Daubert is Off the Deck and Back in Florida!

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After five years of uncertainty over the standard for admitting expert scientific evidence in Florida, the Florida Supreme Court on May 23rd ruled that the Daubert standard, rather than the Frye standard, determines the admissibility of expert evidence in the state courts of Florida.


Frye – The Old Standby

The Frye standard, developed in 1922, provides that expert opinion based on a scientific technique is admissible only where the technique is generally accepted as reliable in the relevant scientific community. Frye v. United States, 293 F. 1013 (D.C. Cir. 1923). But as the use of expert testimony in litigation has grown considerably since its inception, and experts are now used to admit into evidence opinions and “facts” related to those opinions, which might not otherwise be admissible, so-called expert testimony became ripe for abuse and the use of “junk science.” As such, states began to recognize the need to protect the jury from these well-paid “experts” and higher standards were developed.

The Daubert standard was created in 1993 in Daubert v. Merrell Dow Pharmaceuticals, 509 U.S. 579 (1993), which held that the Federal Rules of Evidence superseded Frye as the standard for admissibility of expert evidence in federal courts. This standard is used by a trial judge to make a preliminary assessment of whether an expert’s scientific testimony is based on reasoning or methodology that is scientifically valid and can properly be applied to the facts at issue. Under this standard, the factors that may be considered in determining whether the methodology is valid are: (1) whether the theory or technique in question can be and has been tested; (2) whether it has been subjected to peer review and publication; (3) its known or potential error rate; (4) the existence and maintenance of standards controlling its operation; and (5) whether it has attracted widespread acceptance within a relevant scientific community. The Daubert standard is the test currently used in the federal courts and all but a handful of state courts (states still using Frye include: California, Illinois, Maryland, Minnesota, New Jersey, New York, Pennsylvania, and Washington).
Daubert and a Turf War

In Florida, the Legislature and the Florida Supreme Court work together to enact and maintain the codified rules of evidence. This process worked well until 2000, when the Florida Supreme Court, at the time dominated by liberal justices, declined to adopt legislation, passed by a conservative state legislature, which governed evidence, holding it unconstitutional. In re Amendments to the Florida Evidence Code, 782 So.2d 339 (Fla. 2000).

This burgeoning turf war continued when, in 2012, the Florida legislature passed a bill amending the Florida Evidence Code and requiring Florida state courts to follow the Daubert standard in determining the admissibility of expert-witness testimony. This bill was signed into law and took effect on July 1, 2013. Although the Florida Evidence Code is modeled on the Federal Rules of Evidence, the Florida Supreme Court had refused to follow the U.S. Supreme Court’s lead and had instead stuck with the Frye test. This had frustrated defendants and the defense bar. In practice, courts applying the Daubert test have been less hospitable to novel or tenuous expert testimony proffered by the plaintiffs’ bar. By passing the law, however, the Florida legislature sought to override the Florida Supreme Court and force the adoption of the Daubert standard by rewriting the Florida statute on admissibility of expert-witness testimony, Florida Evidence Code § 90.702, to incorporate the Daubert test and reflect its federal counterpart, Federal Rule of Evidence 702, which itself was amended in 2000 to codify the Daubert test.

Because this change in the law concerns a rule of court, however, it is also subject to scrutiny by the Florida Supreme Court. The Supreme Court has constitutional authority to adopt or reject legislative changes to the rules of court—including rules of evidence—to the extent they are procedural (as opposed to substantive). The Florida Supreme Court may disapprove of the new law only to the extent it is procedural. The Court periodically reviews legislative changes to rules of court to decide whether it approves of procedural changes. When it rejects a legislative change during one of these reviews, the Court will state that it rejects the amended rule to the extent it is procedural.

Before the Florida Supreme Court undertakes a review of new or amended rules of evidence, the State Bar of Florida, dominated by the plaintiffs’ bar, reviews it and makes recommendations to the Supreme Court. Specifically, the Florida Bar Committee on Code & Rules of Evidence reviews legislative amendments to the evidence code that are procedural in nature, and if procedural, makes a recommendation to the Bar Board of Governors, who then makes a recommendation to the Florida Supreme Court as to whether the amendment should be adopted.

