Supreme Court of Florida

No. SC16-2182
LT 4D13-4351, 4D14-146

RICHARD DELISLE,
Petitioner,

v.

CRANE CO. AND R.J. REYNOLDS TOBACCO CO.,
Respondents.

RESPONDENT CRANE CO.'S ANSWER BRIEF

AUSLEY MCMULLEN

Richard E. Doran
rdoran@ausley.com
FL Bar No. 325104
123 South Calhoun Street
P.O. Box 391
Tallahassee, Florida 32302
Tel: (850) 425-5305
Fax: (850) 222-7560

K&L GATES LLP

Paul F. Hancock
paul.hancock@klgates.com
FL Bar No. 140619
William J. Simonitsch
william.simonitsch@klgates.com
FL Bar No. 422060
200 S. Biscayne Blvd., 3900
Miami, Florida 33131
Tel: (305) 539-3300
Fax: (305) 358-7095

Attorneys for Respondent Crane Co.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

STATEMENT OF THE CASE AND THE FACTS

A. Brief Procedural History

Respondent Crane Co. provides this statement as the statement provided by Petitioner omits facts necessary for a full understanding of the case.

Petitioner Richard DeLisle ("Plaintiff" or "Mr. DeLisle") initiated this action based upon the claim he developed mesothelioma (a cancer of the lining of the lung) as the result of exposure to numerous companies' asbestos-containing products. Plaintiff originally sued sixteen defendants, alleging negligence and strict liability under failure-to-warn and design-defect theories. (R. Vol. 1 at 1–43.)[1] Trial commenced in August 2013, and Crane Co., Lorillard Tobacco Co., and Hollingsworth & Vose Company were the only remaining defendants.[2]

Besides seeking to exclude the causation testimony described below, at the close of Plaintiff's case, Crane Co. moved for a directed verdict because Plaintiff failed to establish a right to relief against Crane Co., as a matter of law, by failing to prove causation, among other things. (R. Vol. 103, T.T. Vol. 21 at 3382–3387.)

---

[1] Pursuant to Fla. R. App. P. 9.220, Crane Co. is filing its Appendix concurrently with this brief. The Appendix contains the same material submitted to the Fourth District Court of Appeal and is limited to "the portions of the record deemed necessary to an understanding of the issues presented." *Id.* When citing the few trial transcripts that are not included in the Appendix, Crane Co. will cite the volume of the Record where the transcript can be found and also the volume of the trial transcript ("T.T. Vol.") with a pin cite.

[2] Respondent RJR Reynolds has since succeeded to the obligations of Lorillard and Hollingsworth & Vose.

The trial court heard argument on Crane Co.'s motion, but deferred ruling. (*Id.* at 3387.)

In its own case, Crane Co. presented evidence to prove that Mr. DeLisle was mistaken in his identification of Cranite, but even if he was correct in this respect, the Cranite would not have released a significant level of asbestos fibers and, in any event, that the chrysotile asbestos fibers used in Cranite did not cause his disease, but, he was injured by a more toxic form of asbestos. (App. Tab C at 2481; App. Tab D at 2669–2671; R. Vol. 104, T.T. Vol. 22 at 3452–3455; R. Vol. 109, T.T. Vol. 28 at 4331, 4362:23–25.) As part of its defense, Crane Co. demonstrated that Mr. DeLisle was exposed to asbestos fibers from products made and sold by various nonparties and that, to the extent the jury determined that Crane Co.'s product contributed to cause Mr. DeLisle's mesothelioma, then the products of these nonparties did so as well. (App. Tab B at 2243–2248.)

At the close of evidence, Crane Co. renewed its motion for directed verdict, and the trial court again heard argument on the motion, but again deferred ruling. (R. Vol. 110, T.T. Vol. 29 at 4537–4541.) Plaintiff also moved for directed verdict, arguing that *none* of the nonparties that contributed to causing Mr. DeLisle's mesothelioma should be placed on the verdict form. (*Id.* at 4484–4529.) The trial court granted Plaintiff's motion by excluding most of the proffered responsible nonparties from the verdict form. (*Id.* at 4541.) After

initially objecting, Plaintiff stipulated that Brightwater Paper Company (Mr. DeLisle's employer) and Owens Corning Fiberglas[3] should be included on the verdict form (though Plaintiff still argued in post-trial motions that both *should not* have been). (*Id.* at 4528.)

The case then went to the jury. The jury awarded $8 million in damages to Plaintiff, and it apportioned fault: Crane Co. 16%, Lorillard Tobacco Co. 22%, Hollingsworth & Vose Company 22%, Brightwater 20%, and Owens Corning Fiberglas 20%. (R. Vol. 114 at 21511–21522, T.T. Vol. 36; *see also* App. Tab G.)

After trial, Crane Co. moved for post-trial relief, requesting judgment under its previous motion for directed verdict, judgment notwithstanding the verdict, or a new trial. (R. Vol. 56 at 10653–10667.) The trial court entered an order denying Crane Co.'s motion for post-trial relief in its entirety and an order entering final judgment. (App. Tab G.) Crane Co. appealed those orders to the Fourth District Court of Appeal.

[3] Owens Corning Fiberglas is one of the now-bankrupt asbestos insulation suppliers that are commonly referred to as "big dusties." *See In re Garlock Sealing Techs., Inc.*, 504 B.R. 72 (Bankr. W.D.N.C. 2014). Prior to the waves of asbestos bankruptcies in the 1990s and early 2000s, asbestos litigation was primarily against these "big dusties"—companies like Owens Corning, Johns-Manville Corp., and other entities—whose primary businesses involved the manufacture and sale of friable asbestos-containing insulation materials that were understood to be the primary causes of asbestos-related injuries. *Id.* at 82–85.

The appellate court reversed the trial court's denial of Crane Co.'s motion for a directed verdict and ordered that directed verdict be entered for Crane Co. Plaintiff moved for rehearing and the District Court of Appeal issued a revised opinion while denying Plaintiff's motion for rehearing on November 9, 2016. *Crane Co. v. DeLisle*, 206 So. 3d 94 (Fla. 4th DCA 2016).

In regard to Crane Co., that court held that the "every exposure" opinion offered by Dr. Dahlgren to establish that Cranite gasket material was a substantial cause of Plaintiff's disease was inadmissible under the principles articulated in *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993), which, since 2013, have been embodied in Section 90.702, Florida Statutes. *Id*. at 98, 100 n.7. After noting that "[t]he opinion that every asbestos exposure level above background level is a substantial contributing factor has been rejected repeatedly by courts as insufficiently supported by data or testing to satisfy *Daubert*" the District Court of Appeal focused on the general absence of any scientific basis for Dr. Dahlgren's opinion:

> Similarly, Dr. Dahlgren's theory is not supported by any studies, as it has not been tested. There was no data presented at the hearing showing that chrysotile asbestos in low levels is associated with mesothelioma. Indeed, the other experts testifying for DeLisle all rejected such an association. Dr. Dahlgren's testimony was more of the nature of ipse dixit, i.e. that it should be reliable merely because he is an expert. This is insufficient to satisfy *Daubert.* Therefore, we conclude the court

> abused its discretion in admitting Dr. Dahlgren's testimony on the "every exposure" theory.

Id. at 106–07.

Further, the Court stated that whether the *Daubert* standard applied was unnecessary to resolve the question of Crane Co.'s liability, since even "if the *Frye* standard applied, most of the expert testimony clearly would be inadmissible as the experts failed to show that the methodology was generally accepted in the scientific community." *Id*. at 100 n.7. Finally, the Court stated that, had it not ruled in Crane Co.'s favor on causation, it would have reversed for a new trial given the trial court's decision to exclude from the verdict form certain nonparty entities. *Id*. at 106 n.10.

B. Plaintiff's Causation Evidence Against Crane Co.

The sole evidence of causation that Mr. DeLisle offered against Crane Co. was the testimony of his expert medical witness, Dr. James Dahlgren. Crane Co. moved to exclude Dr. Dahlgren's opinions under Section 90.702, Florida Statutes. Although Plaintiff, at trial, contended that *Frye*, and not the *Daubert* standard, codified in Section 90.702, Florida Statutes, should apply to determine the admissibility of expert opinion, Plaintiff did not argue that *Marsh* should apply, as Plaintiff now argues. (T.T. Vol. 1 at 124:15–25.) The trial court denied that motion, but the District Court of Appeal held that that ruling was error.

