

## DAUBERT IS OUT—AND FRYE IS BACK IN

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In a recent 4-3 decision, the Florida Supreme Court struck down the Florida Legislature's 2013 Amendment to the Florida Evidence Code F.S. Ch. 90 which codified *Daubert* as the evidentiary standard for admissibility of expert opinions. *Richard DeLisle v. Crane Co., et al.*, Case No. SC16-2182. At the time the 2013 Amendment was enacted, the Florida Legislature was following in the footsteps of the federal evidentiary standard adopted after the 1993 U.S. Supreme Court case of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1991). Prior to 2013, the *Frye* standard governed the admissibility of expert opinions in Florida. *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923).

*Frye*'s "general acceptance" test had been used to prevent the admissibility of "junk science," permitting the admissibility of an expert opinion, if based on a scientific technique, only upon a showing it was generally accepted in the relevant scientific community. Proponents of *Frye* believed it ensured the reliability of new or novel scientific evidence by ensuring it was generally accepted. However, the U.S. Supreme Court found the *Frye* standard excluded valid scientific evidence, whereas *Daubert* permitted expert opinion as long as it was relevant and valid.

Importantly, the court's opinion in *DeLisle* was not based on whether *Frye*, or *Daubert*, was substantively the superior evidentiary standard—although Justice Quince, writing for the majority, noted the court felt *Frye* was the higher scientific standard. The decision essentially turned on which branch of government had the power to

decide procedural rights, such as evidentiary standards, and the manner in which the legislature enacted the amendment.

Ultimately in *DeLisle*, the Florida Supreme Court held that the legislature's power was limited only to substantive rights, whereas the court decided rules regarding procedural rights. The court's opinion acknowledged that some evidentiary rules involve both substantive and procedural rights. It also pointed out that it had previously reaffirmed *Frye* as Florida's evidentiary standard in cases after 2013, and it never formally adopted *Daubert* to the Rules of Evidence. Importantly, the court ruled the legislature could not repeal a procedural rule such as *Frye* without a two-thirds vote in both the House and the Senate. It only passed the 2013 amendment with a simple majority.

You may wonder why the Florida Supreme Court is just now ruling on a 2013 amendment, five years later. The court previously declined to address the constitutional issues presented in the 2013 amendment until the issue was properly before the court, which finally came in the *DeLisle* case. There are mixed feelings in the legal community about the reversal back to *Frye*, although *Daubert* was not without criticism. Practically, *Frye* may be a more favorable standard in workers' compensation cases for employers and carriers as, arguably, it helps to counter recommendations for new or experimental procedures that have not been subject to peer review or established in the scientific community.

Take away: *Daubert* is out. *Frye* is back in (if it was ever out). ||



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