The Committee addressed the issue of Daubert in October 2014, and by a narrow margin voted to make a recommendation to the Florida Supreme Court to reject the legislative amendments to the extent they are procedural in nature. There was a mixed view amongst the committee members whether the legislative amendment is procedural or substantive, which explains why the vote was very close. The Evidence Committee made its recommendation to the Board of Governors, and the Florida Bar Board of Governors on December 4, 2015, voted 33-9 to recommend to the Florida Supreme Court that it not adopt the Daubert standard, setting up the showdown between the State Legislature and the State Bar and Supreme Court over whether
changing from the *Frye* standard to the *Daubert* standard is substantive or procedural and, in effect, whether the plaintiffs’ bar would continue to foist junk science onto juries or higher standards would win the day.

*Daubert* on the Ropes

In 2016, as the Florida Supreme Court mulled what to do with the *Daubert* amendment, Florida’s Fourth District Court of Appeal in *DeLisle v. Crane Co.*, ruled that the trial court should have excluded the testimony of plaintiff’s expert witnesses James Daughlgen, James Crapo, and James Rasmuson under the *Daubert* standard. *Crane Co. v. Delisle*, 206 So. 3d 94 (Fla. 4th DCA 2016). The Fourth District ruled that the trial court should have excluded Dahlgren’s opinion that every exposure to asbestos above background level is a substantial contributing cause of mesothelioma. *Id.* at 103-06. The appellate court further ruled that the trial court should have granted defendant R.J. Reynolds Tobacco Company’s *Daubert* motions to exclude the testimony Crapo and Rasmuson linking the plaintiff’s mesothelioma to Kent Micronite cigarettes because they had failed to support their opinions with reliable data. *Id.* at 108-110.

This victory for *Daubert* in Florida was short-lived as on February 16, 2017, the Florida Supreme Court issued its decision declining to adopt the *Daubert* amendment to the extent it is procedural. *In re Amendments to the Fla. Evidence Code*, 210 So. 3d 1231 (Fla. 2017). Because this decision was issued as part of the Court’s periodic consideration of amendments to the rules of court rather than in a case or controversy, however, the Court could not rule on the issues of whether the amendment was actually procedural (rather than substantive) and whether it was constitutional.

The Court subsequently granted review in *DeLisle* to consider those very issues. In a 4-3 decision issued October 15, 2018, reversing the Fourth District’s decision in *DeLisle*, the Florida Supreme Court ruled that the *Daubert* amendment was unconstitutional and that the trial court had properly admitted the testimony of Dahlgren, Crapo, and Rasmuson. In considering the constitutionality of the *Daubert* amendment, the Supreme Court analyzed two issues: (1) whether the *Daubert* amendment was procedural or substantive; and (2) whether the amendment, if procedural, conflicted with a rule adopted by the Supreme Court. The Court answered both questions in the affirmative. Because the amendment did not “create, define, or regulate a right” but instead “solely regulate[d] the action of litigants in court proceedings,” the Court ruled that the amendment was procedural rather than substantive. The Supreme Court further ruled that the amendment conflicted with a procedural rule of the Court, *viz.*, the Court’s adoption of the *Frye* standard in prior cases. As such, the *Daubert* amendment violated the Florida Constitution, which grants the Florida Supreme Court the exclusive authority to “adopt rules for the practice and procedure in all courts.” Fla. Const. Art. V, § 2(a). In a footnote, the Court also noted its concern that the amendment would affect the right of access to courts recognized in the Florida Constitution “by imposing an additional burden on the courts.” (This issue was discussed at greater length in a concurring opinion by Justice Pariente.)
To the Victor Go the Spoils

As 2018 came to a close, the outgoing Republican Governor, Rick Scott, attempted to fill soon-to-be vacancies on the Florida Supreme Court before he left office. Three solidly liberal justices would be retiring at the end of the year, and Governor Scott wanted to appoint conservative justices to fill their seats. This created yet another turf-war and a lawsuit, which ended with the Florida Supreme Court ruling that Governor Scott exceeded his authority by directing the Supreme Court Judicial Nominating Commission to submit its nominations to fill the three Florida Supreme Court vacancies by November 10, 2018. Ultimately, it was determined that Governor Scott’s successor would be the one to fill these important vacancies.

