

MEDICAL DEFENSE AND HEALTH LAW

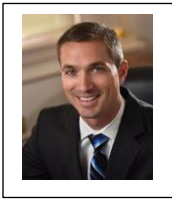
OCTOBER 2019

IN THIS ISSUE

Recently, the Florida Supreme Court adopted Daubert as the standard for expert opinion admissibility, only months after it had seemingly adopted retention of the Frye standard.

Florida Shifts Direction on Expert Admissibility Standard

ABOUT THE AUTHOR



Erik W. Legg is a Member at Farrell, White & Legg PLLC in Huntington, West Virginia. He practices in West Virginia, Kentucky and Ohio. Erik is active in pharmaceutical and medical products liability litigation, medical professional malpractice, workplace exposure and injury, and commercial litigation. He can be reached at ewl@farrell3.com.

ABOUT THE COMMITTEE

The Medical Defense and Health Law Committee serves all members who represent physicians, hospitals and other healthcare providers and entities in medical malpractice actions. The Committee added a subcommittee for nursing home defense. Committee members publish monthly newsletters and *Journal* articles and present educational seminars for the IADC membership at large. Members also regularly present committee meeting seminars on matters of current interest, which includes open discussion and input from members at the meeting. Committee members share and exchange information regarding experts, new plaintiff theories, discovery issues and strategy at meetings and via newsletters and e-mail. Learn more about the Committee at www.iadclaw.org. To contribute a newsletter article contact:



Constance A. Endelicato
Vice Chair of Newsletters
Wood Smith Henning & Berman
cendelicato@wshblaw.com

The International Association of Defense Counsel serves a distinguished, invitation-only membership of corporate and insurance defense lawyers. The IADC dedicates itself to enhancing the development of skills, professionalism and camaraderie in the practice of law in order to serve and benefit the civil justice system, the legal profession, society and our members.

This spring, the Florida Supreme Court adopted legislative amendments to Rules 702 and 704 of the Florida Evidence Code, expressly adopting the federal *Daubert*¹ standard for admissibility of expert testimony.² This decision constituted a significant change of course for Florida, as the Court had declined to adopt the amendments in 2017³, and had in 2018 seemingly again rejected the Florida Legislature's attempt to adopt *Daubert*.⁴

Florida's expert admissibility standard has been something of a moving target recently. For decades, Florida had followed the *Frye*⁵ standard. In 2013, the Florida Legislature amended the Florida Evidence Code to incorporate the *Daubert* test. As the Florida Supreme Court has summarized:

Following our repeated affirmations of the *Frye* rule, in 2013 the Legislature amended section 90.702 to incorporate *Daubert* in the Florida Rules of Evidence. The amendment revised the statute to read as follows:

90.702 Testimony by experts.—If scientific, technical, or other specialized knowledge will assist the trier of fact in understanding the

evidence or in determining a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify about it in the form of an opinion or otherwise, if:

- (1) The testimony is based upon sufficient facts or data;
- (2) The testimony is the product of reliable principles and methods; and
- (3) The witness has applied the principles and methods reliably to the facts of the case.

§ 90.702, Fla. Stat. (as amended by ch. 2013-107, § 1, Laws of Fla.).⁶

In 2017, by a narrow vote, the Florida Bar's Code and Rules of Evidence Committee recommended against adoption of the federal *Daubert* standard, citing constitutional concerns, and the Florida Supreme Court accepted the Committee's recommendation.⁷

Then, in 2018, the Court held in *DeLisle* that Rule 702 of the Florida Evidence Code is

¹ *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993).

² *In re Amendments to the Florida Evidence Code*, ___ So. 3d ___, No. SC19-107, 2019 WL 2219714 (Fla. May 23, 2019), *reh'g denied*, No. SC19-107, 2019 WL 4127349 (Fla. Aug. 30, 2019) (herein, "*In re Amendments (2019)*").

³ *In re Amendments to Fla. Evidence Code*, 210 So.3d 1231, 1239 (Fla. 2017) (herein, "*In re Amendments (2017)*").

