IN THE SUPREME COURT
STATE OF FLORIDA

CASE NO. SC16-2182

RICHARD DELISLE,

Petitioner,

v.

CRANE CO. *et al.,*

Respondents.

ANSWER BRIEF ON JURISDICTION 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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STATEMENT OF THE CASE AND FACTS

As set forth in the November 9, 2016 opinion of the Fourth District Court of Appeal, Petitioner Richard DeLisle prevailed at trial on his claim that his use of asbestos-containing products manufactured by Respondents Crane Co. (Crane), Lorillard Tobacco Company (Lorillard), and Hollingsworth & Vose Co. (H&V), caused his mesothelioma. Petitioner's Appendix to Brief on Jurisdiction [hereinafter "A"] at 1-2, 4.[1] Respondent R.J. Reynolds Tobacco Company (Reynolds) is the successor by merger to Lorillard. (A:2 n.2).[2]

DeLisle's claim against Lorillard was based on his alleged use of Lorillard's "Original Kent" cigarettes, which were produced between 1952 and 1956, using "asbestos-containing 'Micronite' filters" produced by a former H&V subsidiary. (A:2).[3] Conflicting evidence was presented by the parties on whether DeLisle ever

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[1] DeLisle's jurisdictional brief purports to recite the underlying facts—but without any citations to the Fourth District's opinion. Petitioner's Brief on Jurisdiction [hereinafter "PB"] at 1-4. The requirement that briefs cite to the record, Fla. R. App. P. 9.210(b)(3), applies to jurisdictional briefs on discretionary review before this Court. Fla. R. App. P. 9.120(d) ("[f]ormal requirements for [jurisdictional] briefs are specified in rule 9.210"). Because only the facts set forth in the opinion sought to be reviewed are properly referenced before this Court, *e.g.*, *Reaves v. State*, 485 So. 2d 829, 830 n.3 (Fla. 1986), this brief will present those facts, with appropriate citations.

[2] DeLisle brought his action against 16 defendants, but proceeded to trial only against Crane, Lorillard, and H&V. (A:2).

[3] DeLisle's claim against Crane was based on alleged asbestos exposure between 1962 and 1966, while he was working at a paper company that used Crane's sheet gaskets, which contained chrysotile asbestos. (A:2 & n.3). The Kent Micronite filters contained crocidolite asbestos. (A:2 & n.3).

used the "Original Kent" cigarettes, and "[t]he parties hotly disputed causation." (A:2-3). "[E]ven 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." (A:3).

DeLisle presented three experts on his claim against Lorillard and H&V: (i) Dr. Millette, an environmental scientist; (ii) Dr. Crapo, a pulmonologist; and (iii) Dr. Rasmuson, an industrial hygienist. (A:3).[4] The trial court denied Respondents' motions to exclude the experts' testimony under Section 90.702, Florida Statutes (2015), which codifies the standards adopted in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). (A:3-6, 14-17).

The Fourth District, applying Section 90.702 because "statutes are presumed to be constitutional and are to be given effect until declared otherwise" (A:5 n.7), held that the trial court erred in allowing Drs. Crapo and Rasmuson to testify and granted Respondents Lorillard and H&V a new trial. (A:16-18).[5] The court also noted that, if the standard set forth in *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923), were to apply, "most of the expert testimony clearly would be inadmissible

[4] A fourth expert, Dr. Dahlgren, testified in support of the claim against Crane. (A:3, 8-13). Crane unsuccessfully sought to exclude that testimony. (A:3, 10-11).

[5] The district court upheld the trial court's ruling that Dr. Millette's testimony was admissible. (A:14-15). The Fourth District also ruled that Dr. Dahlgren's testimony is inadmissible (A:8-13) and, because his opinion "was the sole evidence on causation against Crane," ordered the trial court to grant a directed verdict for Crane. (A:18).

as the experts failed to show that the methodology was generally accepted in the scientific community." (A:5 n.7).

Addressing Dr. Crapo, the Fourth District recited his unsupported opinion that "it would just be expected that a filter would release some of the fibers that are in it," and noted that the witness "has never conducted any tests to verify that expectation." (A:16). Because Dr. Crapo "offered precious little in the way of a reliable foundation or basis for his opinion," and indeed "left his basis unstated," the Fourth District held that "he did not provide enough for the court to evaluate the reliability of his opinion," and that DeLisle had not demonstrated "the reliability of [Dr. Crapo's] opinion, nor its helpfulness." (A:16-17).