Plaintiff alleged that Mr. DeLisle was exposed to asbestos fibers from "Cranite" brand sheet gaskets[4] between 1962 and 1966, while working at Brightwater Paper Company in Adams, MA. Crane Co. was, and is, primarily a manufacturer of industrial equipment, like valves and pumps. "Cranite" was a sheet gasket material that contained chrysotile asbestos fibers and was manufactured by other companies and sold by Crane Co. during certain years. (R. Vol. 92, T.T. Vol. 9 at 1200–1201.) Mr. DeLisle and one on his co-workers, Bruce Clerc, identified "Cranite" as a brand of gaskets they used at Brightwater. (App. Tab C at 2480–2481; App. Tab D at 2669–2671.)

Plaintiff offered Dr. James George Dahlgren as his sole witness on the issue of causation as to Crane Co.[5] Dr. Dahlgren testified that *all* inhalations of asbestos

[4] Gaskets have been generally described in asbestos litigation as "not a significant product," in terms of potential liability. *See Garlock*, 504 B.R. at 82. That observation was supported here by testimony from Plaintiff's own expert witness. Dr. James Millette, Plaintiff's expert witness in industrial hygiene, testified that, unlike the asbestos insulation materials to which Mr. DeLisle was exposed, asbestos-containing gaskets generally were not "friable" products that would easily release asbestos fibers. (R. Vol. 95, T.T. Vol. 12 at 1756.) Although Dr. Millette testified that he had determined through testing that certain asbestos-containing gaskets could release asbestos fibers if manipulated in certain ways, he *never* tested Cranite for its potential to release asbestos fibers, nor did he attempt to quantify Mr. DeLisle's exposures in any manner. (R. Vol. 96, T.T. Vol. 13 at 1952.)

[5] Dr. Dahlgren was the sole witness Plaintiff offered on that issue: "At trial, he was the sole witness to testify that exposure to low levels of chrysotile asbestos through Crane Co. products was a substantial cause of DeLisle's mesothelioma." *DeLisle*, 206 So. 3d at 103.

fibers released into the air in an industrial setting create an increased risk of mesothelioma:

> Q: Is it your opinion that all work with asbestos-containing products would constitute [a] health hazard?
>
> A: If they were friable and inhaled. If they're encapsulated and not in the air and not inhaled, there would not be a risk.

(App. Tab B at 2239:8–13.) Dr. Dahlgren testified further, over Crane Co.'s objection, that "dust" created by cutting Cranite gaskets "was a substantial contributing cause" of Mr. DeLisle's disease, without ever (1) opining that the "dust" contained any asbestos fibers, or (2) quantifying any amount of asbestos fibers in any such "dust." (App. Tab A at 2170–71.) Plaintiff's trial counsel summarized Dr. Dahlgren's testimony as providing that "each and every exposure above background levels" would have substantially contributed to Mr. DeLisle's mesothelioma. (App. Tab A at 2083:2–12.) It was, in Plaintiff's view, unnecessary to know the amount of fibers released by any defendant's product, and unnecessary to compare any such amount of fibers with any documented levels of exposure they agree not to be harmful.

Dr. Dahlgren also testified before the trial court in connection with Crane Co.'s evidentiary challenge. (App. Tab A at 2041–2136.) In this testimony, Dr. Dahlgren accepted the general principle that there is a safe level of "background" asbestos exposure, but then he purported to quantify the level as

being virtually no asbestos exposure. (*Id.* at 2070–2079.)[6] Dr. Dahlgren opined that every exposure above this *de minimis* "background" level—which he found to be 5,000 times less than the current OSHA limit for workplace exposure—could cause disease, while conceding there is some undefined "gap" between the safe background level and the level of exposure needed to cause disease. (*Id.* at 2071.)

Dr. Dahlgren could not quantify this "gap," or state that Mr. DeLisle's alleged exposure associated with Cranite exceeded this "gap." (*Id*. at 2169–71.) He also acknowledged that published scientific research has determined that different forms of asbestos fibers have differing abilities to cause mesothelioma, but that information played no role in the opinions he offered. (*Id*. at 2067.)

Before the jury, however, Dr. Dahlgren disregarded entirely the concept of a safe level of exposure, and opined that essentially every airborne asbestos fiber to which one may be exposed in an industrial setting can be a substantial factor in causing mesothelioma, without regard to its relation to the safe background level to which he testified earlier. (App. Tab B at 2239:8–13.) Without receiving any evidence that Mr. DeLisle was exposed to sufficient levels of asbestos from Cranite to cause his mesothelioma, the jury was led to believe that one can attribute

[6] Dr. Dahlgren estimated that the safe "background" level of asbestos exposure is 0.00002 fibers/cc. (App. Tab A at 2070:13–23.) This is 5,000 times less than the .1 fiber/cc level that is currently permitted under OSHA. Accordingly, Dr. Dahlgren's opinion is that the current OSHA level is 5,000 times more hazardous than the level of exposure at which Dr. Dahlgren believes harm occurs.

Mr. DeLisle's mesothelioma to Cranite, absent any meaningful scientific causal analysis. (App. Tab A at 2166–2171.)

C. The evidence showing that certain nonparties contributed to causing Mr. DeLisle's mesothelioma.

Plaintiff originally sued sixteen companies and it was undisputed that Mr. DeLisle was exposed to asbestos from products made and supplied by even more companies than that. (R. Vol. 1 at 1–43.) In his opening statement, Plaintiff stated: "No one is going to come here and say that Mr. DeLisle may not have been exposed to other asbestos-containing products, other than the individuals here. Not going to tell you that. Because that wouldn't be intellectually honest, and that is not the facts." (R. Vol. 91, T.T. Vol. 8 at 1022:15–21.)

Plaintiff's theory (and the basis for suing so many companies to start with) was that any company's asbestos-containing products that Mr. DeLisle ever encountered contributed to his disease, and those companies were at fault because they used asbestos in their products and failed to warn about the dangers of that asbestos. (R. Vol. 1 at 1–43; *see also supra* at 2–5.) This was the core of Dr. Dahlgren's testimony. However, after the close of evidence, Plaintiff argued that only *three companies* were to blame for causing Mr. DeLisle's disease. (R. Vol. 110, T.T. Vol. 29 at 4484–4529.)

Contrary to Plaintiff's argument, there was evidence that Mr. DeLisle was exposed to asbestos-containing products associated with several different

entities—companies excluded from the verdict form and excluded from the jury's apportioning of fault—and that none of those companies warned him of their asbestos content. For example, the testimony at trial established that Mr. DeLisle worked with at least two other gasket and packing "sealing" materials besides Cranite: "Garlock" brand gaskets and "A.W. Chesterton" brand packing. (App. Tab C at 2465; App. Tab D at 2658–2661.) The undisputed evidence was that these products typically contained chrysotile asbestos fibers. (App. Tab E at 3931–32.)

Mr. DeLisle testified that he also worked with brake pads associated with Ford and Bendix. (App. Tab D at 2684–87.) The evidence established that "virtually all" of the automotive brake pads sold in the relevant time period contained asbestos. (App. Tab E at 3931.) The evidence similarly established Mr. DeLisle's exposure to other asbestos-containing products associated with still other nonparties. (*See, e.g.*, App. Tab D at 2456, 2639–42, 2655–2657; App. Tab E at 3928–29; R. Vol. 107 at 20317–20471, T.T. Vol. 26 at 3978.)

Regarding these products, Mr. DeLisle testified that he saw no warnings on any product. Plaintiff argued that the health hazards related to asbestos were well known at the time and knowledge of those hazards could be attributed to all of the companies discussed above. (App. Tab D at 2635–2636; R. Vol. 91, T.T. Vol. 8 at 1043–1045.) Plaintiff's expert, Dr. Dahlgren, applying his "every exposure"

theory of causation, testified that if Mr. DeLisle was exposed to *any* nonparty's asbestos-containing product, then that product was a substantial factor in causing his mesothelioma, just like he testified regarding Crane Co. (App. Tab B at 2243–2248.)

Plaintiff never explained, nor could Plaintiff explain, how the evidence against Crane Co. was materially different from the evidence against the nonparties that defendants sought to add to the verdict form, a request the trial court denied. (T.T. Vol. 29 at 4541:3–4542:14; 4547:24–4548:7.)

SUMMARY OF THE ARGUMENT

The question that lies at the heart of the present dispute is whether a Florida court has the ability—indeed, the responsibility—to exclude scientifically unreliable evidence. The Court's review of the Fourth District order directing a verdict in Crane Co.'s favor does not require the Court to analyze or dispose of weighty matters of Constitutional law, nor does it call upon the Court to select which of two federal opinions should govern a trial judge's analysis of scientific evidence that presents a close call on admissibility. The Court's analysis of those issues should await another case with facts more appropriate for those determinations. Here, there is little question that the Fourth District correctly held that the medical causation opinions Plaintiff offered against Crane Co. were scientifically unsound, and there is little question that Florida courts have the

ability—and the responsibility—to exclude scientifically unreliable testimony. The Court need reach no further to affirm the Fourth District's order directing entry of a verdict in Crane Co.'s favor.

