SUPREME COURT OF THE STATE OF FLORIDA

NO. SC16-2182

LT 4D13-4351, 4D14-146

RICHARD DELISLE,
Petitioner

v.

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

PETITIONER'S REPLY BRIEF

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Table of Contents

Table of Contents ii

Table of Authorities iii

Argument 1

Constitutional Issues 1

Preservation of Issue 2

Court of Appeal's Ad Hoc Trial of Case 4

No Scientific Dispute as to Causation of Mesothelioma 6

Evidence Rules: Substantive v. Procedural 9

Junk Science 11

The Daubert Amendment was not an Amendment of the Common Law 12

Rule 90.702 Does Not Require the Jury To Apply Every Step in the Scientific Method 13

Conclusion 14

Certificate of Service 16

Table of Authorities

Cases

Castillo v. E.I. Du Pont De Nemours & Co. Inc.,
854 So.2d 1264 (Fla. 2003) 4

Chiles v. A, B, C, D, & E,
589 So.2d 260 (Fla. 1991) 1

Fla. Dep't of Revenue v. City of Gainesville,
918 So.2d 250, 256 (Fla. 2005) 2

Glendening v. State,
536 So.2d 212 (Fla. 1988) 11

Haven Federal Sav. & Loan Ass'n v. Kirian,
579 So.2d 730, 732 (Fla. 1991)..... 11

Holland v. State,
773 So.2d 1065 (Fla. 2000) 6

Hopt v. Utah,
110 U.S. 574 (1884) 10, 11

In re Amendments to the Florida Evidence Code,
210 So.3d 1231 (Fla. 2017) 1

Marsh v. Valyou,
977 So.2d 543 (Fla. 2007) ..... *passim*

Pagan v. State,
830 So.2d 792 (Fla. 2002) 6

Ripley v. Ewell,
61 So.2d 420 (1952) 13

Constitution

Article I, section 22, Fla. Const. 5

Article II, section 3, Fla. Const. 1

Article V, section 2(a), Fla. Const. 1

Statutes

§ 2.01, Fla. Stat. (2017) 12

§ 90.702, Fla. Stat. (2013) ..... *passim*

Chapter 13-107, Laws of Florida ..... *passim*

Argument

Constitutional Issues

Just before granting review in this case, this Court released its decision in *In re Amend. Fla. Evid. Code*, 210 So. 3d 1231 (Fla. 2017), declining to adopt Chapter 2013-107, sections 1 and 2, Laws of Florida ("the Daubert Amendment") "to the extent that it is procedural . . . ." In doing so, the Court cited "constitutional concerns raised, which must be left for a proper case or controversy." *Id.* This appeal presents exactly such a case or controversy.

Below, the Fourth District held that the Daubert Amendment is the only proper basis for admitting scientific opinion evidence, displacing the Florida Evidence Code adopted by this Court under Article V, section 2, Florida Constitution.[1] The Daubert Amendment is contrary to the Constitution's allocation of powers allowing only this Court to prescribe rules of practice and procedure for the Court system.[2] The legislature has no constitutional power by a simple majority

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[1] *See* Art. V, § 2(a), Fla. Const. (Supreme Court shall adopt rules of practice and procedure in all courts of this State). The same provision adds that such rules of court may be repealed only by two-thirds votes by the members of each house. The Daubert Amendment was not adopted by a two-thirds vote in both houses.

[2] Art. II, § 3, Fla. Const. (a branch of state government cannot exercise powers of another branch without specific authority from the constitution itself). *Chiles v. A, B, C, D, E, & F*, 589 So. 2d 260, 263 (Fla. 1991) (no branch may encroach on powers of another); *Abdool v. Bondi*, 141 So. 3d 529 (Fla. 2017) (statute contrary to rule decreed by Supreme Court is unconstitutional to extent of conflict).

vote to repeal or alter a Supreme Court rule of practice and procedure for the admission or exclusion of evidence in a judicial branch trial. For this reason, the legislature's simple majority enactment of the Daubert Amendment was a clear violation of the constitutional separation of powers.[3] Accordingly, without this Court adopting it, it should never have been applied by the lower courts.

To make matters worse, the Daubert Amendment states that the legislature's intent was to prohibit pure opinion evidence in Florida courts, thereby tacitly overruling *Marsh v. Valyou*, 977 So. 2d 543 (Fla. 2007). Not a single word, phrase, or sentence in the Constitution, however, can be read to in any way empower the legislature to overrule judicial decisions of this Court. For this additional reason, the Daubert Amendment is unconstitutional on its face.

