darlington to test his theory. He testified without contradiction that galvanic corrosion is generally recognized in the scientific community. In addition, AMERACE could not estimate the age of the terminator which separated and injured Mr. Stallings. Since AMERACE began manufacturing the terminator

in issue in 1977 and the accident occurred in 1992, the terminator could have been in place for as many as 15 years. Obviously, Mr. Darlington did not have 15 years between the accident in 1992 and the trial in 1998 to test his theory.

In any event, AMERACE incorrectly argues that Mr. Darlington's opinion should have been *Frye*-tested. Actually, the principle, not the opinion, should be subject to *Frye* when a novel scientific principle is involved.

Under the abuse of discretion standard, Mr. Darlington's testimony should be evaluated as a "pure opinion" since it rested on his long and broad experience at TECO. Indeed, Mr. Darlington's reasoning differed not at all with the testimony introduced in *Florida Power & Light Co. v. Tursi,* 729 So.2d 995 (Fla. 4th DCA 1999).

Even if Mr. Darlington's testimony was admitted improperly at trial, the harmless error doctrine preserves the result in the STALLINGS' favor. This is particularly true since abundant evidence in addition to Mr. Darlington's opinion supported and justified the jury's verdict.

Three unrebutted sets of facts support the verdict in addition to Mr. Darlington's testimony. First, the allegations of the Amended Complaint and the STALLINGS' theory at trial consisted of allegations that the terminator was defective

because it permitted uncovered aluminum to be exposed to the elements. Second, the STALLINGS introduced the testimony of Mr. Manfred Seuss, a metallurgist, in support of their theory to show that high transient currents, such as lightning, could have caused the ultimate separation on the uncovered portion of the terminator. Third, the theories provided by all of the experts testifying in the case supported the inference that leaving the aluminum uncovered constituted a defect.

Based on the evidence as a whole, this Court should not remand with instruction to enter judgment in favor of AMERACE. The evidence as a whole, including the theory propounded by AMERACE'S experts, supports the defect as a cause of the accident.

Indeed, AMERACE as much as embraced the theory propounded by Mr. Seuss. Mr. Seuss opined that high transient currents coupled with corrosion on the exposed aluminum caused the terminator to melt, notch and separate. He also noted that exposed copper resisted corrosion better than did aluminum, transmitted electricity at least as well and melted at a temperature 50 percent higher than aluminum. AMERACE introduced two terminators manufactured by General Electric which used copper in their exposed portions and did not notch even though they had been exposed to high transient currents. Finally, Mr.

Seuss testified that the absence of tin-plating on the aluminum made corrosion more likely in Tampa's climate.

AMERACE'S experts both essentially testified that lightning, not galvanic corrosion, caused the ultimate separation of the terminator. Since an electrical connector such as a terminator was designed to sit atop a power pole, the foreseeability of its being exposed to lightning does not appear remote. Thus, a reasonable jury could infer that leaving the terminator exposed to lightning caused the accident.

Finally, the STALLINGS relied on the inference provided by *Cassisi v. The Maytag Co.*, 396 So.2d 1140 (Fla. 1st DCA 1981) in opposition to AMERACE'S various motions before and during trial. *Dicta* in *Cassisi* suggests that its holding does not apply to design defects. AMERACE never raised this argument in the trial court and it should be foreclosed from doing so at this point. The *Cassisi*

inference alone establishes a *prima facie* case for the STALLINGS.

This Court granted conflict certiorari review only on the question of whether the STALLINGS should have been awarded interest between the date of the verdict and the date of the final judgment. The trial court denied "prejudgment interest", but the court of appeal reversed and ordered it.

