

No. SC16-2182

IN THE
Supreme Court of Florida

RICHARD DELISLE,

Petitioner,

v.

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

Respondents.

On Review from the Fourth District Court of Appeal
Lower Tribunal Case Nos. 4D13-4351 & 4D14-146

**BRIEF OF WASHINGTON LEGAL FOUNDATION
AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS**

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IDENTITY & INTEREST OF *AMICUS CURIAE*

Founded in 1977, Washington Legal Foundation (WLF) is a nonprofit, public-interest law firm and policy center with supporters in all 50 States, including Florida. WLF devotes a substantial portion of its resources to defending and promoting free enterprise, individual rights, limited government, and the rule of law. To that end, WLF has long appeared as *amicus curiae* in pivotal cases to support the principle that trial courts must exclude any expert opinion that lacks sufficient indicia of reliability. *See, e.g., Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999); *Gen. Elec. Co. v. Joiner*, 522 U.S. 136 (1997); *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993).

In addition, WLF's Legal Studies Division, the publishing arm of WLF, regularly publishes articles on evidentiary issues, including the proper reliability threshold for expert testimony. *See, e.g.,* Josh Becker & Aaron Block, *The Florida Supreme Court Should Adopt a Modernized Scientific-Testimony Standard for the "Sunshine" State*, WLF Legal Opinion Letter (June 30, 2017); Kirby T. Griffis, *The Role of Statistical Significance in "Daubert"/Rule 702 Hearings*, WLF Working Paper (March 2017).

WLF believes that scientifically unreliable evidence is no evidence at all. Accordingly, the quality of decision-making in the Florida courts rests on the ability and willingness of Florida trial judges to ensure that unreliable "scientific"

expert evidence is never presented to the finder of fact. WLF fears that if this Court excuses trial-court judges from their gatekeeping obligation by, for example, permitting them to decide that the reliability of an expert's opinion bears upon its weight rather than its admissibility, disastrous unintended consequences will follow, undermining the Florida civil justice system's ability to produce a fair and just result.

SUMMARY OF ARGUMENT

Although WLF believes that the Florida Legislature acted well within its constitutional authority when it amended the Florida Evidence Code to replace the "general acceptance" test of *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923), with the federal admissibility standard for expert testimony embodied in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S 579 (1993), and its progeny, WLF will not address that rarified question of state constitutional law here. Instead, regardless of the outcome of this Court's separation-of-powers analysis, WLF urges the Court to abandon the *Frye* test forever and remain with the overwhelming majority of jurisdictions that have embraced *Daubert* and Rule 702 of the Federal Rules of Evidence to ensure the reliability of expert evidence.

While *Daubert* enjoys many advantages over *Frye*, perhaps the most important of these is that although *Frye* is concerned with the reliability of only the *methodology* invoked by an expert witness, *Daubert* requires judges to scrutinize

both the methodology invoked *and* the expert's *application* of that methodology. Because it merely evaluates "the general acceptance" of the scientific technique on which expert evidence purportedly relies, *Frye* permits even expert evidence derived from an improper application of a "generally accepted" technique to be admitted to the jury. But it makes little sense to police a scientific methodology if that methodology can be implemented in any haphazard or scientifically unreliable way the expert sees fit. In contrast, by ensuring the reliability of not only the scientific method but also its application in every given case, *Daubert* provides a more robust and consistent framework for excluding unreliable scientific evidence from the jury's consideration.

Another distinct advantage of *Daubert* is that the *Frye* test's scrutiny of expert evidence is triggered only when that evidence is derived from "new or novel" methodologies. Indeed, as this Court's *Frye* precedents have made clear, if proffered expert testimony does not rely on "new or novel" scientific study, test, procedure, or methodology, *Frye* simply does not apply. In practice, this means that in the overwhelming majority of cases involving expert testimony, the scientific reliability of that evidence is completely beyond the purview of the trial judge. Even if a methodology would at one time have been rejected as unreliable under *Frye* when it was "new or novel," so long as that method has been around long enough, the court presumably may no longer scrutinize it. In contrast, while

Daubert considers general acceptance as one of many indicia of reliability, the admissibility of expert evidence hinges on its actual reliability in each given case, not on the happenstance of the methodology's evolutionary stage of advancement toward general acceptance.

