IN THE SUPREME COURT OF FLORIDA

CASE NO. SC16-2182

RICHARD DELISLE,

Petitioner,

v.

CRANE CO., *et al*.,

Respondents.

APPENDIX TO ANSWER BRIEF OF RESPONDENTS R.J. REYNOLDS TOBACCO COMPANY, AS SUCCESSOR-BY-MERGER TO LORILLARD TOBACCO COMPANY, AND HOLLINGSWORTH & VOSE COMPANY

ON DISCRETIONARY REVIEW FROM A DECISION OF THE FOURTH DISTRICT COURT OF APPEAL

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***DeLisle v. Crane Co., et al.*, No. SC16-2182**

Index to Appendix to Answer Brief of Respondents R.J. Reynolds Tobacco Company, as successor-by-merger to Lorillard Tobacco Company, and Hollingsworth & Vose Company

Description	**Appendix Designation**
Fourth District Court of Appeal's reported decision in *Crane Co. v. DeLisle*, 206 So. 3d 94 (Fla. 4th DCA 2016)	Appendix 1
Compilation of evidentiary statutes not included in the Florida Evidence Code	Appendix 2

Respectfully submitted,

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I certify that, on October 20, 2017, a copy of this appendix was filed electronically in this Court and served via registered e-mail to counsel listed below.

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APPENDIX 1

206 So.3d 94
District Court of Appeal of Florida,
Fourth District.

CRANE CO., R.J. Reynolds Tobacco Co., and Hollingsworth & Vose Co., Appellants,
v.
Richard DeLISLE and Aline DeLisle, his wife, Appellees.

Nos. 4D13–4351, 4D14–146.
|
Nov. 9, 2016.

Synopsis

Background: Plaintiff who developed mesothelioma filed personal injury action against manufactures of asbestos-containing gaskets and cigarettes and supplier of asbestos-containing cigarette filters. The Circuit Court, Seventeenth Judicial Circuit, Broward County, John Murphy, III, J., granted judgment on jury verdict in favor of plaintiff, awarding him $8 million in past and future non-economic compensatory damages. Defendants appealed, and plaintiff cross-appealed.

Holdings: On motion for rehearing, the District Court of Appeal, Warner, J., held that:

[1] proffered expert's opinion that gaskets were substantial cause of plaintiff's mesothelioma was inadmissible;

[2] proffered expert's findings regarding release of asbestos fibers from cigarette filters were admissible;

[3] proffered expert's opinion that cigarettes were substantial contributing factor to plaintiff's mesothelioma was inadmissible;

[4] proffered expert's opinion that plaintiff's mesothelioma risk was increased by low-level of exposure to crocidolite asbestos was admissible;

[5] proffered expert's opinion that asbestos-containing cigarettes constituted significant exposure to crocidolite asbestos was inadmissible; and

[6] hourly rate paid for experts was improper basis for damages award.

Reversed and remanded.

West Headnotes (25)

[1] Constitutional Law Presumptions and Construction as to Constitutionality

Statutes are presumed to be constitutional and are to be given effect until declared otherwise.

1 Cases that cite this headnote

[2] **Appeal and Error** Competency of witness

Standard of review for trial court decisions concerning the qualifications of expert witnesses and the scope of their testimony is abuse of discretion. West's F.S.A. § 90.702.

Cases that cite this headnote

[3] **Appeal and Error** Competency of witness

Evidence Determination of question of competency

A trial court has broad discretion in determining the range of the subjects on which an expert can testify, and the trial judge's ruling will be upheld absent a clear error. West's F.S.A. § 90.702.

Cases that cite this headnote

[4] **Evidence** Matters involving scientific or other special knowledge in general

Evidence Necessity and sufficiency

Trial courts must act as gatekeepers, excluding expert evidence unless is it reliable and relevant. West's F.S.A. § 90.702.

Cases that cite this headnote

[5] **Evidence** Necessity and sufficiency

Evidence Speculation, guess, or conjecture

Trial courts are charged with a gatekeeping function regarding expert testimony to ensure that speculative, unreliable expert testimony does not reach the jury under the mantle of reliability that accompanies the appellation "expert testimony." West's F.S.A. § 90.702.

Cases that cite this headnote

[6] **Evidence** Grounds for admission

To properly perform its gatekeeping function over expert testimony, the court must first determine that the expert is qualified on the matter about which he or she intends to testify; second, that the expert is employing reliable methodology; and third, that the expert's testimony can assist the trier of fact through the application of expertise to understand the evidence or fact in issue. West's F.S.A. § 90.702.

Cases that cite this headnote

[7] **Evidence** Necessity and sufficiency

In assessing whether an expert's methodology is reliable, so as to support admission of expert testimony, the court should consider the following factors: (1) whether the theory can be, and has been, tested; (2) whether it has been subjected to peer review and publication; (3) the known or potential rate of error for a particular scientific technique; and (4) whether the theory or technique has been generally accepted by the relevant scientific community. West's F.S.A. § 90.702.

Cases that cite this headnote

[8] **Evidence** Necessity and sufficiency

Court's gatekeeping function regarding expert evidence requires more than simply taking the expert's word for it; something does not become scientific knowledge just because it is uttered by a scientist, nor can an expert's self-serving assertion that his conclusions were derived by the scientific method be deemed conclusive. West's F.S.A. § 90.702.

Cases that cite this headnote

[9] **Evidence** Necessity and sufficiency

Trained experts commonly extrapolate from existing data, but nothing requires a trial court to admit opinion evidence that is connected to existing data only by the ipse dixit of the expert; a court may conclude that there is simply too great an analytical gap between the data and the opinion proffered. West's F.S.A. § 90.702.

Cases that cite this headnote

[10] **Evidence** Necessity and sufficiency

An expert opinion is inadmissible when the only connection between the conclusion and the existing data is the expert's own assertions. West's F.S.A. § 90.702.

Cases that cite this headnote

[11] **Evidence** Necessity and sufficiency

Where an expert relies solely or primarily on his or her experience, the proponent seeking admission of the expert's testimony has the burden to explain how that experience led to the conclusion the expert reached, why that experience was a sufficient basis for the opinion, and just how that experience was reliably applied to the facts of the case. West's F.S.A. § 90.702.

Cases that cite this headnote

[12] **Evidence** Necessity and sufficiency

Trial court's gatekeeping role regarding expert testimony is not a passive role; the court should affirmatively prevent imprecise, untested scientific opinion from being admitted. West's F.S.A. § 90.702.

Cases that cite this headnote

[13] **Evidence** Disclosure, necessity and right

For expert testimony to be admissible, the expert must explain his or her methodology and how it is applied to the data relevant to the case. West's F.S.A. § 90.702.

Cases that cite this headnote

[14] **Evidence** Experiments and results thereof

When relying on studies, the expert must identify the studies and explain how they support the application of the methodology used for the testimony to be admissible. West's F.S.A. § 90.702.

Cases that cite this headnote

[15] **Evidence** Medical testimony

Opinion of proffered expert, who was physician specializing in occupational and environmental medicine, that exposure to low levels of chrysotile asbestos from manufacturer's gaskets was substantial cause of plaintiff's mesothelioma, was not supported by sufficient data or based upon reliable principles and methods, and thus was inadmissible in personal injury action, though proffered expert stated he relied on accepted Bradford Hill criteria to evaluate association between mesothelioma and asbestos; proffered expert failed to explain Bradford Hill criteria or how they applied, to provide any data or studies of association between mesothelioma and chrysotile asbestos at low levels, and to support his assumptions on equivalency of potency of all types of asbestos with reliable data. West's F.S.A. § 90.702.

Cases that cite this headnote

[16] **Evidence** Medical testimony

Methodologies of proffered expert, who was environmental scientist who tested asbestos-containing products for fiber release, were scientifically reliable, and thus his findings regarding release of crocidolite asbestos fibers from cigarette filters were admissible in personal injury action by plaintiff who alleged asbestos fibers from cigarette filters caused his mesothelioma, though proffered expert's testing of cigarettes had not been published or peer-reviewed; proffered expert testified extensively as to his methods, which were simply new applications of generally accepted methodologies, and it was not necessary for methodology to have been peer reviewed to be admissible. West's F.S.A. § 90.702.

1 Cases that cite this headnote

[17] **Evidence** Necessity and sufficiency

It is not necessary for a proffered expert's particular application of a methodology to have been peer reviewed to satisfy admissibility standards. West's F.S.A. § 90.702.

Cases that cite this headnote

[18] **Evidence** Medical testimony

Evidence References to authorities on subject

Proffered expert, who was pulmonologist, failed to demonstrate reliability or helpfulness of his opinion that cigarettes containing crocidolite asbestos, rather than exposure to chrysotile asbestos, were substantial contributing factor to plaintiff's mesothelioma, and thus opinion was inadmissible in personal injury action by plaintiff who developed mesothelioma; proffered expert left basis for his opinions unstated, effectively telling trial court to take his word for it, proffered expert's reliance on studies was only to assume some level of fiber release and did not establish any dose, proffered expert otherwise relied on his experiences but did not explain how they applied, and proffered expert relied on weight of medical literature without identifying any specific literature. West's F.S.A. § 90.702.

Cases that cite this headnote

[19] **Evidence** Experiments and results thereof

Proffered expert, who was industrial hygienist and toxicologist, demonstrated reliability and helpfulness of his opinion on general causation that plaintiff's mesothelioma risk was increased by even low-level exposure to crocidolite asbestos, and thus opinion was admissible in plaintiff's personal injury action against manufacturer of cigarettes that contained crocidolite asbestos; proffered expert not only cited studies he relied on, he also specified that they were peer-reviewed and the results had been replicated, and proffered expert explained findings of studies and how he had applied them to come to his conclusion. West's F.S.A. § 90.702.

Cases that cite this headnote

[20] **Evidence** Medical testimony

Evidence Experiments and results thereof

Proffered expert, who was industrial hygienist and toxicologist, failed to demonstrate reliability of his opinion that plaintiff's smoking of cigarettes containing crocidolite asbestos fibers constituted significant exposure to crocidolite asbestos, and thus opinion was inadmissible in personal injury action by plaintiff who developed mesothelioma against cigarette manufacturer and other defendants; proffered expert relied on one study to support basis of his opinion, but proffered expert did not know whether methodology underlying study was an accepted methodology, nor did he know whether the published study was peer-reviewed, which it was not. West's F.S.A. § 90.702.

Cases that cite this headnote

[21] **Products Liability** Proximate Cause

Products Liability Asbestos

Plaintiff, who developed mesothelioma, failed to support personal injury claim against manufacturer of gaskets containing asbestos, in absence of causation evidence linking manufacturer's products to plaintiff's mesothelioma.

Cases that cite this headnote

[22] **Trial** Form and arrangement

Generally, the applicable standard jury instructions are presumed correct and should be given unless such instructions are erroneous or inadequate.

Cases that cite this headnote

[23] **Trial** Form and arrangement

Trial Matters of law

Trial Instructions Already Given

A trial court is not inexorably bound to the standard instructions, but rather a trial court abuses its discretion when it fails to give a proposed instruction that is: (1) an accurate statement of the law, (2) supported by the facts of the case, and (3) necessary for the jury to properly resolve the issues, so long as the subject of the proposed instruction is not covered in other instructions given to the jury and the failure to instruct is shown to be prejudicial.

Cases that cite this headnote

[24] **Products Liability** Instructions

Where product use is contested in a products liability action, a targeted instruction to the jury to determine that issue first would be appropriate.