Preservation of Issue

Both Respondents now for the first time contend that Petitioner failed to preserve the right to argue that he was entitled to damages based on pure opinion testimony under the Evidence Code rules existing before the legislature's enactment of the Daubert Amendment. That contention is without merit.

The Daubert Amendment was enacted just as trial was set to commence.[4]

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[3] A statute is facially invalid when there are no circumstances in which it can be constitutionally applied. *Fla. Dep't of Rev. v. City of Gainesville*, 918 So. 2d 250, 256 (Fla. 2005).

[4] T1:39 (trial court stating "I know our law changed here in Florida just a month ago, so it didn't leave you a lot of time.").

Respondents argued that the Daubert Amendment must be applied immediately and, accordingly, that the *Daubert* standard should control the admission of opinion testimony at trial. Petitioner objected and argued that Evidence Code rule 90.702 was still the proper standard.

To decide that issue, the trial court held a pretrial hearing on whether to apply the Daubert Amendment. The trial court addressed the issue before trial began to avoid repeated objections during trial and the inevitably lengthy mini-trials on expert qualifications that would have otherwise ensued.

At the pretrial hearing, Petitioner's counsel expressly stated that the questions he desired to ask of experts would be "specific questions that we can ask here under our Florida code."[5] The Court ultimately rejected Petitioner's arguments and made clear that all opinion evidence must comply with the Daubert Amendment, which, as stated above, explicitly prohibits, among other things, "pure opinion testimony as provided in *Marsh v. Valyou*, 977 So. 2d 543 (Fla. 2007)." All parties thus knew that any attempt to rely on Evidence Code rule 90.702 and *Marsh* was then prohibited.

After the trial court's ruling, Petitioner's counsel explicitly stated the following to preserve the issue for appellate review:

> Make sure I don't waive that whether we're still under *Frye* or whether we're under *Daubert*, because it hasn't been adopted by the Florida Supreme Court. . . . We understand we have to bring forward the

[5] T1:78.

> qualifications [complying with Chapter 2013-107]. ***I just don't want to waive that we are still under Frye*** *until the Florida Supreme Court actually adopts it*. If they're going to.[6]

Thus, while the trial court's decision to apply the Daubert Amendment and not to permit testimony under Evidence Code rule 90.702 obviously barred Petitioner from proceeding under *Marsh*, there is no doubt that Petitioner preserved the issue.

Court of Appeal's Ad Hoc Trial of Case

In *Castillo v. E. I. Du Pont De Nemours & Co. Inc*., 854 So. 2d 1264, 1268 (Fla. 2003), this Court held that the proponent of opinion evidence bears the burden of showing the *trial judge* by the greater weight of the evidence that the underlying scientific principles and methodology have been accepted by relevant members of the field in question. Trial judges are limited to assessing only the validity of the underlying science used and may not assess the expert's application of scientific principles to the relevant facts. It is the jury that must resolve competing scientific opinions and apply them to the evidence at trial. 854 So. 2d at 1276.

Before trial began, the trial judge carefully ascertained that all allowed opinions were based on generally accepted scientific principles and methodology. He further held that the experts were qualified and had used relevant scientific principles, methods, processes, and data, without speculation or ipse dixit.

Marsh instructs that courts "must resist the temptation to usurp the jury's role

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[6] T1:124 (emphasis added).

in evaluating the credibility of experts and choosing between legitimate but conflicting scientific views." 977 So. 2d at 549. *Marsh* warned against judges involving themselves in evaluating "the acceptability of an expert's opinions and conclusions [because to do so] would convert judges into fact-finders to an extent not contemplated by Florida's *Frye* jurisprudence." 977 So. 2d at 549-50.

The Fourth District ignored and violated these teachings. In its analysis, the three-judge panel reweighed the opinion evidence presented to the jury,[7] reassessed the credibility of the experts, reapplied the scientific data, and chose for themselves between conflicting scientific views to reach a verdict contrary to the one cast by the jury. Under well-settled precedent, this was manifest error, deprived Petitioner of the right to have the jury decide whether to accept the expert opinions and conclusions, *Marsh*, 977 So. 2d at 549-50, and denied Petitioner the right to a trial by jury set forth in Article I, section 22, Florida Constitution.[8]

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[7] In addition to usurping the role of the jury by reweighing the expert analysis, the Fourth District also appeared to reweigh non-scientific fact evidence. *See, e.g.*, *DeLisle*, 206 So. 3d at 99 ("Lorillard contested DeLisle's use of Kent cigarettes. DeLisle testified that he smoked on average a pack of Kent cigarettes a day from junior high school until he enlisted in the army in 1957. Two of his high school friends, however, did not recall him smoking, and his former wife testified that by the late 1960's, DeLisle was only smoking unfiltered cigarettes.").