In doing so, the court of appeal followed *Palm Beach School Board v. Montgomery,* 641 So.2d 183 (Fla. 4th DCA 1994). This issue presents a pure question of law for the Court to resolve. Essentially, the STALLINGS alleged that they are entitled to interest on the verdict, which is not true prejudgment interest, since the verdict liquidated their entitlement even though it was reduced due to TECO's negligence and an excessive award for medical bills. No good reason appears for the entitlement awarded by the jury to lie fallow while the trial court considered AMERACE'S post- trial motions. The court of appeal below merely allocated the entitlement to the growth of the money awarded in the verdict to the STALLINGS rather than permit AMERACE to retain it. Contrary to the suggestion in the brief of the Florida Defense Lawyers' Association, nothing about this allocation appears punitive.

Finally, AMERACE'S argument that §55.03, Fla. Stats. (1999) does not permit the award of interest in these circumstances rings hollow. The statute does not expressly or impliedly purport to govern interest on verdicts. Therefore, it does not control this issue.

For the foregoing reasons, then, the Court should affirm the decision of the court of appeal below.

ARGUMENT

I. THE COURTS BELOW CORRECTLY EVALUATED MR. DARLINGTON'S TESTIMONY.

a. The Standard of Review Differs Depending Upon Whether a 'Novel Scientific Principle' is Involved.

Generally, a trial court will be afforded broad discretion in determining the topic upon which an expert may testify in any given trial. A trial judge's decision with respect to an expert's testimony will be disregarded only if its broad discretion is abused. *Angrand v. Key*, 657 So.2d 1146, 1148 (Fla. 1995). For example, a medical examiner can testify regarding the distance a gun must be fired to leave "stippling" or "soot" on a victim with a proper showing of training and experience. *Burns v. State,* 609 So.2d 600, 603-604 (Fla. 1992).

When a novel scientific principle becomes involved the abuse of discretion standard no longer governs. Instead, the party opposing introduction of the opinion is entitled to a *de novo* review. In this instance the question of whether the novel scientific principle meets the standards of *Frye v. United States*, 293 F. 1013, 1014 (D.C. Cir. 1923) becomes a matter of law. *Hadden v. State,* 690 So.2d 573, 579 (Fla. 1997).

b. AMERACE Did Not Properly Raise its Entitlement to Review Under *Frye.*

The trial judge permitted AMERACE wide latitude in evaluating whether Mr. Darlington's testimony should be

admitted. (Vol. 13: 239-350) AMERACE failed, however, to raise its entitlement to a *Frye* hearing as required by *Hadden, supra*, 690 So.2d at 580. Accordingly, the only question properly posed to the court of appeal turned on whether the trial court abused its discretion in permitting Mr. Darlington to testify.

Hadden, supra,690 So.2d at 580, held that a *Frye* determination must be made "only upon proper objection that the novel scientific evidence offered is unreliable..." During extensive voir dire, proffers and predicates, AMERACE only attacked Mr. Darlington's expertise. (See e.g., Vol. 13: 295) After an extensive evidentiary foundation for his opinion, the trial court properly found Mr. Darlington qualified. (Vol. 13: 297, 326) AMERACE never argued that a novel scientific theory was involved. (Vol. 13: 239-350)

As the Court held in *Hadden*, the absence of a *Frye* objection required the trial court to rule only on the relevance of Mr. Darlington's testimony. *Id.* [citing] *Glendening v. State*, 536 So.2d 212 (Fla. 1988), *cert. denied* 492 U.S. 907 (1989), *Toro v. State*, 642 So.2d 78 (Fla. 5th DCA 1994). In short, AMERACE failed to present the court of appeal or this Court with the "specific contention asserted as the legal ground for objection, exception, or motion below." *Id.* [citing] *Steinhorst v. State,* 412 So.2d 332, 338 (Fla. 1982)

To the extent, then, that AMERACE complains of the trial court's failure to provide a review under *Frye*, its failure to perfect the record forecloses relief on this point. Even if it had perfected the record, *Frye* provides no basis of relief for AMERACE.

Frye, supra, 293 F. at 1014, an oft-quoted but apparently seldom-read decision, simply requires that a scientific principle

> must be sufficiently established to have gained general acceptance in the particular field in which it belongs.

A copy of *Frye* is included in the STALLINGS' Appendix.