Cases that cite this headnote

[25] **Damages** Expenses

Hourly rate paid for experts in personal injury action brought by plaintiff who developed mesothelioma against manufacturer of asbestos-containing cigarettes and other defendants, upon which plaintiff's attorneys asked jury to base damages award, constituted arbitrary number used to establish plaintiff's damages, and thus was improper basis for damages award, though hourly rate was in evidence in personal injury trial; hourly rate was not in evidence for purposes of establishing plaintiff's damages, and hourly rate improperly focused on defendants' ability to pay, not loss to plaintiff. West's F.S.A. § 768.74(5)(c).

Cases that cite this headnote

***98** Consolidated appeals and cross-appeal from the Circuit Court for the Seventeenth Judicial Circuit, Broward County; John Murphy, III, Judge; L.T. Case No. CACE12025722.

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ON MOTION FOR REHEARING

WARNER, J.

We deny appellant's motion for rehearing, withdraw our previously issued opinion and substitute the following in its place.

Crane Co. and R.J. Reynolds Tobacco Co. appeal from an adverse jury verdict in favor of Richard DeLisle in which the jury found that both appellants' products containing asbestos were substantial contributing causes to appellee DeLisle's mesothelioma and awarded substantial damages. Crane primarily argues that the court erred in not excluding expert causation testimony, in denying its motion for directed verdict, and in excluding *Fabre* [1] defendants from the verdict form. R.J. Reynolds argues that the court erred in admitting expert testimony and in refusing a non-standard jury instruction. Both Crane and R.J. Reynolds argue that the court abused its discretion in failing to grant a remittitur. DeLisle cross-appeals the inclusion of a *Fabre* defendant on the verdict form. We hold that the court abused its discretion

in admitting expert testimony and thus reverse for a new trial for R.J. Reynolds and for entry of a directed verdict for Crane. We also address, for the purposes of new trial, the jury instruction issue and the damage award.

1 *Fabre v. Marin,* 623 So.2d 1182 (Fla.1993).

After developing mesothelioma, DeLisle filed a personal injury action against sixteen defendants, claiming that each caused him to be exposed to asbestos. He alleged negligence and strict liability under failure-to-warn and design-defect theories. Of these defendants, DeLisle proceeded to trial only against Crane, Lorillard Tobacco Co., and Hollingsworth & Vose Co. ("H & V"). [2]

2 R.J. Reynolds is the successor by merger to both Lorillard and H & V.

At trial, DeLisle presented evidence that he was exposed to asbestos fibers from sheet gaskets while working at Brightwater Paper Co. between 1962 and 1966. Crane, a valve and pump manufacturer, used "Cranite" sheet gaskets containing chrysotile asbestos fibers. DeLisle also testified that he smoked Original Kent cigarettes with asbestos-containing "Micronite" filters from 1952 to 1956. These cigarettes were produced by Lorillard's ***99** predecessor, and the filters were supplied by a former subsidiary of H & V. The filters contained crocidolite asbestos. [3] In addition to Cranite gaskets and Kent cigarettes, DeLisle testified that he was exposed to asbestos-containing products from the following nonparty defendants: Garlock Sealing Technologies, LLC; A.W. Chesterton Co.; Ford Motor Co.; Honeywell International, Inc., f/k/a Allied Signal, as successor in interest to Allied Corp., as successor in interest to The Bendix Corp.; Georgia–Pacific LLC, f/k/a Georgia–Pacific Corp.; Goulds Pumps, Inc.; Union Carbide Corp.; Brightwater; and Owens–Corning Fiberglass.

3 Crocidolite is a type of asbestos. There are various types of asbestos, including, as relevant to this case, chrysotile asbestos. The toxicity of different types was debated by the expert witnesses during the trial.

Lorillard contested DeLisle's use of Kent cigarettes. DeLisle testified that he smoked on average a pack of Kent cigarettes a day from junior high school until he enlisted in the army in 1957. Two of his high school friends, however, did not recall him smoking, and his former wife testified that by the late 1960's, DeLisle was only smoking unfiltered cigarettes.

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. Although all of DeLisle's experts agreed that the crocidolite asbestos in the Kent filters was a causative factor, they disagreed as to whether the other products were substantial contributing factors.

Appellees challenged each expert's opinions under section 90.702, Florida Statutes, which adopted the *Daubert* [4] test for expert testimony. DeLisle introduced the causation expert opinions of Drs. James Dahlgren, James Millette, James Crapo, and James Rasmuson. Lorillard and H & V unsuccessfully moved to exclude their testimony, as well as any testimony regarding experiments conducted by Dr. William Longo. [5] Dr. Dahlgren is a toxicologist who testified as to causation. Dr. Millette is an environmental scientist who tested asbestos-containing products for fiber release. Dr. Crapo, a pulmonologist, reviewed studies by both Dr. Longo and Dr. Millette to determine that Kent cigarettes would be a substantial contributing factor to mesothelioma. Dr. Rasmuson, an industrial hygienist, relied on Dr. Longo's testing to opine on DeLisle's exposure. Following *Daubert* hearings, the trial court admitted each expert's testimony.

4 *Daubert v. Merrell Dow Pharm., Inc.,* 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993).

5 DeLisle did not, however, seek to introduce Dr. Longo as an expert witness.

Before the jury, Dr. Dahlgren opined that "every exposure" above background levels to friable, [6] inhaled asbestos —regardless of product, fiber type, and dose—would be considered a substantial contributing factor to DeLisle's

mesothelioma. In contrast, Dr. Rasmuson testified that low-level exposures to chrysotile asbestos would not increase the risk of mesothelioma. Dr. Crapo testified similarly to Dr. Rasmuson as to low-level chrysotile asbestos.

6 "Friable" is defined as "[e]asily crumbled or broken into small pieces." BLACK'S LAW DICTIONARY (10th ed.2014). In the context of the materials involved in this case, friable or dust-producing materials are the opposite of materials in which the asbestos remains encapsulated or encased.

Crane, Lorillard, H & V, and DeLisle all moved for directed verdicts, and DeLisle sought to exclude any *Fabre* defendants ***100** from the verdict form. The court denied the motions for directed verdict and determined that Brightwater, DeLisle's former employer, and Owens–Corning, which manufactured asbestos-containing products that DeLisle had worked with at Brightwater, should be included on the verdict form. The court excluded the remaining nonparty defendants as *Fabre* defendants.

During the jury charge conference, Lorillard and H & V asked the trial court to instruct the jury on the threshold issue of whether DeLisle ever smoked Kent cigarettes. DeLisle opposed the instruction. The court denied the proposed instruction, reasoning that the issue was "subsumed in the [standard] instruction."

Following three days of deliberation, the jury awarded DeLisle $8 million in damages and apportioned fault as follows:

- Crane: 16%
- Lorillard: 22% H & V: 22%
- Brightwater: 20%
- Owens–Corning: 20%

After trial, Crane, Lorillard, and H & V variously moved for a judgment notwithstanding the verdict, judgment in accordance with their motions for directed verdict, a new trial, or, in the alternative, for a remittitur. The trial court denied the motions. The court then entered a final judgment awarding DeLisle $8 million in past and future non-economic compensatory damages, apportioned to Crane, Lorillard, and H & V based on the jury's distribution of fault.

Crane now appeals the trial court's denial of its motions for directed verdict and judgment notwithstanding the verdict, and the court's failure to exclude expert causation testimony. It also appeals the denial of its motion for new trial based on the trial court's exclusion of *Fabre* defendants. R.J. Reynolds (for Lorillard and H & V) appeals the admissibility of expert testimony following the *Daubert* hearings as well as the failure to give a jury instruction on product use. Crane and R.J. Reynolds jointly challenge the $8 million award as excessive. DeLisle cross-appeals regarding the inclusion of Owens–Corning as a *Fabre* defendant.

Admission of Expert Testimony

[1] Crane contends that Dr. James Dahlgren's opinions as to its liability were not properly admitted, and R.J. Reynolds argues that the trial court abused its discretion by finding the testimony of Drs. Millette, Crapo, and Rasmuson admissible under *Daubert.* [7] We find that the court failed to properly exercise its gatekeeping function as to Drs. Dahlgren, Crapo, and Rasmuson.

7 DeLisle also argues that this court lacks the authority to apply *Daubert,* as incorporated through section 90.702, Florida Statutes (2015), which was adopted in 2013 prior to the trial in this case, because it is a legislative change to the evidence code that has not yet been approved by the Florida Supreme Court. However, statutes are presumed to be constitutional and are to be given effect until declared otherwise. *Mallory v. State,* 866 So.2d 127, 128 (Fla. 4th DCA 2004). Further, we, and other

Florida appellate courts, have applied the statute to the admission of testimony. *Bunin v. Matrixx Initiatives, Inc.,* 197 So.3d 1109 (Fla. 4th DCA 2016); *Booker v. Sumter Cty. Sheriff's Office/N. Am. Risk Servs.,* 166 So.3d 189 (Fla. 1st DCA 2015); *Perez v. Bell S. Telecommunications, Inc.,* 138 So.3d 492 (Fla. 3d DCA 2014); *R.C. v. State,* 192 So.3d 606 (Fla. 2d DCA 2016). We therefore find that this argument lacks merit. Moreover, 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.

[2] **[3]** "The standard of review for trial court decisions concerning the qualifications of expert witnesses and the scope of their testimony is abuse of discretion." ***101** *Tengbergen v. State,* 9 So.3d 729, 736 (Fla. 4th DCA 2009). "Further, a trial court 'has broad discretion in determining the range of the subjects on which an expert can testify, and the trial judge's ruling will be upheld absent a clear error.' " *Davis v. State,* 142 So.3d 867, 872 (Fla.2014) (quoting *Penalver v. State,* 926 So.2d 1118, 1134 (Fla.2006)).

Since 2013, Florida has applied "the standards for expert testimony in the courts of this state as provided in *Daubert v. Merrell Dow Pharmaceuticals, Inc.,* 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993), *General Electric Co. v. Joiner,* 522 U.S. 136, 118 S.Ct. 512, 139 L.Ed.2d 508 (1997), and *Kumho Tire Co., Ltd. v. Carmichael,* 526 U.S. 137, 119 S.Ct. 1167, 143 L.Ed.2d 238 (1999)." 2013 Fla. Sess. Law Serv. Ch. 2013–107 (H.B.7015) (WEST). Section 90.702 codifies the standard:

> If scientific, technical, or other specialized knowledge will assist the trier of fact in understanding the evidence or in determining a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify about it in the form of an opinion or otherwise, if:
>
> (1) The testimony is based upon sufficient facts or data;
>
> (2) The testimony is the product of reliable principles and methods; and
>
> (3) The witness has applied the principles and methods reliably to the facts of the case.

§ 90.702, Fla. Stat. (2015).

[4] **[5]** Under section 90.702 and *Daubert,* 509 U.S. at 597, 113 S.Ct. 2786, the trial courts must "act as gatekeepers, excluding evidence unless is it reliable and relevant." *Hughes v. Kia Motors Corp.,* 766 F.3d 1317, 1328 (11th Cir.2014). The trial courts "are charged with this gatekeeping function 'to ensure that speculative, unreliable expert testimony does not reach the jury' under the mantle of reliability that accompanies the appellation 'expert testimony.' " *Id.* at 1328–29 (quoting *Rink v. Cheminova, Inc.,* 400 F.3d 1286, 1291 (11th Cir.2005)). "Whether an expert's testimony is reliable depends on 'the particular facts and circumstances of the particular case.' " *Id.* at 1329 (quoting *Kumho Tire,* 526 U.S. at 158, 119 S.Ct. 1167).