As *Daubert* emphasizes, rigorous judicial gatekeeping is the only way to ensure that reliability remains a threshold question for the court—not the jury. It is not enough to invoke “cross-examination” as a cure-all while leaving any dispute about reliability to the “weight” a jury decides to give that testimony. Unreliable evidence is entitled to *no* weight and thus should never reach the jury. Although cross-examination has its benefits, it cannot help jurors readily distinguish valid expert conclusions from junk science, nor can it supplant the court's duty to ensure that expert evidence is sufficiently relevant and reliable when it is submitted to the jury—that vital task must fall only on the court's shoulders. But in this case—as the Fourth District rightly held—the trial court abused its discretion in failing to prevent unreliable expert evidence from reaching the jury.

Beyond the question of the proper reliability threshold for expert evidence, the decision below should be affirmed because any methodology for establishing toxicological causation that fails to account for dose is inherently unreliable. In reversing the trial court's abuse of discretion, the Fourth District painstakingly pored over the relevant expert methodologies and their application in this case. The

appeals court rejected as unreliable the expert opinion that Petitioner’s “every exposure” to asbestos—regardless of product, fiber type, or even dose—was a substantial contributing factor to his mesothelioma. Not only has Petitioner’s “every exposure” theory of causation been roundly rejected as unreliable by the vast majority of courts throughout the country, but it contradicts the first tenet of modern toxicology: the dose makes the poison. So despite Petitioner’s insistence that the link between dose and causation is “massively irrelevant” to “the actual dispute in this case,” Pet’r Br. at 25, dose remains the single most important factor to consider in determining whether any given exposure to a particular asbestos source legally caused Petitioner’s disease.

Nor may Petitioner rely on conclusory statements from regulatory agency websites to establish causation in this case. Claiming that “no safe dose” of asbestos actually exists, Petitioner cites an unproven statement to that effect on the website of the Occupational Safety and Health Administration (OSHA). Not only is that statement contradicted by the very studies it purportedly relies upon, but such prophylactic regulatory warnings are made with an eye toward reducing public exposure to harmful substances and do not adhere to the rigorous causation standards of a court of law. For that reason, courts have uniformly held that merely pointing to regulatory agency statements that “no safe dose” of a toxin exists cannot satisfy a plaintiff’s burden to prove causation in any given case.

ARGUMENT

I. The *DAUBERT* STANDARD IS SUPERIOR TO *FRYE* IN ENSURING THE RELIABILITY OF EXPERT EVIDENCE

A. Unlike *Frye*, *Daubert* Evaluates Both the Reliability of a Scientific Methodology and Its Application in Any Given Case

The reliability of scientific opinion evidence rests not only on the validity of an expert's underlying methodology but also on the expert's proper *application* of that methodology in reaching a given conclusion. After all, neither an invalid methodology nor a valid methodology improperly applied will yield reliable results. Nonetheless, as this Court has made clear, "*Frye* does not require the court to assess the application of the expert's raw data in reaching his or her conclusion." *Castillo v. E.I. du Pont de Nemours & Co.*, 854 So. 2d 1264, 1276 (Fla. 2003). In contrast, *Daubert* works to ensure that every component of expert evidence—the expert's conclusion, methodology, and reasoning—satisfies the ultimate goal of admitting only reliable evidence to the trier of fact.

It is not enough for an expert witness to simply invoke a reliable scientific technique without also showing that he or she faithfully applied that technique. To the extent that *Frye* does not permit—much less require—trial judges to verify the proper application of a generally accepted methodology, it invites the proliferation of "junk science" in the courtroom. So, for example, if an expert testifies that he relied on a randomized, controlled trial to establish causation but—in fact—he or

she actually performed a simple coin toss (heads: causation, tails: no causation), *Frye* would permit that expert's "scientific findings" to be admitted to the trier of fact.

