

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.

**RESPONSE IN OPPOSITION TO RESPONDENT
CRANE CO.'S MOTION FOR REHEARING**

The petitioner, Richard Delisle (“Plaintiff”), by and through undersigned counsel, hereby responds in opposition to Respondent Crane Co.’s (“Crane”) Motion for Rehearing, stating as follows:

On October 30, 2018, Crane filed a Motion for Rehearing, advancing two arguments, neither of which has any merit. First, Crane argues that rehearing is required because the Court “overlooked or misapprehended” its own prior precedent, namely *Looney v. State*, 803 So. 2d 656 (Fla. 2001), on the question of whether it had “conflict jurisdiction” to hear this case—an issue which was fully briefed, addressed at length during oral argument, specifically analyzed in the majority opinion, and formed the basis of Justice Labarga’s concurring opinion and Justice Canady’s dissent. That Crane disagrees with the majority’s fully informed

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conclusion is not a basis for rehearing. *See* Philip J. Padovano, *Florida Appellate Practice*, § 21.2 (2016 ed. Vol. 2) (“[I]t is not appropriate for a lawyer to quarrel with the court about its decision or to present a more pointed argument merely to express disagreement or dissatisfaction with the decision.”).

But, to be clear, the Court did not overlook or misapprehend *Looney*. Crane cites to *Looney* for the proposition that the *Daubert* statute cannot conflict with any rule or procedure of this Court adopting *Frye* because, according to Crane, this Court never promulgated a rule or procedure adopting *Frye*. *See* Reh’g Mot. at 9. In this regard, it is Crane that has “overlooked or misapprehended” the majority’s conclusions that “[a] procedural rule of this Court may be pronounced in caselaw,” Opinion at 18, and that, in *Marsh v. Valyou*, 977 So. 2d 543 (Fla. 2007), this Court “reaffirmed” *Frye* as a “procedural rule of the Court” Opinion at 1 n.1. Thus, as the majority recognized, *Frye* is a procedural rule of the Court pronounced in caselaw, rendering *Looney* inapplicable.¹

Crane’s second argument is that rehearing is required because, according to Crane, the seven justices of this Court somehow completely “overlooked the question of whether,” under *Fabre v. Marin*, 623 So. 2d 1182 (Fla. 1993), “the trial court erred by preventing the jury from considering the fault of all non-parties that

¹ Aside from this, Petitioner rests on the majority’s and Justice Labarga’s express analysis of the jurisdictional issue, Petitioner’s Brief on Jurisdiction, and Petitioner’s presentation on the jurisdictional question at oral argument.

contributed to Plaintiff's disease," which, according to Crane, were Georgia Pacific, Union Carbide Corporation, Ford, Bendix, Goulds, A.W. Chesterton, and Garlock (collectively, "the Excluded Non-Parties"). However, the Court clearly did not "overlook" Crane's *Fabre* argument, but instead expressly "decline[d] to address" it, Opinion at 21, as courts often do where, as here, the argument lacks merit.

At the risk of belaboring the issue, Crane's *Fabre* argument, which Crane fully presented in its Answer Brief, is meritless because, as the trial court concluded, Crane failed to provide sufficient evidence that the Excluded Non-Parties were at fault for Plaintiff's injury. On the other hand, the trial court concluded that there was sufficient evidence to include two other non-party defendants, Owens Corning Fiberglas and Brightwater, on the verdict form.

"*Fabre* permits a jury to determine each party's and each nonparty's percentage of fault and how much that fault contributed to a plaintiff's injury." *W.R. Grace & Co.-Conn. v. Dougherty*, 636 So. 2d 746, 748 (Fla. 2d DCA 1994). This Court has equated "fault" with "liability." *Fabre*, 623 So. 2d at 1185. Thus, a defendant seeking to add a non-party to the verdict form must offer sufficient evidence to establish a prima facie case of the non-party's *liability*.

To satisfy this burden in an asbestos case, and enable the jury to properly apportion fault between the various defendants, Florida Courts have long required the moving defendant to make a stringent evidentiary showing consisting of "the

specifics” of each of the non-party’s products, “how often th[ose] products were used on the job sites, and the toxicity of those products as they were used,” which requires evidence of “the specific type of asbestos fiber incorporated into the product,” “the physical properties of the product itself,” “the percentage of asbestos used in the product,” “the geographical origin of the mineral,” “whether the product is in the form of a solid block or . . . loosely packed insulation,” and “the amount of dust a product generates.” *Dougherty*, 636 So. 2d at 748 (quoting *Celotex Corp. v. Copeland*, 471 So. 2d 533, 538 (Fla. 1985)); see also *Snoozy v. U.S. Gypsum Co.*, 695 So. 2d 767, 769 (Fla. 3rd DCA 1997).