⁴ *DeLisle v. Crane Co.*, 258 So. 3d 1219, 1227 (Fla. 2018), *reh'g denied*, No. SC16-2182, 2018 WL 6433137 (Fla. Dec. 6, 2018).

⁵ *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923).

⁶ *See, DeLisle*, 258 So. 3d at 1227.

⁷ *See, In re Amendments (2017)*, 210 So.3d at 1239.

procedural.⁸ Stressing separation of powers concerns and noting its “exclusive authority to ‘adopt rules for the practice and procedure in all courts’”, the Court concluded that the Legislature’s promulgation of the amendments had overstepped its constitutional bounds, infringing on the Court’s inherent rulemaking authority.⁹ Thus, the *Frye* standard remained in place.

In 2019, the Court again revisited whether to accept the amendments to the Evidence Code, this time expressly adopting *Daubert* and replacing the *Frye* standard:

The Court, according to its exclusive rulemaking authority pursuant to article V, section 2(a) of the Florida Constitution, adopts chapter 2013-107, sections 1 and 2, Laws of Florida (*Daubert* amendments), which amended sections 90.702 (Testimony by experts) and 90.704 (Basis of opinion testimony by experts), Florida Statutes, of the Florida Evidence Code to replace the *Frye* standard for admitting certain expert testimony with the *Daubert* standard, the standard for expert testimony found in Federal Rule of Evidence 702.¹⁰

In so holding, the Court observed that, while it was not going to rule upon constitutional questions about the amendments in “this

rules case”, it did not consider those issues a barrier to its adoption of the amendments.

We now recede from the Court's prior decision not to adopt the Legislature's *Daubert* amendments to the Evidence Code and to retain the *Frye* standard. As Justice Polston has explained, the “grave constitutional concerns” raised by those who oppose the amendments to the Code appear unfounded:

[T]he United States Supreme Court decided *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993), in 1993, and the standard has been routinely applied in federal courts ever since. The clear majority of state jurisdictions also adhere to the *Daubert* standard. *See* 1 *McCormick on Evidence* § 13 (7th ed. June 2016 Supp.). In fact, there are 36 states that have rejected *Frye* in favor of *Daubert* to some extent. *See* Charles Alan Wright & Victor Gold, 29 *Federal Practice and Procedure* § 6267, at 308-09 n.15 (2016). 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

⁸ The Court did not, however, address whether Rule 704 is procedural, leaving that question to another day. *In re Amendments* (2019), at *1.

⁹ *DeLisle*, 258 So. 3d at 1223.

¹⁰ *In re Amendments* (2019) at *1.

the admissibility of expert testimony?
Of course not.

As a note to the federal rule of evidence explains, “[a] review of the caselaw after *Daubert* shows that the rejection of expert testimony is the exception rather than the rule.” Fed. R. Evid. 702 advisory committee's note to 2000 amendment. “*Daubert* did not work a ‘seachange over federal evidence law,’ and ‘the trial court's role as gatekeeper is not intended to serve as a replacement for the adversary system.’” *Id.* (quoting *United States v. 14.38 Acres of Land*, 80 F.3d 1074, 1078 (5th Cir. 1996)).

Furthermore, I know of no reported decisions that have held that the *Daubert* standard violates the constitutional guarantees of a jury trial and access to courts. To the contrary, there is case law holding that the *Daubert* standard does not violate the constitution. See, e.g., *Junk v. Terminix Int'l Co.*, 628 F.3d 439, 450 (8th Cir. 2010) (rejecting legal merit of the constitutional claim “that the district court violated [appellant's] Seventh Amendment right to a jury trial by improperly weighing evidence in the course of its *Daubert* rulings” and explaining that “*Junk* does not cite any case for the notion that a proper *Daubert* ruling violates a party's right to a jury trial”); *E.I. du Pont de Nemours & Co. v. Robinson*,

923 S.W.2d 549, 558 (Tex. 1995) (rejecting claim “that allowing the trial judge to assess the reliability of expert testimony violates [the parties'] federal and state constitutional rights to a jury trial by infringing upon the jury's inherent authority to assess the credibility of witnesses and the weight to be given their testimony”); see also *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 142-43, 118 S.Ct. 512, 139 L.Ed.2d 508 (1997) (rejecting “argument that because the granting of summary judgment in this case was ‘outcome determinative,’ it should have been subjected to a more searching standard of review” and explaining that, while “disputed issues of fact are resolved against the moving party[,] ... the question of admissibility of expert testimony is not such an issue of fact”).