Under *Frye*, this Court has effectively precluded trial judges from ever considering the reliability of the reasoning underlying an expert's opinion. See *Castillo*, 854 So. 2d at 1276 ("We therefore conclude that the Third District erroneously assessed the [plaintiffs'] expert testimony under *Frye* by considering not just the underlying science, but the application of the data generated from that science in reaching the expert's ultimate conclusion."); see also *Rodgers v. State*, 948 So. 2d 655, 666 (Fla. 2006) (finding test results admissible despite objections to actual testing conditions because "these objections are matters of weight, not admissibility, and do not implicate *Frye*").

The case of *Hood v. Matrixx Initiatives, Inc.*, 50 So. 3d 1166, 1170-71 (Fla. 4th DCA 2010), epitomizes *Frye*'s grave deficiency in this regard. In that case, the Fourth District explained that it was "compelled" by this Court's *Frye* jurisprudence to admit expert testimony that had been roundly rejected as unreliable by *seven* different federal courts. Among the myriad deficiencies of that expert's report identified by one federal judge were that it

attempts to use animal studies without support for extrapolation to humans, cites "epidemiological studies" that fail to follow the fundamentals of epidemiology, makes unsupported analogies between different chemical substances, performs unsound experiments, draws

impermissible conclusions from other scientists' articles and experiments, and relies on irrelevant and unreliable data. In short, Dr. Jafek has not "employ[ed] in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field."

Benkwith v. Matrixx Initiatives, Inc., 467 F. Supp. 2d 1316, 1332 (M.D. Ala. 2006) (quoting *Kumho*, 526 U.S. at 152). Yet, as the *Hood* court recognized, each and every one of these deficiencies was beyond the reach of the trial judge under *Frye*.

Unlike *Frye*, *Daubert* ensures the reliability of expert evidence by clarifying that "any step that renders the analysis unreliable under the *Daubert* factors renders the expert's testimony inadmissible." *In re Paoli R.R. Yard PCB Litig.*, 35 F.3d 717, 745 (3d Cir. 1994). This is true "whether the step completely changes a reliable methodology or merely misapplies that methodology." *Id.* Because *Daubert* recognizes that "conclusions and methodology are not entirely distinct from one another," a trial court should never "admit opinion evidence that is connected to existing data only by the *ipse dixit* of the expert." *Joiner*, 522 U.S. at 146. Rather, if the court concludes "that there is simply too great an analytical gap between the data and the opinion proffered," it is obliged to exclude that opinion. *Id.*

Although Petitioner attempts to escape the unreliability of his own experts' specific-causation opinions by characterizing their methodology as a "differential diagnosis," merely affixing that label to an expert opinion cannot immunize that

opinion from further judicial scrutiny. Rather, as the Fourth District rightly recognized, “something doesn’t become scientific knowledge just because it’s uttered by a scientist, nor can an expert’s self-serving assertion that his conclusions were derived by the scientific method be deemed conclusive.” *Crane Co. v. Delisle*, 206 So. 3d 94, 101 (Fla. 4th DCA 2016) (quoting *Hughes v. Kia Motors Corp.*, 766 F.3d 1317, 1328 (11th Cir. 2014)). Here, Petitioner’s experts’ assumptions on the equal potency of all types of asbestos were not supported by reliable data. For example, Dr. Dahlgren’s assumptions were based solely on “his thinking that all commercial types of asbestos *were probably* of the same potency.” *Id.* at 105. But that is pure speculation, not science. As the appeals court aptly concluded, even if Petitioner’s experts’ “methodology was appropriate, it was not supported by any data.” *Id.*

B. Unlike *Frye*, *Daubert* Evaluates the Reliability of All Expert Evidence, Not Merely Evidence Derived from “New or Novel” Scientific Methodologies

Another significant flaw of *Frye* as a standard for ensuring the reliability of expert evidence—as applied in Florida and many other jurisdictions—is that it may be invoked only in cases involving “new or novel” scientific evidence. *See, e.g., Castillo*, 854 So. 2d at 1272-73 (explaining that the *Frye* standard “is only used when new scientific methodology is being presented”); *U.S. Sugar Corp. v. Henson*, 823 So. 2d 104, 109 (Fla. 2002) (“By definition, the *Frye* standard only

applies when an expert attempts to render an opinion that is based upon new or novel scientific techniques.”); *Gelsthorpe v. Weinstein*, 897 So. 2d 504, (Fla. 2d DCA 2005) (finding *Frye* inapplicable where the “testimony did not rely on any study, test, procedure, or methodology that constituted new or novel scientific evidence”).