Contrary to AMERACE'S initial brief, at 6, nothing in *Frye* required Mr. Darlington to test his theory. Besides, time did not permit Mr. Darlington to test his theory. AMERACE began manufacturing the terminator model in issue in 1977. AMERACE could not estimate the age of the one responsible for Mr. Stallings' injuries. (Vol. 14: 414) Accordingly, it could have been exposed to the elements for 15 years before the accident in 1992. Obviously, 15 years could not be simulated between 1992 and the trial in 1998.

Indeed, the seminal question with respect to *Frye* involves whether galvanic corrosion constitutes a novel scientific principle. Mr. Darlington testified without contradiction that

galvanic corrosion is generally recognized in the scientific community. (Vol. 13: 253) Given the fact that galvanic corrosion provides the power for an item as commonplace as the household battery, Mr. Darlington's testimony regarding galvanic corrosion rings true. (Vol. 13: 250)

AMERACE also argues that Mr. Darlington's expert opinion testimony should have been *Frye*-tested since it did not constitute "pure opinion testimony." (AMERACE'S initial brief, 14-19) Actually, the principle should be *Frye*-tested when novel, not the expert's opinion. *Berry v. CSX Transp., Inc.*, 709 So.2d 552, 567 (Fla. 1st DCA, 1998), *rev. denied*, 718 So.2d 167 (1998).

For the foregoing reasons, then, *Frye* does not control this case.

c. The Trial Court Properly Permitted Mr. Darlington's Testimony as a 'Pure Opinion.'

AMERACE focuses on the unrealistically narrow questions of whether Mr. Darlington could serve as an expert in metallurgy, chemistry and galvanic corrosion. Thus, it loses sight of the forest for the trees just as the appellant did in *Florida Power & Light Co. v. Tursi*, 729 So.2d 995, 997 (Fla. 4th DCA 1999).

In *Hadden*, *supra,* 690 So.2d at 579-580, the Court held that

the *Frye* standard for the admissibility of scientific evidence does not apply to an expert's pure opinion. Pure opinion testimony is based solely on the expert's training and experience, not studies and tests.

In *Ramirez v. State*, 542 So.2d 352, 355 (Fla. 1989), the Court gave several examples of what it considered novel scientific methods. The Court cited cases in which it found no proper predicate to establish expert testimony, including *Ramos v. State*, 496 So.2d 121 (Fla. 1986) (dog scent discrimination lineups), *Bundy v. State*, 471 So.2d 9 (Fla. 1985), *cert. denied*, 479 U.S. 894 (1986) (hypnotically recalled testimony), *Delap v. State*, 440 So.2d 1242 (Fla. 1983), *cert. denied*, 467 U.S. 1264 (1984) (polygraph test). *Ramirez I* and a later appeal, *Ramirez v. State,* 651 So.2d 1164 (Fla. 1995), both reversed the trial court's admitting evidence from the State's expert that the defendant's knife was the only one in the world that could have caused the wounds to the victim. Other novel scientific theories include *Hadden, supra,* 690 So.2d 573 (child sexual abuse accommodations syndrome) and *Flanagan v. State*, 625 So.2d 827 (Fla. 1993) (pedophile/child sex offender profile evidence).

A recent example of pure opinion testimony occurred in *Tursi, supra,* 729 So.2d 995. In *Tursi*, Florida Power & Light Co.

(FP&L) appealed a jury verdict in favor of a plaintiff, arguing that the trial court erroneously permitted a physician to give an opinion on causation. The physician diagnosed a cataract resulting from a toxin's dripping into the plaintiff's eye from an electrical transformer on an utility pole.

FP&L filed a motion for a hearing to test whether the ophthalmologist's opinion met the *Frye* standard. The physician testified that cataracts have many causes, including exposure to chemicals and other trauma. The physician ruled out some causes of cataracts on the basis that plaintiff had a cataract in only one eye. The court relied on *Flanagan, supra*, 625 So.2d at 828, finding the physician's testimony consisted of pure opinion and did not have to comply with *Frye*.