The trial court concluded that Crane met its burden to place Owens Corning Fiberglas and Brightwater on the verdict form, but Crane entirely failed to meet its burden as to the Excluded Non-Parties. In arguing to the contrary, Crane makes three primary contentions. First, as to exposure, Crane cites to record excerpts in which Plaintiff admitted he was exposed to products manufactured or supplied by each of the Excluded Non-Parties, including that:

- (1) he worked with or around Garlock gaskets;
- (2) he used packing from A.W. Chesterton;
- (3) he worked on brakes manufactured by Ford and Bendix;
- (4) he used a joint compound manufactured by Georgia Pacific; and
- (5) he worked with Goulds pumps.

The glaring problem with this contention is that Crane did not offer, and the record does not contain, any evidence demonstrating that any of the specific products to which Plaintiff was exposed actually contained asbestos, much less the “specifics” thereof required under *Dougherty*. Indeed, Plaintiff testified that he did not know whether any of those products contained asbestos, T. 12854, 12855, 12858-59, 12994, 13013, and even Crane’s own expert specifically admitted that:

- (1) not all Georgia-Pacific joint compound contained asbestos;
- (2) not all Union Carbide panels contained asbestos; and
- (3) not all brakes manufactured by Ford or Bendix contained asbestos.

T. 3976-77, 3983-85. Moreover, there is nothing in the record whatsoever regarding the percentage or toxicity of the purported asbestos in those products, or the frequency, duration, or timing of the purported exposures to the purported asbestos in the products. This is in stark contrast to the undisputed evidence that every single Crane product to which Plaintiff was exposed contained 75%-85% chrysotile asbestos, T. 2820, and the evidence of the toxicity of, and frequency, duration, and timing of Plaintiff’s exposures to, the Crane products.

Next, Crane attempts to establish the fault or liability of the Excluded Non-Parties for failure to warn, arguing that:

- (1) information regarding any and all relevant health hazards related to asbestos was well known during the time period at issue;

- (2) knowledge of this information could be attributed to all of the companies discussed above; and
- (3) “there was no evidence at trial that any of these products featured a warning.”

There are two errors in this argument. First, it does not account for Crane’s failure to offer any evidence that the specific products of the Excluded Non-Parties to which Plaintiff was exposed actually contained asbestos. Of course, if the products did not contain asbestos, there was no need for them to contain any asbestos warning. Second, Crane’s argument flips the burden of proof on its head. Even assuming, *arguendo*, that the products contained asbestos, to establish the liability of the Excluded Non-Parties for failure to warn, it was Crane’s burden to offer evidence affirmatively showing that the specific products to which Plaintiff was exposed did not contain a sufficient warning, as Plaintiff did against Crane. That Crane admits there was no evidence in the record on this issue is fatal to, rather than supports, its contention.

Finally, as to expert causation, Crane wisely declines to rely on the testimony of its own expert witness, Dr. Rasmuson, who on cross examination expressly opined that, even if the products listed above contained asbestos, any exposure to them would not have been a substantial cause of Plaintiff’s mesothelioma, based on the kinds of asbestos they might have contained and the minimal frequency and

duration of the possible exposures. T. 3976-77, T. 3983-87. Instead, Crane relies on the testimony of Plaintiff's expert, Dr. Dahlgren, who testified that if Mr. DeLisle was exposed to any non-party's asbestos-containing product, that product would be a substantial factor in causing Petitioner's mesothelioma. Reh'g Mot. at 8; T. 2242-48. According to Crane, since this Court has concluded that "Dr. Dahlgren's . . . opinion was admissible against Crane Co. and sufficient to support a finding of liability against it, then it should have been equally admissible and sufficient against" the Excluded Non-Parties who were excluded from the verdict form. Reh'g Mot. at 5.

Crane is incorrect. Dr. Dahlgren's testimony was based on hypotheticals in which he was asked to *assume* that the specific products of the Excluded Non-Parties to which Plaintiff was exposed actually contained asbestos. T. 2242-48. However, as explained above, there was no evidence in the record to support this assumption, much less the specifics required by *Dougherty*. In this regard, Crane is incorrect when it states that the evidence it presented against the Excluded Non-Parties was "the precise combination of evidence which [Plaintiff] presented against Crane Co." Reh'g Mot. at 8. To the contrary, unlike Crane in its attempt to establish liability against the Excluded Non-Parties, Plaintiff offered evidence affirmatively establishing that the Crane products to which he was exposed contained 75%-85% chrysotile asbestos, T. 2820, and the "specifics" thereof required by *Dougherty*.

Because Crane failed to offer evidence showing that the specific products of the Excluded Non-Parties to which Plaintiff was exposed actually contained asbestos, let alone the percentage they contained or the remaining evidence required by *Dougherty*, Dr. Dahlgren's opinion cannot establish causation against the Excluded Non-Parties.

In sum, Crane utterly failed to establish a prima facie case of fault or liability against the Excluded Non-Parties. Accordingly, the trial court did not err in refusing to add them to the verdict form.

WHEREFORE, Plaintiff respectfully requests that this Court deny Crane's Motion for Rehearing.

Dated November 9, 2018

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on November 9, 2018, 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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