Turning to Dr. Rasmuson, the Fourth District held his testimony inadmissible because he had relied solely on studies by a witness whom DeLisle did not call, Dr. Longo, and Dr. Rasmuson "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." (A:3 & n.5, 13, 17). Accordingly, the trial court "could not conclude that Dr. Rasmuson's opinions were based upon reliable data, or that his Kent-specific causation opinion was reliable." (A:17-18).[6]

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[6] In addition to reversing the judgment due to the trial court's error in admitting the expert testimony, the Fourth District addressed the trial court's refusal to instruct the jury on the threshold question whether DeLisle "actually used Lorillard and H&V's products." (A:18-19). Although the court "would not have reversed on this issue alone," it directed the trial court, on remand, to "consider giving an appropriate instruction on product use in any new trial." (A:19). The Fourth (continued . . .)

SUMMARY OF ARGUMENT

The Fourth District neither declared Section 90.702, Florida Statutes, as amended, constitutional nor expressly construed—or even cited—*any* provision of the Florida Constitution. What the court did—in accordance with the long-established rule that statutes are presumed to be constitutional—was to *apply* Section 90.702 to the facts and rule that the trial court erred in allowing critical expert witnesses to testify on causation. And the court also noted that "most of the expert testimony clearly would be inadmissible" under the pre-statute *Frye* standard.

DeLisle's fallback jurisdictional argument, that the Fourth District's decision creates conflict with decisions that predate the 2013 amendment to Section 90.702, is baseless. Nothing in the opinion even hints at a conflict with pre-amendment precedent.

ARGUMENT

PETITIONER HAS ESTABLISHED NO BASIS FOR DISCRETIONARY REVIEW.

DeLisle purports to invoke three separate constitutional bases under Article V, Section 3(b)(3) of the Florida Constitution for exercise of discretionary-review

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(. . . continued)
District also faulted the $8 million damages award because the jury appears to have accepted a suggestion by DeLisle's counsel in closing argument "to compensate DeLisle based upon the rate the parties compensated their experts," which the court held was a "wholly arbitrary number to use to establish damages." (A:19-20) (citation and internal quotation marks omitted). The court held that, on its own, this would "have warranted a remittitur or a new trial on damages." (A:20).

jurisdiction: (i) the decision "expressly declares valid a state statute"; (ii) it "expressly construes a provision of the state or federal constitution"; and (iii) it "expressly and directly conflicts with a decision of another district court of appeal or of the supreme court on the same question of law." (PB:3-6). None of his arguments has merit.

First, the Fourth District did not "expressly declare[]" Section 90.702 to be valid. The entirety of the DeLisle's argument (PB:2-3) rests on a footnote in the Fourth District's decision:

> 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), *review denied*, No. SC16-1532, 2017 WL 1882470 (Fla. May 9, 2017)]; *Booker v. Sumter Cty. Sheriffs Office/N. Am. Risk Servs.*, 166 So. 3d 189 (Fla. 1st DCA 2015); *Perez v. Bell S. Commc'ns, 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.

(A:5 n.7). This is statutory *application*—not an express declaration of validity.[7]

[7] At the time DeLisle's jurisdictional brief was filed, this Court had under consideration whether to adopt the amended Section 90.702 as a rule of evidence. (PB:7 & n.5). The brief inappropriately cited both observations made at the (continued . . .)

"A district court of appeal decision is not subject to review merely because it has the *effect* of upholding the validity of a statute." Philip J. Padovano, 2 Fla. Prac., Appellate Practice, § 3:7 (2016 ed.) [hereinafter Padovano] (emphasis added). Indeed, the 1980 amendment to Section 3(b)(3), which added the "expressly declares valid" requirement for discretionary review, was a dramatic departure from the pre-1980 version of the constitutional provision, which allowed for this Court's direct review of trial court orders "passing upon the validity of a state statute." *E.g.*, *Harrell's Candy Kitchen, Inc. v. Sarasota-Manatee Airport Auth.*, 111 So. 2d 439, 441 & n.2 (Fla. 1959). Under the pre-1980 provision, this Court applied the "doctrine of inherency," *Harrell's Candy Kitchen,* 111 So. 2d at 441-42, to allow review "even in the absence of an express statement or declaration as to the validity of the statute." Padovano, *supra* at note 4. The 1980 amendment to Section 3(b)(3) abandoned that doctrine. *E.g.*, Harry Lee Anstead, *et al*., *The Operation and Jurisdiction of the Supreme Court of Florida*, 29 Nova L. Rev. 431, 503 (2005) ("[i]mportantly, the 1980 constitutional jurisdictional amendments overruled the much criticized 'inherency doctrine' by which review

