IN THE SUPREME COURT OF FLORIDA
TALLAHASSEE, FLORIDA

AMERACE CORPORATION, a Delaware corporation,	:	
Petitioner,	:	
v.	:	CASE NO. SC00-565
GARY E. STALLINGS and VERA J. STALLINGS, his wife,	:	
Respondents.	:	

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

PETITIONER'S REPLY BRIEF ON THE MERITS

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REPLY ARGUMENT

I. A PARTY MAY NOT RELY UPON PURE OPINION TESTIMONY TO PROVE HIS CASE WHEN THE WITNESS PRESENTING THE PURE OPINION HAS NO PERSONAL EXPERIENCE OR TRAINING THAT PROVES THE PROFFERED OPINION.

At bottom, this case is about the reliability of "scientific" evidence. As this Court cogently explained:

> [W]e firmly hold to the principle that it is the function of the court to not permit cases to be resolved on the basis of evidence for which a predicate of reliability has not been established. **Reliability is fundamental to issues involved in the admissibility of evidence.**

Hadden v. State, 690 So. 2d 573, 578 (Fla. 1997) (emphasis added). This predicate of reliability is particularly important with respect to expert scientific testimony, which, by definition, relates to ideas and concepts with which the average juror is not familiar. Thus, "[n]ovel scientific evidence must also be shown to be reliable **on some basis other than simply that it is the opinion of the witness who seeks to offer the opinion.**" Id. (emphasis added).

The Stallings admit that Darlington's theory was never subjected to any generally accepted testing methodology. Nor do the Stallings contend that Darlington personally developed his theory through clinical (that is, real-world) experience. The Stallings fail to recognize, however, the conclusion to be drawn from these undisputed facts: that Darlington's testimony lacks

any predicate of reliability. Instead, the Stallings offer several arguments that, notwithstanding this lack of reliability, the jury's verdict was proper.

First, the Stallings first argue that Amerace has waived any objection to that fact the Darlington's opinion failed to satisfy the Frye standard. (Respondents' Answer Br., at 18-19) However, the record clearly demonstrates that Amerace objected to Darlington's testimony on these grounds before trial, at trial, and after trial.

Amerace first objected to Darlington's testimony in the form of a motion to strike him as an expert witness. (V7:1451-65) In that motion, Amerace alleged that the bases for Darlington's testimony were not generally accepted in the relevant scientific fields. (V7:1452, ¶ 4) Amerace then pointed out that Darlington had admitted that he did not know whether his opinion was generally accepted, that he had not tested his opinion, and that he had not submitted his opinion to peer review. (V7:1459) As a result, Amerace argued that Darlington's opinion "must be precluded based on the Fyre test, as enunciated in Ramirez[v. State, 651 So. 2d 1164 (Fla. 1995)]." (V7:1460-61)

Amerace reiterated this argument at trial. During Darlington's trial testimony, Amerace's counsel asked to voir dire Darlington. (V13:T248, T296) Following voir dire as to Darlington's qualifications (V13:T249-50), the lower court

overruled Amerace's objection as to the adequacy of those qualifications. (V13:T250) However, the lower court then instructed Amerace's counsel to "go ahead and voir dire **on the basis upon which he thinks he can give an opinion**." (V13:T297 (emphasis added)) The lower court reminded Amerace's counsel that it had already ruled on Darlington's qualifications. (V13:T297)

During this second voir dire examination, Darlington once again admitted that he had not performed any tests to support his opinions, that he had not published his opinions in any peer-review journals, and did not know whether his opinions were generally accepted in the relevant scientific communities. (V13:T300-02) Based on these admissions, Amerace's counsel argued that this Court, in rejecting Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993), "said that it would continue to adhere to the Frye standards regarding scientific evidence." (V13:T314-15) The lower court nevertheless overruled Amerace's objection. (V13:T326)

Finally, Amerace renewed its objection as to Darlington's **opinion** -- in addition to its objection as to Darlington's **qualifications** -- in its post-trial motions. (V10:2022-31) Once again, Amerace specifically argued that Darlington's opinion was

inadmissible because, inter alia, it had not been tested or subjected to peer review. (V10:2029)

In sum, Amerace objected to Darlington's opinion on the grounds that it did not satisfy the Frye test throughout the proceedings. The Stallings' argument that Amerace somehow waived this objection is therefore thoroughly refuted by the record.

The Stallings then argue that "Frye provides no basis of relief for Amerace." (Respondents' Answer Br., at 19-20) This argument is premised on the Stallings' contentions (1) that, under Frye, Darlington was not required to test his theory, and (2) that Frye does not even apply in this case because galvanic corrosion is not a novel scientific principle. Both these premises are false.

