



SORRAYA SOLAGES-JONES

Now You See It... Now You Don't: The Uncertainty of the Expert Reliability Standard

Just when it seemed like *Frye v. U.S.*, 293 F. 1013 (D.C. Cir. 1923), was the secure expert standard in Florida, it suddenly wasn't. As the newly appointed Justices settled in, *In re Amendments to the Florida Evidence Code*, 44 Fla. L. Weekly S170, 2019 Fla. LEXIS 818, 2019 WL 2219714 (Fla. May 23, 2019), dropped with a sonic boom. In a 5-2 split, the Florida Supreme Court resurrected *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), as the expert standard of choice in Florida. The Court chose not to address the "correctness" of *DeLisle v. Crane Co.*, 258 So. 2d 1219 (Fla. 2018), but latched on to confirm the procedural nature of Section 90.702 of the Florida Statutes. *In re Amends. to the Fla. Evid. Code*, 2019 Fla. LEXIS, at *1-*2.

Outside the majority opinion, Justice Lawson concurred specially to counter Justice Luck's lengthy dissent. Justice Lawson penned that the Court was following the proper procedure for adopting rules as well as its internal operating procedures. *Id.* at *8-*13. Justice Labarga dissented, opining that *DeLisle* was correctly decided and that *Frye* offers a superior standard of reliability that also safeguards constitutional rights. *In re Amends. to the Fla. Evid. Code*, 2019 Fla. LEXIS, at *14-*20. Justice Labarga further discussed the significant concerns raised by the Florida Bar's Code and Rules of Evidence Committee. *Id.* at *20.

Justice Luck took a different approach in his dissent. First, he sought the Court's adherence to its own rules regarding the adoption of procedural rules rather than circumventing that procedure and falling back on Article V, Section 2(a) of the Florida Constitution, despite the rules being created to implement the authority afforded by the state constitution. *Id.* at *21-*44. Justice Luck stated that the Court "can't ignore

the process altogether and do whatever we want, whenever we want to do it" *Id.* at *33. He opined that the Court should not rely upon "years-old stale information from rules committees" when deciding whether to adopt rule amendments. *Id.* at *43.

Second, Justice Luck opined that the *Daubert* amendment was not procedural and therefore, could not be adopted by the Court as a procedural rule. *In re Amends. to the Fla. Evid. Code*, 2019 Fla. LEXIS, at *44 *51. Recognizing that section 90.702 establishes rights and sets forth duties, Justice Luck espoused that the statute was substantive and the sole responsibility of the Florida Legislature. *Id.* at *45-*46. He concluded by anticipating a future case or controversy to revisit the holding of *DeLisle*.

What Does This Mean?

For starters, practitioners can pull out their legal authorities on *Daubert* that had yet to accumulate dust. As codified under section 90.702, an expert (qualified by knowledge, skill, expertise, training, or education) can offer an opinion 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."

Under Section 90.704 of the Florida Statutes, the expert need not disclose to the jury otherwise inadmissible facts or data that formed the bases of his or her opinions unless the court determines the probative value substantially outweighs the prejudicial effect.

Presumably, practitioners will need to rely on federal court persuasive authority when making *Daubert* arguments given the

present dearth of precedential state court authority.

What's on the Horizon?

It appears that the Florida Supreme Court left an opening to address the procedural nature of Section 90.704 of the Florida Statutes as amended by Chapter 2013-107, Section 2 of the Laws of Florida (2012). Also on the table, to be addressed in a future case or controversy, are potential "constitutional or other substantive concerns" raised by the *Daubert* amendments. It is anticipated that part and parcel will likely be another revisit to *DeLisle*.

In sum, for those who blinked, Florida is now a *Daubert* state . . . again.

.....
Sorraya M. Solages-Jones is the Appellate and Trial Support Attorney for Lytal, Reiter, Smith, Ivey & Fronrath, LLP in West Palm Beach and can be reached at ssolagesjones@foryourrights.com

Luncheon Honoring Justice Barbara Pariente



September 19th, 2019

11:45 AM - 1:00 PM

Marriott Hotel

1001 Okeechobee Blvd.

West Palm Beach