In practice, *Frye*’s “new or novel” threshold requirement means that the scientific reliability of expert evidence is beyond the purview of the trial judge in the overwhelming majority of cases. *See, e.g., Henson*, 823 So. 2d at 109 (“[I]n the vast majority of cases, no *Frye* inquiry will be required—because no innovative scientific theories will be at issue.”). Consequently, in Florida courts applying *Frye*, expert testimony on such esoteric evidence as tire thickness, global positioning satellite (GPS) technology, and even the enhancement of driver visibility on earth-moving equipment is deemed neither new nor novel and so is immune from *any* gatekeeping scrutiny. *See Jones v. Goodyear Tire Co.*, 871 So. 2d 899, 903 (Fla. 3d DCA 2003) (tire expert); *Still v. State*, 917 So.2d 250, (Fla. 3d DCA 2005) (GPS expert); *Davis v. Caterpillar, Inc.*, 787 So. 2d 894, 898 (Fla. 3d DCA 2002) (earth-moving equipment visibility expert).

The *Frye* test thus allows the vast majority of expert evidence to be admitted without *any* scrutiny of its reliability. Even if a methodology would have once been rejected as unreliable under *Frye* when it was “new or novel,” once that

unreliable method has been around long enough, the court presumably may no longer scrutinize it. This peculiar approach to scientific reliability leaves much to be desired. For example, although astrology and phrenology have been around for many centuries, that fact does not make expert opinions derived from those ancient “methodologies” any more reliable. As one court has colorfully put it, “a person with a degree should not be allowed to testify that the world is flat, that the moon is made of green cheese, or that the Earth is the center of the solar system.” *E.I. du Pont de Nemours and Co. v. Robinson*, 923 S.W.2d 549, 558 (Tex. 1995).

Not only does *Frye*’s “new or novel” threshold allow unreliable evidence based on “old” methodologies to be presented to the jury, but it often bars the admission of demonstrably reliable expert evidence that is still too novel to have gained “general acceptance.” As the First District has recognized, “[t]his creates a ‘cultural lag’ during the technique’s development, requiring that relevant evidence which might be demonstrated to be completely reliable must be excluded from consideration.” *Brown v. State*, 426 So. 2d 76, 88 n.17 (Fla. 1st DCA 1983), *disapproved on other grounds*, *Bundy v. State*, 471 So. 2d 9, 17 (Fla. 1985). In such instances, *Daubert* admits reliable expert evidence that would be excluded under *Frye*. So a unique deficiency of *Frye* is not that it is either too restrictive or too permissive, but that it is paradoxically both—and therefore capricious.

Under *Daubert*, the trial judge—not the methodology—is the gatekeeper.

While *Daubert* considers general acceptance as one indicia of reliability, the admissibility of expert evidence hinges on its actual reliability in each given case—not on the happenstance of the methodology’s evolutionary stage of advancement toward general acceptance. The *Frye* standard, by contrast, with its myopic focus on the acceptance of the specific methodology or discipline being relied upon, lacks the flexibility of *Daubert* to scrutinize the reliability of the actual conclusions an expert witness espouses.

C. *Daubert* Clarifies that Cross-Examination Is No Substitute for Judicial Gatekeeping

Under *Daubert*, it is not enough to invoke the “cross-examination” of expert testimony while leaving any dispute about reliability to the “weight” a jury decides to give that testimony. While cross-examination has its benefits, it is no panacea; it cannot readily distinguish valid expert opinions from junk science, and thus it cannot take the court’s place in determining an expert’s reliability in the first instance. As Professor Jules Epstein has explained:

This treatment of cross-examination as the palliative of choice has its flaws, not merely in its expectation that cross-examination without other resources can fairly respond to an expert witness. The mythic status of cross-examination in this regard actually impedes accurate fact-finding because leading questions are not always an appropriate or sufficient tool for truth finding. Courts have not acknowledged these limitations.

