Supreme Court of Florida

No. SC16-2182

Richard DeLisle,
Petitioner,

v.

Crane Co., et al.,
Respondents.

RESPONDENT CRANE CO.'S ANSWER BRIEF ON JURISDICTION

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STATEMENT OF THE CASE AND FACTS

This is an asbestos personal-injury action. Petitioner originally sued sixteen defendants, but proceeded to trial against only three. *See* Fourth District's November 9, 2016 Opinion ("Opinion") at 2.[1] Under Florida law, to establish liability, Petitioner had to prove, among other things, that each defendant substantially contributed to causing his disease. With respect to Crane Co., Petitioner argued that asbestos fibers released from "Cranite" brand sheet composition gaskets—which Crane Co. sold before 1972—substantially contributed to his disease. *Id.*

To support his contention that asbestos fibers released from Cranite gaskets were a substantial contributing factor to his disease, Petitioner presented one expert witness, Dr. Dahlgren. *Id.* at 8–13, 18. Crane Co. objected at trial to the admissibility of Dr. Dahlgren's "every exposure" testimony, arguing, among other things, that it was scientifically unreliable. *Id.* at 3. But the trial court admitted that testimony over Crane Co.'s objections, and the jury found in favor of Petitioner, awarding him $8 million, with16% of the fault apportioned to Crane Co. *Id.* at 3–4.

Crane Co. appealed to the Fourth District Court of Appeal on several grounds. Relevant here, the Fourth District found that the trial court abused its discretion by admitting Dr. Dahlgren's "every exposure" causation testimony. *Id.* at 8–13, 18. In doing so, the Fourth District applied the *Daubert* test for expert admissibility, which was adopted in 2013 by the Florida Legislature when it

[1] This opinion can be found in Petitioner's Appendix to Brief on Jurisdiction.

amended Section 90.702, Florida Statutes. Because Dr. Dahlgren's testimony was Petitioner's only causation evidence against Crane Co. and it should have been excluded under *Daubert*, the Fourth District granted a directed verdict for Crane Co. *Id.* at 18.

Petitioner now argues that the Fourth District's applying *Daubert* was error, and he asks this Court to review footnote 7 of the Fourth District's opinion, in which it explained why it applied the *Daubert* test instead of the *Frye*[2] test. As the Fourth District explains, in holding that Dr. Dahlgren's testimony was inadmissible under *Daubert*, it merely presumed the validity of the Florida statute adopting *Daubert*; it did not analyze the constitutionality or validity of that statute, and it did not even discuss whether the Legislature's change to the Florida rules of evidence was substantive or procedural. *Id.* at 4 fn. 7 (citing *Mallory v. State*, 866 So.2d 127, 128 (Fla. 4th DCA 2004)).[3]

Meanwhile, the Fourth District noted that the testimony at issue would also have been inadmissible under *Frye*, *see* Opinion at 5 n.7, and there is no indication that this conclusion was in any way incorrect, *see, e.g.*, *Betz v. Pneumo Abex, LLC*, 44 A.3d 27 (Pa. 2012) (finding same type of "every exposure" opinion offered by

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[2] *Frye v. United States*, 293 F. 1013, 1013 (D.C. Cir. 1923).

[3] This is no surprise because Petitioner never raised a constitutional challenge in the courts below—he never asked either the trial court or the Fourth District to hold that amended Section 90.702, Florida Statutes, is unconstitutional. Rather, Petitioner argued only that the lower courts were not permitted to apply *Daubert* until this Court adopted Section 90.702 as a rule of evidence, an argument he repeats on page 2 of his Brief on Jurisdiction.

Dr. Dahlgren here novel and inadmissible under *Frye* in an asbestos action like this one).