Whether viewed in light of the standards for admissibility of expert testimony articulated in *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993) or the standards articulated in *Frye v. U.S.*, 293 Fed. 1013 (D.C. Cir. 1923), the testimony of Plaintiff's causation expert, Dr. James Dahlgren, was inadmissible, and Crane Co.'s timely motion for directed verdict should therefore have been granted. For that reason, this case does not present an appropriate vehicle to reach the question of whether *Daubert* or *Frye* properly applies in Florida—that issue is not dispositive here, because the result is the same either way, as the Fourth District correctly concluded.

The Fourth District properly applied the standards of *Daubert* (and *Frye*) here and, to the extent necessary, the Court should now formally adopt the *Daubert* standard. But, whether the standard is *Daubert, Marsh or Frye*, the result the Fourth District reached was correct and should be affirmed. Plaintiff's argument against that conclusion is based solely on a mischaracterization of the causation opinion at issue here, and thus a mischaracterization of the question before the Court. The question is not whether an expert medical witness may present to a jury a reliable "differential diagnosis" or whether an expert medical witness in an

asbestos action may testify that asbestos exposure causes mesothelioma as a general proposition. Those propositions are not in dispute and are entirely irrelevant to the question before the Court here, which is whether the exposures to the specific asbestos-containing products were sufficient to cause Mr. DeLisle's disease.

The Fourth District correctly concluded that Dr. James Dahlgren's "every exposure" opinion[7] was unsupported by any scientific data, methodology, or reasoning and was inadmissible *regardless* of the standard for admissibility. The Fourth District's affirmative answer to that question is entirely in line with the analysis of virtually every court to consider the same issue, whether under *Daubert* or *Frye*, and the Court should reach the same conclusion. As noted above, based on Dr. Dahlgren's "every exposure" opinion, the jury was led to believe that one can attribute Mr. DeLisle's mesothelioma to Cranite, absent any meaningful scientific causal analysis. Under this scenario, the concepts of product identification and causation impermissibly merged into a single inquiry and the Fourth District was correct to exclude such an opinion.

[7] That is, that every exposure to asbestos that Mr. DeLisle sustained above some undefined "background" level, regardless of the product, dose, or fiber type involved and regardless of what other exposures Mr. DeLisle may have sustained, was a substantial factor in causing his disease.

To the extent the Court does not affirm the Fourth District's decision that a directed verdict in Crane Co.'s favor was the proper result, the Court should remand to allow a new jury to consider the allocation of damages (and not the damage amount). In asking the Court to reinstate the original judgment, Plaintiff conveniently ignores the court's holding that the trial court erred in excluding several nonparties from the verdict form. If, as Plaintiff argues, the causation testimony of Dr. Dahlgren was admissible and sufficient to support a finding of liability against Crane Co., (which it was not under any test that requires a scientific basis for an expert's testimony) then it was equally admissible and sufficient to support a finding of liability against several nonparties that the trial court erroneously excluded from the jury's consideration. Since Plaintiff asserted there was evidence that the several nonparties contributed to Mr. DeLisle's mesothelioma, they should, based on Plaintiff's theory, have been included on the verdict form for the jury to at least consider their fault: Georgia Pacific, Union Carbide Corporation, Ford, Bendix, Goulds, A.W. Chesterton, and Garlock.

However, the court need not reach that issue if it finds, as the District Court did, that there was insufficient evidence as a matter of law to send the case against Crane Co. to the jury.

Finally, assuming the Court does not agree to dismiss the case against Crane Co., the trial court properly permitted the jury to allocate fault to Owens Corning

Fiberglas and the jury properly did so. Plaintiff argues throughout his brief that the courts must defer to the jury to assess the testimony of expert witnesses, but, in a reverse of course, argues that the jury's finding that Owens Corning Fiberglas was at fault for causing Mr. DeLisle's injuries must be entirely disregarded. Besides fundamentally contradicting Plaintiff's other positions, this argument finds no support in the trial evidence.

STANDARD OF REVIEW

The questions of whether (1) the lower courts properly applied *Daubert* over *Frye* or *Marsh*, (2) the trial court erred in not granting Crane Co.'s timely motion for directed verdict and (3) alternatively, the trial court erred in determining that, as a matter of law, insufficient evidence existed to include several third parties on the verdict form, are all questions of law reviewed *de novo*.[8] That same standard applies should the court find it necessary to reach the issue of including Owens Corning Fiberglas on the verdict form. *See Van v. Schmidt*, 122 So. 3d 243, 246 (Fla. 2013); *Keck v. Eminisor*, 104 So. 3d 359, 363, 366 (Fla. 2012).

[8] Ordinarily, abuse of discretion is the standard of review for the admissibility of evidence which the Fourth District properly applied and correctly concluded that the trial court abused its discretion in admitting the "every exposure" opinion of Dr. Dahlgren. *See Tengbergen v. State*, 9 So. 3d 729, 737 (Fla. 4th DCA 2009) ("The standard of review for admissibility of evidence is abuse of discretion, limited by the rules of evidence. The standard of review for trial court decisions concerning the qualifications of expert witnesses and the scope of their testimony is abuse of discretion.") (internal citations omitted).

ARGUMENT

ISSUE ONE: The *Daubert* standard should apply and the District Court of Appeal properly applied it

A. *Daubert* does not interfere with or conflict with this Court's decisions or procedural rules because *Daubert* is the natural evolution of *Frye*.

If an enactment of the Legislature establishes a procedural rule, the Court will hold it unconstitutional under Article V, Section 2(a) of the Florida Constitution *only* if the legislatively imposed procedure is "*interfering with* and *intruding upon* the procedures and processes of this Court and *conflicts with this Court's own rule* regulating the procedure." *Looney v. State*, 803 So. 2d 656, 676 (Fla. 2001) (emphasis in original, internal quotation marks omitted).

Although Plaintiff bypasses this issue entirely, the Court would be well-justified in holding that the Fourth District's application of *Daubert* here did not interfere or conflict with the Court's prior opinions or rules even if that rule is a procedural one, a point Crane Co. does not concede. *See id*. ("[T]his court has promulgated no rule or procedure governing the admissibility of [the] evidence at the time of the Legislature's enactment (or at any time since). Accordingly, the legislatively enacted statute does not 'interfere with,' 'intrude upon' or 'conflict [with] this Court's own rule.' As such, it cannot be said that the statute unconstitutionally violates separation of powers."). While Florida courts have undoubtedly applied the *Frye* standard and the Court's subsequent holding in

Marsh v. Valyou, 977 So. 2d 543 (Fla. 2007), there is no *rule* of evidence or procedure promulgated by the Court that codifies these standards. *See Hadden v. State*, 690 So. 2d 573, 578 (Fla. 1997) (noting the Court's intent to use the *Frye* standard while recognizing that "the *Frye* test is not set forth in the evidence code").[9] Decisions that have found an unconstitutional infringement on the power of the Court to govern procedure have focused on conflicts between new legislative enactments and promulgated rules of civil or appellate procedure. *See e.g., Massey v. David*, 979 So. 2d 931, 940 (Fla. 2008) ("[T]he requirements of the statute conflict with the procedural mechanisms that have been clearly established by this Court though our rules of procedure."); *Aulet v. Castro*, 44 So. 3d 140 (Fla. 3d DCA 2010) (comparing newly enacted statute with existing Florida Rule of Civil Procedure). Based on precedent, the Court should properly find that, given the uncodified nature of the *Frye* standard and the holding in *Marsh*, the Fourth District properly applied the legislatively-adopted *Daubert* standard in this matter.[10]

---

[9] Justice Pariente echoed this point during oral argument prior to the Court issuing its opinion in *In re Amendments to Florida Evidence Code*, 210 So. 3d 1231 (Fla. 2017), stating "*Frye's* not in a rule of evidence. . . ." Oral Argument Transcript *available at* http://www.wfsu.org/gavel2gavel/transcript/pdfs/16-181.pdf.

[10] Although Plaintiff criticizes the Fourth District's conclusion that it was bound to apply state legislation unless and until the Court determines that legislation to be unconstitutional, Plaintiff cites no authority that would permit the District Court of Appeal to disregard properly enacted legislation. As the Third District correctly

Further, if the application of *Frye* is akin to a rule of the Court, there is no conflict to remedy, because *Daubert* provides lower courts with more discretionary authority than *Frye*. In *Daubert*, the United States Supreme Court noted that "a rigid 'general acceptance' requirement [required by *Frye*] would be at odds with the 'liberal thrust' of the Federal Rules and their 'general approach of relaxing the traditional barriers to 'opinion' testimony." *Daubert*, 509 U.S. at 588. The Court held that, even under *Daubert*, "general acceptance can yet have a bearing on the inquiry." *Daubert*, 509 U.S. at 594; *see also id*. ("Widespread acceptance can be an important factor in ruling particular evidence admissible, and 'a known technique which has been able to attract only minimal support within the community' may properly be viewed with skepticism."). But, the Court liberalized the *Frye* standard by giving trial judges the authority to admit otherwise reliable scientific evidence even absent some showing of "general acceptance." *See, e.g.*, *McCullock v. H.B. Fuller Co.*, 61 F.3d 1038, 1042 (2d Cir. 1995) ("In *Daubert*, the Supreme Court abandoned the *Frye* rule, concluding that *Frye's* rigid standard was inconsistent with the liberal thrust of the Federal Rules.").

