
AMENDMENTS TO THE FLORIDA EVIDENCE CODE

On May 23, 2019, the Florida Supreme Court released a far-reaching opinion, adopting the *Daubert* standard for determining the admissibility of expert testimony, effective immediately. The court reversed course from its decision a few months earlier not to adopt the Legislature's *Daubert* amendments and to retain the *Frye* standard. This recent opinion might finally resolve the long and bitter contest over the correct legal standard for admitting expert testimony in Florida.

The *Frye* standard grew out of a 1923 federal court decision, requiring expert opinions to rest on generally accepted procedures, principles or techniques. Florida adopted the *Frye* standard in 1952, but over the years, its application was limited and its efficacy in excluding unreliable expert testimony proved to be poor. Florida only applied the *Frye* standard to expert testimony founded on new or novel techniques, meaning it did not apply in the vast majority of cases. Even where the *Frye* standard did apply, experts were allowed to circumvent the general acceptance requirement by offering "pure opinion" testimony derived from their personal experience and training.

In 1993, the United States Supreme Court articulated a more stringent test for assessing the admissibility of expert testimony, which became known as the *Daubert* standard. Under the *Daubert* standard, the party offering the expert testimony must show: (a) the expert is qualified to offer the testimony, (b) the testimony is based on sufficient facts or data, (c) the testimony is the product of reliable principles and methods, and (d) the expert reliably applied the principles and methods to the facts of the case. Under this standard, trial judges are responsible for screening out expert testimony not sufficiently reliable or trustworthy. The federal court system, as well as at least 36 states, have adopted the *Daubert* standard. Although Florida resisted the change, the Florida Legislature finally codified the *Daubert* standard in 2013, when it amended §§ 90.702 and 90.704 of the Florida Evidence Code. In response, the Florida Bar's Code and Rules of Evidence Committee recommended that the Florida Supreme Court reject, to the extent it was procedural, the Legislature's *Daubert* amendment, citing "grave constitutional concerns." In 2017, the Florida Supreme Court followed that recommendation and declined to adopt the *Daubert* amendment. In October 2018, the court reaffirmed that *Frye* was the appropriate test in Florida courts for the admissibility of expert testimony. *DeLisle v. Crane Co.*, 258 So. 3d 1219 (Fla. 2018).

In the wake of three new appointments to the Florida Supreme Court by Republican Governor Ron DeSantis, the court promptly revisited its prior decision. Highlighting a clear political shift, the court reversed itself by adopting the Legislature's 2013 amendments as procedural rules of evidence to the extent they are procedural in accordance with its "exclusive rule-making authority and longstanding practice of adopting provisions of the Florida Evidence Code as they are enacted or amended by the Legislature." Since this opinion adopted procedural rules of evidence, the *Daubert* standard should be applied in every pending case throughout all Florida courts.

Given the critical role that experts play in our judicial system, the significance of this opinion cannot be overstated. Experts are permitted to offer opinions on topics about which jurors often have little exposure or understanding. Although jurors are permitted to assess the believability of an expert, jurors tend to cloak experts with a presumption of credibility. As a result, expert testimony can have an enormous impact on the outcome of a case.

In light of the court's new decision, expert testimony will be subjected to a higher level of scrutiny. Litigants will have a means of challenging expert testimony founded on junk science. Trial judges will act as gatekeepers charged with excluding unqualified experts and unreliable testimony. With more challenges to expert testimony, there probably will be more hearings and greater expense. However, the added time and expense may prove insignificant when compared to the benefit of assuring only competent and reliable expert testimony reaches the ears of the jury.