The same reasoning should apply to this case. AMERACE does not contest Mr. Darlington's credentials as an electrical engineer. His education, training and experience qualify him to render opinion testimony given his familiarity with TECO's distribution system, connectors and electrical arcs. Nor does AMERACE fault his investigation. It merely faults his ability to diagnose galvanic corrosion, a process he understood from college courses and from 37 years of working as an electrical engineer. Effectively, Mr. Darlington used the same sort of education and experience and the same sort of reasoning as those

employed by the physician in *Tursi*.

Finally, Mr. Darlington's inability to cure the terminator's defect provides no relief to AMERACE. (Vol. 13: 301) As an expert he had no obligation to design AMERACE'S product.

Accordingly, the trial court's admission of Mr. Darlington's pure opinion testimony should be affirmed.

d. Even if Mr. Darlington's Testimony was Improperly Admitted, it Constituted Harmless Error Given the Other Evidence in the Record.

Even if the admission of Mr. Darlington's opinion regarding galvanic corrosion would somehow be considered error, no "miscarriage of justice" occurred given the overwhelming weight of the evidence in favor of Defendant's liability. §59.041, Fla. Stats. (1997). Any error, then, would be harmless.

The harmless error doctrine applies to expert testimony. In *Andrews v. Tew*, 512 So.2d 276, 279 (Fla. 2nd DCA 1987) *rev. denied* 519 So.2d 988 (1988) the court held that the admission of an accident reconstruction expert's testimony, even if erroneous, did not require reversal as it was merely cumulative of other evidence. In this case, Mr. Darlington's testimony could be considered cumulative of the other expert's opinions.

Therefore, Mr. Darlington's opinion, even if erroneously admitted, constituted cumulative and harmless evidence. See

also, *Carvajal v. Adams*, 405 So.2d 763 (Fla. 3rd DCA 1981), *rev. denied* 412 So.2d 464 (1982). If cumulative to properly admitted expert testimony, no undue prejudice could have resulted to AMERACE. *Cross v. Lakeview Center, Inc.*, 529 So.2d 307, 310 (Fla. 1st DCA 1988).

The erroneous admission of expert testimony can also be harmless error if other sufficient evidence justifies the jury's reaching the conclusion supported by the opinion. *School Board of Broward County v. Surette*, 394 So.2d 147, 152 (Fla. 4th DCA 1981) [citing cases], *pet. for rev. dismissed*, 399 So.2d 1146 (Fla. 1981). As will be discussed below, abundant evidence justified the jury's verdict.

Accordingly, the verdict and judgment below should be upheld since Mr. Darlington's testimony constituted harmless error if its admission was error at all.

II. THE EVIDENCE, EVEN EXCLUSIVE OF MR. DARLINGTON'S OPINION, ESTABLISHED THE DEFECT NECESSARY TO SUPPORT THE JURY'S VERDICT.

AMERACE argues that the evidence failed to establish a defect in its terminator so the trial court should have entered a directed verdict. AMERACE takes the position that this Court should remand with instructions to enter a final judgment in its favor due to the alleged insufficiencies of Mr. Darlington's testimony.

In assessing the sufficiency of the STALLINGS' case, three ideas ignored by AMERACE should be borne in mind. First, the STALLINGS alleged that the terminator was defective because it permitted uncovered aluminum to be exposed to the elements, not that galvanic corrosion caused the accident. Second, the STALLINGS introduced Mr. Seuss' testimony that high transient currents caused the notching and separation as well as Mr. Darlington's opinion regarding galvanic corrosion. Third, virtually all experts agreed that lightning and corrosion (Mr. Seuss), lightning (Mr. Pearson and Dr. Caulfied) or galvanic corrosion (Mr. Darlington) caused the melting of the exposed aluminum.

