

## CLIENT ALERT

### About Face! Florida Supreme Court Adopts *Daubert* Standard— Seven Months After Rejecting It

May.29.2019

In a surprise reversal, the Florida Supreme Court last week adopted the state legislature’s 2017 “*Daubert* amendments,” replacing *Frye* with *Daubert* as the test for admissibility of expert testimony in the state’s trial courts.<sup>1</sup> The decision comes just seven months after the court rejected the *Daubert* amendments as unconstitutional in *DeLisle v. Crane Co.*<sup>2</sup> The switch is effective immediately.

When we wrote in our [October 22, 2018 client alert](#) that “the debate [in Florida] has come to an apparent end with the decision in *DeLisle*,”<sup>3</sup> little did we know how much the word “apparent” would matter. *DeLisle* was the “proper case or controversy” the Court had insisted was necessary to address the constitutional concerns it had raised about *Daubert* in a 2017 *per curiam* order.<sup>4</sup> *DeLisle* held that the *Daubert* amendments were procedural, not substantive; as such, they could be enacted only by the Court itself.<sup>5</sup> The Court declined to do so. “With our decision today,” said the Court, “we reaffirm that *Frye*, not *Daubert*, is the appropriate test in Florida courts.”<sup>6</sup>

But in its May 23 decision, the Court adopted, “according to its exclusive rulemaking authority,”<sup>7</sup> the very same amendments it had rejected last October. Now, said the Court, “the ‘grave constitutional concerns’ raised by those who oppose the amendments to the Code appear unfounded[.]”<sup>8</sup> Briefly addressing the merits of the two admissibility standards, the Court added that “the *Daubert* amendments remedy deficiencies of the *Frye* standard,” “will create consistency between the state and federal courts,” and will “help lessen forum shopping.”<sup>9</sup>

What changed in seven months? The composition of the Court. Since *DeLisle*, three of the judges in the 4-3 majority have retired. “Without now readdressing the correctness of this Court’s ruling in *DeLisle*...,”<sup>10</sup> the three dissenters joined two new judges to form the majority in the May 23 *per curiam* order.

Have we reached the end of the long and winding road to *Daubert* in Florida? Perhaps. But the Court left an opening once more: “[W]e do not decide, in this rules case, the constitutional or other substantive concerns that have been raised about the amendments. Those issues must be left for a proper case or controversy.”<sup>11</sup>

---

<sup>1</sup> *In re: Amendments to the Florida Evidence Code* (May 23, 2019).

<sup>2</sup> No. SC16-2182 (October 15, 2018).

<sup>3</sup> Client Alert, "Florida Supreme Court Rebuffs Legislature's Mandate to Adopt Daubert Standard," October 22, 2018.

<sup>4</sup> *In re Amendments to the Florida Evidence Code*, Order at 9 (Feb. 16, 2017).

<sup>5</sup> *DeLisle*, slip op. at 7.

<sup>6</sup> *Id.* at 19.

<sup>7</sup> *In re: Amendments to the Florida Evidence Code*, Order at 1 (May 23, 2019).

<sup>8</sup> *Id.* at 2.

<sup>9</sup> *Id.* at 6.

<sup>10</sup> *Id.* at 2.

<sup>11</sup> *Id.* at 5.

---

For more information, please contact the professional(s) listed below, or your regular Crowell & Moring contact.

**Clifford J. Zatz**

Partner – Washington, D.C.

Phone: +1 202.624.2810

Email: [czatz@crowell.com](mailto:czatz@crowell.com)

**William L. Anderson**

Partner – Washington, D.C.

Phone: +1 202.624.2942

Email: [wanderson@crowell.com](mailto:wanderson@crowell.com)