Taking the second premise first, the Stallings are simply incorrect that Frye does not apply to novel opinions, as long as those opinions are based on generally-accepted scientific principles. Frye clearly governs the admissibility of **all** novel opinions based on scientific principles. See, e.g., Hadden v. State, 690 So. 2d 573, 578 (Fla. 1997) (reiterating the court's intent "to use the Frye test as the proper standard for admitting novel scientific **evidence** in Florida"); also Ramirez v. State, 651 So. 2d 1164, 1167 (Fla. 1995) (noting that Frye applies "[w]hen a novel **type of opinion** is offered").

Ironically, even the case cited by the Stallings refutes their argument. See Berry v. CSX Transp., Inc., 709 So. 2d 552, 568 (Fla. 1st DCA 1998) ("[W]e must emphasize at this juncture that the issue in Frye and in the instant cases involves the admissibility of **expert testimony**.")

The Stallings have confused the issue of whether Frye **applies** with the issue of what the Frye test **requires**. As applied in Florida, the Frye test requires

> the proponent of the evidence to prove the general acceptance of **both** the underlying scientific principle **and the testing procedures used to apply that principle to the facts of the case at hand**.

Ramirez, 651 So. 2d at 1168 (emphasis added).[1] Thus, the Stallings are also incorrect that Frye did not require Darlington to test his theory.

The Stallings' claims that they should be exempt from this requirement because of the length of time testing would require, (Respondents' Answer Br., at 19), are unpersuasive. In the first place, Darlington testified that a test of his theory would take between **five** and fifteen years. (V13:T254) As Amerace

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[1]Hence, the actual holding of the Berry court: not that Frye did not apply to novel opinions based on generally accepted scientific principles, but simply that "under Frye and its Florida progeny, when the expert's opinion is well-founded and based upon generally accepted scientific principles **and methodology**, it is not necessary that the expert's **opinion** be generally accepted as well." 709 So. 2d at 567 (emphasis added).

pointed out in its initial brief, the Stallings spent much of that five years searching for an expert to support their claim. (Petitioner's Initial Br., at 18) Moreover, this Court has recognized that difficulties in satisfying the Frye test does not justify relieving a plaintiff of his or her burden of proof. See Stokes v. State, 548 So. 2d 188, 193-94 (Fla. 1989) (explaining that "a courtroom is not a laboratory, and as such it is not the place to conduct scientific experiments").

Finally, the Stallings attempt to justify Darlington's testimony as "pure opinion." (Respondents' Answer Br., at 20-23) According to the Stallings, Darlington's "education, training and experience" and his "familiarity with TECO's distribution system, connectors and electrical arcs" qualified him to render his pure opinion.

These general credentials cannot justify Darlington's testimony as pure opinion.[2] This Court has defined "pure

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[2]Indeed, Darlington's credentials (as an electrical engineer) do not even justify qualifying Darlington as an expert in the subjects on which he ultimately testified. "It is not enough, then, that a witness be qualified in some general way ... the witness must be possessed of special knowledge about the discrete subject upon which he is called to testify." United Techs. Communications Co. v. Industrial Rick Insurers, 501 So. 2d 46, 49 (Fla. 3d DCA 1987); see also Flanagan v. State, 586 So. 2d 1085, 1111, n. 23 (Fla. 1st DCA 1991) (en banc) (Ervin, J., concurring in part and dissenting in part) ("If a witness is not qualified as an expert in the relevant field to which the person's opinion is directed, he or she should not be permitted to express an opinion.")

opinion" as a "kind of expert-opinion testimony **which is personally developed through clinical experience**." Hadden, 690 So. 2d at 580 (emphasis added). Darlington, on the other hand, had neither tested a terminator nor seen one fail in his thirty-seven years of experience. (V13:T247, T302) Darlington could not testify that he had encountered even one terminator that had been notched because of galvanic corrosion due to a design defect. Thus, Darlington's testimony could not possibly have been "personally developed through clinical experience," because that "clinical experience" did not include observation of terminators that had notched due to galvanic corrosion due, in turn, to a design defect.

The absence of such observations completely distinguishes the present case from Florida Power & Light Co. v. Tursi, 729 So. 2d 995 (Fla. 4th DCA 1999). In Tursi, the expert ophthalmologist had treated thousands of cataract patients; knew, from personal observation, that chemical agents could cause cataracts; and was able -- again, based on personal observation -- to rule out other potential causes. See id. at 996-97.

Contrary to the Stallings' assertion, this is not the "same sort of education and experience" possessed by Darlington. Had he had the same clinical experience as Darlington, the expert in Tursi would simply have testified that he was an ophthalmologist

with many years' experience, but that he had never observed the formation of a cataract, let alone a cataract caused by chemical agents. Such testimony could not have supported the jury's verdict in Tursi, and such testimony cannot support the jury's verdict here.

