Supreme Court of Florida

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

RICHARD DELISLE,
Petitioner,

v.

CRANE CO. & **R. J. REYNOLDS TOBACCO CO.,**
Respondents.

PETITIONER'S INITIAL BRIEF

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Statement of Case and Facts

Petitioner Delisle sued Respondents Crane and R. J. Reynolds [RJR][1] for exposing him to the asbestos that caused his fatal disease of mesothelioma. When he filed the action in 2013, section 90.702, Florida Statutes (2012), set the standard for the admission of all evidence.[2] Before trial began the Legislature enacted chapter 13-107, section 1 [*Daubert* enactment], purporting to require the judicial branch to apply new federal standards for evidence as adopted in *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993), for the admission of scientific opinion evidence. Over our objections the trial judge accepted the arguments of Respondents and granted their motions to apply the *Daubert* enactment for the admission of scientific opinions at trial instead of the existing text of section 90.702, Florida Statutes (2012). All expert witnesses who testified were qualified and applied recognized and accepted scientific standards in stating their opinions.

Dr. James Dahlgren[3] received a degree in medicine from the University of

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[1] RJR has since succeeded by merger to the obligations of Lorillard Tobacco Company and Hollingsworth & Vose Company, the original entities sued.

[2] § 90.702, Fla. Stat. (2012) ("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").

[3] The District Court is astonishingly mistaken in saying that he "is not a scientist," and his testimony therefore unreliable under *Daubert*, in spite of the fact that he is a board-certified physician licensed to practice medicine in California:

"Although Dr. Dahlgren may be an expert in the field of occupational

California and trained in an array of hospitals in the United States. T14:2141-42. He has specialized in Occupational and Environmental Health and Toxicology since 1977. T14:2145-47.

Dr. Dahlgren testified that plaintiff's exposure to asbestos in Kent Micronite cigarettes and later exposure to asbestos in Cranite gaskets during his employment at Brightwater Paper caused his mesothelioma. He reviewed his medical records and based the specific causation opinion on "decades of experience working in internal medicine, occupational environmental medicine, toxicology and [his] medical training." T14:2054.

He was asked a specific opinion on causation requiring him to assume that: (1) "Mr. Delisle worked hands-on with sheet gaskets that bear the name Cranite between approximately 1962 to 1965"; (2) the gaskets "contained approximately 80 percent chrysotile asbestos"; (3) "Mr. Delisle scraped old Cranite gaskets off of equipment" and inhaled the dust produced; (4) "Mr. Delisle cut new Cranite sheet gaskets," also inhaling the dust produced; and (5) "Mr. Delisle did this work … almost daily during the five-day workweek during that time period." T14:2167-68.

> 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."

Crane Co. v. Delisle, 206 So.3d 94, 104 (Fla. 4th DCA 2016). The District Court has ignored the universal requirement for medical doctors to have extensive course work in the life sciences in order to apply the scientific method in treating patients.

Dr. Dahlgren responded that Petitioner's exposure to Cranite gaskets was a substantial contributing cause of his mesothelioma. T14: 2169-70. He relied on a variety of peer-reviewed studies widely accepted in the relevant scientific community for diagnosing and determining the cause of mesothelioma. T14:2057. He relied on the Bradford Hill study's nine elements in reaching his conclusion on causation. T14:2057. He relied on peer-reviewed studies conducted by Landrigan, Nicholson and Suzuki as well as the Iwatsubo, Randall and Rodelsperger articles. T14:2066, 2069. He relied on guidance issued by the Environmental Protection Agency. T14:2071-72. He considered case and animal studies in forming the opinion that chrysotile asbestos from Crane's products and that, as well, crocidolite asbestos from the filters on Kent Micronite cigarettes substantially contributed to Mr. Delisle's mesothelioma. T14:2167-71 (Cranite gaskets); T14:2164-66 (Kents).

Consistent with section 90.702, Dr. Dahlgren opined that exposures to asbestos above the general background level were substantial contributing factors in the development of mesothelioma. T14:2171. He testified that within a reasonable degree of medical certainty Mr. Delisle's inhalation of crocidolite asbestos fibers from Kent Micronite cigarettes for 4 years and from chrysotile asbestos in Cranite gaskets for 5 years substantially contributed to cause mesothelioma. T14:2166-69, 2170. He gave the following testimony in Respondent Crane's cross-examination:

> Q. Doctor, would you agree that there is a threshold level of asbestos at which there is no increased risk of mesothelioma?

A. *There is a theoretical threshold, somewhere above background. It has not yet been established what that level is*.
Q. Okay. So just to be clear for the record, it's your opinion that there's no defined threshold at which there is [a] known increased risk for developing an asbestos-related disease. Correct?
A. Well, there is a threshold; it just hasn't been established yet.… *Very, very low concentrations resulted in significant increases in risk of mesothelioma, and those* ***papers and many others have suggested that you don't have a level of asbestos below which there is no risk***. And this is precisely what led the EPA to attempt to ban asbestos back in the 1990s.

…

Q. Are you aware, sir, of any peer-reviewed literature that supports the opinion that every exposure to asbestos *above background is a substantial factor* in causing mesothelioma?

…

A. Well, the three that I just mentioned all studied very low-level exposure. … *But, nevertheless, very low-level exposures have been found to cause the disease*.
Q. Okay. Just to be fair, none of those studies actually said that each and every exposure above background contributes to mesothelioma or mesothelioma risk?
A. … You are correct.

…

Q. But as a scientist and as a physician, you can't exclude the possibility that background exposures to asbestos in the environmental air contribute in some way to mesothelioma?
A. What I've said is that *there is not a single study and no one has asserted that*. Obviously as to causation, the term *any exposure* means any exposure ***above the background***. [e.s.]

T14:2068-71. As the District Court itself noted: "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." 206 So.3d at 110.

Along with other witnesses on both sides, Dr. Dahlgren testified that mesothelioma has been recognized and generally accepted by relevant science as a

diagnostic ***marker*** – a reliable indicator to all scientists that one has been exposed to amounts of asbestos enough above the general background level to cause the fatal disease of mesothelioma. T14:2078; 2162-63; T10:1378; T22:3490. In sum, all experts agreed that multiple asbestos exposures above the background level accumulate to cause mesothelioma. T10:1385-86; T22:3459, 3491.

Respondent RJR did not dispute that filters in Kent Micronite cigarettes contained crocidolite asbestos but argued that no established science holds that asbestos gets into the lung when they are smoked. In response, however, Petitioner introduced several RJR documents from as early as 1954 showing that Kent Micronite cigarettes released asbestos fibers when smoked.[4] Indeed, Respondent's corporate representative, Kevin Reinert, discussed a document stating that defendant RJR [Lorillard] had "embarked upon a program attempting to work out a method for the elimination of the presence of such fibers in smoke." T11:1544-45.

