IN THE SUPREME COURT OF FLORIDA

IN RE: AMENDMENTS TO THE FLORIDA EVIDENCE CODE **CASE NO.: SC19–107**

MOTION FOR REHEARING/HEARING

Patricia M. Dodson, Chair of the Code and Rules of Evidence Committee ("the Committee"), and Joshua E. Doyle, Executive Director of The Florida Bar, move for rehearing on this administrative decision, pursuant to Florida Rule of Judicial Administration 2.140(b)(7), on the grounds that the Court overlooked or misapprehended points of law and fact. The Committee by a vote of 34-2-2 approved this motion for rehearing. As the Court will recall, section 90.702, Florida Statutes, and section 90.704, Florida Statutes, were reviewed by the Committee and the Court in *In re: Amendments to Florida Evidence Code*, 210 So. 3d 1231 (Fla. 2017); subsequent to that opinion release, this Court found these statutes unconstitutional in *DeLisle v. Crane Co.*, 258 So. 3d 1219, (Fla. 2018).

THE ADMINISTRATIVE DECISION WAS, AND SHOULD REMAIN, FINAL

Justice Lawson's majority concurrence declared that "[a]ll this Court is doing now is reconsidering its earlier administrative (i.e., non-adjudicative) decision not to adopt the proposed *Daubert* amendments." *In re: Amendments to the Florida Evidence Code,* 44 Fla. L. Weekly S170, 171 (Fla. May 23, 2019) (emphasis added). In this instant case, the Court, for the first time, finds that its administrative decisions setting rules are ephemeral, changeable without notice, and that they are not subject to the established process for change. In doing so, the Court has overlooked, or announces that it is exempt from, the philosophy behind the established principle that decisions of administrative bodies are rules of law and that parties and the public should be able rely on them:

> The doctrine of decisional finality provides that there must be a "terminal point in every proceeding both administrative and judicial, at which the parties and the public may rely on a decision as being final and dispositive of the rights and issues involved therein." *Florida Power Corp. v. Garcia*, 780 So. 2d 34, 44 (Fla. 2001) citing *Austin Tupler Trucking, Inc. v. Hawkins,* 377 So. 2d 679, 681 (Fla.1979).

Because new facts may develop, or governing substantive law may be amended, the Court added that "[a] decision, once final, may only be modified if there is a significant change in circumstances or if modification is required in the public interest." *Id.* However, neither the Court's *per curiam* decision nor the concurrence identify any new facts, new governing law, or a change in circumstance. In an earlier decision, this Court stressed the importance of the rule of law in administrative decisions, stating:

> Administrative boards are vested with no such arbitrary hegemony over individual rights as is charged here. Ours is still a government of laws and not one of men actuated by caprice and arbitrary power. The highest duty of the man or board whose duty is to administer laws, rules, or regulations is to see that they bear equally on all persons or groups. *York v. State ex rel. Jones*, 144 Fla. 216, 197 So. 766 (Fla. 1940).

The administrative decision in *In re: Amendments to Florida Evidence Code*, 210 So. 3d 1231 (Fla. 2017) ("2017 Opinion") is final. None of the *Daubert*-supporting commenters sought rehearing, including the Senate and House sponsors, one of whom orally argued the matter in this Court. In line with the doctrine of decisional finality, after the time for seeking rehearing had closed, those parties and commenters, along with members of The Florida Bar, the judiciary, and the public, properly relied on the finality of this administrative decision.

Following the Court's 2017 Opinion to not adopt the Legislature's 2013 amendments, legislators met in three 60-day sessions after weeks of committee meetings and no protest, nothing by way of amendment or attempted overruling, came from the Capitol. Not only did the Legislature accept that its 2013 enactment would not govern, it offered no new legislation on the topic. If the Legislature had acted to address the Court's concerns, there would have been "a significant change in circumstances" or the potential for "modification…required in the public interest." *Florida Power Corp*., supra, 780 So. 2d at 44. The Committee would then have been able to take it up during the next 3-year regular-cycle report—but the Legislature did not act. Just last month, the opinion on the Committee's 2019 Regular-Cycle Report was released, with nothing regarding expert opinion testimony having been considered. *In re: Amendments to the Florida Evidence Code–2019 Regular-Cycle Report*, 44 Fla. L. Weekly S161 (Fla. May 2, 2019).

NOTICE AND OPPORTUNITY TO COMMENT SHOULD BE GIVEN WHEN CHANGES TO RULES OF COURT ARE CONSIDERED

While it is clear the Court supports the content of the *Daubert* amendments as a rule of evidence, there has been no input from any member of the bench, the bar, or the citizenry that accounts for the change. The Court, in this case, revisited the final administrative decision without giving any notice or opportunity to be heard to practitioners or the public who are "on the ground" using the rules. Florida Rule of Judicial Administration 2.140(d) provides clear procedures for amendments initiated by the Court, while still providing for publication and comment opportunities. The commenters in the 2017 Opinion were not served with the Court's decision in this instant case in order to comment after the release of the decision and were not given notice or opportunity to be heard prior to the Court's release of the opinion.

