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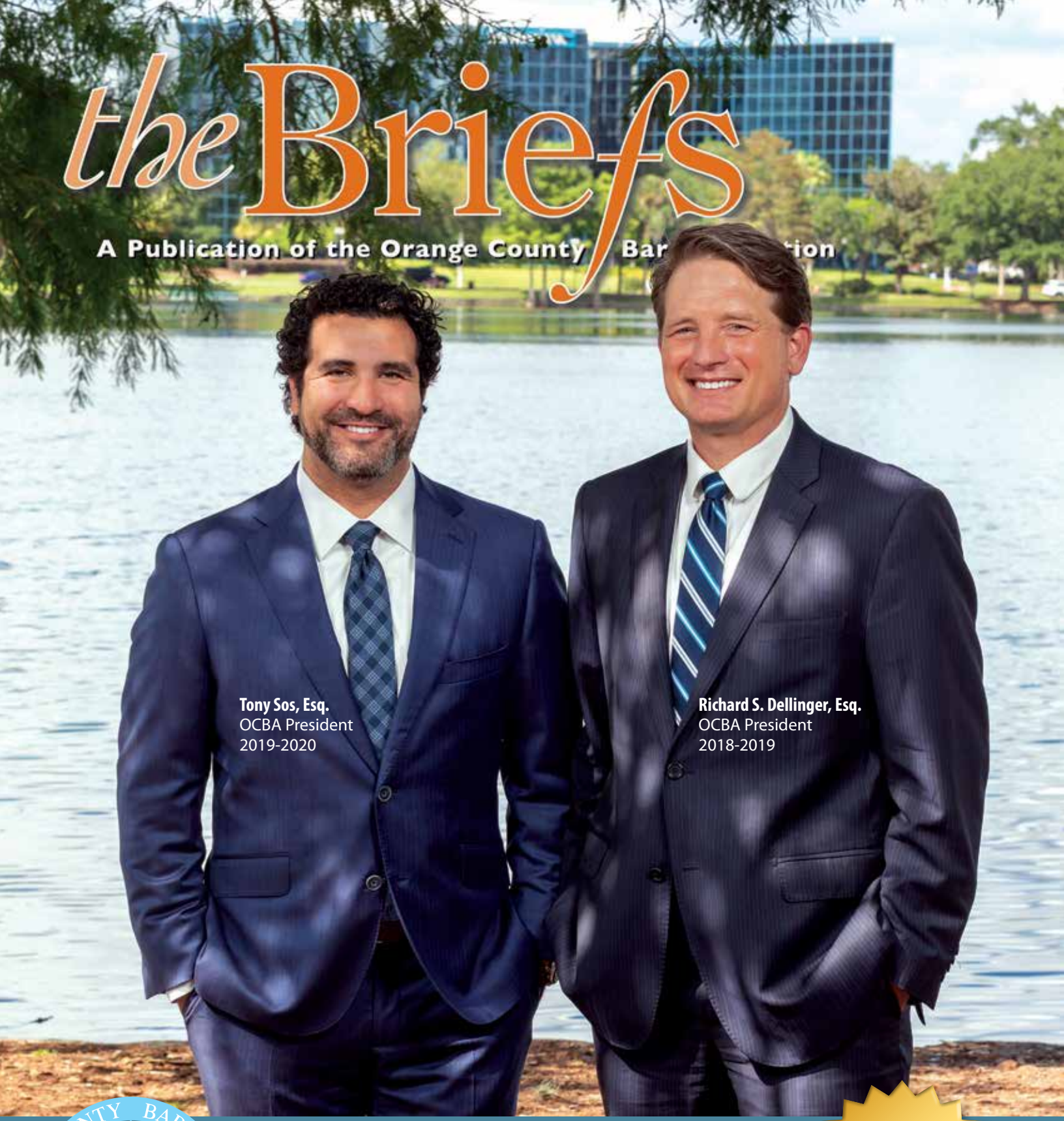

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DeLisle *& the Demise of Florida's* Daubert *Standard: Unanswered Questions for Workers' Compensation Practitioners*

Frye v. United States, 293 F. 1013 (D.C. Cir. 1923) held that "general acceptance" in a particular scientific field was the appropriate standard for admission of scientific evidence.[1] The *Frye* test became pervasive over the years in federal and state litigation, including in Florida courts.[2]

Seventy years after *Frye*, the Supreme Court of the United States decided *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). In *Daubert*, the Court determined that Rule 702 of the Federal Rules of Evidence had superseded the common law *Frye* standard.[3] Rule 702 established the following new test for admission of expert testimony, now labeled the *Daubert* standard:

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:

> (a) 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;
>
> (b) the testimony is based on sufficient facts or data;
>
> (c) the testimony is the product of reliable principles and methods; and
>
> (d) the expert has reliably applied the principles and methods to the facts of the case.[4]