---

noted when applying Section 90.702, the Legislature's adoption of that section "settled the debate [between *Daubert* and *Frye*] for the trial and appellate courts of this state" until the Court holds otherwise. *See Perez v. Bell South Telecommunications, Inc.*, 138 So. 3d 492, 498 (Fla. 3d DCA 2014).

Therefore, *Daubert* is properly viewed as the natural evolution of *Frye*—incorporating its standard within a larger and more flexible framework. The 2013 *Daubert* amendment to section 90.702, Florida Statutes does not conflict with the rules or procedures established by the Court, is constitutional, and should apply.

B. Should the Court find conflict, *Daubert* is the superior standard; the Court has the power to adopt *Daubert* and should do so

In *In re Amendments to Florida Evidence Code*, 201 So. 3d 1231 (Fla. 2017) the Court questioned whether there may be constitutional concerns regarding the Legislature's adoption of the *Daubert* standards—specifically, concerns surrounding the right to a jury trial and the potential denial of access to courts. The Court noted that a "proper case or controversy" would be required to address those concerns. For the reasons discussed below, this case presents no such opportunity, because, *inter alia*, the Fourth District held the testimony of Dr. Dahlgren inadmissible under *both Daubert* and *Frye*. Accordingly, even if the Court were to find conflict between its rules and procedures and the Legislature's action, this is not the case in which to resolve that conflict. If, as here, both tests lead to the same outcome, then the lower courts did not deprive Plaintiff of any constitutional right by applying one over the other.

Moreover, the Court can obviate any constitutional issue created by the Legislature's action by simply adopting *Daubert* itself. In arguing that the Legislature overstepped its boundaries in adopting the *Daubert* standards, the

Plaintiff disregards that the Court can simply adopt the *Daubert* standards, which would be entirely consistent with the Court's longstanding practice of construing legislation in a manner that avoids constitutional concern. *See Mallory v. State*, 866 So. 2d 127, 128 (Fla. 4th DCA 2004) (citing *State v. Smith*, 260 So. 2d 489 (Fla. 1972)). To the extent the Court finds such an action necessary, it should adopt the *Daubert* framework for analyzing scientific testimony, because there is no basis for any suggestion that *Daubert* violates any litigants' right to a jury trial (and it most certainly did not do so here, given the Fourth District's determination that the application of *Daubert* and *Frye* would lead to the same outcome).

i. *Daubert* does not deprive litigants of any rights.

As Justice Polston cogently noted in his dissent in the Court's rule adoption opinion, there is simply no authority supporting the proposition that *Daubert* deprives litigants of any rights. *Id*. at 1242–43 (Polston, J., dissenting) ("Furthermore, I know of no reported decisions that have held that the *Daubert* standard violates the constitutional guarantees of a jury trial and access to courts. To the contrary, there is case law holding that the *Daubert* standard does not violate the constitution." *See, e.g., Junk v. Terminix Int'l Co.*, 628 F.3d 439, 450 (8th Cir. 2010) (rejecting legal merit of the constitutional claim 'that the district court violated [appellant's] Seventh Amendment right to a jury trial by improperly weighing evidence in the course of its *Daubert* rulings' and explaining that 'Junk

does not cite any case for the notion that a proper *Daubert* ruling violates a party's right to a jury trial'); *E.I. du Pont de Nemours & Co. v. Robinson*, 923 S.W.2d 549, 558 (Tex. 1995) (rejecting claim "that allowing the trial judge to assess the reliability of expert testimony violates [the parties'] federal and state constitutional rights to a jury trial by infringing upon the jury's inherent authority to assess the credibility of witnesses and the weight to be given their testimony"); *see also Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 142–43 (1997) (rejecting "argument that because the granting of summary judgment in this case was 'outcome determinative,' it should have been subjected to a more searching standard of review" and explaining that, while "disputed issues of fact are resolved against the moving party[,] ... the question of admissibility of expert testimony is not such an issue of fact).").

The Unites States Supreme Court, the court charged with protecting the right to a jury trial guaranteed to all citizens by the Seventh Amendment to the United States Constitution, is the court that adopted the *Daubert* framework and consistently upheld its application. Plaintiff offers neither case authority nor evidence from the trial to support the contrary.

Although courts maintain the right to exclude evidence under *Daubert*, it is notable that official commentary to Federal Rule of Evidence 702 explains that "[a] review of the case law after *Daubert* shows that the rejection of expert testimony is the exception rather than the rule." Fed. R. Evid. 702 advisory

committee's note to 2000 amendment. Simply put, "*Daubert* did not work a 'sea change over federal evidence law,' and 'the trial court's role as gatekeeper is not intended to serve as a replacement for the adversary system.'" *Id*. (quoting *United States v. 14.38 Acres of Land*, 80 F.3d 1074, 1078 (5th Cir. 1996)). If anything, *Daubert* liberalizes the admission of scientific evidence—that was precisely the Supreme Court's intent in adopting the standard. *Daubert*, 509 U.S. at 588; *see also Brim v. State*, 695 So. 2d 268, 271 (Fla. 1997) (noting that Florida has "maintained the higher standard of reliability as dictated by *Frye*" and has not adopted the "more lenient standard" embodied in *Daubert*).

States have overwhelmingly embraced the *Daubert* standard. At least 36 states have rejected *Frye* and its rigid "general acceptance" requirement in favor of applying *Daubert* to varying degrees. *See* Charles Alan Wright & Victor Gold, 29 FED. PRAC. AND PRO. EVID. § 6267, at 308–09 n.15 (2016). As the Supreme Court of Alaska noted in its decision to abandon *Frye* and adopt *Daubert*: "*Frye* is potentially capricious because it excludes scientifically reliable evidence which is not yet generally accepted, and admits scientifically unreliable evidence which although generally accepted, cannot meet rigorous scientific scrutiny." *State v. Coon*, 974 P.2d 386, 393-94 (Alaska 1999); *see also State v. Alberico*, 861 P.2d 192, 202–03 (N.M. 1993) ("[T]he critical issue is whether the *Frye* test is a legitimate means for determining what is and what is not scientific knowledge.

We hold that it is not and that the *Frye* test should be rejected as an independent controlling standard of admissibility. Accordingly, we hold that a particular degree of acceptance of a scientific technique within the scientific community is neither a necessary nor a sufficient condition for admissibility; it is, however, one factor that a district court normally should consider in deciding whether to admit evidence based upon the technique.") (internal quotation marks and citations omitted).

The Supreme Court of Colorado, in rejecting *Frye*, noted: "*Frye's* general acceptance test has . . . been heavily criticized on several grounds. . . . Commentators have found vagueness and ambiguity under *Frye* in determining, for example, (1) precisely what must be generally accepted, (2) the relevant scientific community, (3) how much agreement constitutes general acceptance, and (4) the extent to which *Frye* applies. . . . Such ambiguity yields to inconsistent results and creates uncertainty in decision making." *People v. Shreck*, 22 P.3d 68, 76 (Colo. 2001) (internal citations omitted).

The Supreme Court of Connecticut, in adopting *Daubert*, stated: "We agree that, when read and applied correctly, *Daubert* provides the proper approach to the threshold admissibility of scientific evidence" and concluded "that a gatekeeping role for trial judges in relation to scientific evidence is appropriate. Although the extent to which juries give scientific evidence undue deference is uncertain, the potential risk can be greatly reduced simply by allowing the judge, as the

participant in the judicial process with both the greater access and ability to gather relevant information, to exclude wholly invalid scientific testimony altogether. Moreover, a trial judge who does admit scientific evidence will be in a better position, by virtue of the knowledge gained during the preliminary assessment, to conduct the trial and instruct the jury in such a way as to minimize the risk that jurors will give that evidence undue deference." *State v. Porter*, 698 A.2d 739, 749 (Conn. 1997).