Jules Epstein, *Cross-Examination: Seemingly Ubiquitous, Purportedly Omnipotent, and “At Risk,”* 14 Widener L. Rev. 427, 437 (2009) (internal citations

omitted). Consistent with this view, the mere “fact that an expert witness was ‘subject to a thorough and extensive examination’ does not ensure the reliability of the expert’s testimony; such testimony must still be assessed *before* it is presented to the jury.” *Nease v. Ford Motor Co.*, 848 F.3d 219, 231 (4th Cir. 2017) (emphasis added) (citation omitted).

Urging the admission of patently unreliable expert testimony on appeal, Petitioner contends that a jury can somehow muddle through the relevant science with the aid of competing expert evidence and cross-examination. But dismissing key, demonstrable, and objective flaws in expert evidence as only bearing upon the weight of that evidence inevitably leaves jurors with the *sui generis* task of resolving the basic *reliability* of the expert’s testimony. Jurors cannot be expected and should not be allowed to make those sorts of reliability determinations. As for how much “weight” a jury should give unreliable expert evidence, there is only one acceptable answer: none. Unreliable, inadmissible evidence “contributes nothing to a ‘legally sufficient evidentiary basis’” for a jury verdict. *Weisgram v. Marley Co.*, 528 U.S. 440, 454 (2000) (internal citation omitted).

Indeed, legal scholars have long insisted that “cross-examination does little to affect jury appraisals of expert testimony.” Christopher B. Mueller, *Daubert Asks the Right Questions: Now Appellate Courts Should Help Find the Right Answers*, 33 Seton Hall L. Rev. 987, 993 (2003). To the contrary, studies have

revealed jurors' commonly held assumption that, because the trial judge admitted the expert evidence, it must have passed at least some minimal level of scrutiny. *See, e.g.,* N.J. Schweitzer & Michael J. Saks, *The Gatekeeper Effect: The Impact of Judges' Admissibility Decisions on the Persuasiveness of Expert Testimony*, 15 *Psychol. Pub. Pol'y & L.* 1, 7 (2009). As a result, trial judges have a duty to avoid "dumping a barrage of questionable" evidence on a jury likely to be "awestruck by the expert's mystique." *Allison v. McGhan Med. Corp.*, 184 F.3d 1300, 1310 (11th Cir. 1999).

The only way to ensure that a jury does not give too much weight to unreliable evidence is to never admit it in the first place. "The basic calipers that jurors use to evaluate testimony—their own life experience—are of little value when jurors evaluate whether an expert is telling the truth." Victor E. Schwartz & Cary Silverman, *The Draining of Daubert and the Recidivism of Junk Science in Federal and State Courts*, 35 *Hofstra L. Rev.* 217, 220 (2006). Thus, any questions about the "factual basis, data, principles, [or] methods" of expert testimony—or "their application"—require the trial judge to determine whether that testimony is reliable *before* sending it to the jury. *Kumho Tire Co.*, 526 U.S. at 149 (emphasis added). Because that is precisely what the trial judge in this case failed to do, the well-reasoned decision of the Fourth District should be affirmed.

II. ANY “METHODOLOGY” FOR ESTABLISHING TOXICOLOGICAL CAUSATION THAT FAILS TO ACCOUNT FOR DOSE IS INHERENTLY UNRELIABLE

A. To Prove Causation, a Plaintiff Must Establish Exposure to a Harmful Dose of the Defendant’s Product, Not Merely *Any* Level of Exposure

Petitioner insists that the link between dose and causation is not only “utterly academic” but “massively irrelevant” to “the actual dispute in this case.” Pet’r Br. at 25. But that contention cannot be squared with this Court’s long-held recognition that asbestos products “have widely divergent toxicities, with some asbestos products presenting a much greater risk of harm than others.” *Celotex Corp. v. Copeland*, 471 So. 2d 533, 538 (Fla. 1985). Under Florida law, to prove that exposure to asbestos from each defendant’s products was a “substantial contributing factor” in causing his mesothelioma, Petitioner must show not only “how often the products were used on the job sites” but also “the toxicity of those products as they were used.” *Lagueux v. Union Carbide Corp.*, 861 So. 2d 87, 88 (Fla. 4th DCA 2004) (internal quotation marks and citation omitted). To satisfy this burden with scientifically reliable evidence, Petitioner cannot simply show exposure to *any* amount of asbestos from a defendant’s product.