In making the argument urging this Court to enter final judgment in its favor, AMERACE also ignores several truisms regarding trial evidence. First, the question of whether a plaintiff has established a *prima facie* case must be made from a review of the entire record, not only plaintiff's case. *McCain v. Florida Power Corp.,* 593 So.2d 500, 502 (Fla. 1992). Second, a motion for directed verdict and a motion for judgment notwithstanding the verdict employ the same rules. Both should be resolved with "extreme caution" and only when "no evidence or reasonable inferences" support a plaintiff's case. *Cooper Hotel Services, Inc. v. MacFarland,* 662 So.2d 710, 712 (Fla. 2nd

DCA, 1995), rev. denied 670 So.2d 939 (Fla. 1996). Third, all inferences should be construed most strictly in favor of the nonmoving party. *Id.* Fourth, on appeal the test is whether no proper view of the evidence could possibly sustain the Stallings' position as a matter of law. *Clark v. Better Const. Co., Inc.*, 420 So.2d 929, 930 (Fla. 3rd DCA 1982)

On the basis of these factual and legal ideas, the STALLINGS established a *prima facie* case in at least three ways independent of Mr. Darlington's testimony.

a. The Testimony of Mr. Manfred Seuss Established a *Prima Facie* Case Against Defendant.

TECO retained Mr. Manfred E. Seuss after Mr. Stallings' accident to determine the probable cause of the notching of the terminators. (Vol. 2: 354) AMERACE did not dispute Mr. Seuss' opinions. Indeed, defense counsel argued at one point that excluding Mr. Darlington as the STALLINGS' expert "may not necessarily be fatal to the Stallings' case" in light of Mr. Seuss' opinions. (Vol. 13: 324-325) Thus, AMERACE recognized the evidentiary force of Mr. Seuss' testimony.

The STALLINGS' chief theory with respect to the defect of the terminator turned on the exposure of the aluminum portion of the terminator to the elements. Mr. Seuss' opinion represented a blending of Mr. Darlington's corrosion opinion with Mr.

Pearson's lightning theory. Mr. Seuss recognized that the notching occurred above the rain cap on exposed metal. (Vol. 2: 372-373) His testimony includes three different significances to the STALLINGS' *prima facie* case.

First, Mr. Seuss noted that the aluminum in the area of the notch had corroded severely. (Vol. 2: 378) The resistance of aluminum oxide, the product of corrosion, is several times greater than aluminum metal, creating greater heat than would occur if the aluminum were not corroded. In his opinion, corrosion exacerbated the heat created by the lightning strikes, making notching more likely. (Vol. 2: 401-403) Thus, leaving the aluminum portion of the probe uncovered made corrosion and notching more likely.

Second, Mr. Seuss noted that copper resisted corrosion better than aluminum, transmitted electricity at least as well and melted at 1,981 degrees Fahrenheit while aluminum melted at 1,200 degrees Fahrenheit. (Vol. 2: 405-407) The benefits of using copper probes became evident during the testimony of Mr. John Sullivan, the TECO engineer who retained Mr. Seuss. He testified that two of AMERACE'S exhibits, 11 and 12, were General Electric terminators constructed with copper exposed probes and not aluminum ones such as AMERACE'S. Although both had flashed over, neither notched. In addition, rain caps

protected the aluminum on both General Electric terminators. (Vol. 15: 573-574)

In fairness, Mr. Sullivan also testified that another General Electric terminator, exhibit 13, notched even though it used uncovered copper. However, defense exhibit 13 was shown to the jury in pieces. Whether a fair comparison between it and defense exhibits 11 and 12 could be made appears questionable. (Vol. 15: 574-575) A reasonable jury could infer from this evidence, though, that uncovered copper would less likely notch and separate.

Third, Mr. Seuss testified that the absence of tin plating on the aluminum made corrosion more likely in Tampa's climate. None of the terminators he examined provided tin plating on the aluminum probe. AMERACE'S newer terminators were tin-plated, however. (Vol. 2: 399-400) Tin plating did not represent a subsequent remedial measure by AMERACE since it sold tin-plated terminators before Mr. Stallings' accident. The terminator that separated and injured Mr. Stallings lacked tin plating on the aluminum portion of the probe. (Vol. 15: 612-613) Therefore, a reasonable jury would have been justified in inferring that the failure to cover the aluminum on the probe with tin constituted a defect.