Dr. Victor Roggli, Respondent Crane's expert pathologist, testified:

> "Q. And, in this case, you did, in fact, confirm, as your role as a pathologist, that Mr. Delisle is, indeed, suffering from malignant mesothelioma?
>
> A. I did.
>
> …
>
> Q. So you would agree that, if the evidence is that the Cranite sheet gasketting [sic] material contains long-fibered Canadian chrysotile, that it certainly can and does cause mesothelioma?

[4] *See* Plaintiff's Ex. 31, 32, 33, 36, 37, 38, 39, and 51 admitted as evidence. T18:2832-36.

…

A. The answer is, in sufficient doses, it can, yes, sir.

…

Q. Science has not demonstrated any proven cause of mesothelioma in the workplace, other than exposure to all forms of asbestos dust, *which makes it a "signal malignancy" – i.e., an* ***epidemiological marker for exposure to asbestos****. You agree with that*?

A. Yes, sir.

Q. And … a "signal malignancy" is what?

A. In terms of epidemiological studies, it means that the disease is *so often associated with asbestos that … would indicate it is a* ***signal*** *or a* ***marker***.

…

Q: It's also your opinion that each and every exposure to asbestos that an individual with mesothelioma experienced in excess of a background level is a substantial contributing factor in the development of the disease, correct?

A: In terms of what accumulates in the lung, that's correct, sir."

T22:3482-91. He also agreed with Petitioner's experts Dahlgren and Brody that all exposures to asbestos in amounts greater than the background level cause mesothelioma.

Respondents presented Arnold Brody who earned a Ph.D. in cellular biology in 1969 and became an assistant professor at Vermont Medical School. There he met the scientist who first established more than 50 years ago that asbestos is the cause of mesothelioma. T10:1302. Dr. Brody spent his career studying how asbestos affects the lungs to injure its cells and cause the lung diseases of mesothelioma and cancer. He has written 154 peer-reviewed articles and more than 50 chapters in textbooks, most of them about asbestos and disease. T10:1303-04. He is published

in more than 20 biomedical journals and sits on the editorial boards of several where he does peer-review for other scientists publishing on asbestos-related disease. T10:1304-06.

For 15 years after his stay at Vermont Medical School Dr. Brody headed the lung pathology laboratory at the National Institute of Environmental Health Sciences. Since then he has been a full professor in pathology at Tulane University Medical School. T10:1308. In all these years he has studied and kept current with the medical-scientific literature in this field and continues to do scientific research on the causes of asbestosis, mesothelioma and lung cancer. T10:1299-1310. He gave the following testimony about causation of mesothelioma:

> Q. Dr. Brody, is it your opinion that *every single exposure to asbestos* will contribute to the development of someone's mesothelioma or is it every exposure above the background level which will contribute to an individual's mesothelioma?
>
> A. Well, *it's every exposure above background*, because that's measurable. I mean, we all live within a certain amount of asbestos that does not cause disease. That's background.… And we all have some asbestos fibers in our lungs. *It is when that exposure gets above the background that it* ***accumulates*** *sufficiently to cause disease. So my opinion is that all exposures above background contribute*. [e.s.]

T10:1333-35. When asked if the applicable science recognizes a safe level of exposure to asbestos above the background level that will not result in the disease, he responded thus:

> A. That's called a threshold. And that kind of science is developed by epidemiologists, which [it] has already been established I am not. But I know what the epidemiologists say. And ***what they say is that***

> ***there is no level below which we can measure it as being safe***. They are able to draw a line showing a dose-response development of disease but you can't go down to a level that is known to be safe, does not cause disease, *if you're above background*.… We're talking about areas above background.… There is no threshold for safety with asbestos.
>
> Q. So, do you have an opinion, based upon your 35 years of training, experience and education and work as it pertains to asbestos and lung pathology, as to whether or not there is any defined safe level of asbestos exposure below which one could say one will not get mesothelioma?
>
> A. *No, that level is not known.*
>
> Q. And is that a generally accepted scientific principle as it relates to the science and the medicine and the literature on asbestos disease?
>
> A. ***Yes***. [e.s.]

T10:1333-35.

Dr. James Millette is an environmental scientist specializing in particle analysis. He has a Ph.D. in Environmental Engineering and has done microscopic analysis of particle contaminants. T12:1597-1600. He was with the EPA for 11 years and became Chair of its electron microscope facility analyzing asbestos. T12:1598-99. He has over 60 publications, several on asbestos and particulates, most of which are peer-reviewed. T12:1606. His consulting company specializes in unbiased laboratory analyses of different kinds of contaminants, and he is a Fellow of the American Academy of Forensic Scientists. T12:1598, 1600-01, 1609. His lab has international accreditation and has done asbestos analyses for the United States Government: viz., the Army Corps of Engineers, as well as the Consumer Product Safety Commission and the Environmental Protection Agency. T12:1601.

Dr. Millette testified there have been no standardized methods for testing asbestos particles in smoke passing though cigarette filters, nothing recognized in the more than 60 peer-reviewed publications. T12:1776-77. This is so because Kent Micronite cigarettes were the only cigarettes using asbestos filters and Respondent RJR [Lorillard] stopped making them in 1956. T11:1455-56.

In 2010 Dr. Millette acquired packages of original Kent Micronite cigarettes from a client. T12:1612. Because of their age, using professional protocol he inspected them for evidence of decrepitude, but found none. T12:1613-18. He sent them to Arista Labs, an accredited, independent laboratory specializing in testing cigarette smoke for both regulatory agencies and tobacco companies themselves. T12:1730-31, 1620.

Arista was tasked to use its technology to "capture the smoke" from the Kent Micronite cigarettes air filters and then send the collected samples to Dr. Millette for analysis. T12:1621-22. Following international protocols, Arista then used a "two-puff test" and an "eight-puff test." T12:1622, 1627. Upon receiving the air filters from Arista containing the "captured smoke," Dr. Millette used a standard protocol for particles under an electron microscope and examined the filters. T12:1622-23, 1626-27. He testified for the eight-puff test that all four samples yielded crocidolite asbestos fibers in numbers ranging from 38,000 to 10 million. T12:1624. No fibers were released in the two-puff tests.

At the close of the evidence the Jury found in favor of Petitioner. RJR was proportionally liable for exposing Petitioner to toxic amounts of asbestos in the filters of its Kent Micronite cigarettes which substantially contributed to his fatal disease of mesothelioma. Crane was proportionally liable for exposing Petitioner to toxic amounts of asbestos in its Cranite gaskets also substantially contributing to his mesothelioma. The Jury fixed total recoverable damages at $8 million and allocated fault: Crane 16%; RJR 44%; non-party Owens-Corning Fiberglass 20%; non-party Brightwater Paper 20%. T36:5144-45.

