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Florida Supreme Court Rejects Legislative Adoption of Daubert Standard for Expert Testimony

by Evan Tager and Matthew Waring

The reliability standard that the Supreme Court articulated in *Daubert v. Merrell Dow Pharmaceuticals, Inc.* is generally considered the touchstone for determining whether expert testimony is admissible in court. But although all federal courts (and most state courts) follow *Daubert*, a handful of states still adhere to the much older *Frye* standard, which looks to whether a scientific technique is "sufficiently established to have gained general acceptance in the particular field in which it belongs."

In 2013, it appeared that Florida—one of these holdout states—had finally joined the ranks of *Daubert* jurisdictions when the Florida Legislature enacted legislation amending the Florida Rules of Evidence to incorporate the *Daubert* standard. But last month, in *DeLisle v. Crane Co.*, the Supreme Court of Florida held that the legislature acted unconstitutionally, thwarting—at least for now—Florida's entry into the league of *Daubert* jurisdictions.

The plaintiff in *DeLisle* sued a number of defendants on failure-to-warn and design-defect theories related to his exposure to asbestos and subsequent development of mesothelioma. Among the defendants were the makers of a certain brand of cigarettes with asbestos-containing filters, which the plaintiff allegedly smoked for several years. The cigarette defendants contested whether their filters could have been a substantial contributing factor to the plaintiff's disease.

The plaintiff introduced expert testimony showing that his use of the cigarettes would have been a substantial contributing factor to his mesothelioma, and the trial court admitted that testimony after conducting *Daubert* hearings. The plaintiff won at trial, and the cigarette defendants appealed. The Florida Fourth District Court of Appeal reversed as to these defendants, holding that the evidence should have been excluded under *Daubert*. The plaintiff appealed to the Florida Supreme Court, which granted review and reversed by a 6-3 vote, holding that the legislature's adoption of *Daubert* was unconstitutional.

Under the separation-of-powers principles of the Florida Constitution as construed by the Florida Supreme Court, the state legislature has the authority to adopt rules of "substantive law," but only the court itself has the ability to determine rules of procedure. The court traditionally obviated any separation-of-powers with the state evidence code by adopting the Code itself after an amendment by the legislature, but beginning in 2000 the court has declined to adopt certain legislative revisions to the Code that it believed infringed on its prerogative to determine its own

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procedural rules.

The court held that the legislature's attempt to adopt the *Daubert* standard was procedural rather than substantive, for three reasons. First, the legislature's adoption of *Daubert* did not "create, define, or regulate a right," but instead "solely regulates the action of litigants in court proceedings." Second, the court held that the legislature had improperly attempted to repeal the court's decisions allowing for pure opinion testimony on questions of medical causation—decisions that had created a procedural rule that such testimony is admissible. And finally, the court noted its "concern that the amendment would affect access to courts," given the "additional length and expense *Daubert* proceedings create."

Having concluded that the legislature's adoption of *Daubert* was invalid, the court applied *Frye* and held that the medical expert testimony was properly admitted, explaining that "medical causation testimony is not new or novel and is not subject to *Frye* analysis." The court stated that the trial court had rightly "resist[ed] the temptation to usurp the jury's role in evaluating the credibility of experts."

The outcome in *DeLisle* will undoubtedly be disappointing to businesses that are sued in Florida state court. To be sure, the Florida Supreme Court's decision described the *Daubert* standard as "more lenient" than *Frye* because *Daubert* can be used to admit new or novel scientific methods in addition to ones that have gained "general acceptance" under *Frye*. But as a practical matter, *Frye* places virtually no limit on the admissibility of expert testimony: A court's *only* role under *Frye* is to determine whether the expert's testimony rests on a new or novel methodology, which most expert testimony does not.

By contrast, *Daubert* permits the court to play a more active gatekeeping role, scrutinizing not only the methodology an expert uses but also the way the expert has *applied* that methodology to the facts of the case. Moreover, the *Daubert* standard applies to all kinds of expert testimony, while the *Frye* standard applies only to scientific testimony. Thus, the upshot of the Florida Supreme Court's decision is likely to be the admission of more problematic expert testimony, particularly in cases involving questions of medical causation.

There is, however, reason for business litigants to hope that this set back will be short-lived. In January 2019, three of the four members of the Florida Supreme Court's "liberal" bloc—Justices Pariente, Lewis, and Quince—will be forced to retire because they have reached Florida's judicial mandatory-retirement age. Although there was quite a kerfuffle over whether current Governor Rick Scott (a Republican) could appoint their replacements on his (and their) last day in office—the Florida Supreme Court ruled that he could not—incoming Governor Ron DeSantis is also a Republican.

As a result, it is a near certainty that the three new members of the court will be materially more "conservative" than the justices whom they are replacing. The new 6-1 conservative majority could either overrule the procedural/substantive distinction that underlies *DeLisle* or, more likely, simply adopt *Daubert* under its own rulemaking authority. Needless to say, we will keep readers apprised of developments.