AMERACE might argue that the STALLINGS did not allege the

facts established by Mr. Seuss in their Amended Complaint. Actually, the Amended Complaint contains a general allegation that the terminator "was in a defective condition unreasonably dangerous to the user when placed in the stream of commerce." (Vol. 2: 274, ¶12) AMERACE did not object to the materiality or relevance of Mr. Seuss' testimony on these points so it cannot be heard to complain if the jury considered them in reaching a verdict for the STALLINGS.

b. The Testimony of Mr. Paul Pearson, AMERACE'S Expert, Provided Evidence From Which a Jury Could Infer a Defect.

AMERACE'S expert, Mr. Paul Pearson, testified that heat generated by lightning caused notching in TECO's system. (Vol. 15: 657-658) He stated that Florida Power Corporation placed terminators, fused cut-outs and arresters in a very close proximity. (Vol. 15: 643-644) He suggested that the closer placement of the equipment provided greater protection. (Vol. 15: 661-662)

The jury might well have credited Mr. Pearson's testimony since it found TECO 60 per cent responsible for Mr. Stallings' injuries. (Vol. 10: 1920) Mr. Pearson recognized as did AMERACE'S former manager of quality engineering that a terminator sitting atop a power pole would be exposed to

lightning. (Vol. 14: 423; Vol 15: 658-659) AMERACE never told its customers to keep its terminators and lightning arresters close together. AMERACE had no idea a terminator could notch if a lightning arrester and a terminator were not placed together. (Vol. 14: 420-421)

A reasonable jury, then, could accept Mr. Pearson's explanation for the terminators' notching and apportion responsibility on a 60/40 basis to TECO and AMERACE. Again, the uncovered aluminum notched while the covered portion of the aluminum did not.

c. *Cassisi v. The Maytag Co.*, 396 So.2d 1140 (Fla. 1st DCA 1981), Without More, Establishes a *Prima Facie* Case.

The STALLINGS relied in part on *Cassisi v. The Maytag Co.*, 396 So. 1140 (Fla. 1st DCA 1981) in opposition to AMERACE'S various motions for summary judgment, for a directed verdict, for judgment notwithstanding the verdict and for a new trial. *Cassisi* followed the reasoning of *Greco v. Bucciconi Engineering Co.*, 283 F.Supp. 978 (W.D. PA. 1967), *Aff'd*, 407 F.2d 87 (3d Cir. 1969) in finding that a product's malfunction during normal operation establishes a *prima facie* case. *Cassisi, supra,* 396 So.2d at 1148.

The general allegations of the STALLINGS' Amended Complaint

brought *Cassisi* to bear. AMERACE'S brief in the court of appeal took the position for the first time that *Cassisi* cannot be applied to design defects. Defendant made no such argument in the trial court. This Court should not permit AMERACE to argue this point during the appellate process. (Vol. 15: 556-558) *Steinhorst, supra,* 412 So.2d at 338.

Even if the argument had been raised below, the portion of *Cassisi* dealing with design defects constitutes *dicta*, a fact noted in *Matter of Civil Jury Inst.,* 435 So. 2d 782, 783 (Fla. 1983). The STALLINGS' entitlement to *Cassisi's* inference is not limited by their allegation of a design defect since they also allege the terminator "was in a defective condition unreasonably dangerous to the user when placed in the stream of commerce." (Vol. 2: 274)

While *Cassisi* establishes the STALLINGS' *prima facie* case, the trial court held that no jury instruction would be given with respect to it. (Vol. 16: 753-754) The trial court relied on *Gencorp v. Wolf*, 481 So.2d 109, 112 (Fla. 1st DCA 1985), *rev. denied* 491 So.2d 281 (1986) in denying the STALLINGS' tendered jury instruction. The trial court's anticipated ruling on the propriety of a *Cassisi* instruction necessitated the use of expert testimony. Denial of the instruction, however, does not

alter *Cassisi's* establishing a *prima facie* case for Plaintiffs.

