CARLTON FIELDS

Supreme Court of Florida Upholds the Frye Standard

November 13, 2018

On October 15, 2018, in the matter of *Richard Delisle vs. Crane Co., et al.*[1], the Supreme Court of Florida unequivocally reaffirmed that *Frye* remains the standard for the admission of expert testimony. This reaffirmation comes after the Florida Legislature amended section 90.702 to incorporate the *Daubert* standard into the Florida Rules of Evidence in 2013.   A little backstory may be instructive. The *Frye* standard gets its name from a federal court of appeals opinion in *Frye v. United States*[2], which, in general, required expert testimony to be based on "well-recognized scientific principle or discovery."[3] Accordingly, novel scientific technique that is not generally accepted by the established scientific community is inadmissible. In Florida, the *Frye* standard became the rule for the admission of expert testimony.[4] Almost 50 years after *Frye*, the Federal Rules of Evidence were born, which included Rule 702. Rule 702 dealt specifically with the admission of expert testimony at trial. Years later, in its opinion in *Daubert v. Merrell Dow Pharmaceuticals*[5] dealing with the application of Federal Rules of Evidence Rule 702, the United States Supreme Court determined that the judge is the "gatekeeper" when it comes to admissibility of expert testimony, which contradicted the *Frye* standard that placed the decision of admissibility with the scientific community. In 2000, Federal Rules of Evidence Rule 702 was amended to reflect the *Daubert* standard. Since that time, the *Daubert* standard, as codified in Federal Rules of Evidence Rule 702, is the standard used in all federal courts. Florida, however, has not followed suit. In 1997, following *Daubert*, the Supreme Court of Florida stated that Florida will continue to apply the *Frye* standard in order to "guarantee the reliability of new or novel scientific evidence."[6] Despite the Court's repeated affirmations, the Florida Legislature amended the Florida Rules of Evidence Rule 90.702 to incorporate the *Daubert* standard. The question before the Supreme Court of Florida in *Delisle* concerned the constitutionality of the Florida Legislature's 2013 amendment to Florida Rules of Evidence Rule 90.702. The Court found that the amendment was unconstitutional because it concerned a procedural, not a substantive, matter, and because the amendment was in conflict with a rule of the Supreme Court of Florida. The Court stated that Florida Rules of Evidence Rule 90.702 is not substantive because "it does not create, define, or regulate a right."[7] The Court noted further that this Rule 90.702 "solely regulates the action of litigants in court proceedings,"[8] thus rendering

the Rule procedural. Pursuant to the Florida Constitution, the Supreme Court of Florida has the exclusive authority to "adopt rules for the practice and procedure in all courts."[9] Accordingly, "[t]he Legislature may only repeal the rules of this Court by 'general law enacted by two-thirds vote of the membership of each house of the legislature.'"[10] The amended Florida Rules of Evidence Rule 90.702 conflicted with the Supreme Court of Florida's earlier affirmations that *Frye* is the applicable procedural standard for the admission of expert testimony. The Florida Legislature failed to collect the required votes. You may be asking yourself: "This is all fine and well, but how does this impact me?" Good question. For cases brought in Florida, and depending on the circumstances, litigants may have the option to choose between litigating in federal court or Florida state court, which will cause the expert's testimony to be scrutinized differently. This should be given serious consideration at the early stages of the litigation. Do not hesitate to contact any member of our construction practice group if you have questions about the *Richard Delisle vs. Crane Co., et al.* decision or any other construction contract or litigation matter. [1] NOTICE: this opinion is not final until time expires to file rehearing motion and, if filed, determined. [2] 293 F. 1013 (D.C. Cir. 1923). [3] *Id.* At 1014. [4] *See e.g., Kaminski v. State*, 63 So. 2d 339, 340 (Fla. 1952); *Bundy v. State*, 471 So. 2d 9, 13 (Fla. 1985); *Stokes v. State*, 548 So. 2d 188, 195 (Fla. 1989); and *Hadden v. State*, 690 So. 2d 573 (Fla. 1997). [5] 509 U.S. 579 (1993). [6] *Brim v. State*, 695 So. 2d 268 (Fla. 1997) (*citing Stokes v. State*, 548 So. 2d 188 (Fla. 1989)). [7] *Richard Delisle v. Crane Co., et al.*, No. SC16-2182 at 17 (Oct. 15, 2018). [8] *Id.*at 17. [9] Art. V, § 2(a), Fla. Const. [10] *Richard Delisle v. Crane Co., et al.*, No. SC16-2182 at 14(Oct. 15, 2018), *quoting* Art. V, § 2(a), Fla. Const.

Authored By

Luis Prats

Related Practices

Construction
Construction Litigation

Related Industries

Construction

©2024 Carlton Fields, P.A. Carlton Fields practices law in California through Carlton Fields, LLP. Carlton Fields publications should not be construed as legal advice on any specific facts or circumstances. The contents are intended for general information and educational purposes only, and should not be relied on as if it were advice about a particular fact situation. The distribution of this publication is not intended to create, and receipt of it does not constitute, an attorney-client relationship with Carlton Fields. This publication may not be quoted or referred to in any other publication or proceeding without the prior written consent of the firm, to be given or withheld at our discretion. To request reprint permission for any of our publications, please use our Contact Us form via the link below. The views set forth herein are the personal views of the author and do not necessarily reflect those of the firm. This site may contain hypertext links to information created and maintained by other entities. Carlton Fields does not control or guarantee the accuracy or completeness of this outside information, nor is the inclusion of a link to be intended as an endorsement of those outside sites.