

# Florida



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## Florida Supreme Court Reinstates *Daubert* Less than One Year After Adopting *Frye*



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On May 23, 2019, the Florida Supreme Court, in a split decision, issued an opinion amending the Florida Evidence Code and reinstating the standard for admitting expert testimony originally set forth by the United States Supreme Court in *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993). See *In Re: Amendments to Florida Evidence Code*, Case No. SC19-107 (Fla. May 23, 2019).

By way of background, on July 1, 2013, Governor Scott signed into law revised §90.702, Florida Statutes. See, ch. 2013-107, Laws of Fla. This aligned Florida with federal courts and the majority of other states by incorporating the well-known *Daubert/Joiner/Kumho*<sup>1</sup> trilogy, which emphasizes the trial court's gatekeeper role to exclude unreliable testimony. Accordingly, section 90.702 was amended to read:

"If scientific, technical, **or other specialized knowledge** will assist the trier of fact in understanding the evidence or in determining a fact in issue, a witness qualified as an expert by

knowledge, skill, experience, training, or education may testify about it in the form of an opinion or otherwise, 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."

Revised §90.702 mirrored Federal Rule 702, which was amended in 2000 to codify *Daubert*, *Joiner*, and *Kumho Tire*. See, Fed. R. Evid. 702 advisory committee's notes ("Rule 702 has been amended in response to [*Daubert*] and to the many cases applying *Daubert*, including [*Kumho Tire*]"). Unlike *Frye*,<sup>2</sup> which only applies to new or novel scientific techniques, (see, *Marsh v. Valyou*, 977 So. 2d 543, 547 (Fla. 2007)), *Daubert* requires that expert testimony be reliable in all aspects. See, Fed. R. Evid. 702 advisory committee's note (explaining that "**any step that renders the analysis unreliable . . . renders the expert's testimony inadmissible.**" (quoting *In re: Paoli R.R. Yard PCB Litig.*, 35 F.3d 717, 745 (3d Cir. 1994) (emphasis added))).

To apply these principles under 90.702, trial courts have engaged in a "rigorous" three-part inquiry that considers whether:

- "(1) the expert is qualified to testify competently regarding the matters he intends to address;
- (2) the methodology by which the expert reaches his conclusions is sufficiently reliable as determined by the sort of inquiry mandated in *Daubert*; and
- (3) the testimony assists the trier of fact, through the application of scientific, technical, or specialized expertise, to understand the evidence or to determine a fact in issue." *United States v. Frazier*, 387 F.3d 1244, 1260 (11th Cir. 2004) (quoting *City of Tuscaloosa v. Harcros Chems., Inc.*, 158 F.3d 548, 562 (11th Cir.1998)).

Just last year, in *DeLisle v. Crane Co., et al.*, No. SC16-2182, (Fla. Oct. 15, 2018), the Florida Supreme Court expressly rejected the *Daubert* test and readopted the *Frye* test for determining the admissibility of expert testimony in Florida courts. Now, just over seven months later, the Court has done another about face, invoking its "exclusive rulemaking authority pursuant to article V, section 2(a) of the Florida Constitution, [to adopt] chapter 2013-107, section 1 and 2, Laws of Florida (*Daubert* amendments), which amended sections 90.702 (Testimony by experts) and 90.704 (Basis of opinion testimony by experts), Florida Statutes, of the Florida Evidence Code" to replace *Frye*. *In Re: Amendments to Florida Evidence Code*, Case No. SC19-107 (Fla. May 23, 2019). "We now recede from the Court's prior decision not to adopt the Legislature's *Daubert* amendments to the Evidence Code and to retain the *Frye* standard." *Id.* Accordingly, the standard for the admission of expert testimony in Florida is once again controlled by the test set forth in *Daubert*.

<sup>1</sup> *Daubert*, 509 U. S. 579; *Gen. Electric v. Joiner*, 522 U.S. 136 (1997); *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137 (1999).

<sup>2</sup> *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923).