Here, the application of *Daubert* did not deprive Plaintiff of his right to a jury trial. A party is not deprived of the right to a jury trial by a trial court's proper application of evidentiary rules and fulfillment of its gatekeeper function. Plaintiff argues that virtually all expert testimony should "go to the jury" but that has never been the law of Florida. As described below, the "every exposure" testimony of Dr. Dahlgren has been excluded routinely by courts, for years, under both *Daubert* and *Frye*. Plaintiff had every opportunity to present reliable scientific testimony; the Fourth District Court of Appeal's determination that the "every exposure" testimony in this case was inadmissible (a conclusion reached by every court that has considered the issue) did not deprive Plaintiff of his right to a jury trial. The Court has the authority and should seize this opportunity to align with the clear majority of jurisdictions and adopt *Daubert*.

ii. Florida's courts are perfectly capable of fulfilling their gatekeeping role in applying Daubert.

In *In re Amendments to Florida Evidence Code*, 201 So. 3d 1231 (Fla. 2017) the Court declined to adopt the *Daubert* standard set forth in §90.702 ". . . to the extent it is procedural." *Id*. at 1239. The filed comments and oral argument in opposition to adoption that preceded the decision focused on concerns of separation of powers, case management and work load concerns. For example, one opponent provided an anecdote at oral argument about a judge so overwhelmed with *Daubert* motions that the court had to hold hearings on Saturdays. A prosecuting attorney raised fears that accepted scientific opinions on matters such as fingerprinting would now require a *Daubert* hearing prior to their introduction into evidence.

Evaluation of the impact of *Daubert* on the federal system, including the 2000 Amendments to the Advisory Committee Notes to Rule 702, should alleviate this Court's concerns with anecdotal fears presented without factual support by the Plaintiff and his *amicus* supporters.

Eleventh Circuit jurisprudence provides a realistic foundation of trial judge experience for this Court to consider. *See McClain v. Metabolife International Inc.*, 401 F.3d 1233, 1239–40 nn. 4 and 5 (11th Cir. 2005); *United States v. Hansen*, 262 F.3d 1217, 1234 (11th Cir. 2001) ("*Daubert* hearings are not required, but may be helpful in complicated cases involving multiple expert witnesses.")

(internal quotation marks omitted); *accord United States v. Alatorre*, 222 F.3d 1098, 1102–03 (9th Cir. 2000) (noting uniformity among the Circuits in holding that applying *Daubert* does not require a hearing because, "the preliminary inquiry as to relevance and reliability is a flexible one, subject to no set list of factors".); *United States v. Singleton*, No. 1:09-CR-546, 2010 WL 3723912, at *1(N.D. Ga. Aug. 2, 2010) (collecting Eleventh Circuit precedents all standing for the proposition that "*Daubert* hearings are not required before a judge may admit expert testimony.").

It is well established that in performing its gatekeeper role the trial court's decision on whether to hold a hearing or not hold a hearing or the extent to which a hearing is structured, are all within the discretion of the trial court and will not be disturbed on appeal absent a finding of an abuse of discretion. Might this be a difficult undertaking for certain judges? Yes. But as Justice Breyer noted in his concurring opinion in *Joiner*, 522 U.S.at 148: "Of course, neither the difficulty of the task nor any comparative lack of expertise can excuse the judge from exercising the gatekeeper duties that the Federal Rules of Evidence impose . . . ."

No documentation has been presented to this Court to support the Plaintiff's implication that of our circuit judges cannot figure out the gatekeeper role. As noted in *McClain*, 401 F.3d at 1240 n.5, "there is no reason for a *Daubert* hearing when a medical doctor is going to testify that too much alcohol causes cirrhosis of

the liver or that ingestion of sufficient amounts of arsenic can cause death." In *The Daubert Puzzle*, 38 GA. L. REV. 699, 766 (1988), Daniel Capra writes: "Trial courts should be allowed substantial discretion in dealing with *Daubert* questions: any attempt to codify procedures will likely to give rise to unnecessary changes in practice and create difficult questions for appellate review." *Accord Kumho Tire Co. v. Carmichael*, 119 U.S. 1167, 1176 (1999) (re-enforcing the notion that the trial court has discretion "both to avoid unnecessary 'reliability' proceedings in ordinary cases where the reliability of an expert's method is properly taken for granted, and to require appropriate proceedings in the less usual or more complex cases with a cause for questioning the expert's reliability arises"). Florida's courts are undoubtedly capable of striking the appropriate balance in this respect, and the Court should reject Plaintiff's suggestion to the contrary.

C. The District Court of Appeal properly applied *Daubert*.

The Fourth District properly applied *Daubert* to exclude the expert testimony of Dr. Dahlgren, Plaintiff's sole causation witness regarding Crane Co., and direct that a verdict be entered in Crane Co.'s favor. *DeLisle*, 206 So. 3d at 110. Plaintiff does not even contest this conclusion (arguing, instead, that *Daubert* never should have applied), because it cannot be contested. The Fourth District explained at length that Dr. Dahlgren failed to identify any methods at all underlying his opinion that Mr. DeLisle's alleged work with Cranite gasket

material caused his disease. Most significantly, and as the Fourth District correctly noted, Dr. Dahlgren provided no data or studies "of the association between mesothelioma and chrysotile asbestos at low levels." *Id*. at 115.

This lack of any scientific foundation was fatal to Dr. Dahlgren's opinion that the low (and entirely unquantified) levels of chrysotile asbestos exposure potentially associated with Cranite gasket material caused Mr. DeLisle to contract mesothelioma. Given the complete absence of sufficient facts or data underlying Dr. Dahlgren's opinion, that opinion failed on the first prong of the *Daubert* test, which requires an expert opinion to be "based upon sufficient facts or data." *Id*. at 101.

The Fourth District also correctly concluded that Dr. Dahlgren's opinion failed on the second prong of the *Daubert* analysis, that the expert's opinion "is the product of reliable principles and methods." *Id*. Dr. Dahlgren's "every exposure" opinion disregarded what is perhaps the most basic, reliable principle of toxicology—the existence of a dose-response relationship. Courts applying *Daubert* in "toxic tort" matters have noted the "the dose-response relationship is a key element of reliability in toxic tort cases." *McClain v. Metabolife Int'l, Inc.*, 401 F.3d 1233, 1241 n.6 (11th Cir. 2005); *see also* Bernard D. Goldstein, *Toxic Torts: The Devil Is in the Dose*, 16 J.L. & POL'Y 551, 551 (2008) ("Dose is a central concept in toxicology—'the dose makes the poison' is the oldest maxim in

the field."). But, as the Fourth District correctly found, "every exposure" testimony like that offered by Dr. Dahlgren, by its very nature, ignores the dose-response relationship entirely, instead assuming that all doses of exposure are equally causative, a proposition with which Dr. Dahlgren himself did not agree. (App. Tab A at 2070–71 [Dr. Dahlgren acknowledging the existence of some "safe" level of asbestos exposure and some additional, but undefined, "gap" between that level and the level of exposure needed to cause disease].) The Fourth District correctly held inadmissible Dr. Dahlgren's testimony that "every exposure above background levels to friable, inhaled asbestos—*regardless of product, fiber type, and dose*—would be considered a substantial contributing factor to DeLisle's mesothelioma." *DeLisle*, 206 So. 3d at 99 (emphasis added).

The Fourth District's analysis of Dr. Dahlgren's opinion here is entirely in accord with the treatment that numerous courts have afforded the same testimony offered in substantially similar asbestos actions. Numerous federal district court decisions have applied *Daubert* to hold that testimony of the "every exposure" variety is inadmissible, unreliable, and based on no identifiable methods. *See Haskins v. 3M Co.*, No. 2:15-cv-02086, 2017 WL 3118017 (D. S.C. July 21, 2017); *Yates v. Ford Motor Co.*, 113 F. Supp. 3d 841, 846–47 (E.D.N.C. 2015); *Vedros v. Northrup Grumman Shipbuilding, Inc.*, 119 F. Supp. 3d 556, 562 (E.D. La. 2015); *Comardelle v. Pa. Gen. Ins. Co.*, 76 F. Supp. 3d 628, 633–35 (E.D.La.2015); *Krik*

v. Crane Co., 76 F. Supp. 3d 747, 750-51 (N.D. Ill. 2014); *Davidson v. Ga. Pac. LLC*, No. 12–1463, 2014 WL 3510268, at *5 (W.D. La. July 14, 2014); *Anderson v. Ford Motor Co.*, 950 F. Supp. 2d 1217, 1225 (D. Utah 2013); *Sclafani v. Air & Liquid Sys. Corp.*, No. 12–3013, 2013 WL 2477077, at *5 (C.D. Cal. May 9, 2013); *Smith v. Ford Motor Co.*, No. 8–630, 2013 WL 214378, at *2 (D. Utah Jan. 18, 2013); *Bartel v. John Crane, Inc.*, 316 F. Supp. 2d 603, 611 (N.D. Ohio 2004). The United States Court of Appeals for the Ninth Circuit has held that an offer of "each and every exposure" testimony should *automatically* lead to an examination under *Daubert*. *Estate of Barabin v. AstenJohnson, Inc.*, 740 F.3d 457 (9th Cir. 2013).