SUMMARY OF THE ARGUMENT

Petitioner asks the Court to exercise its discretionary review to determine whether the Fourth District erred by applying the *Daubert* test rather than the *Frye* test for expert admissibility. Without even analyzing whether there are any grounds to exercise discretionary review here, however, the Court should reject Petitioner's petition for review because the answer to the question Petitioner attempts to raise makes no difference to the outcome of this action with respect to Crane Co. This is because the Fourth District already found that the expert testimony at issue would be inadmissible under either *Daubert* or *Frye*. *See* Opinion at 5 n.7. Thus, under either the *Daubert* or *Frye* test, Crane Co. is entitled to a directed verdict.[4]

In a motion filed on February 27, 2017, Petitioner argued that this action should "travel together" with *Bunin v. Matrixx Initiatives Inc.*, SC16-1532. This Court recently rejected the petition for review in *Bunin*, and thus, under Petitioner's own theory, the Court should deny the petition here as well. Indeed, since the Court found no grounds to exercise discretionary review in *Bunin*, it

[4] Petitioner also suggests that neither *Daubert* nor *Frye* should apply to expert admissibility in this case because, he alleges, the expert testimony in this case did not involve "new or novel science," and thus was admissible as "pure opinion" testimony under *Marsh v. Valyou*, 977 So.2d 543 (Fla. 2007). But this argument fails for several reasons. First, Petitioner neither raised this argument nor cited *Marsh* in the courts below. Second, Dr. Dahlgren's "every exposure" testimony is certainly "new or novel science." *See Betz*, *supra*. And finally, *Marsh* was superseded, in any event, when the Legislature amended Section 90.702, Florida Statutes, as explained in more detail below.

certainly should find no grounds for review here. In *Bunin*, the District Court of Appeal held that the trial court's application of *Daubert* actually affected the outcome of the dispute—*i.e.*, that the expert testimony held inadmissible under *Daubert* would have been admissible under pre-existing Florida standards for the admission of expert testimony. *See Bunin v. Matrixx Initiatives, Inc.*, 197 So. 3d 1109, 1110 (Fla. 4th DCA 2016). Here, however, the Court's decision to apply *Daubert* instead of *Frye* did not affect the outcome of the dispute, because the Fourth District stated that the expert testimony at issue would have been equally inadmissible under a *Frye* standard. Accordingly, the issue that Petitioner seeks to raise is a distinction that makes no difference in this instance.

Regardless, Petitioner cannot invoke the Court's discretionary jurisdiction here because none of the grounds he identifies for invoking that jurisdiction under Fla. Const. art. V, § 3(b)(3) and Fla. R. App. P. 9.030(a)(2) is present.

- The Fourth District's opinion does not *expressly* declare valid the Florida statute adopting *Daubert*—it merely "presumed [it] to be constitutional," *see* Opinion at 4–5 n.7—and it does not *expressly* construe any provisions of the Florida Constitution.
- The Fourth District's opinion does not *conflict on the same question of law* with this Court's decisions in *Marsh*, *Ibar*, or *Castillo*,[5] all of which pre-date the Florida Legislature's 2013 adoption of *Daubert*.

[5] *See* Petitioner's Brief on Jurisdiction at 3–5 (citing *Marsh v. Valyou*, 977 So.2d 543 (Fla. 2007); *Ibar v. State*, 938 So.2d 451 (Fla. 2006); *Castillo v. E.I. Du Pont de Nemours & Co. Inc.*, 854 So.2d 1264 (Fla. 2003)).

- Finally, the Fourth District's application of *Daubert* does not conflict with a decision of any other Florida District Court of Appeal; indeed, all five District Courts of Appeal have applied the *Daubert* test since its adoption in 2013.

ARGUMENT

A. The Fourth District neither *expressly declared* valid a state statute nor *expressly construed* a provision of the Florida Constitution.

Under Fla. Const. art. V, § 3(b)(3) and Fla. R. App. P. 9.030(a)(2)(A)(i)–(ii), the Court has discretionary jurisdiction to review decisions of the District Courts of Appeal that "expressly declare valid a state statute" or that "expressly construe a provision of the state or federal constitution." In his Notice Invoking Discretionary Jurisdiction of the Supreme Court, Petitioner argues that the Fourth District's opinion expressly declares valid a state statute, and, in doing so, expressly construes provisions of the State Constitution. *See* Notice at 1. In his Brief on Jurisdiction, however, Petitioner concedes that this is not really the case because the Fourth District merely "presumed valid" the statute adopting *Daubert*, as it was required to do. *See* Brief on Jurisdiction at 3; *see also* Opinion at 4 fn. 7 (citing *Mallory*, 866 So.2d at 128).[6]

