

Down Goes Daubert - Florida Reverts Back to Frye

BY MICHAEL LEVINE



Weeks ago, in *DeLisle v. Crane Company*, Florida's Supreme Court ruled that Daubert does not apply in determining the admissibility of expert testimony.

After years of litigating the issue, the opinion was celebrated by the plaintiffs' bar and panned by the defense bar.

In *DeLisle*, the plaintiff suffered from mesothelioma and filed suit against multiple defendants whose products allegedly contained asbestos. The Fourth District, applying Daubert, ruled that the trial court improperly admitted the testimony of several experts.

For decades, Florida adhered to the Frye standard. Under Frye, if an expert's opinion is new or novel, it is admissible only if the scientific principles and testing procedures underlying the opinion are generally accepted in the relevant scientific community. "By definition, the Frye standard only applies when an expert attempts to render an opinion that is based upon new or novel scientific techniques." *Marsh v. Valyou*, 977 So. 2d 543, 547 (Fla. 2007).

In 2013, the Florida Legislature amended the Florida Evidence Code to incorporate the standard set forth in *Daubert v. Merrell Dow Pharmaceuticals* 509 U.S. 579 (1993). See Fla. Stat. § 90.702. Under Daubert, a qualified expert may offer an opinion if 1) the opinion is based upon

sufficient facts or data; 2) the opinion is the product of reliable methodology; and 3) the opinion results from the reliable application of the principles to the facts of the case.

Writing for the majority in *DeLisle*, Justice Quince explained that the Florida Legislature's amendment violated the separation of powers. While the Legislature has the power to enact substantive law, procedural law is left to the Court. Substantive law defines, creates, or regulates rights while procedural law governs the "form, manner, or means by which substantive law is implemented." Ultimately, the Court deemed section 90.702, Florida Statutes, to be procedural because it regulates the actions of litigants, and therefore falls under the Court's purview. Additionally, the Court found that the Daubert amendment conflicts with the Court's precedent, rendering it unconstitutional.

Chief Justice Canady dissented, writing that the majority was wrong to exercise its jurisdiction based upon an express and direct conflict. According to the Chief Justice, the questions of law in *DeLisle* were based upon section 90.702, which became effective after *Marsh*. Therefore, these cases could not be in conflict because they did not address the same questions of law. In other words, Chief Justice Canady believed the majority had overreached in order to find that the Florida Legislature had overreached.

Ultimately, the Court's ruling affirms the separation of powers between the

judiciary and the legislature. Justice Quince specifically noted that the Daubert amendment was written to overrule the Court's decision in *Marsh*, infringing on the Court's authority "to determine matters of practice or procedure." Where do we go from here? Back to Frye. Likewise, under the Court's decision in *Marsh*, if an expert's opinion is based upon the expert's training and experience, it is admissible and not subject to Frye.

The key distinction between Frye and Daubert is that while Frye applies only to new or novel scientific evidence, Daubert applies to all expert testimony. As a result, as Justice Pariente observed in her concurrence, although Daubert was intended to be the more lenient standard, it has "blocked more court access than it has enabled." The application of Daubert had increased the risk that litigants' experts would be excluded, which of course increased the likelihood of losing at summary judgment, precluding plaintiffs from getting in front of a jury. And that is precisely why the plaintiffs' bar celebrated the *DeLisle* decision.

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Circuit Standards of
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