# Supreme Court of Florida

No. SC16-2182

**RICHARD DELISLE**,
Petitioner/Appellee.

v.

**LORILLARD TOBACCO CO**. & **HOLLINGSWORTH & VOSE CO**., n/k/a **R.J. REYNOLDS TOBACCO CO.;** & **CRANE CO**.,
Respondents/Appellants,

## PETITIONER'S BRIEF ON JURISDICTION

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## *Statement of Case and Facts*

In this case a Jury found respondent R.J. Reynolds Tobacco Company[1] liable for exposing petitioner to toxic amounts of asbestos in its Kent cigarettes that substantially contributed to his terminal disease of mesothelioma, and awarded him substantial damages. The Jury also found respondent Crane Company liable for exposing petitioner to toxic amounts of asbestos in its Cranite gaskets that also substantially contributed to his mesothelioma, and also awarded him substantial damages.

RJR did not contest the fact that filters in Kent cigarettes contained crocidolite asbestos. Crane did not contest the fact that its Cranite gaskets contained chrysotile asbestos. Nor did any witness at trial dispute that mesothelioma is a marker that the person has been exposed to toxic amounts of asbestos. Experts on both sides testified that exposure to amounts of asbestos above the general background level is capable of causing mesothelioma. Petitioner argued that all expert testimony should be admitted under the Florida Evidence Code as it then existed when the cause of action accrued and the action was filed, but the trial Judge allowed such evidence only under the newly enacted *Daubert* standard.

On appeal the Fourth District relied solely on chapter 13-107, § 1, Laws of

[1] Hereafter: "RJR." By merger RJR succeeds to the obligations of Lorillard Tobacco Company and Hollingsworth & Vose Company.

Florida[2], to hold that it was error to admit expert testimony proving medical causation and reverse the final judgments appealed. *Crane Co. v. Delisle*, 2016 WL 4771438, 41 Fla. L. Weekly D213 (Fla. 4th DCA Sept. 14, 2016). Petitioner objected in both lower courts to any reliance on the newly enacted *Daubert* standard because the Florida Constitution gives the Supreme Court exclusive power over procedural rules within the judicial system.[3] Petitioner argued that this Court has not approved and adopted it to replace then existing section 90.702 and the *Frye* standard, and therefore *Daubert* cannot yet (if ever) be applied. The District Court rejected that argument, reasoning as follows:

> DeLisle also argues that this court lacks the authority to apply *Daubert*, as incorporated through section 90.702, Florida Statutes (2015), which was adopted in 2013 prior to the trial in this case, because it is a legislative change to the evidence code that has not yet been approved by the Florida Supreme Court. However, statutes are presumed to be constitutional and are to be given effect until declared otherwise. *Mallory v. State*, 866 So.2d 127, 128 (Fla. 4th DCA 2004). Further, we, and other Florida appellate courts, have applied the statute to the admission of testimony. *Bunin v. Matrixx Initiatives, Inc*., 197 So.3d 1109 (Fla. 4th DCA 2016); *Booker v. Sumter Cty. Sheriff's Office/N. Am. Risk Servs*., 166 So.3d 189 (Fla. 1st DCA 2015); *Perez v. Bell S. 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.

2016 WL 4771438, at *3 n.7.

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[2] Hereafter: the "*Daubert* enactment."

[3] Article V, § 2(a), Fla. Const.

## ***Argument***

### A. *Jurisdictional Provisions*

The Fourth District has plainly resolved this constitutional issue by holding that the *Daubert* enactment must be presumed valid ab initio and therefore applicable in all cases in spite of petitioner's constitutional challenge that this Court has not adopted the enactment as the sole basis for admitting scientific evidence under the rules of evidence. In deciding that only expert evidence satisfying *Daubert* is admissible, the District Court necessarily rejected the manifest effect of article V, § 2(a), and article V, § 3(b)(3).

In no way does this case involve new or novel science, so neither *Frye* nor *Daubert* sets the governing standard for admission. *U.S. Sugar Corp. v. Henson*, 823 So.2d 104, 109 (Fla. 2002) (by definition *Frye* applies only when an expert renders an opinion based on new or novel scientific techniques). The issue as to admitting the expert evidence in this case is instead directly controlled by the holding on differential diagnosis in *Marsh v. Valyou*, 977 So.2d 543 (Fla. 2007). *Marsh* holds that *Frye* does not apply to testimony by a medical doctor linking causation to disease, and that "even if it did, such testimony satisfies it." 977 So.2d at 545.

All of petitioner's experts agreed that the crocidolite asbestos in Kent filters and the chrysotile asbestos in Cranite gaskets are capable of causing mesothelioma, including Dr. James Dahlgren, who specializes in occupational and environmental

medicine and toxicology and in treating workers exposed to asbestos. 2016 WL 4771438, at *3. He testified that Petitioner's exposure to asbestos fibers released from the filters of Kent cigarettes and Cranite gaskets were substantial contributing causes of Petitioner's mesothelioma. Dr. Dahlgren relied on criteria derived from epidemiology, animal and experimental studies, as well as others, to which he applied his education, training and experience.