[6] **[7]** To properly perform its gatekeeping function, the court must first determine that the expert is "qualified on the matter about which he [or she] intends to testify"; second, that the expert is employing "reliable methodology"; and third, that the expert's testimony can "assist the trier of fact through the application of expertise to understand the evidence or fact in issue." *Id.* In assessing whether an expert's methodology is reliable, the court should consider the following factors: (1) whether the theory "can be (and has been) tested"; (2) whether it "has been subjected to peer review and publication"; (3) "the known or potential rate of error" for "a particular scientific technique"; and (4) whether the "theory or technique has been generally accepted by the relevant scientific community." *Daubert,* 509 U.S. at 593–94, 113 S.Ct. 2786.

[8] **[9]** **[10]** **[11]** However, "[t]he court's gatekeeping function requires more than simply 'taking the expert's word for it.' " *United States v. Frazier,* 387 F.3d 1244, 1265 (11th Cir.2004) (en banc) (quoting Fed.R.Evid. 702 advisory committee's note (2000 amends.)). "[S]omething doesn't become scientific knowledge just because it's uttered by a scientist; nor can an expert's self-serving assertion that his conclusions were derived by the scientific method be deemed conclusive." *Hughes,* 766 F.3d at 1331 (quoting *McDowell v. Brown,* 392 F.3d 1283, 1299 (11th Cir.2004)) (alteration ***102** in original). As the Supreme Court explained in *Joiner,*

> [t]rained experts commonly extrapolate from existing data. But nothing in either *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence that is connected to existing data only by the ipse dixit of the expert. A court may conclude that there is simply too great an analytical gap between the data and the opinion proffered.

Joiner, 522 U.S. at 146, 118 S.Ct. 512. Thus, "an expert opinion is inadmissible when the only connection between the conclusion and the existing data is the expert's own assertions[.]" *McDowell,* 392 F.3d at 1300. Additionally, where an expert relies solely or primarily on their experience, the proponent of the testimony has the burden "to explain how that experience led to the conclusion [the expert] reached, why that experience was a sufficient basis for the opinion, and just how that experience was reliably applied to the facts of the case." *Frazier,* 387 F.3d at 1265.

In *Frazier,* the defendant in a sexual assault case sought to introduce expert testimony that no hair or bodily fluids were discovered at the crime scene, and therefore it was unlikely he had assaulted the victim. *Id.* at 1252. In upholding the exclusion of this testimony, the appellate court found the expert's methodology unreliable and his opinion unhelpful to the jury. *Id.* at 1265. Although the expert relied on his experience and various tests, he never explained how they supported his opinion. *Id.* He failed to offer "any hard information" or show that "his opinions had been subjected to peer review or, even, the percentage of cases in which his opinion had been erroneous." *Id.* The court stated,

> While the expert's statement that the recovery of hair or seminal fluid "would be expected" expresses an intrinsically probabilistic or quantitative idea, the probability it expresses is unclear, imprecise and ill-defined.... Without knowing how frequently hair or seminal fluid is transferred during sexual conduct in similar cases—whether derived from reliable studies or based on some quantification derived from his own experience—it would be very difficult indeed for the district court (or for that matter the jury) to make even an informed assessment, let alone to verify that the recovery of hair or fluid evidence in this case "would be expected."

Id. The expert's "imprecise and unspecific" opinion meant that "the jury could not readily determine whether the 'expectation' ... was a virtual certainty, a strong probability, a possibility more likely than not, or perhaps even just a possibility." *Id.* at 1266. Thus, the opinion "easily could serve to confuse the jury, and might well have misled it." *Id.*

Similarly, in *Hughes,* 766 F.3d at 1331, involving an automobile accident, the exclusion of expert testimony was upheld where the expert's "leap from data to opinion was too great[.]" The expert in *Hughes* opined that the plaintiff would not have sustained the fatal injury had the vehicle been equipped with a shut-off switch, based on the evidence, his experience, and relevant literature. *Id.* at 1330.

> He explained in his report that he reached his conclusion based on the scientific method, without further explaining how he tested his hypothesis to support his conclusions. During his deposition, he explained a bit more—declaring that the amount of intrusion and the velocity of the adjacent door were the most important factors to his evaluation—but even then, his explanation ***103** went no further. He did not explain how those two variables were relevant, nor did he explain how he used those factors to reach his conclusion.

Id. (footnote omitted). Moreover, the expert admitted that he was unable to rule out other impacts as the cause of the injury, and was unable to explain how they would have affected the plaintiff. *Id.* The *Hughes* court noted that, like in *Frazier,* the expert "offered precious little in the way of a reliable foundation or basis for his opinion." *Id.* at 1329 (quoting Frazier, 387 F.3d at 1265).

[12] **[13]** **[14]** In sum, the trial court's gatekeeping role is not a passive role. The court should affirmatively prevent imprecise, untested scientific opinion from being admitted. The expert must explain his or her methodology and how it is applied to the data relevant to the case. Further, when relying on other studies, the expert must identify those studies

and explain how they support the application of the methodology used. We evaluate the various challenged experts and the trial court's rulings on the admissibility of their opinions with the foregoing principle in mind.

i. Dr. James Dahlgren

[15] Dr. James Dahlgren is a medical doctor, specializing since 1977 in occupational and environmental medicine, with a subspecialty in toxicology. He is not a scientist, but has studied and worked in the field of treating workers exposed to industrial chemicals, including asbestos. At trial, he was the sole witness to testify that exposure to low levels of chrysotile asbestos through Crane products was a substantial cause of DeLisle's mesothelioma.

In arriving at his opinion on causation, Dr. Dahlgren followed a two-step process, first determining general causation, i.e. the ability of the substance to cause the disease, then determining whether the particular individual had sufficient exposure to the substance to have that health effect.

In analyzing whether a particular substance caused DeLisle's disease, Dr. Dahlgren stated that he had relied on the Bradford Hill criteria [8] for determining causation based upon epidemiology studies, animal studies, experimental studies, and other studies. These criteria are "strength, consistency, specificity, temporality, biological gradient, plausibility, coherence, experiment[,] and analogy[.]" Dr. Dahlgren was not asked to explain what the factors mean or how he used them to analyze causation. He also stated that he had applied his training and experience, but he was not asked and did not explain how his experience provided a sufficient basis for his conclusions.

[8] The Bradford Hill criteria refers to a list of criteria developed by epidemiologist Dr. Bradford Hill in the 1960s.

Based upon his review and collection of the literature on the disease, Dr. Dahlgren testified that both chrysotile and crocidolite asbestos can cause mesothelioma. When asked on cross-examination whether all commercial types of asbestos were similar in terms of their potency, he said, "*Probably.* I know that there's some dispute about that, but, in my opinion, based on animal studies, I believe they're pretty comparable in potency." (Emphasis added). He did not provide nor discuss the results of the animal studies on which he relied, except for admitting that the view that the potency of chrysotile fibers were equivalent to amphibole asbestos was contrary to pathology studies on human lung tissue (as opposed to animal studies). Dr. Dahlgren rejected the human studies because ***104** he did not believe that they took into account that chrysotile was the most common form of asbestos in the world, and he considered the controlled animal studies to be more legitimate.

Dr. Dahlgren relied on one study by a South African doctor, Dr. Wagner, but that study was of crocidolite, not chrysotile asbestos. And, although he was aware that Dr. Wagner had later concluded that there was no clear evidence that chrysotile asbestosis caused mesothelioma tumors, Dr. Dahlgren indicated he relied on Dr. Wagner's prior work.

Apart from the Wagner study, Dr. Dahlgren could not recall the names of other papers on which he relied. But then he admitted that there were many papers which showed that amphibole asbestos was many times more potent (some studies showing a hundred times more potent) than chrysotile fibers. He could not point to any study involving chrysotile alone which showed that the different fibers were similar in potency. The one paper he did rely on regarding studies of asbestos doses involved mixed types of asbestos. Unfortunately, none of the papers were provided to the trial court. He had not done any research himself to determine the amount of asbestos required to cause mesothelioma.

Dr. Dahlgren maintained that "every exposure" to asbestos of any kind above background level would be a substantial contributing cause of mesothelioma. He stated that "background level is pretty well accepted to be .0002 fibers per CC, a little higher in some studies, a little lower in others[.]" Although there is a gap between the background level and those levels at which there is an increased risk of disease, the studies he relied on had been unable to establish the

threshold. He did not know of any study which supported his "every exposure" conclusion, nor did he think that such a study could be done. He did refer generally to several studies finding increased mesothelioma rates from "very low levels" of exposure. However, he conceded that "none of those studies actually said that each and every exposure above background contribute[d] to ... mesothelioma risk[.]"

Based on this, the trial court accepted Dr. Dahlgren as an expert and found that his opinions were supported by sufficient data and peer-reviewed studies, and were based upon reliable principles and methods.

We cannot find that the trial court properly exercised its discretion in admitting Dr. Dahlgren's opinions. Although Dr. Dahlgren may be an expert in the field of occupational medicine and evaluation of mesothelioma, the record does not in any way support a finding that his opinions were supported by sufficient data or based upon reliable principles and methods under a proper *Daubert* analysis. While Dr. Dahlgren stated that he relied on accepted methodology in reaching his opinions, i.e. the Bradford Hill criteria, he did not explain that methodology at all. The Bradford Hill criteria are used to evaluate the strength of an association between two factors (such as asbestos and mesothelioma) from epidemiological studies. *Milward v. Acuity Specialty Products Group, Inc.,* 639 F.3d 11 (1st Cir.2011), provides an explanation of the criteria and how they are applied:

> Dr. Smith's opinion was based on a "weight of the evidence" methodology in which he followed the guidelines articulated by world-renowned epidemiologist Sir Arthur Bradford Hill in his seminal methodological article on inferences of causality. *See* Arthur Bradford Hill, *The Environment and Disease: Association or Causation?,* 58 Proc. Royal Soc'y Med. 295 (1965).
>
> ***105** Hill's article explains that one should not conclude that an observed association between a disease and a feature of the environment (e.g., a chemical) is causal without first considering a variety of "viewpoints" on the issue. These viewpoints include: the strength or frequency of the association; the consistency of the association in varied circumstances; the specificity of the association; the temporal relationship between the disease and the posited cause; the dose response curve between them; the biological plausibility of the causal explanation given existing scientific knowledge; the coherence of the explanation with generally known facts about the disease; the experimental data that relates to it; and the existence of analogous causal relationships. *See id.* at 295–99.
>
> Although Hill identified nine viewpoints, it is generally agreed that this list is not exhaustive and that no one type of evidence must be present before causality may be inferred.

Id. at 17 (footnote omitted). These criteria are usually applied by epidemiologists in evaluating causation. "Several courts that have considered the question have held that it is not proper methodology for an epidemiologist to apply the Bradford Hill factors without data from controlled studies showing an association." *In re Fosamax Prods. Liab. Litig.,* 645 F.Supp.2d 164, 188 (S.D.N.Y.2009).