[8] Moreover, differential diagnosis is commonly used by medical doctors to diagnose disease because it is "generally accepted in the scientific community." *U. S. Sugar Corp. v. Hensen*, 823 So. 2d 104, 109 (Fla. 2002). To admit scientific opinion requires testimony by kindred experts that a consensus of qualified scientists in the field has accepted the theory and not just because a consensus of federal trial

No Scientific Dispute as to Causation of Mesothelioma

There was no conflict in the evidence about Petitioner's diagnosis of mesothelioma or that it was caused by asbestos. The conflict was over whose asbestos products were substantial contributing causes.

Respondent Crane's contention that the testimony of Petitioner's experts constitutes impermissible "every exposure" opinion is without merit. To begin with, Petitioner's experts did not subscribe to the so-called "every exposure" theory of causation, which posits that *every* exposure to asbestos is a substantial contributing cause of mesothelioma. Petitioner's experts made clear that only non-background[9]

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judges has done so. The sufficiency of the expert's qualifications and the decision regarding the range of subjects on which the expert can testify are matters left to the sound ***discretion*** of the trial judge, not appellate judges. *Jones v. State*, 440 So. 2d 570 (Fla. 1983) (standard of review is abuse of discretion); *Holland v. State*, 773 So. 2d 1065 (Fla. 2000). The determination and ruling will be upheld absent clear error. *Pagan v. State*, 830 So. 2d 792 (Fla. 2002).

[9] Background exposures to asbestos occur in everyday living and involve infinitesimally small doses. They take place, for example, when one enters a school containing asbestos insulation in the ceiling. No matter how many times one experiences such exposures, they will never exceed the minimum background threshold necessary to cause mesothelioma. In short, one life time is not long enough to fill the bucket one grain of sand at a time.

Exposures <u>above</u> background, on the other hand, are an entirely different matter. They occur when someone uses, replaces, manipulates, or tears out asbestos or asbestos-containing products, or is in the vicinity of someone who is doing so. Just one exposure above background engulfs a person with an overwhelming dose of asbestos fibers—often producing far more than enough sand to fill the entire bucket in an instant.

exposures to asbestos are sufficient to be causative.[10] This is consistent with the scientific consensus that background exposures are entirely different from non-background exposures. The gap between a lifetime of background exposures and a single day of non-background exposures is analogous to crossing the Grand Canyon. There is no fine line.

Crane's "every exposure" objection is especially perplexing given that its own expert agreed with these universally accepted principles. Specifically, Crane's expert agreed that: (1) every exposure to asbestos an individual with mesothelioma experiences in excess of background can be a substantial contributing factor in the development of the disease; and (2) mesothelioma is a "signal malignancy," i.e., an epidemiological marker for exposure to asbestos."[11] Experts on both sides

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[10] Despite Dr. Dahlgren repeatedly reaffirming his position that only exposures above background can cause mesothelioma, Crane makes the outrageous assertion that "Dr. Dahlgren disregarded entirely the concept of a safe level of exposure" before the jury and opined that "essentially every airborne fiber to which one may be exposed in an industrial setting can be a substantial factor in causing mesothelioma . . . ." (Ans. Br. 8) (emphasis added). That is blatantly false. The excerpt of the transcript Crane cites in support of this misrepresentation shows that Dr. Dahlgren actually testified that he "certainly" could conceive of an "occupational exposure to asbestos" that "might not increase the risk" of contracting mesothelioma. He then stated the unremarkable proposition that all work with asbestos-containing products resulting in the inhalation of friable asbestos can constitute "a health hazard." (Emphasis added). Despite Crane's best efforts to peg Dr. Dahlgren as an "every exposure" proponent, Dr. Dahlgren makes no mention whatsoever of "every airborne asbestos fiber" being a substantial factor cause of mesothelioma.