[6] On February 16, 2017, this Court declined to adopt the Florida Legislature's changes to Fla. Stat. § 90.702 adopting the *Daubert* standard, to the extent such changes were procedural. *In re Amendments to the Florida Evidence Code*, 210 So.3d 1231, 1239 (Fla. 2017). But the Court did not determine whether the Florida Legislature's adoption of the *Daubert* standard was procedural or substantive, or whether it was otherwise constitutional, expressly leaving these questions for another day, in an appropriate case or controversy coming before the Court. *Id.* This action is not an appropriate case or controversy for answering these questions, however, because the Fourth District did not analyze the issues—it did not

Petitioner is suggesting that the Court can exercise discretionary jurisdiction if a District Court of Appeal *inherently* declares valid a state statute. The Fourth District did not even *inherently* declare a statute valid here, and, in any event, even if it had, more than that is required for the Court to exercise discretionary jurisdiction. "A district court of appeal decision is not subject to review merely because it has the effect of upholding the validity of a statute." 2 Fla. Prac., Appellate Practice § 3:7 (2016 ed.). Since 1980, for the Court to have discretionary jurisdiction, a District Court of Appeal must *expressly* declare valid a state statute.

> Under former rule 9.030(a)(1)(A)(ii), the supreme court's mandatory appellate jurisdiction could be invoked if a lower tribunal "inherently" declared a statute valid. *See Harrell's Candy Kitchen, Inc. v. Sarasota-Manatee Airport Auth.*, 111 So. 2d 439 (Fla. 1959). The 1980 amendments to article V and this subdivision require a district court to "expressly declare" a state statute valid before the supreme court's discretionary jurisdiction may be invoked.

Fla. R. App. P. 9.030, Committee Notes, 1980 Amendments. It is a District Court of Appeal's "express" finding that a statute is valid that confers discretionary jurisdiction on this Court. *See, e.g.*, *Cantor v. Davis*, 489 So.2d 18, 20 (Fla. 1986) ("The district court's expressly finding section 768.56 to be constitutional conveyed jurisdiction to this Court. Art. V, § 3(b)(3), Fla. Const."). Here, the Fourth District merely *presumed valid* the statute adopting *Daubert*, as Petitioner

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determine whether the adoption of *Daubert* was procedural or substantive, and it did not rule on the constitutionality of the statutory amendments.

admits; it did not *expressly declare valid* that statute. Thus, Petitioner may not invoke the Court's discretionary review.

The Fourth District also did not *expressly construe* any provision of the Florida Constitution, as Petitioner suggests. *See* Petitioner's Brief on Jurisdiction at 3. Invoking the Court's discretionary review under Article V, § 3(b)(3) on the basis that a District Court of Appeal's opinion expressly construes a provision of the Constitution "plainly requires a written statement explaining or defining the disputed constitutional language." 2 Fla. Prac., Appellate Practice § 3:8 (2016 ed.). Here, Petitioner argues that the Fourth District "necessarily rejected the manifest effect of article V, § 2(a), and article V, § 3(b)(3)." *See* Brief on Jurisdiction at 3 (emphasis added). The glaring problem with Petitioner's argument, however, is that the Fourth District did not even consider, much less explain or define, article V, § 2(a), or article V, § 3(b)(3)—indeed, these articles are not even cited in the Fourth District's opinion. Again, Petitioner has no basis for invoking the Court's discretionary review.

B. The Fourth District's opinion does not expressly and directly conflict on *the same question of law* with *Marsh, Ibar,* or *Castillo*.

In *Marsh*, *Ibar*, and *Castillo*, *see*, *supra*, footnote 6, this Court explained the tests applicable to the admission of expert testimony under Florida law. Essentially, those opinions explain that Florida applied the *Frye* test, and not the *Daubert* test, and that, in some circumstances, "pure opinion" testimony could be admissible without even applying the *Frye* test. *Id.* But subsequently, in 2013, the Florida Legislature revised Section 90.702 of the Florida Evidence Code to, among

other things, (i) adopt the *Daubert* test; (ii) reject the *Frye* test; and (iii) prohibit "pure opinion" testimony as previously permitted under *Marsh*.

> In 2013, the Florida legislature amended section 90.702 of the Florida Evidence Code to adopt the standards for expert testimony in the courts of this state as provided in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993) and as reaffirmed and refined by both *General Electric Co. v. Joiner*, 522 U.S. 136 (1997), and *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137 (1999). Ch. 2013–107, § 1, Laws of Fla. (2013) (Preamble to § 90.702). In so doing, the Legislature 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). *Id.* On July 1, 2013, these revisions to section 90.702 went into effect, changing Florida from a *Frye* jurisdiction to a *Daubert* jurisdiction.