For the foregoing reasons, the trial court did not commit error when it failed to direct a verdict or enter a judgment notwithstanding the verdict. Nor did the court of appeal err in affirming the trial court.

III. THE COURT OF APPEAL CORRECTLY HELD THAT THE TRIAL COURT ERRED IN DENYING INTEREST ON THE VERDICT.

The STALLINGS filed a Motion to Tax Costs and Prejudgment Interest with a memorandum seeking the imposition of interest between the date of the verdict, June 13, 1998, until the entry of final judgment on November 18, 1998. (Vol. 10: 2032-2048) The trial judge considered the motion and denied it during a post-trial hearing on the basis that no judgment was tendered for his signature. (Vol. 16: DT 3-6) The court of appeal reversed.

After the trial AMERACE submitted a Renewed Motion for Directed Verdict, Motion for Judgment Notwithstanding the Verdict, or, in the Alternative, Motion for New Trial. (Vol. 10: 2022-2031) AMERACE submitted a memorandum in support of its motion and the STALLINGS filed a memorandum in opposition to it. (Vol. 11: 2049-2076, 2077-2085) The trial court considered AMERACE'S motion for nearly five months before entering a Final Judgment for the STALLINGS on November 18, 1998. (Vol. 11:

2217) The trial court entered an Amended Final Judgment for the STALLINGS on December 22, 1998 in which it denied their Motion for Pre-Judgment Interest. (Vol. 11: 2220)

In *Palm Beach School Board v. Montgomery,* 641 So.2d 183 (Fla. 4th DCA 1994), the court considered the same question under the same set of facts. In *Montgomery*, the jury awarded plaintiff more than $400,000.00 in a personal injury case. The trial court took post-trial motions under advisement and entered a final judgment six months after the jury's verdict. The Fourth District, relying on *Argonaut Ins. Co. v. May Plumbing Co.*, 474 So.2d 212 (Fla. 1985), affirmed the interest award, finding that the verdict liquidated the amount of the plaintiffs' damages. The same situation exists in this case and the same result should obtain.

Griefer v. DiPierto, 708 So.2d 666 (Fla. 4th DCA 1998), *rev. dism.* 732 So.2d 323 (Fla. 1999), reaches the same result as does *Lipsig v. Ramlawi*, 760 So.2d 170 (Fla. 3d DCA 2000), a case decided after the decision below. Thus, the Second, Third and Fourth Districts are aligned against the First District on this issue.

Rockman v. Barnes, 672 So.2d 890 (Fla. 1st DCA 1996) and *Easkold v. Rhodes,* 632 So.2d 146 (Fla. 1st DCA 1994) support

AMERACE. In *Easkold,* the court relied on *Allstate Ins. Co. v. Powell*, 513 So.2d 802 (Fla. 4th DCA 1987) *rev. denied,* 520 So.2d 585 (Fla. 1988) and *Smith v. Dunning*, 467 So.2d 465 (Fla. 1st DCA 1985). *Smith* was decided a few months before *Argonaut Ins. Co., supra*. *Powell, supra* apparently turns on the question of whether interest on attorney's fees awarded in anticipation of appeal should have been granted. It relies on *Merchant v. Merchant*, 433 So.2d 633, 634 (Fla. 1st DCA 1983), which also precedes *Argonaut Ins. Co.* In short, both cases present factual situations dissimilar to those of *Montgomery* and this case. *Rockman, supra,* relied on *Easkold* without a recitation of its own pertinent facts.

Montgomery appears to be the better-reasoned decision since it presents the same facts for consideration present in this case. The verdict below liquidated the STALLINGS' damages as of June 13, 1998 so no good reason appears against attaching interest, or, put another way, to have the award lie fallow. The STALLINGS should not bear the loss of their recovery due to the trial court's consideration of AMERACE'S motions.

In *Easkold,* by contrast, the *plaintiff's* motion for new trial occasioned the delay in entering judgment. In the context of awarding interest on costs, the First District expressly

found that the plaintiff's motions and appeal delayed the entry of the costs judgment. The same reasoning apparently controls the decision against awarding damages from the date of the verdict until the date of the final judgment.