Like their analysis of Frye testing, the Stallings' proposed definition of "pure opinion" ignores the fundamental purpose of ensuring the reliability of novel "scientific" evidence. Such testimony must either be validated by generally accepted scientific principles and methodologies, or by the expert's own empirical observations. Darlington's testimony has neither of these indicia of reliability.

In short, Darlington's novel theory has no basis "other than simply that it is the opinion of the witness who seeks to offer the opinion." Hadden, 690 So. 2d at 578. As a result, Darlington's testimony is inadmissible. See id.

II. APART FROM DARLINGTON'S INADMISSIBLE OPINION TESTIMONY, THERE WAS NO EVIDENCE TO SUPPORT A FINDING THAT THE TERMINATOR CONTAINED A DESIGN DEFECT.

Part II of the Stallings' answer brief essentially argues that the admission of Darlington's testimony was harmless error because other evidence supports the jury's verdict. More specifically, the Stallings contend that the testimony of Manfred Seuss and Paul Pearson supports their claim that the

terminator was defectively designed. (Respondents' Answer Br., at 26-29) The Stallings then argue that the jury was entitled to infer that the accident was the result of a design defect. (Respondents' Answer Br., at 29-31)

The Stallings' reliance on the testimony of both Seuss and Pearson suffers from a single flaw. Neither Seuss nor Pearson testified that notching was the result of a design defect. That is, neither witness testified that the fact that the terminator did not include the Stallings' proposed extended raincap would have prevented the notching and, ultimately, the accident.[3] The only witness to testify that an extended raincap would have prevented the notching was Darlington. Darlington's testimony, then, was not merely "cumulative" of other evidence. Its erroneous admission cannot therefore be considered harmless.

Other factors prevent the Stallings from successfully relying on the testimony of Seuss and Pearson. For example, although the Stallings' refer to Seuss' testimony as "a blending of Mr. Darlington's corrosion opinion with Mr. Pearson's lightning theory," (Respondents' Answer Br., at 26), Seuss expressly declined to testify as to whether the presence of

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[3]In fact, Pearson affirmatively testified that the cause of the accident was caused, not by a design defect in the terminator, but by TECO's placement of lightning arresters. (V15:T647-48, T669-70) Thus, while Mr. Pearson's testimony support the jury's verdict against TECO, it does not support the verdict against Amerace.

corrosion was necessary for an overvoltage[4] to cause notching. (V2:393-94)

Similarly, the Stallings' reliance on Seuss' testimony that the absence of tin plating made corrosion less likely is misplaced. The sole theory of defect presented to the jury was that the terminator's raincap did not completely cover the aluminum crimp barrel. (V2:273, ¶ 9; V12:T47; V16:T799-800) The Stallings cannot seriously argue that the jury's verdict was based on a finding the jury was never asked to make. Moreover, to allow the Stallings to rationalize the jury's verdict in this manner would deprive Amerace of its due process rights to notice and the ability to defend against the Stallings' theory of liability. See, e.g., Southeast Recycling v. Cottongim, 639 So. 2d 155 (Fla. 1st DCA 1994).[5]

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[4]The Stallings continue to confuse overvoltage with overamperage, suggesting that the fused cut-out to which a terminator was connected "exploded in the event of overvoltage." (Respondents' Answer Br., at 5) The fused cut-outs are affected by over**amperage**, not overvoltage. (V2:286-87) Overvoltage of the type that may have caused the notching will not blow the fuse. (V15:T658)

[5]The Stallings suggest that their general allegation that the terminator "was in a defective condition unreasonably dangerous to the user when placed in the stream of commerce" allows them to rely on **any** theory of defect to support the jury's verdict. (Respondents' Answer Br., at 28) However, this general allegation is expressly limited by the specific theory of defect alleged in the complaint. (V2:273, ¶ 11) In any event, regardless of the allegations made, the Stallings pursued only the raincap theory at trial. (V16:T799-800)

Perhaps recognizing the lack of support for their theory in the testimony of Seuss and Pearson, the Stallings then rely on Cassisi v. Maytag Co., 396 So. 2d 1140 (Fla. 1st DCA 1981), to argue that the jury could have inferred a design defect from the circumstances of the accident. Cassisi simply does not support the jury's verdict in this case.

In the first place, Cassisi expressly does not apply to design defects. See id. at 1146, 1153 n.29.[6] The distinction between design and manufacturing defects is important. Cassisi's holding is based on the idea that it is reasonable to infer that a product's **malfunction during normal use** (such as a fire in a dryer) was caused by a defect in the manufacture of a product. In cases involving alleged design defects (in which there is no similar "malfunction"), application of the inference would allow a jury to infer a design defect merely from the happening of an accident. Cassisi cannot be read so broadly.

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[6]The Stallings' incorrectly assert that Cassisi's self-limiting language is dicta. (Respondents' Answer Br., at 30) The dicta in Cassisi is its discussion of changes to the Restatement's definition of "design defect." The Court then clearly noted that it was unnecessary to decide that issue because the case before it involved a manufacturing defect. See 396 So. 2d at 1146.