*3 Accordingly, the ... “grave constitutional concerns” regarding the *Daubert* standard are unfounded.

In re Amends. to Fla. Evidence Code, 210 So.3d 1231, 1242-43 (Polston, J., concurring in part and dissenting in part). While we find Justice Polston's observations instructive in deciding to now adopt the Legislature's *Daubert* amendments, we do not decide, in this rules case, the constitutional or other substantive concerns that have been raised about the amendments. Those issues must be left for a proper case or

controversy.¹¹

The Court went on to further justify its decision in *In re Amendments (2019)* by observing that “the *Daubert* amendments remedy deficiencies of the *Frye* standard” by giving the trial judge the opportunity to weigh reliability in addition to relevance, and that adoption of *Daubert* would help to promote uniformity and predictability in the Courts as to the standard for expert testimony admissibility.¹²

While the decision states that it is effective immediately and that the filing of a motion

for reconsideration does not alter the effective date of the amendments¹³, it should be noted that as of the date of this article, *In re Amendments (2019)* had not yet been released for publication in the permanent law reports and therefore remains subject to revision or withdrawal.¹⁴ At this juncture, however, it appears that Florida has become the latest state to join the *Daubert* majority rule.¹⁵

¹¹ *In re Amendments (2019)* at *2–3.

¹² *Id.* at *3.

¹³ *Id.* at *3.

¹⁴ *Id.* at *1.

¹⁵ See, *Kemp v. State*, __ So.3d __, 2019 WL 3436887 at *5 (acknowledging that the Florida Supreme Court

adopted the Legislature’s *Daubert* amendments in *In re Amendments (2019)* and, therefore “the constitutional defect found in *DeLisle* has now been eliminated”).

Past Committee Newsletters

Visit the Committee's newsletter archive online at www.iadclaw.org to read other articles published by the Committee. Prior articles include:

AUGUST 2019

[One Bad Apple: Navigating through Sexual Battery and Other Intentional Torts](#)

Constance A. Endelicato

JULY 2019

[Overcoming Sticker Price: The Emergence of the Reasonable Value Approach](#)

Tom Dawson, Rick Farlow, Tom Geroulo and Tyler Robinson

JUNE 2019

[Penalties, Punitives, and Granny Cams: The Escalating Lure of Elder Abuse Litigation](#)

Constance A. Endelicato

APRIL 2019

[Common Pitfalls of EMR Metadata](#)

Mark D. Hansen and Tyler J. Pratt

MARCH 2019

[Summary of Statutes Applicable to Medical Malpractice Lawsuits in Texas](#)

Robert G. Smith, Jr.

DECEMBER 2018

[Illinois Supreme Court Holds Hospital Not Liable Under the Doctrine of Apparent Agency](#)

Mark D. Hansen and Richard K. Hunsaker

NOVEMBER 2018

[Challenging the Plaintiff's Economic Expert](#)

Erik W. Legg and Stephanie M. Rippee

OCTOBER 2018

[Ex Parte Communications with Treating Physicians: Leveling the Playing Field](#)

Joseph D. Piorkowski, Jr.

SEPTEMBER 2018

[Illinois Appellate Court Considers Scope of Privilege Established by Patient Safety Act](#)

Mark D. Hansen and Emily J. Perkins

JULY 2018

[Illinois Appellate Court Issues Opinion Limiting Expert Testimony Regarding Proximate Cause and on Plaintiff's Use of Voluntary Dismissal to Avoid Directed Verdict and Retain Additional Experts](#)

Mark D. Hansen and J. Matthew Thompson

JUNE 2018

[Hospital's Reimbursement Rates Found to be Relevant to Determine Whether the Hospital's Charges are Reasonable](#)

Robert G. Smith, Jr.