One court recently observed that the scientific unreliability of "every exposure" testimony in asbestos actions is now a matter that is beyond any reasonable dispute. *See Bell v. Foster Wheeler Energy Corp.*, No. 15-16394, 2016 WL 5847124 (E.D. La. 2016) ("By now, the deficiencies of the 'each and every exposure' theory of causation in asbestos exposure cases have been extensively discussed and will not be repeated here. Suffice it to say, the Court continues to be of the view that the each and every exposure theory is not an acceptable approach for a causation expert to take because it is nothing more than the *ipse dixit* of the expert.") (internal quotation marks and citations omitted). Likewise, the United States Court of Appeal for the Seventh Circuit recently affirmed the decision to

exclude, under *Daubert*, expert causation testimony substantially similar to that Dr. Dahlgren presented here for all of the same basic reasons identified by the Fourth District. *See Krik v. Exxon Mobil Corp.*, --- F.3d ---, 2017 WL 3768933, at *2 (7th Cir. Aug. 31, 2017).

Although Plaintiff disagrees with the conclusion of the Fourth District and these other courts, Plaintiff does not directly challenge the Fourth District's reasoning. Instead, Plaintiff's attempt to defend Dr. Dahlgren's "every exposure" testimony is based on nothing more than an effort to re-characterize the testimony after-the-fact and mischaracterize the question before the Court. Plaintiff argues that the opinion at issue is simply "that asbestos causes mesothelioma" and that Dr. Dahlgren did nothing more than perform a "differential diagnosis." (Petitioner's Initial Brief, pp. 11, 22.)

Regarding the former argument, Crane Co. did not dispute that asbestos may cause mesothelioma. Further, Crane Co. did not dispute that asbestos exposure caused Mr. DeLisle's mesothelioma. The dispute focused, rather, on whether Dr. Dahlgren had a reliable scientific basis for testifying *that products associated with Crane Co.* were a substantial factor in causing Mr. DeLisle's mesothelioma.[11]

[11] Dr. Dahlgren was the sole witness Plaintiff offered on that issue: "At trial, he was the sole witness to testify that exposure to low levels of chrysotile asbestos through Crane Co. products was a substantial cause of DeLisle's mesothelioma." *DeLisle*, 206 So. 3d at 103.

See DeLisle, 206 So. 3d at 99 ("The parties hotly disputed causation, and even DeLisle's own experts did not agree on which products produced sufficient exposure to asbestos to constitute a substantial contributing factor to DeLisle's disease."). The basis for Dr. Dahlgren's opinion in this regard was his belief that *every* asbestos exposure above some undefined level is a substantial factor. *See id.* ("Dr. Dahlgren opined that "every exposure" above background levels to friable, inhaled asbestos—regardless of product, fiber type, and dose—would be considered a substantial contributing factor to DeLisle's mesothelioma."). It is *that* opinion that the Fourth District found unsupported by any scientific data or reasoning, and it is *that* opinion that is at the heart of this appeal.

Plaintiff's contention that Dr. Dahlgren did no more than provide a "differential diagnosis" is similarly unavailing. A differential diagnosis is "an established scientific methodology in which the expert eliminates possible causes of a medical condition to arrive at the conclusion as to the actual debilitating factor." *Marsh v. Valyou*, 977 So. 2d 543, 548 n. 2 (Fla. 2007) (internal quotation marks omitted). Here, there was no need for a differential diagnosis of Mr. DeLisle's mesothelioma—Crane Co. did not dispute that asbestos caused it.[12] Another undisputed fact is Dr. Dahlgren failed to conduct a differential diagnosis

[12] This fact alone distinguishes this case from *Marsh*, in which the question was whether the experts at issue could reliably testify that trauma, generally, could cause fibromyalgia.

regarding the different *sources* of asbestos exposure that Mr. DeLisle may have encountered. That is the only causation issue that is relevant to this case. Dr. Dahlgren's testimony was exactly the opposite of a "differential diagnosis." Instead of attempting to differentiate among Mr. DeLisle's alleged exposures to determine which ones were substantially causative and which were not, Dr. Dahlgren simply assumed that they all were, regardless of the different products, doses, and fiber types involved, based solely upon his scientifically unsupportable "every exposure" rational. *DeLisle*, 206 So. 3d at 99.

In another after-the-fact effort to "bolster" Dr. Dahlgren's testimony, Plaintiff claims that "[n]othing in the record suggests that [Mr. DeLisle] was ever exposed for any duration to asbestos from some . . . source" other than the defendants' products. (Petitioner's Initial Brief, p. 11.) This comment is both irrelevant and inaccurate. First, even if it were the case that Mr. DeLisle's only significant exposures to asbestos resulted from his encounters with the defendants' products, that does not relieve Plaintiff of the burden of producing reliable expert testimony implicating *each* defendant, *individually*, in the causation of Mr. DeLisle's disease. Plaintiff produced no such reliable testimony here as to Crane Co. Second, the evidence was undisputed that the Brightwater paper mill, the physical location of Mr. DeLisle's exposures, had *miles* of high-temperature pipes running throughout the facility that were insulated with asbestos pipe

covering, and that it was common for that pipe insulation to be torn and flaking. (App. Tab C at 2456–2458.) On the basis of this evidence, the jury allocated 40% of the fault to entities other than the trial defendants. That finding, in itself, demonstrates the factual inaccuracy of Plaintiff's argument.

In sum, the Fourth District correctly held that Dr. Dahlgren's "every exposure" opinion testimony was not supported by any reliable methodology. Plaintiff's efforts to re-characterize Dr. Dahlgren's opinion after-the-fact and to mischaracterize the trial record demonstrate the propriety of the Fourth District's conclusion.

ISSUE TWO: The District Court of Appeal's alternative holding in support of Crane Co. correctly determined that the "every exposure" opinion of Dr. Dahlgren was inadmissible under *Frye* scrutiny as triggered under *Marsh*

Plaintiff argues that to the extent an opinion is not clearly admissible under the analysis of *Marsh*, then *Frye* and *Daubert* provide entirely distinct frameworks for evaluating expert testimony. Plaintiff did not raise this "*Marsh* not *Frye*" argument in the trial court and it is not preserved for appeal. *See Mizell Live Stock v. J.J. McCaskill Co.*, 51 So. 322, 328 (Fla. 1910) ("'It is the declared policy of this court to confine the parties litigant to the points raised and determined in the court below, and not to permit the presentation of points, grounds, or objections for the first time in this court, when the same might have been cured or obviated by

amendment, if attention had been called to them in the trial court.'") (quoting *Hartford Fire Ins. Co. v. Hollis*, 50 So. 268 (Fla. 1909)).

Assuming, *arguendo*, this Court considers its merit, the argument is not accurate. Both *Frye* and *Daubert* require the trial court to act as a gatekeeper and ensure that before a jury receives scientific testimony, it has some basic indicia of reliability. In addition to ruling Dr. Dahlgren's "every exposure" testimony inadmissible under *Daubert*, the District Court of Appeal ruled in the alternative that Dahlgren's opinion testimony would not survive scrutiny under the *Frye* standard. *DeLisle*, 206 So. 3d at 100 n.7. That conclusion is correct, and the Court should agree that the trial court erred in not granting a directed verdict regardless of the evidentiary standard and affirm on that basis. *See Dade County Sch. Bd. v. Radio Station WQBA*, 731 So. 2d 638, 644–45 (Fla. 1999) (holding that a correct decision in a lower court should be affirmed for any reason); *Van v. Schmidt*, 122 So. 3d 243, 262 n.5 (Fla. 2013) (same).

A. The District Court of Appeal correctly determined that if *Daubert* did not apply, *Frye* scrutiny would be triggered under *Marsh*.

Plaintiff's primary contention on appeal is that, while Dr. Dahlgren's testimony would be admissible under *Frye*, *Frye* is not even applicable to it in light of *Marsh*. Plaintiff did not make this argument in the trial court and has waived it for purposes of appellate review. *See Mizell Live Stock*, 51 So. at 328.

Assuming, *arguendo*, the court considers this argument, the Court should reject it.[13] The *Marsh* Court held that "[a] challenge to the conclusions of Marsh's experts as to causation, *rather than the methods used to reach those conclusions*, is a proper issue for the trier of fact." *Marsh*, 977 So. 2d at 549 (emphasis added). Here, Crane Co. contended that Dr. Dahlgren's "every exposure" opinion, which formed the basis of his causation testimony against Crane Co., was not based upon any reliable scientific methodology, and the Fourth District agreed. *See DeLisle*, 206 So. 2d at 104-05 (noting Dr. Dahlgren's inability to explain his methodology or how he applied it in this case). Crane Co.'s challenge went to the reliability of Dr. Dahlgren's scientific testimony, and not to the nature of his ultimate conclusion. *Marsh* makes clear that such a challenge triggers scrutiny under *Frye*, the "purpose" of which is to "ensure the reliability of expert testimony." *Marsh*, 977 So. 2d at 550.