Not only did Dr. Dahlgren fail to explain the Bradford Hill criteria or how they applied, he did not provide any data or studies of the association between mesothelioma and chrysotile asbestos at low levels. All of the studies upon which he relied were studies of mixed types of asbestos, even though he was giving opinions on causation from products containing only chrysotile asbestos.[9] And his assumptions on the equivalency of the potency of all types of asbestos were also unsupported by any reliable data. Instead, they were based upon his thinking that all commercial types of asbestos were *probably* of the same potency. As well, he thought that his opinion that levels of exposure "significantly" above background level could cause disease were "fair." Thus, even if the methodology was appropriate, it was not supported by any data.

[9] It is unclear from the record which type(s) of asbestos were involved in the animal studies.

The 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 "every exposure" theory has been advanced by plaintiffs and their experts in a number of recent cases. *See* Joseph Sanders, *The "Every Exposure" Cases and the Beginning of the Asbestos Endgame,* 88 Tul. L.Rev. 1153, 1157 (2014). The "every exposure" theory "represents the viewpoint that, because science has failed to establish that any specific dosage of asbestos causes injury, every exposure to asbestos should be considered a cause of injury." *Yates v. Ford Motor Co.,* 113 F.Supp.3d 841, 846 (E.D.N.C.2015); *see also Krik v. Crane Co.,* 76 F.Supp.3d 747, 750–51 (N.D.Ill.2014). The judicial reception to this theory has been largely negative. Numerous courts have excluded expert testimony or evidence grounded in this theory, reasoning that it lacks sufficient support in facts and data. *See, e.g., Yates,* 113 F.Supp.3d at 846–47; ***106** *Comardelle v. Pa. Gen. Ins. Co.,* 76 F.Supp.3d 628, 633–35 (E.D.La.2015); *Krik,* 76 F.Supp.3d at 752–53; *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). Likewise, applying the *Daubert* factors, courts have found that the theory cannot be tested, has not been published in peer-reviewed works, and has no known error rate. *E.g., Yates,* 113 F.Supp.3d at 846–47.

Vedros v. Northrop Grumman Shipbuilding, Inc., 119 F.Supp.3d 556, 562–63 (E.D.La.2015). *Vedros* also rejected the claim that "every exposure above background level" was any different than the "every exposure" theory. *Id.*

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. [10]

10 Were we not concluding that Dr. Dahlgren's testimony was inadmissible, it would have provided a sufficient basis for including at least six *Fabre* defendants on the verdict form, together with DeLisle's testimony of his exposure to each of those products, and we would have reversed for failure to include the *Fabre* defendants.

ii. Dr. William Longo

A substantial issue in reviewing the expert testimony was the reliability of studies conducted by Dr. William Longo. In 1995, Dr. Longo published an article in the publication Cancer Research, based on his work in 1991 for a plaintiff in a similar action against Lorillard and H & V. In this first set of experiments, Dr. Longo "smoked" forty-year-old Kent cigarettes utilizing a hand-held syringe to smoke the cigarettes in an upright position. The 1995 article was not subjected to formal peer review and was published in a section titled "Advances in Brief" and marked "Advertisement." Although Cancer Research is a peer-reviewed journal, Dr. Longo's short article, under the journal's policies, would have "receive[d] an accelerated review," unlike the peer review to which other articles are subject. Additionally, Dr. Longo failed to mention that when he performed a second round of tests, the results were dramatically different.

In 2012, Dr. Longo conducted more testing on Kent cigarettes. Counsel for a plaintiff sent Dr. Longo four packs of the cigarettes for testing as to whether the smoke contained asbestos from the filter. The cigarettes were nearly sixty years old at the time of testing; it was unclear where they came from, how they had been stored, or whether they sufficiently resisted aging and degradation to give accurate results. The 2012 study showed the release of asbestos into the smoke, but the results again varied widely from the earlier experiments.

Before trial, Lorillard moved to exclude any expert opinion or testimony about the experiments conducted by Dr. Longo on the basis that his work was unreliable and not based on sound scientific theories. DeLisle's counsel agreed that Dr. Longo's testing would not be part of the case. However, Dr. Longo's research came up multiple times during the trial, apparently ***107** relied on by several of the expert witnesses.

iii. Dr. James Millette

[16] During Dr. James Millette's *Daubert* hearing, he discussed his background in microscopic analysis and identification of particles. He had published "about 60 or so" articles on asbestos in peer-reviewed journals. This included articles "measuring the potential for asbestos fibers to come out of different products[,]" including gaskets, packing, and dryer felts. None of these articles dealt with cigarette filters.

As to the cigarette filters, Dr. Millette testified that in 2010 and 2011, he received several packs of Kent cigarettes, in their original packaging, from a law firm. They were sent to him in plastic containers and he was unsure of their origin or previous storage conditions. Upon receiving the cigarettes, Dr. Millette tested them for degradation by visually looking for mold and mildew, and testing brittleness of the paper with tweezers. He stated that there was no evidence of degradation and the paper was not brittle.

Dr. Millette then sent a cigarette from each package to Arista Laboratories for "smoking testing," as such testing was outside his area of expertise. He testified that Arista is an accredited, "independent laboratory group that does testing for cigarette companies and the government to determine ... whether the cigarettes complied with certain regulations[.]" Arista used a "smoking machine" to send each cigarette's smoke through filter pads made of glass fibers. Following an International Standards Organization ("ISO") protocol and a Canadian Health Protocol, Arista performed both an "eight puff" test and a "two puff" test on the cigarettes, as well as a control. The filters were then returned to Dr. Millette for analysis.

Because the filter pads used by Arista were not designed for particle analysis, but for examining organic material, in order to detect asbestos fibers, Dr. Millette took a portion of each filter and dissolved the glass fibers using an acid-base wash, a type of indirect preparation. This involved boiling the filter in acid for an hour, running it through a centrifuge, boiling it in a base, running it back through the centrifuge, and then suspending the remaining materials in water. Dr. Millette then analyzed the solution using a transmission electron microscope.

He did not find any fibers in the filters from the "two puff" test. The detection limit was about 30,000 crocidolite asbestos fibers per cigarette. However, on the four filters from the "eight puff" test, he found between 38,000 to 10 million fibers. He had not calculated the error rate for the individual samples, but "it certainly would be within that range." The fibers he observed were mostly individual or smaller particles, rather than bundles or clusters. He admitted that the acid wash preparation could have broken up such bundles, but it was unlikely because then he would have been able to see the fibers without the acid wash. He also testified that indirect preparations generally net higher numbers of particles.

Dr. Millette acknowledged that there is no standard method or body of literature for testing asbestos in cigarette smoke, nor did any of his publications cover such testing. His testing of Kent cigarettes had not been published or peer reviewed, but the acid-base method is peer reviewed, with two publications describing the methodology listed in his report. He testified that it is generally accepted in the scientific community among material scientists for this type of testing.

He also testified that his use of the electron microscope to identify asbestos fibers had also appeared in peer-reviewed ***108** publications listed in his report. Additionally, he testified that Arista's testing was done pursuant to the two protocols, and although he could not recall any particular publications, they were standard methods that had been peer reviewed.

The trial court then found that Dr. Millette was adequately qualified as an expert, his testimony was based on sufficient data, and was "the product of reliable principles and methods ... that have been peer reviewed before, and he's applied

these principle[s] and methods to the facts of the case," such that his testimony would be allowed. Dr. Millette later testified to his findings before the jury.

[17] The trial court did not abuse its discretion in holding Dr. Millette's testimony admissible. He testified extensively as to his methods, which were simply new applications of generally accepted methodologies. It is not necessary for a particular application of a methodology to have been peer reviewed to satisfy admissibility standards. [11] *See Kumho Tire Co. v. Carmichael,* 526 U.S. 137, 151, 119 S.Ct. 1167, 143 L.Ed.2d 238 (1999) ("It might not be surprising in a particular case, for example, that a claim made by a scientific witness has never been the subject of peer review, for the particular application at issue may never previously have interested any scientist.").

11 Dr. Millette's methodology in this exact study has been upheld under *Daubert. See Quirin v. Lorillard Tobacco Co.,* No. 13 C 2633, 2014 WL 716162, at *4 (N.D.Ill. Feb. 25, 2014).

iv. Dr. James Crapo

[18] Dr. James Crapo was originally deposed as Ford's witness, but his deposition was introduced by DeLisle at trial. In his deposition, Dr. Crapo opined that, based on "the weight of the medical literature," crocidolite and amosite asbestos were "very potent." He did not consider exposure to chrysotile a cause of mesothelioma unless in very high doses. He testified that DeLisle's "smoking Kent Micronite cigarettes [which contained crocidolite asbestos] was a substantial contributing cause for his mesothelioma [,]" rather than his exposures to chrysotile asbestos.

Dr. Crapo was familiar with Dr. Longo's study, but testified that Dr. Longo's "laboratory is one that I think often is at the far end of the spectrum on exposures to particles," with results that are "often not reproduced by other industrial hygienists." Dr. Crapo nonetheless relied on the study because Dr. Longo had found crocidolite fibers in cigarette smoke, but admitted that "because of the issues of filter degradation, the time lapse, and the absence of a second validation from a different laboratory, ... I would not rely on this for exact numbers for the release amount." Dr. Crapo also reviewed Dr. Millette's study, but ultimately relied on the studies "[o]nly to the extent that I recognized that both Millette and Longo found fibers in the airstream coming through a Micronite filter," but not to "establish the dose." He testified that "it would just be expected that a filter would release some of the fibers that are in it," although he has never conducted any tests to verify that expectation. He summed up his testimony by stating, "What I'm trying to tell you is putting crocidolite, a very, very dangerous fiber, into a filter and having a person put that in his mouth and suck on it, ... that sounds very dangerous to me." Based on this, the trial court found that Dr. Crapo's testimony was reliable under *Daubert.*

Dr. Crapo's testimony is similar to the expert testimony in *United States v. Frazier,* 387 F.3d 1244, 1265 (11th Cir.2004), where the expert stated that the recovery ***109** of hair or seminal fluid from an assault scene "would be expected," but failed to state the basis for the opinion. Like the expert in *Frazier,* Dr. Crapo "offered precious little in the way of a reliable foundation or basis for his opinion." *Id.* Because he left his basis unstated, he did not provide enough for the court to evaluate the reliability of his opinion. Dr. Crapo effectively told the court to take his word for it. Although he relied on the studies by Dr. Longo and Dr. Millette, it was only to assume some level of fiber release. Thus, he did not establish any dose. Otherwise, he relied on his experiences, but did not explain how they applied. Furthermore, he relied on the "weight of medical literature" without identifying any specific literature. Accordingly, we find that Dr. Crapo's testimony did not demonstrate the reliability of his opinion, nor its helpfulness. This is not to say that he could not have possibly been admitted under *Daubert;* there simply is not enough in the record for the court to have made a proper determination.

v. Dr. James Rasmuson

Dr. James Rasmuson was called by Crane, and the trial court conducted a *Daubert* hearing. He is an industrial hygienist and toxicologist. Dr. Rasmuson opined that DeLisle's mesothelioma risk was increased by even low-level exposure to crocidolite or amosite asbestos (both of which are referred to as types of amphibole asbestos). He explained that he based his opinion on three peer-reviewed case control studies which compared mesothelioma rates with type of asbestos and degree of exposure. He explained the results and noted that the three separate studies had replicated the results. He stated, based on the results, what the background level was for crocidolite fibers.