Summary of Arguments

Article II section 3, Florida Constitution, divides the powers of Florida government and bars one branch of government from encroaching upon the powers of another. Article V, section 1, Florida Constitution, specifies that the judicial power is vested only in the Supreme Court and lower courts. Article V, section 2(a), Florida Constitution, empowers ["shall"] only the Supreme Court to adopt rules of practice and procedure in all courts and grants the Legislature only the power to repeal such rules by two-thirds votes. The Constitution gives the Legislature no power to adopt rules of practice and procedure or to require the judicial branch to follow them.

This case involves differential diagnosis, a settled scientific method in which an expert eliminates possible causes of a medical condition to arrive at the actual

cause. Differential diagnosis is a form of pure opinion testimony widely accepted in the medical community. Such testimony is based upon clinical experience and does not rely on any study, test, procedure, or methodology constituting new or novel scientific evidence. Instead it is based on an examination of the patient or, as is common in occupational medicine, a review of the patient's work history, an analysis of medical records, and then on differential diagnosis.

There is no basis in the record for the District Court's *obiter dictum* (dropped on the tail of its *Daubert* holding) to the effect that evidence of the capacity of asbestos to cause mesothelioma is admissible only under *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923). *Frye* applies only when the relevant, material scientific evidence is essentially a new or novel discovery.[5] Experts on both sides in this case agree that science settled the instant issue some 40 years ago that asbestos causes mesothelioma and that is not new.

Both Respondents conceded being a source of asbestos to Petitioner. Even their experts said that Petitioner definitely has mesothelioma caused by exposure to the asbestos described here. Nothing in the record suggests that he was ever exposed for any duration to asbestos from some other source.

If allowed to stand as applicable law, the District Court's eccentric analysis as

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[5] *U.S. Sugar Corp. v. Henson*, 823 So.2d 104, 109 (Fla. 2002) (*Frye* applies only when expert renders opinion based on new/novel scientific techniques).

to the admission of all medical evidence of scientific opinion in Florida Courts would compel future trials in all cases to adduce massive amounts of needless academic dissertations and opinions of mystifyingly abstruse scientific arcana. All of no benefit to Jurors, Judges or Parties.

We ask that this Court disapprove the decision below and return the case to the District Court with instructions to reinstate the Final Judgment of the Circuit Court and remand with instructions to the trial Court to remove Owens Corning Fiberglass, a *Fabre* non-party, for lack of evidence that Mr. Delisle was exposed to any Owens Corning Fiberglass asbestos-containing product.

Argument

Preface

Rules of evidence are unique. Rules of evidence control the access to truth for resolving disputes. Rules of evidence serve a special, elemental role in litigation. They are the epistemological structure with which facts may be reliably accepted by finders-of-fact. Rules of evidence control the only basis of knowledge on which a finder-of-fact may decide the case.

Continuity and permanence are basic to our system of laws and its judicial procedures and practices. Routine and necessary use of expert opinion evidence has been long accepted as a critical element in both civil and criminal trials. Reliance on its use is a strong reason against change.

A. *Daubert Invalid On Separation of Powers Grounds*

Article II, section 3, of the Florida Constitution divides the powers of Florida government and forbids one branch of government from encroaching upon the powers of another. Article V, section 1, of the Florida Constitution specifies that the judicial power is vested in only the Supreme Court and lower courts. Article V, section 2(a), Florida Constitution, specifies that the Supreme Court alone "shall adopt" rules of practice and procedure in all courts and that the only role of the Legislature is that it may repeal such rules by a two-thirds vote.[6]

The Legislature has been given no power to adopt rules of practice and procedure or to require the judicial branch to follow them. In spite of the clear allocation and limitation of powers, the Legislature nevertheless proceeded to adopt the *Daubert* enactment.[7] In this instance the Legislature did not merely repeal section 90.702 as it had the power to do. *See* Art. V, § 2(a), Fla. Const.

The *Daubert* enactment rewrote Evidence Code section 90.702 so that its absolute directive was radically altered by the addition of a new required condition, to-wit:

> "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,

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[6] "Rules of court may be repealed by general law enacted by two-thirds vote of the membership of each house of the legislature."

[7] *See Daubert v. Merrell Dow Pharm. Inc*., 509 U.S. 579 (1993).

> 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*." [e.s.]

Laws 2013-107, § 1 eff. July 1, 2013. The highlighted text is the portion added by the Legislature in 2013.

Respondents contended in both Courts below that scientific opinion testimony should be admitted or excluded under *Daubert*. Petitioner opposed its application, arguing that the Florida Evidence Code as it existed when the Legislature enacted *Daubert* is the only basis for admitting and excluding evidence of medical expert opinions as to established science. The Trial Court disagreed and applied the *Daubert* enactment for all scientific opinion evidence. Petitioner dutifully repeated objections to reliance on the *Daubert* enactment for proposed scientific testimony during the trial.

Petitioner specifically argued to the Trial Court that application of the *Daubert* enactment was in open and obvious conflict with the Florida Constitution and its grant of the exclusive authority over rules of practice and procedure within the judicial system to the Supreme Court. Transcript, Pre-Trial Hrg., Aug. 14, 2013; T:103; 124-25. Petitioner further argued that, because this Court had not approved and adopted the *Daubert* enactment, Florida Courts have no conceivable authority to apply the then embryonic change until and unless this Court approved it. On

appeal the District Court rejected Petitioner's argument based solely on the following analysis:

> "Delisle also argues that this court lacks the authority to apply *Daubert* … 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. …
>
> Further, we, and other Florida appellate courts, have applied the statute to the admission of testimony. … 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."[8] [c.o.]

From that conclusion that much of our expert scientific opinion evidence on causation and diagnosis of mesothelioma was not admissible, the District Court reversed the Final Judgment. It directed a verdict outright in favor of Respondent Crane and granted Respondent RJR a new trial on all issues. Application of the *Daubert* enactment and related issues was the basis for the outcome on appeal.

The Constitution clearly settles the concomitant principle that the Legislature may control Florida substantive law but has no power over practice and procedure in the State's judicial branch. Yet by very explicit text, chapter 13-107, section 1, Laws of Florida, seeks to gather to the Legislature itself the power to control all attempts to adduce scientific evidence in judicial proceedings throughout the entire State. In the endeavor, the Legislature did not even pretend to restrict its function

[8] 206 So.3d at 100, n.7.

as merely an element in a particular statutory cause of action. Under the Constitution the Legislature had utterly no power to do what it did.[9]

2. Daubert *Must Not Be Presumed Valid*

As its Opinion shows, the Fourth District obviously thought it was bound to afford the *Daubert* enactment a *conclusive* presumption of statutory validity and to grant immediate enforcement even though this Court had not approved and adopted it. The Fourth District notably erred in presuming this *Daubert* enactment valid for any purpose.

