

Lawyer Group Asks To Weigh In On Mesothelioma Appeal

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Law360, New York (August 10, 2017, 9:27 PM EDT) -- The [Florida Justice Association](#) urged the state high court Thursday to let it weigh in on efforts to reinstate a mesothelioma sufferer's \$8 million verdict in litigation against R.J. Reynolds and an industrial manufacturer, saying an appeals court erred by following the state Legislature's lead and applying the wrong standard for screening expert testimony.

The statewide attorney association offered a proposed amicus brief in support of Richard DeLisle's appeal seeking to revive a favorable jury verdict on claims that he developed mesothelioma due to exposure from [R.J. Reynolds Tobacco Co.](#) cigarette filters and Crane Co. gaskets, contending that the Florida Legislature acted unconstitutionally by trying to impose the so-called Daubert standard on state courts through an amendment to state law and an appeals court shouldn't have gone along with it.

"In accordance with the separation of powers guaranteed by the Florida Constitution, this court recently declined to adopt the Daubert amendment to the extent it is procedural," the Florida Justice Association said. "This court should now hold that the Daubert amendment is an unconstitutional infringement by the legislature on this court's settled procedure governing the admissibility of expert testimony."

In 1993 in *Daubert v. Merrell Dow Pharmaceuticals*, the [U.S. Supreme Court](#) established a federal standard for determining whether expert testimony is admissible, providing several factors to consider: whether the testimony is based on sufficient facts or data and is the product of reliable principles and methods, as well as whether the witness has applied those principles and methods reliably to the facts of the case.

However, the Florida high court continued to use the approach it had adopted in the 1980s, which was laid out in the D.C. Circuit's 1923 decision in *Frye v. U.S.*, requiring the one advancing the proof to establish by a preponderance of the evidence that the underlying scientific principles and methodology were generally accepted.

The Legislature tried to abolish that procedure in 2013 and adopt the more stringent requirements of the Daubert standard, which the lawyers group said violated the state's separation of powers doctrine in the process.

An appeals court in September [overturned a lower court verdict](#) in DeLisle's favor, taking issue with the use of multiple experts in his trial, particularly James Dahlgren, a physician with a specialty in occupational and environmental medicine who testified that chrysotile-variety asbestos from Crane gaskets contributed to the man's sickness.

The appeals court also said testimony from physicians James Crapo and James Rasmuson, who linked asbestos to mesothelioma, should have been blocked because the trial court did not have enough information to approve or disapprove them.

The court also noted that DeLisle's \$8 million award at trial was "substantially higher" than any other

personal award for a mesothelioma or asbestosis case.

DeLisle then turned to the Florida Supreme Court, contending in his jurisdictional brief in December that Florida's high court needs to address its stance on the Daubert analysis, saying "lawyers and parties across Florida want this court to take it up."

The justices [agreed to hear the matter](#) in mid-July, and DeLisle's opening brief reiterated that the appeals court shouldn't have used the Daubert standard and chucked testimony that followed settled scientific methods that are widely accepted in the medical community.

Specifically, DeLisle said, this case involves differential diagnosis, which involves an expert eliminating possible causes of a medical condition in order to figure out the actual cause based on an examination of the patient or a review of their work history and an analysis of their medical records.

Forty-four physicians, scientists and scholars offered an amicus brief on Wednesday detailing the generally accepted practices they use to attribute causation of asbestos-related diseases, saying they know the court must apply Florida law in the end, but they "seek only to ensure the court has the benefit of an accurate view of the science."

Among other things, they noted that they generally use a multifaceted approach to determine the cause of asbestos-related diseases, with a review of the patient's exposure history being a key part.

R.J. Reynolds had challenged their bid to file an amicus brief on Monday, arguing that they don't address the issue upon which DeLisle secured review, namely, whether the Florida Legislature incorrectly codified Daubert.

However, the physicians, scientists and scholars offered their brief anyway, and court approval remains pending.

The Florida Justice Association's own proposed brief did center around the Daubert issue, contending that the Legislature's attempt to impose the standard on Florida courts is an unconstitutional infringement on the high court's exclusive control over the rules of practice and procedure.

The amendment also contravenes public policy, the association noted, saying the Frye standard did a sufficient job screening out unreliable testimony and upping the requirements has done nothing but "increase procedural hurdles, delays, and costs in the justice system."

Bryan S. Gowdy of Creed & Gowdy PA, who represents the Florida Justice Association, told Law360 on Thursday that the association's position is that the Daubert statute is a rule of procedure that falls within the authority of the Florida Supreme Court.

"The brief cites many authorities for the argument that the admissibility of evidence is a rule of procedure, and the Florida Constitution gives that authority to the Supreme Court, not the Legislature," he said.

A representative for Crane declined to comment Thursday. Representatives for the other parties didn't immediately return requests for comment after business hours.

The Florida Justice Association is represented by Bryan S. Gowdy of Creed & Gowdy PA and Howard C. Coker of [Coker Schickel Sorenson Posgay Camerlengo & Iracki](#).

The physicians, scientists and scholars are represented by Wesley A. Bowden of [Levin Papantonio Thomas Mitchell Rafferty & Proctor PA](#).

Crane is represented by William J. Simonitsch of [K&L Gates LLP](#). R.J. Reynolds is represented by Elliot H. Scherker, Sabrina R. Gallo, Julissa Rodriguez, Brigid F. Cech Samole and Stephanie L. Varela of [Greenberg Traurig LLP](#).

DeLisle is represented by Gary M. Farmer Sr. of [Farmer Jaffe Weissing Edwards Fistos & Lehrman PL](#) and James L. Ferraro and David A. Jagolinzer of the [Ferraro Law Firm PA](#).

The case is Richard DeLisle vs. Crane Co. et al., case number SC16-2182, in the Supreme Court of the State of Florida.

--Additional reporting by Emily Field and Christopher Crosby. Editing by Brian Baresch.