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(. . . continued)
rulemaking hearing and that "[l]awyers and parties across Florida want this Court to take it up." (PB:7). The Court has since declined to adopt Section 90.702 as a rule "to the extent that it is procedural, due to … constitutional concerns," i.e., the potential for "undermining the right to a jury trial and denying access to the courts." *In re Amends. to Fla. Evid. Code*, 210 So. 3d 1231, 1239 (Fla. 2017). This Court, however, "does not address the constitutionality of a statute or proposed rule within the context of a rules case," *id*., and none of the potential constitutional concerns mentioned in this Court's decision earlier this year were raised by DeLisle in this case.

might be had if the Court believed that an opinion tacitly found a statute valid," which "might occur . . . where the opinion applied the statute as though it were valid but did not directly discuss or make a finding of validity" (footnotes and citations omitted)). That amendment must be given its due effect.

Statutory construction principles apply equally to the construction of Florida's Constitution. *E.g., Fla. Dep't of Revenue v. City of Gainesville*, 918 So. 2d 250, 264 (Fla. 2005). And it is a fundamental tenet that, "[w]hen a statute is amended to change a key term or to delete a provision, it is presumed . . . to have a meaning different from that accorded to it before the amendment." *Bd. of Trustees, Jacksonville Police & Fire Pension Fund v. Lee*, 189 So. 3d 120, 126 (Fla. 2016) (citations and internal quotation marks omitted); *see also In re Advisory Opinion to the Governor*, 112 So. 2d 843, 847 (Fla. 1959) (applying the same tenet to constitutional amendment). DeLisle's attempt to revive the long-discarded "inherency doctrine" to secure review cannot succeed.

Second, DeLisle's assertion that the Fourth District's decision "necessarily rejected the manifest effect" of Article V, Section 2(a) of the Florida Constitution (PB:3, 6), is even less well-founded. The term "expressly," which this Court has construed in the context of conflict-of-decisions discretionary jurisdiction to mean "expressly address[ing] a question of law," *Persaud v. State*, 838 So. 2d 529, 532 (Fla. 2003), must be identically applied to discretionary jurisdiction in this context. *E.g.*, *Anderson Columbia v. Brewer*, 994 So. 2d 419, 423 (Fla. 1st DCA 2008) ("term used [i]n one subsection has the same meaning as the same term used in another"). Thus, "[a] decision of a district court of appeal is not reviewable under

Article V, § 3(b)(3) merely because it has the effect of construing a provision of the state or federal constitution." Padovano, *supra* at § 3:8. Rather, "Section 3(b)(3) plainly requires a written statement explaining or defining the disputed constitutional language." *Id*.[8]

There is no such "written statement" in the Fourth District's decision. Indeed, there is not even a mention of Article V, § 2. DeLisle's attempt to link his request for discretionary review to a constitutional provision that is not expressly construed in the opinion that is sought to be reviewed likewise cannot serve as a basis for this Court's jurisdiction.