Petitioner’s contention that dose is irrelevant also flies in the face of the first tenet of toxicology: “The dose makes the poison.” Federal Judicial Center, *Reference Manual on Scientific Evidence* 636 (3d ed. 2011). The basic concept of a necessary dose dates back to the sixteenth century when Paracelsus, the “father of

toxicology,” observed: “All substances are poisonous; there is none which is not a poison. The right dose differentiates poison from a remedy.” *Casarett & Doull’s Toxicology: The Basic Science of Poisons* 5 (Curtis D. Klaassen ed., 7th ed. 2008). As Florida courts have recognized, “even water if consumed in large enough quantities can be toxic.” *Berry v. CSX Transp., Inc.*, 709 So. 2d 552, 559 (Fla. 1st DCA 1998).

Indeed, any “expert who avoids or neglects this principle [of the dose-response relationship] without justification casts suspicion on the reliability of his methodology.” *McClain v. Metabolife Int’l, Inc.*, 401 F.3d 1233, 1242 (11th Cir. 2005). That is why experts seeking to prove toxicological causation must “demonstrate the levels of exposure that are hazardous to human beings generally as well as the plaintiff’s actual level of exposure.” *Westberry v. Gislaved Gummi AB*, 178 F.3d 257, 263 (4th Cir. 1999). As one leading expert has observed, “Dose is the single most important factor to consider in evaluating whether an alleged exposure caused a specific adverse effect.” David L. Eaton, *Scientific Judgment and Toxic Torts—A Primer in Toxicology for Judges and Lawyers*, 12 J.L. & Pol’y 5, 11 (2003).

For this reason (among many others), the “expert” opinion that *every* asbestos exposure level above background level is *always* a substantial cause of a plaintiff’s asbestos-related disease has been roundly rejected by courts as

insufficiently reliable for proving causation. *McIndoe v. Huntington Ingalls, Inc.*, 817 F.3d 1170, 1176 (9th Cir. 2016); *Moeller v. Garlock Sealing Techs., LLC*, 660 F.3d 950, 954-55 (6th Cir. 2011); *Scapa Dryer Fabrics, Inc. v. Knight*, 788 S.E.2d 421, 427 (Ga. 2016); *Bostic v. Georgia-Pac. Corp.*, 439 S.W.3d 332, 339-40 (Tex. 2014); *Betz v. Pneumo Abex, LLC*, 44 A.3d 27, 56-57 (Pa. 2012).

At the very least, proof of causation requires the ability to quantify the dose-specific level of exposure to a substance that is allegedly toxic or dangerous. By their own admission, however, Petitioner's experts *never* evaluated the dose-specific level of Petitioner's exposure to chrysotile or crocidolite asbestos fibers. Because a single fiber among millions cannot be substantially causative of a disease that is inherently dose responsive, the Fourth District's decision should be affirmed.

B. Petitioner Cannot Rely on Statements From Government Websites that “No Safe Dose” of Asbestos Exists as a Substitute for Actual Proof of Causation

Although Petitioner maintains that dose is “massively irrelevant” to proving causation, he simultaneously insists that “no safe dose” of asbestos actually exists. Pet'r Br. at 24, 25. To support this no-safe-dose claim, Petitioner relies *not* on any epidemiological or other study, but on the OSHA website, which states: “There is no ‘safe’ level of asbestos exposure for any type of asbestos fiber.” *Id.* at 25 (quoting U.S. Dep't of Labor, OSHA, *Safety & Health Topics*,

<https://www.osha.gov/SLTC/asbestos/>). But neither of the studies cited by OSHA even remotely stands for that sweeping proposition. See E. Skammeritz, *et al.*, *Asbestos Exposure and Survival in Malignant Mesothelioma: A Description of 122 Consecutive Cases at an Occupational Clinic*, 2 Int’l J. Occupational & Env’tl. Med. 189, 231 (2011) (“It has never been possible to establish a lower threshold for cumulative asbestos exposure in relation to development of [malignant mesothelioma], despite the fact that a dose-response relationship has been determined.”); Morris Greenburg, *et al.*, *Mesothelioma Register 1967-68*, 31 Brit. J. Indus. Med. 91, 91 (1974) (concluding that the finding of asbestos fibers or pleural plaques “occurred as frequently in those cases classified as ‘definitely not mesothelioma’ as in confirmed cases”).¹