In arguing that Dr. Dahlgren's opinion testimony was not novel, and thus should not be subject to (nor survive scrutiny under) *Frye*, Plaintiff cites a handful of decisions standing for the proposition that the opinion that asbestos exposure

[13] During the trial, Plaintiff contended that *Frye*, and not *Daubert*, governed the admissibility of Dr. Dahlgren's testimony. (T.T. Vol. 1 at 124:15–25.) However, Plaintiff failed to present at trial the argument Plaintiff presents to the Court now—that *Marsh* should actually control over both *Daubert* and *Frye*. The Court should decline to reach this argument as unpreserved. *See Mizell Live Stock*, 51 So. at 328.

causes mesothelioma is not a novel one. (Petitioner's Initial Brief, pp. 23.) But, that is not the opinion at issue here. The opinion that is at issue—that every exposure to asbestos above some undefined level that Mr. DeLisle sustained was a "substantial factor" in causing his mesothelioma—runs contrary to the most basic principle of toxicology, the principle of dose-response.[14] *See*, *e.g.*, *McClain*, 401 F.3d at 1241 n.6; *In re W.R. Grace & Co.*, 355 B.R. 462, 476 (Bankr. D. Del. 2006) ("The use of the no safe level or linear 'no threshold' model for showing unreasonable risk 'flies in the face of the toxicological law of dose-response, that is, that 'the dose makes the poison. . . .'"). It is thus a "novel scientific principle" by definition, *see Ramirez v. State*, 651 So. 2d 1164, 1166–67 (Fla. 1995); *Gosciminski v. State*, 132 So. 3d 678, 701–02 (Fla. 2013), and subject to scrutiny under *Frye*.

Acceptance of Plaintiff's interpretation of the *Frye* test would mean a trial court could never exclude an opinion lacking any scientific basis if it could not characterize the indisputably baseless opinion as being "novel." In such instances, the trial court would surrender any ability to uphold the gatekeeper function that lies at the heart of *Frye* and *Daubert*. This is not, nor has it ever been, the law in

[14] It also ignores entirely the well-established fact that "[a]sbestos-containing products do not create similar risks of harm because there are several varieties of asbestos fibers, and they are used in various quantities, even in the same class of product." *Goldman v. Johns-Manville Sales Corp.*, 514 N.E.2d 691, 697 (Ohio 1987).

Florida. Whatever the precise construction most appropriately placed upon Section 90.702, Florida Statutes, it is inarguable that its test for admissibility, and a trial court's inherent function as a "gatekeeper" for the presentation of evidence, requires a court to determine that expert testimony will assist the trier of fact. Scientific opinions that are not based on any reliable scientific data, methodology, or reasoning will not do so, and the Fourth District correctly held Dr. Dahlgren's opinion inadmissible *regardless* of the precise standard for admissibility.

B. Dr. Dahlgren's "every exposure" testimony does not survive scrutiny under *Frye*.

Plaintiff focuses his argument on the purported inapplicability of *Frye*, because Dr. Dahlgren's testimony cannot survive scrutiny under *Frye*. As the proponent of Dr. Dahlgren's testimony, Plaintiff bore the burden of "establishing by a preponderance of the evidence the general acceptance of the underlying scientific principles and methodology." *Marsh*, 977 So. 2d at 547. Plaintiff failed to satisfy that burden at trial, and makes virtually no effort to do so now.

To be admissible under *Frye*, expert testimony must be "deduced from a well-recognized scientific principle or discovery" that is "sufficiently established to have gained general acceptance in the particular field" at issue. *Frye*, 293 F. at 1014. Toxicology is the field of science that focuses on whether a particular allegedly injurious exposure "was causally related to a specific adverse effect or disease in an individual." *McClain*, 401 F.3d at 1242 (internal quotation marks

omitted). The "hallmark of basic toxicology" is the dose-response relationship. *Id.* (internal quotation marks omitted). The "every exposure" principle on which Dr. Dahlgren based his testimony denies the existence of a dose-response relationship, and instead presumes that all exposures to asbestos above some vanishingly small, and undefined, level are substantially causative of disease. Plaintiff failed to demonstrate that that novel approach to the question of causation is generally accepted in any relevant scientific community. Indeed, as noted above, Dr. Dahlgren stated that he believes the safe "background" level of asbestos exposure is 5,000 times less than the .1 fiber/cc level that is currently permitted under OSHA. Accordingly, Dr. Dahlgren's opinion is that the current OSHA level is 5,000 times more hazardous than the level of exposure at which Dr. Dahlgren believes harm occurs.[15] Such an opinion is not generally accepted and can only be described as an extreme outlier.

Contrary to Plaintiff's unsupported contention that Dr. Dahlgren's opinion is admissible under *Frye*, in *Betz v. Pneumo Abex, LLC*, 44 A.3d 27 (Pa. 2012), the Pennsylvania Supreme Court held inadmissible the same basic "every exposure"

[15] Of course, there is no evidence in this case that work with products such as Cranite could give rise to asbestos-related disease, even if that work could somehow create exposures in excess of the regulatory exposure limits (it cannot). As the Washington Legal Foundation notes, those limits are the result of the application of a "preventative perspective" that has no bearing on the inquiry into causation in a civil proceeding. *See* Brief of Washington Legal Foundation as *Amicus Curiae* in Support of Respondents, No. SC16-2182 (Sept. 20, 2017).

opinion offered by Dr. Dahlgren here after conducting an extensive *Frye* analysis.[16] The *Betz* court's analysis mirrored much of the analysis the Fourth District performed under *Daubert*. For instance, the *Betz* court noted that the plaintiffs failed to provide any reliable data or studies supporting the proposition that some vanishingly small exposure to asbestos fibers could cause an asbestos-related disease. *Id*. at 40. The court pointed out the irreconcilable nature of holding the opinion (as Dr. Dahlgren did here) that every exposure to asbestos contributes to cause disease while acknowledging (as Dr. Dahlgren did here) that a disease is dose-responsive and there is some threshold exposure below which there is no disease risk. *Id*. at 56. Ultimately, the court held inadmissible precisely the opinion Dr. Dahlgren offered here. *Id*. at 58. There is no basis for any different treatment in this case.[17]

---

[16] The *Betz* court answered Plaintiff's argument here that Dr. Dahlgren's every exposure testimony was not novel by indicating that the term "novel" must have a "reasonably broad meaning" and is satisfied when a court believes that an expert witness "has not applied accepted scientific methodology in a conventional fashion." *Id*. at 53. The undisputed lack of testing or data underlying Dr. Dahlgren's "every exposure" opinion, in itself, indicates that his opinion and methods were far from conventional. And his adoption of an opinion entirely inconsistent with the dose-response principle was certainly a "novel" approach. Id. at 53.

[17] Just like the Fourth District did here, an intermediate appellate court in Pennsylvania reversed a jury verdict upon determining that the trial court should have excluded, under *Frye*, the "every exposure" opinion offered by plaintiff's expert medical witness in an asbestos action just like this one. *See Nelson v. Airco Welders Supply*, 107 A.3d 146, 157–58 (Pa. Super. Ct. 2014).

Besides disregarding the *Betz* decision in his brief, Plaintiff mistakenly argues that the jurisprudence of the Supreme Court of Texas somehow supports his position regarding application of the *Frye* standard. (*See* Petitioner's Initial Brief, p. 24.) Unfortunately for the Plaintiff, the Supreme Court of Texas has held unequivocally that "every exposure" testimony is inadmissible, and legally insufficient to support a verdict, in asbestos-related personal injury actions in Texas. *See Bostic v. Georgia-Pacific Corp.,* 439 S.W.3d 332 (Tex. 2014).

The *Bostic* court explained that, to provide a reliable opinion on causation in a case like this one, "proof of 'any exposure' to a defendant's product will not suffice and instead the plaintiff must establish the dose of asbestos fibers to which he was exposed by his exposure to the defendant's product." *Id*. at 353. The plaintiff's expert must then demonstrate, based on reliable scientific studies, that such an exposure dose is associated with a significantly increased risk of contracting mesothelioma. *Id*.

Here, Dr. Dahlgren did not take either one of these steps; indeed, his opinion that every exposure above some undefined (but vanishingly small) level causes disease made this reliable scientific analysis entirely unnecessary. Contrary to Plaintiff's argument, that opinion would not be admissible in a Texas or Pennsylvania proceeding, it does not survive *Frye* scrutiny, and the Fourth District correctly concluded it should not have been admitted here.