Dr. Dahlgren testified that leading scientific, medical, and regulatory organizations recognize no safe level of exposure. In short, there is no measureable level of asbestos exposure (chrysotile or crocidolite) below which mesothelioma has ***not*** been shown to occur. In fact, Crane's own expert pathologist, Dr. Victor Roggli, agreed with the World Health Organization's position that there is no recognized safe level of exposure to asbestos above the general background level. Dr. Roggli testified that the science recognizes that "very, very low concentrations result[] in significant increases of mesothelioma."

The District Court erroneously concluded that a medical doctor is not a scientist. The District Court thereupon excluded Dr. Dahlgren's testimony as unreliable under *Daubert*, reasoning:

> Although Dr. Dahlgren may be an expert in the field of occupational medicine and evaluation of mesothelioma, the record does not in any way support a finding that his opinions were supported by sufficient data or based upon reliable principles and methods under a proper *Daubert* analysis.

2016 WL 4771438, at *7. In effect the Fourth District based its decision entirely on its erroneous application of the unconstitutional *Daubert* enactment.

In *Marsh* this Court approved differential diagnosis as an established scientific methodology in which a medical expert eliminates other possible causes of a medical condition to ascertain the actual debilitating factor. *Marsh* held that medical experts routinely form opinions as to causation based on their experience and training in the science of medicine. *Marsh* made clear that disagreement among experts does not transform an ordinary opinion on medical causation into a new or novel principle subject to *Frye*. Conflict with *Marsh* is clear.[4]

The holding also necessarily conflicts with other kindred decisions such as *Ibar v. State*, 938 So.2d 451, 467 (Fla. 2006), holding that Florida courts do not follow *Daubert* and instead follow the test set out in *Frye* in cases involving new or novel science. In C*astillo v. E.I. Du Pont de Nemours & Co. Inc*., 854 So.2d 1264, 1268 (Fla. 2003), this Court held that to determine "whether expert testimony is admissible under section 90.702, Florida Statutes (2001), Florida courts follow the test set out in *Frye*." Accordingly, to the extent that the opinions offered in this case involve new or novel science, the only test for admissibility under *Frye* is the validity of the underlying science, not how the expert used raw data to reach the conclusions.

[4] The Legislature explained: "by amending s. 90.702, Florida Statutes, the Florida Legislature intends to prohibit in the courts of this state pure opinion testimony as provided in *Marsh v. Valyou*, 977 So.2d 543 (Fla. 2007)."

The Fourth District's opinion also conflicts with DCA decisions that have applied a statutory presumption of validity to the *Daubert* enactment ***ONLY*** *when no constitutional objection has been raised*. In *Baan v. Columbia County*, 180 So.3d 1127 (Fla. 1st DCA 2015), the Court held that ***only*** when the Art. V, § 2(a), constitutional issue is not raised may the court apply the *Daubert* enactment to evaluate expert testimony. *See also Maines v. Fox*, 190 So.3d 1135 (Fla. 1st DCA 2016) (same); *R.C. v. State*, 192 So.3d 606 (Fla. 2d DCA 2016) (same).

Article V, § 2(a), gives this Court sole responsibility to enact procedural rules in the judicial branch. Under that provision, the Legislature lacks the constitutional authority to originate such rules. The Legislature may veto rules duly adopted by the Supreme Court, but may not originate them. The Legislature did not seek to veto § 90.702 as it existed before the adoption of the *Daubert* enactment. Conflict is manifest.

B. *Why This Court Should Grant Review*

Rules of evidence are unique. They serve a special elemental role in litigation. They are the sole epistemological structure to decide which facts may be reliably true. Evidence rules comprise the very foundation for factual knowledge on which finders of fact within the judicial system must make their decisions. Evidence rules control the source of truth in resolving disputes.

Routine and necessary use of opinion evidence by experts is a standard, critical

element in judicial proceedings throughout this State. Where this kind of evidence is concerned, the reliance factor on rules that have existed for decades is an overpowering factor militating against change. Continuity and permanence are essential for rules controlling fact-finding in the judicial system.

Evidence rules necessarily function like fundamental law. They must be intrinsic and stable, as grudgingly changed as organic rules. The policy of this Court to adopt and approve an occasional substantive amendment to the Evidence Code offered by the Legislature should not embolden new majorities to change the basic rules of knowledge for all trials. Rules of Evidence are not meant to change with each new political or ideological wind.

During oral argument on September 1, 2016, where this Court considered adopting the *Daubert* enactment,[5] several Justices noted the lack of a pending case formally seeking review in this Court of an appellate decision from a final judgment touching on objections to *Daubert* and making pertinent arguments in the context of the actual application of *Daubert*. This case supplies that perspective and directly presents that issue to this Court. Lawyers and parties across Florida want this Court to take it up.

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[5] *In re Amendments to the Florida Evidence Code*, SC16-181.

*Certificate of Filing and Service*

I hereby certify that in compliance with Fla. R. Jud. Adm. 2.515 this Brief was electronically filed on December 14, 2016. I further certify that in compliance with Fla. R. Jud. Adm. 2.516 this Brief was electronically served on all persons in the attached Service List on December 14, 2016.

Respectfully submitted,

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