AMERACE correctly notes the general rule prohibits interest before judgment in tort cases due to the speculative nature of tort damages. (Petitioner's initial brief, at 24). Historically, the topic of prejudgment interest has been fraught with confusion. *Argonaut Ins. Co., supra.*

Part of the confusion in this case arises out of lumping the STALLINGS' entitlement under the term "prejudgment interest." As AMERACE cogently pointed out in its cross-answer brief in the Second District, the STALLINGS are not seeking prejudgment interest in the strictest sense. In the strictest sense, prejudgment interest constitutes an element of damages awarded in, not after, the jury verdict. The interest sought by the STALLINGS appears more analogous to post-judgment interest to compensate them for lost use of the award until judgment. (Cross-Answer Brief, 16, n. 1)

The award of interest in this case should create no confusion. The verdict, by virtue of the award of damages and the allocation of responsibility, liquidated the STALLINGS' entitlement. The certainty of their award did not change with

their willingness to accept a remittitur of $196,940.02 in the face of a clearly excessive award for past medical bills. (Vol. 11: 2216) No good reason exists to permit AMERACE'S continued enjoyment of the fruits of its money after the jury spoke to the STALLINGS' award. The STALLINGS, after all, sought only interest on the amount awarded, not interest from the date of Mr. Stallings' injury.

Contrary to the position taken in the brief of the Florida Defense Lawyers' Association, the award of interest to the STALLINGS does not penalize AMERACE. (Brief of *Amicus Curiae,* 7-8) Nothing in *Montgomery, supra,* suggests a penalty. Indeed, *Montgomery* does not identify the nature of the post-verdict motions or the identity of the party who filed them. It merely allocates the entitlement to the growth of the money to plaintiffs during the six-month hiatus between verdict and judgment.

Finally, §55.03, Fla. Stats. (1999) does not compel a different result. First, the applicable section, §55.03(2), does not prohibit the entry of interest on a verdict. It merely provides that any judgment for money damages directed to a sheriff for execution shall bear the rate of interest payable on the judgment.

Rockman, supra, then, correctly notes that the amendments

to §55.03 were not effected by ch. 94.239, Laws of Florida (1994). The earlier version, however, did not expressly or impliedly prohibit interest on a verdict either. Simply put, the statute does not control this issue.

Therefore, the court of appeal should be affirmed for ordering interest between the date of the verdict and the date final judgment was entered.

CONCLUSION

Based on the foregoing facts and law, the decision reached by District Court of Appeal for the Second District should be affirmed in all respects. Its affirmance without discussion of the jury's award poses no conflict in precedence or injustice to AMERACE. The award of interest to the STALLINGS between the date of the verdict and the date of the judgment should be affirmed since the verdict liquidated the STALLINGS' entitlement.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to: CHARLES TYLER CONE, ESQUIRE, Fowler, White, Gillen, Boggs, Villareal and Banker, P.A., P. O. Box 1438, Tampa, Florida 33601 and WARREN B. KWAVNICK, ESQUIRE, Cooney, Mattson, Lance, Blackburn, Richards & O'Connor, P.A., P.O. Box 14546, Fort Lauderdale, Florida 33302 on this 8th day of January, 2001.

CERTIFICATE OF TYPE SIZE AND STYLE

Counsel for Respondents, GARY E. STALLINGS and VERA J.

STALLINGS, his wife, certify that this brief is printed in Courier New 12-point font, a monospaced typeface with 10 characters per inch.

Respectfully submitted,

PILKA & ASSOCIATES, P.A.
DANIEL F. PILKA, ESQ.
Florida Bar No. 442021
ROBERT FRASER, ESQ.
Florida Bar No. 218529
P. O. Box 3470

Brandon, FL 33509-3470
(813) 653-3800
Attorneys for Respondents,
GARY E. STALLINGS and VERA J. STALLINGS