

## Florida Supreme Court Frye-s Daubert



Craig Distel | Wednesday, October 24, 2018

Last week, the Florida Supreme Court rejected a 2013 amendment to Florida Statutes § 90.702 and held that the *Frye* standard, not the *Daubert* standard was the appropriate method to evaluate expert testimony. This decision clarified a troublesome ambiguity in Florida's evidence code. In 2013, the Florida legislature amended Fla. Stat. § 90.702 to formally adopt the *Daubert* standard. Since that time, lawyers have been unclear whether courts would apply the *Frye* or *Daubert* standard because court decisions conflicted with statutory language. In its Oct. 15, 2018, decision in the matter of *DeLisle v. Crane Co.* No. SC16-2182, the court determined that Fla. Stat. § 90.702 was an unconstitutional infringement on the court's rulemaking authority.

### **The Case - *DeLisle v. Crane Co.***

Richard DeLisle sued 16 defendants for personal injuries arising out of exposure to asbestos and resulting mesothelioma. He was allegedly exposed to asbestos while working in the 1960s and through cigarettes. The lawsuit alleged that DeLisle's experts agreed that Kent cigarette filters were a cause of his health issues, but could not agree whether other products were substantial contributing factors. Crane Co. challenged DeLisle's experts under the *Daubert* standard adopted in Fla. Stat. § 90.702, but the trial court admitted the experts' testimony. The Fourth District Court of Appeal reversed for a new trial for RJ Reynolds and reversed and remanded for entry of a directed verdict in Crane's favor based on its finding that the trial court failed to perform its duty as gatekeeper under *Daubert*.

# florida supreme court frye s daubert

---

The Florida Supreme Court's decision turned on the difference between substantive and procedural law. The Florida legislature has the authority to enact substantive law, while the court has the authority to enact procedural law. A substantive law is a law that "[exist] for their own sake and constitute[e] the normal legal order of society, i.e., the rights of life, liberty, property, and reputation."<sup>[1]</sup> Procedural law consists of the "rules governing the parties, their counsel and the Court throughout the progress of the case from the time of its initiation until final judgment and its execution."<sup>[2]</sup> The Supreme Court determined that the changes outlined in Fla. Stat. § 90.702 were not substantive in nature, but were instead, procedural changes. The Supreme Court further found that instituting the *Daubert* standard heavily relied on a judge's scientific knowledge to determine the viability of an opinion rather than *Frye*'s reliance on the scientific community.

## Frye Standard

The *Frye* standard is derived from *Frye v. United States*.<sup>[3]</sup> In *Frye* the court determined that courts should admit expert testimony "deduced from a well-recognized scientific principle or discovery."<sup>[4]</sup> The D.C. Circuit Court of Appeals elaborated on its decision explaining that the opinion must be "sufficiently established to have gained general acceptance in the particular field in which it belongs."<sup>[5]</sup> Florida courts have maintained that this is the proper standard to evaluate expert testimony based upon new or novel scientific techniques.

## Daubert Standard and Fla. Stat. § 90.702

In 2013 the Florida legislature amended Fla. Stat. § 90.702 to provide that an expert's opinion testimony may be admissible 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.<sup>[6]</sup>

This statutory revision was based on the United States Supreme Court's decision in *Daubert v. Merrell Dow Pharmaceuticals*<sup>[7]</sup> which adopted the revised Federal Rules of Evidence as the standard for evaluating expert testimony. According to the United States Supreme Court, this standard focused more on the methodology for developing an opinion rather than the conclusion reached. The theory behind making this change was that if an expert provided a novel theory that had not yet gained widespread acceptance, an expert that could show the information was based on the scientific method may still be able to testify. In practice, however, the *Daubert* standard has been used to effectively attack experts' opinions for lack of sufficient basis.

## Effect on Litigation in Florida

For the past five years, Florida attorneys have been faced with ambiguity regarding the governing standard for expert testimony. This decision provides a clear answer as to which standard applies. For defense attorneys, this eliminates a powerful tool used in pre-trial procedure to attach plaintiffs' expert witness' credibility. *Frye* is restricted to analysis of novel techniques. Although *Daubert* is not the standard in Florida state courts, it is the standard in federal court. If there is a serious concern about viability of an opinion and federal court may have jurisdiction, attorneys should consider removing their case to federal court.

---

[1] DeLisle at 7 citing *In re Fla. Rules of Criminal Procedure*, 272 So. 2d 65, 65 (Fla. 1972) (Adkins, J., concurring).

[2] DeLisle at 8 citing *Allen v. Butterworth*, 756 So. 2d 52, 60 (Fla. 2000).

[3] 293 F. 1013 (D.C. Cir. 1923)

[4] *Frye v. United States*, 293 F. 1013, 1014 (D.C. Cir. 1923)

[5] *Id.*

[6] Fla. Stat. § 90.702 (2018)

[7] 509 U.S. 579 (1993).

---



**Craig Distel**

Team member bio