Dr. Rasmuson also opined that smoking Kent cigarettes would constitute a significant exposure to crocidolite asbestos. Dr. Rasmuson stated that he relied solely on Dr. Longo's studies to come to this conclusion. He did not know whether the methodology that Dr. Longo used was an acceptable methodology, although it sounded "reasonable" to him even though he was not qualified in that area. He testified that "if Dr. Longo's tests are anywhere in the ball park ..., even if they're higher than what was observed by some significant factor, there still could be some level of risk" from Kent cigarettes. Dr. Rasmuson had assumed, without knowing, that Dr. Longo's article had been peer reviewed. Dr. Rasmuson testified that Dr. Longo's study was "the type of evidence that would be ... reasonably relied upon by experts" in his field.

[19] With regard to his first opinion of general causation, regarding low-level exposure to crocidolite, Dr. Rasmuson demonstrated the reliability of his opinion and its helpfulness to the jury. He not only cited the studies he had relied on, he also specified that they were peer-reviewed and the results had been replicated. He also explained the findings of the studies and how he had applied them to come to his conclusion.

[20] With regard to his Kent-specific opinions, Dr. Rasmuson concluded that the exposure would have been significant, and he testified that Dr. Longo's study was the sole study that he relied on to form the basis of his opinion. However, he did not know whether the methodology underlying Dr. Longo's study was an accepted methodology, nor did he know whether the published study was peer reviewed, which it was not. The trial court therefore could not conclude that Dr. Rasmuson's opinions were based upon reliable data, or that his Kent-specific causation opinion was reliable and satisfied the *Daubert* standard.

***110** In sum, Drs. Crapo and Rasmuson failed, at least in part, to demonstrate the reliability of their opinions on this record. Further, they failed to support their opinions with reliable data. Because their opinions should not have been admitted, we reverse for a new trial for R.J. Reynolds.

[21] As for Crane, Dr. Dahlgren's opinion was the sole evidence on causation against Crane regarding the link between its products and DeLisle's mesothelioma. As we find that his testimony did not satisfy the standard of *Daubert* and that his "every exposure" theory was insufficient to establish liability, we reverse the denial of a directed verdict for Crane and direct that a verdict be entered in its favor. [12]

12 To the extent that Dr. Dahlgren offered opinions on causation as to Kent cigarettes and as to DeLisle's prognosis and damages, no party has contested these opinions.

Jury Instruction

R.J. Reynolds next argues that the trial court erred by refusing to instruct the jury and to submit for its consideration the threshold question of whether DeLisle actually used Lorillard and H & V's products. Because we are reversing for a new trial, we address this issue, even though we would not have reversed on this issue alone.

[22] **[23]** "Generally, the applicable standard jury instructions are presumed correct and should be given unless such instructions are erroneous or inadequate." *Aubin v. Union Carbide Corp.,* 177 So.3d 489, 516 (Fla.2015). A trial court, however, is not inexorably bound to the standard instructions:

> A trial court abuses its discretion when it fails to give a proposed instruction that is (1) an accurate statement of the law, (2) supported by the facts of the case, and (3) necessary for the jury to properly resolve the issues, so long as the subject of the proposed instruction is not covered in other instructions given to the jury and the failure to instruct is shown to be prejudicial.

R.J. Reynolds v. Jewett, 106 So.3d 465, 467 (Fla. 1st DCA 2012).

[24] The trial court refused to give Lorillard's instruction as to whether DeLisle smoked cigarettes because it was not a standard instruction and the question was inherent in the standard instruction, even though the trial court thought that the standard instructions should include one on product use. The standard instructions do appear to, in some measure, assume product use, and thus we agree that where product use is contested, as it was in this case, a targeted instruction to the jury to determine this issue first would be appropriate.

Nevertheless, given that the issue was hotly contested and thoroughly addressed in preliminary instructions, the testimony, and in closing argument, it is not reasonable to think that the jury was misled and would have or could have found for DeLisle on his claims without also concluding that he smoked Kent cigarettes. But as we are reversing for a new trial on other grounds, the court should consider giving an appropriate instruction on product use in any new trial.

Damage Award

[25] Both R.J. Reynolds and Crane challenge the jury's $8 million award as excessive and argue that the trial court abused discretion in denying remittitur. They note, in part, that in closing argument, DeLisle's counsel asked the jury to compensate DeLisle based upon the rate the parties compensated their experts. We agree with Judge Wetherell in his ***111** dissenting opinion in *R.J. Reynolds Tobacco Co. v. Townsend,* 90 So.3d 307 (Fla. 1st DCA 2012), that this is an improper analogy because it focuses on the defendant's ability to pay, not the loss to the plaintiff. *Id.* at 318 (Wetherell, J., concurring in part, dissenting in part) (stating that counsel's argument that "the jury could use the annual compensation of one of [defendant's] experts ... and one of its executives ... as 'reasonable gauges or measuring sticks' to value the time Appellee lost with her husband as a result of his premature death from lung cancer" was improper because it was "nothing more than a thinly veiled invitation for the jury to lavishly compensate Appellee for the death of her husband simply because [the defendant] could afford to do so").

Section 768.74(3), Florida Statutes (2016), requires the court to subject a damage award to "close scrutiny." One of the criteria that the court must consider is "[w]hether the trier of fact took improper elements of damages into account or arrived at the amount of damages by speculation and conjecture [.]" § 768.74(5)(c), Fla. Stat. In this case, DeLisle's attorney stated the hourly pay rates charged by the experts and provided the jury with calculations that reflected an award of an amount in this range for each hour of each day that DeLisle had been ill. Counsel encouraged the jury to take into account an improper measure of damage by using the defendants' ability to pay its experts as the gauge for a damage award.

Werneck v. Worrall, 918 So.2d 383, 388 (Fla. 5th DCA 2006), is instructive. There, in a wrongful death case against a trucking company, the plaintiff's attorney suggested to the jury in closing that it calculate the pain and suffering to the survivors based upon the number of trucks owned by the company. *Id.* The court held that this was an improper basis for an award:

> Although, as Appellee points out, the number of trucks and hourly wage of a daycare worker were in evidence, this evidence was introduced for different purposes and had no "logical nexus in deduction or analogy" to the amount of pain and suffering incurred by Appellee. *Wright & Ford Millworks, Inc. v. Long,* 412 So.2d 892 (Fla. 5th DCA 1982).

> The fact that counsel could have suggested a wholly arbitrary number to the jury does not give counsel carte blanche to mislead the jury by knowingly urging it to employ specious methodology....

Id. (footnote omitted). Similarly, in this case, while the hourly rate of the experts was in evidence, it was not for the purpose of establishing DeLisle's damages, and it was a "wholly arbitrary number" to use to establish damages, focused on what the defendants could pay. *Id.* It appears that the jury relied on counsel's suggestions to arrive at its verdict. The appeal to the jury to use this wholly improper and arbitrary means of measuring the damages to DeLisle should have warranted a remittitur or a new trial on damages.

Conclusion

As we are reversing for a new trial for R.J. Reynolds based on the improper admission of the expert testimony, the new trial should include the issue of damages because of the foregoing analysis.

At a new trial, the court should also reconsider the prior inclusion of Owens–Corning on the verdict form as a *Fabre* defendant, as raised on cross-appeal by DeLisle. Dr. Rasmuson testified that DeLisle's exposure to Owens–Corning products containing asbestos would be a substantial contributing factor to DeLisle's mesothelioma, but his testimony on this issue did not meet the test of *Daubert.*

For the foregoing reasons we reverse and remand for entry of a directed verdict ***112** for Crane and for a new trial on all issues as to R.J. Reynolds.

CIKLIN, C.J., and KLINGENSMITH, J., concur.

All Citations

206 So.3d 94, 41 Fla. L. Weekly D2532

End of Document

Negative Treatment

Negative Direct History

The KeyCited document has been negatively impacted in the following ways by events or decisions in the same litigation or proceedings:

1. Crane Co. v. DeLisle KEYCITED

206 So.3d 94 , Fla.App. 4 Dist. , Nov. 09, 2016

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2. Delisle v. Crane Co. MOST NEGATIVE

2017 WL 3484484 , Fla. , July 11, 2017

Negative Citing References (1)

The KeyCited document has been negatively referenced by the following events or decisions in other litigation or proceedings:

Treatment	Title	Date	Type	Depth	Headnote(s)
Distinguished by	1. Northrop Grumman Systems Corporation v. Britt --- So.3d ---- , Fla.App. 3 Dist. Background: Worker and worker's wife brought action against owner of industrial facilities after worker was diagnosed with mesothelioma, claiming worker's exposure to asbestos...	Sep. 06, 2017	Case		16 So.3d

History (10)

Direct History (6)

1. Delisle v. A.W. Chesterton Co.
2013 WL 12200587 , Fla.Cir.Ct. , Nov. 21, 2013

Reversed and Remanded by

2. Crane Co. v. DeLisle
206 So.3d 94 , Fla.App. 4 Dist. , Nov. 09, 2016

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3. Delisle v. Crane Co.
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4. Crane Co. v. DeLisle
--- So.3d ---- , Fla.App. 4 Dist. , Sep. 14, 2016

Opinion Withdrawn and Superseded on Rehearing by

5. Crane Co. v. DeLisle
206 So.3d 94 , Fla.App. 4 Dist. , Nov. 09, 2016

Review Granted by

6. Delisle v. Crane Co.
2017 WL 3484484 , Fla. , July 11, 2017

Related References (4)

7. Delisle v. A W Chesterton Co.
2013 WL 12200591 , Fla.Cir.Ct. , Aug. 02, 2013

8. Delisle v. A.W. Chesterton Co.
2013 WL 12200589 , Fla.Cir.Ct. , Nov. 05, 2013

9. Delisle v. A.W. Chesterton Co.
2013 WL 12200590 , Fla.Cir.Ct. , Nov. 05, 2013

10. Delisle v. A.W. Chesterton Co.
2013 WL 12200588 , Fla.Cir.Ct. , Nov. 21, 2013

APPENDIX 2

	SECTION	TITLE	STATUTE
1	45.061	Offers of settlement	(1) At any time more than 60 days after the service of a summons and complaint on a party but not less than 60 days (or 45 days if it is a counteroffer) before trial, any party may serve upon an adverse party a written offer… to settle a claim …. Evidence of an offer *is not admissible* except in proceedings to enforce a settlement or to determine sanctions under this section.[1]
2	60.05	Abatement of nuisances	(3) Evidence of the general reputation of the alleged nuisance and place *is admissible* to prove the existence of the nuisance.
3	61.58	Confidentiality of a collaborative law communication	Except as provided in this section, a collaborative law communication is confidential to the extent agreed by the parties in a signed record or as otherwise provided by law. **(1) Privilege against disclosure for collaborative law communication; admissibility; discovery.--** (a) Subject to subsections (2) and (3), a collaborative law communication is privileged as provided under paragraph (b), is not subject to discovery, and *is not admissible into evidence*. * * * * **(2) Waiver and preclusion of privilege.--** (a) A privilege under subsection (1) may be waived orally or in a record during a

[1] Emphasis is added to each of the provisions.