The *Daubert* enactment is that rare example of legislative action that must be seen at once as invalid on its very face. Giving the enactment's words their only possible meaning, it plainly purports to assume control of all judicial proceedings for the admission of all evidence of scientific opinion. From the enactment it was flagrantly nothing more than a bid by the Legislature to assume control of the general practice and procedure for admitting scientific evidence in all proceedings in the judicial branch. It is patently and unavoidably contrary to article V, section

[9] *See Chiles v. Children*, 589 So.2d 260 (Fla. 1991) (Florida constitution prohibits any branch of state government from encroaching upon powers of another and prohibits any branch from delegating constitutionally assigned power to another branch); *Haven Fed. Sav. & Loan Ass'n.*, 579 So.2d 730 (Fla. 1991) (where Supreme Court adopts rules relating to practice and procedure of all courts and statute provides contrary practice/procedure statute is invalid for conflict).

2(a) of the Florida Constitution.[10]

The District Court significantly erred in relying on the presumption. The proper use of a presumption of statutory validity is to begin review of statutes of purely substantive law that present no issue of legislative authority. By the clear text of the Constitution and its settled meaning, no Florida lawyer could possibly construe a legislative act requiring a procedural rule for the court system to be anything but a prohibited raid into judicial territory to restrict judicial power and assert legislative control over practice and procedure in the judicial branch. It manifestly lacked color of authority. Allowing a presumption of statutory validity has the effect of making separation of powers subject to temporary legislative abuse incapable of being immediately remedied.

To be sure, this *initial* presumption (not conclusive) is suitable for review of most Legislative enactments plainly involving only substantive law. Even then the conventional use is only as a starting point for judicial review, not a substitute for analysis. Such a presumption is hardly fitting for review and approval of an enactment dealing solely with practice and procedure in the Judicial Branch. The

[10] *See Southeast Floating Docks Inc. v. Auto-Owners Ins. Co.*, 82 So.3d 73 (Fla. 2012) (Constitution gives Supreme Court sole authority over rules of judicial practice and procedure in State courts; Legislature's authority is limited to substantive law). *See also City of Jacksonville v. Bowden*, 64 So. 769, 772 (Fla. 1914) (courts may decline to enforce statute that is facially clear and unmistakable violation of Constitution); *Fla. Jai Alai Inc. v. Lake Howell Water & Reclam. Dist.*, 274 So. 2d 522, 524 (Fla. 1973) (facially invalid act not presumed valid).

Fourth District made what might usually be just a starting place the end of review.

Nor is it possible to view the *Daubert* enactment as creating some new substantive element for distinctive evidence allowable only in a specific statutory action over which the Legislature has plenary authority. The *Daubert* enactment's few words blatantly regulate the very process and procedure Judges must follow to admit or exclude all scientific opinion evidence in all cases. It lacks any pretense of being substantive and is about as procedural as things can get in statutes.

The lower Courts in Florida have no authority to ignore the clear constitutional division of powers and presume this kind of enactment to be immediately effective before this Court has even considered it. Allowing the courts to do so is, in effect, a judicial capitulation to intermittent nullification of the judicial power granted under article V, section 2(a).

As it happens, this Court has since released *In re Amendments to the Florida Evidence Code*, 210 So.3d 1231 (Fla. 2017), in which it refused to adopt the *Daubert* Amendment "to the extent that it is procedural, due to the constitutional concerns raised, which must be left for a proper case or controversy." But in the four years since enactment, most courts have presumed the enactment valid and misapplied it in many pending cases that are now final for all purposes.

Yet the mischief resulting from the lower Courts presuming *Daubert* valid and upholding its application will continue despite this Court's refusal to adopt and

apply it. Because the process of the Florida Bar in making recommendations on proposed rules of judicial procedure is unavoidably lengthy and cumbersome, the mechanism for approving and adopting a legislative procedural act for the judicial system can stretch over years. Here it is now four years since the *Daubert* enactment and many cases are now, thus, beyond any possible corrective relief.

In short, treating such enactments as presumed valid during that process creates irremediable decisional unfairness. The precipitous application of an unauthorized, invalid enactment is capable of repetition yet evading corrective review. For that reason and consistent with separated governmental powers this Court should now make clear that future legislative enactments of procedural rules for the Court system may not be presumed during the interim to be valid and applicable until they are considered, approved and adopted by this Court.

3. *Daubert Means Defer To Trial Judge on Evidence*

Even if *Daubert* did somehow control this case, the Fourth District has utterly ignored the Supreme Court's *Daubert* holding that Trial Judges be given considerable discretion in admitting or excluding evidence and that those rulings will not be reversed on review unless the ruling is manifestly erroneous.

Daubert itself grants Trial Judges very broad latitude to determine whether to admit or exclude scientific opinion testimony based on specific factors as to whether an expert's scientific opinion is reliable in that particular case. *Daubert*

stressed a focus on principles and methodology, not on the conclusions that they generate. 509 U.S. at 594-5. "Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence." 509 U.S. at 596; *see also Quiet Tech. DC-8 Inc. v. Hurel-Dubois UK Ltd.*, 326 F.3d 1333, 1342 (11th Cir. 2003).

In *General Electric Co. v. Joiner*, 522 U.S. 136, 139 (1997), the Court granted review to determine the standard to be applied by reviewing courts to a Trial Court's decision admitting or excluding expert testimony under *Daubert*. *Joiner* applied a "manifest error" standard for appellate review under *Daubert* to hold that it must give a decision to exclude expert testimony "that special deference that is the hallmark of abuse-of-discretion review." 522 U.S. at 141-43. It reversed the Court of Appeals decision because the Trial Court did not abuse discretion in excluding a scientific opinion that was connected to existing data only by the dogmatic intrinsic opinion (his *ipse dixit*) of the expert. *See also Heller v. Shaw Industries Inc.*, 167 F.3d 146, 152 (3d Cir. 1999) (*Daubert* factors are simply useful signposts not dispositive hurdles that must overcome).

The Fourth District erred in failing to give any deference to the Trial Court's decisions on the scientific testimony. It engaged in "overly stringent review" in reversing as a matter of law, which *Daubert* and *Joiner* expressly forbid. The

Fourth District would unreasonably require all such expert opinion testimony to discuss and explain each step in the scientific method, from the germ of the idea, to testing, to publication, to peer-review, to replication, to acceptance and finally to application. Neither *Daubert* nor *Joiner* require, permit or encourage such unnecessary detail to insure the reliability of the opinion expressed to the Jury.

So, if despite our showing of error in review by the Fourth District, this Court should nevertheless decide that the *Daubert* enactment controls this evidentiary issue, then this Court must also engage in that great deference that *Daubert*/*Joiner* require for review of Trial Courts' evidentiary decisions. When reviewed under the correct standard, the Trial Court's decisions on the admission of scientific evidence can be only affirmed.