Under Article V, Section 2(a) of the Florida Constitution, the Florida Supreme Court has the exclusive authority to "adopt rules for the practice and procedure in all courts…" *Allen v. Butterworth*, 756 So.2d 52, 59 (Fla. 2000). In 1976, the Florida legislature enacted the state's first Evidence Code. Beginning in 1979, the Florida Supreme Court ("the Court") periodically adopted the Code and its amendments as rules of court, "to the extent [they are] procedural."[5] However, the Court occasionally rejected legislative amendments to the code.[6]

In 2013, the Florida legislature amended § 90.702, Fla. Stat., adopting a near-verbatim version of the *Daubert* standard.[7] Under Article V, Section 2(a) of the Florida Constitution, the legislature may override the Court's rejections via a two-thirds majority. The amendment to § 90.702 failed to obtain the supermajority required to override the existing *Frye* standard. In 2017, without deciding whether the *Daubert* standard was substantive or procedural, the Court declined to adopt the legislature's amendment to § 90.702, Fla. Stat., to the extent that it was procedural.[8] Then, in 2018, the question of whether the standard was substantive came squarely before the Court in *DeLisle v. Crane Co.*, 258 So.3d 1219 (Fla. 2018). In *DeLisle*, the Court discussed whether the new rule was substantive or procedural, whether it was bound by it, and whether *Daubert* was good policy.[9] Ultimately, the Court declined to adopt the new rule on the grounds of legislative overreach and its preference for the existing *Frye* standard.[10] These determinations were, of course, the Court's prerogative. However, *DeLisle* states that §90.702 is a statute "that solely regulates the action of litigants in court proceedings."[11]

This statement was incorrect because the Florida Evidence Code – § 90.702 included – also regulates workers' compensation proceedings, which are not "court proceedings," but take place in the Office of the Judges of Compensation Claims ("OJCC").[12] The OJCC's jurists are called Judges of Compensation Claims ("JCCs"). The OJCC is part of the Division of Administrative Hearings ("DOAH"), within the Department of Management Services, and thus is an executive branch agency. Having been overlooked in the Court's analysis, workers' compensation is also overlooked in the decretal portion of *DeLisle*. The opinion does not mention the OJCC or workers' compensation hearings, and therefore leaves the OJCC in limbo as to the applicable standard for admitting expert testimony.

In *Johnson v. Krehling Industries/Travelers Insurance*, an OJCC decision issued just a month after *DeLisle*, a JCC in Fort Myers held that *Daubert* no longer applies to OJCC proceedings.[13] Interpreting *DeLisle* as holding that §90.702 was "unconstitutional," the JCC in *Johnson* held that the Court would not require it to apply an unconstitutional standard.[14]

This ruling, however, overlooked an important distinction. In 1993, the legislature transferred the power to make OJCC procedural rules from the Court to the OJCC itself.[15] The Court has recognized that it "does not have [inherent] jurisdiction . . . to adopt rules of practice and procedure for an executive branch agency," such as the OJCC.[16] Indeed, in a concurrence, Judge Wetherell of the First District Court of Appeal relied on this distinction, stating that the argument that *Daubert* did not apply in workers' compensation proceedings "was recently considered – and rejected as meritless." [17]

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The Court's ruling in *DeLisle* differs significantly from most constitutional determinations. While the Court found §90.702 "unconstitutional," *DeLisle* could be read as holding simply that the Court was not bound by the legislature's decision to adopt *Daubert*. The ruling could also be limited as an "as applied" holding, applying only to Article V cases. "Where this Court promulgates rules . . . and a statute provides a contrary practice or procedure, the statute is unconstitutional to the extent of the conflict."[18] If either is true, the opinion does not apply to the OJCC.

So how do we resolve this apparent conflict between *DeLisle* and *In re Workers' Comp.*? If the Court in *DeLisle* wanted to limit its holding to Article V cases, presumably it would have said so. On the other hand, a broad reading of *DeLisle* arguably creates a constitutional crisis, albeit one that did not bother the legislature for nearly twenty years.

A secondary question also remains: if *DeLisle* prohibits JCCs from applying *Daubert*, what *is* the applicable standard for admission of expert testimony in workers' compensation cases? *DeLisle* reaffirmed that *Frye* is "the appropriate test in Florida courts."[19] However, the Evidence Code never included the *Frye* test,[20] and *Henson* cited no authority to impose the *Frye* standard on the OJCC.[21] The OJCC's own rules do not expressly include any test regarding admissibility of expert opinions.[22]

The JCC's ultimate ruling in *Johnson* warrants discussion. At issue in that case was a claim for a variation of an otherwise well-established treatment protocol. The employer/carrier objected to expert testimony in support of the use of a variant procedure. After holding that *Daubert* was inapplicable, the JCC considered both the *Frye* and *Daubert* standards in determining the weight to give the expert's opinion. Ultimately, the JCC found that the variant procedure was not "generally accepted in the scientific community," and rejected the expert opinion on its merits.[23]

This perhaps drives home a point noted by the JCC in *Johnson* and others: that a gatekeeper is arguably not needed in a bench trial. The purpose of standards such as *Daubert* is to ensure that only reliable scientific evidence is admitted to avoid confusing the factfinder. However, when the judge is both gatekeeper and factfinder, what purpose is served by the exclusion of evidence?[24] A judge who might exclude testimony from an expert who relied on unreliable science would presumably also reject the evidence on its merits in the judge's fact-finding role. This is particularly true in the OJCC context, as JCCs are specialists who frequently consider medical opinions.[25]

On the other hand, judges are required to exclude evidence for many reasons, even when serving as factfinder, and our bench trial system requires judges to consider only admissible evidence regardless of what other evidence they have reviewed in determining the evidence's admissibility.