	SECTION	TITLE	STATUTE
			proceeding if it is expressly waived by all parties and, in the case of the privilege of a nonparty participant, if it is expressly waived by the nonparty participant. (b) A person who makes a disclosure or representation about a collaborative law communication that prejudices another person in a proceeding may not assert a privilege under subsection (1). This preclusion applies only to the extent necessary for the person prejudiced to respond to the disclosure or representation.
4	68.093	Florida Vexatious Litigant Law	(3)(b) At the hearing upon any defendant's motion for an order to post security, the court shall consider *any evidence, written or oral, by witness or affidavit, which may be relevant* to the consideration of the motion. *No determination made by the court in such a hearing shall be admissible on the merits* of the action or deemed to be a determination of any issue in the action.
5	70.51	Land use and environmental dispute resolution	(20) The special magistrate's recommendation is a public record under chapter 119. However, actions or statements of all participants to the special magistrate proceeding are evidence of an offer to compromise and *inadmissible in any proceeding*, judicial or administrative.
6	73.015	Presuit negotiation	(5) Evidence of negotiations or of any written or oral statements used in mediation or negotiations between the parties under this section *is inadmissible in any condemnation proceeding*, except in a

	SECTION	TITLE	STATUTE
			proceeding to determine reasonable costs and attorney's fees.
7	73.032	Offer of judgment	(8) Evidence of an offer of judgment is admissible only in proceedings to enforce an accepted offer or to determine the costs to be awarded a defendant … or a reasonable attorney's fee …..
8	88.3161	Special rules of evidence and procedure	(2) An affidavit, a document substantially complying with federally mandated forms, or a document incorporated by reference in any of them, which would not be excluded under the hearsay rule if given in person, *is admissible in evidence* if given under penalty of perjury by a party or witness residing outside this state. (3) A copy of the record of child support payments certified as a true copy of the original by the custodian of the record may be forwarded to a responding tribunal. The copy *is evidence of facts asserted in it, and is admissible* to show whether payments were made. (4) Copies of bills for testing for parentage of a child, and for prenatal and postnatal health care of the mother and child, furnished to the adverse party at least 10 days before trial, *are admissible in evidence* to prove the amount of the charges billed and that the charges were reasonable, necessary, and customary. (5) Documentary evidence transmitted from outside this state to a tribunal of this state by telephone, telecopier, or other electronic means that do not provide an

	SECTION	TITLE	STATUTE
			original record *may not be excluded from evidence on an objection based on the means of transmission.*
9	92.05	Final judgments and decrees of courts of record	All final judgments and decrees heretofore or hereafter rendered and entered in courts of record of this state, and certified copies thereof, *shall be admissible as prima facie evidence* in the several courts of this state of the entry and validity of such judgments and decrees.
10	92.06	Judgments and decrees of United States District Courts	All final judgments and decrees heretofore or hereafter to be rendered and entered in the United States District Courts of this state and certified copies thereof *are declared to be admissible as prima facie evidence* in the several courts of this state of the entry and validity of such judgments and decrees.
11	92.07	Judgments and decrees of this state	The recitals in all judgments and decrees of the Supreme Court and of the several circuit courts of this state, when such judgment or decree appears regular and has been recorded as provided by law for more than 20 years, *shall be admissible in evidence as prima facie proof* of the truth of the facts so recited. Either party to any suit at law or equity may offer a properly certified copy of such judgment or decree entered and recorded more than 20 years prior to the institution of the suit in which the same is offered …. [N]othing in this law *shall render admissible* in evidence any instrument of writing based on any judgment, deed of conveyance or power of attorney included in this law where any such instrument of writing has heretofore

	SECTION	TITLE	STATUTE
			been brought in question in any action at law or in equity in any suit now pending or heretofore decided.
12	92.08	Deeds and powers of attorney of record for 20 years or more	The recitals in any deed of conveyance or power of attorney *shall be admissible* in evidence when offered in evidence by either party to any suit at law or in equity as prima facie proof of the truth of the facts therein recited, provided such deed of conveyance or power of attorney appears regular on its face and is a muniment in the chain of title under which the party offering the deed claims ….. The original deed or power of attorney shall be offered unless the party offering the certified copy shall show that the original is not within the custody or control of the party offering the copy.
13	92.09	Effect of reversal, etc., of judgment or successful attack on deed	No copy of a judgment or decree shall be admitted in evidence as aforesaid when it shall be made to appear that such decree has been reversed, annulled, vacated, or set aside, or that the same in collateral proceedings has been successfully attacked. No deed shall be admitted in evidence as hereinbefore provided if it shall appear that the execution or validity of said deed has been successfully attacked in any proceedings to which the grantee therein named or those or any of them holding under such grantee has been a party or parties.
14	92.13	Certified copies of records of certified copies	Certified copies of the record of certified copies of deeds, mortgages, powers of attorney and other instruments … shall have the same effect as to notice and all

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			other purposes whatsoever as the record of the original has or can have; and certified copies of the record of such certified copies *shall be admissible and may be used in evidence* in the same manner and with like effect and under the same conditions as certified copies of the record of the original instrument.
15	92.14	United States deeds and patents and copies thereof	Deeds and patents issued by the United States Government and photographic copies made by authority of said government from its records thereof in the General Land Office, embracing lands in this state, and certified copies of the record thereof made in this state *may be used in evidence in the courts of this state* subject to the same rules that are applicable to the admission in evidence of other deeds and certified copies of the record thereof.
16	92.16	Certificates of Board of Trustees of the Internal Improvement Trust Fund respecting the ownership, conveyance of, and other facts in connection with public lands	A certificate of the Board of Trustees of the Internal Improvement Trust Fund under its official seal, with respect to the present or past ownership by the state … certificate shall be admissible in evidence in all of the courts of this state. All such certificates shall, without other or further proof, be admitted ….
17	92.17	Effect of seal of Board of Trustees of the Internal	The impression of the seal of the Board of Trustees of the Internal Improvement Trust Fund upon any deed, agreement or contract, purporting to have been made

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		Improvement Trust Fund	by the Board of Trustees of the Internal Improvement Trust Fund, or by the members of the State Board of Education, *shall entitle the same to be received in evidence* in all courts and in all proceedings in this state.
18	92.18	Certificate of state officer	The certificate of any state officer, under seal of office, as to any official act occurring in the course of the official business of the office in which the state officer presides, *shall be prima facie evidence* of such fact.
19	92.19	Portions of records	In all cases where any certified copy of any record, pleading, document, deed, conveyance, paper or instrument in writing, involving the title to real estate shall be lawfully admissible in evidence in any of the courts of this state, a certified copy of such portions of such instrument as shall contain the essential parts thereof and only such portion of the descriptive matter thereof as shall be involved in the case on trial, *shall likewise be admissible in evidence*; and in no case shall it be necessary to include in such certified copies descriptive matter not involved in the case in which such copy is offered in evidence.
20	92.20	Certificates issued under authority of Congress	Every certificate issued under authority of the Congress and every duly certified copy thereof under the seal of the United States governmental department having the authority to issue such certified copy, relating to the grade, classification, quality or condition of agricultural products *shall be accepted in any court of this state as*

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			prima facie evidence of the true grade, classification, condition or quality of such agricultural product at the time of its inspection.
21	92.21	Certificate as to sanitary condition of buildings	Every owner, agent, or lessee of any building or buildings used for the purpose of providing board and lodgings for the entertainment of guests, containing 10 rooms or more, who shall have obtained and posted a certificate as provided by law, *may present the same as evidence* in the owner's, agent's, or lessee's defense in any suit in any of the courts in this state in which damages are claimed for injuries from alleged unsanitary conditions of said buildings and premises.
22	92.23	Rule of evidence in suits on fire policies for loss or damage to building	In all suits or proceedings brought upon policies of insurance on buildings against loss or damage by fire, hereafter issued or renewed, the insurer *shall not be permitted to deny* that the property insured was worth, at the time of insuring it by the policy, the full sum insured therein on such property.
23	92.25	Records destroyed by fire; use of abstracts	Whenever in the trial of any suit, or in any proceeding in any court of this state, it shall be made to appear that the original of any deed or other instrument of writing, or of any record of any court relating to any land, the title thereof or any interest therein being in controversy in such suit or proceeding, is lost or destroyed, or not within the power of the party to produce the same, and that the record thereof has been heretofore destroyed by fire, and that no certified copy of such record is in

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			the possession or control of such party, it is lawful for such party, and *the court shall receive as evidence*, any abstract of title, or letter-press copy thereof made in the ordinary course of business prior to such loss or destruction; and it is also lawful for any such party to offer, and *the court shall receive as evidence*, any copy, extract or minutes from such destroyed records, or from the original thereof, which were at the date of such destruction in the possession of any person or persons then engaged in the business of making abstracts of titles for others for hire.
24	92.26	Records destroyed by fire; use of sworn copies	A sworn copy of any writing admissible under [Section] 92.25 made by the person or persons having possession of such writing *shall be admissible in evidence*; provided, the party desiring to use such sworn copy, as aforesaid, shall have given the opposite party a reasonable opportunity to verify the correctness of such copy; and provided, that no abstract of title or letter-press copy thereof, extract or minutes or copy made admissible in evidence by this section, shall be so admitted by virtue hereof unless a copy thereof shall have been served on the opposite party, or the opposite party's attorney or counsel, at least 10 days before the same is offered in evidence. Nothing herein shall be construed to prevent the impeachment of such evidence, or its exclusion by the court for good and sufficient cause.
25	92.27	Records	In all cases in which any destroyed

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		destroyed by fire; effect of abstracts in evidence	abstracts, copies, minutes, extracts, maps or plats, or copies thereof, purchased and placed in the clerk's office, as provided by law, or which are made admissible in evidence under any of the provisions of this revision, whether purchased or placed in such office or not, *shall be received in evidence under this law*, all deeds or other instruments of writing appearing thereby to have been executed by any person or persons, or in which they appear to have joined, shall (except as against any person or persons in actual possession of the land or lot described therein at the time of the destruction of the record of such county, claiming title thereto, otherwise than under sale for taxes or special assessments) be presumed to have been executed and acknowledged according to law ….
26	92.28	Records destroyed by fire; land title suits; what may be received in evidence	In all suits or proceedings concerning any land, or any estate, interest or right in, or any lien or encumbrance upon the same, when it shall be made to appear that the original of any deed, conveyance, map, plat or other written or record evidence has been lost or destroyed, or is not in the power, custody or control of the party wishing to use it on the trial to produce same, and the record thereof has been heretofore destroyed by fire, *the court shall receive all such evidence as may have a bearing on the case* to establish the execution or contents of any deed, conveyance, map, plat record, or other written evidence so lost or destroyed;

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			provided, that the testimony of the parties themselves shall be received only in such cases, and subject to all the qualifications in respect to such testimony as now provided by law; and provided further, that any writing in the hands of any person or persons, which may become admissible in evidence under the provisions of this section, or any part of this law, *shall be rejected and not admitted as evidence*, unless the same appear upon the face thereof without erasure, blemish, alteration, interlineation or interpolation in any material part, unless the same shall be explained to the satisfaction of the court, and appear fairly and honestly made in the ordinary course of business.
27	92.29	Photographic or electronic copies	Photographic reproductions or reproductions through electronic recordkeeping systems made by any federal, state, county, or municipal governmental board, department or agency, in the regular course of business, of any original record, document, paper or instrument in writing or in an electronic recordkeeping system, which is, or may be, required or authorized to be made, filed, or recorded with that board, department or agency *shall in all cases and in all courts and places be admitted and received as evidence* with a like force and effect as the original would be, whether the original record, document, paper, or instrument in writing or in an electronic recordkeeping system is in existence or not.