B. *Marsh* – Not *Frye* – For Opinion Evidence

When more than 40 years ago this Court necessarily considered what elements are necessary to allow opinion testimony, it implicitly rejected the approach of the *Daubert* enactment. The sole basis under Evidence Rule 90.702 for admitting settled scientific opinion is that it is important to "assist the trier of fact in understanding the evidence and determining a fact in issue" in the case. No other basis is needed to invoke the use of expert opinion.

Evidence Rule 90.702 has always provided that a witness qualified as an expert by knowledge, skill, experience, training, or education may testify about technical

or specialized subjects "in the form of an opinion or otherwise" *to assist the Jury's understanding of the medical issues.* The testimony of opinion about medical conditions such as disease and their cause is admissible as "pure opinion testimony." *Id.*

In *Marsh v. Valyou*, 977 So.2d 543 (Fla. 2007), this Court relied on Evidence Rule 90.702 to hold that an expert opinion diagnosing a disease (fibromyalgia) and its cause (trauma) was admissible as *pure opinion* without any of the added elements imposed by the District Court under the *Daubert* enactment. *Marsh* recognized that medical experts routinely form medical causation opinions based on symptoms presented by patients as they are understood from the perspective of their professional experience and training. This Court described this method as *differential diagnosis* and held it the "generally accepted method for determining specific causation." 977 So.2d at 549.

Thus did this Court make clear that diseases such as fibromyalgia and its related cause, trauma, are appropriate for the use of pure opinion testimony under the method called differential diagnosis. Based on that holding there is now no possible reason why the medical condition or disease of mesothelioma and its cause by asbestos is not the very equal of the kind of "technical or specialized subject" the drafters had in mind for this pure opinion testimony.

This Court adopted *Frye* only for those cases where the pivotal evidence of

science is new and novel. But *Frye* has no application or relevance in applying the rule of decision here, which involves medical differential diagnosis, the established basis for pure opinion testimony. As this Court explained in *Stokes v. State*, 548 So.2d 188 (Fla. 1989), *Frye* is applicable only for new and novel evidence even though the *Frye* standard is not stated in the Evidence Code.

In truth, courts in *Frye* jurisdictions have expressly rejected the argument that attributing mesothelioma to asbestos exposure involves new or novel science that requires a *Frye* hearing. For one, the New York Appellate Division in Manhattan held:

> "Defendants-appellants' claim that a *Frye* hearing should have been held is without merit. The link between asbestos and disease is well documented, and the parties merely differed as to whether the asbestos contained in this particular product could be released in respirable form so as to cause the disease. Since the parties argued over causation, no novel scientific technique or application of science was at issue, and a *Frye* hearing was not warranted."

Wiegmann v. AC&S Inc., 24 A.D.3d 375, 375-76 (N.Y. App. Div. 1st Dep't 2005); *see Myers v. Celotex Corp*., 594 A.2d 1248, 1256 (Md. 1991) (holding expert's opinion was not subject to *Frye* analysis because "[t]hat exposure to asbestos may cause cancer, however, is not a novel or controversial assertion"). In an early landmark opinion involving asbestos, the Fifth Circuit noted more than 40 years ago that "mesothelioma is a form of lung cancer caused by exposure to asbestos." *Borel v. Fibreboard Paper Prods. Corp*., 493 F.2d 1076, 1083 (5th Cir. 1973).

Courts also recognize the scientific consensus that mesothelioma is caused by accumulating "low-dose" exposures. In determining the proximate causation in asbestos cases, courts have long held that "the frequency and regularity prongs become less cumbersome when dealing with cases involving diseases like mesothelioma [that] develop after only minor exposure to asbestos fibers." *Tragarz v. Keene Corp.*, 980 F.2d 411, 420 (7th Cir. 1992). The Texas Supreme Court made this same observation, citing a treatise on scientific evidence:

> "Asbestosis appears to be dose-related, 'so that the more one is exposed, the more likely the disease is to occur, and the higher the exposure the more severe the disease is likely to be.' *See* 3 David L. Faigman, et al., *Modern Scientific Evidence: The Law and Science of Expert Testimony*, § 28:22, at 447 (2007); *cf. id.* § 28:5, at 416 (noting that 'it is generally accepted that one may develop mesothelioma from low levels of asbestos exposure')."

Borg-Warner Corp. v. Flores, 232 S.W.3d 765, 771 (Tex. 2007).

Consistent with these holdings Federal agencies recognize the lack of any "safe" level of exposure to asbestos and the corresponding dangers of low-level exposures. OSHA announces that, even at its current permissible exposure limit of 0.1 asbestos fibers per cubic centimeter, it nevertheless expects to see an increase of 6.9 cases of mesothelioma per 100,000 persons exposed in a single year. 51 Fed. Reg. 22612, 22644 (June 20, 1986); *see also id.* at 22620 ("OSHA concludes that well-conducted studies demonstrate a substantially increased rate of lung cancer and mesothelioma mortality among workers having low cumulative exposures to

asbestos."). OSHA explains that the only reason it has not set the permissible exposure limit any lower is because "lower levels of asbestos cannot be reliably measured under workplace conditions." OSHA's website recently said:

> "There is no 'safe' level of asbestos exposure for any type of asbestos fiber. Asbestos exposures as short in duration as a few days have caused mesothelioma in humans. Every occupational exposure to asbestos can cause injury of disease; every occupational exposure to asbestos contributes to the risk of getting an asbestos related disease."[11]

Obviously there is no new or novel science as to the cause of mesothelioma. Here the science was established for decades, and therefore *Frye* has absolutely no application to discerning either the disease or its cause.

Based on the evidence as shown in the Statement of Facts above, it is massively irrelevant and immaterial that some experts disagree on the purely academic issue about the size of the smallest dose of asbestos above the background level that may possibly infect some victim. It is irrelevant and immaterial because the size of any single dose is utterly academic and irrelevant to the actual dispute in this case. Mr. Delisle experienced repeated and sustained exposures to asbestos by smoking Kent Micronite cigarettes from 1953 to 1956 and by working daily with Cranite gaskets from 1962 to 1965. T14:2164-67.

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[11] U.S. Dept. of Labor, Occupational Safety & Health Admin., *Safety and Health Topics*, *https://www.osha.gov/SLTC/asbestos* (accessed July 14, 2017) (citations omitted).

Whatever the size of any single dose of asbestos may have been, no one refutes that Mr. Delisle suffers from the disease of mesothelioma. All experts agreed that he surely became so infected from an *accumulation* of above background exposures. The repeated exposures amass until mesothelioma results. Because the disease exists as a result of amassed exposures, the size of any single exposure is insignificant and thus irrelevant and immaterial in this legal action. No party contested that he now suffers from mesothelioma.

