

Florida Supreme Court Adopts the *Daubert* Amendments

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The Florida Supreme Court, in a 5-2 decision, has receded from its prior decision not to adopt the Legislature's *Daubert* amendments to the Evidence Code, and has now held that the *Daubert* standard for admission of expert testimony applies in Florida.¹

The *Daubert* amendments² revised sections 90.702 (Testimony by experts) and 90.704 (Basis of opinion testimony by experts), Florida Statutes, to replace the *Frye* standard with the *Daubert* standard for determining the admissibility of expert testimony.

In 2017, the Court declined to adopt the *Daubert* amendments, to the extent they are procedural, due to "grave constitutional concerns" raised by the Florida Bar Code and Rules of Evidence Committee and commenters who supported the Committee's recommendation that the Court not adopt the *Daubert* amendments.³ Those concerns included undermining the right to a jury trial and denying access to the courts.

In October 2018, in a 4-3 opinion, the Court found the *Daubert* amendments unconstitutional, reasoning that they infringe on the Court's rulemaking authority. The Court determined that *Frye*, not *Daubert*, remained the standard in Florida for determining the admissibility of expert testimony.⁴

But just over seven months later, the Court receded from its 2017 decision, and adopted the *Daubert* amendments. In doing so, the Court cited Justice Polston's 2017 dissenting opinion in which he observed that federal courts have routinely applied *Daubert* since 1993, a "majority [of] state jurisdictions adhere to the *Daubert* standard," and "there are 36 states that have rejected *Frye* in favor of *Daubert* to some extent." Justice Polston cited the advisory committee's note to the 2000 amendment to Fed. R. Evid. 702 that "[a] review of the case law after *Daubert* shows that the rejection of expert testimony is the exception rather than the rule," and ultimately opined that the "grave constitutional concerns" regarding the *Daubert* standard were "unfounded."

However, the Court did not decide the constitutional or other substantive concerns raised about the amendments, and specifically stated that those issues must be left for a proper case or controversy. So while *Daubert* is now the standard in Florida for determining the admissibility of expert testimony, further challenges may be on the horizon.

¹ *In re Amendments to the Florida Evidence Code*, No. SC19-107, 2019 WL 2219714 (Fla. May 23, 2019).

²Ch. 2013-107, §§ 1 and 2, Laws of Fla.

³ *In re Amendments to the Florida Evidence Code*, 210 So. 3d 1231 (Fla.2017), superseded by *In re Amendments to the Florida Evidence Code*, No. SC19-107, 2019 WL 2219714 (Fla. May 23, 2019).

⁴ *DeLisle v. Crane Co., et al*, 258 So.3d 1219 (Fla.2018). *See also* Jaret J. Fuente & Monica L. Strady, *Florida Florida Supreme Court Reaffirms that Frye is the Standard*, HCBA Lawyer Magazine (Vol. 29, No. 4, March-April 2019).

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