

FLORIDA SUPREME COURT REAFFIRMS THAT *FRYE* IS THE STANDARD

Trial & Litigation Section

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The Florida Supreme Court, in a 4-3 opinion, held that *Frye*, not *Daubert*, remains the standard in Florida for determining the admissibility of expert testimony. *DeLisle v. Crane Co.*, 258 So. 3d 1219 (Fla. 2018). In doing so, the Supreme Court held unconstitutional the Legislature's 2013 amendment to section 90.702, Florida Statutes, incorporating *Daubert* into the Florida Rules of Evidence.

The plaintiff in *DeLisle* alleged that exposure to asbestos caused him to develop mesothelioma. The defendants challenged the plaintiff's experts under section 90.702, Florida Statutes, as amended in 2013. Following *Daubert* hearings, the trial court admitted the plaintiff's expert testimony, and the jury returned a verdict for the plaintiff.

Some of the defendants appealed the trial court's admission of expert testimony. The Fourth District Court of Appeal reviewed the admission under *Daubert*, held that the trial court failed to properly exercise its gatekeeping function, and reversed. The plaintiff sought review by the Florida Supreme Court on the ground that the Fourth DCA's decision conflicted with *Marsh v. Valyou*, 977 So. 2d 543 (Fla. 2007), which reaffirmed the procedural rule set forth in *Stokes v. State*,

548 So. 2d 188 (Fla. 1989), wherein the Court formally adopted *Frye*.

The Supreme Court held that the 2013 amendment infringed on the Court's rulemaking authority. The Court noted that article II, section 3 of the Florida Constitution prohibits one branch of government from exercising any of the powers of the other branches, and that article V, section 2(a) granted the Supreme Court exclusive authority to adopt rules for the practice and procedure of all courts. The Court ruled that section 90.702, as amended in 2013, is a procedural statute that solely regulates the action of litigants in court proceedings; therefore, the amendment interfered with the Court's exclusive authority.

The Court further noted that the Legislature enacted the 2013 amendment without the required two-thirds vote of the membership of each House of the Legislature necessary to repeal a rule of the Court. It held that while the Legislature purported to have pronounced public policy in overturning *Marsh*, the rule reaffirmed in *Marsh* was a procedural rule that the Legislature could not repeal by the simple majority vote that passed the amendment.

The Supreme Court reaffirmed that *Frye*, not *Daubert*, is the appropriate test in Florida courts. It ultimately held that, under *Frye*, the trial court properly admitted the expert testimony in *DeLisle*, and that the Fourth DCA should not have excluded it. The Court noted that, as stated in *Marsh*, medical causation testimony is not new or novel and therefore is not subject to a *Frye* analysis. The Court quashed the Fourth DCA's decision and remanded with instructions to remand to the trial court to reinstate the final

judgment. At least for now, *DeLisle* clarifies that *Frye*, not *Daubert*, is the standard in Florida for determining the admissibility of expert testimony.



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