And so the size of the smallest single dose of asbestos that participated in causing mesothelioma may be a subject of debate among science experts, but that does not make it relevantly new or novel and subject to *Frye*. Any Judicial interest in the size of the smallest infecting dose is akin to asking how many angels dance on the head of a pin. Because it will turn out to have been only one of multiple exposures not separately identifiable that accrued to cause the disease, its incidence is not relevant to any legal issue in this action.

The Fourth District's decision on the fitness of scientific opinion evidence about causation of mesothelioma erroneously focuses unduly on evidence of scientific opinion dealing with new discovery. Indeed the entire *Daubert* decision itself seems to focus on new or novel science rather than long existing scientific consensus. But there is clearly no new discovery involved in Petitioner's mesothelioma and its causation. The issue of his illness involves medical doctors

routinely forming a diagnosis based on experience and training, and therefore neither *Daubert* nor *Frye* is applicable.

If this Court allows the Fourth District's decision on *Daubert* to prevail, the burden placed on lawyers in proving scientific opinions will be hugely unjustified. It will lengthen and complicate trials immeasurably. Jurors too will be forced to understand every odd aspect of the scientific subject, whether really germane or not. Most evidence then routinely required will be like academic dissertations of arcane pedantic science unusable to understanding real legal issues. Jury selection will turn into searches for jurors with appropriate Ph.D. degrees.

C. Damages Not Excessive

Petitioner's next issue is based on the Fourth District's original justification for a remittitur, that the $8 million verdict "was substantially higher than any previous award for a victim of mesothelioma or asbestosis," which turned out to be not true. *See Crane Co. v. Delisle*, 41 Fla. L. Weekly D 2133 (Fla. 4th DCA Sept. 14, 2016). The District Court later amended its Opinion and removed that statement but left the remittitur in its decision without further explanation. 206 So.3d at 94.

In *Allred v. Chittenden Pool Supply Inc*., 298 So.2d 361, 365 (Fla. 1974), this Court established that appellate courts must accord "great effect" to a Jury's award of damages. In *Aubin v. Union Carbide Corp*., 177 So.3d 489 (Fla. 2015), a Jury returned a verdict awarding $14,191,000 in products liability damages involving

the same disease, *mesothelioma*. But that $14+ million verdict did not raise even eyebrow or argument in this Court and nothing in *Aubin* refers to the personal aspects of the suffering to justify the amount.

The facts in this case have powerful equivalents to the factors that the Fourth District applied in *Philip Morris USA Inc. v. Naugle*, 103 So.3d 944 (Fla. 4th DCA 2012). The evidence shows that he had part of his right lung removed with part of his rib in the surgery; that he had lymph nodes removed and has thoracentesis; that he repeatedly has liters of fluid removed from his lungs. T30:4803. But unlike *Naugle*, Mr. Delisle's condition is fatal. There is no cure. There is no hope.

At the time of trial he had perhaps 1½ to 2 years left. Which contrasts with the 11+ years he might have had without mesothelioma. T30:4806. He has been robbed of his joys as a grandfather with his grandchildren, for he can no longer even just play with them in the pool. T19:2942-43. He can no longer help and tend to his learning-disabled granddaughter, as her "Pepe" once could do.

He faces a cruel certainty. His disease will keep growing and spreading until it destroys his lungs completely. He will slowly choke to death by a long, growing unbearable asphyxiation. From month-to-month, then day-to-day, then hour-to-hour and, in his last minutes, he will find himself desperately unable to breathe. Then, "one by one his stars will all go out" and he will simply be unable to take one more breath. That is the awful suffering he now bears in this long, intense loss

of any capacity to share in the joys of life. T30:4810. If this Record does not support the Jury's decision on damages, it is hard to see how any verdict quantifying such suffering could stand.

We ask that the Trial Court's denial of remittitur be upheld on this review based on comparison of like awards for like diseases. If *Aubin*'s $14+ million for the same disease failed to evoke even a whisper about excessiveness by this Court, on what legal basis could $8 million for the identical disease be excessive as a matter of law in the Fourth District?

The decisions in comparable cases are a reliable basis on whether the Jury award is legally outside a reasonable range of damages. *Philip Morris USA Inc. v. Kayton*, 104 So.3d 1145 (Fla. 4th DCA 2012), from the same Court, involved compensatory damages equal to the amount here, $8 million, in a tobacco case involving another lung infection, chronic obstructive pulmonary disease. There, even though closing argument labeled Philip Morris as the "most notorious liar in the history of American civilization," the District Court decided that the amount of damages should not be disturbed because of passion and prejudice. Other amounts in comparable cases have been recognized as within the range of reason and do not exceed the range in which a jury could legally operate. *Kayton*, 104 So.3d at 1150; *Owens Corning Fiberglas Corp. v. McKenna*, 726 So.2d 361 (Fla. 3d DCA 1999) (where lung disease was caused by asbestos, denial of remittitur of $5 million

verdict was upheld based on loss of physical well-being and right to be free from physical and mental pain and loss of enjoyment of remainder of life were utterly devastating).

In *R. J. Reynolds Tobacco Co. v. Townsend*, 90 So.3d 307 (Fla. 1st DCA 2012), the Court faced an identical argument of excessiveness where the damage award of nearly $11 million for a surviving spouse of the decedent who died from lung cancer. The Court rejected the argument that the amount was excessive, and explained:

> "Although the $10.8 million compensatory damage award in this case is higher than the non-economic damage awards affirmed by this Court in the other *Engle* progeny cases that we have reviewed to date, we cannot say that the award obviously exceeds the 'reasonable range within which the jury may properly operate. The highest post-*Engle* compensatory damages awards that have passed appellate muster thus far are the $7.8 million award in *Liggett Group* [*LLC v. Campbell*, 60 So.3d 1078 (Fla. 1st DCA), *rev. den*., 67 So.3d 1050 (Fla. 2011]and the $5 million award in [*R.J. Reynolds Tobacco Co. v. Martin*, 53 So.3d 1060, 1066 (Fla. 1st DCA 2010), *rev. den*., 67 So.3d 1050 (Fla. 2011)]. We are persuaded from our review of the record that a proper evidentiary basis existed to justify the award and that, despite its size, it was not based merely on passion or prejudice."

90 So.3d at 311-12.

In *Adams v. Saavedra*, 65 So.3d 1185, 1189 (Fla. 4th DCA 2011), that Court held: "The verdict should not be disturbed 'unless the record affirmatively shows the impropriety of the verdict or there is an independent determination by the trial judge that the jury was influenced by considerations outside the record.'"

RJR did not concede any damages, arguing that plaintiff should recover nothing. T32:4986. Crane argued for a limit of $1 million. T32:5059. Petitioner suggested a range of amounts and even described one methodology for fixing an amount. Counsel pointed out that plaintiff's life expectancy has been shortened by 11 years. He suggested that the Jury *might* use that number of days to multiply some periodic amount of accruing damages it found reasonable but stressed that any amount should be "fair and just in terms of the evidence you hear. T30:4810.

