Florida Litigation | Alert

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Florida Supreme Court Rejects Procedural Aspects of *Daubert* Based on 'Grave Constitutional Concerns'

On Feb. 16, 2017, the Florida Supreme Court declined to adopt the federal standard for admissibility of expert testimony. Specifically, in a 4-2 per curiam decision, the Florida Supreme Court declined to adopt as a rule the Florida Legislature's amendments to Sections 90.702 and 90.704 of the Florida Evidence Code, which amendments had replaced the standard previously articulated in *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923), and instead codified the federal standard for admissibility of expert testimony set forth in the United States Supreme Court's decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), certain cases applying *Daubert*,[1] and Federal Rule of Evidence 702 (collectively, the *Daubert* standard).[2]

The *Daubert* standard for admissibility of expert testimony, which federal courts have applied in some form since 1993, charges trial judges with a gatekeeping responsibility to exclude unreliable expert testimony, such that trial judges must "ensur[e] that an expert's testimony both rests on a reliable foundation and is relevant to the task at hand."[3] Rule 702 was amended in response to the Supreme Court's *Daubert* decision and certain cases that followed shortly thereafter. As amended, Rule 702 sets forth "some general standards that the trial court must use to assess the reliability and helpfulness of proffered expert testimony."[4]

Before the Legislature's amendments took effect in July 2013,[5] Florida courts applied the *Frye* standard for admissibility of expert testimony. Under *Frye*, "in order to introduce expert testimony deduced from a scientific principle or discovery, the principle or discovery 'must be sufficiently established to have gained general acceptance

[1] *Gen. Elec. Co. v. Joiner*, 522 U.S. 136 (1997), and *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137 (1999) (together with *Daubert*, frequently referred as the *Daubert* trilogy).
[2] *In re: Amends. to the Fla. Evid. Code*, No. SC16-181 (Fla. Feb. 16, 2017) (Slip op.); Ch. 2013-107, §§ 1, 2, Laws of Fla.
[3] *Daubert*, 509 U.S. at 597.
[4] Fed. R. Evid. 702, advisory committee's note to 2000 amendments.
[5] Ch. 2013-107, § 3, Laws of Fla.

in the particular field in which it belongs.'"[6]

The Legislature's *Daubert* amendments came before the Florida Supreme Court as part of The Florida Bar's Code and Rules of Evidence Committee's regular-cycle report.[7] The majority (Chief Justice Labarga and Justices Pariente, Lewis, and Quince) followed the recommendation of a 16-14 majority of the Committee not to adopt the amendments,[8] to the extent they are procedural, which the Court is empowered to do under Florida's Constitution.[9] The majority refrained from providing any elaborate analysis to support its decision, but did share the Committee's "grave constitutional concerns" about the *Daubert* amendments, such as "undermining the right to a jury trial and denying access to the courts."

Perhaps not surprisingly to most Florida practitioners, Justice Polston, joined by Justice Canady, dissented. The dissent, which would adopt the *Daubert* standard as amended by the Florida Legislature, criticized the majority for its purported (and "unfounded") "grave constitutional concerns" about the federal standard, pointing out that: "the standard has been routinely applied in federal courts ever since" the United States Supreme Court decided *Daubert* in 1993; a "clear majority of state jurisdictions also adhere to the *Daubert* standard"; and there are no "reported decisions [of which the dissent is aware] that have held that the *Daubert* standard violates the constitutional guarantees of a jury trial and access to courts"; indeed, case law holds to the contrary.[10]

Justice Lawson, who joined the Court recently in January 2016, following the retirement of Justice Perry, did not take part in the ruling.

The majority's decision not to adopt the *Daubert* amendments "to the extent that they are procedural," does not end the debate on the standard for admissibility of expert testimony in Florida. The Court made it clear that the Committee's constitutional concerns "must be left for a proper case or controversy."[11]

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[6] *Flanagan v. State*, 625 So. 2d 827, 828 (Fla. 1993) (quoting *Frye*, 293 F. at 1014).
[7] *See* Fla. R. Jud. Admin. 2.140 (a), (b).
[8] The Florida Bar's Board of Governors approved the Committee's recommendations. Slip op. at 4.
[9] The Florida Constitution authorizes the supreme court to "adopt rules for the practice and procedure in all courts." Art. V, § 2(a), Fla. Const.
[10] Slip op. at 15-16 (Polston, J., dissenting).
[11] Slip op. at 1, 5, 9, 15.

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