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28	92.295	Copies of voter registration records	Any reproduction of an original voter registration record stored pursuant to [Section 98.461], whether microfilmed or maintained digitally or on electronic, magnetic, or optic media, which reproduction is certified by the supervisor of elections who is the custodian of the record, *is admissible as evidence* in any judicial or administrative proceeding in this state with the same effect as the original voter registration record, whether the original voter registration record exists or not.
29	92.30	Presumption of death; official findings	A written finding of presumed death, made by the Secretary of the Army, the Secretary of the Navy, or other officer or employee of the United States authorized to make such findings … or a duly certified copy of such finding, *shall be received in any court*, office, or other place in this state as evidence of the death of the person therein found to be dead, and the date, circumstances, and place of the person's disappearance. (footnote omitted).
30	92.31	Missing persons and persons imprisoned or interned in foreign countries; official reports	An official written report or record, or duly certified copy thereof, that a person is missing, missing in action, interned in a neutral country, or beleaguered, besieged, or captured by an enemy, or is dead, or is alive, made by any officer or employee of the United States authorized … to make same, *shall be received in any court,* office, or other place in this state as evidence that such person is missing, missing in action, interned in a neutral country, or

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			beleaguered, besieged, or captured by an enemy, or is dead, or is alive, as the case may be.
31	92.32	Official findings and reports; presumption of authority to issue or execute	[A]ny finding, report, or record, or duly certified copy thereof, purporting to have been signed by such an officer or employee of the United States … shall prima facie be deemed to have been signed and issued by such an officer or employee pursuant to law, and the person signing same shall prima facie be deemed to have acted within the scope of the person's authority. If a copy purports to have been certified by a person authorized by law to certify the same, such certified copy shall be prima facie evidence of the person's authority so to certify.
32	92.33	Written statement concerning injury to person or property; furnishing copies; admission as evidence	*No written statement by an injured person shall be admissible in evidence* or otherwise used in any manner in any civil action relating to the subject matter thereof unless it shall be made to appear that a true and complete copy thereof was furnished to the person making such statement at the time of the making thereof, or, if it shall be made to appear that thereafter a person having possession of such statement refused, upon request of the person who made the statement or his or her personal representatives, to furnish him or her a true and complete copy thereof.
33	92.565	Admissibility of confession in sexual abuse cases	(2) In any criminal action in which the defendant is charged with a crime against a victim … involving sexual abuse … or with any attempt, solicitation, or conspiracy to

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			commit any of these crimes, the defendant's memorialized confession or admission *is admissible during trial without the state having to prove a corpus delicti* of the crime if the court finds in a hearing conducted outside the presence of the jury that the state is unable to show the existence of each element of the crime, and having so found, further finds that the defendant's confession or admission is trustworthy.
34	92.60	Foreign records of regularly conducted business activity	(2) In a criminal or civil proceeding in a court of the State of Florida, a foreign record of regularly conducted business activity, or a copy of such record, *shall not be excluded as evidence by the hearsay rule* if a foreign certification attests that: (a) Such record was made at or near the time of the occurrence of the matters set forth by, or from information transmitted by, a person with knowledge of those matters; (b) Such record was kept in the course of a regularly conducted business activity; (c) The business activity made such a record as a regular practice; and (d) If such record is not the original, it is a duplicate of the original; unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness.
35	92.605	Production of certain records	(8) As soon after the arraignment as practicable, or 60 days prior to trial, a

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		by Florida businesses and out-of-state corporations	party intending to offer in evidence under this section an out-of-state record of regularly conducted business activity shall provide written notice of that intention to each other party. A motion opposing admission in evidence of such record shall be made by the opposing party and determined by the court before trial. Failure by a party to file such motion before trial shall constitute a waiver of objection to such record or duplicate, but the court for cause shown may grant relief from the waiver.
36	316.066	Written reports of crashes	(4) Except as specified in this subsection, each crash report made by a person involved in a crash and any statement made by such person to a law enforcement officer for the purpose of completing a crash report required by this section shall be without prejudice to the individual so reporting. Such report or statement may not be used as evidence in any trial, civil or criminal.
37	624.312	Reproductions and certified copies of records as evidence	(1) Photographs or microphotographs in the form of film or prints, or other reproductions from an electronic recordkeeping system, of documents and records made under [Section] 624.311(3) … shall have the same force and effect as the originals thereof and shall be treated as originals for the purpose of their admissibility in evidence. Duly certified or authenticated reproductions of such photographs, microphotographs, or other reproductions from an electronic recordkeeping system *shall be as*

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			admissible in evidence as the originals.
38	624.319	Examination and investigation reports	(2) The examination report so filed is *admissible in evidence in any action or proceeding brought by the department* or office against the person examined, or against its officers, employees, or agents. *In all other proceedings, the admissibility of the examination report is governed by the evidence code*.
39	626.8467	Testimony compelled; immunity from prosecution	(1) If a person asks to be excused from attending or testifying or from producing any books, papers, records, contracts, documents, or other evidence in connection with any examination, hearing, or investigation being conducted … by the department or office or its examiner on the ground that the testimony or evidence required of the person may tend to incriminate him or her or subject him or her to a penalty or forfeiture and notwithstanding is directed to give such testimony or produce such evidence, the person must, if so directed by the Department of Financial Services and the Department of Legal Affairs or by the office and the Department of Legal Affairs, nonetheless comply with such direction, but he or she shall not thereafter be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he or she may have so testified or produced evidence, *and no testimony so given or evidence produced shall be received against the person upon any criminal action, investigation, or*

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			proceeding. [Similar provisions in §§ 624.322(1) and 687.071(6).]
40	627.408	Application as evidence	(1) An application for the issuance of any life or health insurance policy or annuity contract is not admissible in evidence in an action relative to the policy or contract unless a true copy of the application was attached to or otherwise made a part of the policy or contract when issued.
41	627.7074	Alternative procedure for resolution of disputed sinkhole insurance claims	(9) Evidence of an offer to settle a claim during the neutral evaluation process, as well as any relevant conduct or statements made in negotiations concerning the offer to settle a claim, is inadmissible to prove liability or absence of liability for the claim or its value….
42	627.7142	Homeowner Claims Bill of Rights	The failure of an insurer to properly deliver the Homeowner Claims Bill of Rights is subject to administrative enforcement by the office but *is not admissible as evidence in a civil action* against an insurer….
43	628.8015	Own-risk and solvency assessment; corporate governance annual disclosure	(4) Confidentiality.**--**The filings and related documents submitted pursuant to subsections (2) and (3) are privileged such that they may not be produced in response to a subpoena or other discovery directed to the office, and any such filings and related documents, if obtained from the office, *are not admissible in evidence* in any private civil action. …. The office or a person receiving these filings and related documents, while acting under the authority of the office, or with whom such filings and related documents are shared

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			pursuant to [Section] 624.4212, *is not permitted or required to testify in any private civil action* concerning any such filings or related documents.
44	629.401	Insurance exchange	(5) (b) In addition to the insurance laws specified in paragraph (a), the [Office of Insurance Regulation] shall regulate the [insurance] exchange pursuant to the following powers, rights, and duties: * * * * 12. Admissibility of reports.--The report of an examination when filed *shall be admissible in evidence* in any action or proceeding brought by the office against the person or entity examined, or against his or her or its officers, employees, or agents. The office or its examiners may at any time testify and offer other proper evidence as to information secured or matters discovered during the course of an examination, whether or not a written report of the examination has been either made, furnished, or filed in the office.
45	631.1521	Actions by and against the receiver	(2) ….[T]he affirmative defense of fraud in the inducement may be asserted against the receiver in a claim based on a contract ….. Evidence of fraud in the inducement is admissible only if it is contained in the records of the insurer.
46	655.50	Florida Control of Money Laundering and Terrorist Financing in Financial	(11) In any prosecution brought pursuant to this section, *the common law corpus delicti rule does not apply*. The defendant's confession or admission is admissible during trial without the state having to prove the corpus *delicti if the court finds in*

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		Institutions Act	*a hearing conducted outside the presence of the jury that the defendant's confession or admission is trustworthy.* Before the court admits the defendant's confession or admission*, the state must prove by a preponderance of the evidence that there is sufficient corroborating evidence that tends to establish the trustworthiness* of the statement by the defendant. *Hearsay evidence is admissible during the presentation of evidence at the hearing*. In making its determination, the court may consider all relevant corroborating evidence, including the defendant's statements.
47	662.147	Records relating to the office examination; limited restrictions on public access	(3) A copy of any document on file with the office which is certified by the office as being a true copy *may be introduced* in evidence as if it were the original.
48	670.207	Misdescription of beneficiary	(3)(b) …. Proof of notice may be made by any admissible evidence. The originator's bank satisfies the burden of proof if it proves that the originator, before the payment order was accepted, signed a writing stating the information to which the notice relates. [Similar provisions in §670.208(2)(b), Fla. Stat.]
49	672.723	Proof of market price; time and place	(2) If evidence of a price prevailing at the times or places described in this chapter is not readily available the price prevailing within any reasonable time before or after the time described or at any other place which in commercial judgment or under

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			usage of trade would serve as a reasonable substitute for the one described may be used, making any proper allowance for the cost of transporting the goods to or from such other place.
50	672.724	Admissibility of market quotations	Whenever the prevailing price or value of any goods regularly bought and sold in any established commodity market is in issue, reports in official publications or trade journals or in newspapers or periodicals of general circulation published as the reports of such market *shall be admissible in evidence*. The circumstances of the preparation of such a report may be shown to affect its weight but not its admissibility.
51	673.5051	Evidence of dishonor	(1) The following *are admissible as evidence and create a presumption of dishonor* and of any notice of dishonor stated: (a) A document regular in form as provided in subsection (2) which purports to be a protest; (b) A purported stamp or writing of the drawee, payor bank, or presenting bank on or accompanying the instrument stating that acceptance or payment has been refused unless reasons for the refusal are stated and the reasons are not consistent with dishonor; and (c) A book or record of the drawee, payor bank, or collecting bank, kept in the usual course of business, which shows dishonor, even if there is no evidence of who made

	SECTION	TITLE	STATUTE
			the entry.
52	681.108	Dispute-settlement procedures	(1) …. In an action brought by a consumer concerning an alleged nonconformity, the decision that results from a certified procedure is admissible in evidence.
53	681.109	Florida New Motor Vehicle Arbitration Board; dispute eligibility	(7) If the department rejects a dispute, the consumer may file a lawsuit to enforce the remedies provided under this chapter. In any civil action arising under this chapter and relating to a matter considered by the department, any determination made to reject a dispute *is admissible in evidence*. [Similar provisions in §§ 681.1095(9), 681.1097(3)(b), Fla. Stat.]
54	689.19	Variances of names in recorded instruments	(2) Variances between any two instruments affecting the title to the same real property both of which shall have been spread on the record for the period of more than 10 years among the public records of the county in which such real property is situated, with respect to the names of persons named in the respective instruments or in acknowledgments thereto arising from the full Christian name appearing in one and only the initial letter of that Christian name appearing in the other or from a full middle name appearing in one and only the initial letter of that middle name appearing in the other or from the initial letter of a middle name appearing in one and not appearing in the other, irrespective of which one of the two instruments in which any such variance occurred was prior in point of time to the other … shall not destroy or impair the presumption that the person so