ISSUE THREE: If this Court determines that Dr. Dahlgren's testimony was admissible, then a remand is necessary to determine the allocation of damages.

A. If Dr. Dahlgren's testimony is admissible against Crane Co. and sufficient to establish causation, it was also sufficient to establish causation against several third parties, as the District Court of Appeal correctly found.

In asking the Court to reinstate the judgment, Plaintiff ignores the District Court's independent ground for remanding the case for a new jury to consider the proper allocation of the damages. *DeLisle*, 206 So. 3d at 106 n.10. If Dr. Dahlgren's "every exposure" opinion was admissible against Crane Co. and sufficient to support a finding of liability against it, then it was admissible and sufficient to support a finding of liability against several nonparties whose comparative fault the trial court improperly barred the jury from considering. *See Fabre v. Marin*, 623 So. 2d 1182 (Fla. 1993).

The evidence at trial established that Mr. DeLisle worked with at least two other gasket and packing materials besides Cranite: "Garlock" brand gaskets and "A.W. Chesterton" brand packing. (App. Tab C at 2465; App. Tab D at 2658–2661.) The undisputed evidence was that these products typically contained chrysotile asbestos fibers, just like Cranite. (App. Tab E at 3931–32.) Mr. DeLisle testified that he also worked with brake pads associated with Ford and Bendix. (App. Tab D at 2684–87.) Again, the evidence established that "virtually all" of the automotive brake pads sold in the relevant time period contained asbestos

fibers. (App. Tab E at 3931.) The evidence similarly established Mr. DeLisle's exposure to other asbestos-containing products associated with still other nonparties. (*See, e.g.*, App. Tab D at 2456, 2639–42, 2655–2657; App. Tab E at 3928–29; R. Vol. 107 at 20317–20471, T.T. Vol. 26 at 3978.)

There was no evidence at trial that any of these products featured a warning, and Plaintiff contended that information regarding any and all relevant health hazards related to asbestos was well known during the time period at issue here and that knowledge of this information could be attributed to all of the companies discussed above. (App. Tab D at 2635–2636; R. Vol. 91, T.T. Vol. 8 at 1043–1045.) Finally, Dr. Dahlgren testified that if Mr. DeLisle was exposed to *any* nonparty's asbestos-containing product, then that product was a substantial factor in causing his mesothelioma, just like he testified with respect to Crane Co. (App. Tab B at 2243–2248.)

To the extent the Court finds that Dr. Dahlgren's "every exposure" testimony was properly admitted the appropriate remedy should be a remand, limited to the issue of the allocation of damages and not the damage amount. FLA STAT. ANN § 59.35 (West 2017) ("An appellate court may, in reversing a judgment of a lower court brought before it for review by appeal, by the order of reversal, if the error for which reversal is sought is such as to require a new trial, direct that a

new trial be had on all the issues shown by the record or upon a part of such issues only.").

ISSUE FOUR: The trial court properly permitted the jury to allocate fault to Owens Corning Fiberglas and the jury properly did so.

Although Plaintiff sought the Court's review solely on the question of the application of *Daubert*, he now argues that, in addition to reinstating the judgment, the Court should direct the fault allocated to nonparty Owens Corning Fiberglas be reallocated to the remaining defendants. The Court should not even reach this request, given the numerous grounds that exist here for either affirming the Fourth District's holding or remanding the case for a new jury to consider the allocation of damages (and not the damage amount). If the Court considers this argument, the Court should reject it.

The evidence supported an allocation of fault to Owens Corning, and the decision as to the exact percentage was one reserved to the jury under *Fabre*. Mr. DeLisle's co-worker, Bruce Clerc, testified that the Brightwater paper mill had miles of high-temperature pipes running throughout the facility insulated with asbestos pipe covering, and that it was common for that pipe insulation to be torn and flaking. (App. Tab C at 2456–2458.) Mr. Clerc recalled that Owens Corning made some of the insulation used at the paper mill. (*Id.* at 2462.) He specifically recalled Mr. DeLisle working around others who were installing or performing maintenance on Owens Corning insulation. (*Id.* at 2466.) And he testified that

they cut the insulation, which created dust near Mr. DeLisle. (*Id.*) Mr. DeLisle testified that he had no reason to disagree with Mr. Clerc's testimony about Owens Corning. (App. Tab D at 2680–2681.)

Based on his experience and training, and a review of Mr. Clerc's trial testimony, Dr. James Rasmuson, an expert in industrial hygiene, testified that the Owens-Corning insulation that Mr. Clerc identified likely contained amosite[18] and chrysotile asbestos. (App. Tab E at 3917–3919, 3933–3934.) Dr. Dahlgren opined that, if Mr. DeLisle worked around asbestos-containing Owens-Corning insulation, then the insulation would have been a substantial contributing factor in causing his disease. (App. Tab B at 2247–2248.) And that insulation, like all the other products Mr. DeLisle worked with and around at the paper mill, did not have warnings regarding asbestos. (App. Tab D at 2635:22–2636:1; TT Vol. 10 at 1413–1414; App. Tab A at 2124–2125.) Since competent evidence from trial supports the jury verdict against Owens Corning, it should not be reversed.

If the Court were to reverse the jury's allocation of fault to Owens Corning, and hold that Owens Corning was improperly included on the verdict slip, then a proceeding limited to the issue of allocation of the previously determined amount of damages would permit a jury to determine the apportionment of fault among the

[18] As Dr. Rasmuson explained, this is regarded as a more "toxic" or potentially harmful form of asbestos than chrysotile asbestos, which was the only type of asbestos in the Crane Co. product at issue, Cranite gasket material.

three party-defendants and one remaining nonparty (and the nonparties improperly excluded from the allocation as discussed in Issue Three above). The Court should reject Plaintiff's suggestion to have the amount "recalculated pro rata for each party remaining" because there is no way to determine what the jury's fault allocation would have been if the comparative fault of Owens-Corning is retrospectively eliminated.[19] Plaintiff seems to rely on *Legueux v. Union Carbide Corp.*, 861 So. 2d 87 (Fla. 4th DCA 2004) to support this argument, but that case is easily distinguished. In *Legueux*, the appellate court reversed the trial court's addition of certain nonparties to the verdict form, leaving only one entity left to which to apportion the fault. *Id*. at 89. That is not the case here. If the Court somehow agrees that including Owens Corning in the allocation process was incorrect, the most the court should do is remand the case for a new jury to allocate the previously determined damages.

[19] That argument is also unpreserved—before the trial court, Plaintiff sought a retrial limited to the issue of allocation, and not the judicial re-allocation of fault Plaintiff now seeks. (R. Vol. 115 at 21672.)

CONCLUSION

For all the reasons discussed above, the Court should affirm the decision of the Fourth District Court of Appeals directing the entry of a directed verdict for Crane Co., or, in the alternative, remand the case for the limited purpose of allocation of the previously determined amount of damages among the parties and nonparties as outlined above.

October 20, 2017

Respectfully submitted,

/s/ William J. Simonitsch
AUSLEY MCMULLEN
Richard E. Doran
rdoran@ausley.com
FL Bar No. 325104
123 South Calhoun Street
P.O. Box 391
Tallahassee, Florida 32302
Tel: (850 425-5305
Fax: (850) 222-7560
K&L GATES LLP
Paul F. Hancock
paul.hancock@klgates.com
FL Bar No. 140619
William J. Simonitsch
william.simonitsch@klgates.com
FL Bar No. 422060
200 S. Biscayne Blvd., 3900
Miami, Florida 33131
Tel: (305) 539-3300
Fax: (305) 358-7095

CERTIFICATE OF SERVICE

I hereby certify that a true copy of this brief was served on counsel this 20th day of October, electronically via the Court's eDCA web application.

/s/ William J. Simonitsch
AUSLEY MCMULLEN
Richard E. Doran
rdoran@ausley.com
FL Bar No. 325104
123 South Calhoun Street
P.O. Box 391
Tallahassee, Florida 32302
Tel: (850) 425-5305
Fax: (850) 222-7560
K&L GATES LLP
Paul F. Hancock
paul.hancock@klgates.com
FL Bar No. 140619
William J. Simonitsch
william.simonitsch@klgates.com
FL Bar No. 422060
200 S. Biscayne Blvd., 3900
Miami, Florida 33131
Tel: (305) 539-3300
Fax: (305) 358-7095

CERTIFICATE OF COMPLIANCE

Appellant hereby certifies that the type size and style of Appellant Crane Co.'s Answer Brief is Times New Roman 14pt, in compliance with 9.210(a)(2) of the Florida Rules of Appellate Procedure.

By: /s/ William J. Simonitsch