If anything is “irrelevant” to this appeal, it is conclusory agency statements that do not adhere to the causation standards of a court of law. In promulgating such warnings, regulatory agencies like OSHA evaluate workplace exposures using a “weight of the evidence” threshold of proof, a threshold “reasonably lower than that appropriate in tort law.” *Allen v. Pa. Eng’g Corp.*, 102 F.3d 194, 199 (5th

¹ The OSHA statement is itself contradicted by other government agencies. According to the Centers for Disease Control and Prevention’s Agency for Toxic Substances and Disease Registry (ATSDR), for example, “[l]ow levels of asbestos that present little, if any, risk to your health can be detected in almost any air sample.” ATSDR, Public Health Statements for Asbestos, <https://www.atsdr.cdc.gov/phs/phs.asp?id=28&tid=4>

Cir. 1996). Unlike Florida tort law, which requires a plaintiff to prove “that it is more likely than not that the conduct of the defendant was a substantial factor in bringing about” the plaintiff’s injury, *Gooding v. Univ. Hosp. Bldg., Inc.*, 445 So. 2d 1015, 1018 (Fla. 1984), the “weight of the evidence” methodology used by regulatory agencies “results from the preventative perspective that the agencies adopt in order to reduce public exposure to harmful substances” via “prophylactic rules governing human exposure.” *Allen*, 102 F.3d at 199.

Stated differently, OSHA’s no-threshold assumption can best be understood “as a bit of regulatory science policy, and not a principle of science subject to proof through the scientific method.” Edward J. Schwartzbauer, *et al.*, *Cancer and the Adjudicative Process: The Interface of Environmental Protection and Toxic Tort Law*, 14 m. J.L. & Med. 1, 12 (1988). So while regulatory thresholds may be “of substantial value to public health agencies charged with ensuring the protection of the public health,” they unquestionably are “of limited value in judging whether a particular exposure was a substantial contributing factor to a particular individual’s disease or illness.” Eaton, *supra*, at 36.

For this very reason, courts have uniformly held that pointing to regulatory statements that “no safe dose” of a toxin exists cannot satisfy a plaintiff’s burden to prove causation in any given case. *See, e.g., Matrixx Initiatives, Inc. v. Siracusano*, 563 U.S. 27, 42 (2011) (noting that regulatory agencies generally make decisions

based on “evidence that gives rise only to a suspicion of causation”); *McClain*, 401 F.3d at 1250 (explaining that because regulatory policy is not concerned with the question of causation in individuals, it “is unreliable proof of medical causation in the present [tort] case”); *Baker v. Chevron USA, Inc.*, 680 F. Supp. 2d 865, 880 (S.D. Ohio 2010) (“[R]egulatory agencies are charged with protecting public health and thus reasonably employ a lower threshold of proof in promulgating regulations than is used in tort cases.”); *Parker v. Mobil Oil Corp.*, 7 N.Y.3d 434, 450 (2006) (“[S]tandards promulgated by regulatory agencies as protective measures are inadequate to demonstrate legal causation.”).

CONCLUSION

For the foregoing reasons, *Amicus Curiae* Washington Legal Foundation respectfully requests that this Court affirm the well-reasoned judgment below.

Respectfully submitted,

September 20, 2017

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CERTIFICATE OF SERVICE

Pursuant to Rule 2.516, Florida Rules of Judicial Administration, I certify that a true and correct copy of the foregoing *Brief of Washington Legal Foundation as Amicus Curiae in Support of Respondents* was electronically served on all persons listed below via the Florida ePortal Court System on this 20th day of September 2017:

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 9.210(a)(2), Florida Rules of Appellate Procedure, I certify that the foregoing *Brief of Washington Legal Foundation as Amicus Curiae in Support of Respondents* complies with the font requirements of that Rule because it was prepared using Microsoft Word 2010, Times New Roman, 14-point font.

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