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[8] The 1980 amendments to Article V also codified this Court's pre-1980 precedent on the limitations of review based on purported constructions of the Florida Constitution by lower tribunals. Padovano, *supra* at § 3:8 nn.2, 3, & 4 (citing *Miami Herald Publ'g Co. v. Brautigam*, 121 So. 2d 431 (Fla. 1960); *Page v. State*, 113 So. 2d 557 (Fla. 1959); and *Carmazi v. Bd. of Cnty. Comm'rs of Dade Cnty.*, 104 So. 2d 727 (Fla. 1958)). The "mere application of unquestioned and unambiguous provisions of the Constitution to a given state of facts"—as contrasted with a decision in which "the meaning of some provision of the Constitution is directly in question, and is doubtful"—was not a basis for review in this Court before 1980. *Carmazi*, 104 So. 2d at 730 (Drew, J., concurring specially). As this Court explained, in construing the pre-1980 constitutional provision that allowed this Court directly to review trial court judgments construing a controlling provision of the Florida or federal constitution, "[f]or us to entertain jurisdiction under this provision[,] the trial judge must undertake to explain, define or otherwise eliminate existing doubts arising from the language or terms of the constitutional provision." *Page*, 113 So. 2d at 557 (internal quotation marks omitted). With the Florida voters having approved the "expressly construes" threshold requirement for discretionary review of district court of appeal decisions, this requirement is preserved—and, indeed, made "even more restrictive." Padovano, *supra* at § 3:8 n.4.

Third, DeLisle attempts to manufacture decisional conflict on the ground that "[i]n no way does this case involve new or novel science, so neither *Frye* nor *Daubert* sets the governing standard for admission." (PB:3; PB:3-5). That issue turns entirely—as DeLisle's choice of words reveals—on the premise that there is a substantive error in the Fourth District's ruling that inquiry into the validity of the witnesses' opinions was appropriate. It is inappropriate to mount a *substantive* challenge to a district court of appeal's decision on an application for discretionary review. Fla. R. App. P. 9.120(d) (petitioner's brief must be "limited solely to the issue of the supreme court's jurisdiction").

Even if that were not so, there is nothing in the Fourth District's decision that addresses, in any way, the issues decided in *Marsh v. Valyou*, 977 So. 2d 543 (Fla. 2007); (PB:3, 5). The question in that case dealt with the admissibility of "pure opinion" testimony under *Frye, id.* at 547-48. Here, in contrast, the testimony held inadmissible by the Fourth District purported to be based on a non-testifying expert's untested laboratory studies and not "pure opinion." (A:13, 16-18). Perhaps more to the point, as DeLisle himself notes (PB:5 n.4), the Legislature, in adopting the 2013 amendment to Section 90.702, directly expressed its intent to "prohibit in the courts of this state *pure opinion testimony* as provided in *Marsh v. Valyou,* 977 So. 2d 543 (Fla. 2007)." Ch. 2013–107, § 1, Laws of Fla. (2013) (emphasis added) (preamble to § 90.702). The post-amendment cases have recognized and enforced that express legislative intent. *E.g., Baan v. Columbia*

Cnty., 180 So. 3d 1127, 1133 (Fla. 1st DCA 2015).[9] By definition, there can be no conflict with pre-amendment cases.[10]

Because there is neither any express declaration of statutory validity or express construction of a constitutional provision in the Fourth District's opinion, nor any express and direct decisional conflict, DeLisle cannot show any basis for this Court's exercise of discretionary-review jurisdiction. His petition for review should be denied.

CONCLUSION

Based on the foregoing, Respondents request this Court to decline to accept jurisdiction in this cause and to deny the petition for review.

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[9] Contrary to DeLisle's assertion that *Baan* held that "*only* when the Art. V, § 2(a), constitutional issue is not raised may the court apply [Section 90.702] to evaluate expert testimony" (PB:6), there is no such holding in the case. The First District reversed summary judgment on a holding that the expert's opinions were admissible under the statute. 180 So. 3d at 1133-34. That court has continued to apply Section 90.702 since this Court's decision not to adopt the statute as a rule, *State Dep't of Corr. v. Junod*, No. 1D15-5259, 2017 WL 1372668, at *5 & n.4 (Fla. 1st DCA Apr. 13, 2017), while the Fifth District has suggested that trial courts might elect to reconsider evidentiary rulings that applied the *Daubert* standard. *See Rhoades v. Rodriguez*, 212 So. 3d 1140, 1142 (Fla. 5th DCA 2017).

[10] The same is so with respect to other pre-amendment cases upon which DeLisle relies, as well as his argument that the Fourth District's holding "necessarily conflicts" with cases "holding that Florida courts do not follow *Daubert* and instead follow the test set out in *Frye*." (PB:5).

Respectfully submitted,

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I certify that, on May 18, 2017, a copy of this brief on jurisdiction was filed electronically in this Court and served via e-mail to counsel listed below.

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