[11] T22:3482-91.

concurred that no one has ever been able to measure the minimum amount of asbestos above the general background level capable of causing the disease. And all qualified experts accepted the existence of the consensus settled forty years ago that mesothelioma is caused solely by non-background exposures to asbestos that accumulate in the lungs.[12]

Respondent Crane's characterization of the background line as "vanishingly small" and "undefined" is a red herring and blatant attempt to confuse this Court's analysis. It is true that the precise theoretical minimum dosage of asbestos necessary to cause mesothelioma is currently the subject of scientific debate. Whatever that *precise* theoretical minimum is, however, is entirely immaterial to this case—here, Petitioner's exposures to asbestos from Respondents' products were miles above it.[13]

The Fourth District's rejection of Petitioner's expert testimony fails to withstand principled analysis. The District Court based its rejection on a half-dozen random, non-binding federal trial court decisions from states other than Florida

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[12] As to the dispute about whether he was ever actually exposed to asbestos above the background from products made by Respondents, the resolution of that purely factual incident or circumstance does not depend on scientific theory. There was substantial testimony and evidence of the necessary qualifying exposures, and the jury found from that evidence that he was actually exposed to asbestos above the background level from products made by Crane and the RJR Lorillard entities.

[13] Crane is debating exactly how many grains of sand it would take to fill a relatively small bucket, whose precise dimensions are unknown, even though in this case there is enough sand to fill an Olympic size pool. This case is nowhere near the background level of asbestos exposure and thus does not hinge on a measurement of the precise dosage required to surpass it.

instead of decades of generally accepted science, including dozens of epidemiological studies. That was wrong.

Here, the trial court admitted Petitioner's expert testimony based on this testimony from a highly qualified scientist:

> [E]pidemiologists say . . . that there is no level below which we can measure [specific amounts of asbestos above the background] 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 . . . if you're above background. . . . We're talking about areas above background. It's called a threshold. *There is no threshold for safety with asbestos*.
>
> . . . .
>
> 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*.[14]

The jury obviously applied that opinion in reaching its verdict. There was no legally sound basis for a panel of appellate judges to reject the trial judge's decision allowing that testimony to support Petitioner's theory of causation.

Evidence Rules: Substantive v. Procedural

This Court's exclusive power over practice and procedure embraces those rules of procedure pertaining to *evidence*. It has long been understood that rules of evidence are commonly procedural and not substantive. They are the archetypical model of applied legal procedure. There is not a single, identifiable substantive aspect present or intended in the Florida Evidence Code. These rules lack any

[14] T10:1333-35 (emphasis added).

integral substantive impact or application.

Respondent RJR correctly notes that the Legislature has built into some statutes certain restraints or requirements about evidence offered in connection with the substantive elements of a particular cause of action or crime and its defenses. Simply because an occasional statutory cause of action has substantive elements making unique restrictions or requirements regarding specific evidence hardly makes the entire Evidence Code substantive.

No one can demonstrate a substantive function within Evidence Code rule 90.702 or the Daubert Amendment. Demonstrably, these rules supply just the method and process to go about admitting opinion evidence in any case.

When an issue does arise as to whether a particular rule of evidence might be judged substantive in a specific application, courts begin the analysis with the presumption that the rule is procedural and require the party to demonstrate that its function in that instance is substantive. In *Hopt v. Utah*, 110 U.S. 574 (1884), for example, the defendant contended that a statute had changed the rule of evidence to permit less or different testimony to convict and that consequently the rule was substantive and could not be applied. The government argued the common presumption that all rules of evidence relate to modes of procedure. Rejecting that ex post facto argument, the Supreme Court held that any "*statutory alteration* of the legal rules of evidence which . . . only removes existing restrictions upon the

competency of certain classes of persons as witnesses, *relate to modes of procedure only*. . . .'" 110 U.S. at 589, 590 (emphasis added).

In *Glendening v. State*, 536 So. 2d 212 (Fla. 1988), this Court followed and applied *Hopt*. The issue was whether Evidence Code rule 90.803(23) had reduced the evidence necessary for a conviction. This Court held that rule 90.803 was categorically procedural and therefore does not affect substantial personal rights. 536 So. 2d at 215. If changes in the rules of evidence are procedural, it necessarily follows that the rules themselves are procedural.

Rules of evidence should be deemed presumptively procedural because in essence they almost always prescribe just the form, manner, means, method, mode, order, process, and steps by which any party supports or enforces claims or defenses. *Haven Federal Sav. & Loan Ass'n v. Kirian*, 579 So. 2d 730, 732 (Fla. 1991). Such rules are not the substantive law that is the subject of the trial; they entail only the way, the procedure, the means or process, by which the parties try to prove their substantive claims or defenses.

Junk Science

Respondents and their amici attack Evidence Code rule 90.702 on the grounds that it results in the admission of *junk* science. Theirs is a common argument made on behalf of industrial and commercial defendants sued for money damages for causing personal injuries. They carefully omit that their definition of *junk* is any

evidence supporting a claim of negligence by the entity being sued.