The Trial Court denied Respondents' post-trial motions that the damages are excessive. Their argument here is the same they made then: some verdicts in other cases should be read to establish de facto ceilings on the amount a Jury may award for non-economic damages in personal injury cases. But their theory of ceilings conflicts with both statutory and decisional law of Florida.

Section 768.74, Florida Statutes (2013), itself makes abundantly clear there is no statutory limit on damages and that excessiveness turns on evidence before the Jury and other factors in the trial. Indeed by limiting review to internal factors, the Legislature has rejected the use of ceilings based on awards in other cases.

The only statutory standard is that the amount should be, as Petitioner argued to the jury, fair and just in the light of the evidence. Respondents explicitly asked the Trial Judge to consider the things listed in section 768.74. In doing so the Judge found nothing in this case to taint the Verdict. In short the very Judge who

presided over the entire trial concluded that there is no basis under the statute to find damages excessive.

"The fact that a damage award is large does not in itself render it excessive nor does it indicate that the jury was motivated by improper consideration in arriving at the award." *Allred*, 298 So.2d at 365. "Not every verdict which raises a judicial eyebrow should shock the judicial conscience." *Laskey v. Smith*, 239 So.2d 13, 14 (Fla. 1970). A verdict should not be declared excessive just "because it is above the amount which the court itself considers the jury should have allowed." *Bould v. Touchette*, 349 So.2d 1181, 1184 (Fla. 1977). The verdict should be disturbed only when "it is so inordinately large as obviously to exceed the maximum limit of a reasonable range within which the jury may properly operate." *Id*. at 1184–85. Review for excessiveness of the amount in verdicts should depend on the nature and extent of injury and its consequences and not on the judicial blood-pressure.

In *Bould* this Court distilled these principles for review verdicts for excessiveness:

> "'There is an element of speculation in most personal injury verdicts, but this is a matter for jury discretion. The court may review their discretion but not the amount awarded unless shown to be clearly arbitrary.' 'The determination of the amount of such damages is peculiarly within the province of the jury.'
> … "we cannot apply fixed rules to a given set of facts and say that a verdict is for more than would be allowable under a correct computation. In tort cases damages are to be measured by the jury's discretion. The court should never declare a verdict excessive merely because it is above the amount which the court itself considers the

jury should have allowed." [e.s., c.o.]

349 So.2d at 1184-85. *Bould* permits verdicts to be set aside only when it exceeds the highest limit of the reasonable range in which a jury may properly operate.

Based on the holdings in the above decisions, the Trial Court's refusal to reduce the award simply cannot be faulted. In *Warner v. Ware*, 182 So. 605, 610 (Fla. 1938), the Court held:

> "When the law furnishes no legal rule of measurement save the discretion of the jury on the evidence before them, courts will not disturb the verdict upon the ground of excessive damages, unless it be so flagrantly improper as to evince passion, prejudice, partiality or corruption of the jury." [e.s.]

In *Winner v. Sharp*, 43 So.2d 634, 636 (Fla. 1950), the Court made clear that damages for pain and suffering may be speculative and difficult to determine, "but no one's estimate is better than a jury's." In *Lassitter v. Int'l Union of Operating Engineers*, 349 So.2d 622 (Fla. 1977), this Court held:

> "Two factors unite to favor a very restricted review of an order denying a motion for new trial on ground of excessive verdict. The first of these is the deference due the trial judge, who has had the opportunity to observe the witnesses and to consider the evidence in the context of a living trial rather than upon a cold record. The second factor is the deference properly given to the jury's determination of such matters of fact as the weight of the evidence and the quantum of damages.

349 So.2d at 627.

These general principles are consistent with the legislative policy expressed in section 768.74, Florida Statutes (2009). The statute recognizes that reasonable

decisions by the jury are a fundamental precept of American jurisprudence and that such actions should be disturbed or modified with caution and discretion. § 768.74(6), Fla. Stat. But the statute also requires courts to give "close scrutiny" to damage awards and lists several criteria for the court to consider in determining whether an award "exceeds a reasonable range of damages." § 768.74(5).

The Trial Judge was in the Courtroom with the Jury and heard all the evidence. His refusal to disturb the Jury's assessment of damages should be powerfully telling on whether discretion has been abused. Also jurors know the nature of pain and suffering, appreciate the uses of money. They know that applying these things to decide balanced compensation demands their best human judgment, so their conscience is the reliable measure. After long reflection on excessiveness, the Trial Judge could not find the amount of damages too much.

When review of a decision is confined to only whether there has been an abuse of discretion, this Court often recurs to this insight:

> "If reasonable men could differ as to the propriety of the action taken by the trial court, then the action is not unreasonable and there can be no finding of an abuse of discretion. The discretionary ruling of the trial judge should be disturbed only when his decision fails to satisfy this test of reasonableness."

Canakaris v. Canakaris, 382 So.2d 1197, 1203 (Fla. 1980).[12] We ask the same.

[12] Comparisons of the amount alone to decide adequacy and excessiveness is unreliable "because no injury is exactly like another, and different individuals may

D. *Fabre* And Fault Issue For Non-Parties

If this Court reverses the Fourth District decision, another error of decision must be corrected on remand. At the close of all the evidence Petitioner moved for a directed verdict on the issue whether one non-party, Owens Corning Fiberglass [OCF], could be placed on the Verdict form as a *Fabre* defendant. T29:4481-4522. The Trial Court decided that the evidence was sufficient for OCF to be included. The Verdict apportioned 20% of liability to OCF, thus reducing the amounts of the Judgment that the parties defendant found liable would have to pay.

Petitioner timely moved post-trial for judgment in accord with his prior motion for directed verdict. We argued that the evidence was lacking for apportionment of any fault to OCF. Again the Trial Court ruled there was enough evidence to do so. This significantly reduced the amount of the respective shares of damages that Petitioner may recover from Respondents Crane and RJR.

Section 768.81(3)(a)2, Florida Statutes (2011), provides that:

> "In order to allocate any or all fault to a nonparty and include the named or unnamed nonparty on the verdict form for purposes of apportioning damages, a *defendant must prove* at trial, by a preponderance of the evidence, *the fault of the nonparty in causing the*

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be adversely affected to a greater or lesser degree by similar injuries." *Aills v. Boemi*, 41 So.3d 1022, 1028 (Fla. 2d DCA 2010). In *Citrus County v. McQuillen*, 840 So.2d 343, 347-48 (Fla. 5th DCA 1990), the Court rhetorically asked: "who can place a dollar value on a human life, measured by the loss and grief of a loved one? That difficult decision is generally one for the jury or fact finder, not the appellate court."

plaintiff's injuries." [e.s.]