To avoid unintended consequences from rules changes, made without current information from those affected by the change, the Court recently unanimously applied its established policy for doing its best to get its administrative decisions right:

> Because the amendments to rule 2.140 that are adopted on the Court's own motion have not been published for comment, interested persons shall have sixty days from the date of this opinion in which to comment on those amendments.

In re: Amends. To Fla. Rules of Judicial Admin., 226 So. 3d 223, 228 (Fla. 2017).

RELEVANT INFORMATION AND COMMENTS WERE NOT CONSIDERED IN THE COURT'S DECISION

The Committee also asks the Court to hear, or rehear, this matter as there is missing information. The Court has overlooked questions that may be prompted in the minds of the bench, bar, and citizenry by what is posted on the Court's docket on its public website in Case No. SC19-107. On that website, a *not-filed* petition was docketed on January 24, 2019, yet an opinion was issued on May 23, 2019. For convenience, the direct link is: http://onlinedocketssc.flcourts.org/DocketResults/CaseByYear?CaseNumber=107&CaseYear=2019.

The Committee considered the uncertainty of what the *not-filed* petition may mean. Given the new Court, it is unclear whether the justices had the opportunity to view the record of the 2017 regular-cycle case including the extensive report, numerous comments, the oral argument, and the submissions of all interested parties. It is also unclear whether the Court was able to research if in the past two years, in the absence of *Daubert*, whether there has been an increase in "junk-science" testimony or other improper expert testimony introduced into evidence in trial cases. Simply, it is unclear what, in the practice of law, with no amendment to the law by the Legislature, motivated the Court's self-reversal—particularly, without the opportunity for the Committee to provide input or review in compliance with the rules of court procedures.

THE RULES PROCESS CAN STILL WORK IF EMPLOYED

While some may appreciate the Court's expression of its mindfulness "of the resources of parties, members of The Florida Bar, and the judiciary," the Court overlooked the consistent, dedicated willingness of those who know what goes on day-to-day in trial practice and in trial-level judging to devote whatever resources it takes so this Court's ultimate decision, revisited or not, squares with the ancient and venerable motto on the Supreme Court Seal: "Soon enough if done rightly."

Without relitigating the discussion in the dissent and concurrence, the rule process is, in fact, still available to be employed. If the Court feels this matter needs reconsideration, it has the ability to instruct the Committee to do so. *See* Fla. Rule Jud. Admin. 2.140(f). However, the Court has only a few, specific Rules of Judicial Administration that it may amend on the Court's own initiative, without the Rules of Judicial Administration Committee's input, yet the amendments are always published for comment; those are Rules 2.310, 2.320, and Part III, Judicial Officers, of the Florida Rules of Judicial Administration. Amendments to all other rules must go to the respective Committee either prior to adoption, Rules 2.140(b), (e), (f), and (g)(2), or subsequent to Court adoption, Rule 2.140(d).

The Court may also have overlooked that this is the first time since the Code and Rules of Evidence were mutually adopted in 1979 that a rule of evidence has been adopted exclusively by the Court—outside the context of an adjudicated case.

The Legislature's enactment of the *Daubert* amendments violated separation of powers because it was procedural and conflicted with *Frye,* an existing rule of evidence adopted in adjudicated cases. *DeLisle v. Crane Co.*, 258 So. 3d 1219, 1229 (Fla. 2018). Over the years, the Committee and the Court have worked

together to respond to legislative enactments. However, this Court's recent administrative decision creates a new regime. In this case, the Court did not adopt the content of section 90.702 "to the extent it is procedural." Rather, the Court adopted it "as procedural rules of evidence." This is a first time in making an administrative decision adopting rules of evidence that the Court has acted without advice from the Committee or anyone else.

Most importantly with respect to its impact on the administration of justice, the Court may have overlooked or failed to consider that, although expert exclusion motions (whether *Daubert* or *Frye*) are rarely granted, the Florida *Daubert* experience greatly increased the number of motions, hearings and expert witness costs detrimental to efficient and cost-effective judicial administration. Given the absence of any renewed *Daubert* outcry before the Committee, the Court or the Legislature, the Committee is unable to discern what led the Court to recede from its 2017 Opinion. Under the circumstances, it is respectfully submitted that, in the interest of judicial economy and preserving access to the courts, the Court should, at the least, forward this issue to the Committee for recommendation of uniform rules of practice for expeditious and economical handling of expert exclusion motions.

WHEREFORE, the Committee, pursuant to Rule 2.140(d), requests that the Court delay the effective date of the rule of evidence and provide an opportunity for comments, or, in line with Rule 2.140(f), refer the rule to the Committee for review and a report; the Committee also requests that the Court provide an opportunity for oral argument.

Respectfully submitted on June 7, 2019.

/s/ Patricia M. Dodson
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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was furnished by e-mail, via the Florida Courts E-filing Portal, on June 7, 2019, to:

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CERTIFICATE OF COMPLIANCE

I certify that this report meets the font requirements of Florida Rule of Appellate Procedure 9.120(a)(2).

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