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Is the Frye Standard Making a Comeback in Florida?

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On July 11, 2017, the Florida Supreme Court accepted jurisdiction of a case in which it is expected to finally decide, conclusively, whether Florida courts are to apply the *Frye* or *Daubert* standard to determine admissibility of expert or scientific evidence.

The *Frye* standard, which was adopted in Florida in 1952, applies to expert testimony based upon new or novel scientific evidence. Under the *Frye* standard, "in order to introduce expert testimony deduced from a scientific principle or discovery, the principle or discovery 'must be sufficiently established to have gained general acceptance in the particular field in which it belongs.'"

The *Frye* standard had reigned supreme nationwide for almost 70 years but, in 1993, the U.S. Supreme Court issued its opinion in *Daubert v. Merrell Dow Pharmaceuticals, Inc.* in which it held that the Federal Rules of Evidence superseded *Frye*'s general acceptance test. In interpreting Federal Rule of Evidence 702, *Daubert* provides that "the trial judge must ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable." The *Daubert* standard is generally considered more stringent than *Frye* and it is now the controlling standard in federal courts, as well as a large majority of the states.

Florida had been one of the minority holdouts that continued to apply *Frye* after the *Daubert* decision, until 2013 when Florida's Legislature made two amendments to Florida's Evidence Code. These amendments were made in order to bring Florida's statutes in line with Federal Rule of Evidence 702 and *Daubert*.[1] Despite these amendments, however, there remained uncertainty about whether to apply *Frye* or *Daubert* even after these legislative changes because, under the Florida Constitution, the Florida Supreme Court has the exclusive power to create rules of procedure, whereas the Florida legislature has the exclusive power over rules that are substantive, and it was unclear whether the evidentiary standard was a procedural issue that had to be blessed by the courts or a substantive issue left to the control of the legislature. Thus, the 2013 legislative amendments intending to implement *Daubert* were arguably not final until Florida's Supreme Court gave its blessing.

In that regard, on February 16, 2017, the Florida Supreme Court weighed in and declined to adopt the *Daubert* standard to the extent it is procedural in nature.[2] In its holding, the Florida Supreme Court declined to adopt *Daubert* but also did not address the ultimate question of whether the Legislature's attempt to transition Florida from *Frye* to *Daubert* was a substantive rather than a procedural change, instead deferring those issues until it had a "proper case or controversy" before it.

Now it seems the Florida Supreme Court may have that case it has been waiting for.

In *Crane Co. v. DeLisle*, the plaintiff obtained a jury verdict at the trial level after the trial judge approved the appearance of three plaintiff expert witnesses. On appeal, the Fourth DCA decided that under *Daubert*, two of the plaintiff's expert witnesses should not have testified and the appellate court overturned the jury verdict. Although the plaintiff argued that the court lacked authority to apply *Daubert* since it had not yet been approved by the Florida Supreme Court, the appellate court held that the amended statutes, which adopted *Daubert*, were presumed to be constitutional and were to be given effect until declared otherwise.

In their jurisdictional brief to the Florida Supreme Court, the plaintiffs' attorneys noted that the Florida Supreme Court had been waiting for a case formally seeking review of an appellate decision touching on objections to "*Daubert* and making pertinent arguments in the context of the actual application of *Daubert*" and argued that "[l]awyers and parties across Florida want this court to take it up." It seems the Florida Supreme Court listened because, on July 11, 2017, it accepted jurisdiction to hear the matter. Many amicus curiae briefs have been filed already, and the deadline for the Petitioners to file a reply brief has been set for November 9, 2017. Accordingly, it seems Florida litigants may soon find out whether the *Frye* standard is going to be revived in the Florida courts.

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[1] *See* Ch. 2013-107, Laws of Fla. §§ 1, 2 (amending sections 90.702 and 90.704 of the Florida Statutes).

[2] *In re Amendments To Florida Evidence Code*.

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