The Stallings' are also incorrect that Amerace has not preserved the argument that Cassisi does not apply to this case. Amerace clearly opposed the applicability of Cassisi in the trial court. (V15:T556-58) The trial court therefore had the opportunity of considering and ruling on the issue.

Cassisi is further distinguishable from the present case. In Cassisi, the allegedly defectively manufactured dryer was badly damaged in a fire, thus preventing plaintiff's expert from connecting the fire to a specific defect in the dryer. See 396 So. 2d at 1143. Although the court noted, in dicta, that the inference may not be dependent on that fact, see id. at 1151, the court's general concern was that it is often difficult for plaintiffs to pinpoint the cause of the accident and to tie the accident to a specific product defect. This rationale is completely absent from this case. The Stallings had no difficulty in concocting a theory for the notching (galvanic corrosion) and in suggesting a specific design defect (the coverage of the raincap). Although the Stallings ultimately offered no legally sufficient evidence to support their theories, they did not face the same difficulties that concerned the Cassisi court. The case is therefore inapplicable.

In sum, the jury could not properly have reached its verdict based on other evidence, or on an inference that the accident was the result of a design defect. The only support for the jury's verdict is Darlington's testimony. As Amerace has clearly demonstrated, the trial court improperly admitted that testimony.

III. PRE-JUDGMENT INTEREST SHOULD NOT ACCRUE FROM THE DATE OF A JURY VERDICT, BECAUSE IT IS THE SUBSEQUENTLY ENTERED

JUDGMENT, AND NOT THE VERDICT ITSELF, THAT LEGALLY ENTITLES A PARTY TO COLLECT THE AWARD.

The Stallings readily admit that interest on a jury's verdict is not true prejudgment interest. Instead, the Stallings support Amerace's position that post-verdict interest "appears more analogous to post-judgment interest to compensate for lost use of the award until judgment." (Respondents' Answer Br., at 34)

The undisputed fact that post-verdict interest is a variant of post-judgment interest compels the conclusion that the First District's holding in Easkold v. Barnes, 672 So. 2d 890 (Fla. 1st DCA 1994), is correct. Of the conflict cases, only Easkold recognizes that section 55.03, Florida Statutes, governs the accrual of post-judgment interest. That statute plainly provides that post-judgment interest accrues from the date of the **judgment**, not the verdict. See id.

The Stallings fail to respond to Amerace's argument on this point. As Amerace explained in its initial brief, the Legislature had a perfectly valid reason for choosing the judgment as the document that triggers the accrual of post-judgment interest. (Petitioner's Initial Br., at 25) The purpose of interest is to compensate for the lost use of money to which the recipient is entitled. A jury's verdict does not give rise to any entitlement to payment; a judgment does. Section 55.03

and, by extension, Easkold correctly apply this general principle.[7]

[7]The Stallings attempt to distinguish Easkold on the grounds that, in that case, the plaintiff himself occasioned the delay in the entry of judgment. (Respondents' Answer Br., at 33) The Stallings have evidently forgotten that the delay in the entry of judgment in this case was likewise a result of their own actions. The trial judge specifically noted that he would have entered judgment as soon as the Stallings presented one for his signature. (V16:DT5-6) While Amerace's post-trial motions would have suspended execution and rendition, they would not have suspended the accrual of interest. See, e.g., McNitt v. Osborne, 371 So. 2d 696 (Fla. 3d DCA 1979). Easkold is therefore perfectly applicable to the present case.

CONCLUSION

The rulings of the lower courts in this case allowed the Stallings to present expert testimony clothed with the **aura** of "scientific" testimony, but lacking in any actual **basis** of reliability. Since the jury's verdict cannot be supported by any other evidence, admission of this unreliable testimony casts serious doubts on the reliability of the jury's verdict itself. The Second District then compounded the error by holding that this unreliable verdict should accrue interest.

Amerace therefore asks that this Court quash the decision of the Second District Court of Appeal and direct the lower courts to enter judgment in favor of Amerace. Alternatively, Amerace asks that this Court quash the Second District's decision insofar as it directs the trial court to award interest on the verdict.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by U.S. Mail to Counsel for Respondents, **ROBERT FRASER, Esquire**, Post Office Box 3470, Brandon, Florida 33509; and to Counsel for Amicus Curiae, **WARREN B. KWAVNICK, Esquire**, Post Office Box 14546, Fort Lauderdale, Florida 33302, on February _____, 2001.

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Charles Tyler Cone, Esquire

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief complies with the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2), and that this brief is printed in Courier New 12-point font, a monospaced typeface with 10 characters per inch.

_____
Charles Tyler Cone, Esquire

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