A firm answer on whether *DeLisle* extends to the OJCC is left for the Court to decide. In the interim, the JCC's decision in *Johnson* makes it clear that litigants have effective remedies beyond seeking to exclude unfavorable evidence based on *Daubert*.

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[1]*Id.* at 1014. At issue in *Frye* was expert testimony regarding the systolic blood pressure deception test, "a crude precursor to the polygraph machine." *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 585 (1993) (discussing the *Frye* decision). The court in *Frye* ultimately excluded the test results.

[2]*See, e.g.*, *Stokes v. State*, 548 So.2d 188, 195 (Fla. 1989).

[3]*Daubert*, 509 U.S. at 587.

[4]Fed. R. Evid. 702.

[5]*In re Amendments to the Fla. Evidence Code*, 53 So.3d 1019, 1020 (Fla. 2011).

[6]*E.g.*, *In re Amendments to the Fla. Evidence Code*, 210 So.3d 1231 (Fla. 2017) (hereinafter "*In re Evidence Code*").

[7]Section 90.702, Florida Statutes, provides: "[i]f 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."

[8]*In re Evidence Code*, 210 So.3d at 1239.

[9]*DeLisle v. Crane Co.*, 258 So.3d 1219 (Fla. 2018). The underlying case was a suit involving mesothelioma resulting from asbestos exposure. The trial court found the Plaintiff's evidence admissible under *Daubert*. The Fourth District held that some of the evidence should have been excluded, and remanded for a new trial. *Id.* at 1222.

[10]*Id.* at 1230.

[11]*Id*. at 1229.

[12]*See U.S. Sugar Corp. v. Henson*, 823 So.2d 104, 107 (Fla. 2002). Somewhat ironically, the question in *Henson* was whether the *Frye* standard applied in workers' compensation cases (it did). *Id.* at 110.

[13]*See* Final Compensation Order, *Johnson v. Krehling Indus./Travelers Ins.*, Case No. 15-023199 (Fla. O.J.C.C. Nov. 16, 2018). The author's partner and colleague Leticia Coleman, Esq., represented the Employer/Carrier in *Johnson*.

[14]*Id.* at 8-9 (stating "It makes little sense to this JCC that the court that mandates the use of the Florida Evidence Code in proceedings before a JCC would require the application of the *Daubert*/section 90.702 standard notwithstanding that the court has found section 90.702 unconstitutional.").

[15]*Id.* at 476 ("Then, in 1993, a separate section of the Florida Statutes governing workers' compensation was modified to grant rulemaking authority to the Office of Judges of Compensation Claims (OJCC)"). In 2002, the legislature transferred the OJCC's rulemaking authority to DOAH, its parent agency. *See id.* at 476-77.

[16]*In re Amendments to the Fla. Rules of Workers' Comp. Proc.*, 891 So.2d 474, 475 (Fla. 2004) (hereinafter "*In re Workers' Comp*").

[17]*See Baricko v. Barnett Transp., Inc.*, 220 So.3d 1219, 1220 (Fla. 1st DCA 2017) (Wetherell, J., concurring).

[18]*Haven Fed. Sav. & Loan Ass'n v. Kirian*, 579 So.2d 730, 732 (Fla. 1991).

[19]*DeLisle*, 258 So.3d at 1229.

[20]The predecessor version of §90.702 tracked the pre-*Daubert* version of Federal Rule 702. "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; however, the opinion is admissible only if it can be applied to evidence at trial." This meant that the court's gatekeeping function was largely limited to determining if a witness qualified as an expert.

[21]*See generally* 823 So.2d at 106-07. By the time *Henson* was decided, the legislature had already divested the Court of its rulemaking authority in workers' compensation cases.

[22]*See* Rules of Procedure for Workers' Compensation Adjudications, Ch. 60Q, Fla. Admin. Code.

[23]*Johnson*, Case No. 15-023199 at 9.

[24]Federal authorities have generally recognized that *Daubert* is less relevant in bench trials, but have held that *Daubert* is "less essential" in such cases, not unnecessary. *E.g.*, *Gibbs v. Gibbs*, 210 F.3d 491, 500 (5th Cir. 2000).

[25]"*Daubert* in Florida workers' compensation allows a judge to hear expert testimony and conclusions in order to determine if the same judge should later listen to those expert conclusions. In a non-jury setting, *Daubert* makes little if any sense as the judge is the "gatekeeper" for the judge." Langham, David, *Daubert better Explained*, Workers' Compensation Adjudication (May 29, 2016), http://flojcc.blogspot.com/2016/05/daubert-better-explained.html. Judge David Langham is the Deputy Chief Judge of the OJCC.