The statute defines joint tortfeasors as those whose acts, independent of each other, unite in causing a single injury. *Grobman v. Posey*, 863 So.2d 1230, 1235 (Fla. 4th DCA 2003) ("Central to the concept of joint and several liability covered by section 768.81 is the idea that a potential defendant caused or contributed to a plaintiff's injury, that a defendant's negligence 'concurred' with that of another defendant to produce an injury"). [e.s.] *Fabre* describes the term fault to mean:

> "The 'fault' which gives rise to the accident is the 'whole' from which the fact-finder determines the party-defendant's percentage of liability. Clearly, the only means of determining a party's percentage of fault is to compare that party's percentage to all of the other entities who contributed to the accident, regardless of whether they have been or could have been joined as defendants."

Fabre v. Marin, 623 So.2d 1182, 1185 (Fla. 1993).

It is well settled in Florida that proof of fault in an action based on negligence requires evidence that a defendant breached a duty of care proximately causing damages to the plaintiff. To be on a Verdict as a *Fabre* defendant necessarily requires evidence at trial addressing all elements of that fault as to each *Fabre* defendant. A party seeking to place a *Fabre* defendant on the Verdict must have presented evidence of that party's fault, just as plaintiff must do to prove the fault of each named defendant.

OCF supplies insulation, some with asbestos, but some without any asbestos. T26:3989. OCF's asbestos insulation came in the form of blocks, not in sheeting.

It was used primarily in the boiler room where Petitioner did not regularly work and passed through from time to time. T26:3989-90. One employee testified that he saw sheeting material in the boiler room. T26:3918.

Dr. Rasmuson was called to give an opinion as to whether plaintiff could have been exposed to asbestos at Brightwater Paper. He testified that OCF made insulation only in blocks, so he assumed that the insulation seen in the boiler room must have been blocks not sheets. T26:3933-34. Then later on cross-examination Dr. Rasmuson conceded that, in fairness, the co-worker *had* in fact said sheets, not block. T26:3987-88.

Hence Dr. Rasmuson himself acknowledged that his testimony about Petitioner having been exposed to OCF asbestos insulation in the boiler room was based on an erroneous assumption of fact not supported by the record. Thus his testimony does not properly show that Petitioner was ever exposed to OCF asbestos-containing fiberglass at any time and thus OCF could not have caused him injury. His recanted testimony is the only evidence purporting to show that Petitioner had been exposed to OCF asbestos.

W. R. Grace & Company-Conn. v. Dougherty, 636 So.2d 746 (Fla. 2nd DCA 1994), holds that the only way to determine fault in a trial is from the evidence presented to the jury. The Court explained that the party asking for the *Fabre* defendant on the verdict in an asbestos case must:

> "produce evidence establishing the specifics of different products, how often the products were used on the job sites, and the toxicity of those products as they were used. … Without that evidence, [defendant has] not satisfied the foundation necessary for a jury to receive jury instructions and a verdict form to decide the case pursuant to section 768.81, Florida Statutes (1991) and *Fabre*."

636 So.2d at 748. Respondents have not met this standard to satisfy their burden for placing OCF on the verdict as a non-party.

In *Lagueux v. Union Carbide Corp.*, 861 So.2d 87 (Fla. 4th DCA 2003), the Fourth District adopted and followed *Dougherty*. *Lagueux* is especially relevant because it too involves apportionment of fault among several suppliers of asbestos. In reversing the apportionment to Union Carbide, the *Lagueux* Court held that the Jury could not possibly have apportioned fault among several defendants and non-parties (Union Carbide, Johns-Manville, Phillip Carey and Georgia-Pacific) without guessing.

Which is exactly what the Jury had to do here. As in *Lagueux*, there is not a shred of evidence as to intervals and usage amount of any asbestos attributable to OCF affecting Mr. Delisle in the workplace. There is not a particle of evidence about specific OCF products, about how often and where they were used on the job sites, and the toxicity of such products as used.

No one testified that OCF supplied specific products with any known amount of asbestos to which plaintiff was actually exposed. No one testified as to specific types of asbestos in any OCF product to which he was actually exposed. In sum

there is no evidence of OCF fault as *Lagueux* requires.

Respondents rely on testimony that Petitioner's occasional presence in the boiler room "*could* [sic] have increased his risk of mesothelioma." T26:3990. One expert did opine that "there is a distinct *possibility* within a reasonable degree of scientific probability" that his exposure to these products "played some role in increasing his risk of mesothelioma." [e.s.] T26:3992-93. Those qualifiers *could* and *possibility* show the legal insufficiency of the opinion. The exposure must have been a substantial contributing cause within a reasonable degree of probability, not merely *possible*. *Gooding v. Univ. Hosp. Bldg. Inc.*, 445 So.2d 1015 (Fla. 1984) (party must prove negligence is "more likely than not" the cause of injury; mere possibility is not enough).

Possible is not probable. Probably *possible* is not *possibly* probable. *Possible* is an unrealized hope, yet to be likely. Respondents cannot apportion fault to another party on the basis that the party *possibly* injured Petitioner. Indeed all the testimony in the world by all the world's greatest scientists swearing within utter certainty that there is a *possibility* that he was exposed to asbestos is still at bottom just that – mere possibility. And anything is possible.

Under principled legal analysis, proof of fault by OCF is little more than a shell game. If Petitioner had offered the same "evidence" against Respondents in his case-in-chief they would have screamed "directed verdict." And be right.

Respondents' evidence does not show any fault of nonparty OCF in causing the Petitioner's injuries. They did not meet the requirements of the statute and *Lagueux*. 861 So.2d at 88; *see also R.J. Reynolds Tobacco Co*. v. *Grossman*, 96 So.3d 917 (Fla. 4th DCA 2012) (Fabre defendant cannot be on verdict unless there is proof of party's negligence). Not a particle of evidence in the record supports apportionment of fault to Owens Corning Fiberglass.

On remand the Fourth District should be instructed to return the case to the Trial Court to correct the final disposition of damages by removing any apportionment of fault to OCF for lack of evidence. With that percentage of apportionment thus no longer applicable, Judgment amounts should be recalculated pro rata for each party remaining at fault according to the percentages newly adjusted to reflect the reduced number of liable parties.

Conclusion

The decision of the District Court should be set aside and the case remanded to the District Court to enter an Order affirming the Final Judgment but removing the *Fabre* defendant Owens Corning Fiberglass for whom there was no proof of negligence.

Certificate of Font Compliance and of Filing and Service

I hereby certify that I have set the font in MS Word 2010, Times New Roman, 14-point and that in compliance with Fla. R. Jud. Adm. 2.515 this Brief was electronically filed on July 31, 2017. I further certify that in compliance with Fla. R. Jud. Adm. 2.516 this Brief was electronically served on all persons in the

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