Of course—as Petitioner demonstrates here—the only opinion evidence allowed under the Florida Evidence Code to be admitted must have been shown to the satisfaction of a trial judge by appropriate testimony as reliable because it represents generally accepted scientific principles and methodology by the relevant practitioners in the particular field. That in turn means that these industrial and commercial entities regard the claimant's evidence as *junk* only because it is defeats the position of the entity being sued. They have endeavored all over the Florida landscape to make the rules on proof of scientific matters decidedly complex and mystifying for those suing them. The *junk* is in their argument.

The Daubert Amendment Was Not
an Amendment of the Common Law

As for the contention that by enacting the Daubert Amendment the legislature was merely changing the common law, the Daubert Amendment, § 1, expressly articulates a different intent. In its very first words, this provision states that it is "[a]n act . . . ***amending s. 90.702, F.S.***" (Emphasis added). Without ever citing the common law, the legislature declared:

> WHEREAS, *by* ***amending s. 90.702***, *Florida Statutes*, to pattern it after Rule 702 of the Federal Rules of Evidence as amended in 2000, *the* ***Florida Legislature intends 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). . . .
>
> WHEREAS, ***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) (Emphasis added). The enacting clause itself clearly proclaims that "***Section 90.702, Florida Statutes, is amended*** to read . . . ." (Emphasis added). As this plain text makes clear, the Daubert Amendment did not merely amend the common law.

That spurious argument does, however, raise a compelling irony. The rule of practice and procedure that the Daubert Amendment seeks to change, rule 90.702, itself originated from a proposed statutory code of evidence enacted by the Legislature in 1976 to replace all *common law* evidence holdings.[15] When this Court adopted that proposed Evidence Code in 1979, it had the immediate effect of eliminating all common law evidence formerly applicable in Florida. Thus, if the Daubert Amendment were truly meant just to modify the common law, it was chasing a ghost—that common law disappeared from this state some decades ago.

There is also this to contemplate. Allowing a simple majority of the legislature to modify or eliminate rules of practice and procedure by the expedient of purporting only to amend the common law threatens the Constitution's careful separation of governmental powers. To do so would place ultimate rule-making for

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[15] Statutes do replace common law. *See* § 2.01, Fla. Stat. (2017) ("The common and statute laws of England which are of a general and not a local nature … are declared to be of force in this state; provided, the said . . . common law be not inconsistent . . . with the acts of the Legislature of this state."); *see Ripley v. Ewell*, 61 So. 2d 420 (Fla. 1952) (if there is an inconsistency between such statute and the common law, the common law is superseded).

the judicial branch in the hands of the legislature. The purpose for separating the powers of the three branches by clear provisions would become a relic of history.

Rule 90.702 Does Not Require the Jury to Apply Every Step in the Scientific Method

No rule on scientific opinion evidence should require jurors to work through every step in the scientific method, make every appropriate analysis, and arrive at ***the*** scientifically correct conclusion. That is what the Fourth District's decision insists that a jury must do. But rules of evidence for scientific opinion testimony are intended just for jurors to decide which expert's testimony is reliable, not which is the correct analysis.

The Fourth District misread the Daubert Amendment by requiring jurors to comprehend, resolve, and apply scientific methods to assess the correctness of an opinion. This contrasts with Evidence Code rule 90.702, which requires only that, based on the qualifications and testimony of the expert and other evidence in the case, the jury decide whether to accept or reject the opinion.

Conclusion

The Fourth District's *Daubert* analysis resulted in reversible error, stripping Petitioner of a valid jury verdict obtained by evidence admissible under Evidence Code rule 90.702, *Frye*, and *Marsh*—and which was consistent with the official scientific positions adopted by the Occupational Safety and Health Administration, the World Health Organization, and the Environmental Protection Agency. The

Daubert Amendment is an unconstitutional attempt to legislate practice and procedure for the court system. The Court could and should use this case to set guidelines for lower courts facing a similar statute adopted by a simple legislative majority that purports to change the valid rules of judicial practice and procedure duly adopted by this Court. Petitioner asks this Court to reverse the Fourth District's opinion and remand to the Circuit Court with instructions to reinstate the Final Judgment in its entirety with the sole exception that Owens Corning Fiberglas be deleted as a Fabre defendant.

Dated: December 12, 2017

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on December 12, 2017, a copy of the foregoing was filed electronically in this Court and served via registered e-mail to counsel listed below.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief was prepared in Times New Roman, 14-point font, in compliance with Rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

/s/ James L. Ferraro, Esq.