

Game of Experts: A Song of Frye & Daubert in Florida State Courts

Spoiler Alert: This Alert may reveal spoilers from *Game of Thrones*.

In November 2018, we reported that the Florida Supreme Court in *Delisle v. Crane Co.*, 258 So. 3d 1219 (Fla. 2018), found that “*Frye*, not *Daubert*, is the appropriate test in Florida courts.” Like Queen Daenerys crossing the Narrow Sea with three dragons and an armada to claim the Iron Throne, we all thought *Frye* was going to finally win in Florida. However, on May 23, 2019, in *In re: Amendments to the Florida Evidence Code*, Case No. SC19-107, the Florida Supreme Court switched sides and, effective immediately, found that *Daubert* now applies in Florida courts. For subrogation professionals, the opinion was the legal equivalent to whispering “*Dracarys*” to Drogon, setting the field of expert qualification issues ablaze again in state courts in Florida.

Generally, the *Daubert* standard, which originated in *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993), provides that an expert is qualified if: (1) the expert’s scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; (2) the testimony is based on sufficient facts or data; (3) the testimony is the product of reliable principles and methods; and (4) the expert has reliably applied the principles and methods to the facts of the case. However, under the *Frye* admissibility standard, which originated in *Frye v. United States*, 293 F. 1013, 104 (D.C. Cir. 1923), expert testimony need only be “sufficiently established to have gained general acceptance in the particular field in which it belongs,” which is essentially a one factor test compared to the multifactor test under *Daubert*. Under *Frye*, experts are generally admitted as qualified witnesses even when opinions are based on experience and training alone, without the lengthy testing or data that may be required under *Daubert*. The common thinking is that *Frye* leads to less motions’ practice than *Daubert*, which, by the nature of its factors, lends itself to more ways to challenge experts and their opinions.

Despite finding in *DeLisle* just seven months ago that *Frye* had historically been the standard in Florida, the Florida Supreme Court has now switched its position to find that “according to its exclusive rulemaking authority,” it could adopt legislation passed in 2013 adding *Daubert* into the Florida Evidence Code, thereby effectively making *Daubert* the standard for expert admissibility in Florida. The court reasoned that “*Daubert* ... will create consistency between the state and federal courts with respect to the admissibility of expert testimony and will promote fairness and predictability in the legal system, as well as help lessen forum shopping.” *Id.* at *6. The sudden shift likely relates, at least in part, to the recent change in makeup of the Florida Supreme Court, allowing for more votes to find in favor of *Daubert*.

The resurrection of *Daubert* is somewhat like Jon Snow being taken down by his own brothers in the Night’s Watch, only to be revived by the Red Woman. *Daubert* may never really have been dead in Florida after all and it just took the right people to revive it. The ultimate importance of the change for recovery professionals is time and money. Now that *Daubert* applies in Florida’s already overburdened state courts, practitioners should anticipate more delays and costs as the parties deal with *Daubert* challenges, added expert work to anticipate *Daubert* challenges and the myriad other issues that flow from this change. Your Master of Coin will not be happy.

Like twists in the recent final season of GOT leading to Bran on the Iron Throne, this change was sudden in light of *DeLisle* just seven months ago. But we have hope that this may not be the end of the story. Jon Snow is heading beyond the Wall with Ghost after being banished back to the Night’s Watch as a queenslayer and the Florida Supreme Court hinted there may be more to *Frye* versus *Daubert* when noted in the new case that “we do not decide, in this rules case, the constitutional or other substantive concerns that have been raised about the [*Daubert*]



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amendments. Those issues must be left for a proper case or controversy.” Given the average length of the appellate process in Florida, however, it is likely that *Daubert* will remain in place for the next few years. Subrogation practitioners should prepare themselves accordingly and be mindful that *Daubert* now sits on the Iron Throne, as the newly crowned expert standard, but that the Game of Experts may not be over in Florida.