Perez v. Bell S. Telecommunications, Inc., 138 So.3d 492, 497 (Fla. 3d DCA 2014) (internal parallel citations omitted); *see also, e.g., Giaimo v. Florida Autosport, Inc.*, 154 So.3d 385, 388 (Fla. 1st DCA 2014).

Simply put, the 2013 amendments to Section 90.702 changed the law in Florida, and subsequent court opinions relying on that statute are not in *conflict* with pre-2013 opinions based on previous law. Here, it is obvious that the Fourth District's opinion did not *conflict on the same question of law* with the Court's opinions in *Marsh*, *Ibar*, or *Castillo* because those opinions all predate 2013, and thus clearly did not pass upon the application of Section 90.702, Florida Statutes, as it was amended by the Florida Legislature in 2013.

C. The Fourth District's opinion does not *expressly and directly conflict* on the same question of law with any other District Court of Appeal opinion.

There is no conflict among the District Court of Appeals here. Indeed, all five District Courts of Appeal have followed revised Section 90.702, Florida Statutes, and applied the *Daubert* test to the admissibility of expert testimony. *See, e.g.*, *Giaimo*, 154 So.3d at 387–88; *R.C. v. State*, 192 So.3d 606, 609 (Fla. 2d DCA 2016); *Perez*, 138 So. 3d at 497; *Bunin v. Matrixx Initiatives, Inc.*, 197 So. 3d 1109, 1110 (Fla. 4th DCA 2016); *Andrews v. State*, 181 So. 3d 526, 527 (Fla. 5th DCA 2015). In fact, all three allegedly "conflicting" opinions that Petitioner cites did exactly that. *See* Petitioner's Brief on Jurisdiction at 6 (citing *Baan v. Columbia County*, 180 So.3d 1127 (Fla. 1st DCA 2015) (applying *Daubert*); *Maines v. Fox*, 190 So.3d. 1135 (Fla. 1st DCA 2016) (same); and *R.C.*, 192 at 609 (same)). While Petitioner argues that these three opinions stand for the proposition that *Daubert* applies *only if* no party objects on grounds that the Legislature's adoption of *Daubert* was unconstitutional, none of these opinions support that proposition.

In *Baan*, for example, the First District stated the following in a footnote: "At least where, as in the present case, the constitutional issue is not raised, First District precedent teaches that the *Daubert* standard is applicable to all expert testimony." *Baan*, 180 So.3d at 1133 (internal citations omitted). The First District did not hold that its application of *Daubert* was contingent solely on the fact that

no parties raised a constitutional issue,[7] but, regardless, there is no conflict between the actual decision of the First District in *Baan* and the decision of the Fourth District here because both courts applied *Daubert*. *See Jenkins v. State*, 385 So. 2d 1356, 1359 (Fla. 1980) (explaining that "it is conflict of decisions, not conflict of opinions or reasons that supplies jurisdiction for review by certiorari") (internal citations omitted); *see also Persaud v. State*, 838 So.2d 529, 532 (Fla. 2003) (internal citations omitted) ("[T]his Court's discretionary review jurisdiction can be invoked only from a district court decision that expressly addresses a question of law within the four corners of the opinion itself by containing a statement or citation effectively establishing a point of law upon which the decision rests.").

As the Court explained in *Aravena v. Miami–Dade County*, 928 So. 2d 1163 (Fla. 2006), one test of express and direct conflict is whether the decisions are "irreconcilable." Neither the opinions cited by Petitioner nor any other District Court of Appeal decision is irreconcilable with the Fourth District's opinion here. Indeed, all District Court of Appeal decisions on this issue are in accord.

CONCLUSION

For all these reasons, the Court should not accept discretionary jurisdiction.

[7] In any event, Petitioner here did not actually raise the constitutional issue in the courts below. *See, supra*, footnote 3.

May 19, 2017

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of this brief was served on counsel this 19th day of May 2017, electronically via the Court's eDCA web application.

/s/ William J. Simonitsch
WILLIAM J. SIMONITSCH

CERTIFICATE OF COMPLIANCE

Respondent hereby certifies that the type size and style of its brief on jurisdiction is Times New Roman 14pt, in compliance with Rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

/s/ William J. Simonitsch
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