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			named in one of said instruments was the same person as the one so named in the other of said instruments which would exist if the names in the two instruments were identical; and, in spite of any such variance, the person so named in one of said instruments shall be presumed to be the same person as the one so named in the other until such time as the contrary appears and, until such time, *either or both of such instruments or the record thereof or certified copy or copies of the record thereof shall be admissible in evidence in the same manner as though the names in the two instruments were identical.*
55	694.08	Certain instruments validated, notwithstanding lack of seals or witnesses, or defect in acknowledgment, etc.	(1) Whenever any power of attorney has been executed and delivered, or any conveyance has been executed and delivered to any grantee by the person owning the land therein described, or conveying the same in an official or representative capacity, and has, for a period of 7 years or more been spread upon the records of the county wherein the land therein described has been or was at the time situated, and one or more subsequent conveyances of said land or parts thereof have been made, executed, delivered and recorded by parties claiming under such instrument or instruments, and such power of attorney or conveyance, or the public record thereof, shows upon its face a clear purpose and intent of the person executing the same to authorize the conveyance of said land or

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			to convey the said land, the same shall be taken and held by all the courts of this state, in the absence of any showing of fraud, adverse possession, or pending litigation, to have authorized the conveyance of, or to have conveyed, the fee simple title, or any interest therein, of the person signing such instruments, or the person in behalf of whom the same was conveyed by a person in an official or representative capacity, to the land therein described as effectively as if there had been no defect in the acknowledgment or the certificate of acknowledgment, if acknowledged, or the relinquishment of dower, and as if there had been no lack of the word "as" preceding the title of the person conveying in an official or representative capacity, of any seal or seals, or of any witness or witnesses, and *shall likewise be taken and held by all the courts of this state to have been duly recorded so as to be admissible in evidence*[.]
56	718.1255	Alternative dispute resolution; voluntary mediation; mandatory nonbinding arbitration; legislative findings	(4) …. If judicial proceedings are initiated, the final decision of the arbitrator *shall be admissible* in evidence in the trial de novo.
57	732.515	Separate writing identifying	A written statement or list referred to in the decedent's will shall dispose of items

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		devises of tangible property	of tangible personal property, other than property used in trade or business, not otherwise specifically disposed of by the will. To be admissible under this section as evidence of the intended disposition, the writing must be signed by the testator and must describe the items and the devisees with reasonable certainty.
58	742.031	Hearings; court orders for support, hospital expenses, and attorney's fee	(1) …. Bills for pregnancy, childbirth, and scientific testing *are admissible as evidence* without requiring third-party foundation testimony, and shall constitute prima facie evidence of amounts incurred for such services or for testing on behalf of the child.
59	742.12	Scientific testing to determine paternity	(4) *Test results are admissible in evidence* and should be weighed along with other evidence of the paternity of the alleged father unless the statistical probability of paternity equals or exceeds 95 percent. A statistical probability of paternity of 95 percent or more *creates a rebuttable presumption*, as defined by [Section] 90.304, that the alleged father is the biological father of the child. If a party fails to rebut the presumption of paternity which arose from the statistical probability of paternity of 95 percent or more, the court may enter a summary judgment of paternity. If the test results show the alleged father cannot be the biological father, the case shall be dismissed with prejudice.
60	760.11	Administrative and civil remedies;	(11) If a complaint is within the jurisdiction of the commission, the commission shall simultaneously with its other statutory

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		construction	obligations attempt to eliminate or correct the alleged discrimination by informal methods of conference, conciliation, and persuasion. Nothing said or done in the course of such informal endeavors may be made public *or used as evidence in a subsequent civil proceeding, trial, or hearing*.
61	772.15	Admissibility of not guilty verdict	A verdict or adjudication of not guilty rendered in favor of the defendant or in favor of any other person whose conduct forms the basis for a claim under this chapter *shall be admissible in evidence*, but shall not act as an estoppel against the plaintiff.
62	766.102	Medical negligence; standards of recovery; expert witness	(3)(b) The existence of a medical injury does not create any inference or presumption of negligence against a health care provider, and the claimant must maintain the burden of proving that an injury was proximately caused by a breach of the prevailing professional standard of care by the health care provider. Any records, policies, or testimony of an insurer's reimbursement policies or reimbursement determination regarding the care provided to the plaintiff *is not admissible as evidence in any medical negligence action*. However, the discovery of the presence of a foreign body, such as a sponge, clamp, forceps, surgical needle, or other paraphernalia commonly used in surgical, examination, or diagnostic procedures, shall be prima facie evidence of negligence on the part of the health care provider.

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			* * * * (5) *A person may not give expert testimony concerning the prevailing professional standard of care unless the person is a health care provider who holds an active and valid license and conducts a complete review of the pertinent medical records and meets the following criteria* [list follows]. (6) A physician licensed under chapter 458 or chapter 459 who qualifies as an expert witness under subsection (5) and who, by reason of active clinical practice or instruction of students, has knowledge of the applicable standard of care for nurses, nurse practitioners, certified registered nurse anesthetists, certified registered nurse midwives, physician assistants, or other medical support staff *may give expert testimony in a medical negligence action with respect to the standard of care of such medical support staff*. (7) Notwithstanding subsection (5), in a medical negligence action against a hospital, a health care facility, or medical facility, *a person may give expert testimony on the appropriate standard of care* as to administrative and other nonclinical issues if the person has substantial knowledge, by virtue of his or her training and experience, concerning the standard of care among hospitals, health care facilities, or medical facilities of the same type as the hospital, health

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			care facility, or medical facility whose acts or omissions are the subject of the testimony and which are located in the same or similar communities at the time of the alleged act giving rise to the cause of action. * * * * (9)(a) In any action for damages involving a claim of negligence against a physician licensed under chapter 458, osteopathic physician licensed under chapter 459, podiatric physician licensed under chapter 461, or chiropractic physician licensed under chapter 460 providing emergency medical services in a hospital emergency department, *the court shall admit expert medical testimony only from physicians, osteopathic physicians, podiatric physicians, and chiropractic physicians who have had substantial professional experience within the preceding 5 years* while assigned to provide emergency medical services in a hospital emergency department. * * * * (11) Any attorney who proffers a person as an expert witness pursuant to this section *must certify that such person has not been found guilty of fraud or perjury* in any jurisdiction. (12) If a physician licensed under chapter 458 or chapter 459 or a dentist licensed under chapter 466 is the party against

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			whom, or on whose behalf, expert testimony about the prevailing professional standard of care is offered, the expert witness must be licensed under chapter 458, chapter 459, or chapter 466 or possess a valid expert witness certificate …. (13) A health care provider's failure to comply with or breach of any federal requirement *is not admissible as evidence in any medical negligence case in this state.*
63	766.207	Voluntary binding arbitration of medical negligence claims	(7)(j) The fact of making or accepting an offer to arbitrate *shall not be admissible* as evidence of liability in any collateral or subsequent proceeding on the claim.
64	768.21	Damages	(6)(c) Evidence of remarriage of the decedent's spouse is admissible.
65	768.72	Pleading in civil actions; claim for punitive damages	(1) In any civil action, no claim for punitive damages shall be permitted unless there is a reasonable showing by evidence in the record or proffered by the claimant which would provide a reasonable basis for recovery of such damages.
66	768.79	Offer of judgment and demand for judgment	(8) Evidence of an offer *is admissible only in proceedings* to enforce an accepted offer or to determine the imposition of sanctions under this section.
67	794.022	Rules of evidence [sexual crimes]	(1) The testimony of the victim need not be corroborated …. (2) Specific instances of prior consensual sexual activity between the victim and any

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			person other than the offender may not be admitted into evidence …. However, such evidence may be admitted if it is first established to the court in a proceeding in camera that such evidence may prove that the defendant was not the source of the semen, pregnancy, injury, or disease; or, when consent by the victim is at issue, such evidence may be admitted if it is first established to the court in a proceeding in camera that such evidence tends to establish a pattern of conduct or behavior on the part of the victim which is so similar to the conduct or behavior in the case that it is relevant to the issue of consent. (3)…. [R]eputation evidence relating to a victim's prior sexual conduct or evidence presented for the purpose of showing that manner of dress of the victim at the time of the offense incited the sexual battery may not be admitted into evidence …. (4) When consent of the victim is a defense …. evidence of the victim's mental incapacity or defect is admissible to prove that the consent was not intelligent, knowing, or voluntary; and the court shall instruct the jury accordingly. (5) An offender's use of a prophylactic device, or a victim's request that an offender use a prophylactic device, is not, by itself, relevant to either the issue of whether or not the offense was committed or the issue of whether or not

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			the victim consented.
68	901.151	Stop and Frisk Law	(6) No evidence seized by a law enforcement officer in any search under this section *shall be admissible* against any person in any court of this state or political subdivision thereof unless the search which disclosed its existence was authorized by and conducted in compliance with the provisions of subsections (2)-(5).
69	907.041	Pretrial detention and release	(4)(h) … *No testimony by the defendant shall be admissible to prove guilt at any other judicial proceeding*, but such testimony may be admitted in an action for perjury, based upon the defendant's statements made at the pretrial detention hearing, or for impeachment.
70	921.241	Felony judgments; fingerprints and social security number required in record	(3) Any such written judgment of guilty of a felony, or a certified copy thereof, *shall be admissible in evidence* in the several courts of this state as prima facie evidence that the fingerprints appearing thereon and certified by the judge as aforesaid are the fingerprints of the defendant against whom such judgment of guilty of a felony was rendered. [Similar provision in § 921.242(2), Fla. Stat.]
71	934.08	Authorization for disclosure and use of intercepted wire, oral, or electronic communications	(3) Any person who has received, by any means authorized by this chapter, or by the laws of any other state or the United States, any information concerning a wire, oral, or electronic communication or evidence derived therefrom, intercepted in accordance with the provisions of this chapter, *may disclose the contents of that*

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			communication or such derivative evidence while giving testimony under oath or affirmation in any criminal proceeding in any court of the state or of the United States; in any grand jury proceedings; …; or in any other proceeding or investigation held under the authority of the State of Florida or any political subdivision thereof, of the United States, or of any other state or political subdivision thereof, if such testimony is otherwise admissible.
72	934.50	Searches and seizure using a drone	(6) Prohibition on use of evidence.--Evidence obtained or collected in violation of this act *is not admissible* as evidence in a criminal prosecution in any court of law in this state.
73	943.0581	Administrative expunction	(6) An application or endorsement under this section *is not admissible as evidence* in any judicial or administrative proceeding and may not be construed in any way as an admission of liability in connection with an arrest.
74	984.06	Oaths, records, and confidential information	(6) A court record of proceedings under this chapter *is not admissible in evidence* in any other civil or criminal proceeding, except that: (a) Records of proceedings under this chapter forming a part of the record on appeal shall be used in the appellate court. (b) Records that are necessary in any case in which a person is being tried upon a charge of having committed perjury are admissible in evidence in that case.
75	985.045	Court records	(4) A court record of proceedings under this chapter is not admissible in evidence

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			in any other civil or criminal proceeding, except that: (a) Orders transferring a child for trial as an adult are admissible in evidence in the court in which he or she is tried, but create no presumption as to the guilt of the child; nor may such orders be read to, or commented upon in the presence of, the jury in any trial. (b) Orders binding an adult over for trial on a criminal charge, made by the committing trial court judge, are admissible in evidence in the court to which the adult is bound over. (c) Records of proceedings under this chapter forming a part of the record on appeal must be used in the appellate court in the manner provided in s. 985.534. (d) Records are admissible in evidence in any case in which a person is being tried upon a charge of having committed perjury, to the extent such records are necessary to prove the charge.