When conservative Republican Ron DeSantis defeated Democratic former Tallahassee Mayor in November 2018, the liberal Florida Supreme Court justices’ gambit to allow a hoped-for Democrat governor to nominate their replacements was also defeated. Newly sworn in Governor DeSantis wasted little time and within days of his swearing-in appointed three new justices with solid conservative credentials and respected reputations within the Florida legal community to ascend to the high court: veteran Third District Court of Appeal Judge and Miami native Barbara Lagoa, who made history on January 9, becoming the first Cuban-American woman appointed to the Florida Supreme Court; former federal prosecutor and Third District Court of Appeal Judge and Miami native Robert J. Luck; and veteran government attorney Carlos G. Muñiz, who had held several positions in the Florida government including as deputy chief of staff and counsel for the Florida House of Representatives under then Speaker Marco Rubio, deputy general counsel to Governor Jeb Bush, and most recently as general counsel to the U.S. Department of Education under Secretary Betsy Devos, and before that, a three-year stint as deputy attorney general and chief of staff to Florida Attorney General Pam Bondi.

In a sudden reversal, that came with no input from or forewarning to the Florida legal community and ended the more than five years of uncertainty about expert evidence in Florida, on May 23, 2019, the Supreme Court of Florida ruled that Daubert – not Frye – now governs the admissibility of expert testimony in Florida. In re Amendments to the Florida Evidence Code, No. SC19-107, May 23, 2019.

In its decision, the Court cited its agreement with Justice Polston’s dissent against the purported “grave constitutional concerns” surrounding the adoption of the Daubert standard. In 2017, Justice Polston wrote: “Has the entire federal court system for the last 23 years as well as 36 states denied parties’ rights to a jury trial and access to courts? Do only Florida and a few other states have a constitutionally sound standard for the admissibility of expert testimony? Of course not.” In re Amendments to Florida Evidence Code, 210 So. 3d 1231, 1239 (Fla. 2017).

The Florida Supreme Court observed that the Daubert amendment to the Florida Evidence Code remedied deficiencies of the Frye test: “Whereas the Frye standard only applied to expert testimony based on new or novel scientific techniques and general acceptance, Daubert provides that ‘the trial judge must ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable.’” The Court also noted that using the Daubert standard in Florida would “create consistency between the state and federal courts with respect to the admissibility of expert
testimony and will promote fairness and predictability in the legal system, as well as help lessen forum shopping.”

The decision comes with no case or controversy before the Court, which noted that the previous Court’s decision not to adopt Daubert was based on “constitutional concerns” which were unfounded, but the Court left open the possibility that the constitutionality of the amendments could be challenged in a specific case. However, the fact that the Court took up this issue with no further input or impetus from any source is a clear indication of the impact of the dramatic shift in the Court’s make-up following the election of Republican Governor Ron DeSantis and his appointment of three conservative justices following the mandatory retirement of three reliably liberal justices.¹

It remains to be seen how the Florida Supreme Court’s reversion back to Daubert will impact cases in Florida – though it should be noted that during the intervening years of uncertainty, most Florida trial and appellate courts applied Daubert undeterred and without creating a constitutional crisis. However, the Court’s decision makes clear that Daubert is again, and for the foreseeable future, the standard in Florida, which should assure that all scientific expert testimony and evidence is reliable, credible and well-founded, and also consistent with that of the federal courts and the majority of states.

¹Delisle majority:  Quince, Pariente, Labarga, and Lewis
(bold are now retired Justices)
Delisle dissenters:  Canady, Polston, and Lawson

“Daubert” majority:  Canady, Polston, Lawson, Lagoa and Muniz
(bold are newly appointed Justices)

“Daubert” dissenters:  Labarga and Luck